IN THE SUPREME COURT OF IOWA
Supreme Court No. 15-0671

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARTHA ARACELY MARTINEZ,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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Ulysses S. Grant, *Inaugural Address*, Mar. 4, 1869

ROUTING STATEMENT

The State agrees this matter is suitable for retention by the Supreme Court. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Defendant is charged with forgery and identity theft, both class "D" felonies. *See* Iowa Code §§ 715A.2(1), 715A.2(2)(a)(4), 715A.8 (2013). The defendant moved unsuccessfully to dismiss the charges on federal preemption grounds. This discretionary review followed.

The Honorable Stuart P. Werling presided.

Course of Proceedings

The State accepts the defendant's statement the procedural history of the case. Iowa R. App. P. 6.903(3).

Facts

In May of 2003, a woman claiming to be Diana Castenada applied for an Iowa ID at a driver's license station in Iowa City. Mins. Evid. (Narr.); App. 9. She provided a California birth certificate in that name, listed a birthdate of xx/yy/83 and a gave a Social Security Number of xxx-yy-9695. *Id.*; App. 9. Five and a half years later, she did the same using the same name. *Id.*; App. 9.

On March 6, 2014, the defendant applied for a driver's license at the Iowa City driver's license station. *Id.*; App. 9. This time, she gave the name "Martha Aracely Martinez Martinez," provided a birthdate of xx/yy/86, and listed a Social Security Number of xxx-yy-8887. *Id.*; App. 9. The defendant's photograph appears to match that of Diana Castenada from 2003 and 2008. *Id.*; App. 9.

The Department of Transportation investigated. It learned that several vehicles had been registered to Castenada. *Id.*; App. 9. It also learned that wages in excess of $1,000 were being earned under that name and Social Security Number at Packer Sanitation Services, Incorporated (PSSI). *Id.*; App. 9. That company provided copies of Castenada's I-9, Iowa ID, Social Security card, and payroll history. *Id.*; App. 9. The DOT also learned from Immigration and Customs Enforcement that Martinez has a valid employment authorization card.

Records for Diana Castenada, with her birthdate, appear in Arkansas, California, and Kentucky. *Id.*; App. 9. None of the photographs in those records match Martinez or Castenada. *Id.*; App. 9.

The DOT investigator spoke to the defendant. She told him that she was born in Guadalupe, Mexico, came to the United States before she turn sixteen years old, has three children, and is pregnant with her fourth. *Id.*; App. 9. She said she borrowed a birth certificate in Castenada's name and does not know that person. *Id.*; App. 9. She said she used Castenada's name and information until she obtained valid work authorization. *Id.*; App. 9. She acknowledged working for PSSI under Castenada's identity. *Id.*; App. 9.

The District Court observed that Martinez was brought to the United States when she was eleven years old. Order (filed Mar. 23, 2015); App. 62. She has resided here continuously ever since. *Id.*; App. 62. In 2013, she applied for work authorization through the Deferred Action for Childhood Arrivals program (DACA). *Id.*; App. 62.

This prosecution followed. Trial Info.; App. 2-3. While the minutes of testimony reference "Castenada's I-9" among other documents, the prosecutor stated "the basis of the prosecution" was not the I-9 but "the forgery by uttering a false Iowa non-operator identification card and by uttering a false Social Security card." Brief in Resistance to Mot. Dismiss, p. 12; App. 51; *see* Mins. Test.

The district court denied the motion to dismiss, noting among other things, the defendant's concession that if a naturalized citizen used another person's identity to obtain employment, they would be subject to the same prosecution as here. Order p. 3; App. 64. "[I]dentity theft and forgery are state crimes independent of the Defendant's immigration status." *Id.*; App. 64. Taking no action to enforce or attack the Immigration Reform and Control Act (IRCA), the State's interest was in "protection of citizens from identity theft and to protect employers from persons who apply for employment under false names" by forging the "signatures of persons whose identities they have stolen." *Id.*; App. 64.

ARGUMENT

I. Federal Law Does Not Preempt Theft Or Forgery.

Preservation of Error and Standard of Review

As to the Defendant's claims, the State accepts her statement of error preservation and the nature of review. Iowa R. App. P. 6.903(3).

Merits

This prosecution relates to a forged Iowa non-operator's identification in the name of another person. Iowa statutes protecting people from this kind of crime remain valid even though the U.S. Congress has enacted significant legislation governing illegal

immigrants who seek work in the United States. Iowa Code sections 715A.2(2)(*a*)(4) and 715A.8(2) are not preempted by federal law.

