SUPREME COURT NO. 15-0671
MUSCATINE COUNTY CASE NO. FECR051342

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA
Plaintiff-Appellee,

v.

MARTHA ARACELY MARTINEZ,
Defendant-Appellant.

APPEAL FOR DISCRETIONARY REVIEW FROM THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY
HONORABLE STUART P. WERLING, DISTRICT COURT JUDGE

FINAL BRIEF OF *AMICUS CURIAE:*
AMERICAN CIVIL LIBERTIES UNION OF IOWA
IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization made up of more than 500,000 members dedicated to the principles of liberty and equality embodied in state and federal law. The ACLU of Iowa, founded in 1935, is its statewide affiliate. The ACLU of Iowa has long sought to ensure the protection of the rights of immigrants within our state to be free from discrimination and unlawful state level immigration enforcement activities. The ACLU of Iowa has worked in the state legislature and through policy advocacy to advance the rights of recipients of the federal Deferred Action for Childhood Arrivals program to participate fully in their Iowa communities, including access to state driver's licenses. The proper resolution of this case therefore is a matter of substantial interest to the ACLU of Iowa and its members.

ARGUMENT

I. INTRODUCTION AND STANDARD OF REVIEW

This Court should reverse the District Court's denial of Ms. Martinez's Motion to Dismiss, because Iowa Code § 715A.2(2)(a)(4) is facially preempted, and the State's prosecution of Ms. Martinez under both Iowa Code § 715A.2(2)(a)(4) and Iowa Code § 715.8 is preempted as applied.

Preemption analysis flows from the Supremacy Clause of the United Sates Constitution. U.S. Const., art. VI, cl. 2. *Staff Management v. Jimenez*, 839 N.W.2d 640, 652 (Iowa 2013) (" 'Congress has the power to preempt state law.' ") *Id.* quoting *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012). Federal preemption of state law may be either express or implied. *See Arizona*, 132 S.Ct. at 2500-2501. Federal law expressly preempts state law where it contains an express preemption provision. *Id.* Federal law impliedly preempts state law either when "Congress, acting within its proper authority, has determined [a field of conduct] must be regulated by its exclusive governance[,]" or when state law conflicts with federal law. *See Id.* at 2501. These two forms of implied preemption are generally referred to as field preemption and conflict preemption respectively. Both field preemption and conflict preemption prohibit the state's prosecution of Martinez.

The applicable standard of review is for correction of errors at law. Iowa R. App. P. 6.907. *See also State v. Mary*, 368 N.W.2d 166, 170 (Iowa 1985) ("One of the purposes of granting discretionary review . . . is to assure that a case is determined under correct legal standards in the trial court.")

II. THE STATE'S PROSECUTION OF MS. MARTINEZ IS FIELD-PREEMPTED BY FEDERAL LAW.

The state's prosecution of Ms. Martinez in this case is field-preempted because the federal government has occupied the field regulating the possession, creation or use of false identification to work by unauthorized immigrants. Congressional "[i]ntent to displace state law altogether can be inferred from a framework of regulation so pervasive that Congress left no room for the states to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 132 S.Ct. at 2501. (internal quotation marks and punctuation omitted). When Congress has occupied the field, state regulation of the same field of conduct is preempted. *Id.* at 2502. This is true even if the state law complements, rather than conflicts with, the federal regulatory scheme. *Id.* The field of conduct at issue here—unauthorized immigrants possessing, making or using false identification to work—involves both a dominant federal interest and a pervasive federal regulatory framework.

A. The regulation of unauthorized immigrants possessing, making or using false identification to work is a dominant federal interest.

The federal government's interest in regulating unauthorized immigrants possessing, making, or using false identification for work is dominant in three ways, each discussed in turn. First, the federal government has exclusive power over immigration law, and the regulation of identity documents required for immigrant employment is part and parcel of that federal interest. Second, federal immigration law balances the competing goals of penalizing unauthorized immigration and protecting humanitarian interests, and regulating immigrant employment affects that federally-set balance. Third, as a functional matter, regulation in this area requires federal interagency coordination.

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S.Ct. at 2498. Its authority comes in part from the "inherent sovereign power to control and conduct relations with foreign nations". *Id.* at 2498-99 (discussing the importance of communication by a single national sovereign with foreign nations to the safety, status, and security of citizens, maintaining sometimes delicate international relationships, and other national interests abroad). The federal government's authority over immigration also comes from the naturalization clause of the U.S. Constitution. *Id.* citing U.S. Const., Art. I, § 8,

cl. 4 ("Congress shall have Power … [t]o establish an uniform Rule of Naturalization …") Although not "every state enactment which in any way deals with aliens is a regulation of immigration," the power "to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354-355 (1976) *superseded by statute on other grounds*, Immigration Control and Reform Act of 1986 [hereinafter IRCA], Pub. L. No. 99-603, 100 Stat. 3359 (1986) *as recognized in Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1975 (2011). The federal government has exercised this exclusive power repeatedly, including regulating the categories of noncitizens that may be admitted, registration of noncitizens, denial of public benefits to noncitizens, and removal of noncitizens. *Arizona,* 132 S.Ct. at 2499.

