IN THE SUPREME COURT OF IOWA

No. 15-0671

STATE OF IOWA,

Plaintiff-Appellee,

v.

MARTHA ARACELY MARTINEZ MARTINEZ,

Defendant-Appellant.

ON DISCRETIONARY REVIEW FROM THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY HONORABLE STUART P. WERLING JUDGE

APPELLANT'S FINAL BRIEF

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CERTIFICATE OF SERVICE

On June 17, 2016, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to

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/s/ Philip B. Mears
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ROUTING STATEMENT

The Supreme Court should retain the case and decide, as a matter of first impression, the important constitutional questions presented. Those questions include:

a. Whether the prosecution of a non citizen for applying for work and working with false papers is prohibited by federal preemption doctrine, as articulated in Arizona v. United States, U.S., 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012).

b. Whether a prosecution under Iowa Code Section 715A.2(2)(a)(4), part of the Forgery Chapter, is preempted on its face by federal immigration law.

c. Whether a prosecution for Identity Theft is preempted by federal immigration law, "as applied" to a non citizen applying for work and working with false papers.

d. Whether the prosecution of Martha Martinez for applying for work and working with false papers is preempted after she was granted administrative relief under the Deferred Action for Childhood Arrivals (DACA).

This case considering preemption for employment fraud is a case of first impression in Iowa.

Whether there is preemption protection for Martinez under DACA would appear to be a case of first impression in the United States.

The case also has significant impact beyond Ms. Martinez. As it becomes known that obtaining administrative relief under DACA can lead to a felony prosecution in Iowa, a significant number on non citizens without status may not seek and obtain that administrative relief. If DACA is expanded, as proposed but stayed by litigation, the impact of the case will be even greater.

STATEMENT OF THE CASE

Nature of the Case:

This discretionary review case concerns two criminal charges brought against Martha Aracely Martinez Martinez in Muscatine County, both Class D felonies. The charges were brought after the State discovered that Martha Martinez, a non citizen, had obtained employment in Muscatine using false papers to support her job application. She was charged with Forgery and Identity Theft, both Class D felonies.

Ms. Martinez filed a Motion to dismiss the charges, arguing that the prosecution was barred under federal preemption principles. Appx. p.38.

On March 23, 2015, Judge Stuart Werling denied the Motion. Appx. p. 62. Ms. Martinez filed a timely petition for discretionary review that was granted on June 4, 2015. Appx. p. 66.

Course of Proceeding:

On June 26, 2014, agents for the Iowa Department of Transportation (IDOT) filed the criminal complaint against Martha Martinez for felony Identity Theft, in violation of Section 715A.8.

On July 31, 2014, the Muscatine County Attorney's Office filed a two-count Trial Information against Ms. Martinez. Count One alleged Class

D felony Identity Theft, in violation of Section 715A.8. Count Two alleged Class D felony Forgery, in violation Section 715A.2(1) and 715A.2(2)(a)(4).

Specifically, Count I alleged that Ms. Martinez committed the D felony of Identity Theft from January 4, 2013 through June 14, 2003, by:

> "fraudulently uses or attempts to use identification information of another person with the intent to obtain credit, property, services, or other benefits, the value of which exceeds $1,000" (Trial Information, Appx. 4).

Count II alleged that Ms. Martinez committed the D felony of Forgery during the same time frame, from January 4, 2013 through June 14, 2003, by

> "fraudulently use or utter a writing, to wit a document prescribed by statute, rule, or regulation for entry into or as evidence of unauthorized 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, Appx. 4).

Following a not guilty plea and a waiver of speedy trial, the case was continued any number of times. The pleadings make clear that the parties were attempting to determine immigration consequences of possible resolutions, along with trying to otherwise resolve the case.

On February 13, 2015, the Defendant filed a Motion to Dismiss (Appx. p. 38). The basis for the Motion was that prosecution of Ms.

Martinez for fraudulently obtaining work in Muscatine, using false documents, and working under the assumed name, was barred by the principle of federal preemption, as articulated in Arizona v. United States, _____U.S._____, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012). Both sides briefed the issue and a hearing was held on March 19, 2015.

On March 23, 2015, Judge Stuart Werling denied the Motion to Dismiss. Appx. p.62. Judge Werling recognized that the issue before the Court was "whether or not Iowa's identity theft and forgery statutes conflict with IRCA either as written or applied to Martinez." Judge Werling reasoned that "if a naturalized US citizen were to fraudulently obtain the identity of another and use that identity to obtain employment, they could possibly be charged with the same offenses that set forth in this matter in counts one and two." (Ruling p. 3, Appx. p.62)

To some extent this was determinative for Judge Werling. He then found the two statutes were independent of the defendant's immigration status. In addition the prosecution was taking no action to enforce or attack the federal immigration statute. "The State's sole interest is in the protection of citizens from identity theft and to protect employers from persons who apply for employment under false names and forged signatures of the names of persons whose identity they have stolen." (Ruling p. 3; Appx. p.62)

Ms. Martinez timely filed for discretionary review. On June 4, 2015, the Iowa Supreme Court granted discretionary review. Appx. p. 94.

STATEMENT OF FACTS

Uncontested facts: On some level, the facts of the case are relatively simple and should not be contested. The facts, primarily, come from the Minutes of Testimony, which include the investigative report from the IDOT, along with various documents. Those facts include the following:

1. Martha Martinez came to the United States in 1997, when she was 11 years old. She was brought to Muscatine at that time by her parents. She has lived in the United States continuously since that time. She attended Muscatine High School and worked for several different employers in Muscatine County.

2. Martha Martinez, prior to 2013, was an undocumented non-citizen. That essentially meant that she was without any lawful immigration status.

3. In 2013, Martha Martinez applied for and received temporary lawful immigration status. She received this discretionary status from the Department of Homeland Security, the federal agency entrusted with

enforcing immigration law. She received her status under a program called the Deferred Action for Childhood Arrivals, or DACA for short.

4. As part of DACA she received specific work authorization, including permission to obtain a social security card. See Minutes; Ex. 1g; Appx. p.6.

5. She qualified for DACA protection in 2013 because she was brought here before age 16, had not been convicted of any crimes, and met the other eligibility criteria.

6. Prior to 2013, because Martha Martinez had no immigration status, she could not lawfully obtain a driver's license or, for that matter, lawful employment. She had no required immigration papers.

7. In 2003, Martha Martinez, who was 17 years old at the time, applied for and obtained an Iowa driver's license. She used a birth certificate in the name of Diana Castaneda, a person with a social security number. She renewed the Driver's license in 2008.[1]

8. By law in this country, prior to working for any employer with a sufficient number of employees, Martinez had to present certain documents in support of her employment application. The purpose of the

[1] The minutes of testimony show that the DOT investigation determined that there were a number of Diana Castaneda's around the country, in other states, presumably with the same social security number. The minutes did not state whether there was in fact a real Diana Castaneda.

documentation was to demonstrate lawful permission to work in this country. This was sometimes referred to as the I-9 paperwork.

9. In 2013 she used the fictitious driver's license and a social security card in that same name, to obtain employment at Packer Sanitation, a business located in Muscatine County. That is the employment that is at issue in this case. The I-9 paperwork appears in the Minutes as Ex. 5a; Appx. p. 6.

10. By June, 2013, she had obtained DACA status. She had lawful immigration status for the first time. She was able to obtain work authorization in her own name from the Department of Homeland Security. See Social Security Card, Ex. 1g, attached to IDOT report, in the Minutes of Testimony; Appx. p. 6.

11. With that lawful status she was eligible, under Iowa law, to obtain an Iowa driver's license. In March, 2014, she went and applied for that license, using her new Social Security Card and correct name.

12. The IDOT, apparently equipped with some sort of facial recognition software, noted a similarity between her photograph taken in 2014 and the photograph of the person who she had said she was when she got her driver's license in 2003 and 2008.

13. This prompted an IDOT investigation, which determined that Martinez had obtained employment in Muscatine and was, in fact, still working in Muscatine using the fictitious identification.

