No. 17-834

In the Supreme Court of the United States

STATE OF KANSAS, PETITIONER

v.

RAMIRO GARCIA, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1324a(b)(5), which prohibits the "use[]" of a designated federal work-authorization form (the I-9) and "any information contained in or appended to such form * * * for purposes other than" specified federal law-enforcement actions, expressly preempts Kansas's prosecution of respondents for providing false identity information on documents other than the I-9.

2. Whether the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, impliedly preempts Kansas's prosecution of respondents.

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INTEREST OF THE UNITED STATES

This case concerns whether the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, preempts state-law prosecutions for identity theft and related offenses under generally applicable criminal laws. The United States enforces IRCA and prosecutes federal crimes that could be affected by the Court's interpretation of IRCA in this case. The United States accordingly has a substantial interest in the resolution of the question presented. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-14a. The Form I-9 is also reproduced in the appendix. *Id.* at 15a-17a.

STATEMENT

A. Legal Background

1. The Constitution vests the federal government with "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona* v. *United States*, 567 U.S. 387, 394 (2012); see U.S. Const. Art. I, § 8, Cl. 4. Pursuant to that power, Congress in 1952 enacted the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, which "set the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 587 (2011) (citation and internal quotation marks omitted).

As initially enacted, the INA did not regulate "the employment of unauthorized aliens." *Arizona*, 567 U.S. at 404. Instead, regulation of alien employment largely came from the States. See *Whiting*, 563 U.S. at 588 & n.1. California, for example, banned employment of any alien "who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." *De Canas* v. *Bica*, 424 U.S. 351, 352 (1976) (citation omitted). The Court unanimously upheld that law against constitutional and statutory preemption challenges. *Id.* at 365.

In 1986, Congress passed and President Reagan signed IRCA, "a major statutory response to the vast tide of illegal immigration that had produced a 'shadow population' of literally millions of undocumented aliens in the United States." *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 481 (1991). As relevant here, IRCA "made combating the employment of illegal aliens central to 'the policy of immigration law.'" *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002) (brackets and citation omitted). Specifically, IRCA

makes it "unlawful for a person or other entity" to "hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is * * * unauthorized" to work in the United States. 8 U.S.C. 1324a(a)(1)(A). An "unauthorized alien" is one neither "lawfully admitted for permanent residence" nor otherwise "authorized to be" employed by the Attorney General. 8 U.S.C. 1324a(h)(3); see 8 C.F.R. 274a.12 (authorizing employment for various classes of aliens).

To enforce its prohibition on employment of unauthorized aliens, IRCA establishes a detailed verification system. 8 U.S.C. 1324a(b). First, employers "must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation"—the Form I-9—that they have "verified" that an employee "is not an unauthorized alien." 8 U.S.C. 1324a(b)(1)(A); see 8 C.F.R. 274a.2(a)(2) (establishing the Form I-9); App., *infra*, 15a-17a (reproducing the Form I-9). Specifically, employers must attest they have examined particular documents establishing the employee's work authorization and identity. 8 U.S.C. 1324a(b)(1)(A)-(D). That requirement applies to any "individual" employee regardless of citizenship or nationality. 8 U.S.C. 1324a(b)(1)(A); see United States Citizenship & Immigration Services, Dep't of Homeland Security, *Handbook for Employers M-274*, at 4, https://www.uscis.gov/i-9-central/handbook-employers-m-274 ("Every employer must complete a Form I-9 for every new employee you hire after [IRCA's effective date]. This includes U.S. citizens and noncitizen nationals who are automatically eligible for employment in the United States."). Failure to follow "IRCA's strictures" subjects an employer to "both civil and criminal sanctions."

Whiting, 563 U.S. at 589; see 8 U.S.C. 1324a(e)(4) and (f); 8 C.F.R. 274a.10.

IRCA also requires an employee to "attest, under penalty of perjury on the [I-9] form," that he is "a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is [otherwise] authorized" to work in the United States. 8 U.S.C. 1324a(b)(2). Although IRCA does not criminalize work without authorization, an employee who makes or uses a fraudulent document to satisfy IRCA's employment-authorization requirement is subject to civil and criminal penalties. See 8 U.S.C. 1324c(a); 18 U.S.C. 1546. In addition, alien employees who work without authorization generally "are not eligible to have their status adjusted to that of a lawful permanent resident" and "may be removed from the country." *Arizona*, 567 U.S. at 405; see 8 U.S.C. 1255(c)(2) and (c)(8), 1227(a)(1)(C)(i).

Several provisions of IRCA provide further direction about the I-9. Section 1324a(b)(3) requires employers to retain the form and make it available to specified federal officials. Section 1324a(b)(4) permits employers to copy the form for particular purposes. Section 1324a(b)(5), entitled "Limitation on use of attestation form," is centrally relevant to this case. That provision states that the I-9 form and "any information contained in or appended to such form[] may not be used for purposes other than for enforcement of" the INA and specified criminal statutes. 8 U.S.C. 1324a(b)(5). The specified statutes are 18 U.S.C. 1001 (false statements), 18 U.S.C. 1028 (identity theft), 18 U.S.C. 1546 (immigration document fraud), and 18 U.S.C. 1621 (perjury).

IRCA also contains an "express pre-emption provision." *Arizona*, 567 U.S. at 406. That provision, titled "Preemption," states that IRCA "preempt[s] any State

or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2).

2. "[P]rotection against fraud" is among "the oldest [powers] within the ambit of the police power" of the States. *California* v. *Zook*, 336 U.S. 725, 734 (1949). Of particular relevance here, state statutes dating back to the Founding (and English statutes before that) have criminalized forgery and obtaining property by false pretenses. 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.7(j) (3d ed. 2018). In the modern era, those crimes increasingly involve identity theft—a serious and "growing problem" throughout the United States. *United States* v. *Berroa*, 856 F.3d 141, 156 (1st Cir.) (citation omitted), cert. denied, 138 S. Ct. 488 (2017). According to the most recent estimates, one in ten Americans over age 16—a total of more than 17 million people—has been a victim of identity theft in the past year. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Victims of Identity Theft, 2016*, at 1 (Jan. 2019), https://www.bjs.gov/content/pub/pdf/vit16_sum.pdf. In 2016 alone, "total losses across all incidents of identity theft totaled $17.5 billion." *Ibid.* In response to this serious problem, Congress and every State in the Nation has specifically criminalized identity theft. 18 U.S.C. 1028, 1028A; see National Conference of State Legislatures, *Identity Theft*, http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx.