The federal Immigration Control and Reform Act ("IRCA") passed in 1986 made clear that regulating employment of immigrants lacking work authorization is central to Congressional exercise of the exclusive federal interest in immigration law. *See* IRCA, 100 Stat. 3359. IRCA "made combating the employment of illegal aliens central to 'the policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) (quoting *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991)). Congress carefully balanced punishment for employing undocumented immigrants among employers and employees and between criminal and non-

criminal sanctions. *See Arizona*, 132 S.Ct. at 2504-2505. This balance was central to a larger scheme to regulate immigration generally. *See Id.* at 2504.

The federal government's interest in regulating the field is also tied to its role in protecting humanitarian interests. This goal is reflected in federal immigration statutes, which provide essential safety valves and discretionary relief to removal on humanitarian grounds, as well as in federal case law and executive policy. For example, 8 U.S.C. § 1182(h) provides a waiver to the bar on admission of certain immigrants for relatives of U.S. citizens and lawful permanent residents. Additionally, victims of domestic violence and children who have been abused, neglected, or abandoned have special reduced eligibility requirements to adjust their immigration status to lawful permanent resident ("LPR" or "green card" status). *See* 8 U.S.C. § 1101(a)(51) (defining certain victims of domestic violence as "VAWA self-petitioner"), § 1101(a)(27)(J) (defining certain children who have been abused, abandoned, or neglected as "special immigrant"), and §1255(c) (reducing bars to adjustment of status for VAWA self-petitioners and special immigrants). Likewise, immigrants who have applied for asylum in the U.S. are eligible for work authorization while their application is still pending, as are those whose asylum application was denied but who may not be returned to their home country. *See* 8 U.S.C. §1158(d)(2); 8 C.F.R. § 274a.12(c)(8); 8 C.F.R. § 274a.12(a)(10).

Federal immigration law also provides a number of discretionary humanitarian exceptions to penalties for unauthorized immigration. *See e.g.* 8 U.S.C. § 1229b ("[t]he Attorney General may cancel removal …"); § 1158(b)(1) (Attorney General "may grant asylum …"); § 1182(h), (i) and (k) (enumerating three different waivers that the Attorney General may grant). The reliance on federal discretion to balance enforcement priorities with humanitarian concerns extends to the treatment of undocumented workers. *See Arizona*, 132 S.Ct. at 2499 ("Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit serious crime.")

The federal executive branch recognizes this balance as well. In 2012, the Department of Homeland Security ("DHS") implemented the Deferred Action for Childhood Arrivals ("DACA") program, explicating its use of prosecutorial discretion in removal proceedings. *See* Memorandum from Secretary of Homeland Security Janet Napolitano, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children", (Jun. 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. DACA provides certain undocumented immigrants with humanitarian relief in the

form of a two-year reprieve from removal, and authorization to work in the United States. USCIS.gov, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (last visited Oct. 18, 2015). DACA is intended for those children of immigrants, like Ms. Martinez, who were brought without immigration authorization to the U.S. by their parents, who are, as President Obama stated in a televised speech from the Rose Garden on June 15, 2012, "Americans in their heart, in their minds, in every single way but one: on paper." *Remarks on Immigration Reform and an Exchange with Reporters,* Daily Comp. Pres. Docs., 2012 DCPD No. 201200483 at 1. One core humanitarian purpose of the DACA program is to encourage young people to participate openly in their communities for the first time by removing "the shadow of deportation." *Id.*

Finally, federal regulation of employment of immigrants is administered by multiple federal agencies in coordination with one another. The federal government's interest is especially strong because it must balance immigration enforcement and the worksite enforcement of labor laws. In 2011, the DHS entered into a cooperative agreement with the Department of Labor ("DOL") setting "forth the ways in which the Departments will work together to ensure that their respective civil worksite enforcement activities do not conflict and to

advance the mission of each Department." Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011) [hereinafter DHS-Labor Memo] at 1, http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf. The agreement outlines procedures that DHS' Immigration and Customs Enforcement Agency ("ICE") will follow to support DOL investigations. *See generally* DHS-Labor Memo at 2. Among these procedures are to "thwart attempts by other parties to . . . retaliate against employees for exercising labor rights," and "to consider DOL requests that ICE grant a temporary law enforcement parole or deferred action to any [undocumented immigrant] witness needed for a DOL investigation[.]" *Id.* at 2-3. Thus, the federal interest is dominant because it must precisely control prosecution of employment of immigrants without work authorization to prevent it from unknowingly assisting employers in violating federal labor-law.