A. General Principles of Preemption.

The preemption doctrine has been described as follows:

> The preemption doctrine stems from the Supremacy Clause. [U.S. Const. Art. VI, cl. 2.] It is a "fundamental principle of the Constitution [ ] that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). There are "three classes of preemption": express preemption, field preemption and conflict preemption. *United States v. Alabama*, 691 F.3d 1269, 1281 (11th Cir.2012). "The first, express preemption, arises when the text of a federal statute explicitly manifests Congress's intent to displace state law." *Id.*; *see also Arizona* [*v. United States*], 132 S.Ct. 2492, 2500–01 [2012]. Under the second, field preemption, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona*, 132 S.Ct. at 2501. Field preemption 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.' " *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).
>
> Third, "even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby*, 530 U.S. at 372. Conflict preemption, in turn, has two forms: impossibility and obstacle preemption. *Id.* Courts find impossibility preemption "where it is impossible for a private party to comply with both state and federal law." *Id.* Courts will find obstacle preemption where the challenged state law "stands 'as an obstacle to the accomplishment and

> execution of the full purposes and objectives of Congress.'" *Arizona*, 132 S.Ct. at 2501 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Finally, any direct regulation of immigration—"which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain"—is constitutionally proscribed because the "[p]ower to regulate immigration is unquestionably exclusive federal power." *DeCanas v. Bica*, 424 U.S. 351, 354–55 (1976).
>
> Analysis of a preemption claim "must be guided by two cornerstones of [the Supreme Court's] jurisprudence. First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.' Second, '[i]n all pre-emption cases, and particularly in those in which Congress has legislated ... in a field which the states have traditionally occupied, ... we 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.' " *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotation marks and citations omitted) (alterations in original). *But see United States v. Locke*, 529 U.S. 89, 108 (2000) ("[A]n assumption of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." (internal quotation marks omitted)).

Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1022-23 (9th Cir. 2013).

"Although the power to regulate immigration is unquestionably an exclusive federal power," the United States Supreme Court "has never held that every state enactment which in any deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised." *Staff Mgmt. v.*

Jimenez, 839 N.W.2d 640, 654 (Iowa 2013) (quoting *De Canas*, 424 U.S. at 354-55 (superseded by statute on other grounds, Immigration Reform Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, as recognized by *Chamber of Comm of U.S. v. Whiting*, 131 S.Ct. 1968, 1975 (2011)). The fact that "aliens are the subject of a state statute," if in fact they are, "does not render it a regulation of immigration, which is essentially a determination of who or who should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas*, 424 U.S. at 356.

There is a broad reluctance to find preemption in areas of "historic police powers." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). "Under our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotations and citations omitted); *see also Bond v. United States*, 134 S.Ct. 2077, 2089 (2014) ("clearest example of traditional state authority is the punishment of local criminal activity"). As to this power, courts will not presume that Congress intended a "complete ouster." *DeCanas*, 424 U.S. at 361; *see Bond*, 134 S.Ct. at 2089 (Court "will not be quick to assume that Congress has meant to effect a significant change in

the sensitive relation between federal and state criminal jurisdiction"). Instead, the court must see a "clear and manifest purpose of Congress" that would justify such an ouster. *DeCanas*, 424 U.S at 361.

B. Relevant Federal Immigration Law

Congress enjoys "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S.Ct. at 2498; *see* U.S. Const. Art. I, § 8, cl. 4 ("Congress shall have Power… To establish an uniform Rule of Naturalization"). "Federal governance of immigration and alien status is extensive and complex." *Arizona*, 132 S.Ct. at 2499. Unlawful entry (or reentry) into the United States is a federal offense. *Id.*; *see* 8 U.S.C. §§ 1325, 1326. Aliens present without permission are subject to removal, which is a civil—not criminal—matter. *Arizona*, 132 S.Ct. at 2499. Removal, incidentally, is not a foregone conclusion for illegally present aliens. *Id.* Congress has conferred on federal officials some discretion in the enforcement of immigration law. 8 U.S.C. § 1227.

For one thing, federal officials may choose not to pursue removal in the first place. *Id.* Or, if they do, the alien may seek asylum, cancellation of removal, or a voluntary departure. *Id.*; *see*

8 U.S.C. §§ 1158, 1229b, 1229c. For another, Congress allows the Attorney General to adjust the immigration status of some unlawfully present aliens who meet a number of conditions. 8 U.S.C. § 1255. Certain equities may weigh in favor of not removing an alien, such as "whether the alien has children born in the United States [and] long ties to the community." *Arizona*, 132 S.Ct. at 2499.