This case involves Kansas's identity-theft and false-information statutes. The identity-theft statute criminalizes "using" any "personal identifying information" belonging to another person, with intent to "[d]efraud

that person, or anyone else, in order to receive any benefit." Kan. Stat. Ann. § 21-6107(a)(1) (Supp. 2017). "[P]ersonal identifying information" includes, *inter alia*, a name, birthdate, driver's license number, or social security number. *Id.* § 21-6107(e)(2). Kansas courts have interpreted the statute to cover use of another person's social security number to receive the benefits of employment. *State* v. *Meza*, 165 P.3d 298, 301-302 (Kan. Ct. App. 2007); see Pet. App. 51-53, 76.[1]

Kansas's false-information statute criminalizes "making, generating, distributing or drawing" a "written instrument" or other specified information with "knowledge that such information falsely states or represents some material matter," and "with intent to defraud, obstruct the detection of a theft or felony offense or induce official action." Kan. Stat. Ann. § 21-5824 (Supp. 2017). As their text indicates, the identity-theft and false-writing statutes are generally applicable. They criminalize conduct by citizens and aliens alike, and nothing limits their application to the employment context. See Pet. App. 55.[2]

B. Proceedings Below

This case arises from three prosecutions under Kansas's identity-theft and false-information statutes, each involving respondents' use of another person's social security number on tax-withholding forms.

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[1] Respondents challenged that interpretation of state law in the Kansas courts, but the Kansas Supreme Court did not address the issue, see Pet. App. 2, and it is not before this Court.

[2] The identity-theft statute was previously codified at Kan. Stat. Ann. § 21-4018 (Supp. 2010). The false-information statute was previously codified at Kan. Stat. Ann. § 21-3711 (Supp. 2010). The statutes have not materially changed. See Pet. Br. 2-3 nn.1-2.

1. Respondent Ramiro Garcia was stopped for speeding by Kansas police. Pet. App. 3. A records check prompted the officer to contact a financial-crimes detective, who obtained documents Garcia had submitted with his employment application at a restaurant. *Ibid.* Further investigation revealed that Garcia had used a Texas woman's social security number on his state and federal tax-withholding forms and his I-9. *Ibid.* The State charged him with identity theft. *Ibid.*

Respondent Donaldo Morales came to officers' attention as a result of irregularities in social security reporting at another restaurant. Pet. App. 62-63. A Social Security Administration agent discovered that Morales had submitted state and federal tax-withholding forms and an I-9 with a social security number that did not belong to him. *Id.* at 63. Morales later admitted that he had "purchased the Social Security number * * * from someone in a park." *Id.* at 63-64. The State charged him with identity theft and making a false information. *Ibid.*

Respondent Guadalupe Ochoa-Lara used another person's social security number to lease an apartment. Pet. App. 91. Police discovered the discrepancy when they tried to contact someone else at the apartment. *Ibid.* Ochoa-Lara admitted that the social security number he had used for the lease did not belong to him, and that he had used the same incorrect social security number on his federal tax-withholding form and I-9. *Id.* at 90-92. The true owner of the social security number "had no knowledge her number was being used and did not consent to it being used," including for reporting to the IRS income that she had not earned. *Id.* at 91. The State charged Ochoa-Lara with identity theft and making a false information. *Id.* at 90.

2. Respondents all contended that their prosecutions were barred by 8 U.S.C. 1324a(b)(5). As noted above, Section 1324a(b)(5) states that the I-9 and "any information contained in or appended to" the I-9 "may not be used for purposes other than" specified federal law-enforcement actions. *Ibid.* In each case, the State agreed not to rely on the I-9 and dismissed charges that pertained only to the I-9, but contended that Section 1324a(b)(5) did not bar its use of other documents on which respondents had used false social security numbers, including their tax-withholding forms. Pet. App. 4, 63, 86, 90-91, 101-102, 115. The trial courts agreed to dismiss the counts that relied on respondents' I-9s, but allowed the State to proceed with charges based on the other documents. See *id.* at 4, 63, 86-87, 90-91, 106, 116-117. Respondents were convicted of the charged offenses. *Id.* at 7, 66, 92.

3. Respondents each appealed to the Kansas Court of Appeals. Three separate panels affirmed their convictions. Pet. App. 48-60, 71-82, 97-112.

a. The Kansas Court of Appeals decided Ochoa-Lara's case first. The court concluded that Section 1324a(b)(5) did not expressly preempt his prosecution because "neither the I-9 form nor the documents appended to the I-9 form were used to prosecute" him, and "nothing in" Section 1324a(b)(5) "prohibits the State from proving identity theft by using information from sources other than the I-9 form, even though that information may also be contained on the I-9 form." Pet. App. 106. The fact that "Ochoa-Lara used the Social Security number of another person in connection with the completion of the I-9 form," the court concluded, "does not mean that he gets the proverbial 'Get Out of

Jail Free' card for other illegal uses of that Social Security number that violate Kansas statutes." *Id.* at 107.

The Kansas Court of Appeals rejected Ochoa-Lara's argument that IRCA impliedly preempted his prosecution. The court explained that IRCA "preempt[s] the area of employment-related verification of immigration status," but Kansas's identity-theft statute does not have "anything to do with the employment-related verification of immigration status." Pet. App. 105. Rather, the "gravamen of the offenses for which Ochoa-Lara was prosecuted [was] the unauthorized use[] of another person's Social Security number." *Id.* at 106.

b. Other panels of the Kansas Court of Appeals affirmed Garcia's and Morales's convictions on similar grounds. Pet. App. 55-57, 80-82.

4. The Kansas Supreme Court reversed each of respondents' convictions by a divided vote. Pet. App. 1-28, 61-69, 88-94.

a. The Kansas Supreme Court decided Garcia's case first. Four Justices concluded that Section 1324a(b)(5) expressly preempted his prosecution because the State proved the offense using the fraudulent social security number on his tax-withholding forms, which he had also provided on his I-9. Pet. App. 27-28. The majority acknowledged that the State "did not rely on the I-9" in the prosecution, but emphasized that Section 1324a(b)(5) "prohibit[s] state law enforcement use not only of the I-9 itself but also" of "*any information contained* in the I-9." *Ibid.* In the majority's view, the fact that the incorrect social security number "was included in the W-4 and K-4 did not alter the fact that it was also" contained in the I-9. *Id.* at 28.

Justice Luckert filed a concurring opinion. Pet. App. 29-38. She rejected "the majority's conclusion that express preemption applies." *Id.* at 29. In her view, "field and conflict preemption" barred Garcia's prosecution. *Ibid.* She concluded that Congress, in enacting the "comprehensive IRCA system," had "occupied the field and prohibited the use of false documents, including those using the identity of others, when an unauthorized alien seeks employment." *Id.* at 35-36. She also concluded the prosecution was preempted because it would "frustrate[] congressional purpose and provide[] an obstacle to the implementation of federal immigration policy by usurping federal enforcement discretion in the field of unauthorized employment of aliens." *Id.* at 36 (quoting *State* v. *Martinez*, 896 N.W.2d 737, 756 (Iowa 2017)).

Justice Biles dissented. Pet. App. 38-45. He rejected the majority's conclusion that Section 1324a(b)(5) "applies literally to all information on the Form I-9, wherever else it might be found." *Id.* at 40. He instead read Section 1324a(b)(5) to apply "to the contents of the completed Form I-9." *Ibid.* Because the I-9 "was not admitted into evidence" in Garcia's case, he concluded, no information "gleaned from it was 'used'" to prove the offense. *Ibid.* In his view, the majority's "sweeping" reading of Section 1324a(b)(5) rested on "a unique and overly literal interpretation" that "stretches statutory interpretation past the breaking point" and "cannot reflect congressional intent." *Id.* at 39-40.