14. The investigation showed that Martinez had used that false identification in submitting the I-9 paperwork to that job. She had apparently earned wages under that false name in excess of $1000.

15. The IDOT also contacted Homeland Security and learned that Martha Martinez did have valid employment authorization.

16. The IDOT then filed the criminal complaint.

Specific Immigration facts

1. From 1997 to 2013, Martha Martinez had no immigration status in this country.

2. The Department of Homeland Security adopted a program in 2012 called the Deferred Action for Childhood Arrivals, or DACA. Someone who obtained DACA status was given protection from deportation or removal action for a certain period of time.

3. DACA protection also gave a person such as Ms. Martinez the right to legally work, pay taxes, obtain a driver's license and, presumably, other obtain the other benefits that would normally be available to non-citizens with a valid immigration status.

4. A DACA protected person has to reapply for DACA status every two years. That status is available to individuals so long as they are not convicted of certain crimes. It is clear that conviction for either of the two felonies filed by the Muscatine County Attorney's Office would result in the loss of DACA protection. Under immigration law, a deferred judgment is regarded as a conviction.

State statutes

There were two different crimes charged in the Trial Information. Both charges were based on the act of applying for and obtaining employment, using false papers.

Identity Theft-Count I

Section 715A. 8 reads as follows:

> 2. A person commits the offense of identity theft if the person fraudulently uses or attempts to fraudulently use identification information of another person, with the intent to obtain credit, property, services, or other benefit.
> 3. If the value of the credit, property, or services exceeds one thousand dollars, the person commits a class "D" felony. If the value of the credit, property, or services does not exceed one thousand dollars, the person commits an aggravated misdemeanor.

Forgery-Count II

Section 715A.2(1) reads as follows:

> 715A.2(1)
> 1. A person is guilty of forgery if, with intent to defraud or injure anyone, or with knowledge that the person is facilitating a fraud or injury to be perpetrated by anyone, the person does any of the following:
> a. Alters a writing of another without the other's permission.
> b. Makes, completes, executes, authenticates, issues, or transfers a writing so that it purports to be the act of another who did not authorize that act, or so that it purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or so that it purports to be a copy of an original when no such original existed.
> c. Utters a writing which the person knows to be forged in a manner specified in paragraph “a” or “b”.
> d. Possesses a writing which the person knows to be forged in a manner specified in paragraph “a” or “b”.

Section 715A.2(2) adds the following:

> 2. a. Forgery is a class “D” felony if the writing is or purports to be any of the following:
> (1) Part of an issue of money, securities, postage or revenue stamps, or other instruments issued by the government.
> (2) Part of an issue of stock, bonds, credit-sale contracts as defined in section 203.1, or other instruments representing interests in or claims against any property or enterprise.
> (3) A check, draft, or other writing which ostensibly evidences an obligation of the person who has purportedly executed it or authorized its execution.

(4) A document prescribed by statute, rule, or regulation for entry into or as evidence of authorized stay or employment in the United States.

A few comments are necessary to explain the particular forgery provision, 715A.2 (2)(a)(4). That subsection was used against Martinez to raise the offense to a D felony.

That provision was added to the Code in 1996 by Senate File 284. Appx. p. 1.

The caption of the bill, a copy of which appears in the Appendix at page 1, was "Forged documents/illegal immigrants." The description of the bill read as follows:

> AN ACT RELATING TO THE CRIME OF FORGERY, BY PROHIBITING THE KNOWING POSSESSION OF FORGED WRITINGS, INCLUDING DOCUMENTS PRESCRIBED FOR ENTRY INTO, STAY, OR EMPLOYMENT IN THE UNITED STATES, AND PROVIDING CRIMINAL PENALTIES AND PROVIDING CIVIL PENALTIES FOR EMPLOYERS HIRING INDIVIDUALS WITH FORGED DOCUMENTS REGARDING THE INDIVIDUALS' ENTRY INTO, STUDY, OR EMPLOYMENT IN THE UNITED STATES.

It is significant that the language used "A document prescribed by statute, rule, or regulation for entry into or as evidence of authorized stay or

employment in the United States" is taken directly from 18 U.S.C. 1546(a). That provision makes it a federal crime to forge such a document, or to possess it knowing it to be forged. The penalty can be either a fine or imprisonment or both.

Also enacted at the time was 715A.2A, a provision that provided for civil penalties assessed against an employer who hires a person knowing that the person was not authorized to be employed. The sanctions against the employer essentially were fines starting at $250 and escalating depending on whether there had been previous violations.

Federal statutes

Here is the basis for all federal preemption, the Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> U.S. Const., Art. VI, cl. 2

Here is the basis for federal authority over immigration. In the Constitution Congress has the power:

> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
>
> U.S. Const., Art. I, § 8, cl. 4

Various Immigration statutes

The specifics of federal immigration law do not need to be set out in detail. Here is the description of the federal statutes from Arizona v. United States, 132 S. Ct. 2492, 2504, 183 L. Ed. 2d 351 (2012)

> Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002). The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. See 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2). It also requires every employer to verify the employment authorization status of prospective employees. See §§ 1324a(a)(1)(B), (b); 8 CFR § 274a.2(b) (2012). These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions. See 8 U.S.C. §§ 1324a(e)(4), (f); 8 CFR § 274a.10.
>
> This comprehensive framework does not impose federal criminal sanctions on the employee side (*i.e.*, penalties on aliens who seek or engage in unauthorized work). Under federal law some civil penalties are imposed instead. With certain exceptions, aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident. See 8 U.S.C. §§ 1255(c)(2), (c)(8). Aliens also may be removed from the country for having engaged in unauthorized work. See § 1227(a)(1)(C)(i); 8 CFR § 214.1(e). In addition to

> specifying these civil consequences, federal law makes it a crime for unauthorized workers to obtain employment through fraudulent means. See 18 U.S.C. § 1546(b).
>
> Arizona v. United States, 132 S. Ct. 2492, 2504, 183 L. Ed. 2d 351 (2012)

One specific provision of the federal Code should be set out:

> Section 8 U.S.C. § 1324a(b)(5) of the Immigration Reform and Control Act from 1986 (IRCA) provides that [a] form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of title 18.

Deferred Action for Childhood Arrivals-DACA

The United States Constitution gives the power over immigration to the United States government. Congress in turn by statute has given a significant amount of discretion in the Executive Branch.

For decades federal immigration authorities have used something called deferred action to refrain from seeking removal of (or deporting) otherwise removable non-citizens and authorizing their presence in the United States for a period of time.

On June 15, 2012 President Barack Obama announced a new administrative program. That program is the most recent example of this

long-standing discretionary practice. This program was called Deferred Action for Childhood Arrivals or DACA. Here's the description of that program:

> To be eligible for DACA, immigrants must have come to the United States before the age of sixteen and have been under thirty-one years old as of June 15, 2012; they must have been living in the United States when DACA was announced and have continuously resided in the United States for at least the previous five years; and they must have graduated from high school, or obtained a GED, or have been honorably discharged from the United States Armed Forces or the Coast Guard, or be currently enrolled in school. Additionally, they must not pose any threat to public safety: anyone who has been convicted of multiple misdemeanors, a single significant misdemeanor, or any felony offense is ineligible for DACA.
>
> Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1058 (9th Cir. 2014)

Martha Martinez qualified for and obtained DACA status as she came to the United States before the age of 16 and was under 31 years old as of June 13, 2012. She was living in the United States when DACA was announced and had continuously resided in the United States for at least the previous five years. She graduated from high school. She doesn't pose a threat to public safety. She's not been convicted of the requisite criminal offenses. It was absolutely clear that if she is convicted of either of the felonies in this case, she will lose her DACA protection.

ARGUMENT

I

THE PROSECUTION OF MARTHA MARTINEZ FOR THE CRIME OF FORGERY COMMITTED BY USING CERTAIN FALSE PAPERS TO OBTAIN A JOB, SHOULD BE DISMISSED AS PREEMPTED BY FEDERAL IMMIGRATION LAW.

