

Analyzing the Kansas Supreme Court's Sweeping Prohibition of Identity Theft Prosecution Under Kansas State Law [State v. Garcia, 401 P.3d 588 (Kan. 2017)]

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Summary: The Kansas Supreme Court held that federal law and the Immigration Reform Control Act of 1986 expressly preempt Kansas identity theft prosecution of undocumented workers. The court erred by overtly interpreting federal law to satisfy its preemption analysis and dispose of the prosecution. The State should have unbridled authority to prosecute undocumented workers for crimes unrelated to illegal alien status.

I. INTRODUCTION

The first calendar year of the Trump Administration created significant uncertainty for immigrants, especially those traversing the southern U.S. border. Questions surrounding who is safe to remain, who is likely to be deported, and how immigration status affects families currently residing in the United States all have come to and remained at the forefront of the social issues facing this country.¹ One of the more divisive topics regarding undocumented aliens is their employment.²

The Kansas Supreme Court made a significant reach in *State v. Garcia*,³ providing protection for undocumented workers by overturning

1. Michael D. Shear & Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/us/politics/dhs-immigration-trump.html?module=ArrowsNav&contentCollection=Politics&action=keypress®ion=FixedLeft&pgtype=article> [https://perma.cc/H6RZ-GQTB]. As a result of changes implemented by the Trump Administration, “millions of immigrants in the country illegally now face a far greater likelihood of being discovered, arrested and eventually deported.” *Id.*

2. David Nakamura, *Trump Administration Grants Work Permits to Thousands of Illegal Immigrants*, WASH. POST (June 12, 2017), https://www.washingtonpost.com/politics/trump-administration-grants-work-permits-to-thousands-of-illegal-immigrants/2017/06/12/9b849488-4f99-11e7-91eb-9611861a988f_story.html?utm_term=.33a66b00c670 [https://perma.cc/F3FF-BQ8X]. Despite concerns from advocates of undocumented immigrants that President Trump would follow through on campaign promises to specifically target work permit-holders for deportation, tens of thousands of immigrants had been granted work permits through the first several months of the new administration. *Id.* These actions, coupled with Trump’s stance on immigration as a whole, have created more uncertainty as to what lies ahead for these undocumented immigrants. *Id.*

3. 401 P.3d 588 (Kan. 2017). *Garcia* is a companion to two similar cases recently decided by the court. See *State v. Morales*, 401 P.3d 155 (Kan. 2017); *State v. Ochoa-Lara*, 401 P.3d 159 (Kan. 2017). This Comment will discuss only *Garcia* because the three decisions use identical analysis leading to the

both the Johnson County District Court and the Kansas Court of Appeals. The court reversed an undocumented worker's conviction under Kansas state law by determining that the Immigration Reform and Control Act of 1986 ("IRCA") expressly preempted Kansas statutes prohibiting identity theft.

II. BACKGROUND

A. Case Description

In August 2012, Overland Park Police Officer Mike Gibson pulled over Ramiro Garcia for speeding.⁴ After performing a routine record check on Garcia, Officer Gibson called Detective Justin Russell, who worked in the financial crimes department, to come to speak with Garcia.⁵ The following day, Detective Russell contacted Bonefish Grill, Garcia's place of employment, and obtained Garcia's employment application documents, including his W-2 and I-9 forms.⁶ After discovering Garcia used the Social Security number belonging to Felisha Munguia (a resident of Edinburg, Texas) to secure employment, Garcia was charged with one count of identity theft.⁷

Prior to trial, relying on an express preemption provision in the IRCA, Garcia filed a motion to suppress the I-9 form.⁸ The State countered by stating it did not intend to rely on the I-9 as a basis for his prosecution.⁹ Garcia further argued that notwithstanding the State's position, the information on the I-9 was transferred to the W-4 form, and therefore the W-4 should also be suppressed.¹⁰ The district court refused to suppress the W-4.¹¹

At trial, the State offered and the court admitted Garcia's employment application into evidence.¹² The application included basic information about his work history and education, but did not contain a Social Security number.¹³ Despite the application's lack of identity verification, Garcia contended that he could verify his identity and legal right to work in the United States if hired.¹⁴ Once a hiring decision was made, Garcia

same result.

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

5. *Id.*

6. *Id.*

7. *Id.* Garcia's identity theft charge was based on his violation of three Kansas statutes: KAN. STAT. ANN. § 21-6107 (2012); KAN. STAT. ANN. § 21-6804 (2012); KAN. STAT. ANN. § 21-6807 (2012).