B. Congress has pervasively regulated the field of unauthorized immigrants possessing, making or using false identification to work.

The state's prosecution of Martinez is also preempted because it intrudes upon a field in which Congress has regulated "so pervasive[ly] … that it left no room for States to supplement it." *See Arizona*, 132 S.Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In *Arizona*, the Court concluded that a state law criminalizing failure to complete or carry an alien registration document, which "in effect … add[ed] a state-law penalty for conduct proscribed by federal law," intruded upon "a field of alien registration" pervasively regulated by Congress. *Id.* at 2502 (citing 8 U.S.C. § 1304(e), 1302(a), 1304(a), 1305(a) and 1306(a)). The Court reasoned that "[t]he federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance[,]" *id.,* and that "[i]t was designed as a 'harmonious whole,' " *id.* quoting *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941)).

Since *Arizona*, lower federal courts have interpreted the IRCA regime, and specific federal statutes it implicates, as proof that Congress has pervasively regulated the field here at issue and the related field of immigration-document-fraud. In *Puente Arizona v. Arpaio*, the U.S. District Court for the district of Arizona, ruling on a preliminary injunction request, held that two Arizona identity theft statutes were likely to be field preempted by IRCA and subsequent immigration law. 76 F.Supp.3d 833 (D. Ariz. 2015)(on appeal). The Arizona statutes in that case criminalized, *inter alia*, the possession, making, or using of anyone's identification information to obtain employment, or to obtain and continue employment. *Id.* at 844-45 (citing Ariz. Rev. Stat. §13–2009 (2015) & §13–2008(a) (2015)). The Court concluded that Congress had

showed its intent to occupy the field. *Id.* at 856-57 (citing, *inter alia,* 8 U.S.C. § 1324c and 18 U.S.C. § 1546, and reasoning that "Congress has imposed every kind of penalty that can arise from an unauthorized alien's use of false documents to secure employment—criminal, civil, and immigration—and has expressly limited States' use of federal employment verification documents.") Similarly, in *United States v. South Carolina*, the Fourth Circuit, reviewing a preliminary injunction held that the 8 U.S.C. § 1324c and 18 U.S.C. § 1546 preempted a state law criminalizing the use of false identification to show lawful presence in the United States. 720 F.3d 518, 532-33 (4th Cir. 2013). It reasoned that "Congress has passed several laws dealing with creating, possessing, and using fraudulent documents." *Id.* at 533 (citing 8 U.S.C. §1324c(a)(1)&(2) (2013) & 18 U.S.C. §1546 (2013)).

As *Puente Arizona* recognizes, and *South Carolina* reinforces, the IRCA regime provides a full set of standards to regulate the field of unauthorized immigrants possessing, making or using false identification to work, and this set was designed as a harmonious whole. IRCA created the I-9 process as the mechanism for employing immigrants legally in the U.S, which requires immigrants to show work authorization and identification. IRCA, 100 Stat. at 3359-3380 (adding 8 U.S.C. 1324a et seq.) This process, as set forth in IRCA and subsequent immigration law, creates a three-tiered system of sanctions—

criminal, civil and immigration—for possessing, making or using false identification to establish the work authorization required by the I-9 process.[1] IRCA also restricts the use of I-9 documents exclusively to federal actors. As discussed below, this federal scheme provides a full set of standards and is a "harmonious whole", showing that Congress has pervasively regulated the field.

1. Federal law imposes criminal sanctions for conduct within the field.

Congress has established criminal penalties for the conduct alleged by the state in this case. IRCA amended 18 U.S.C. 1546(a) to provide:

> Whoever knowingly forges, counterfeits, alters, or falsely makes any … *document prescribed by statute or regulation for entry into or as evidence of … employment in the United States*, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any … [such] document … knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained … shall be fined or imprisoned [for up to 10, 15, 20 or 25 years depending on the nature of the offense] or both.

[1] These sanctions, aimed at *employees* who are undocumented, are connected to a set of sanctions for *employers* who hire undocumented workers in violation of the I-9 process. *See e.g.* 8 U.S.C. §1324a(e)(4)(providing for $250-2,000 fines for initial violations, $2,000-5,000 for second, and $3,000-10,000 for any further violations); 8 U.S.C. §1324a(f)(providing criminal fine up to $3,000 and up to 6 months in jail).

See IRCA, 100 Stat. at 3380 (amending 18 U.S.C. §1546(a) to contain italicized language). IRCA also added 18 U.S.C. 1546(b), specifically penalizing misuse of its employment verification system:

> Whoever uses—(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, (2) an identification document knowing (or having reason to know) that the document is false, or (3) a false attestation, for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act [codified at 8 U.S.C. §1324a(b), relating to the I-9 process], shall be fined under this title, imprisoned not more than 5 years, or both.