Standard of Review

The question of whether a state statute is preempted by federal law is a constitutional issue. Review is *de novo*. Staff Mgmt. v. Jimenez, 839 N.W.2d 640, 652 (Iowa 2013)

Preservation of Error:

Martha Martinez raised the questions presented for this appeal by filing a Motion to Dismiss before the District Court. Appx. p.38. Judge Stuart Werling denied the motion on the merits. Appx. p. 62.

Summary of the argument

Martha Martinez is being prosecuted for the Class D felony of forgery for showing her employer false papers when she applied for work in Muscatine County in 2013. The papers were submitted as part of filling out the federal immigration paperwork, known as the I-9 paperwork.

The particular forgery statute is specifically directed at “illegal immigrants”. This in fact appeared in the title of the bill enacting the provision in 1996. For that reason the statute can be challenged on its face.

The power over matters regarding immigration and non-citizens is specifically delegated by the Constitution to the United States government. The Federal Government extensively regulates the field of fraudulent employment by non-citizens.

Where there is some form of conflict between state law and federal immigration law and policy state law must yield. This conflict is addressed broadly with a doctrine known as preemption.

There are a number of types of preemption. There is express, field and conflict preemption. There are two types of preemption that apply to the Martinez case as to the forgery charge.

The first type of preemption is called “field preemption”. Field preemption exists when the Federal Government extensively regulates a particular area to the point where no state regulation is permitted.

In Martinez case the “field” in question is the field of the fraudulent employment of unauthorized aliens. Because the Unites States has occupied that field, state prosecutions in that area are prohibited. The prosecution for forgery is in that field.

While all preemption essentially involves a conflict, there is a specific type of preemption known as “conflict preemption”. This can occur in two ways. First there can be an impossibility to comply with both statutes, or other irreconcilable differences between the way the federal government handles the matter and the particular state statute. That does not really apply in the Martinez case.

Conflict preemption also can exist where, despite the fact that there is not an actual impossibility of compliance with both statutes, the state regulation will “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” Arizona v. United States, 132 S. Ct. 2492, 2501, 183 L. Ed. 2d 351 (2012)

In Martinez there is conflict preemption as this state forgery prosecution creates a large obstacle to the objectives of Congress.

Summary of Facts

The facts with regard to this particular issue are not complicated. They are as follows:

1. Martha Martinez applied for a job at Packers Sanitation in early 2013 using false identification. She used a false name. At that time she was a non-citizen without status.
2. At that time an I-9 form was completed with her employer, with Martinez providing the false identification.
3. The forgery subsection of the state statute makes it a Class D felony where the falsified documents are: documents prescribed by statute rule or regulation for entry into or as evidence of authorized stay or employment in the United States.
4. It appears as if a social security card is one of the documents under that section.

Preemption in general

The Iowa Supreme Court in Staff Mgmt. v. Jimenez, 839 N.W.2d 640, 652 (Iowa 2013) discussed preemption of state law by federal law.

> Under the Supremacy Clause, the laws of the United States are the supreme law of the land. U.S. Const., art. VI, cl. 2. "Congress has the power to preempt state law." Arizona v. United States, —— U.S. ——, ——, 132 S.Ct. 2492, 2500, 183 L.Ed.2d 351, 368 (2012). There are at least three scenarios where federal law will preempt state law: (1) Congress may enact a statute with an express preemption provision, (2) Congress may occupy the field with a regulatory framework " 'so pervasive ... that

> Congress left no room for the States to supplement it,' " or (3) the state law is an obstacle for Congress's objectives and purposes. *Id.* at ——, 132 S.Ct. at 2500–01, 183 L.Ed.2d at 368–69 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947)).
>
> Staff Mgmt. v. Jimenez, 839 N.W.2d 640, 652 (Iowa 2013)

As identified by the Iowa Supreme Court there are three well-recognized types of preemption: express, field, and conflict preemption. See also Arizona v. United States, ___U.S._____,132 S. Ct. 2492, 2500-01, 183 L. Ed. 2d 351 (2012)

Express preemption occurs when Congress has a statute containing an express preemption provision. See Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 131 S. Ct. 1968, 1974-75, 179 L. Ed. 2d 1031 (2011) In the Staff Management case the Iowa Supreme Court was considering whether such an express provision applied.

There are two types of "implied" preemption. The first is called field preemption. This type of preemption precludes states "from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."

A second implied preemption is conflict preemption. This in turn can occur in either of two ways.

First, there can be the case when "compliance with both federal and state regulations is a physical impossibility". Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

Second, conflict preemption can also occur when the state action in question "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed.2d 581 (1941).

Preemption in immigration matters

There have been several important federal cases regarding preemption in the immigration field in the last four years. Part of this resulted from a political development around 2010 where state legislatures enacted legislation directed at "controlling" a perceived problem in those states because of the large number of non citizens in those states without immigration status. Three of those cases were brought by the Justice Department.

This section in this brief will discuss those federal cases. It will also discuss the very few state court decisions involving employment fraud and preemption. All of those cases arose from individual criminal prosecutions.

United States Supreme Court case on preemption and immigration

The principal United States Supreme Court case on the subject of immigration and preemption of state prosecutions is Arizona v. United States, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)

In that case the United States Supreme Court considered several Arizona state criminal statutes that were enacted in 2010 to address what was perceived as a large number of undocumented individuals living in Arizona.

One provision before the Court, identified as Section 3, made failure to comply with Federal Alien Registration requirements a state misdemeanor. Section 5c of the statute made it a state criminal misdemeanor for an unauthorized alien to seek or engage in work in the state.

Both provisions were struck down by the United States Supreme Court under preemption principles.

The first statute was preempted by field preemption. The Supreme Court concluded that Congress has occupied the field of alien registration.

> The present regime of federal regulation is not identical to the statutory framework considered in *Hines*, but it remains comprehensive. Federal law now includes a requirement that aliens carry proof of registration. 8 U.S.C. § 1304(e). Other aspects, however, have stayed the same. Aliens who remain in the country for more than 30 days must apply for registration and be fingerprinted. Compare § 1302(a) with *id.*, § 452(a) (1940 ed.). Detailed information is required, and any change of address has to be reported to the Federal Government. Compare §§ 1304(a), 1305(a) (2006 ed.), with *id.*, §§ 455(a), 456 (1940 ed.). The statute continues to provide penalties for the willful failure to register. Compare § 1306(a) (2006 ed.), with *id.*, § 457 (1940 ed.).
> The framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration.
>
> Arizona v. United States, 132 S. Ct. 2492, 2502, 183 L. Ed. 2d 351 (2012)

The Court then considered Section 5(c) the provision criminalizing working without authorization. The Court found that provision "conflict preempted."

> Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002). The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. See 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2). It also requires every employer to verify the employment authorization status of prospective employees. See §§ 1324a(a)(1)(B), (b); 8 CFR § 274a.2(b) (2012). These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number

> of times an employer has violated the provisions. See 8 U.S.C. §§ 1324a(e)(4), (f); 8 CFR § 274a.10.
> This comprehensive framework does not impose federal criminal sanctions on the employee side (*i.e.*, penalties on aliens who seek or engage in unauthorized work)……In addition to specifying these civil consequences, federal law makes it a crime for unauthorized workers to obtain employment through fraudulent means. See 18 U.S.C. § 1546(b). Congress has made clear, however, that any information employees submit to indicate their work status "may not be used" for purposes other than prosecution under specified federal criminal statutes for fraud, perjury, and related conduct. See 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)–(G).
> The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.
>
> Arizona v. United States, 132 S. Ct. 2492, 2504, 183 L. Ed. 2d 351 (2012)

This created a conflict between federal law and state law.

> The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines,* 312 U.S., at 67, 61 S.Ct. 399. Under § 5(C) of S.B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. The Court has recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Motor Coach Employees v.*

> *Lockridge,* 403 U.S. 274, 287, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971). The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.
>
> Arizona v. United States, 132 S. Ct. 2492, 2505, 183 L. Ed. 2d 351 (2012)

The Arizona case is important in several respects. First it demonstrates the analysis to be used in determining both field preemption and conflict preemption.