In enacting the Immigration Reform and Control Act (IRCA), Congress altered the law to combat illegal employment of aliens. *Id.* at 2504. IRCA made it unlawful to knowingly hire an illegal immigrant. 8 U.S.C. § 1324a(a)(1)(A); *see Whiting*, 131 S.Ct. at 1974. It also required employers to attest under penalty of perjury on Department of Homeland Security Form I-9 that the worker is not an unauthorized alien. *Whiting*, 131 S.Ct. at 1974; 8 U.S.C. § 1324a(b)(1)(A)-(D).

While the law imposes criminal and civil penalties on employers for hiring illegal immigrants, it does not impose criminal punishment on the employees for seeking the work. *Id.*; 8 U.S.C. §§ 1324a; 8 C.F.R. 274a.10. Instead, unauthorized employment may prevent the alien from having his or her status adjusted to lawful permanent resident or may lead to removal. 8 U.S.C. §§ 1255(c)(2), (8),

1227(a)(1)(C)(i); 8 C.F.R. § 214.1(e). There are a variety of penalties for forging documents necessary for the immigration chapter. 8 U.S.C. § 1324c. Additionally, there is a five-year prison sentence, fine, or both in the offing if an alien uses "an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor" to satisfy the employer's obligations to verify the employee's lawful status. 18 U.S.C. § 1546(b)[1]. There is a 10-year sentence for one who "knowingly forges, counterfeits, alters, or falsely makes…[a] document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States." This second criminal penalty appears untethered to the employment relationship.

Congress has also concluded 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 and sections 1001, 1028, 1546, and 1621 of Title 18.

8 U.S.C. § 1324a(b)(5); *see also id.* § 1324a(d)(2)(F)-(G). For sake of reference, section 1001 relates to false writings, section 1028 to fraud

[1] There are far more serious penalties at play if the alien forges a document evidencing lawful presence or employment for purposes of drug trafficking or terrorism. 18 U.S.C. § 1546(a).

in identification documents, section 1546 to fraud in documents used to show authorized stay, and section 1621 to perjury. 18 U.S.C. §§ 1001, 1028, 1546, 1621.

C. Elements of State Offenses

1. Forgery.

As charged here, forgery is a Class "D" offense when, "with intent to defraud or injure," a person "[m]akes, completes, executes, authenticates, issues, or transfers a writing so that it purports to be the act of another who did not authorize the act…[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(2)(a)(4) (2013). Put another way, the elements are that the defendant:

> (1) made, completed, executed, or transferred a writing purporting to be the act of another who did not authorize the act…
> (2) with the specific intent to defraud or injure another person or financial institution or knew the defendant's act would facilitate a fraud or financial injury, and
> (3) the document was one prescribed by statute, rule, or regulation as evidence of authorized stay or employment in the United States.

See State v. Romos, 2010 WL 2598630, *3 (Iowa Ct. App. June 30, 2010) (citing *State v. Calhoun*, 559 N.W.2d 4, 6 (Iowa 1997)).

2. Identity Theft.

As charged here, identity theft occurs where a "person fraudulently uses or attempts to fraudulently use identification information of another person, with the intent to obtain credit, property, services, or other benefit." Iowa Code § 715A.8(2). A Class "D" felony occurs when the loss exceeds $1,000. *Id.* § 715A.8(3). Accordingly, the elements are that the defendant,

> (1) fraudulently used or attempted to fraudulently use,
> (2) another person's identification information, and
> (3) the defendant intended to obtain credit, property, services, or other benefit.

Iowa Model Jury Instr. No. 1500.9. "Identification information" includes a "nonoperator's identification card number." *Id.* 1500.10.

Identity theft often occurs in the traditional sense where a person uses another's personal information to steal from that person. But, identity theft also occurs when a person uses another person's identity to cause less direct injury. One such example occurs by assuming another's persona to avoid an arrest warrant. *State v. Armstrong*, 787 N.W.2d 472, 474 (Iowa Ct. App. 2010).

D. Preemption Analysis

Congress has preempted State legislation on the employment illegal aliens. But, it has not preempted state crimes of forgery or identity theft. This remains true for legislation making it a crime to utter a false document in order to get an identification card or later use it to receive wages in another person's name.