See id. (adding subsection (b) to 18 U.S.C. 1546). Finally, IRCA's verification system contemplates the use of three additional federal criminal statutes for enforcement of the verification system. Section 1001 generally criminalizes material misrepresentation, fraud or concealment, or making or using any writing or document containing the same in any matter under the jurisdiction of the federal government. *See* 18 U.S.C. §1001. Section 1028 generally criminalizes the production, transfer, knowing possession with intent to use to defraud the United States, of an identification document without lawful authority, an authentication feature, or a false identification document, if such activity affects interstate commerce, or if the item was transferred through the mail or appears to be issued by the United States. *See* 18 U.S.C. §1028. Section 1621 is a federal perjury statute, generally criminalizing any statement or certification believed not to be true submitted under oath or penalty of perjury

(as permitted under 28 U.S.C. §1746). *See* 18 U.S.C. §1621. This statute governs a false certification on the I-9 form, as stated on the form itself. *See* Dept. Homeland Sec., Form I-9: Employment Eligibility Verification (2013) at 7, http://www.uscis.gov/sites/default/files/files/form/i-9.pdf.

2. Federal law imposes civil sanctions for conduct within the field.

Congress has supplemented IRCA's employment verification process with civil sanctions for the conduct alleged by the State in this case. Under 8 U.S.C. 1324c(a):

> It is unlawful for any person or entity knowingly—(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of [the Immigration and Nationality Act; i.e. title 8 of the U.S. Code] … (2) to use attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter … (3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter … (4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section 1324a(b) of this title … or (5) to prepare, file, or assist another in preparing or filing, … any document required under this chapter, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted…

8 U.S.C. §1324c(a). Violation of these provisions is punishable by a cease and desist order, or such an order and a $250–$2,000 civil money penalty for first

offenders and a $2,000–$5,000 penalty for repeat offenders. 8 U.S.C. §1324c(d)(3).

3. Federal law imposes immigration sanctions for conduct within the field.

Congress has further supplemented IRCA's employment verification process with immigration sanctions. 8 U.S.C. 1227(a)(3)(c) makes an immigrant deportable if she has a final order for a civil violation of section 1324c above. *See* 8 U.S.C. §1227(a)(3)(C). It also provides a waiver if the government did not impose a civil money penalty and "the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual)." *Id.* Section 1227(a)(3)(D) makes an immigrant deportable if he falsely represents himself as a U.S. citizen to undermine the employment verification process or obtain any government benefit. *See* 8 U.S.C. 1227(a)(3)(D). Section 1182(a)(6)(C) mirrors 1227(a)(3)(D), but makes the immigrant "inadmissible," rather than "deportable," thus rendering the immigrant ineligible to adjust to lawful permanent resident status. *See* 8 U.S.C. §1182(a)(6)(C); §1255(a) (to adjust status to LPR the immigrant must be "admissible"). Finally, if the government criminally convicts an immigrant under 18 U.S.C. §1546(a), discussed above, the conviction is classified as an "aggravated felony," making the immigrant deportable, subject to mandatory detention during immigration proceedings, and excluded from most forms of

relief from deportation. *See* 8 U.S.C. §1101(a)(43)(P)(defining an 18 U.S.C. §1546(a) violation as an "aggravated felony"); §1227(a)(2)(A)(iii)(rendering an immigrant deportable for an aggravated felony); §1226(c)(1)(C)(subjecting aggravated felons to mandatory detention); §1229b(a)(3)&(b)(1)(C)(barring cancellation of removal); §1158(b)(2)(barring asylum).

4. I-9 documents may only be used to enforce federal law.

Rounding out the "harmonious whole", IRCA further demonstrates Congress' intent that the federal government exclusively regulate the field by limiting use of the I-9 form and "any information contained in or appended to such form[.]" *See* IRCA, 101 Stat. at 3363 (adding 8 U.S.C. 1324a(b)(5) containing quoted language). Indeed, fatally for the State's prosecution, this provision expressly prohibits using such forms and information "for purposes other than enforcement" of the federal statutes outlined above and others contained in Title Eight of the U.S. Code. *See* 8 U.S.C. 1324a(b)(5) ("[The I-9 form and its contained or appended information] may not be used for purposes other than for enforcement of this Act and sections 1001, 1028, 1546, and 1621 of Title 18"); 8 C.F.R. 274a.2(b)(4).

5. These federal statutes provide a "full set of standards" for the conduct of unauthorized immigrants possessing, making or using false identification to work and constitute a "harmonious whole."

