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Kansas v. Garcia: Restoring Historic State Police Powers in Traditional Areas of Criminal Law Enforcement

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Note

KANSAS V. GARCIA: RESTORING HISTORIC STATE POLICE POWERS IN TRADITIONAL AREAS OF CRIMINAL LAW ENFORCEMENT

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In *Kansas v. Garcia*,[1] the United States Supreme Court addressed whether the Immigration Reform and Control Act ("IRCA")[2] preempts states from prosecuting unauthorized aliens[3] for identity theft based on false information found in federal and state tax-withholding forms, when the same information is also contained on a federal work-authorization form ("I-9 form").[4] The Court held that the IRCA does not preempt such state prosecutions.[5] Ultimately, the Court correctly decided the case, as federalism favors deference to the historic police powers of the states in a traditional area of criminal law.[6] Further, the Court interpreted the relevant provisions

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1. 140 S. Ct. 791 (2020).

2. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359.

3. The author recognizes that the term "alien" has long been considered a dehumanizing term to describe undocumented persons. Currently, efforts are being made to move away from using the term, including a movement to eliminate the term from United States immigration laws and replace it with the word "noncitizen." *See* Nicole Acevedo, *Biden Seeks to Replace 'Alien' with Less 'Dehumanizing Term' in Immigration Laws*, NBC NEWS (Jan. 22, 2021, 3:34 PM), https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350. However, because the term "alien" is used by the United States Supreme Court in *Garcia* as well as Title 8 of the United States Code, this Note will use the term "alien" for purposes of consistency.

4. 8 C.F.R. § 274a.2(a)(2) (2019) (establishing the I-9 form). The I-9 form is a federal form used to "verify the identity and employment authorization of individuals hired for employment in the United States." U.S. Citizenship and Immigration Services, *I-9, Employment Eligibility Verification*, https://www.uscis.gov/i-9 (last modified May 19, 2020). Both employers and employees are required to complete the form. 8 C.F.R. § 274a.2(a)(3) (2019).

5. *Garcia*, 140 S. Ct. at 804, 806.

6. *See infra* Section IV.B.

of the IRCA to prevent a construction that would produce absurd results,[7] and the Court avoided inappropriate "judicial guesswork"[8] into legislative intentions.[9]

I. THE CASE

In August 2012, following a routine traffic stop, Kansas authorities contacted the restaurant where Ramiro Garcia worked to obtain his employment application.[10] A joint state-federal investigation revealed that the Social Security number Garcia used on his I-9 form, federal tax-withholding form ("W-4 form"), and state tax-withholding form ("K-4 form") belonged to a Texas woman.[11] As a result, Garcia was charged with identity theft under Kansas law.[12] Prior to trial, Garcia, relying on the IRCA's express preemption provision,[13] successfully moved to suppress the I-9 form that he filled out during the hiring process.[14] Next, Garcia moved to suppress the W-4 form, arguing that "the information contained on the I-9 [form] was transferred to [the] W-4 form."[15] But the district court refused to suppress the W-4 form.[16] Thus, the W-4 and K-4 forms—both containing the same fraudulent Social Security number—were admitted into evidence.[17] Garcia was subsequently found guilty of identity theft.[18]

Similarly, a joint state-federal investigation of Donaldo Morales revealed that Morales had used a Social Security number belonging to another person on his I-9, W-4, and K-4 forms when he applied for work at a Kansas restaurant.[19] While the State agreed not to rely on the I-9 form as a basis for prosecution, the tax-withholding forms were admitted into

7. *See infra* Section IV.C.

8. *Garcia*, 140 S. Ct. at 808 (Thomas, J., concurring).

9. *See infra* Section IV.D.

10. State v. Garcia, 401 P.3d 588, 590 (Kan. 2017), *rev'd*, 140 S. Ct. 791 (2020).

11. *Id.*

12. *Id.*; *see* KAN. STAT. ANN. § 21-6107(a)(1) (2019) (criminalizing "using . . . any personal identifying information . . . belonging to or issued to another person, with the intent to . . . [d]efraud that person, or anyone else, in order to receive any benefit").

13. *See* 8 U.S.C. § 1324a(b)(5) (limiting the use of the I-9 form and "any information contained in or appended to" the form "for purposes other than" enforcing the IRCA and other specified provisions of federal law).

14. *Garcia*, 401 P.3d at 590.

15. *Id.*

16. *Id.*

17. *Id.* at 591.

18. *Id.*

19. State v. Morales, 401 P.3d 155, 156 (Kan. 2017), *rev'd*, 140 S. Ct. 791 (2020).

evidence.[20] Consequently, Morales was charged and convicted of identity theft and making false information.[21]

Finally, Guadalupe Ochoa-Lara became the focus of an investigation after officers determined that he had used a Social Security number issued to another individual to lease an apartment in Kansas.[22] Officers subsequently contacted the restaurant where Ochoa-Lara worked and reviewed his completed I-9 and W-4 forms, which included the same false Social Security number.[23] The I-9 form was not used to prosecute Ochoa-Lara, but the W-4 form was admitted into evidence.[24] Ochoa-Lara was then found guilty of state identity theft.[25]

The Kansas Supreme Court reversed Garcia's conviction, holding that state prosecutions for identity theft based on fraudulent documents that include the same false information found in an unauthorized alien's I-9 form are expressly preempted by the IRCA.[26] The court concluded that the plain language of Section 1324a(b)(5) expressly preempted the use of the I-9 form and "any information contained in" the form for purposes other than those listed in the provision.[27] Because the fraudulent Social Security number contained in Garcia's tax-withholding forms also appeared on his I-9 form, the court found the State's argument that it had not actually relied on the I-9 form irrelevant.[28] Concurring, Justice Luckert agreed that Section 1324a(b)(5) preempted Garcia's prosecution, but through the doctrines of field and conflict preemption rather than express preemption.[29]

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20. *Id.*

21. *Id.*; *see* KAN. STAT. ANN. § 21-5824 (2019) (criminalizing, among other things, "making, generating, distributing or drawing . . . any written instrument . . . 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").

22. State v. Ochoa-Lara, 401 P.3d 159, 160 (Kan. 2017), *rev'd*, 140 S. Ct. 791 (2020).

23. *Id.*

24. *Id.*

25. *Id.* at 161.

26. State v. Garcia, 401 P.3d 588, 599–600 (Kan. 2017), *rev'd*, 140 S. Ct. 791 (2020).

27. *Id.* at 599. The IRCA limits the use of the I-9 form and "any information contained in or appended to" the form to enforcement of the INA and a handful of other federal statutes, including 18 U.S.C. § 1001 (false statements), § 1028 (identity theft), § 1546 (immigration-document fraud), and § 1621 (perjury). 8 U.S.C. § 1324a(b)(5).

28. *Garcia*, 401 P.3d at 599.