1. Defendant's Facial Preemption Challenge to Forgery.

Martinez makes a facial challenge to Iowa's forgery statute, contending federal law preempts section 715A.2(2)(*a*)(4). Specifically, she relies on theories of field and "obstacle" preemption.

"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2449 (2015). It is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist" under which the statute would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). It is a "heavy burden." *Id.*

a. Field Preemption

"[F]ield preemption can be inferred either where there is a regulatory framework 'so pervasive…that Congress left no room for the State to supplement it" or where the 'federal interest [is] so

dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013) (quoting *Arizona*, 132 S.Ct. at 2501). More is required than that the state legislation "deals with aliens." *Staff Mgmt.*, 839 N.W.2d at 652. This is particularly true "in a field which the states have traditionally occupied." *Whiting*, 732 F.3d at 1023 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

Traditionally, criminal law is for the states. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Prevention of forgery and identity theft rest within the scope of the state's police power. Forgery in Iowa follows the Model Penal Code, parting from that formulation only in describing more specifically the kinds of writings protected which in turn set the grade of offense. *Compare* Iowa Code § 715A.2 *with* Model Penal Code § 224.1. Identity theft has emerged with the "Information Age." *State v. Meza*, 165 P.3d 298, 302 (Kan. Ct. App. 2007). It is, however, sufficiently pernicious that not only has the Legislature enacted section 715A.8, but other state bodies—including the Iowa Supreme Court—have acted to protect personal

information. *See* Iowa R. App. P. 16.601 *et seq.* (requiring redaction of personal information from publicly-filed documents).

The State can agree that authority on the subject of this appeal is sparse, despite popular attention to illegal immigration. On the issue here, the limited number of cases suggests Congress did not preempt State statutes on the crime of forgery or theft.

There is one case that suggests federal law preempts state law prohibiting forgery of a document that evidences authorized stay or employment. *United States v. South Carolina* considered several pieces of legislation related to illegal aliens. 720 F.3d 518, 522 (4th Cir. 2014). Section 6(B)(2) made it,

> unlawful for a person to display, cause or permit to be displayed, or have in the person's possession a false, fictitious, fraudulent, or counterfeit picture identification for the purpose of offering proof of the person's lawful presence in the United States.

Act 69, 2011 S.C. Acts (S.B. 20). The Court noted that 8 U.S.C. section 1324c(a)(1) and (2) as well as 18 U.S.C. section 1546 made it a federal crime to counterfeit federal immigration documents or use such documents to satisfy immigration requirements. *South Carolina*, 720 F.3d at 532. The Court determined that, "when the fraud at issue involves federal immigration documents, the

presumption against preemption does not apply." *Id.* And, as such, the court concluded that federal law preempted the South Carolina statute.

South Carolina is distinguishable. The South Carolina statute criminalized a forgery done "for the purpose of offering proof of the person's lawful presence in the United States." Act 69, 2011 S.C. Acts (S.B. 20) § 6(B)(2). Iowa's statute has a more general, traditional focus. The document at issue does include those required "as evidence of authorized stay or employment in the United States." But, unlike the South Carolina statute, the intent element is "intent to defraud or injure anyone." Iowa Code § 715A.2(1).

The difference between "intent to defraud…anyone" and "for the purpose of offering proof of the person's lawful presence in the United States" is like the difference between "lightning" and "lightning-bug." They share a common root, but the difference is stark.

And, for purposes of a facial challenge, other differences may prove helpful. The Iowa ID is a document with numerous uses. Like a driver's license, it may be used to gain admittance to a bar, to buy

beer, or even to go see an "R" rated movie. And, it may be used to show authorized presence in the U.S. or permission to work here.

Both citizens and non-citizens alike may use an Iowa ID for these and other purposes. If a citizen forges an Iowa ID to avoid a warrant, to get into a 21-only bar, or to buy beer, he violates Iowa Code section 715A.2(2)(*a*)(4). Given the breadth of section 715A.2(2)(*a*)(4), a facial challenge cannot succeed.