As demonstrated above, the federal scheme provides exhaustive coverage of every foreseeable way an immigrant could make, use or possess a false identification document in the I-9 process. Just as in *Arizona,* the federal scheme provides "a full set of standards … including punishment for noncompliance[,]" and is "designed as a 'harmonious whole'." *Arizona*, 132 S.Ct. at 2502 (quoting *Hines*, 312 U.S. 61). Specifically, Congress designed these federal statutes as a "harmonious whole" in three ways. First, structurally, Congress incorporated the criminal, civil, and immigration penalties into the IRCA regime's employment verification process. Second, these penalties are a key component of the IRCA regime's discrete system that combats unauthorized employment by sanctioning employers and employees alternatively for not following the I-9 procedure. *See* 8 U.S.C. 1324a(e)&(f); *Hoffman*, 535 U.S. at 148-49. Third, Congress harmonized the statutes so that the federal government has precise control over if, and how, it will sanction an immigrant and the immigration consequences for unauthorized work.[2]

[2] The possibilities for federal prosecutorial discretion, recognized by the *Arizona* court as fundamental to immigration law, are numerous. For example, federal prosecutors may choose pursue a final order against an immigrant under 8 U.S.C. §1324c and thereby make them deportable, but also may decide not

C. The Iowa statutes and state prosecution at issue here are field preempted.

Because Iowa Code § 715A.2(2)(a)(4) and § 715A.8 intrude upon the federally occupied field, they are preempted both on their face and as applied.

1. Iowa Code § 715A.2(2)(a)(4) is facially preempted.

The District Court erred when it found that the Iowa forgery statute is a "state crime[] independent of the Defendant's immigration status" because the statute is preempted on its face. (Order at 3; Am. App. 64.) Iowa Code § 715A.2(2)(a)(4) is not simply a law regarding document use. Rather, it was intended to regulate in the field of unauthorized immigrants possessing, making or using false identification to work. The Iowa Legislature intruded in this federally-occupied field by taking the language of Iowa Code 715A.2(2)(a)(4) directly from federal immigration law. Subsection (2)(a)(4) of the Iowa forgery statute states:

> 2. a. Forgery is a class "D" felony if the writing is or purports to be any of the following:
> …
> (4) *A document prescribed by statute, rule, or regulation for entry into or as evidence of authorized stay or employment in the United States.*

Iowa Code § 715A.2 (emphasis added). The emphasized language is taken

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pursue a civil money penalty, thereby leaving the immigrant the possibility of a waiver of deportability. *See* 8 U.S.C. §1227(a)(3)(C).

word-for-word from 18 U.S.C. 1546(a). This language was added to the federal statute to regulate undocumented employment specifically. *See* IRCA, 100 Stat. at 3380. As the federal district court in *Puente Arizona* recognized, 18 U.S.C. §1546 is one of the statutes that established federal occupation of the field; Iowa's use of this statutory language necessarily intrudes on the field.

Further, the legislative context of Iowa Code § 715A.2(2)(a)(4) demonstrates the Iowa legislature's purpose to regulate unauthorized immigrants possessing making or using false identification to work, rather than to pass a law of neutral application that had only incidental impact on immigrants. First, the title of the Act enacting 715A.2(2)(a)(4) was "Forged Documents – Illegal Immigrants." 1996 Ia. Legis. Serv. Ch. 1881 (WEST) (S.F. 284). Second, this Act also added another section which penalized employers for "accommoda[ting]" violators of Iowa Code § 715A.2(2)(a)(4), but provided a good faith defense to employers who follow the verification process of IRCA. *See id.* (adding § 715A.2A to the Iowa Code).

This demonstrates that the adoption of the current version of § 715A.2(2)(a)(4) was not directed at regulating document use, possession and manufacture generally, but rather was part of a broader effort by the Iowa legislature to incorporate aspects of federal immigration law directly into the state regulatory regime. Put together, the text and the history of the statute

reveal that when the Iowa legislature codified § 715A.2(2)(a)(4), it intended to specifically regulate immigrants making, using or possessing false identification to work, thereby intruding upon a federally occupied field. Iowa Code § 715A.2(2)(a)(4) is thus field preempted on its face.

2. Iowa Code 715A.2(2)(a)(4) is field preempted as applied to Ms. Martinez.

The District Court was also in error when it held that Iowa's forgery statute was not preempted as applied to Ms. Martinez. (*See* Order at 3; Am. App. 64.) The trial information, minutes of evidence, and the State's concessions demonstrate that the State has intruded upon the federally-occupied field in its application of Iowa Code § 715A.2(2)(a)(4) to Ms. Martinez.

The State is applying Iowa Code § 715A.2(2)(a)(4) to prosecute an unauthorized immigrant for making, possessing or using false identification to work. It alleges Ms. Martinez violated Iowa Code § 715A.2(2)(a)(4) "from January 4, 2013 through June 14, 2013" by:

> fraudulently us[ing] or utter[ing] a writing, to wit: a document prescribed by statute, rule or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing that said writing was forged by altering, completing, authenticating, issuing or transferring to be the act of another without their permission.

(Trial Information at 1; Am. App. 4); (*see also* Mins. of Evidence at 1; Am. App.