8. *Garcia*, 401 P.3d at 590. "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

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

10. *Id.*

11. *Id.*

12. *Id.* at 591.

13. *Id.*

14. *Id.*

electronically filled out W-4 and K-4 tax forms, each containing a Social Security number and digital signature.¹⁵ Following completion of the forms, a Bonefish Grill manager required Garcia to submit a paper Social Security card, as is protocol with any Bonefish Grill hire, before verifying the documents and proceeding with the hiring process.¹⁶

A jury found Garcia guilty of identity theft, and a judge sentenced him to eighteen months of probation.¹⁷ Finding no reversible error, the Kansas Court of Appeals affirmed the district court decision.¹⁸ Garcia appealed his conviction to the Kansas Supreme Court, asserting that his identity theft prosecution was preempted by the IRCA.¹⁹ The court determined Garcia's prosecution for identity theft under Kansas state law was preempted expressly by the language and congressional intent in the IRCA.²⁰

B. Legal Background

The Immigration and Nationality Act ("INA") was enacted to create a "comprehensive federal statutory scheme for regulation of immigration and naturalization" and to set the standard for admission and treatment of aliens lawfully within the country.²¹ In 1986, the IRCA was introduced as a supplement to the INA to comprehensively regulate employment of illegal aliens.²² According to the IRCA, the employment of unauthorized aliens is unlawful.²³ Further, it mandates that employers demonstrate their employees' immigration status through an employment verification system.²⁴

The Immigration and Naturalization Service ("INS") instituted a regulation in 1987 to establish a more rigid employment verification system.²⁵ According to this regulation, employers must use an I-9 to verify employment eligibility.²⁶ The verifying employer must: (1) ensure that the prospective employee completes the I-9; (2) examine the applicant's identification and work authorization documents; (3) complete the portion of the I-9 designated for employers; and (4) sign an attestation.²⁷ An employer may inspect a potential employee's Social Security card to verify

15. *Garcia*, 401 P.3d at 591.

16. *Id.*

17. *Id.*

18. *State v. Garcia*, 364 P.3d 1221 (Table), 2016 WL 368054, at *1 (Kan. App. 2016), *rev'd*, 401 P.3d 588 (Kan. 2017).

19. *Garcia*, 401 P.3d at 591.

20. *Id.* at 600. "A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter." 8 U.S.C. § 1324a(b)(5).

21. *Chamber of Commerce v. Whiting*, 563 U.S. 582, 587 (2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 353 (1976)).

22. *Garcia*, 401 P.3d at 596.

23. 8 U.S.C. § 1324a(a) (2012).

24. *Id.* § 1324a(b).

25. *See* 8 C.F.R. § 274a.2 (2017).

26. *Id.* § 274a.2(b).

27. *Id.*

employment eligibility.²⁸

III. COURT'S DECISION

The Kansas Supreme Court provided a detailed explanation of both facial and as-applied preemption before declaring its decision.²⁹ First, the court determined Garcia's preemption argument was properly "preserved in the district court through IRCA defense arguments in favor of suppression and a subsequent evidentiary objection."³⁰ Although the United States Supreme Court sometimes presumes preemption does not apply, the Kansas Supreme Court deemed it unnecessary to apply such a presumption against an express preemption claim.³¹ The court reasoned that where Congress has stated its explicit intent, there is no need to presume its intent.³² Ultimately, because Kansas sought to punish Garcia, an alien, for stealing the personal identity of another to gain work authorization, Garcia's preemption analysis was deemed by the court to be an "as-applied" express preemption issue.³³

In its analysis, the court pointed to an express preemption clause included by Congress in 8 U.S.C. § 1324a(h)(2), which it concluded related to employers in the IRCA.³⁴ Further, in § 1324a(b)(5), Congress declared 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 for enforcement of this chapter."³⁵

Although the State did not use the I-9 in prosecuting Garcia, the court concluded that it was Congress' clear intent to preempt the use of the form "and any information contained in the I-9 for purposes other than those listed in § 1324a(b)(5)."³⁶ Prosecution of an alien who committed identity theft is not one of the purposes expressly allowed in the IRCA, even if using the information without the form.³⁷

IV. COMMENTARY

Express preemption in an area of traditional state concern, such as

28. *Id.* § 274a.2(b)(1)(v)(C)(1).

29. *State v. Garcia*, 401 P.3d 588, 591–93 (Kan. 2017).

30. *Id.* at 594.