This Code section—despite including documents that can be used for immigration purposes—is a law of general applicability. Two state-court decisions suggest a statute like Iowa's is not preempted. In the first, the Missouri Court of Appeals considered the case of a man who used a false Social Security Number on an employment application. *State v. Diaz-Rey*, 397 S.W.3d 5, 8 (Mo. Ct. App. 2013). Like Iowa, the Missouri statute has a broad intent element: "with the purpose to defraud," although it does not specify the kinds of documents at issue as section 715A.2(2)(*a*)(4) does. Mo. Ann. Stat. § 570.090 (West 2017). Still, the court reasoned that federal legislation did not preempt section 570.090 because it "uniformly applies to all person as members of the general public, and makes no distinction between aliens and non-aliens." *Diaz-Rey*, 397 S.W.3d at

9. "Such laws," the court continued, "are not preempted simply because a class of persons subject to federal regulation may be affected." *Id.* Inasmuch as the statute did not regulate employment of unauthorized aliens, the court concluded it was not preempted. *Id.*

In *Diaz-Rey*, the Missouri Court of Appeals observed that section 570.090 criminalizes use of inauthentic writings with knowledge and intent to defraud. 397 S.W.3d at 10. This was not activity that "Congress has decided not to criminalize." *Id.* As such, the state law did not conflict with *Arizona* or "Congress's purpose in enacting IRCA." *Id.*

The Minnesota Court of Appeals considered the matter of a woman who used a false Minnesota identification card on an I-9 application, among other things. *State v. Reynua*, 807 N.W.2d 473, 475 (Minn. Ct. App. 2011). Notwithstanding that 8 U.S.C. section 1324a(b)(5) prohibits use of "any information" used on an I-9 for any non-federal purpose, the Court wrote, "we cannot read this provision so broadly as to preempt the state from enforcing its laws relating to its own identification documents." *Id.* at 480-81. The court determined that prosecution for simple forgery was an exercise of "historic police powers of the state" and therefore presumably not

superseded by federal legislation. *Id.* (citing *Altria Group*, 129 S.Ct. at 543).

> It would be a significant limitation on state powers to preempt prosecution of state laws prohibiting falsification of state-issued identification cards, let alone prohibit all use of such cards merely because they also support the federal employment verification application.

Id.

It is inescapable that section 715A.2(*a*)(4) protects documents that might also be embraced 18 U.S.C. section 1546(a) or (b). And, it seems true that the Iowa Legislature intended to address forged documents and "illegal immigrants." The preamble to 96 Iowa Acts ch. 1181 makes that clear, to say nothing of the civil penalties and requirements for employers contained in section 715A.2A. But, the General Assembly drafted the Act sufficiently broadly to protect against U.S. citizens who would forge identification documents in order pass a background check or credit history.

Therefore, a field preemption facial challenge to section 715A.2(2)(*a*)(4) must fail. A variety of social ills follow when people—irrespective of their citizenship—use false Iowa IDs obtained with false documents with a general purpose to injure or defraud. The state legislature may attempt to redress those problems, even if

Congress wishes to address a more targeted matter of forged employment documents.

b. Conflict Preemption

The Fourth Circuit concluded that a law prohibiting use of false "federal immigration documents" was "conflict preempted." *South Carolina*, 720 F.3d at 533. State prosecution would interfere with the discretion federal officials enjoy. *Id.*

But, there is a better view. *Diaz-Rey* recognized that preemption "will not be lightly presumed where, as here, it is alleged that a conflict exists between a federal law and an area of law normally reserved to the States—in this case, a criminal forgery statute." 397 S.W.3d at 10 (quotation marks omitted).

Reynua recognized no conflict preemption where the defendant was being prosecuted for forgery apart from "perjury on the I-9 form or…the false identification card in support of that form." 807 N.W.2d at 481.

Finally, there is some reason to think Congress condones state prosecutions for forgery of state-issued documents. An unauthorized alien may be subject to removal if convicted of an "aggravated felony." 8 U.S.C. §§ 1101(a)(43), 1182(a), 1227(a). An "aggravated felony"

means an offense such as a section 1546(a) offense related to document fraud or an "offense relating to … forgery" whether "in violation of Federal or State law." *Id.* § 1101(a)(43)(P), (R). Similarly, it is also a federal crime to use the identity of another if doing so "constitutes a violation of Federal law… or that constitutes a felony under any applicable State or local law." 18 U.S.C. § 1028(a)(7).

That is, Congress anticipates the States might criminalize forgery and identity theft. And, if the states do, the conduct can have federal consequences as well. Recognizing the significance of this conduct in both state and federal systems suggests Congress did not intend to supplant state prosecution of that conduct. Put another way, Congress contemplates an unauthorized alien may be subject to prosecution or removal if she uses an identity for an activity which is a felony under State law or forges a check, a title document, or a non-operator's identification card.