29. *Id.* at 600 (Luckert, J., concurring). Unlike express preemption, field and conflict preemption do not require statutory language explicitly prohibiting states from enacting or enforcing a specified type of law. *Id.* Instead, field preemption occurs when Congress occupies a regulatory field through comprehensive legislation, clearly intending for the field to be regulated exclusively by the federal government. 1 JACOB A. STEIN, GLEN A. MITCHELL, ET AL., ADMINISTRATIVE LAW § 2.02 (Matthew Bender ed., 2020). Conflict preemption arises where "it is impossible for a party to comply with both federal and state requirements" or when a state law operates as an obstacle to the implementation of a federal statutory scheme. *Id.* Whereas the majority found express

Based on its holding in *State v. Garcia*,[30] the court also reversed the convictions of Morales and Ochoa-Lara.[31] The United States Supreme Court granted certiorari to address whether the IRCA preempts state prosecutions of unauthorized aliens who use false identities on tax-withholding forms when the same fraudulent information also appears in an I-9 form.[32]

II. LEGAL BACKGROUND

The United States Constitution makes clear the federal government's supremacy in the field of foreign affairs, including its power over immigration, naturalization, and deportation of aliens.[33] When the federal government promulgates "by treaty or statute . . . established rules and regulations touching the rights, privileges, obligations or burdens of aliens . . . the treaty or statute is the supreme law of the land."[34] Pursuant to the Supremacy Clause, when Congress acts within its enumerated authority, it has the power to preempt state law.[35] To implement the Supremacy Clause, the Supreme Court has developed various preemption principles that are relevant to the Court's *Garcia* decision.[36] Section II.A discusses the enactment of the Immigration and Nationality Act ("INA"), the precursor to the IRCA.[37] Section II.B describes the framework of the IRCA and its employment verification system.[38] Section II.C explains the contours of preemption doctrine.[39] Finally, Section II.D explores the approaches taken by other state and lower federal courts regarding preemption questions involving aliens prosecuted for using false information and documents in employment-related contexts.[40]

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preemption language in 8 U.S.C. § 1324a(b)(5), Justice Luckert observed no explicit language in the statute preempting state civil or criminal proceedings against employees. *Garcia*, 401 P.3d at 600–01 (Luckert, J., concurring).

30. 401 P.3d 588 (Kan. 2017).

31. State v. Morales, 401 P.3d 155, 157 (Kan. 2017), *rev'd*, 140 S. Ct. 791 (2020); State v. Ochoa-Lara, 401 P.3d 159, 161 (Kan. 2017), *rev'd*, 140 S. Ct. 791 (2020).

32. Kansas v. Garcia, 140 S. Ct. 791, 797 (2020).

33. Hines v. Davidowitz, 312 U.S. 52, 62 (1941); *see* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform [sic] [r]ule of [n]aturalization . . . .").

34. *Hines*, 312 U.S. at 62–63.

35. Arizona v. United States, 567 U.S. 387, 399 (2012); *see* U.S. CONST. art. VI, cl. 2 (providing that federal law "shall be the supreme [l]aw of the [l]and; and the [j]udges in every [s]tate shall be bound thereby, any [t]hing in the Constitution or [l]aws of any [s]tate to the [c]ontrary notwithstanding").

36. State v. Martinez, 896 N.W.2d 737, 746 (Iowa 2017) (citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982)).

37. *See infra* Section II.A.

38. *See infra* Section II.B.

39. *See infra* Section II.C.

40. *See infra* Section II.D.

A. The Enactment of the INA

The INA is the foundation of the United States' immigration and naturalization laws.[41] The INA is a "comprehensive federal statutory scheme for regulation of immigration and naturalization," which sets "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."[42] The INA "provides criteria by which 'aliens' . . . may enter, visit and reside in the country."[43] Moreover, the INA sets forth the "sole and exclusive procedure for determining whether an alien" should be admitted to or removed from the United States.[44] As originally enacted, employment of illegal entrants was a "peripheral concern" of the INA, and the Supreme Court originally held that states were not precluded from regulating the employment of aliens pursuant to their police powers.[45]

B. The Enactment of the IRCA and the Requirements of its Employment Verification System

In 1986, Congress supplemented the INA by enacting the IRCA, which established a comprehensive scheme that "made combating the employment of illegal aliens" in the United States "central to '[t]he policy of immigration law.'"[46] The major purpose of enacting the IRCA was to regain control over the Nation's borders.[47] Congress concluded that "[t]he primary incentive for illegal immigration is the availability of [employment in the United States]."[48] To reduce this incentive, the IRCA imposes sanctions on employers who knowingly hire unauthorized aliens.[49] According to the

41. Immigration and Nationality Act, Pub. L. 414, 66 Stat. 163 (1952), *amended by* Act of Oct. 3, 1965, Pub. L. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

42. De Canas v. Bica, 424 U.S. 351, 353, 359 (1976), *superseded by statute*, 8 U.S.C. § 1324a(h)(2).

43. State v. Martinez, 896 N.W.2d 737, 743 (Iowa 2017) (quoting 8 U.S.C. § 1101(a)(3)).

44. *Id.* at 744 (quoting 8 U.S.C. § 1229a(a)(3)).

45. *De Canas*, 424 U.S. at 360, 362. Police powers describe the states' authority to enact laws that protect the health, safety, morals, and welfare of their citizens. *See* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 793–94 (2007) ("[I]nsofar as the expression is used in American constitutional law, the phrase 'police power' normally refers to the authority of the states for the promotion of public health, public safety, public morals, and public welfare.").

46. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (alteration in original) (quoting INS v. Nat'l Ctr. for Immigrants' Rts., Inc., 502 U.S. 183, 194 (1991)).

47. 131 CONG. REC. 23,317 (1985); 52 Fed. Reg. 16,205 (May 1, 1987) ("[The IRCA], the most comprehensive reform of our immigration laws since the enactment of the [INA] in 1952, reflects a resolve to strengthen law enforcement to control illegal immigration.").

48. 131 CONG. REC. 23,317 (1985); S. REP. NO. 99-132, at 1 (1985); *see also* H.R. REP. NO. 99-682, pt. 1, at 46 (1986) ("Employment is the magnet that attracts aliens here illegally . . . .").

49. 131 CONG. REC. 23,317 (1985).

House Committee on the Judiciary, imposing sanctions would deter employers from hiring unauthorized aliens, which in turn would deter aliens from entering the country illegally in search of employment.[50] Further, the Committee explained that Congress intended for the IRCA to preempt only a narrow class of state laws—those providing for "civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens."[51]

Accordingly, the IRCA established an "employment verification system" to curtail the employment of unauthorized aliens.[52] Using the I-9 form, "employer[s] must attest under penalty of perjury" that they "'verified that [an employee] is not an unauthorized alien'" after reviewing approved documents, such as an employee's United States passport or resident alien card.[53] Employers who violate the IRCA may face civil and/or criminal penalties.[54] However, states are expressly preempted from "imposing civil or criminal sanctions (other than through licensing and similar laws)" against employers who hire unauthorized aliens.[55]

The IRCA also imposes duties on employees, requiring employees to "attest" on the I-9 form that they are lawfully able to work in the United States.[56] The IRCA does not impose criminal sanctions on aliens who seek or engage in unauthorized work, and the Supreme Court has held that states are impliedly preempted from criminalizing such conduct.[57] But the IRCA does impose civil and criminal penalties on aliens who commit document fraud to show authorization to work.[58]

Finally, the IRCA limits the use of "any information contained in or appended to" an I-9 form for purposes other than enforcing the IRCA and other specified provisions of federal law.[59] The IRCA also limits the use of

50. H.R. REP. NO. 99-682, pt. 1, at 46 (1986). The Committee explained that it was convinced that imposing employer sanctions was "the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." *Id.*

51. *Id.* at 58.

52. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

53. Chamber of Com. v. Whiting, 563 U.S. 582, 589 (2011) (citing 8 U.S.C. § 1324a(b)(1)(A)–(D)).

54. 8 U.S.C. § 1324a(e)(4)(A), (f)(1). Depending on the number of previous violations, an employer who violates the IRCA shall be ordered to pay a civil fine ranging from $250 to $10,000 for each unauthorized worker with respect to whom a violation occurred. *Id.* § 1324a(e)(4)(A). In terms of criminal penalties, employers who engage in a pattern of violations shall be fined up to $3,000 for each undocumented employee and imprisoned for up to six months. *Id.* § 1324a(f)(1).

55. *Id.* § 1324a(h)(2).

56. *Id.* § 1324a(b)(2).

57. Arizona v. United States, 567 U.S. 387, 403–07 (2012).

58. 8 U.S.C. §§ 1324c(a)(1)–(4), (d)(3), 1546(b).