Justice Stegall also dissented. Pet. App. 45-47. He explained that the majority's decision "appears to wipe numerous criminal laws off the books in Kansas—starting with, but not necessarily ending with," identity-

theft laws. *Id.* at 45. He doubted that "Congress intended to expressly preempt state use of all information contained in a person's I-9 form * * * for any purpose." *Id.* at 46. Such a reading, he observed, would prevent state prosecutors from using "the name of any citizen who has completed an I-9"—an untenable result. *Ibid.*

b. The Kansas Supreme Court reversed Morales's and Ochoa-Lara's convictions on similar grounds. Pet. App. 67, 93.

SUMMARY OF ARGUMENT

IRCA does not expressly or impliedly preempt Kansas's prosecution of respondents for violating generally applicable identity-theft and false-information laws.

A. The prosecutions are not expressly preempted. Under 8 U.S.C. 1324a(b)(5), a State may not "use[]" the Form I-9 or "any information contained in or appended to such form" for a criminal prosecution. That limitation poses no bar to the prosecutions here because Kansas prosecuted respondents using only the tax-withholding forms on which they entered false social security numbers. Although the State initially brought charges based on respondents' entry of false social security numbers on their I-9s, the State voluntarily dismissed those counts. That underscores that the State did not "use[]" respondents' I-9s or "any information contained in * * * such form[s]" to convict them. *Ibid.* A State cannot violate Section 1324a(b)(5)'s limitation on use of information in the I-9 by relying exclusively on information in documents other than the I-9.

The Kansas Supreme Court's holding that the State used information "contained in" the I-9s is contrary to the statute's plain meaning. An ordinary speaker would not say that she used information contained in one doc-

ument if she actually took the information from a different document, even if the documents happen to contain the same information. The Kansas Supreme Court's holding also produces implausible results. Under the court's reasoning, the State may not use any information "contained in" an I-9, including such basic information as a name or address, even if the State takes the information entirely from different documents wholly unrelated to the employment context. Because virtually everyone who has a job—citizens and aliens alike—must submit an I-9, the decision below would preclude the use of basic identity information in most state and many federal law-enforcement operations. Unsurprisingly, every other court to consider the question has found that result irreconcilable with the statutory text, structure, and purpose.

B. The prosecutions are also not impliedly preempted. Respondents contend (Br. in Opp. 21-22) that the prosecutions are field preempted because Congress has occupied fields related to the employment of unauthorized aliens. But Congress has not occupied those fields. And even if it had, respondents' prosecutions would not be field preempted, because respondents were not prosecuted for seeking unauthorized employment, but rather for committing identity theft and document fraud —generally applicable offenses that are not limited to the employment context or to unauthorized aliens. Respondents' contrary position would mean that Kansas could prosecute a U.S. citizen or authorized alien who presents an employer with a false social security number, but could not prosecute an unauthorized alien who does the same. Nothing in IRCA or elsewhere suggests

that Congress intended to carve out an exception to generally applicable state laws for the exclusive benefit of unauthorized aliens.

Respondents' conflict-preemption argument is similarly flawed. Respondents contend that their prosecutions pose an obstacle to federal purposes "by usurping federal enforcement discretion in the field of unauthorized employment of aliens." Br. in Opp. 23 (citations omitted). But respondents were not prosecuted for seeking unauthorized employment, so their prosecutions cannot have usurped federal enforcement discretion in that field. Indeed, federal law-enforcement officials participated in the prosecutions, which strongly suggests their discretion was not usurped. And prosecuting identity theft is fully consistent with federal purposes as expressed in IRCA and elsewhere. The decision below therefore should be reversed.

ARGUMENT

IRCA DOES NOT EXPRESSLY OR IMPLIEDLY PREEMPT KANSAS'S PROSECUTION OF RESPONDENTS

A. IRCA Does Not Expressly Preempt The Prosecutions

The "purpose of Congress is the ultimate touchstone in every pre-emption case." *Hughes* v. *Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (citation omitted). When analyzing an express-preemption provision, courts "focus on the plain wording of the" statute, "which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 594 (2011) (citation omitted) (analyzing IRCA); see *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (looking to

"Congress's intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved").

1. The text of Section 1324a(b)(5) does not bar the prosecutions

The Kansas Supreme Court concluded that respondents' prosecutions were expressly preempted by 8 U.S.C. 1324a(b)(5). Titled "Limitation on use of attestation form," Section 1324a(b)(5) states that the I-9 "form * * * and any information contained in or appended to such form [] may not be used for purposes other than" specified federal law-enforcement actions. *Ibid.* That limitation does not bar the prosecutions here. In prosecuting respondents, "the State did not rely on the I-9." Pet. App. 28. The State instead prosecuted respondents "us[ing]" exclusively their tax-withholding forms and the false social security numbers "contained in * * * such form[s]." 8 U.S.C. 1324a(b)(5). Under its "plain wording," Section 1324a(b)(5) did not preempt the prosecutions. *Whiting*, 563 U.S. at 594 (citation omitted).

The procedural history of the case illustrates what Section 1324a(b)(5) does and does not prevent. Kansas initially brought charges against respondents based on their entry of false social security numbers on both their I-9s and their tax-withholding forms. See p. 8, *supra*. Had the State proceeded with the charges based on the I-9s, it would have "used" respondents' I-9 forms and information "contained in * * * such form[s]" in violation of Section 1324a(b)(5). 8 U.S.C. 1324a(b)(5); see *Voisine* v. *United States*, 136 S. Ct. 2272, 2278 n.3 (2016) (explaining that the ordinary meaning of the verb "use[]" is "to employ") (citation omitted). But the State dismissed the counts involving respondents' entry of false social security numbers on the I-9s and declined to

introduce the I-9s into evidence for any purpose. See p. 8, *supra*. Kansas accordingly did not "use[]" the I-9s or the false social security numbers "contained in * * * such form[s]." 8 U.S.C. 1324a(b)(5). To the contrary, Kansas deliberately decided *not to* "use[]" the I-9s or the false social security numbers "contained in * * * such form[s]." *Ibid.* A State does not violate the prohibition on "us[ing]" the I-9 or "information contained in * * * *such form*" when its prosecution is premised entirely on separate documents *other than* the I-9. *Ibid.* (emphasis added).