A Iowa driver's license or identification card is a state-issued document, a significance apart from any uses one may find for the document. Section 715A.2(2)(*a*)(4) reaches non-citizens and citizens alike for conduct irrespective of employment. As such, it has a vitality independent of Congressional legislation. The state's sovereignty in

this instance is important; indeed, it is part of our federal system. To disagree would mean that Congress has shouldered the burden of prosecuting not only the unauthorized alien who forges a driver's license. It would have taken on the task of addressing those who use fake IDs such as the high-school student trying to get into an "R" rated movie, the college student trying to buy beer, the suspect trying to avoid a warrant, the convicted sex offender trying to get a job in a school, and the parent trying to avoid a wage garnishment. These are matters for the state. The Court should find that in this facial challenge, federal law does not preempt Iowa's forgery statute.

2. Defendant's As-Applied Preemption Challenge to Identity Theft

Martinez recognizes that Iowa Code section 715A.8 is not "specifically directed at non-citizens." Appellant's Pr. Br. pp. 59-60. As such, she raises an "as-applied" challenge to Iowa Code section 715A.8. Her focus, as in the preceding challenge, is on field and conflict preemption. Iowa's identity theft statute withstands her preemption challenge.

a. Field Preemption

The strongest case in favor of Martinez' position is *Pueute Arizona v. Arpaio*, a federal district court decision now on appeal. 76 F. Supp. 3d 833 (D. Ct. Ariz. 2015).[2] There, the district court found federal legislation such as 8 U.S.C. 1324 and 18 U.S.C. 1546 preempted Arizona's identity theft statute. The Arizona statute made it a crime to take another person's identity "with the intent to obtain employment." *Id*. at 844-45 (quoting A.R.S. §§ 13-2008(a) and 13-2009). The district court found the legislation was passed with the "purpose and intent" of regulating unauthorized alien employment. *Id*. at 855.

The district court acknowledged that the United States Supreme Court in *Puente* had declined to find Congress occupied the field of unauthorized alien employment, but did find conflict preemption. *Id.* But, the district court concluded Congress had occupied the narrower field of "unauthorized-alien fraud in obtaining employment." *Id*. at 857. In short, the district court believed that Congress occupied the

[2] The Ninth Circuit recently reversed *Pueute* finding Arizona's identify theft laws were "not factually preempted because they have obvious constitutional applications." *Pueute Arizona v. Arpaio*, No. 15-15211, 15-15213, 15-15215, _ F.3d__, 2016 WL 1730588, *3-4 (Ninth Cir. May 2, 2016).

field in imposing "every kind of penalty that can arise from an unauthorized alien's use of false documents to secure employment—criminal, civil, and immigration." *Id.*

A different conclusion should obtain here. For one thing, section 715A.8 does not criminalize identity theft for purposes of securing employment. For another, other cases suggest the *Arpaio* decision may either be incorrect or at least limited to statutes directed at the procurement of employment.

The Georgia Supreme Court considered an identity theft statute that—like section 715A.8—was not tied to employment. *Hernandez v. State*, 639 S.E.2d 473, 474 (Ga. 2007). In *Hernandez*, the defendant used another person's Social Security Number to obtain a license and, later, employment with a poultry processing plant. *Id.* Unfortunately, Hernandez did not pay his income taxes and the person whose identity he used was saddled with a $12,000 tax debt. *Id.* at 475. The court found no field or conflict preemption. *Id.* Noting the presumption against preemption, the court believed the "active exercise of criminal jurisdiction by the state" should prevail. *Id.*

Kansas has had at least seven cases turning away preemption arguments against its identity theft statute. *State v. Ochoa-Lara*, 362 P.3d 606, 612 (Kan. Ct. App. 2015); *State v. Garcia*, No. 112,502, 2016 WL 368054, *4 (Kan. Ct. App. Jan. 29, 2016); *State v. Morales*, No. 111,904, 2016 WL 97848, *4-5 (Kan. Ct. App. Jan. 8, 2016); *State v. Saldana*, No. 111,429, 2015 WL 4486779, *3 (Kan. Ct. App. July 17, 2015); *State v. Dorantes*, No. 111,224, 2015 WL 4366452, *2–4 (Kan. Ct. App. June 26, 2015); *State v. Lopez–Navarrete*, No. 111,190, 2014 WL 7566851, *2–4 (Kan. Ct. App. Dec. 19, 2014); *State v. Flores–Sanchez*, No. 110,457, 2014 WL 7565673, *3–4 (Kan. App. Ct. Dec. 19, 2014).