59. *Id.* § 1324a(b)(5).

the employment verification system, more broadly, for "law enforcement purposes" other than enforcing the IRCA and its provisions.[60]

C. The Development of the Various Preemption Doctrines

The United States Supreme Court has established two categories of preemption: express and implied.[61] Express preemption occurs when a statute's text clearly states that congressional authority is exclusive,[62] while implied preemption involves drawing inferences as to congressional intent from the entirety of a legislative act.[63] The Court recognizes two types of implied preemption: field and conflict.[64]

Field preemption arises when either "the scheme of federal regulation [is] so pervasive . . . that Congress left no room for the [s]tates to supplement it" or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[65] For example, in addition to immigration, the Supreme Court has held that Congress has occupied the field of aircraft noise regulation "insofar as it involves controlling the flight of aircraft."[66] In *City of Burbank v. Lockheed Air Terminal, Inc.*,[67] the City Council of Burbank, California, in an attempt to reduce airport noise, adopted an ordinance making it unlawful for a "pure jet aircraft" to take off from a local airport between the hours of 11:00 P.M. and 7:00 A.M.[68] Both the federal trial court and the United States Court of Appeals for the Ninth Circuit found the ordinance unconstitutional on Supremacy Clause grounds, and the Supreme Court affirmed.[69] Although it found no express preemption provision in the Federal Aviation Act of 1958 as amended, the Court explained that the "pervasive nature of the scheme of federal regulation of aircraft noise" supported a conclusion of preemption.[70] Further, the Court recognized that the Act requires a "delicate balance between safety and efficiency . . . and the protection of persons on the

60. *Id.* § 1324a(d)(2)(F).

61. Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–53 (1982).

62. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

63. *See id.* (explaining preemption "is compelled [where] Congress'[s] command is . . . implicitly contained in [a statute's] structure and purpose").

64. Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 376–77 (2015).

65. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

66. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633–35 (1973) (quoting Letter from Alan S. Boyd, Sec'y of Transp., to Senate Comm. on Com. (June 22, 1968)).

67. 411 U.S. 624 (1973).

68. *Id.* at 625–26.

69. *Id.* at 626.

70. *Id.* at 628–633 (describing how the Noise Control Act of 1972 amended the Federal Aviation Act to vest exclusive federal control over aircraft noise in the Federal Aviation Administration and Environmental Protection Agency).

ground."[71] As such, the Court reasoned that these factors were so interdependent as to require a "uniform and exclusive system of federal regulation," leaving "no room for local curfews or . . . controls."[72]

On the other hand, conflict preemption arises when either "compliance with both federal and state regulations is a physical impossibility"[73] or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[74] For example, in *Crosby v. National Foreign Trade Council*,[75] the Supreme Court relied on obstacle preemption to invalidate Massachusetts's Burma law.[76] There, the state law barred state agencies from purchasing goods or services from companies doing business with Burma.[77] Three months after the law was enacted, Congress adopted a statute imposing federal sanctions on Burma.[78] The federal statute also authorized the President to impose additional sanctions or waive sanctions, subject to certain conditions.[79] Further, the federal statute directed the President to develop a comprehensive and multilateral strategy addressing democracy, human rights practices, and the quality of life in Burma.[80] Applying obstacle preemption principles, the Court held that the Massachusetts law was "an obstacle to the accomplishment of Congress's full objectives under the federal Act."[81] The Court explained that Congress went to great lengths "to provide the President with flexible and effective authority over economic sanctions against Burma."[82] Moreover, the Court determined that Congress intended to limit the economic pressure on the Burmese government to a precise range.[83] Yet the Massachusetts law used different economic leverage, penalizing conduct that Congress specifically exempted or excluded from sanctions.[84] Finally, the Court found that the

71. *Id.* at 638–39.

72. *Id.*

73. Arizona v. United States, 567 U.S. 387, 399 (2012) (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

74. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

75. 530 U.S. 363 (2000).

76. *Id.* at 373, 388.

77. *Id.* at 367.

78. *Id.* at 368. The statute included three sanctions: (1) a ban on all aid to the Burmese government, except for humanitarian assistance, counter-narcotics efforts, and promotions of human rights and democracy; (2) a mandate instructing United States representatives to international financial institutions to vote against loans or other assistance to or for Burma; and (3) a restriction on entry visas to Burmese government officials. *Id.*

79. *Id.* at 369.

80. *Id.*

81. *Id.* at 373.

82. *Id.* at 374–76.

83. *Id.* at 377.

84. *Id.* at 378.

state law interfered with the President's ability to speak on behalf of the United States when dealing with foreign governments.[85] For these reasons, the Court held that the Massachusetts law stood as an obstacle to the accomplishment of Congress's full purposes and objectives and, therefore, was preempted.

D. Other State and Lower Federal Court Treatment of Preemption Questions Involving Aliens and Identity Theft Laws

Many states have laws prohibiting fraud, forgery, and identity theft.[86] While these statutes are perfect examples of state exercises of police power, the enactment of the IRCA has caused them to become the subject of numerous challenges as applied[87] to unauthorized aliens seeking employment.[88]

Courts have reached opposite conclusions regarding as-applied challenges to these laws.[89] For example, in *State v. Diaz-Rey*,[90] the Missouri Court of Appeals addressed whether the State was preempted from prosecuting an unauthorized alien for forgery based on his use of a false Social Security number on an employment application.[91] There, the State charged Pablo Gilberto Diaz-Rey, an unauthorized employee, with violating Missouri's forgery statute by using a false Social Security number on an employment document.[92] Diaz-Rey filed a motion to dismiss, arguing that based on *Arizona v. United States*,[93] states were prohibited from enacting laws "making it a misdemeanor for an unauthorized alien to seek or engage in work," and that he was being charged with the same conduct.[94] The state

85. *Id.* at 381–82.

86. Kansas v. Garcia, 140 S. Ct. 791, 798 (2020).

87. There are two basic types of preemption challenges: facial and as-applied. Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2391 (2018) (Breyer, J., dissenting). To prevail on a facial challenge, a party "must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). In contrast, to prevail on an as-applied challenge, a party must demonstrate that a state law is unconstitutional when applied in the circumstances of their case. *Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2391 (Breyer, J., dissenting) (quoting Chicago v. Morales, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting)).

88. *See, e.g.*, Puente Ariz. v. Arpaio, 821 F.3d 1098, 1102 (9th Cir. 2016) (challenging Arizona's employment-related identity theft laws for violating the Supremacy Clause); State v. Martinez, 896 N.W.2d 737, 742 (Iowa 2017) (challenging an alien's prosecution under Iowa's identity theft and forgery statutes).

89. *See Martinez*, 896 N.W.2d at 751–54 (identifying inconsistent applications of preemption principles by lower federal courts in cases involving aliens and employment).

90. 397 S.W.3d 5 (Mo. Ct. App. 2013).

91. *Id.* at 7–8.

92. MO. REV. STAT. § 570.090 (2017).

93. 567 U.S. 387 (2012).