It also makes clear that there can be conflict preemption in several important ways. First there can be conflict even if the prohibited conduct is the same in both forums. Second there can be conflict if the penalties for the same thing are different in state and federal court. Finally there can be conflict as to the discretionary function of determining which cases to prosecute.

Other federal case regarding preemption and employment fraud

There have been three federal court decisions since the Arizona case that have involved challenges to state statutes, which were designed to "regulate" immigration matters. Two were Court of Appeals cases. United

States v. Alabama, 691 F.3d 1269 (11th Cir. 2012) was decided a few months after the Arizona case. United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013) was decided in 2013. The third case was a District Court case that is currently on appeal. Puente Arizona v. Arpaio, 76 F. Supp. 3d 833 (D. Ariz. 2015)

The two Court of Appeals cases were brought by the United States Attorney General challenging state statutes that were enacted specifically to regulate immigration, primarily activities of non-citizens without status. In both cases all employment related criminal statutes were found to be preempted.

In the Alabama case one provision of the new Alabama law, Section 11(a), criminalized the application for, solicitation of, or performance of work by an alien who is not authorized to work in the United States. Ala.Code 1975, §§ 31–13–11.

This provision was struck by the Eleventh Circuit under conflict preemption, with the following language:

> In light of Congress's decision that "it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment," Alabama's section 11(a) is preempted by federal law. *Id.* Section 11(a) cannot be meaningfully distinguished from the provision at issue in *Arizona.* Both the Alabama and Arizona provisions criminalize the application, solicitation, and performance of work by an unauthorized alien. Ala.Code § 31–13–11(a); Ariz.Rev.Stat. § 13–2928(C). This attempt to criminalize conduct that Congress has chosen not to criminalize presents an obstacle to

> accomplishment of federal law. *Arizona*, 132 S.Ct. at 2505. As a result, section 11(a) is preempted by federal law.
>
> United States v. Alabama, 691 F.3d 1269, 1283 (11th Cir. 2012)

Section 16 of the Alabama statute prohibited employers from deducting, as a business expense, compensation paid to unauthorized aliens. Ala.Code 1975, §§ 31–13–16. It also imposed a monetary penalty equal to ten times the deduction. This provision was struck as being expressly preempted by the particular part of the IRCA which prohibited any state from imposing similar criminal sanctions on those who employ unauthorized aliens. United States v.Alabama, 691 F.3d 1269, 1290 (11th Cir. 2012) The Iowa Supreme Court discussed this provision in the Staff Management case.

Other portions of the Alabama statute were also preempted. That included Section 10, which criminalized an alien's willful failure to carry registration documents. Ala.Code 1975, §§ 31–13–10. Field preemption followed directly from the Supreme Court case Arizona v. United States. The field recognized was the "field of alien registration".

Also preempted were Section 13 which made it criminal to provide various forms of assistance to unlawfully present aliens. Ala.Code 1975, §§ 31–13–13. Section 27 was

preempted which prohibited Alabama courts from enforcing or recognizing contracts where one of the parties was an unlawfully present alien. Ala.Code 1975, §§ 31–13–27.

United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013) involved challenges to three different parts of the South Carolina statute.

Sections 4(A) and (C) operated to criminalize unlawful presence. This was conflict preempted. S.C.Code 1976, § 16–9–460 (Section 4).

> Sections 4(A) and (C) are thus conflict preempted because they stand as an obstacle to the execution of the federal removal system and interfere with the discretion entrusted to federal immigration officials. They make criminals out of aliens attempting to do no more than go to school, go to work, and care for their families. *Cf. Arizona*, 132 S.Ct. at 2504 ("[M]aking criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives.").
>
> United States v. S. Carolina, 720 F.3d 518, 530 (4th Cir. 2013)

Sections 4(B) and (D) criminalized transporting, sheltering or harboring a person who is in the country illegally. The Court found those sections were field preempted. The field was "regulating the concealing, harboring and transporting of unlawfully present aliens."

> Sections 4(B) and (D) of the Act are field preempted because the vast array of federal laws and regulations on this subject, *see supra*, slip op. at 24–25, is "so pervasive ... that Congress left no room for the States to supplement it." *Arizona*, 132 S.Ct.

at 2501 (citation and internal quotation marks omitted).

> "[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation ... states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines v. Davidowitz*, 312 U.S. 52, 66–67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).
>
> United States v. S. Carolina, 720 F.3d 518, 531 (4th Cir. 2013)

The particular provision was "conflict" preempted as well. That was based on the fact that the two jurisdictions essentially punished the same conduct. There was a conflict since the critical determinations as to prosecution had to be made by federal prosecutors. 720 F.3d. at 531-32.

Section 5 of the South Carolina legislation made it a misdemeanor for a person to fail to carry an alien registration card. S.C.Code 1976, § 16–17–750 (Section 5). This was struck as field preempted based on similar treatment of the Arizona statute in the Arizona v. United States Supreme Court decision. United States v. S. Carolina, 720 F.3d 518, 532 (4th Cir. 2013).The field was "regulation of alien registration".

The final provision, and the one important to Martinez, was Section 6(B)(2) of the South Carolina statute. S.C.Code 1976, §§ 16–13–480, 16–17–750 (Section 6). That section made it unlawful for any person "to display or possess a false or counterfeit ID for the purpose of proving

lawful presence in the United States." The Court discussion of this provision is important, as it relates to consideration of both of the statutes in the Martinez case.

South Carolina argued that there should not be preemption because this case just dealt with "ordinary fraud." The State argued that the presumption against preemption should apply because "fraud is an area traditionally for state legislatures."

The Fourth Circuit initially rejected the state's argument that since there was a prosecution for "fraud" there should be a presumption against preemption. United States v. S. Carolina, 720 F.3d 518, 532 (4th Cir. 2013)

The Court then concluded that Section 6(B)(2) was field preempted.

> Section 6(B)(2) is field preempted in that Congress has passed several laws dealing with creating, possessing, and using fraudulent immigration documents. *See* 8 U.S.C. § 1324c(a)(1) and (2); 18 U.S.C. § 1546 (providing penalties up to 25 years' imprisonment). Congress has occupied this field and, in such a case, even complementary or auxiliary state laws are not permitted. *See Hines*, 312 U.S. at 66–67, 61 S.Ct. 399; *Arizona*, 132 S.Ct. at 2501–02.
>
> United States v. S. Carolina, 720 F.3d 518, 533 (4th Cir. 2013)

The Court also found the statute conflict preempted as follows:

> In addition, Section 6(B)(2) is conflict preempted because enforcement of these federal statutes necessarily involves the discretion of federal officials, and a state's

> own law in this area, inviting state prosecution, would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67, 61 S.Ct. 399.
>
> United States v. S. Carolina, 720 F.3d 518, 533 (4th Cir. 2013)

The District Court case of importance is Puente Arizona v. Arpaio, 76 F. Supp. 3d 833 (D. Ariz. 2015). In that case a group of individuals and organizations challenged the Arizona identity theft statute, as applied to employment of unauthorized aliens. The provision criminalized taking another person's identity with the intent of obtaining employment.

What is significant about this case is that the Arizona statute in question, identity theft, on its face, is not directed at non-citizens. The plaintiffs in the case, however, argued that the primary use of the statute was to criminalize fraud in the employment application stage when committed by non-citizens.

The District Court granted a preliminary injunction, determining that the plaintiffs were likely to succeed on the merits. In reaching that conclusion the Court found the state statute to be preempted. Here was the reasoning of the court:

First of all, the Court looked at field preemption. In analyzing field preemption it was necessary for the Court to identify the precise field that might have been occupied by Congress.

One suggestion by plaintiffs was that the field of "regulation of unauthorized alien employment" had been occupied. The second possible field was the "regulation of unauthorized alien fraud" in connection with applying for work.