31. Compare *id.* at 594–95, with *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 627 (2011) (Sotomayor, J., dissenting), and *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

32. *Garcia*, 401 P.3d at 595.

33. *Id.* at 596.

34. *Id.* According to the IRCA, "[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." 8 U.S.C. § 1324a(h)(2) (2012).

35. 8 U.S.C. § 1324a(b)(5).

36. *Garcia*, 401 P.3d at 599 (emphasis in original). The purposes expressly provided in § 1324a(b)(5) only allow for use of information contained in forms such as the I-9 for enforcement of the IRCA. 8 U.S.C. § 1324a(b)(5).

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

identity theft prosecution, must be clearly defined.³⁸ IRCA's express preemption provision is silent about the potential for states to impose additional penalties on the employees.³⁹ The provision only places a bar on a state's imposition of penalties on an employer who employs unauthorized aliens.⁴⁰ Kansas Supreme Court precedent holds that, "[i]n the absence of express preemption in a federal law, there is a strong presumption that Congress did not intend to displace state law."⁴¹ Where a federal law contains an express preemption clause, courts are to focus on the plain language of the statute to determine congressional intent.⁴² The plain language of the IRCA proscribes the use of a form, such as the I-9, or any information contained within or appended to the form for any purposes other than those explicitly set forth in the IRCA.⁴³

The majority's rationale establishes a precedent that overwhelmingly prohibits prosecution of unlawful aliens for identity theft occurring during the employment process.⁴⁴ Such a result is categorically wrong because immigration status is irrelevant in determining the lawfulness of conduct under these Kansas statutes.⁴⁵ The Kansas identity theft statutes under which Garcia was prosecuted contain no language regarding unauthorized aliens.⁴⁶ Instead, Garcia's conviction was based on completion of the federal W-4 and Kansas K-4 tax forms, which are wholly independent of the federal employment verification system under the IRCA.⁴⁷

The court's overly broad interpretation of Congressional intent in § 1324a(b)(5) simply cannot reflect the intent of lawmakers. Section 1324a(b) requires employers to verify that "an individual" is not an undocumented alien.⁴⁸ The requirement placed on employers is that they verify all potential employees, regardless of believed immigration status.⁴⁹ Thus, the court effectively bars any prosecution under Kansas' identity theft statute if the prosecution relies on information that is also on or attached to the I-9.⁵⁰ In Garcia, the State never admitted the I-9 into evidence, and the other two forms are quite clearly used for different purposes.⁵¹ Garcia was not convicted of deceiving an employer on a work verification form, a crime that would be preempted by the IRCA; he was convicted of using another

38. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

39. 8 U.S.C. § 1324a(h)(2).

40. *Arizona v. United States*, 567 U.S. 387, 406 (2012); see also 8 U.S.C. § 1324a(h)(2).

41. *Zimmerman v. Bd. of Cty. Comm'rs*, 218 P.3d 400, 404 (Kan. 2009).

42. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 895 (2000) (Stevens, J., dissenting).

43. 8 U.S.C. § 1324a(b)(5).

44. *State v. Garcia*, 401 P.3d 588, 603 (Kan. 2017) (Biles, J., dissenting).

45. See *id.* at 603-04.

46. See KAN. STAT. ANN. § 21-6107 (2012).

47. *Garcia*, 401 P.3d at 603-04 (Biles, J., dissenting).

48. See 8 U.S.C. § 1324a(b) (2012).

49. *Garcia*, 401 P.3d at 604 (Biles, J., dissenting).

50. *Id.*

51. *Id.*

person's Social Security information on tax withholding forms.⁵² By taking the overly-literal interpretive route, the majority bars any information that could possibly be gleaned from the I-9 for identity theft prosecution purposes.⁵³

The majority also dismissed contrary case law on its way to this sweeping decision. No court prior to this case reached the same conclusion as the Kansas Supreme Court. The United States Supreme Court has determined the IRCA's express preemption provision, in most instances, bars states from penalizing employers of unauthorized aliens.⁵⁴ However, the Court noted the express preemption provision is "silent about whether additional penalties may be imposed against the employees."⁵⁵ In *Puente Arizona v. Arpaio*,⁵⁶ a federal district court in Arizona looked at the same statutory language and determined Congress preempted only state prosecution of fraud committed directly in the I-9 process.⁵⁷ The court found conduct outside the scope of the I-9 was not preempted because federal penalties did not address such conduct.⁵⁸