6) (alleging no other act during that period of time besides Ms. Martinez's alleged employment at Packer Sanitation Services earning wages under a false identity.) To prove its accusations, the state intends to present the testimony of an investigator who found Ms. Martinez to have used false identification in her I-9 and associated Identification documents, and earned wages under a false social security number. (*See* Mins. of Evidence: Attached Narrative; Am. App. 9-10.) The investigator is also alleged to have witnessed a confession from Ms. Martinez that she "used [the false] name and personal information to work until her work authorization was valid." *Id.* Indeed, the State has conceded that its prosecution of Ms. Martinez for forgery arises from her alleged employment-related conduct. In the trial court proceedings on Ms. Martinez's motion to dismiss, the State argued that "because she [allegedly] obtained the identity of another person and used that identity in order to obtain gainful employment, the act of signing the name Castaneda to her employment application gives rise to the forgery charge under Count II…". (Order at 2; Am. App. 63.) This course of alleged conduct—using identification as an unauthorized immigrant to work—is squarely within the field of conduct occupied by the federal government. Such conduct may be subject to federal prosecution under 18 U.S.C. 1546(a), 8 U.S.C. 1324c, and the plethora of other statutes at the federal government's disposal, as discussed above. But it may

not be subject to state prosecution. By attempting to prosecute such conduct at the state level and pursuant to state regulations, the state has intruded upon the federally-occupied field in its application of Iowa Code § 715A.2(2)(a)(4) to Ms. Martinez.

3. Iowa Code § 715A.8 is field preempted as applied to Ms. Martinez.

The State's application of § 715A.8 is for using false identification to work, covering the same alleged conduct charged under Iowa Code § 715A.2(2)(a)(4). (Trial Information at 1; Am. App. 4.). To prove a class D felony violation of § 715A.8 as charged, the State must show that Ms. Martinez "fraudulently use[d] or attempt[ed] to fraudulently use identification information of another person, with the intent to obtain credit, property, services…[and] the value of the credit, property, or services exceeds one thousand dollars." Iowa Code § 715A.8(2)-(3). Here, the only evidence of "credit, property" or "services" the State alleges Ms. Martinez to have obtained are employment. (*See* Trial Information at 1; Am. App. 4, *and* Mins. of Evidence at 1; Am. App. 6.) As with its application of § 715A.2(2)(a)(4), the State alleges that Ms. Martinez violated Iowa Code § 715A.2(2)(a)(4) from January 4, 2013 to June 14, 2013 and provides no other allegation of committing identity theft over that time other than using false identification to

work. *See id.* The State has also conceded that its prosecution of Ms. Martinez for identity theft arises from her alleged employment-related conduct. (*See* Order at 2; Am. App. 63.) (In the trial court proceedings, the State argued "…the attempt to obtain gainful employment using the Castaneda identity gives rise to the identity theft charge under Count I.") The State's own allegations and proposed testimony demonstrate that the alleged conduct was unambiguously within the field of conduct occupied by the federal government. Such conduct could be prosecuted federally, as discussed above. But by trying to regulate such conduct at the state level, as under § 715A.2(2)(a)(4), the state has intruded upon the federally-occupied field in its application of Iowa Code § 715A.8 to Ms. Martinez.

III. THE STATE'S PROSECUTION OF MS. MARTINEZ IS CONFLICT PREEMPTED BY FEDERAL LAW.

State law is conflict preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. U.S.*, 132 S.Ct. at 2501 (quoting *Hines*, 312 U.S. at 67). This is true even if the state regulation seeks to complement congressional objectives. *Id.* at 2502. In *Arizona,* the Court held that a provision of Arizona law criminalizing failure to meet federal alien registration requirements was preempted. *See id.* at 2501-03. Although the issue presented was one of field

preemption, the Court outlined "specific conflicts" between the federal law and the state law at issue. *Id.* First, it recognized that if the law were "to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law . . . where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Id.* at 2503. Second, the federal law allowed for punishment by fine, imprisonment or probation, but the state law excluded probation as a possible sentence. *Id.* Because the federal and state punishments for the given conduct were inconsistent, the Court found the state regime to "create[] a conflict with the plan Congress put in place." *Id.*

Each of these conflicts has in turn provided a basis for subsequent federal court decisions finding conflict preemption. In *South Carolina*, the Fourth Circuit preliminarily enjoined a state law criminalizing display or possession of a false ID to show lawful presence, because of the dilution of federal discretion. 720 F.3d at 532-33 (The conduct prohibited by South Carolina law was also prohibited by 8 U.S.C. 1324c(a)(1) and (2) and 18 U.S.C. 1546). The state statute was not only field preempted but was also conflict preempted "because enforcement of these federal statutes necessarily involves the discretion of federal officials.") *Id.* at 533.