Like Iowa, Kansas's statute is general, rather than tied to employment procurement. *See* K.S.A. 2012 Supp. 21-6107(a). "The purpose of our statute 'is criminal theft of another person's personal identifying information.'...[It] has nothing to do with immigration or creating criminal penalties for illegal aliens working in the state." *Garcia*, No. 112,502, 2016 WL 368054, at *4 (quoting *Saldana*, No. 111,429, 2015 WL 4486779, at *3). "[T]he possible illegal uses of another's Social Security number are myriad," the Court noted. *Id.* at *4 (quoting *Ochoa-Lara*, 362 P.3d 606, 612 (Kan. Ct. App. 2015)).

"There is nothing in the IRCA that suggests that Congress intended the comprehensive preemption of the police powers of the Sate to prosecute all such instances of identity theft." *Id.*

Furthermore, *Garcia* distinguished *Arpaio* and found *South Carolina* unpersuasive. No. 112,502, 2016 WL 368054 at *4. The purpose of the Kansas statute was criminalizing theft of another's identity—rather than unauthorized employment—and, in short, it was not an immigration statute. *Id.*

This prosecution has a connection with employment, to be sure, but it is tangential. The wages establish the grade of punishment. Otherwise, the crime is untethered to Martinez's immigration status. Neither is it tethered to the I-9 application.

b. Conflict Preemption

As above, *Arpaio* offers the best support for Martinez' position that conflict preemption bars a prosecution for identity theft. At the risk of oversimplification, the Arizona District Court found conflict preemption where it believed Arizona sought to legislatively deter alien employment by use of fraudulent documents. *Arpaio*, 76 F.Supp.3d at 857-58. And, as above, the State notes that section 715A.8 is not directed at the attainment of employment. It is not an

element of the offense. Even if the wages show the level of injury, that is apart from the initial act of securing the employment. Finally, as above, federal criminal legislation suggests Congress contemplated the States would make criminal the improper use of "a means of identification." 18 U.S.C. § 1028(a)(7). That contemplation buttresses the presumption against federal preemption.

3. Conclusion

It may be common for unauthorized aliens to forge documents and steal other people's identities. The reasons for committing these crimes may range from the laudable to the banal. But motive is largely irrelevant. "Regulation of criminal law is primarily the business of the States[.]" *Rose v. Mitchell*, 443 U.S. 545, 585 (1979). When a person forges a state-issued driver's license or identification card, the crime is a state crime. The card itself may be used for immigration and a host of other purposes. Congress did not likely intend to consume the entire buffet of crimes that occur when people acquire and use fake, state-issued IDs.

Likewise, when a person steals another's identity, the crime is a state one, notwithstanding that some or many illegal immigrants do it to get work and receive wages. The Court should find that Congress

did not intend to preempt state law criminalizing forgery and identify theft.

E. Preemptive Effect of Executive Policy

Martinez and *amici* argue that the exercise of prosecutorial discretion through the President's "Deferred Action for Childhood Arrivals" preempts Iowa Code sections 715A.2(2)(*a*)(4) and 715A.8. Martinez states she is a beneficiary of the program, which led to her prior identity theft and forgery being found; and if she is convicted, she will be subject to removal.

Amici Dream Iowa et al. raise complementary arguments. They argue or imply that 1) the State's prosecution is an "end-run run around" the President's policy; 2) that many illegal immigrants engage in the practice Martinez followed; 3) that published guidance to employers reflect that changes of name, birthdate, and Social Security Number are to be expected under DACA; 4) the practice is harmless or this prosecution has not shown anyone was harmed; 5) that the State has prosecuted several people including a high-achieving young woman; 6) that Iowa needs productive young-people to reinvigorate a depleted rural interior; and 7) the prosecution has or

will chill participation in the DACA program. The State will attempt to address each.

As to the first and last of these positions, whether the State's prosecution has or will impair the DACA program is not determinative. It is questionable that the President has the constitutional authority to preempt a state law through the exercise of prosecutorial discretion. *See Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 329 (1994) ("We need not here consider the scope of the President's power to preempt state law pursuant to authority delegated by a statute or a ratified treaty"). Executive branch policy without the force of law cannot render a state law unconstitutional. *Id.* The Constitution reserves the power of preemption to Congress. U.S. Const. Art. VI, cl. 2.