To be sure, as the Kansas Supreme Court observed, respondents entered the same false social security numbers on both their tax-withholding forms and their I-9s. Pet. App. 28. But the presence of the same numbers on both documents does not mean that Kansas "used" the I-9s or "information contained in * * * such form[s]" to prosecute respondents. 8 U.S.C. 1324a(b)(5). An ordinary speaker would not typically say that she "used" information contained in one document if she took the information from a different document. This Court, for example, requires counsel of record to submit an e-mail address and telephone number on the cover of a brief. Sup. Ct. R. 34(f). Counsel will almost certainly submit that same contact information to other recipients for other purposes—for instance, to a bank to open a checking account. If the Clerk's Office were to contact counsel based on the e-mail address or phone number on the cover of the brief, an ordinary speaker would not say that the Office had "used" information "contained in" counsel's bank records, even though the same e-mail address and phone number appear there. The natural reading of Section 1324a(b)(5)'s text is thus that it bars

a State's use only of "the I-9 form or its supporting documents *themselves*." *Whiting*, 563 U.S. at 603 n.9 (plurality opinion) (emphasis added). Respondents' contrary interpretation is the kind of "hyperliteral" construction that this Court has rejected in favor of the ordinary meaning of the statutory language. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012); see, *e.g.*, *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 774 (2016).

Respondents suggest that their hyperliteral interpretation is necessary to avoid rendering "nugatory the statutory clause 'and any information contained in' the I-9 Form." Br. in Opp. 18 (quoting 8 U.S.C. 1324a(b)(5)). That contention is mistaken. Section 1324a(b)(5) bars use of the I-9 and "information contained in or appended to such form" to make clear that a State may not extract information from the I-9—for example, an employee's use of a false name or social security number in Section One of the form, see App., *infra*, 15a—and then claim that Section 1324a(b)(5) does not apply because the State is not using the I-9 "form" in its entirety, 8 U.S.C. 1324a(b)(5). See Pet. App. 40 (Biles, J., dissenting) (explaining that the "information contained in" provision of Section 1324a(b)(5) ensures that the prohibition covers all "the contents of the completed" I-9). If Congress had wanted all information that appears on the I-9 "to be *totally off-limits*" to state law enforcement, even when the information is taken from documents other than the I-9, Congress "would have worded the statute much differently." *State* v. *Martinez*, 896 N.W.2d 737, 768 (Iowa 2017) (Mansfield, J., dissenting).

For these reasons, every state or federal judge who has considered the question—with the exception of the

four-Justice majority below—has concluded that "IRCA's document use limitation is only violated when the identity theft laws are applied in ways *that rely on the Form I-9* and attached documents." *Puente Ariz.* v. *Arpaio*, 821 F.3d 1098, 1108 (9th Cir. 2016) (emphasis added); see *Martinez*, 896 N.W.2d at 768 (Mansfield, J., dissenting); *State* v. *Reynua*, 807 N.W.2d 473, 480-481 (Minn. Ct. App. 2011); Pet. App. 40-44 (Biles, J., dissenting); Pet. App. 46 (Stegall, J., dissenting); Pet. App. 80-82 (citing numerous Kansas Court of Appeals decisions reaching the same result). The government has consistently interpreted Section 1324a(b)(5) in the same way, explaining that Section 1324a(b)(5) does not expressly "preclude a State from relying on" information that appears in an I-9 so long as it is "taken from another source." Gov't C.A. Amicus Br. at 14, *Puente Ariz.*, *supra* (No. 15-15211).

2. The structure and purpose of IRCA confirm that Section 1324a(b)(5) does not bar the prosecutions

a. IRCA's structure and purpose confirm Congress's focus on limiting use of the "form I-9 itself"—not distinct documents that happen to contain information that also appears on the I-9. *Whiting*, 563 U.S. at 589. Section 1324a(b)(5) is titled, "Limitation on use of attestation form," which reinforces Congress's focus on the I-9 form. Cf. *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (relying on similar title in interpreting statute). Section 1324a(b)(5) appears immediately after other provisions that govern use of the I-9 form itself. See 8 U.S.C. 1324a(b)(3) (retention of form); 8 U.S.C. 1324a(b)(4) (copying of form). And Section 1324a(d)(2), which governs administrative changes to IRCA's "verification system," specifies that that "*[t]he system* may not be used for law enforcement

purposes" other than those enumerated in Section 1324a(b)(5), and that if the system "requires individuals to present a new card or document" for employment verification, "*such document* may not be required to be presented for any purpose other than" those enumerated in Section 1324a(b)(5). 8 U.S.C. 1324a(d)(2)(F)-(G) (emphases added). The "structure and internal logic of" IRCA indicate that Section 1324a(b)(5) similarly governs use of the I-9 form and information taken from that form, not separate documents that have nothing to do with employment verification but happen to contain the same information that appears on the I-9. *Lockhart* v. *United States*, 136 S. Ct. 958, 962 (2016); see *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (plurality opinion) (rejecting preemption argument that "might be plausible were [the Court] to interpret that provision in isolation, but * * * simply is not tenable in light of the [statute's] surrounding provisions").

The same understanding follows from IRCA's purpose: to create a federal framework for "combating the employment of illegal aliens." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002); see *id.* at 155 (Breyer, J., dissenting) ("[T]he general purpose of [IRCA's] employment prohibition is to diminish the attractive force of employment, which like a 'magnet' pulls illegal immigrants toward the United States.") (citation omitted). The reading of Section 1324a(b)(5) adopted by the Kansas Supreme Court and endorsed by respondents would produce results that have nothing to do with that purpose. Although state and federal tax-withholding forms may, as a matter of practice, be submitted to employers at roughly the same time as I-9s (and other documents such as payroll direct-deposit forms), tax-withholding forms (like direct-deposit forms)

are required for reasons that have nothing to do with verifying work authorization—the central function of the I-9. See p. 3, *supra*; *Rowan Cos.* v. *United States*, 452 U.S. 247, 256-257 (1981) (discussing the history of tax withholding). Moreover, under the logic of the decision below, Kansas would be barred from using *any* information contained in a defendant's I-9—including basic identity information like the defendant's name, birthdate, address, and phone number, see App., *infra*, 15a—in any prosecution for any crime, even one that has nothing to do with employment, and even if the State never sees the I-9. See Pet. App. 45 (Stegall, J., dissenting). For example, the State would be barred from using a suspected drug dealer's address or phone number in an application for a search warrant, so long as the suspect included that information on his I-9. And because all employees—citizens and aliens alike—must submit I-9s, see p. 3, *supra*, the logic of the decision below would restrict the State's ability to prosecute *virtually everyone who has a job*.

In addition, the Kansas Supreme Court's reasoning "appears to wipe numerous criminal laws off the books" entirely. Pet. App. 45 (Stegall, J., dissenting). It would seem impossible to prosecute identity theft, for example, if the State cannot rely on basic identity information such as a defendant's name. *Ibid.* Proving state crimes that depend on age, from underage drinking to statutory rape, would also be virtually impossible if the birthdates of the relevant parties (including the victims) are "contained in" I-9s and therefore inadmissible under the logic of the decision below. And if the Kansas Supreme Court's reading of Section 1324a(b)(5) were adopted by this Court, many federal criminal prosecu-

tions would also be disrupted. Section 1324a(b)(5) allows "use[]" of information "contained in" an I-9 for only four federal crimes, but many crimes that rely heavily on identity information are not included. For example, prosecutions for aggravated identity theft, 18 U.S.C. 1028A, misuse of a social security number, 42 U.S.C. 408(a), and numerous other forms of fraud not covered by Section 1324a(b)(5) depend on identity information generally contained in the I-9 of anyone who has a job.