Similarly, in *Puente Arizona*, the court preliminarily enjoined Arizona's work related-identity theft laws as likely both field and conflict preempted for having penalties inconsistent with those of the corresponding federal immigration statutes. 76 F.Supp.3d at 857-58. The Court reasoned that the solely criminal sanctions under the Arizona law for using fraudulent documents to obtain employment were inconsistent with the federal scheme prohibiting the same conduct. *See id.* at 858.

Additionally, as discussed earlier, enforcement of laws affecting immigrants entails particular foreign policy concerns uniquely within the powers of the federal government, because "one of the most important and delicate of all international relationships has to do with the protections of the just rights of a country's own nationals . . . in another country." *Arizona*, 132 S.Ct. at 2498-99. Even thoughtful state intervention in this area is likely to conflict with sensitive federal foreign policy concerns. *Id.* The potential for state intervention in immigration law to undermine foreign relations was also important in the *Arizona* case, in which over 15 countries submitted *amicus curiae* briefs to the U.S. Supreme Court opposed to Arizona's law. *See* Amicus Curiae Brief of the United Mexican States in Support of Respondent, *Arizona v. U.S.*, 132 S.Ct. 2492 (2012) (No. 11-182); Motion of Argentina, et al., *Arizona v. U.S.*, 132 S.Ct. 2492 (2012) (No. 11-182).

Finally, state intervention in regulating immigrant employment conflicts with the federal interagency agreement between DHS and DOL discussed above. *See* DHS-Labor Memo. Because state prosecutors, unlike federal DHS officers, are not bound by the MOU, state intervention into immigrant employment could make states an unwitting agent of employer retaliation. Similarly, because states, unlike DHS, do not have a mechanism for receiving and reviewing DOL requests for parole or deferred action, state intervention into immigrant employment could undermine DOL investigations.

1. Iowa Code § 715A.2(2)(a)(4) is conflict preempted on its face.

As in *Arizona* and *South Carolina*, Iowa Code § 715A.2(2)(a)(4) prohibits conduct already prohibited by federal law. As discussed above, Iowa Code § 715A.2(2)(a)(4) regulates the same conduct as a series of federal statutes, including 18 U.S.C. § 1546(a), containing identical language. The Iowa statute therefore dilutes federal control over the regulated conduct by allowing the state to bring charges where the federal government would not.

As in *Arizona* and *Puente Arizona,* the state penalties here are inconsistent with federal penalties for the same conduct. *Compare* 18 U.S.C. § 1546(a)&(b) (providing up to 10, 15, 20, or 25 years depending on if it is a second or third offense, or if it involves drug trafficking or terrorism) *with* Iowa Code § 715A.2(2)(a)(4) and § 902.9(1)(e) (providing "no more than five years…").

Also, the purely criminal penalties to which an immigrant is exposed under the Iowa statutes differ from the suite of penalties for violating federal document fraud statutes. *See, e.g.,* 18 U.S.C. 1546 (providing criminal sanctions); 8 U.S.C. § 1324c (providing civil fines); 8 U.S.C. §§ 1182 & 1227 (providing immigration consequences). Just as the state laws at issue in *Arizona* and the subsequent federal cases, Iowa Code § 715A.2(2)(a)(4) conflicts with federal law by diluting the discretion of the federal executive and creates inconsistent penalties by allowing State prosecution for federally prohibited conduct. It is thus conflict preempted on its face.

2. Iowa Code § 715A.2(2)(a)(4) and § 715A.8 are conflict preempted as applied to Ms. Martinez.

Iowa Code § 715A.2(2)(a)(4) and § 715A.8 are being applied here to alleged use of false identification documents to work as an unauthorized immigrant which, as discussed above, is prohibited under various federal immigration statutes. This raises at least four conflicts with federal objectives. First, the state has charged Ms. Martinez; the federal government has not. Second, the state's prosecution under § 715A.2(2)(a)(4) and § 715A.8 exposes Ms. Martinez to penalties that are different than the penalties under IRCA. Third, the state's use of I-9 documents in Ms. Martinez's prosecution is in express conflict with 8 U.S.C. 1324a(d)(2)(F), which limits use of these documents to enforcement of specific federal statutes. *See* 1324a(d)(2)(F).

Finally, the State's conduct here conflicts with federal foreign policy goals and interagency coordination between DHS and DOL. Accordingly, the State's application of § 715A.2(2)(a)(4) and § 715A.8 to Ms. Martinez are conflict preempted.

IV. THE STATE'S ARGUMENTS AGAINST PREEMPTION ARE MISTAKEN.

In the lower court, the State raised three erroneous arguments that are inconsistent with preemption doctrine.