94. *Diaz-Rey*, 397 S.W.3d at 7–8.

trial court agreed and dismissed the charges on grounds that the prosecution was preempted by the IRCA.[95] On appeal, the Missouri Court of Appeals reversed, holding that the forgery prosecution was neither expressly nor impliedly preempted by federal law.[96]

In its implied preemption discussion, the court emphasized that where "it is alleged that preemption applies in an area . . . that has been traditionally occupied by the states, a preemption review starts with th[e] assumption" that state police powers are not superseded unless Congress has made its preemptive intent "clear and manifest."[97] While acknowledging that the "IRCA provides a comprehensive framework for combating the employment of illegal aliens," the court found that the Missouri forgery statute did not intrude into the employment of unauthorized aliens.[98] Further, the court held that the forgery statute did not conflict with the IRCA, as the forgery statute did not "criminalize activity that Congress ha[d] decided not to criminalize."[99] Rather than imposing sanctions on unauthorized aliens for performing work,[100] the statute merely "criminalize[d] the use of inauthentic writings or items as genuine with knowledge and intent to defraud."[101]

On the other hand, the Iowa Supreme Court held that the enforcement of identity theft and forgery statutes as applied to unauthorized aliens who commit fraud to obtain employment is preempted by federal law.[102] In *State v. Martinez*,[103] Martha Martinez, an unauthorized alien, was charged with identity theft and forgery for providing her employer with a fictitious driver's license and Social Security card during the hiring process.[104] Martinez filed a motion to dismiss on the basis that the IRCA preempted her prosecution.[105] The state trial court denied the motion.[106]

95. *Id.*

96. *Id.* at 8–11. The court determined that the forgery statute was not expressly preempted by the IRCA "because [the forgery statute] does not sanction those who employ, recruit, or offer for employment unauthorized aliens." *Id.* at 8–9.

97. *Id.* at 9 (quoting *Arizona*, 567 U.S. at 400).

98. *Id.*

99. *Id.* at 10.

100. *See Arizona*, 567 U.S. at 405–06 (holding that states may not criminalize unauthorized aliens for performing work because the IRCA illustrates a deliberate choice by Congress "not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment").

101. *Diaz-Rey*, 397 S.W.3d at 10.

102. State v. Martinez, 896 N.W.2d 737, 754–57 (Iowa 2017).

103. 896 N.W.2d 737 (Iowa 2017).

104. *Id.* at 741–42.

105. *Id.* at 742.

106. *Id.*

On interlocutory review, the Iowa Supreme Court determined that Martinez's prosecution for identity theft[107] was field and conflict preempted by the IRCA.[108] With respect to field preemption, the court explained that "the IRCA establishes a comprehensive regime of criminal, civil, and immigration related consequences,"[109] forming "a system that can work as a 'harmonious whole.'"[110] As such, the court reasoned that "federal immigration law occupies the field regarding the employment of unauthorized aliens," and thus, the State could not prosecute Martinez for identity theft related to the fraudulent documents she provided to her employer as an unauthorized alien.[111] The court also found that the identity theft prosecution was conflict preempted, as the prosecution would "frustrate[] congressional purpose and provide[] an obstacle to the implementation of federal immigration policy by usurping federal enforcement discretion" with respect to the employment of unauthorized aliens.[112] Further, the court determined that enforcement of state laws regulating employment of unauthorized workers would lead to "inconsistent enforcement . . . undermin[ing] the harmonious whole of national immigration law."[113]

III. THE COURT'S REASONING

In *Garcia*, the United States Supreme Court addressed whether the IRCA preempts states from prosecuting aliens for identity theft based on false information contained in state and federal tax-withholding forms when the same false information is also contained in an employee's I-9 form.[114] In a 5-4 decision, the Court held that the IRCA does not preempt states from doing

107. The court also determined that the forgery prosecution was preempted because Iowa's forgery statute was a "mirror image of federal immigration law, namely 18 U.S.C. § 1546(a)." *Id.* at 754.

108. *Id.* at 755–57.

109. *Id.* at 755.

110. *Id.* (quoting Valle Del Sol Inc. v. Whiting, 732 F.3d 1006, 1025 (9th Cir. 2013)).

111. *Id.* at 755–56.

112. *Id.* at 756.

113. *Id.*

114. Kansas v. Garcia, 140 S. Ct. 791, 797 (2020). Under Kansas law, every employer who is required to withhold federal income tax is also required to withhold state income tax. KAN. STAT. ANN. § 79-3298 (2019). To let an employer know how much Kansas income tax should be withheld, an employee should provide his or her employer with a signed K-4 form. *See* KAN. DEP'T OF REVENUE, 500518, FORM K-4, EMPLOYEE'S WITHHOLDING ALLOWANCE CERTIFICATE (2019) (instructing new employees to complete the K-4 form and give it to his or her employer in order to have Kansas income tax withheld). Additionally, on or before the date on which an employee commences employment, the employee must provide the employer with a signed W-4 form for purposes of determining the proper amount of federal income taxes to withhold from the employee's pay. 26 C.F.R. § 31.3402(f)(2)-1(a) (2020).

so.[115] Because the respondents invoked all three categories of preemption,[116] the Court considered each argument in turn.[117]

Every member of the Court agreed that nothing in the IRCA expressly preempts Kansas's identify theft laws as applied to the respondents.[118] The Court explained that "the mere fact that an I-9 contains an item of information . . . does not mean that information 'contained in' the I-9 is used whenever [that information] is later employed."[119] The Court reasoned that such an interpretation would lead to strange results.[120] For example, if the Kansas Supreme Court's interpretation of Section 1324a(b)(5) were upheld, once an employee has stated his or her name on an I-9 form, no person could use that name for any other purpose.[121] Thus, the employee's name could not be used by a prosecutor in an indictment, an employer cutting a paycheck, or a family member mailing a birthday card.[122] The majority then addressed the respondents' reliance on Section 1324a(d)(2)(F)[123] as a basis for arguing that their prosecutions were expressly preempted.[124] The Court found this argument unpersuasive because the IRCA's employment verification system and the completion of tax-withholding forms serve different functions in two entirely different systems.[125] Whereas "[t]he sole function of [the federal employment verification system] is to establish that an employee is not barred from working in this country due to alienage," completing and submitting tax-withholding forms help "to enforce federal and state income tax laws."[126]

Next, the Court turned to the respondents' implied preemption arguments.[127] The respondents asserted that Congress ousted states from regulating "the field of fraud on the federal employment verification system"

115. *Garcia*, 140 S. Ct. at 804, 806.

116. *See supra* Section II.C (explaining the various types of preemption).

117. *Garcia*, 140 S. Ct. at 801.

118. *Id.* at 804, 808.

119. *Id.* at 803. The Court found the Kansas Supreme Court's interpretation "contrary to standard English usage," explaining that a person does not use information contained in a particular source unless the person actually makes use of that source. *Id.* at 802.

120. *Id.* at 803.

121. *Id.* at 803.

122. *Id.*; *see also infra* Secition IV.C.

123. 8 U.S.C. § 1324a(d)(2)(F) limits the use of the federal employment verification system "for law enforcement purposes, other than" enforcing the IRCA and the same federal statutes listed in § 1324a(b)(5), i.e., 18 U.S.C. § 1001 (false statements), § 1028 (identity theft), § 1546 (immigration-document fraud), and § 1621 (perjury).

124. *Garcia*, 140 S. Ct. at 803; *see supra* text accompanying note 60.

125. *Garcia*, 140 S. Ct. at 803–04.

126. *Id.*

127. *Id.* at 804.

or, even more broadly, "the 'field *relating to* the federal employment verification system.'"[128] The majority reiterated that the submission of tax-withholding forms are neither part of nor related to the employment verification system.[129] The majority also clarified that complying with the employment verification system and submitting tax-withholding forms results in different benefits.[130] Furthermore, the majority explained that the IRCA does not preclude states from regulating information that must be supplied as a precondition for employment.[131]

The majority concluded its field preemption analysis by distinguishing *Arizona*, finding no similarity to the consolidated case before the Court.[132] While federal immigration law exclusively occupies the field of alien registration,[133] the majority stated that federal law has not created a similar "comprehensive and unified system regarding information that a [s]tate may require employees to provide."[134]

The majority also found no basis for holding that the Kansas statutes conflicted with federal law.[135] First, the majority concluded that it was possible for employees to comply with both the IRCA and the Kansas statutes.[136] Second, the majority again distinguished *Arizona*. In *Arizona*, the Court inferred from the legislative history of the IRCA "that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment;" however, the Court explained that here, Congress did not decide that unauthorized aliens who use false identities on tax-withholding forms should be free from criminal prosecution.[137] Rather, Congress made it a crime to use false information on

128. *Id.* (emphasis in original) (quoting Brief for Respondents at 42, Kansas v. Garcia, 140 S. Ct. 791 (2020) (No. 17-834), 2019 WL 3776032, at *42).