On top of that, the Kansas Supreme Court's reasoning would invite fraud on I-9s. Identity thieves who use fraudulent information on other documents would have an incentive to duplicate that information on their I-9s as a means of preventing States from using the information in an identity-theft prosecution. Converting the I-9 into a "Get Out of Jail Free" card would undermine both IRCA's purpose and common sense. Pet. App. 107; see, *e.g.*, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 165 (2001) (rejecting an interpretation that "would immunize from [criminal] liability many of those at whom this Court has said [the relevant statute] directly aims"). Simply put, "[t]here is no basis in law, fact, or logic" for the Kansas Supreme Court's decision. *Whiting*, 563 U.S. at 597; cf. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 487 (1996) (plurality opinion) (rejecting express-preemption argument that "is not only unpersuasive, [but] is implausible").

b. Rather than defend such untenable results, respondents point (Br. in Opp. 7, 13, 20) to language in the Kansas Supreme Court's opinion (Pet. App. 20, 28) suggesting that the decision applies only to "alien[s]." But respondents identify no basis in the court's reasoning or Section 1324a(b)(5) to support such a limitation. Unlike other provisions of the INA, Section 1324a(b)(5)

does not differentiate between citizens and aliens. Cf. 8 U.S.C. 1325 (providing that "[a]ny alien" who crosses the border illegally shall be punished). And as noted, IRCA requires verification of *all* employees, citizens and aliens alike. See p. 3, *supra*.

Even if respondents' proffered limitation were possible, it would produce untenable results of its own. On respondents' reading of the decision below, Kansas could prosecute a U.S. citizen who presents an employer with a false social security number (for example, to conceal a prior criminal conviction or to hide income from the government) but the State could not prosecute an alien who presents an employer with the same false social security number (regardless of the purpose). "[N]o such limit is remotely discernible in the statutory text" of IRCA, and Congress gave no other indication that it meant to grant aliens unique immunity to violate generally applicable state criminal laws free of state criminal prosecution. *Whiting*, 563 U.S. at 599; cf. *Medtronic*, 518 U.S. at 487 (plurality opinion) (rejecting preemption claim that would "have the perverse effect of granting complete immunity from [state-law] liability to an entire" category of defendants without any support in the federal statutory scheme).

B. IRCA Does Not Impliedly Preempt The Prosecutions

The Kansas Supreme Court "dispose[d] of" this case on "express preemption" grounds and declined to "decide the merits of any other" preemption theory. Pet. App. 27-28. The concurring Justice below, however, concluded that IRCA impliedly preempted the prosecutions, *id.* at 31-38, and respondents contend (Br. in Opp. 20-27) that the judgment can be affirmed on that ground. Respondents are mistaken. IRCA does not impliedly

preempt the prosecutions on either a field-preemption or a conflict-preemption theory.

1. IRCA does not impliedly preempt the prosecutions through field preemption

Under the doctrine of field preemption, "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona* v. *United States*, 567 U.S. 387, 399 (2012). A successful field-preemption claim thus must establish (1) that Congress has occupied a particular field, and (2) that the challenged state law "falls within the preempted field." *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015). Respondents' claim fails at both steps. IRCA does not preempt either of the fields that respondents suggest it does (Br. in Opp. 21-22). And even if it did, respondents' prosecutions would not be preempted because they do not fall within either of the allegedly preempted fields.

1. The first step in a field-preemption analysis is to identify the allegedly preempted field. "Every Act of Congress occupies some field, but [courts] must know the boundaries of that field before [they] can say that it has precluded a state from the exercise of any power reserved to it by the Constitution." *De Canas* v. *Bica*, 424 U.S. 351, 360 n.8 (1976) (citation omitted).

a. Respondents contend that Congress has broadly occupied the "field of 'unauthorized employment of aliens.'" Br. in Opp. 22 (quoting *Arizona*, 567 U.S. at 406). But respondents cite nothing in the text of IRCA to support that assertion, and IRCA's text refutes it. IRCA prohibits the hiring of unauthorized aliens and prescribes sanctions for employer violations, 8 U.S.C.

1324a(a) and (e)-(f), but nothing in IRCA states or suggests that those provisions are "exclusive" or "'so pervasive'" that "'Congress left no room for the States to'" act in the entire field of employment of unauthorized aliens. *Arizona*, 567 U.S. at 399 (citation omitted).

To the contrary, where Congress sought to disable state or local action on subjects covered by IRCA, Congress did so expressly. Section 1324a(h)(2), entitled "Preemption," states that the "provisions of [IRCA] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ * * * unauthorized aliens." 8 U.S.C. 1324a(h)(2). Respondents do not contend that Section 1324a(h)(2), which pertains only to *employer* sanctions, expressly preempts their prosecutions. And Section 1324a(h)(2) directly undermines respondents' contention that Congress occupied the field of the employment of unauthorized aliens. If Congress had actually occupied that field, the preemption clause of Section 1324a(h)(2) would be superfluous, and the "saving clause" permitting state regulation of the employment of unauthorized aliens through "'licensing and similar laws'" would be inoperative. *Whiting*, 563 U.S. at 587 (citation omitted); see *Cipollone*, 505 U.S. at 547 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines.").

The only authority respondents cite for their assertion that IRCA occupies the "field of 'unauthorized employment of aliens'" is this Court's decision in *Arizona*. Br. in Opp. 22 (quoting *Arizona*, 567 U.S. at 406). But *Arizona* cuts against their position. In *Arizona*, this

Court evaluated the federal government's claim that several provisions of an Arizona statute were preempted. 567 U.S. at 393-394. The Court first held that a provision criminalizing failure to carry an alien-registration document as required by federal law was field preempted, because the federal government had "occupied the field of alien registration." *Id.* at 401. The Court then separately considered a provision criminalizing an unauthorized alien's attempt to seek employment. *Id.* at 403. In contrast to its holding that the alien-registration provision was *field* preempted, the Court concluded that the alien-employment provision was *conflict* preempted, because it constituted an "obstacle to the regulatory system Congress chose." *Id.* at 406. The contrast between those portions of the Court's decision is telling. The Court would not have needed to determine whether the alien-employment provision constituted an "obstacle" to federal law, *ibid.*, if Congress had "occupied the * * * field of 'unauthorized employment of aliens.'" Br. in Opp. 22 (citation omitted). Respondents' position is thus inconsistent with IRCA and this Court's decisions interpreting it.[3]

b. Respondents contend in the alternative that Congress has occupied the narrower field of the "use of false

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[3] Respondents' reliance (Br. in Opp. 21-22) on the Fourth Circuit's decision in *United States* v. *South Carolina*, 720 F.3d 518 (2013), is misplaced for similar reasons. The state law at issue in that case made "it unlawful for any person to display or possess a false or counterfeit ID for the purpose of proving lawful presence in the United States." *Id.* at 532. Relying on *Arizona*'s holding that Congress has occupied the field of *alien registration*, the court concluded that the South Carolina law was field preempted. *Id.* at 533. But that law regulating an alien's *presence*, like the alien-registration at issue in *Arizona*, did not regulate employment.