First, the State argued that it was not regulating immigration, but rather was exercising a historic police power of the state and the court should presume against preemption. (Br. in Resistance to Mot. to Dismiss at 6-7; Am. App. 45-46.) In *U.S. v. Locke*, the Supreme Court examined the "'assumption' of non pre-emption" established in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and concluded it is "not triggered when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke*, 529 U.S. 89, 108 (2000); *see also South Carolina* 720 F.3d at 532 (distinguishing the state's claimed traditional power of regulating fraud from regulating fraud related to immigration documents).

Iowa Code § 715A.2(2)(a)(4) on its face, and both § 715A.2(2)(a)(4) and § 715A.8 as applied in this case, all regulate unauthorized immigrants possessing, making or using false identification for work. Since the passage of IRCA in 1986, this field is indisputably an area of "significant federal presence." Thus, no assumption against preemption applies here. Even if it did, that assumption must give way to a "clear and manifest purpose of Congress," evidenced by either "scheme of federal regulation" that is "pervasive" or by a "federal interest" that is "dominant[.]" *Rice*, 331 U.S. at 230. Both elements are present here.

Second, the state argued that the preemption challenge here was a mere "alien immunity defense." (*See* Br. In Resistance to Mot. to Dismiss at 2-7; Am. App. 41-46.) ("[D]efendant essentially claims as an alien she is immune[] from prosecution.") This argument misunderstands both Iowa and federal law. Preempting § 715A.2(2)(a)(4), which is a penalty enhancement clause, does not limit the breadth of conduct prohibited by § 715A.2(1). The acts constituting forgery under Iowa law are unchanged by preemption. Preempting subsection (2)(a)(4) merely excises the one *impermissible* penalty enhancement that currently applies *only to immigrants*, and leaves untouched the other four penalty enhancements set forth at subsections (2)(a)-(b). Similarly, preempting § 715A.8 as applied here does not limit the breadth of conduct prohibited on the

face of § 715A.8(1)-(2); the acts constituting identity theft under Iowa law are unchanged by preemption. Instead, preempting § 715A.8 as applied here merely precludes the use of § 715A.8 to regulate unauthorized immigrants using false identification to work, by treating immigrant employment as "credit", "property", or "services" as those terms are used in § 715A.8(2). Any immigrant who fraudulently uses identification information of another person with the intent to obtain credit, property, or services (or other benefits) not including employment would still be subject to prosecution. The State's argument also misstates federal law. Preempting the *state* here does not prevent the *federal government* from prosecuting or otherwise penalizing noncitizens for possessing, making, or using false identification to work in Iowa.

Finally, the state argued that the prosecution was not preempted because "[f]ederal immigration law expressly contemplates that the States will criminalize forgery of immigration documents." (*See Id.* at 7-12; Am. App. 46-51.) The State acknowledged that it could not find any authority to support this assertion. (Tr. of Hr'g on Mot. to Dismiss 22). Although there is no authority for the state's argument, there is substantial authority *against* it, because many state criminal laws similar to those listed in 8 U.S.C. 1101(a)(43) have been held preempted by federal courts. *See South Carolina*, 720 F.3d at 530-31 (state harboring law similar to 8 U.S.C. 1324(a)(1)(A) & (2) is both conflict and field

preempted); *G.L.A.H.R.* v. *Governor of Georgia*, 691 F.3d 1250, 1264-65 (11th Cir. 2012) (same); *U.S. v. Alabama*, 691 F.3d 1269, 1285-88 (11th Cir 2012) (same); *see also Lozano v. City of Hazleton*, 724 F. 3d 297, 314-21 (3rd Cir. 2013) (city ordinance similar to 8 U.S.C. 1324(a)(1)(A)&(2) is both field preempted and conflict preempted); *Puente Arizona*, 76 F.Supp.3d at 856-58 (state statute similar to 8 U.S.C. 1546 is both field and conflict preempted); *South Carolina,* 720 F.3d at 532-33 (same).

V. THE TRIAL INFORMATION FAILS TO STATE PARTICULARS THAT CONSTITUTE AN IDENTITY THEFT CHARGE.

The State did not state particulars in its trial information and minutes of evidence that constituted the charge of identity theft in violation of Iowa Code § 715A.8. Thus it is possible to dismiss the trial information without reaching the question of whether the identity theft statute as applied is preempted. *See* Iowa R. Crim. P. 2.11(6)(a). The State did not allege facts to demonstrate that Ms. Martinez used or attempted to use the identity information of "another person" as § 715A.8(2) requires. *See* Iowa Code § 715A.8(2). The only factual allegation proffered by the State possibly relevant to this element appears in the narrative of DOT investigator Matt Dingbaum. Nothing in the narrative alleges that "Diana Castaneda," the alleged victim is an actual person, as

opposed to a fictitious, non-existent person. (*See* Mins. of Evidence: Attached Narrative; Am. App. 9-10.)

CONCLUSION

Because the State's prosecution of Ms. Martinez is preempted by federal law, this Court should reverse the District Court's denial of her Motion to Dismiss.

Respectfully submitted,

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