The District Court found that the United States Supreme Court in the Arizona case had specifically chosen not to find field preemption in connection with alien employment. In fact, the United States Supreme Court in Arizona had relied on conflict preemption. Since the United States Supreme Court was not prepared to find field preemption based on the field of the employment of aliens, the district court in Arpaio was not prepared to do that either. Puente Arizona v. Arpaio, 76 F. Supp. 3d 833, 856 (D. Ariz. 2015)

It was, however, prepared to find field preemption in connection with the regulation of fraud in the employment verification process. Here was its reasoning.

The narrower field identified by Plaintiffs—unauthorized-alien fraud in seeking employment—has been heavily and comprehensively regulated by Congress.

As noted above, Congress requires employers to verify the authorized status of aliens seeking employment and has established an entire federal system for employment verification. Employers must comply with the program and verify that applicants are authorized to work in the United States, and applicants must submit specified documents for use in the verification system. To combat fraud in obtaining employment, IRCA makes it a federal crime for an applicant to use a false identification document for the purpose of satisfying the federal employment verification system. 18 U.S.C. § 1546(b). IRCA also expands the crimes for selling, making, or using fraudulent immigration documents to include those used "as evidence of authorized ... employment in the United States." *Id.* § 1546(a). And IRCA specifically identifies other federal criminal statutes that can be applied to fraud in the employment verification process. *See* Pub.L. 99–603, § 101 (adding 8 U.S.C. § 1324a(b)(5) and listing applicable statutes in Title 18, §§ 1001 [false statements], 1028 [fraud in connection with identity documents], 1546, and 1621 [perjury]).

Congress has also enacted laws that impose civil penalties on persons who use false documents to satisfy the employment verification system. 8 U.S.C. § 1324c. And Congress has made the use of false employment documents a basis for deportation. 8 U.S.C. § 1227; *see also id.* § 1182(a)(6)(C) (making those who make false claims to citizenship, including for purposes of establishing eligibility for employment, inadmissible and thus ineligible *857 for adjustment of status to that of a lawful permanent resident).

Congress has even regulated the law enforcement use that may be made of documents submitted for federal employment verification. IRCA provides that any information employees submit to indicate their work status "may not be used" for purposes other than prosecution under specified federal criminal statutes for fraud, perjury, and related conduct—an evident attempt to limit states from using these documents to prosecute crimes. *See* 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)–(G).

> These provisions evince an intent to occupy the field of regulating fraud against the federal employment verification system. 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.
>
> The Court concludes that Congress has occupied the field of unauthorized-alien fraud in obtaining employment. As a result, the identity theft laws, which have the purpose and effect of regulating the same field, are likely preempted.
>
> Puente Arizona v. Arpaio, 76 F. Supp. 3d 833, 856-57 (D. Ariz. 2015)

The Court also found conflict preemption.

> The overlapping penalties created by the Arizona identity theft statutes, which "layer additional penalties atop federal law," likely result in conflict preemption. *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1267 (11th Cir.2012). The Arizona laws "conflict [ ] with the federal scheme by divesting federal authorities of the exclusive power to prosecute these crimes." *Valle del Sol*, 732 F.3d at 1027.
>
> Puente Arizona v. Arpaio, 76 F. Supp. 3d 833, 858 (D. Ariz. 2015)

The Puente Arizona case is currently on appeal. As of December 17, 2015 the appeal docket indicates that argument should be in February 2016.

Iowa case on preemption in employment

There is one Iowa appellate case that has considered federal preemption in the employment context. It is not that helpful. In 2013 the Iowa Supreme Court decided Staff Management v. Jimenez 839 N.W. 2d 640 (Iowa 2013). In that case the employer challenged a decision of the Iowa Workers Compensation Commissioner to award healing period benefits to an undocumented worker.

On appeal, the employer argued in particular that healing period benefits were precluded by federal preemption. The employer relied on the case of Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151, 122 S.Ct. 1275, 1284, 152 L.Ed.2d 271, 283–84 (2002). In the Hoffman case the United States Supreme Court had determined that awarding back pay to undocumented workers would be preempted, being in violation of an explicit statutory provision. The Iowa Supreme Court found that healing period damages were not back pay, which would have been precluded.

In analyzing the preemption argument the Iowa Supreme Court looked at the three basic types of preemption, where federal law will preempt state law: express, field, and conflict.

The Court determined that the employer's argument fell under the express preemption theory. The Court then held that the express preemption in the federal immigration statute only prohibited civil sanctions against an

employer who hired an undocumented worker. The Court then interpreted the healing period benefits under the Iowa Workers Compensation statute not to be a "civil sanction". This meant these benefits were not back pay, which would have been prohibited by the Hoffman Plastic case.

State court cases

There have been several state court cases involving conviction of non-citizens for fraudulent employment where the courts have considered arguments for preemption. These cases have involved criminal prosecutions where the defendants were prosecuted under state statutes, usually identity theft, that made no particular reference to non-citizens.

Georgia: In Hernandez v. State 639 S.E. 2d 473 (Ga. 2007) the defendant was prosecuted for identity fraud, committed by misappropriating a social security number of a citizen. In a case five years before the Arizona v. United States case, Hernandez contended that the prosecution was preempted by federal immigration law. The Supreme Court of Georgia rejected that argument finding, in a very short discussion, that there was neither direct, implied nor field preemption. 639 S.E. 2d 473, 475 (Ga. 2007).

Kansas: There have been a number of cases in the last two years in the state of Kansas all involving its Court of Appeals. The most recent was State

v. Saldana, 2015 WL 4486779 (Kan. Ct. App. 2015). Saldana was prosecuted in 2012 for identity theft for working under a false social security number. She had been employed using that identification since 2004. Because the original application was so long ago she was prosecuted for accepting wages under the false social security number.

Saldana argued again that the identity theft prosecution was preempted by the Federal Immigration Reform and Control Act. The Court took note of the Arizona v. United States case. It then summarily rejected the preemption argument.

> Saldana ignores that the statute at issue in *Arizona* and the identity theft statute at issue in this case are very different. In *Arizona*, the United States Supreme Court held that the Arizona law, which created a criminal penalty for unauthorized aliens engaging in or seeking work in Arizona, was preempted because Congress had made a deliberate choice not to impose criminal penalties on aliens engaging in or seeking work in the United States. 132 S.Ct. at 2503–05. Here, Saldana was convicted of identity theft under K.S.A.2011 Supp. 21–6107(a). Unlike the Arizona statute, the Kansas identity theft statute does not impose criminal penalties on aliens engaging in or seeking employment in the State. The purpose of K.S.A.2011 Supp. 21–6107(a) is to criminalize theft of another person's personal identifying information. Thus, the Kansas identity theft statute K.S.A.2011 Supp. 21–6107(a) has nothing to do with immigration or creating criminal penalties for illegal aliens working in the state like the Arizona statute did in *Arizona*.
>
> State v. Saldana, 353 P.3d 470 (Kan. Ct. App. 2015)

One qualification about the Kansas cases should be made. In the first of the Court of Appeals cases in Kansas, State v. Lopez-Navarrete, 2014 WL 7566851, *4 (Kan. Ct. App. 2014) the Court noted that there is the federal prohibition against using the I-9 paperwork in a state prosecution. The Court acknowledged that the defendant was not prosecuted for that paperwork.

Missouri: The Missouri Court of Appeals allowed a forgery charge to go forward in the face of a preemption argument. In State v. Diaz-Rey, 397 S.W. 3d 5(Mo. Ct. App. E.D., 2013) the prosecution was based on defendant's applying for and obtaining employment through the use of a false social security card and other documentation. The District Court had granted the motion to dismiss based on Arizona v. United States.

The Missouri Court of Appeals reversed. The Court noted that the historic police powers of states were not superseded under preemption unless that was the clear and manifest purpose of Congress. 397 S.W. 3d. at p. 9. The Court of Appeals also observed that the state law was of general applicability "that uniformly applies to all persons as members of the general public and makes no distinction between aliens and non-aliens." 397 S.W. 3d. at p. 9.