documents * * * when an unauthorized alien seeks employment." Br. in Opp. 21 (quoting Pet. App. 35-36 (Luckert, J., concurring)). That contention fails for similar reasons. Congress has established penalties for document fraud undertaken to establish work-authorization and other immigration-related fraud, see 8 U.S.C. 1324c(a)(1) and (d)(3); 18 U.S.C. 1546, but nothing in IRCA indicates that Congress intended those penalties to be "exclusive" or "'so pervasive'" that "'Congress left no room for the States to'" act in the entire field. *Arizona*, 567 U.S. at 399 (citation omitted). Respondents' claim of field preemption is particularly strained given the States' historic regulation of identity theft and similar crimes, see p. 5, *supra*, and this Court's instruction that Congress's intent to preempt a field "'traditionally occupied by the States' * * * must be 'clear and manifest.'" *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990) (citations omitted).

Respondents' claim is also flatly inconsistent with this Court's decision in *Whiting*. There, the Court rejected a conflict-preemption challenge to an Arizona statute requiring state employers to use E-Verify—a mechanism for verifying the work authorization of prospective employees. 563 U.S. at 590, 608-609. The Court would not have considered that challenge under *conflict* preemption, let alone *upheld* the state law, if Congress had in fact preempted the field of the "use of false documents * * * when an unauthorized alien seeks employment." Br. in Opp. 21 (citation omitted); see *Arizona*, 567 U.S. at 401 ("Field pre-emption reflects a congressional decision to foreclose any state regulation in the area, *even if it is parallel to federal standards*.") (emphasis added).

c. Finally, both of respondents' field-preemption theories are flawed because they assert that Congress preempted fields specifically involving the employment of *unauthorized aliens*. Br. in Opp. 21-22. As noted above, however, nothing in IRCA supports a distinction between citizens and aliens. See pp. 20-21, *supra*. And respondents' position would produce the anomalous result that a State could prosecute a U.S. citizen or authorized alien who commits identity theft by presenting an employer with a false social security number (for example, to conceal a prior criminal conviction or hide income from the government) but could not prosecute an unauthorized alien who presents an employer with the same false social security number to obtain employment. Creating such preferential treatment for unauthorized aliens was hardly the "purpose of Congress" in enacting IRCA. *Hughes*, 136 S. Ct. at 1297 (citation omitted).

2. In any event, even if Congress had occupied the fields respondents suggest, the prosecutions at issue would not be preempted because the state laws under which respondents were prosecuted do not regulate either "'unauthorized employment of aliens,'" or "the 'use of false documents * * * when an unauthorized alien seeks employment.'" Br. in Opp. 21-22 (citations omitted). To the contrary, the laws are "generally applicable" statutes that regulate specified forms of fraud in any context and apply equally to aliens and non-aliens alike. Pet. App. 20. Thus, a prospective employee who submits someone else's social security number on a tax-withholding form is guilty of identity theft regardless of whether the employee is a citizen, an alien authorized to work, or an alien unauthorized to work. The same person would also be guilty of identity theft for submitting

a loan application, a benefits claim, or a credit-card transaction using false identity information, even though those forms of fraud have nothing to do with employment. By the same token, an unauthorized alien who submits a *truthful* tax-withholding form is not guilty of identity theft or making a false information even if he is hired and begins work unlawfully. In short, the Kansas identity-theft and false-information statutes do not "have anything to do with the employment-related verification of immigration status." *Id.* at 105; see Pet. Br. 7 (citing identity-theft prosecutions of non-aliens in non-employment contexts).

Respondents' prosecutions are accordingly not field preempted. In conducting field-preemption analysis, this Court has "emphasize[d] the importance of considering the *target* at which the state law *aims* in determining whether that law is" preempted. *Oneok*, 135 S. Ct. at 1599. The Court has held, for example, that generally applicable state antitrust laws "not aimed at natural-gas companies in particular, but rather all businesses in the marketplace" are not within the field preempted by the federal Natural Gas Act, 15 U.S.C. 717 *et seq.* *Oneok*, 135 S. Ct. at 1601. Similarly, the Court has held that general state tort laws that might "in some remote way affect * * * nuclear safety decisions" are not "within the pre-empted field" established by the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* *English*, 496 U.S. at 84-85. And of particular relevance here, the Court concluded that state regulations of alien employment adopted before IRCA were not within the field preempted by the INA. *De Canas*, 424 U.S. at 362.

As the Court explained, "the fact that aliens are the subject of a state statute does not render it a regulation of immigration." *Id.* at 355.[4]

The logic of those decisions "supports a finding of no pre-emption." *Oneok*, 135 S. Ct. at 1601. The fact that Kansas's generally applicable prohibitions on identity theft and related crimes can be applied to unauthorized aliens who submit false documents to their employer does not mean those laws regulate the "field of 'unauthorized employment of aliens,'" Br. in Opp. 22 (citation omitted), any more than generally applicable state antitrust laws regulate the field of natural gas, or generally applicable state tort laws regulate the field of nuclear safety. Likewise, the fact that respondents were prosecuted for committing identity theft on forms submitted to an employer does not mean that the prosecutions regulated the field of unauthorized-alien employment, any more than prosecutions for identity theft in depositing a check would constitute regulation in the field of banking. The prosecutions are not field preempted.

2. IRCA does not impliedly preempt the prosecutions through conflict preemption

Respondents also contend (Br. in Opp. 23) that their prosecutions are impliedly preempted by "the doctrine of conflict preemption." As relevant here, conflict preemption exists when a "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 567 U.S. at 399 (citation omitted).

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[4] Although the particular California law at issue in *De Canas* would be expressly preempted by IRCA, see *Whiting*, 563 U.S. at 590, this Court has continued to rely on the reasoning of *De Canas* in conducting preemption analysis, see *id.* at 601 (plurality opinion).

Respondents do not seriously contend that prosecuting their identity-theft and related crimes actually undermined any federal purpose or objective. Punishing such criminal conduct is plainly consistent with Congress's purposes and objectives, given that Congress has also criminalized identity theft and similar offenses. See, *e.g.*, 18 U.S.C. 1028, 1028A, 1546. Moreover, federal law-enforcement officials worked alongside Kansas authorities in investigating and prosecuting respondents. See Pet. App. 3, 6, 73. For example, a federal Social Security Administration agent testified at trial that using someone else's social security number could create numerous problems for federal programs and beneficiaries, including disqualifying victims of identity theft from eligibility for federal benefits because of false reports that they were earning income. *Id.* at 6.