129. *Id.* at 805; *see supra* text accompanying note 126.

130. *Garcia*, 140 S. Ct. at 805 ("Submitting W-4's and K-4's helped respondents get jobs, but this did not in any way assist them in showing that they were authorized to work in this country.").

131. *Id.*

132. *Id.* at 805–06.

133. *See* Arizona v. United States, 567 U.S. 387, 400–03 (2012) (explaining that the comprehensive statutory framework for the registration of aliens demonstrates that Congress has occupied the field of alien registration); Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941) (holding that "where the federal government . . . has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot . . . conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations").

134. *Garcia*, 140 S. Ct. at 806.

135. *Id.*

136. *Id.* In other words, a Kansas employee could truthfully comply with the employment verification system while refraining from making false information or committing identity theft.

137. *Id.*

a W-4 form.[138] The majority explained that the mere fact that a state law may overlap with federal criminal law does not establish a case for preemption.[139]

Accordingly, the majority rejected both the express and implied preemption arguments set forth by the respondents.[140] The Court concluded that the State's prosecutions were not preempted by the IRCA and reversed and remanded the judgments of the Kansas Supreme Court.[141]

A. Concurring Opinion of Justice Thomas

In a concurring opinion, Justice Thomas, joined by Justice Gorsuch, urged the Court to abandon its "purposes and objectives" implied conflict preemption jurisprudence.[142] Justice Thomas argued that the doctrine has no constitutional basis[143] and articulated that the Court must only hold that federal law preempts state law if the two "directly conflict."[144] Further, Justice Thomas also expressed skepticism about field preemption, specifically "as applied in the absence of a congressional command that a particular field be pre[]empted."[145] However, Justice Thomas conceded that the majority correctly applied the Court's field preemption precedents in *Garcia*.[146]

B. Opinion of Justice Breyer, Concurring in Part and Dissenting in Part

Writing for the dissent, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concluded that state prosecutions of aliens for using fraudulent documents to convince their employers that they are eligible to

138. *Id.* (citing 26 U.S.C. § 7205).

139. *Id.*

140. *Id.* at 804, 806.

141. *Id.* at 807.

142. *Id.* (Thomas, J., concurring).

143. *See id.* at 807–08 (refusing to apply the "purposes and objectives" preemption doctrine because "it is contrary to the Supremacy Clause"). *But see* Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of* McCulloch, 33 BERKELEY J. EMP. & LAB. L. 153, 167 (2012) (discussing historical support for the doctrine of obstacle preemption).

144. *Garcia*, 140 S. Ct. at 808 (Thomas, J., concurring) (quoting Wyeth v. Levine, 555 U.S. 555, 590 (2009) (Thomas, J., concurring in the judgment)). According to Justice Thomas's "direct conflict" standard, preemption turns on whether the text of state and federal laws set forth conflicting commands. *Wyeth*, 555 U.S. at 590; Gilbert, *supra* note 143, at 163 n.56 ("Justice Thomas indicates that a direct conflict can exist not only when state law penalizes what federal law requires . . . . It may also exist where federal law authorizes a person to engage in certain actions prohibited by state law." (citing *Wyeth*, 555 U.S. at 589–91, 593–95)).

145. *Garcia*, 140 S. Ct. at 808 n.* (Thomas, J., concurring) (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting)).

146. *Id.*

work are field preempted.[147] The dissent explained that the IRCA makes its preemptive intent clear by (1) prohibiting states from using the I-9 form and the federal employment verification system to police work-authorization fraud, and (2) creating "a comprehensive and unified system to keep track of who is authorized to work" in this country, leaving no room for state laws to police work-authorization violations.[148] Thus, the dissent reasoned that the Kansas prosecutions were preempted by the IRCA, as the prosecutions did exactly what Congress reserved to itself when it enacted the IRCA: "police fraud committed to demonstrate federal work authorization."[149] As an example, the dissent discussed the prosecution of Donaldo Morales and explained that Kansas's "theory of guilt was that Morales intended to deceive his employer" into believing that he was authorized to work so that his employer, relying on the deception, "would give him a job."[150] Therefore, the dissent concluded that Kansas prosecuted Morales for work-authorization fraud "for the purpose of obtaining employment."[151]

IV. ANALYSIS

In *Garcia*, the Supreme Court held that state prosecutions of unauthorized aliens for identity theft based on false information found in tax-withholding forms that contain the same information as an I-9 form are not preempted by the IRCA.[152] To begin, this Note does not take the position that the doctrine of field preemption should be eliminated.[153] Rather, this Note argues that the Court correctly decided the case, as the holding preserved traditional state police powers where Congress had not clearly demonstrated an intent to preempt state authority.[154] In doing so, the Court construed the IRCA to avoid absurdity[155] and properly refrained from

147. *Id.* at 809 (Breyer, J., concurring in part and dissenting in part). The dissent also seems to consider obstacle preemption as a basis for preempting the Kansas prosecutions, and in doing so, the dissent discussed *Arizona*. *Id.* at 809–10. However, the dissent ultimately rested its preemption argument on field preemption, concluding that the IRCA "occupies the field of policing fraud committed to demonstrate federal work authorization." *Id.* at 810.

148. *Id.*

149. *Id.* at 811.

150. *Id.*

151. *Id.* However, the dissent explained that "[o]n different facts, there would have been no preemption." *Id.* For example, had Kansas proved that Morales used the false Social Security number on his tax-withholding forms to induce a different type of reliance or obtain a different type of benefit, then the "IRCA would [have] permit[ted] the prosecution." *Id.*

152. *Id.* at 804, 806 (majority opinion).

153. *See infra* Section IV.A.

154. *See infra* Section IV.B.

155. *See infra* Section IV.C.

"judicial guesswork" into congressional purposes not clearly and manifestly expressed by the IRCA.[156]

A. Falling Outside the Preempted Field Versus Eliminating Field Preemption Jurisprudence

Justice Thomas has expressed skepticism towards the Court's field preemption jurisprudence.[157] To limit its expansive application, Justice Thomas would not apply field preemption "in the absence of statutory language expressly requiring it."[158] Other members of the Court have likewise objected to the scope of the Court's field preemption jurisprudence.[159] Moreover, some scholars go as far as to urge the Court to abandon the doctrine altogether.[160]

This Note does not purport to suggest that the Court should abandon its field preemption jurisprudence. Even the doctrine's critics have been willing to apply it, although, admittedly, their reason for doing so may be influenced more by stare decisis than on the doctrine's correctness.[161] Nevertheless, this

156. *See infra* Section IV.D.

157. *See, e.g.*, *Garcia*, 140 S. Ct. at 808 n.* (Thomas, J., concurring) ("I am . . . skeptical of field pre-emption . . . ."); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 616–17 (1997) (Thomas, J., dissenting) ("[F]ield pre-emption is itself suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted."). Justice Thomas has similarly objected to the Court's obstacle preemption jurisprudence. *See, e.g.*, *Garcia*, 140 S. Ct. at 808 (Thomas, J., concurring) (criticizing obstacle preemption because it "impermissibly rests on judicial guesswork about 'broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law'" (quoting Wyeth v. Levine, 555 U.S. 555, 587 (2009) (Thomas, J., concurring in the judgment)); Arizona v. United States, 567 U.S. 387, 440 (2012) (Thomas, J., concurring in part and dissenting in part) (explaining that obstacle preemption "is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text"); *Wyeth*, 555 U.S. at 587 (Thomas, J., concurring in the judgment) (describing obstacle preemption as "vague" and "potentially boundless" (citing Geier v. Am. Honda Motor Co., 529 U.S. 861, 907 (2000) (Stevens, J., dissenting)).

