No. 17-834

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

RAMIRO GARCIA, DONALDO MORALES, AND GUADALUPE OCHOA-LARA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"). IRCA made it illegal to employ unauthorized aliens, established an employment eligibility verification system, and created various civil and criminal penalties against employers who violate the law. 8 U.S.C. § 1324a.

Regulations implementing IRCA created a "Form I-9" that employers are required to have *all* prospective employees complete—citizens and aliens alike. IRCA contains an "express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens," *Arizona v. United States*, 567 U.S. 387, 406 (2012), but IRCA "is silent about whether additional penalties may be imposed against the employees themselves." *Id.* IRCA also provides that "[the Form I-9] and any information contained in or appended to such form, may not be used for purposes other than enforcement of [chapter 12 of Title 8] and sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. §1324a(b)(5).

Here, Respondents used other peoples' social security numbers to complete documents, including a Form I-9, a federal W-4 tax form, a state K-4 tax form, and an apartment lease. Kansas prosecuted Respondents for identity theft and making false writings without using the Form I-9, but the Kansas Supreme Court held that IRCA expressly barred these state prosecutions.

This petition presents two questions, depending on the answer to the first question:

1. Whether IRCA expressly preempts the States from using any *information* entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications.

2. If IRCA bars the States from using all such information for *any* purpose, whether Congress has the constitutional power to so broadly preempt the States from exercising their traditional police powers to prosecute state law crimes.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding in 1981, EFELDF has defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, EFELDF has consistently opposed unlawful behavior, including illegal entry

[1] *Amicus* files this brief with all parties' consent, with 10 days' written notice; *amicus* has lodged respondents' written consent to the filing of this brief, and petitioners have lodged their blanket consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

into and residence in the United States, and supported enforcing immigration laws. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Three illegal aliens convicted in state court of identity theft and false statements challenge those convictions on the theory that the Immigration Reform & Control Act, PUB. L. NO. 99-603, 100 Stat. 3359 (1986) ("IRCA") preempts the use of identity-related information on or appended to the "I-9" form, 8 U.S.C. §1324a(b)(5), without regard to whether the information came *from* the I-9 form. The Kansas Supreme Court found Kansas's facially neutral identity-related crimes expressly preempted as applied to these illegal aliens, and Kansas appealed.

Constitutional Background

Under the Constitution's Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which federal laws can preempt state laws: express or implied preemption, with implied preemption subdividing into "field" and "conflict" pre-emption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992); *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000).

Preemption analysis begins with the federal statute's plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). Under *Santa Fe Elevator* and its progeny, courts in implied-preemption cases sometimes apply a presumption against preemption for federal

legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). In express-preemption cases, by contrast, the Court recently rejected the presumption against preemption. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S.Ct. 1938, 1946 (2016).

Statutory Background

The relevant Kansas criminal statutes concern false statements and identity theft, without regard to a defendant's immigration status. *See* Pet. at 2-6; KAN. STAT. ANN. §§21-3711, 21-4018 (2011); KAN. STAT. ANN. §§21-5918, 21-6107.

In a subsection captioned "Limitation on use of attestation form," IRCA provides that "[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 enforcement of this chapter and [18 U.S.C. §§1001, 1028, 1546, and 1621]." 8 U.S.C. §1324a(b)(5). Further, another subsection captioned "Preemption" provides that "[t]he 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." *Id.* §1324a(h)(2).

Factual Background

Amicus EFELDF adopts the facts as stated in the petition (Pet. at 6-15). The trial courts excluded the I-9 forms themselves under §1324a(b)(5), but allowed use of the same information from non-immigration sources (*e.g.*, state and federal tax-withholding forms).

SUMMARY OF ARGUMENT

Most importantly, *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968 (2011), has already decided this case, and the Kansas Supreme Court's decision fails to follow that binding precedent. *Whiting* allowed employers to use information from the E-Verify system that corresponds to the I-9 information, and this Court read §1324a(b)(5) as limited to "the I-9 form or its supporting documents themselves." *Whiting*, 563 U.S. at 603 n.9. That is precisely the position taken by Kansas and the lower Kansas courts. *See* Section I.A.2.