Respondents' principal argument is that allowing their prosecutions "frustrates congressional purpose and provides an obstacle to the implementation of federal immigration policy by usurping federal enforcement discretion in the field of unauthorized employment of aliens." Br. in Opp. 23 (quoting Pet. App. 36 (Luckert, J., concurring)). That contention is flawed for multiple reasons. As explained above, see pp. 26-28, *supra*, Kansas's identity-theft and false-information statutes do not regulate "the field of unauthorized employment of aliens," so they cannot "usurp[] federal enforcement discretion" in that field. Br. in Opp. 23 (citations omitted). Indeed, respondents' prosecutions were based on tax-withholding forms that had nothing to with verifying employment authorization. See pp. 14-16, *supra*. And it is difficult to view the prosecutions as a usurpa-

tion of federal discretion given that federal agents voluntarily participated in the investigation and criminal proceedings. See pp. 28-29, *supra*.

Respondents rely primarily (Br. in Opp. 24-26) on this Court's holding in *Arizona* that allowing state criminal prosecutions of aliens seeking employment would "interfere with the careful balance struck by Congress" in IRCA and create "an obstacle to the regulatory system Congress chose." 567 U.S. at 406. But that holding was premised on the Court's determination that Congress had made a "deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Id.* at 405; see *ibid.* ("IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work * * * would be inconsistent with federal policy and objectives."). Unlike *Arizona*, this case does not involve a State's effort to impose criminal liability on aliens for *seeking unauthorized employment*. It involves prosecutions for *using someone else's social security number*, regardless of citizenship or work-authorization status. Respondents do not suggest that IRCA contains a "deliberate choice" or "considered judgment" against criminally punishing the use of another person's social security number. *Ibid.* *Arizona* accordingly provides no support for respondents' conflict-preemption claim.

Respondents' contention (Br. in Opp. 26) that conflict preemption bars state prosecutions of unauthorized aliens for "offenses relating to employment eligibility" would also create numerous anomalies. As discussed above, barring state prosecutions of unauthorized aliens who commit identity theft to establish employment eligibility, but allowing state prosecutions of U.S. citizens or authorized aliens who do the same (for

example, to hide a disqualifying prior criminal conviction), would inexplicably provide unauthorized alien criminals with immunities not enjoyed by U.S. citizens or aliens authorized to work. See pp. 20-21, 25-26, *supra*. In addition, under respondents' theory, a State could prosecute an alien who uses a fraudulent social security number on a tax-withholding form to avoid garnishment of his wages for back taxes or child support because such fraud did not "relat[e] to employment eligibility." Br. in Opp. 26. But the State could not prosecute an alien who uses a fraudulent social security number on a tax-withholding form as part of an effort to establish work authorization, because that fraud was "relat[ed] to employment eligibility." *Ibid.* Respondents' theory thus makes conflict preemption of state laws turn on the subjective motive of private parties regulated by those laws. There is no basis in IRCA or elsewhere for that impractical and counterintuitive limitation.

Ultimately, respondents' position stems in part from concerns that Kansas could selectively enforce its criminal laws against aliens as an end-run around federal immigration policies. Br. in Opp. 25. The State disputes that suggestion, noting that it prosecutes identity-theft crimes without regard to citizenship or nationality. Pet. Br. 7. This Court need not resolve that dispute here. If, as explained above, prosecutions under Kansas's identity-theft law do not conflict with IRCA, concerns about selective enforcement—whatever their relevance to other types of claims or defenses—are not relevant to the implied-preemption analysis under IRCA. "Implied pre-emption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'" *Whiting*, 563 U.S. at 607

(plurality opinion) (citation omitted). Because respondents have not shown that their prosecutions for violating Kansas law conflict with IRCA, their conflict-preemption claims cannot succeed.

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted.

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MAY 2019

APPENDIX

1. 8 U.S.C. 1324a provides in pertinent part:

Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity—

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) Defense

A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) Use of labor through contract

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after November 6, 1986, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

(5) Use of State employment agency documentation

For purposes of paragraphs (1)(B) and (3), a person or entity shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of an individual who was referred for such employment by a State employment agency (as defined by the Attorney General), if the person or entity has and retains (for the period and in the manner described in subsection (b)(3) of this section) appropriate documentation of such referral by that agency, which documentation certifies that the agency has complied with the procedures

specified in subsection (b) of this section with respect to the individual's referral.

(6) Treatment of documentation for certain employees

(A) In general

For purposes of this section, if—

(i) an individual is a member of a collective-bargaining unit and is employed, under a collective bargaining agreement entered into between one or more employee organizations and an association of two or more employers, by an employer that is a member of such association, and

(ii) within the period specified in subparagraph (B), another employer that is a member of the association (or an agent of such association on behalf of the employer) has complied with the requirements of subsection (b) of this section with respect to the employment of the individual,

the subsequent employer shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of the employee and shall not be liable for civil penalties described in subsection (e)(5) of this section.

(B) Period

The period described in this subparagraph is 3 years, or, if less, the period of time that the individual is authorized to be employed in the United States.

(C) Liability

(i) In general

If any employer that is a member of an association hires for employment in the United States an individual and relies upon the provisions of subparagraph (A) to comply with the requirements of subsection (b) of this section and the individual is an alien not authorized to work in the United States, then for the purposes of paragraph (1)(A), subject to clause (ii), the employer shall be presumed to have known at the time of hiring or afterward that the individual was an alien not authorized to work in the United States.

(ii) Rebuttal of presumption

The presumption established by clause (i) may be rebutted by the employer only through the presentation of clear and convincing evidence that the employer did not know (and could not reasonably have known) that the individual at the time of hiring or afterward was an alien not authorized to work in the United States.

(iii) Exception

Clause (i) shall not apply in any prosecution under subsection (f)(1) of this section.

(7) Application to Federal Government

For purposes of this section, the term "entity" includes an entity in any branch of the Federal Government.

(b) Employment verification system

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) of this section are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining—

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of

any other document or as requiring the individual to produce such another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individual's—

(i) United States passport;[1]

(ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document—

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,

(II) is evidence of authorization of employment in the United States, and

(III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(C) Documents evidencing employment authorization

A document described in this subparagraph is an individual's—

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or

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[1] So in original. Probably should be followed by "or".

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(D) Documents establishing identity of individual

A document described in this subparagraph is an individual's—

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

(E) Authority to prohibit use of certain documents

If the Attorney General finds, by regulation, that any document described in subparagraph (B), (C), or (D) as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

(2) Individual attestation of employment authorization

The individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a hand-written or an electronic signature.

(3) Retention of verification form

After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during a period beginning on the date of the hiring, recruiting, or referral of the individual and ending—

(A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and

(B) in the case of the hiring of an individual—

(i) three years after the date of such hiring, or

(ii) one year after the date the individual's employment is terminated, whichever is later.

(4) Copying of documentation permitted

Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

(5) Limitation on use of attestation form

A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of title 18.

(6) Good faith compliance

(A) In general

Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

(B) Exception if failure to correct after notice

Subparagraph (A) shall not apply if—

(i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,

(ii) the person or entity has been provided a period of not less than 10 business days (be-

ginning after the date of the explanation) within which to correct the failure, and

(iii) the person or entity has not corrected the failure voluntarily within such period.