158. *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 617.

159. *See, e.g.*, *Arizona*, 567 U.S. at 423 (Scalia, J., concurring in part and dissenting in part) (objecting to the majority's expansive field preemption approach and arguing that "[i]mplicit 'field preemption' will not do" to eliminate the states' inherent sovereign power).

160. *See, e.g.*, Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 811–12 (1994) (arguing that field preemption is illegitimate); Kimberly K. Asano & Kamaile A. Nichols, Note, Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu*: Demonstrating the Need to Abandon the Field Preemption Doctrine*, 29 U. HAW. L. REV. 501, 502 (2007) (contending that "the doctrine of field preemption should be abandoned" because it is "impractical in application and undermines federalism principles"); Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74–75 (2005) ("I think there should be only two situations when there is preemption of state law. One is express preemption. The other is when federal law and state law are mutually exclusive, so it is not possible for somebody to comply with both.").

161. *See, e.g.*, Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 628, 630–38 (2012) (illustrating Justice Thomas's application of field preemption in which Justice Scalia joined).

Note takes the position that *Garcia* was correctly decided because the Court's implied preemption analysis wisely recognized key policy considerations underlying state police powers and, by doing so, prevented field preemption from going too far. One need not go so far as to challenge the legitimacy of the doctrine of field preemption.

B. The Court Properly Recognized the States' Historic Police Powers

In preemption cases, the Court presumes that the historic police powers of the states are not superseded by a federal act unless "that was the clear and manifest purpose of Congress."[162] Criminal law enforcement is a classic example of a state police power.[163] This is because the purpose of state criminal law enforcement is to protect citizens' health, safety, morals, and welfare.[164] Since the founding of this country, "criminal law enforcement has been primarily a responsibility of the [s]tates," which remains true today.[165] Across the country, identity theft results in devastating financial loss and emotional distress for its victims.[166] State identity theft laws address

162. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted). Concern for federalism favors preservation of traditional state authority over local matters unless Congress has clearly taken away that authority. *Id.* at 241 (Frankfurter, J., dissenting). While historically the Supreme Court has discussed this "presumption against preemption," recent Supreme Court cases have failed to apply it. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968, 971 (2002). In fact, some scholars have argued that the Court's analysis in recent preemption decisions "has, in effect, created a presumption *in favor of* preemption." *Id.* at 971; *see also* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1315 (2004) ("Contrary to . . . [the Supreme Court's] homage to the presumption against preemption, . . . recent Supreme Court preemption cases clearly put the presumption in favor of preemption."); Gilbert, *supra* note 143, at 161 (explaining that there is a recent, emerging trend for the Court "to no longer explicitly apply the presumption against preemption, and in some cases, to do exactly the opposite—presume preemption").

163. United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the [n]ational [g]overnment and reposed in the [s]tates, than the suppression of violent crime and vindication of its victims.").

164. For example, in *Barnes v. Glen Theatre, Inc.*, two entertainment establishments that wished to provide "totally nude dancing" sued to enjoin the enforcement of Indiana's public indecency statute, which prohibited complete nudity in public places, on the grounds that the statute violated the First Amendment. 501 U.S. 560, 562–64 (1991). The lower courts agreed with the entertainment establishments, but the Supreme Court reversed, finding that the Indiana public indecency statute fell within the scope of the State's police powers, as the statute "[was] designed to protect morals and public order." *Id.* at 569 ("The traditional police power of the [s]tates is defined as the authority to provide for the public health, safety, and morals, and [the Court] ha[s] upheld such a basis for legislation.").

165. Kansas v. Garcia, 140 S. Ct. 791, 806 (2020).

166. In 2016, of the 17.7 million persons age sixteen or older who experienced one or more incidents of identity theft resulting in a loss of $1 or more, the losses collectively totaled $17.5 billion. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 251147, Victims of Identity Theft, 2016 (2019). Additionally, more than a third of victims who spent six months or more resolving the financial repercussions of identity theft experienced severe emotional distress. *Id.*

this growing problem by protecting citizens from the fraudulent use of personal information.[167]

The Kansas statutes at issue in *Garcia*, which protect the health and safety of citizens within the State from misuse of personal information, "address conduct . . . 'deeply rooted in local feeling and responsibility.'"[168] Victims of misused personal data by unauthorized employees are directly harmed and often must spend months attempting to clear their names and fixing their damaged credit.[169] In the dissent's view, rather than protecting a local interest, Kansas's application of its criminal laws operated to police violations of the federal employment verification system.[170] In reaching its conclusion, the dissent overlooked important policy considerations and erroneously relied on *Arizona*.

In *Arizona*, the State had enacted the Support Our Law Enforcement and Safe Neighborhoods Act ("S.B. 1070").[171] As part of the Act, Section 3 imposed a state penalty on aliens for failing to obey federal alien-registration laws.[172] The United States contended that the Arizona law intruded on the occupied field of alien registration, which Congress left no room for states to regulate.[173] The Supreme Court agreed, explaining that the comprehensive

167. Puente Ariz. v. Arpaio, 821 F.3d 1098, 1106 (9th Cir. 2016). *Compare* State v. Martinez, 896 N.W.2d 737, 766 (Iowa 2017) (Mansfield, J., dissenting) ("[Identity theft laws] cover certain categories of fraudulent conduct and operate in an area of traditional state police power."), *with* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001) ("Policing fraud against federal agencies is hardly 'a field which the [s]tates have traditionally occupied' . . . ." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

168. Wis. Dep't of Indus. v. Gould Inc., 475 U.S. 282, 291 (1986) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243–44 (1959)).

169. For example, mother Camber Lybbert, after receiving news from her bank that her three-year-old daughter's Social Security number was on file for two credit cards and two auto loans, spent approximately thirty hours per week for four to five months scrambling to clear up her daughter's credit history. John Leland, *Immigrants Stealing U.S. Social Security Numbers for Jobs, Not Profits*, N.Y. TIMES (Sept. 4, 2006), https://www.nytimes.com/2006/09/04/world/americas/04iht-id.2688618.html. As it turned out, an illegal immigrant was using the child's Social Security number to get a job. *Id.* Lybbert explained that "[the undocumented worker has] ruined the innocence of her [daughter's] Social Security number because when [her daughter] goes to apply for loans, she's going to have this history." *Id.* Similarly, Los Angeles County police detective Adrian Flores also became a victim of identity theft and learned that one of the culprits was an undocumented immigrant working in Utah. Anna Gorman, *Theft of Identity Compounds the Crime*, L.A. TIMES, July 9, 2007, at B3. While Flores, "[did not] lose any money . . . his damaged credit prevented him from buying a house[,] [a]nd the process to clear his name was long and difficult." *Id.*

170. *Garcia*, 140 S. Ct. at 811 (Breyer, J., concurring in part and dissenting in part); *see supra* Section III.B.

171. Arizona v. United States, 567 U.S. 387, 393 (2012).

172. *Id.*

173. *Id.* at 400 (citing Brief for the United States at 27, 31, Arizona v. United States, 567 U.S. 387 (2012) (No. 11-182), 2012 WL 939048, at *27, *31).

statutory framework for the registration of aliens demonstrates that Congress occupies the field of alien registration and that where Congress occupies an entire field, "even complementary state regulation is impermissible."[174] As a result, the Court held that Section 3 of S.B. 1070 was preempted by federal law.[175]

Yet, the Kansas statutes at issue in *Garcia* are different from the challenged provision in *Arizona*. Notably, in *Arizona*, the State's purpose in enacting S.B. 1070 was to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[176] Thus, Section 3 was an attempt to drive out unauthorized aliens from the State's borders by enforcing federal alien-registration laws at the state level and imposing penalties for violations. But, in *Garcia*, Kansas's identity theft and false information statutes, as applied, did not impose penalties on unauthorized aliens for committing fraud to demonstrate federal work authorization.

