

Preemption Issues High Court is Considering in I-9 Fraud Case

By Amy L. Peck

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Meet the Authors



Amy L. Peck

Principal

402-391-1991

Amy.Peck@jacksonlewis.com

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Immigration

The U.S. Supreme Court has heard oral argument in *Kansas v. Garcia*, a case in which it will decide whether a state may prosecute individuals for using false information on a Form I-9 Employment Eligibility Verification, a federal employment eligibility verification form. *Kansas v. Garcia*, No. 17-834.

The basic question presented is whether the Immigration Reform and Control Act (IRCA) preempts states from prosecuting fraud cases using such personal identifying information, including common data — *e.g.*, name, date of birth and Social Security number — that was used to establish work authorization, even though that information can be found on other common non-IRCA documents.

The Supreme Court's decision will affect thousands of undocumented workers and their employers. If the Court holds the state prosecutions are preempted, those among the approximately eight million undocumented workers in the U.S. who may be using someone else's Social Security number to work and pay taxes will have one less source of anxiety.

If the Court holds that the state's prosecutions are not preempted, new state law prosecutions may force more of these workers out of the workforce and affect the industries that rely on them heavily, including agriculture, food processing, hospitality, construction, and even home health care.

The Players

In earlier proceedings, the Kansas Supreme Court held that the state's prosecutions for identity theft were preempted by IRCA, and reversed the convictions of three men, Ramiro Garcia, Donaldo Morales, and Guadalupe Ochoa-Lara.

The state of Kansas wants the U.S. Supreme Court to overturn the Kansas Supreme Court's ruling and hold that its prosecutions for identity theft are not preempted by IRCA and that the convictions of the three men may stand.

Garcia, Morales, and, Ochoa-Lara want the U.S. Supreme Court to uphold the Kansas Supreme Court's ruling, find that the state law prosecutions are preempted, and that their convictions for identity theft were rightly overturned.

Background

Garcia and the others did not have Social Security cards and were all convicted of identity theft for using other people's Social Security numbers to gain employment in various restaurants. In September 2017, the Kansas Supreme Court reversed those convictions on the grounds that the state was prohibited from using information found on the defendants' I-9 forms to prove its case because such prosecution was preempted by IRCA. *State v. Garcia*, 401 P.3d 588 (Kan. 2017).

The state argued that their prosecutions had not relied on Social Security numbers found on

the defendants' I-9 forms, but on Social Security numbers found on their tax withholding forms.

The Kansas Supreme Court decided that the information on or attached to the I-9 forms could not be used for a state prosecution even if the information could be found elsewhere, because the statute required the state to prove the false information was used to obtain employment, a purpose preempted by IRCA.

In dissent, Kansas Supreme Court Judge Daniel Biles noted that the decision would “wipe numerous criminal laws off the books” and that Congress “did not intend to immunize [defendants] from traditional state prosecutions for identify theft” by enacting IRCA.

Before deciding to take up the case, the U.S. Supreme Court asked the U.S. government to weigh in. The U.S. solicitor general agreed with the state of Kansas that its identity theft prosecutions were not preempted. Essentially agreeing with Justice Biles, the solicitor general explained that although IRCA prohibits the use of information on or attached to an I-9 for state prosecutions, it does not go so far as to prevent states from using the same information if it is found on other documents.

Arguments Before the Supreme Court

The state of Kansas was represented by its attorney general, Derek Schmidt. Aiming to reinstate the convictions below, in the state's brief, Schmidt argued that the prosecutions were not preempted by IRCA — expressly or impliedly — because the prosecutions relied on information found on federal and state tax withholding documents, not on information taken from or found only on the Form I-9s. Any other decision, Kansas argued, has “no support in the text or structure of the statute [IRCA].”

Kansas also contended that the “absurd result” of the Kansas Supreme Court's decision would “upend the federal-state balance by divesting States of their traditional authority to enforce their criminal statutes and by undermining the federal government's concerted efforts to partner with States in combatting identity theft.”

It continued, “[C]rime will go unpunished and more victims [of identity theft] will be left without justice.” In addition, holding that unauthorized aliens cannot be prosecuted for “any crimes committed related to their employment ... would immunize unauthorized aliens from prosecution under a host of state laws that have nothing to do with immigration policy.”