The Court noted that the Arizona case had made clear that Congress provided a comprehensive framework for combating employment of illegal aliens. There was no field preemption because:

> In contrast, section 570.090 does not purport to intrude into or regulate the employment of unauthorized aliens in any manner. Rather, section 570.090 is a state law of general applicability that uniformly applies to all persons as members of the general public, and makes no distinction between aliens and non-aliens. As a general matter, such laws are not preempted simply because a class of persons subject to federal regulation may be affected. *See Gade v. National Solid Wastes Management Ass'n,* 505 U.S. 88, 107, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992). Section 570.090 does not regulate the employment of unauthorized aliens and therefore is not preempted by IRCA by implication on the ground that IRCA has occupied the field of employment of unauthorized aliens.
>
> State v. Diaz-Rey, 397 S.W.3d 5, 9 (Mo. Ct. App. 2013)

The Court recognized there could be conflict preemption where state law was an obstacle to the purposes and objectives of Congress. This would mean that there could be preemption if the state law "criminalized activity that Congress has decided not to criminalize." 397 S.W.3d at p. 10. That was not the case.

> Unlike section 5(C) of the *Arizona* statute, section 570.090 does not criminalize activity that Congress has decided not to criminalize. Rather, as charged in this case, it criminalizes the use of inauthentic writings or items as genuine with knowledge and intent to defraud. *See Smothers,* 297 S.W.3d at 633–35. Thus, section 570.090 does not stand as an obstacle to Congress's purpose in enacting IRCA.

State v. Diaz-Rey, 397 S.W.3d 5, 10 (Mo. Ct. App. 2013)

At no point in the discussion of conflict preemption was there discussion of the fact that Congress had given considerable discretion to the federal officials to determine when to enforce the immigration laws on employment fraud. At no point was there discussion of the federal statute that prohibited the use in state court of the information contained in the I-9 paperwork.

Minnesota: In State v. Reynua 807 N.W. 2d 473 (Minn. Ct. App. 2011) the Minnesota Court of Appeals, in a decision prior to the Arizona v. United States case, considered a preemption challenge to a number of convictions relating to the use of a false identify. Several counts concerned the defendant working under a false name. The State had introduced as evidence the I-9 application containing the false information, accompanied by the false documents.

The Court found that the conviction for perjury field preempted.

> The state concedes that this provision of IRCA is broad enough to prohibit even use of the I–9 form in a state prosecution for perjury. We agree, given the congressional intent that is evident in this and other provisions in IRCA to preempt the area of employment-related verification of immigration status.

State v. Reynua, 807 N.W.2d 473, 479 (Minn. Ct. App. 2011)

The Court also identified conflict preemption.

> And, as the Ninth Circuit noted in *United States v. Arizona*, the federal act evidences "Congress' intent that systematic state immigration enforcement will occur under the direction and close supervision of the Attorney General." *Id.* at 352. The enforcement of Minnesota's perjury statute is not subject to that direction and supervision. Moreover, state perjury prosecutions could shift the illegal-immigration enforcement focus from the employer to the employee. Thus, a Minnesota perjury prosecution for false statements on the I–9 form would tend to obstruct the full purposes and objectives of IRCA.

State v. Reynua, 807 N.W.2d 473, 480 (Minn. Ct. App. 2011)

The Court did not, however, find that the State was prohibited from enforcing non-employment related fraud in connection with some of the same documentation. The defendant had used the false identification to register several car titles. Those convictions were not reversed.

Distinction between challenge on its face or as applied

Other than in litigation concerning the First Amendment, where there can be special standing rules, there can be questions about whether a statute is being challenged "on its face" or "as applied". See United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)

The obvious distinction is that a challenge to a statute on its face strikes the entire statute. Obviously a challenge to a statute "as applied" only operates in particular circumstances. On the other hand as long as it gets challenged in your particular case that is usually satisfactory to you.

Some of the litigation regarding immigration statutes in the last four years statutes have been challenged on their face. See for example the statutes challenged in United States v. Arizona; and the South Carolina and Alabama cases. In those cases it was clear that the statutes in question were specifically directed at non-citizens.

The Iowa Forgery statute is specifically directed at non citizens. They would seem to be the only ones who would be concerned with documents showing lawful presence in this country.

Statues prohibiting identity theft, however, are not specifically directed at non citizens. These statutes would appear to be of general applicability. It is clear that the statute would apply and probably does apply in any number of cases involving citizens.

If you think of preemption as essentially being an analysis of whether there is a conflict between a state statute and some federal law, it is clear that there can be cases where there is a conflict, but just in particular cases.

A preemption case from Virginia provides a good example. Virginia had a statute pertaining to life insurance. It addressed the situation where the employee's marital status has changed but the person had failed to update the beneficiary designation prior to death. The statute provided that a divorce would vacate a designation of life insurance or other written contract. In 2013 the Supreme Court held that that particular Virginia statute would be preempted as applied to federal employees. That was because of a specific provision in a federal statute called the Federal Employees Group Life Insurance Act of 1954. Hillman v. Maretta, __US __133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013) See also Wos v. E.M.A. ex rel. Johnson, 133 S. Ct. 1391, 185 L. Ed. 2d 471 (2013)

To some extent if you're the beneficiary of the federal employee in Virginia you would not really care whether that particular state statute was struck on its face or struck as applied to you. The result is the same.

Actually if you look at the analysis in Hillman, the analysis is the same when considering whether there should be an 'as applied' challenge. In both cases the question is whether there is a conflict. That conflict can be express or implied. Conflict can appear if the objects of the state statute are an obstacle to the full purpose of the federal provision.

The line between a facial and an 'as applied' challenge can be fuzzy at times. With respect to the forgery statute in Iowa it would certainly mostly apply to non-citizens. On the other hand, perhaps you could hypothesize a situation where a citizen submitted a false social security card in order to avoid a felony showing up or being on the sex offender registry. In the Arpaio case the Court responded to that argument by saying that certainly wasn't enough to defeat the challenge. Here is what the Court said.

> Defendants argue that because there are constitutional applications of the identity theft laws—namely, to United States citizens—Plaintiffs' facial preemption challenge must fail. Doc. 60 at 11–12. Relying on *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), Defendants argue that a facial preemption challenge can succeed only if the challenger can show "that no set of circumstances exists under which the act would be valid." The same argument was made in *Lozano v. City of Hazleton*, 724 F.3d 297 (3rd Cir.2013), another case involving a preemption challenge to an immigration-related law. The Third Circuit found that "no part of the majority opinion in *Arizona*, and no part of *Whiting*, references *Salerno* at all.... That approach would reject a conflict preemption claim in a facial challenge whenever a defendant can conjure up just one hypothetical factual scenario in which implementation of the state law would not directly interfere with federal law." *Id.* at 313 n. 22. The Court agrees. A law "is not saved from pre-emption simply because the State can demonstrate some additional effect outside of the [preempted area]." *Gade*, 505 U.S. at 107, 112 S.Ct. 2374.
>
> Puente Arizona v. Arpaio, 76 F. Supp. 3d 833, 858-59 (D. Ariz. 2015)

Application of this law to this case for the forgery charge

There are two kinds of preemption that should operate in this case to prohibit the prosecution under the forgery statute. The first is field preemption. The second is conflict preemption.

Field Preemption: Analysis for field preemption starts with identifying what is the possible field. One possibility is that Congress has occupied the field of employment of non-citizens. Another possibility is that Congress has occupied the field of regulation of employment fraud by non-citizens.

There is a good case to be made that there is a comprehensive federal program regulating the employment of unauthorized aliens. In Arizona v. United States the Supreme Court said that Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." Arizona v. United States, 132 S. Ct. 2492, 2504, 183 L. Ed. 2d 351 (2012)

There are statutes governing both the employer and the employee. There are criminal and civil penalties. The application process is extensively prescribed. If you are without status, just working is not a federal crime. Yet fraud in the application process, including possessing forged documents is a

federal crime. Indeed Congress has specifically prohibited the use in court of any I-9 paperwork, other than for a federal prosecution.