Rather, the Kansas laws and prosecutions imposed criminal sanctions for stealing personal identifying information belonging to another person.[177] Kansas utilized its police powers, not to prosecute unauthorized aliens for immigration violations, but to address the identity theft problem within its borders. Indeed, while S.B. 1070 targeted noncitizens, the Kansas statutes are criminal laws of general applicability, applying to citizens and noncitizens alike. That is to say, even if "Congress has occupied . . . the . . . field of policing fraud committed to demonstrate federal work authorization[,]"[178] Kansas's application of its identity theft laws to unauthorized aliens who use false identities on tax-withholding forms, where the same information is also contained in an I-9 form, falls outside of that field. Contrary to the dissent's assertion that Kansas applied its laws to prosecute the respondents for misrepresenting their federal work authorization, the State actually prosecuted the respondents for identity theft and making false information by fraudulently using other individuals' information on their tax-withholding forms.

Although conceding that the IRCA has created a comprehensive scheme whereby Congress has taken from the states the power to police fraud committed to demonstrate federal work authorization,[179] it cannot be said that

174. *Id.* at 401.

175. *Id.* at 403.

176. *Id.* at 393.

177. KAN. STAT. ANN. § 21-6107(a)(1) (2019).

178. Kansas v. Garcia, 140 S. Ct. 791, 808 (2020) (Breyer, J., concurring in part and dissenting in part).

179. *See* 8 U.S.C. § 1324a(b)(5), (d)(2)(F) (limiting the states' use of the I-9 form and the employment verification system); 131 CONG. REC. 23,317 (1985) (aiming to reduce the availability

Congress has similarly demonstrated a clear intent to preempt states from prosecuting unauthorized aliens for using fraudulent information on employment-related documents, unrelated to work authorization. Nothing in the IRCA's "text, . . . structure, context, [or] purpose"[180] alludes to, much less demonstrates, a "clear and manifest" intent to prohibit states from applying their laws to prosecute individuals for identity theft or making false information.

In the absence of a "clear and manifest" intent on the part of Congress demonstrating that the IRCA should have preemptive effect on specific applications of state identity theft and making false information laws, federalism favored upholding historic state police powers.[181] To hold otherwise would be an inappropriate intrusion on the exercise of state police powers in criminal law enforcement that has historically been conceded to the states, as well as inconsistent with the federal system.

C. The Court Wisely Interpreted the IRCA to Avoid Absurdity

In preemption analyses, "[c]ongressional purpose is . . . 'the ultimate touchstone.'"[182] Courts prefer to interpret a statute in a manner that leads to logical results in order to prevent an absurd meaning the legislature did not intend.[183] However, the Kansas Supreme Court's interpretation of Section 1324a(b)(5) would result in strange consequences.[184] If the United States Supreme Court had affirmed the Kansas Supreme Court's interpretation of the provision, *any* information "contained in" the I-9 form could not be used by *any* person[185] for *any* purpose other than those listed in the provision.[186] However, this interpretation would lead to bizarre results.[187] For example, even if an employee truthfully stated his name on an I-9 form, his employer could neither cut him a paycheck with that name, nor could his sister use his name to mail him a card.[188] Surely Congress did not intend those results.

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of employment in the United States to illegal immigrants by establishing an employment verification system).

180. *Garcia*, 140 S. Ct. at 808 (Breyer, J., concurring in part and dissenting in part).

181. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 241 (1947) (Frankfurter, J., dissenting).

182. Wis. Dep't of Indus. v. Gould Inc., 475 U.S. 282, 290 (1986) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985)).

183. *See* Christina Gomez, *Canons of Statutory Construction*, 46 COLO. LAW., Feb. 2017, at. 23, 25 ("[C]ourts have held that . . . statutes should be construed to avoid absurd results the legislature could not have intended.").

184. *Garcia*, 140 S. Ct. at 803.

185. 8 U.S.C. § 1324a(b)(5) applies not only to states but also to the federal government and private citizens. *Id.* at 802.

186. *Id.* at 800.

187. *Id.* at 803.

188. *Id.*

It may be countered that there is a narrower reading to the Kansas Supreme Court's interpretation and that the federal government would not have an interest in prohibiting individual uses of personal information "contained in" the I-9 form for the purposes illustrated. Further, the Kansas Supreme Court itself suggested "that its interpretation applied only to the prosecution of aliens for using a false identity to establish 'employment eligibility.'"[189] Nevertheless, that (1) the Kansas Supreme Court's interpretation, if read literally, could produce such results, (2) such limitations are not found within the text of Section 1324a(b)(5),[190] and (3) the structure and purpose of the IRCA (i.e., to combat the employment of illegal aliens) does not support these broad results, all suggest that the Kansas Supreme Court's interpretation is inconsistent with Congress's intent with respect to the scope of the limitation provision.

Moreover, the heading of Section 1324a(b)(5), which reads "[l]imitation on use of *attestation form*,"[191] further supports a finding that Congress did not express a "clear and manifest" intent to preempt state identity theft prosecutions with respect to misused personal information by unauthorized aliens on employment documents. Although "headings are not commanding, they supply cues" of what Congress intended "to sweep within its reach."[192] Here, "attestation form" refers to the statutory requirement that a prospective employee attest on the "form designated or established by the Attorney General," i.e., the I-9 form,[193] that they are authorized to work in the United States, and that an employer attest on the same form that they have reviewed the requisite document(s) produced by the prospective employee.[194] Thus, the language "[l]imitation on use of attestation form" cannot reasonably be understood to indicate a congressional intent to limit a state's use of *tax-withholding forms*. If Congress did in fact intend to expressly preempt states from using fraudulent tax-withholding forms as the basis for prosecuting unauthorized aliens, it used the most inconspicuous language to do so. As such, the most appropriate reading of Section 1324a(b)(5) is that Congress intended to create a "use limitation" on the I-9 form rather than a sweeping "information-use preemption."[195]

189. *Id.* (quoting State v. Garcia, 401 P.3d 588, 596 (Kan. 2017)).

190. *Id.*

191. 8 U.S.C. § 1324a(b)(5).

192. Yates v. United States, 574 U.S. 528, 540 (2015).

193. 8 C.F.R. § 274a.2(a)(2) (2019) (establishing the I-9 form).

194. 8 U.S.C. § 1324a(b)(1)(A)–(D), (2).

195. Brief for the Petitioner at 28, Kansas v. Garcia, 140 S. Ct. 791 (2020) (No. 17-834), 2019 WL 2296765, at *28 (quoting State v. Garcia, 401 P.3d 588, 604 (Kan. 2017) (Biles, J., dissenting), *rev'd*, 140 S. Ct. 791 (2020)).

Lastly, the Kansas statutes are neutral, applying to both aliens and United States citizens. Had the United States Supreme Court affirmed the holding of the Kansas Supreme Court, only United States citizens could be prosecuted by states for using fraudulent tax-withholding documents containing the same information as found in an I-9 form. Unauthorized aliens would be immune from prosecution for the same conduct—only held accountable at the whim of the federal government.[196] Although this observation rings true whenever federal law preempts state law, such an outcome would have been inappropriate in *Garcia* where the State utilized its police powers to address a local problem. This is because the State would be rendered unable to fully eliminate an inherently local injury, unrelated to any federal policy.[197]

D. The Court Rightly Refrained from "Judicial Guesswork" Following Arizona

When a federal act contains an express preemption clause, the Court focuses on the plain language of that clause as evidence of congressional intent.[198] While preemption analysis requires ascertaining congressional intent, the Court has said that legislative history, alone, is insufficient to establish preemptive intent.[199] Moreover, the Court has explained that "unenacted approvals, beliefs, and desires are not laws."[200] Rather, the Court has consistently looked to the text of federal statutes as the principal authority for finding, or not finding, a basis for preemption.[201]

196. State v. Martinez, 896 N.W.2d 737, 761 (Iowa 2017) (Mansfield, J., dissenting).

197. *See supra* Section IV.B.