Furthermore, a Minnesota state appellate court determined § 1324a(b)(5) could not be read "so broadly as to preempt a state from enforcing its laws relating to its own identification documents."⁵⁹ The Minnesota court reasoned that it would place a significant limitation on the state's police power by prohibiting use of such information simply because it is also used in the federal employment verification process.⁶⁰ The court determined that perjury prosecution for false statements on the I-9 would obstruct the full purposes and objectives of the IRCA.⁶¹ However, it explained that this same analysis would not apply to a fictitious or fraudulent identification card "merely because that card has been presented in support of an I-9 federal employment-eligibility verification form."⁶² Such a situation has not been clearly and expressly preempted, therefore the state's police powers are not superseded.⁶³

The decision runs counter to a slew of recent Kansas Court of Appeals decisions.⁶⁴ In each of three contiguous decisions in 2015, the court held,

52. *Id.*

53. *Id.* at 603.

54. *Arizona v. United States*, 567 U.S. 387, 406 (2012).

55. *Id.*

56. No. CV-14-01356-PHX-DGC, 2017 WL 1133012 (D. Ariz. Mar. 27, 2017).

57. *Id.* at *8 ("Congress clearly and manifestly intended to prohibit the use of the Form I-9, documents attached to the Form I-9, and documents submitted as part of the I-9 employment verification process, whether attached to the form or not, for state law enforcement purposes.").

58. *Id.* at *7.

59. *State v. Reynua*, 807 N.W.2d 473, 480–81 (Minn. App. 2011).

60. *Id.* at 481.

61. *Id.* at 480.

62. *Id.* at 481.

63. *Id.*

64. *State v. Garcia*, 364 P.3d 1221 (Table), 2016 WL 368054 (Kan. App. 2016), *rev'd*, 401 P.3d 588 (Kan. 2017); *State v. Morales*, 364 P.3d 305 (Table), 2016 WL 97848 (Kan. App. 2016), *rev'd*, 401 P.3d 155 (Kan. 2017); *State v. Ochoa-Lara*, 362 P.3d 606 (Kan. App. 2015), *rev'd*, 401 P.3d 159 (Kan.

“there is nothing in the [federal] preemption language that prohibits the State from proving identity theft by using information from sources other than the I-9 form, even though that information may also be contained on the I-9 form and the documents appended thereto.”⁶⁵ Moreover, in each of the unpublished court of appeals decisions, the conclusion was the same: The State’s prosecution of the undocumented alien in violation of state identity theft statutes placed zero weight on the alien’s immigration status, lawful presence in the country, or, therefore, his eligibility for legal employment.⁶⁶ Instead, the State merely prosecuted each individual solely based on his violation of the identity theft statutes, regardless of his immigration status.⁶⁷ Nothing in the IRCA indicates a manifest intent by Congress to preempt the state’s police powers in prosecuting obvious instances of identity theft.⁶⁸

However, the court in *Garcia* failed to focus on the plain language of the statute.⁶⁹ Nothing in the IRCA forbids state prosecution of identity theft using forms other than the I-9.⁷⁰ A state law is preempted only if it obstructs the accomplishment of the entire purposes and objectives of the federal legislation.⁷¹ In this instance, the plain language clearly does not expressly preempt the state prosecution for conduct completely distinct from contents of the I-9. Additionally, the state prosecution simply has nothing to do with *Garcia*’s status as an undocumented alien. Stretching the IRCA to preempt this particular set of facts places a significant strain on a state’s police power.

Ultimately, the court’s decision leads to an unjust and sweeping result. Just as the State of Kansas would be perfectly able to prosecute a citizen of the state for identity theft under similar circumstances, so too should it be permitted to prosecute an undocumented worker for the same crime.

2017); *State v. Saldana*, 353 P.3d 470 (Table), 2015 WL 4486779 (Kan. App. 2015); *State v. Dorantes*, 353 P.3d 469 (Table), 2015 WL 4366452 (Kan. App. 2015); *State v. Flores-Sanchez*, 340 P.3d 1235 (Table), 2014 WL 7565673 (Kan. App. 2014); *State v. Lopez-Navarette*, 340 P.3d 1235 (Table), 2014 WL 7566851 (Kan. App. 2014).

65. *Ochoa-Lara*, 362 P.3d at 611.

66. *Id.* at 612.

67. *Id.*

68. *Id.*; see also 8 U.S.C. § 1324a (2012).

69. See *State v. Garcia*, 401 P.3d 588 (Kan. 2017).

70. See 8 U.S.C. § 1324a.

71. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).