Despite this congressional statutory framework the Supreme Court in Arizona chose not to rely on any particular field preemption to strike down the Arizona provision criminalizing unauthorized aliens from working. Instead the Court struck the provision using "conflict preemption" concluding that the Arizona statute stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." This led the district court in Puente Arizona v. Arpaio to conclude that it would not find a preemptive field based on the broad field of "regulation of unauthorized alien employment." Puente Arizona v. Arpaio, 76 F.Supp.3d 833, 856 (D.Ariz.,2015)

But there are more narrow fields that can apply in the Martinez case. The judge in Arizona v. Arpaio concluded that the more narrow field of "regulation of unauthorized alien fraud" existed. The Court concludes that Congress has occupied the field of unauthorized-alien fraud in obtaining employment. Puente Arizona v. Arpaio, 76 F.Supp.3d 833, 857 (D.Ariz.,2015) That field was used to strike the identity theft statute in that case.

The Fourth Circuit recognized the field of "creating, possessing and using fraudulent immigration documents."

> Section 6(B)(2) is field preempted in that Congress has passed several laws dealing with creating, possessing, and using fraudulent immigration documents. *See* 8 U.S.C. § 1324c(a)(1) and (2); 18 U.S.C. § 1546 (providing penalties up to 25 years' imprisonment). Congress has occupied this field and, in such a case, even complementary or auxiliary state laws are not permitted.
>
> United States v. S. Carolina, 720 F.3d 518, 533 (4th Cir. 2013)

See also State v. Reynua, 807 N.W. 2d 473, 479 (Ct. App. Minn. 2011)

Conflict Preemption:

In addition to field preemption there is also conflict preemption in this case. Conflict preemption occurs in those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". Arizona at p. 2501.

To some extent the state statute in this case has a similar purpose to the purposes of the various federal statutes. They are all seeking to deter unauthorized aliens from obtaining employment using fraudulent documents. In the Arizona v. United States case, the penalty framework was very different from the IRCA's framework. The Arizona case struck down a state statute that made it a misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place, or perform work as

an employee." Congress, on the other hand, in its enforcement framework chose not to impose criminal penalties on aliens who seek or engage in work. Moreover federal authorities had an array of possible sanctions, short of felony prosecution. The difference in the penalties available creates a conflict.

The penalty for forgery in Iowa is a D Felony. While the sentence can be deferred, for immigration purposes, a deferred judgment is a full felony conviction. The federal penalty for fraudulently applying for work is either a prison sentence or a fine or both.

Even if the penalties, however, were the same, the cases make clear that Congress has given the discretion to the Executive Branch to decide when to prosecute. Where the state prosecutes, that discretion is obviously taken away. As was observed by the Fourth Circuit:

> As with other immigration-related measures, prosecution for counterfeiting or using federal immigration documents is at the discretion of the Department of Justice acting through the United States Attorney, and allowing the state to prosecute individuals for violations of a state law that is highly similar to a federal law strips federal officials of that discretion. As the *Arizona* Court observed, "Discretion in the enforcement of immigration law embraces immediate human concerns" and also "involve[s] policy choices that bear on this Nation's international relations." 132 S.Ct. at 2499.
>
> United States v. S. Carolina, 720 F.3d 518, 532-33 (4th Cir. 2013)

The fact that a felony conviction in state court would cause someone like Martinez to lose her DACA eligibility is even more reason to realize that there is conflict preemption. Allowing a state prosecution to conviction in this kind of case would thoroughly defeat the purposes of federal immigration law.

II. THE PROSECUTION OF MARTHA MARTINEZ FOR IDENTITY THEFT, COMMITTED BY USING CERTAIN FALSE PAPERS TO OBTAIN A JOB, SHOULD BE DISMISSED AS PREEMPTED, AS APPLIED TO NON CITIZENS WITHOUT STATUS

Standard of Review

The question of whether a state statute is preempted by federal law is a constitutional issue. Review is *de novo*. Staff Mgmt. v. Jimenez, 839 N.W.2d 640, 652 (Iowa 2013)

Preservation of Error:

Martha Martinez raised the questions presented for this appeal by filing a Motion to Dismiss before the District Court. Appx. p. 38. Judge Stuart Werling denied the motion on the merits. Appx. p. 62.

Summary of argument

The big difference, of course, between prosecution for forgery and for identity theft is that the identity theft statute is not specifically directed at

non-citizens. Citizen defendants can and do commit identity theft. For this reason, a challenge under preemption theory is based on looking at identity theft, as applied to a person like Martinez, a non-citizen seeking and obtaining employment using somebody else's identity.

As was discussed above, preemption analysis for "as applied" cases is not that different from preemption analysis for challenges to the face of statutes. Preemption after all is basically determining whether a state action is in some form of conflict with federal law or policy.

The first question is whether there is any express preemption provision. There probably is not. The closest you come in this case is the federal prohibition on using the I-9 as evidence in state court. That could be read to specifically prevent or preempt a prosecution just based on that fact alone.

The next question is whether there is any field of federal regulation. The fields of preemption identified in the previous section of this brief presumably do not change depending on the state statute considered. To the extent that they prohibit state prosecution for forgery, they should equally prohibit the same criminal charge with slightly different elements and a different name.

To the extent Congress extensively regulated and occupied the field of unauthorized employment or fraud in the obtaining of that employment, that same field would preempt prosecution based on the identity theft chapter.

Finally, there is a question of whether there is "conflict preemption". The question is whether the state prosecution stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.

Since prosecution of an undocumented person for fraudulently working is an obstacle to achieving the goals of federal immigration policy, that conclusion does not change when the criminal charge changes.

The Court should conclude that there is in fact the same preemption in the identity theft charge as there was for the forgery charge. The preemption of identity theft applies to the group of non citizens who are prosecuted for obtaining work through fraudulent documents. That includes Martha Martinez.

Facts for this issue

There are not many facts to be considered.

1. Martha Martinez applied for and worked for a company in Muscatine for a period of time using the identity of someone else.

2. Martha Martinez at the time was a non-citizen without status.

3. The charge is a class D felony.

Application of law to the facts

The application of the law to the facts is just about the same as was made with regard to the forgery statute.

There is extensive federal regulation of the employment of aliens. There is even more extensive regulation of the fraudulent employment of aliens.

The same fields should be recognized as were set out above for the Forgery charge. The existence of a field that creates field preemption does not in any way change depending on the facial validity of a particular state statute. This Court should recognize the field of "regulation of unauthorized alien fraud" existed. That comes from the Arpaio case. The Court can recognize the field of "creating, possessing and using fraudulent immigration documents." That comes from the South Carolina case.

There is also conflict preemption for all the same reasons. There is a specific statutory framework imposed by Congress and the Executive agency in charge of administering those statues. That framework conflicts with a state statutory framework.

The state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". Arizona at p. 2501.

Prosecution in state court, by definition, interferes with the discretion Congress has given to the Executive Branch.

The fact that the prosecution cannot be shown to have been brought with an anti immigrant bias does not matter. The prosecution for identity theft, as applied to Martinez, is preempted.

III. THE PROSECUTION OF MARTHA MARTINEZ UNDER EITHER CHARGE, FOR APPLYING FOR WORK AND WORKING WITH FALSE PAPERS, IS PREEMPTED AFTER SHE WAS GRANTED RELIEF UNDER THE FEDERAL DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

Standard of Review:

The question of whether a state statute is preempted by federal law is a constitutional issue. Review is *de novo*. Staff Mgmt. v. Jimenez, 839 N.W.2d 640, 652 (Iowa 2013)

Preservation of Error:

Martha Martinez raised the questions presented for this appeal by filing a Motion to Dismiss before the District Court. Appx. p. 38. Judge Stuart Werling denied the motion on the merits. Appx. p.62.

Summary of argument

The argument for preemption based on DACA status is a simple one. It is advanced as an alternative to the Court making a finding that there is otherwise field or conflict preemption.

Congress by statute has delegated considerable discretion to the Executive Branch with respect to determining when non-citizens can work. Congress has delegated considerable discretion as to when non citizens are deported.

The Executive branch in 2012 exercised that authority and implemented a program called Deferred Action for Childhood Arrivals, or DACA for short. Under that program, individuals who had previously not had immigration status could obtain legal status, even if it was only on a temporary basis. With that status they could obtain authorized employment, driver's licenses, pay taxes, and essentially come out of the shadow of deportation.