(C) Exception for pattern or practice violators

Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section.

* * * * *

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(2) Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

2. Kan. Stat. Ann. § 21-5824 (Supp. 2017) provides:

Making false information. (a) Making false information is making, generating, distributing or drawing, or causing to be made, generated, distributed or drawn, any written instrument, electronic data or entry in a book of account with knowledge that such information falsely states or represents some material matter or is not what it purports to be, and with intent to defraud, obstruct the detection of a theft or felony offense or induce official action.

(b) Making false information is a severity level 8, nonperson felony.

3. Kan. Stat. Ann. § 21-6107 (Supp. 2017) provides:

Identity theft; identity fraud. (a) Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to:

(1) Defraud that person, or anyone else, in order to receive any benefit; or

(2) misrepresent that person in order to subject that person to economic or bodily harm.

(b) Identity fraud is:

(1) Using or supplying information the person knows to be false in order to obtain a document containing any personal identifying information; or

(2) altering, amending, counterfeiting, making, manufacturing or otherwise replicating any document containing personal identifying information with the intent to deceive;

(c)(1) Identity theft is a:

(A) Severity level 8, nonperson felony, except as provided in subsection (c)(1)(B); and

(B) severity level 5, nonperson felony if the monetary loss to the victim or victims is more than $100,000.

(2) Identity fraud is a severity level 8, nonperson felony.

(d) It is not a defense that the person did not know that such personal identifying information belongs to another person, or that the person to whom such personal identifying information belongs or was issued is deceased.

(e) As used in this section:

(1) "Personal electronic content" means the electronically stored content of an individual including, but not limited to, pictures, videos, emails or other data files;

(2) "personal identifying information" includes, but is not limited to, the following:

(A) Name;

(B) birth date;

(C) address;

(D) telephone number;

(E) driver's license number or card or nondriver's identification number or card;

(F) social security number or card;

(G) place of employment;

(H) employee identification numbers or other personal identification numbers or cards;

(I) mother's maiden name;

(J) birth, death or marriage certificates;

(K) electronic identification numbers;

(L) electronic signatures;

(M) any financial number, or password that can be used to access a person's financial resources, including, but not limited to, checking or savings accounts, credit or debit card information, demand deposit or medical information; and

(N) passwords, usernames or other log-in information that can be used to access a person's personal electronic content, including, but not limited to, content stored on a social networking website; and

(3) "social networking website" means a privacy-protected internet website which allows individuals to construct a public or semi-public profile within a bounded

system created by the service, create a list of other users with whom the individual shares a connection within the system and view and navigate the list of users with whom the individual shares a connection and those lists of users made by others within the system.

Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 08/31/2019

►**START HERE:** **Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.**

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation *(Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.)*

Last Name *(Family Name)*	First Name *(Given Name)*	Middle Initial	Other Last Names Used *(if any)*

Address *(Street Number and Name)*	Apt. Number	City or Town	State	ZIP Code

Date of Birth *(mm/dd/yyyy)*	U.S. Social Security Number	Employee's E-mail Address	Employee's Telephone Number
	☐☐☐ - ☐☐ - ☐☐☐☐		

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following boxes):

☐ 1. A citizen of the United States

☐ 2. A noncitizen national of the United States *(See instructions)*

☐ 3. A lawful permanent resident (Alien Registration Number/USCIS Number): _____

☐ 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy): _____
Some aliens may write "N/A" in the expiration date field. *(See instructions)*

Aliens authorized to work must provide only one of the following document numbers to complete Form I-9:
An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.

1. Alien Registration Number/USCIS Number: _____
OR
2. Form I-94 Admission Number: _____
OR
3. Foreign Passport Number: _____
Country of Issuance: _____

QR Code - Section 1
Do Not Write In This Space

Signature of Employee	Today's Date *(mm/dd/yyyy)*

Preparer and/or Translator Certification (check one):

☐ I did not use a preparer or translator. ☐ A preparer(s) and/or translator(s) assisted the employee in completing Section 1.
(Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator	Today's Date *(mm/dd/yyyy)*

Last Name *(Family Name)*	First Name *(Given Name)*

Address *(Street Number and Name)*	City or Town	State	ZIP Code

STOP *Employer Completes Next Page* STOP

Section 2. Employer or Authorized Representative Review and Verification

(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")

Employee Info from Section 1	Last Name *(Family Name)*	First Name *(Given Name)*	M.I.	Citizenship/Immigration Status

List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title		Document Title		Document Title
Issuing Authority		Issuing Authority		Issuing Authority
Document Number		Document Number		Document Number
Expiration Date *(if any)(mm/dd/yyyy)*		Expiration Date *(if any)(mm/dd/yyyy)*		Expiration Date *(if any)(mm/dd/yyyy)*
Document Title				
Issuing Authority				
Document Number				
Expiration Date *(if any)(mm/dd/yyyy)*				
Document Title				
Issuing Authority				
Document Number				
Expiration Date *(if any)(mm/dd/yyyy)*				

Additional Information

QR Code - Sections 2 & 3
Do Not Write In This Space

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment *(mm/dd/yyyy)*: _____ ***(See instructions for exemptions)***

Signature of Employer or Authorized Representative	Today's Date *(mm/dd/yyyy)*	Title of Employer or Authorized Representative

Last Name of Employer or Authorized Representative	First Name of Employer or Authorized Representative	Employer's Business or Organization Name

Employer's Business or Organization Address (Street Number and Name)	City or Town	State	ZIP Code

Section 3. Reverification and Rehires *(To be completed and signed by employer or authorized representative.)*

A. New Name *(if applicable)*			**B.** Date of Rehire *(if applicable)*
Last Name *(Family Name)*	First Name *(Given Name)*	Middle Initial	Date *(mm/dd/yyyy)*

C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title	Document Number	Expiration Date *(if any)* *(mm/dd/yyyy)*

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Today's Date *(mm/dd/yyyy)*	Name of Employer or Authorized Representative

LISTS OF ACCEPTABLE DOCUMENTS
All documents must be UNEXPIRED

Employees may present one selection from List A
or a combination of one selection from List B and one selection from List C.

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		**1.** Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		**1.** A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		**2.** ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		**2.** Certification of report of birth issued by the Department of State (Forms DS-1350, FS-545, FS-240)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		**3.** School ID card with a photograph		**3.** Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
4. Employment Authorization Document that contains a photograph (Form I-766)		**4.** Voter's registration card		**4.** Native American tribal document
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: **a.** Foreign passport; and **b.** Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.		**5.** U.S. Military card or draft record		**5.** U.S. Citizen ID Card (Form I-197)
		6. Military dependent's ID card		**6.** Identification Card for Use of Resident Citizen in the United States (Form I-179)
		7. U.S. Coast Guard Merchant Mariner Card		**7.** Employment authorization document issued by the Department of Homeland Security
		8. Native American tribal document		
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI		**10.** School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		

Examples of many of these documents appear in Part 13 of the Handbook for Employers (M-274).

Refer to the instructions for more information about acceptable receipts.