In combination with an apparent immigration-law disconnect between *Whiting* and *Arizona v. U.S.*, 132 S.Ct. 2492 (2012), this Court's recent rejection of the presumption against preemption for express-preemption cases has created uncertainty in the lower courts, as evidenced by the fractured nature of lower-court decisions on §1324a(b)(5). *See* Section I.A.1. The apparent *Arizona*-*Whiting* disconnect could be readily resolved by reading *Arizona*'s preemption of state law that restricts "unauthorized employment" to apply only to the type of sanction based on an employee's immigration status at issue in *Arizona*, while excluding facially neutral, generally applicable, non-immigration statutes such as the general prohibitions against identity theft or false statements at issue here. *See* Section I.A.2.

The recent elimination of the presumption against preemption in express-preemption cases raises the question of whether this is an express-preemption case. If not, the presumption against preemption applies, and the Kansas Supreme Court's reading of

§1324a(b)(5) cannot survive. *See* Section I.B.1. More importantly, this Court should make clear that less-potent but nonetheless important federalism-based canons of statutory construction – such as the clear-statement rule – continue to apply in express-preemption contexts. *See* Section I.B.2.

Finally, if the Kansas Supreme Court's holding survives the first question presented, this Court then must decide whether to answer the second question presented: does Congress have the Article I power to displace state authority over facially neutral non-immigration crimes as applied to illegal aliens. *See* Section II.B. In addition, *amicus* EFELDF submits that Congress would violate the Equal Protection component of the Fifth Amendment if Congress indeed intended to do what the Kansas Supreme Court held Congress to have intended to do: namely, favor illegal aliens over citizens and lawful residents. *See* Section II.A. With both of these constitutional issues, the Court should reject the Kansas Supreme Court's interpretation under the doctrine of constitutional avoidance. *See* Section II.A.

ARGUMENT

I. THE DECISION BELOW DEMONSTRATES THE NEED FOR THIS COURT TO CLARIFY ITS PREEMPTION STANDARDS IN THE AREA OF IMMIGRATION.

The Kansas Supreme Court's fractured decision – and the similarly fractured or split decisions in other jurisdictions – demonstrate the need for guidance from this Court on both the mechanics of preemption generally and the contours of immigration preemption specifically. The lower courts are divided on whether

§1324a(b)(5) invokes express or implied preemption, and they are confused about the application of presumptions in favor of the traditional balance in state-federal power (*e.g.*, the clear-statement rule or the presumption against preemption).

A. The lower courts are in disarray over how to analyze preemption under §1324a(b)(5).

Amicus EFELDF respectfully submits that this Court's recent withdrawal of the presumption against preemption from express-preemption cases combines in the substantive area of immigration with seemingly divergent immigration rulings in *Whiting* and *Arizona* to create confusion in this important area of law. A writ of *certiorari* here is needed to clarify the field.

1. The fractured and divergent lower-court decisions under §1324a(b)(5) demonstrate the need for this Court to clarify its preemption standards.

In this case, four judges voted for the express-preemption holding, with one judge concurring in the judgment by finding field and conflict preemption and two judges dissenting. Pet. App. 17-28, 29-38, 38-47. By contrast, the Iowa Supreme Court decided a similar case with four judges rejecting express preemption but finding field and conflict preemption – with two of those four judges specially concurring on additional issues of field preemption and the exclusively federal discretion for prosecuting immigration-related matters – and three judges dissenting. *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017). Moreover, the Ninth Circuit rejected a facial challenge by treating the issue here as one of field and

conflict preemption, including the presumption against preemption. *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1105 (9th Cir. 2016). In short, the decisions are deeply fractured, with no other court agreeing with the Kansas Supreme Court about §1324a(b)(5)'s presenting express-preemption issues.

Amicus EFELDF respectfully that the fractured nature of the decisions on these issues results in large part from the need for greater clarity from this Court on issues of both preemption generally and immigration preemption specifically.