As to the second and fifth arguments—that many people have committed identify theft and forgery, including a successful, promising young woman—the Court does not consider facts outside the record. *Rasmussen v. Yentes*, 522 N.W.2d 844, 846 (Iowa 1994); *see State v. Washington*, 832 N.W.2d 650, 654 (Iowa 2013) (declining to take judicial notice of criminal files of other cases). The State has no reason to disagree that identity theft and forgery may be

common among illegal aliens. Neither can the State dispute the poignancy of *amici*'s anecdotes. They are beyond the record and there is no basis for accepting or denying them.

The third argument—that employer guidance implying recognition of prior forgery and identity theft—has insufficient force. It is true, of course, that employers have been advised to prepare new I-9 forms when the employee's name, date of birth, or Social Security Number have changed. https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/DACA-Fact-Sheet-I-9_Guidance-for-employers_nov20_2012.pdf (last accessed Apr. 14, 2016). Inasmuch as these are usually immutable characteristics (except, perhaps, a name change), one can suspect that the earlier information was not true. But, like a "'FAQ' section of a website," the guidance should not be regarded as a "source of 'federal law'" or "an interpretation announced there to be subject to deference by a court." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1073 (9th Cir. 2014) (Christen, J., concurring). And, even if prior information submitted in an I-9 were not true, if unauthorized

employment attempts may be shielded by 8 U.S.C. 1324, independent acts of identity theft and forgery are not.

The State will treat the question of whether Martinez harmed any specific individual in the following section. But, whether—as argument six implies—young illegal immigrants are a boon to Iowa is an argument better made to Congress or the Iowa Legislature.

Sympathy may explain the President's act of discretion. But, the value of unauthorized aliens' contributions to the state or the hard-heartedness of the law has little bearing on Congressional preemption. The local prosecutor must enforce the law. Iowa Code § 331.756. If that seems too harsh, then there is no better "method to secure the repeal of bad or obnoxious law so effective as their stringent execution." Ulysses S. Grant, *Inaugural Address*, Mar. 4, 1869. The better place to address the policy concerns raised here is in Congress or the Iowa Legislature.

F. American Civil Liberties Union's Challenge to Charging Document.

The American Civil Liberties Union and, to a lesser extent, *amici* for DREAM IOWA *et al.* argue there is insufficient evidence of identity theft. *See* Iowa Code § 715A.8 (use of the identity of "another person"). They argue there is no proof that Diana Castaneda is a real

person[3]. Brief of *Amicus Curiae* ACLU pp. 39-40 ("The State did not allege facts to demonstrate that Ms. Martinez used or attempted to use the identity of "another person" as [section] 715.8(2) requires."); Brief of *Amici* DREAM IOWA et al. p. 31 ("no actual other person has been identified").

The State must prove that Diana Castenada was a real person, but not that Martinez knew it. *State v. Garcia*, 788 N.W.2d 1, 1-2 (Iowa Ct. App. 2010); *State v. Madrigal*, S. Ct. No. 09-1623, 2009 WL 3986558, *2 n.3 (Iowa Ct. App. Sept. 17, 2009).

The minutes of testimony state that Martinez claimed to have been "Diana Castaneda" with a certain Social Security Number. Mins. Test.; App. 7. It appears other people have used Castenada's name and Social Security Number. *Id.*; App. 7. This does not mean there is no Diana Castenada. Presumably, there is. The minutes suggest several people answer to her name. One may be the real Castenada and the others are imposters. Or, Castenada is a victim of all the people mentioned in the minutes.

In any case, the Court cannot reach this issue. *Amicus* ACLU alone raises the issue, not Martinez. The Court does not consider

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[3] This, of course, is no defense to forgery. *State v. Calhoun*, 618 N.W.2d 337, 339-40 (Iowa 2000).

issues raised solely by *amici*. *Rants v. Vilsack*, 684 N.W.2d 193, 198-99 (Iowa 1994). "Reviewable issues must be presented in the parties' briefs, not an amicus brief." *Martin v. Peoples Mut. Sav. & Loan Ass'n*, 319 N.W.2d 220, 230 (Iowa 1982).

Furthermore, neither did Martinez assert the issue below. An *amicus* cannot preserve issues for appeal. *Mueller v. Ansgar State Bank*, 465 N.W.2d 659, 660 (Iowa 1991).

The Court should decline to reach the issue that *amicus* ACLU advances.

CONCLUSION

The district court's ruling should be affirmed.

REQUEST FOR ORAL SUBMISSION

The State requests oral argument.

Respectfully submitted,

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