198. Chamber of Com. v. Whiting, 563 U.S. 582, 594 (2011); *see also* Gomez, *supra* note 183, at 23 ("[T]he starting point in construing a statute . . . is the *plain meaning of the text*.").

199. P.R. Dep't of Consumer Affairs v. Isla Petrol. Corp., 485 U.S. 495, 501 (1988); *see also Whiting*, 563 U.S. at 599 ("Congress's 'authoritative statement is the statutory text, not the legislative history.'" (citing Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005))).

200. *Isla Petrol. Corp.*, 485 U.S. at 501. At the same time, this is not the view taken by every judge or legal scholar and remains a massive debate in statutory interpretation. *Compare, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76–77, 102, 105, 111 (2006) (arguing that the purposivist approach to statutory interpretation, which gives priority to policy context, completely ignores the legislative process and makes it difficult for legislators to articulate boundary lines for legislation, because political minorities cannot rely upon the statutory text "as a predictable means for setting the desirable limits on bills" they are only willing to assent to "upon the acceptance of bargained-for conditions"), *with* Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 7, 57 (2013) (defending purposivist statutory interpretation on the grounds that it is necessary to "the task of fashioning a workable legal system"). However, it is beyond the scope of this Note to resolve this ongoing scholarly debate.

201. *See Isla Petrol. Corp.*, 485 U.S. at 501 (upholding the tax and regulation on the grounds that there was no enacted statutory text to support a preemptive intent); *see also Whiting*, 563 U.S. at 594–95, 598 (finding that the IRCA expressly preserves the states' ability to impose sanctions

For example, in *Chamber of Commerce v. Whiting*,[202] the Court intently focused on the language of the savings clause[203] within the express preemption provision of Section 1324a(h)(2).[204] Based on its plain text, the Court concluded that an Arizona law allowing Arizona courts to suspend or revoke business licenses of employers who knowingly or intentionally hire unauthorized aliens was not preempted by the IRCA.[205] Furthermore, in *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*,[206] the Court upheld regulations on gasoline and petroleum products enacted by the Puerto Rico Department of Consumer Affairs on the grounds that there was absolutely no text to attach a preemptive intent of a federally mandated free-market.[207]

However, in *Arizona*, the Court diverged from its previous rulings regarding a federal act's legislative history and *solely* relied on the legislative history of the IRCA as the basis for striking down a state law.[208] Such a divergence is problematic, as "[u]nder the Supremacy Clause, pre-emptive effect is to be given to congressionally enacted laws, not to judicially divined legislative purposes."[209] It is sheer guesswork for a court to attempt to

through licensing laws on employers of unauthorized workers); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 233 (1947) (holding that the text of the amended United States Warehouse Act clearly gave exclusive authority to the Secretary of Agriculture over persons licensed under the Act).

202. 563 U.S. 582 (2011).

203. Black's Law Dictionary defines a "saving[s] clause" as "[a] statutory provision exempting from coverage something that would otherwise be included." *Saving clause*, BLACK'S LAW DICTIONARY (11th ed. 2019). Accordingly, although Congress has restricted the states' ability to combat the employment of unauthorized workers, the IRCA includes a savings clause, or exception, for sanctions imposed "through [state] licensing and similar laws." 8 U.S.C. § 1324a(h)(2) (2018). As such, Congress explicitly saved the states' power to enforce "licensing and similar laws" against employers of unauthorized aliens, which would otherwise have been preempted.

204. *Whiting*, 563 U.S. at 594–96; *see* 8 U.S.C. § 1324a(h)(2) ("[T]his section preempt[s] any [s]tate 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.").

205. *Whiting*, 563 U.S. at 599.

206. 485 U.S. 495 (1988).

207. *Id.* at 501, 503.

208. As part of S.B. 1070, § 5(C) made it a misdemeanor for "an unauthorized alien 'to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor'" in the State of Arizona. Arizona v. United States, 567 U.S. 387, 403 (2012) (quoting ARIZ. REV. STAT. ANN. § 13-2928(C) (2010)). While the IRCA imposes sanctions on employers who knowingly employ unauthorized aliens or fail to comply with the employment verification system, 8 U.S.C. § 1324a(a)(1), it is silent as to whether additional penalties may be imposed against employees, *Arizona*, 567 U.S. at 406. Ultimately, the Court held that the "Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens." *Id.* The Court explained that "[t]he legislative background of [the] IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment" and that the states could not make criminal what Congress did not. *Id.* at 405–06.

209. *Arizona*, 567 U.S. at 440 (Thomas, J., concurring in part and dissenting in part).

decipher the subjective thoughts motivating the members of Congress at the moment they adopt or reject a bill or provision. For example, Congress's rejection of a provision including criminal penalties for employees in *Arizona* could have also been reasonably understood as the antithesis.[210]

In *Garcia*, the Court properly refrained from such "judicial guesswork."[211] Similar to Congress's silence regarding whether states may impose additional penalties on unauthorized employees in *Arizona*, the IRCA regulates the use of the I-9 form and appended documents but says nothing about the use of other documents for law enforcement purposes.[212] The *Garcia* court did not engage in "atextual speculation about legislative intentions,"[213] and instead rightly upheld the Kansas statutes.

It may be urged that the Court's absurdity analysis in *Garcia* is itself "judicial guesswork."[214] However, highlighting and rejecting the bizarre potential consequences of the Kansas Supreme Court's interpretation of Section 1324a(b)(5) is a far cry from a "freewheeling"[215] speculation into congressional purposes. Certainly, when presented with a state's interpretation of a federal statute, one cannot expect the Court to forego all common sense and understanding of English language conventions in ascertaining its meaning.

V. CONCLUSION

In *Garcia*, the Supreme Court held that the IRCA does not preempt states from prosecuting unauthorized aliens for identity theft or other similar statutes based on false information found in documents independent of the I-9 form.[216] The Court correctly decided the case because the holding preserves historic state police powers in a traditional area of criminal law enforcement where Congress lacked a "clear and manifest" purpose to preempt.[217] By rejecting the interpretation of the Kansas Supreme Court, the

210. *Id.* at 433 (Scalia, J., concurring in part and dissenting in part) ("There is no more reason to believe that this rejection was expressive of a desire that there be no sanctions on employees, than expressive of a desire that such sanctions be left to the [s]tates."); *see also supra* note 200 (discussing legislative compromise).

211. *See* Kansas v. Garcia, 140 S. Ct. 791, 808 (2020) (Thomas, J., concurring) (arguing that "'purposes and objectives' pre-emption impermissibly rests on judicial guesswork about 'broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law'") (quoting Wyeth v. Levine, 555 U.S. 555, 587 (2009) (Thomas, J., concurring in the judgment)).

212. *Id.* at 798 (majority opinion).

213. *Id.* at 808 (Thomas, J., concurring).

214. *Id.*; *see supra* Section IV.C.

215. *Wyeth*, 555 U.S. at 604 (Thomas, J., concurring in the judgment).

216. *Garcia*, 140 S. Ct. at 804, 806.

217. *See supra* Section IV.B.

Court properly construed the IRCA to prevent strange and absurd results from occurring.[218] Finally, the Court refrained from inquiring solely into congressional purposes outside of the IRCA's text after deviating off course in *Arizona*.[219]

218. *See supra* Section IV.C.
219. See *supra* Section IV.D.