2. <u>The Kansas Supreme Court's holding is inconsistent with federal law and this Court's *Whiting* decision.</u>

As Kansas points out, the federal Department of Justice ("DOJ") has rejected the Kansas Supreme Court's position. Pet. at 23-24. But even without deference to DOJ, the Kansas Supreme Court's resolution of the statutory question would be wrong as a matter of purely federal law. And, in any event, the Kansas Supreme Court's resolution is inconsistent with *Whiting* on the scope of preemption under §1324a(b)(5). Whether to correct its own decision in *Whiting* or the Kansas Supreme Court's decision in *Garcia*, this Court should grant the petition.

First, the same prohibition against using I-9 information that would keep Kansas from enforcing its generally applicable laws would apply equally to the federal government. Under the Kansas Supreme Court's view, enforcement is prohibited outside the contexts of an immigration-related enforcement or the sections of Title 18 that §1324a(b)(5) enumerates (namely, 18 U.S.C. §§1001, 1028, 1546, and 1621). *See*

8 U.S.C. §1324a(b)(5). As a consequence, the federal Internal Revenue Service could not seek to pursue tax-evasion remedies generally, *see*, *e.g.*, 26 U.S.C. §7201, to say nothing of *civil* remedies. Specifically, because 26 U.S.C. §7201 is not enumerated in §1324a(b)(5) and tax enforcement is not "enforcement of this chapter" under §1324a(b)(5), the Kansas Supreme Court's overly broad interpretation of §1324a(b)(5) would prevent federal enforcement of 26 U.S.C. §7201 for the same reason Kansas purportedly cannot enforce state identity-theft and false-statement laws. Congress is unlikely to have intended to give a pass to anyone – whatever his or her immigration status – for generally applicable tax laws.

While EFELDF respectfully submits the Kansas Supreme Court's resolution here would be improper if that court were writing on a blank slate, the court was not writing on a blank slate. In *Whiting*, the Legal Arizona Workers Act of 2007 – which compelled as a matter of state law employers to use the federally non-mandatory E-Verify system – was held neither impliedly nor expressly preempted.

Specifically, although a "request to the E-Verify system" is "based on information that the employee provides similar to that used in the I-9 process," 563 U.S. at 590, this Court limited preemption under §1324a(b)(5) to "the I-9 form or its supporting documents themselves." *Whiting*, 563 U.S. at 603 n.9. In other words, so long as an entity – *e.g.*, an employer or governmental prosecutor – uses the I-9 information without using the form or its attachments themselves, there is no preemption.

The provision at issue in *Whiting* fell within the "donut hole" of §1324a(h)(2)'s preemption of *employer*-based sanctions (*i.e.*, it was not preempted because it fell within the exception for "licensing and similar laws"). *See* 8 U.S.C. §1324a(h)(2). In that respect, the Arizona statute in *Whiting* was identically situated *vis-à-vis* IRCA to the Kansas statutes here: there was no preemption under §1324a(h)(2), so §1324a(b)(5) did not preempt using information on the I-9 form if the information was obtained from other sources. As *Whiting* has already held, the correct meaning of §1324a(b)(5) is the one Kansas presses here.

Although *Whiting* appears to conflict with *Arizona* on the surface, the conflict is more apparent than real. Advocates for illegal aliens cite *Arizona* to argue that any state action that interferes with an illegal alien's employment is conflict preempted by IRCA's comprehensive federal enforcement scheme, but *Arizona* was not that broad. The *Arizona* holding about exempting *employee*-based sanctions – as opposed to *employer*-based sanctions – from IRCA enforcement focuses exclusively on the "unauthorized employment," as distinct from other unlawful acts indirectly related to employment (*e.g.*, identify theft) or flowing from that employment (*e.g.*, tax evasion):

> The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.

Arizona, 567 U.S. at 406.[2] Like three justices of this Court,[3] *amicus* EFELDF did not interpret IRCA as the *Arizona* majority interpreted it, but the question now before the Court is different. Here, the parties ask whether IRCA's focus on unauthorized employment also reaches non-employment actions that – while indirectly related to or flowing from employment – violate facially neutral, generally applicable laws such as tax evasion and identity theft.