Paul W. Hughes, on behalf of the three men, argued that the state prosecutions requiring personal identifying information on Form I-9 to show that someone is authorized for employment are preempted by IRCA. With IRCA, the federal government created a process for determining whether individuals are authorized to work in the U.S., that process includes the completion of a federal Form I-9. Providing false or fraudulent information in connection with the I-9 process is a crime under federal law and IRCA preempts states from separately prosecuting that offense.

On behalf of the men, Hughes further asserted that the state identity theft prosecutions are preempted because those prosecutions required Kansas to show that the defendants sought to fraudulently obtain a benefit — in this case, employment. The convictions, therefore, were “irrevocably tethered ... to [defendants'] use of false information in the employment verification process.” He also argued that Kansas state laws on identity theft would not be obliterated by a preemption holding because the laws would be “preempted

only insofar as prosecutors use them to regulate fraud on the federal employment verification system.”

The federal government’s aims include not only preventing undocumented workers from working without authorization, but also prosecuting employers who knowingly hire those workers. The men asserted that allowing their convictions to stand inherently conflicts with that federal policy.

The federal government frequently relies on “foreign nationals, including unauthorized aliens, to build criminal cases, particularly cases against human traffickers and employers who violate IRCA.” Plea negotiations with undocumented workers used to obtain information about their employers would be “thwarted by parallel state prosecutions of the same individuals for offenses already regulated by federal law.”

Not only did the United States file a friend-of-the-court, but others did as well. The AFL-CIO also sided with the Kansas Supreme Court, arguing that state prosecutions should be preempted so that employees allegedly engaging in IRCA fraud would not be treated as felons. The Eagle Forum Education and Legal Defense Fund argued against preemption on federalism grounds, and the state of Michigan — joined by nine other states — argued against preemption based on state sovereignty and inherent police powers.

Oral Argument

At the October 16 oral argument, questioning focused on when, if ever, preemption would apply. The parties were asked to explain whether there is a reasonable distinction between information submitted to an employer for the Form I-9 work authorization process — which could not be used in a state prosecution — and information, even if it is the same information, submitted to that same employer at the same time for tax withholding purposes.

Schmidt, arguing for the state of Kansas, responding to a question from Justice Ruth Bader Ginsburg on this issue, alluded to the history of the I-9 process. He submitted that when Form I-9 was introduced, it was a novel information collection process and Congress was concerned about how the information collected on the form itself might be used. Schmidt said:

The distinction ... that’s been drawn is between the I-9 system itself, which Congress created and placed off limits, and the broader employment hiring context, which states have traditionally been able to reach and we believe still can.

In other words, Congress preempted the states from prosecuting an immigration offense, but not other state crimes that relied on information found on other forms — even if the same information is on the Form I-9.

The United States, represented by Christopher Michel, assistant to the solicitor general, supported Kansas and distinguished immigration offenses from other offenses. He succinctly argued that “nothing in IRCA diminished the states’ long-standing power to prosecute crimes like this [identify theft], nonimmigration offenses on nonimmigration forms submitted for nonimmigration purposes.”

Hughes, responding to a question from Chief Justice John Roberts, conceded that the respondent’s theory of preemption “is a limited one.” He continued, “[W]hat federal law preempts is a prosecution for the use of false information with respect to showing that somebody is authorized under federal immigration laws for employment.”

In a colloquy with Justice Neil Gorsuch, he further explained that “while Kansas may prosecute a wide range of offenses on its tax system ... what Kansas might not do is have its own individual immigration policy and immigration offenses.”

This is the heart of the respondent’s argument. Kansas, through the use of identity theft laws, is actually creating its own immigration enforcement process – which it cannot do. The Court’s questions appear to show it has understood this argument at its core level.

The case is difficult. Identity theft is a serious problem. Yet, immigration is a federal system and state laws can be drafted in a way that will protect the public from identity theft without infringing upon the federal immigration system. The case’s outcome will come down to whether Kansas has correctly drafted its statutes to protect the federal interest in immigration enforcement.

A ruling from the Supreme Court is not expected before June 2020.

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