Individuals receiving DACA status, including Ms. Martinez, are by definition, young people. Many are now adults. It is to be expected that up until the point where they obtained that status, many of them had been employed as best they could. Given the requirement that employers verify

work authorization, that often meant that they were employed using fictitious identification.[2]

DACA status was intended to allow recipients to work. Prosecution and conviction for a felony of either of the two statutes in this case will cause Martinez to lose her DACA status. There is a prime example of preemption where the state statute is an obstacle to the federal immigration objectives and purposes. This is a clear form of conflict preemption.

Conflict preemption exists and should prevent prosecution of a DACA recipient for employment under false identification.

DACA litigation

The DACA program was announced in June of 2012. There has not been much litigation about the program. This is somewhat in contrast with the litigation coming out of Texas concerning the expanded DACA program. Indeed at this point the expanded DACA program, known as DAPA, has been enjoined. The preliminary injunction for that Executive Branch action was upheld by the Fifth Circuit Court of Appeals in Texas v. United States, 2015 WL 6873190 (5th Cir. Nov. 9 2015). That case seems headed to the United States Supreme Court, even though it may be a little late for consideration in the present Supreme Court term.

[2] As to this proposition, one is reminded of Captain Renault's comment in the movie *Casablanca* that he was "shocked, shocked, to find that gambling is going on in here".

There have been two federal cases involving DACA. The State of Mississippi brought an action reminiscent of the Texas case, seeking to enjoin the DACA program. The District Court dismissed the case. In April of 2015 the Fifth Circuit upheld the dismissal and the denial of a preliminary injunction. The ruling was based on the lack of standing by the complaining parties. Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015)

The case of significance came out of, not surprisingly, Arizona, Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053 (9th Cir. 2014). In response to the implementation of the DACA program, the State of Arizona implemented a policy preventing DACA recipients from obtaining Arizona driver's licenses. A group of recipients sued bringing a claim both under federal preemption and equal protection. The district court found that there was a likelihood of success on the merits under the equal protection claim. The judge concluded, however, that a preliminary injunction should not issue as the plaintiffs had not shown a sufficient likelihood of irreparable harm.

Plaintiffs appealed to the Ninth Circuit which reversed. Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053 (9th Cir. 2014) In the appeal the Court talked about whether the Arizona driver's license regulation was

preempted by the DACA regulation. The Court resolved the question of "success on the merits" by concluding the plaintiffs would succeed with an equal protection claim. The Court's discussion on preemption based on the DACA regulation is almost all relevant to this case.

> Plaintiffs argue that Defendants' policy is conflict-preempted because it interferes with Congress's intent that the Executive Branch possess discretion to determine when noncitizens may work in the United States. While we are unable to resolve this issue conclusively on the record now before us, we agree that Plaintiffs' conflict-preemption theory is plausible.
>
> Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1061 (9th Cir. 2014)
>
> Congress has given the Executive Branch broad discretion to determine when noncitizens may work in the United States. (footnote omitted) *See, e.g.*, 8 U.S.C. § 1324a(h)(3) (defining "unauthorized alien," for employment purposes, as an alien who is neither a lawful permanent resident nor "authorized to be ... employed by this chapter or by the Attorney General"); 8 U.S.C. § 1324a(h)(*l*) (providing that Attorney General is responsible for certifying aliens' right to work in the United States); 8 U.S.C. § 1324a(b)(1)(C)(ii) (providing that a document is valid as evidence of employment authorization if "the Attorney General finds [it], by regulation, to be acceptable" for that purpose); *see also* 8 U.S.C. § 1103(g)(2) (authorizing Attorney General to "perform such other acts as the Attorney General determines to be necessary" to enforce the nation's immigration laws); 8 C.F.R. § 274a.12 (establishing classes of noncitizens authorized to work in the United States). Exercising this discretion, the Executive Branch has determined that deferred action recipients—including

DACA recipients—are ordinarily authorized to work in the United States. 8 C.F.R. § 274a.12(c)(14). In fact, DACA recipients are *required* to apply for employment authorization, in keeping with the Executive's intention that DACA recipients remain "productive" members of society.

Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1062 (9th Cir. 2014)

Plaintiffs' conflict preemption argument is that although Congress has given the Executive discretion to determine when noncitizens may work in the United States, and the Executive has determined that DACA recipients may—indeed, *should*—work in the United States, Defendants' policy obstructs many DACA recipients' ability to work in Arizona. By ensuring that DACA recipients are unable to drive, Plaintiffs maintain, Defendants' policy severely curtails DACA recipients' ability to work.

Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1062 (9th Cir. 2014)

It does not matter that Defendants' policy does not formally prohibit DACA recipients from working. "[P]reemption analysis must contemplate the practical result of the state law, not just the means that a state utilizes to accomplish the goal." *United States v. Alabama,* 691 F.3d 1269, 1296 (11th Cir.2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 2022, 185 L.Ed.2d 905 (2013). In considering whether a state law is conflict-preempted, *1063 "we 'consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.' " *Ting v. AT & T,* 319 F.3d 1126, 1137 (9th Cir.2003) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977)). If the practical result of the application of Defendants' policy is that DACA recipients in Arizona are generally obstructed from working—despite the Executive's determination, backed

> by a delegation of Congressional authority, that DACA recipients throughout the United States may work—then Defendants' policy is preempted.
>
> Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1062-63 (9th Cir. 2014)

In the end the Ninth Circuit resolved the merits of the case by finding an equal protection violation. For that reason the Court did not have to reach the merits of the preemption argument. Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1063 (9th Cir. 2014) The argument however has been made.

Application of law

Prosecution of Martha Martinez is conflict preempted given her status as a DACA recipient.

The DACA program has been enacted through the exercise of appropriate administrative discretion. That discretion was authorized by Congress. If not being able to drive to work was a practical conflict, as was discussed in the Arizona Dream Act Coalition case, Martinez can establish so much more.

A conviction for either felony for working under false identity will cause the Martinez to lose her DACA status entirely.

It is the intent and the purpose of the DACA program to incorporate these young people into our society, even on a temporary basis. That incorporation is completely negated by a conviction in a case such as this one.

This Court should find the prosecution as conflict preemptive based on the administrative regulation as authorized by Congress.

CONCLUSION

Martha Martinez was brought to this country by her parents at age 11. She had no immigration status. She had no way to work or obtain a driver's license or do many of the other things associated with just living. A ray of hope appeared in her life. The federal immigration officials adopted a program called DACA, Deferred Action for Childhood Arrivals. Ms. Martinez applied for that program and was granted status for the first time. At that point, with the expected enthusiasm that comes from emerging from the dark, she went and applied for an Iowa driver's license, in her own name.

The Iowa Department of Transportation gave her that driver's license but determined that she had done the unpardonable. She had gotten a driver's license over ten years before, as a teenager, using a false name. It was the only way she could get one.

The DOT investigation showed she had even been working under that false name. DOT officials, at that point, filed a felony charge against her in Muscatine County. The Muscatine County Attorney made it two different felonies and this case is now presented.

The doctrine of federal preemption should put a stop to this prosecution. There are several theories that apply. The forgery charge should be found to be preempted on its face. The identity theft charge should be preempted as applied.

In both cases there should be recognized fields of preemption into which state prosecutions cannot venture.

The prosecutions under both statutes should also be determined to be "conflict preempted." That is because the felony prosecutions stand as obstacles to the "accomplishment and execution of the full purposes and objectives of Congress."

On top of all of that, the federal exercise of federal discretion called DACA also should provide her with relief. Allowing a prosecution under these circumstances completely takes away everything that was given to her that brought her out of the dark.

This Court should find the prosecutions preempted for a number of reasons and should direct that the charges be dismissed.

RESPECTFULLY SUBMITTED,

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REQUEST TO BE HEARD IN ORAL ARGUMENT

The Appellant hereby requests to be heard in oral argument in connection with this appeal.

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Brief was $7.60.

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/s/ Philip B. Mears
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06/17/16
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