In sum, although *Arizona* could be read broadly to preempt any state action that directly *or indirectly* affects illegal aliens working here, that is not what *Arizona* held: the law challenged there applied directly to the act of seeking or holding work without the proper immigration authorization. By contrast, the laws challenged here are facially neutral as to the defendant's immigration status and fall well within a state's traditional police power. Because immigration law has not touched on these types of state laws, they remain unaffected by IRCA and thus within a state's authority under *Whiting*.

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[2] Section 5(C) of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act prohibited "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." ARIZ. REV. STAT. ANN. §13-2928(C). In other words, the Arizona law was not facially neutral with respect to immigration status.

[3] *See Arizona*, 567 U.S. at 432-33 (Scalia, J., concurring in part and dissenting in part); *id.* at 439 (Thomas, J., concurring in part and dissenting in part); *id.* at 450-53 (Alito, J., concurring in part and dissenting in part).

B. This Court should clarify how other canons of statutory construction overlap with the presumption against preemption.

Although this Court has recently rejected the presumption against preemption for express-preemption statutes, the Court should nonetheless interpret IRCA deferentially to state authority because Congress itself would have done so. Indeed, the fractured and diverse resolutions of §1324a(b)(5) cases demonstrate that lower courts need more clarity on these issues, and this litigation presents an ideal vehicle for the Court to provide that clarity.

As the Court recently recognized, "a fair reading of statutory text" requires "recognizing that Congress legislates against the backdrop of certain unexpressed presumptions." *Bond v. U.S.*, 134 S.Ct. 2077, 2088 (2014) (interior quotations omitted). One of the presumptions inherent in this Court's analysis of congressional enactments has been that "Congress does not cavalierly pre-empt [state law]," *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted), but there have been two metrics for evaluating the proper deference to state authority: the clear-statement rule and the presumption against preemption.

Although the presumption against preemption appears to have grown out of the clear-statement rule,[4] they are no longer the same thing. *Gonzales v.*

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[4] In announcing the presumption against preemption, *Santa Fe Elevator,* 331 U.S. at 230, relied on cases that merely required that Congress act clearly. *Napier v. Atlantic Coast Line,* 272 U.S. 605, 611 (1926) ("intention of Congress to exclude States from

Oregon, 546 U.S. 243, 274-75 (2006) (distinguishing between the two). Instead, the presumption against preemption could upend other canons of construction: "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotations omitted). By contrast, the Court's "clear statement rules … are merely rules of statutory interpretation, to be relied upon only when the terms of a statute allow," as "rules for determining intent when legislation leaves intent subject to question." *U.S. v. Lopez*, 514 U.S. 549, 610-11 (1995). As such, unlike the presumption against preemption, the clear-statement rule does not come into potential conflict with a statute's plain text, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp.*, 507 U.S. at 664. In any event, either the presumption against preemption or at least the clear-statement rule apply here.

1. <u>A presumption against preemption continues to apply outside express-preemption cases.</u>

Although the Kansas Supreme Court avoided the presumption against preemption by analyzing this as an express-preemption case, Pet. App. 16, other courts have reviewed §1324a(b)(5) as an implied-preemption statute. *See*, *e.g.*, *Puente Arizona*, 821 F.3d at 1105; *Martinez*, 896 N.W.2d at 755-58. To the extent that the presumption against preemption applies, that

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exerting their police power must be clearly manifested"); *Allen-Bradley v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (same).

presumption applies not only to determining the *existence* of preemption, but also to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Applying the presumption against preemption to the scope of preemption here would be fatal to the preemption claims.

Specifically, if this were an implied-preemption case to which the presumption against preemption applied, §1324a(b)(5) would be amenable to a reading that prohibits only using the I-9 form and its attachments themselves, without precluding states from enforcing facially neutral non-immigration laws based on the same common data – such as names and Social Security numbers – that the state acquires by other means (*e.g.*, tax forms, license applications). *See State v. Reynua*, 807 N.W.2d 473, 481 (Minn. Ct. App. 2011) (applying presumption against preemption to §1324a(b)(5)). The Kansas Supreme Court's reading of §1324a(b)(5) cannot survive the presumption against preemption.

2. <u>The clear-statement rule and similar canons of statutory construction apply, even when the presumption against preemption does not.</u>

Assuming *arguendo* and in the alternative that this were an express-preemption case, it then would become important for this Court to make clear that federalism-related canons of statutory construction continue to apply, even though – indeed *especially* because – this Court has withdrawn the presumption against preemption from express-preemption cases:

- "If Congress intends to alter the usual constitutional balance between the States and the

Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *accord Bond*, 134 S.Ct. at 2091.

- "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *U.S. v. Bass*, 404 U.S. 336, 349 (1971); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same).

Although not to the same degree as the presumption against preemption, these federalism-related canons of statutory construction would support Kansas here, and it is incumbent on this Court to clarify that these less-potent federalism canons remain in play after the presumption against preemption's withdrawal.

II. READING §1324a(b)(5) BROADLY WOULD UNNECESSARILY RAISE QUESTIONS UNDER THE CONSTITUTION.

As Kansas explains, Pet. at 25-33, the doctrine of constitutional avoidance provides another reason to reject the Kansas Supreme Court's broad reading of §1324a(b)(5): the preemptive statute that the Kansas Supreme Court imagines may be outside the power of Congress to enact and likely would violate the Equal Protection component of the Fifth Amendment.

In the face of such doubt, courts should interpret statutes to avoid the constitutional issues. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2258-59 (2013). In providing illegal aliens an as-applied exemption from facially neutral, generally applicable state-law crimes *because* they are illegal aliens, the Kansas Supreme Court begs the question:

can Congress do that? While *amicus* EFELDF readily can answer that question in the negative, this Court may instead prefer to avoid the question by interpreting §1324a(b)(5) not to raise these constitutional issues.

A. Giving illegal aliens an exemption from facially neutral general laws would violate the Equal Protection component of the Fifth Amendment.

Although *amicus* EFELDF respectfully submits that it is ludicrous to suggest that Congress intended to exempt illegal aliens from prosecution for facially neutral, generally applicable crimes within the states' historic police powers, the Kansas Supreme Court has put that question to this Court. If Congress intended that result, Congress would have violated the Equal Protection component of the Fifth Amendment.[5]

As the Kansas Supreme Court understands it, Congress *intended* §1324a(b)(5) to authorize illegal aliens – but not citizens or lawful residents – to use identity theft to hide criminal records from employers, to evade wage garnishment, and to escape compliance with generally applicable tax laws. Assuming that Congress intended to benefit illegal aliens *because* they are illegal aliens, that intent would violate Equal Protection unless Congress had at least a rational basis for that preference. *Pers. Adm'r v. Feeney,* 442

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[5] By its terms, the Fourteenth Amendment's Equal Protection Clause applies only to states, U.S. CONST. amend. XIV, §1, cl. 4, but this Court has found an equivalent protection vis-à-vis federal action in the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe,* 347 U.S. 497, 499-500 (1954).

U.S. 256, 279 (1979).[6] In the absence of a sufficiently important governmental interest, §1324a(b)(5) would be unconstitutional, at least as the Kansas Supreme Court has interpreted §1324a(b)(5).

B. Congress may not have the power to foreclose states' enforcement of immigration-neutral criminal laws.

As Kansas explains, Pet. at 30-33, §1324a(b)(5) as interpreted by the Kansas Supreme Court may well be outside the power of Congress to enact. EFELDF adopts Kansas's argument without adding to it. *See* S.Ct. Rule 37.1. As with the foregoing equal-protection issue, the question is not whether §1324a(b)(5) as interpreted by the Kansas Supreme Court would actually be unconstitutional but whether the question is serious enough to counsel this Court to interpret §1324a(b)(5) differently.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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[6] Indeed, discriminating against citizens and lawful residents should trigger heightened scrutiny, *U.S. Dept. of Agric. v. Moreno,* 413 U.S. 528 (1973), although most citizenship-related equal-protection claims involve alleged discrimination *against* non-citizens. *See*, *e.g.*, *Clarke v. Deckebach*, 274 U.S. 392, 397 (1927). In any event, it is incumbent on the party pressing the alleged preference for illegal aliens over all others to show even a rational basis for Congress to have done so.

January 10, 2018

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