

Federal Challenge to NJ's Immigrant Trust Directive Could be Undermined by Its Own Arguments - *New Jersey Law Journal*

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On March 3, 2020, the United States Supreme Court held in *Kansas v. Garcia* that federal immigration law did not preempt Kansas from prosecuting aliens for supplying false information on tax-withholding forms even though state law may not criminalize the use of the same false information on federal I-9 employment-verification forms. The federal government supported Kansas' position in the case. In a 5-4 decision, the Supreme Court sided with Kansas and the United States, and held that the federal Immigration Reform and Control Act of 1986 (IRCA) does not preempt state identify-theft and false-information statutes as applied to aliens who use others' Social Security numbers on tax-withholding forms.

The case addressed both express and implied preemption under the Constitution's Supremacy Clause. For present purposes, the most important ruling concerned implied "conflict" preemption, that is, the principle that state laws are preempted when they stand as an obstacle to congressional purposes in federal law. The majority took a narrow, textual view of conflict preemption, with two of the five justices in the majority calling for abrogation of the doctrine entirely.

While the federal government supported Kansas' efforts to prosecute aliens for obtaining work through false information, it recently sued New Jersey to enjoin Attorney General Gurbir S. Grewal's Immigrant Trust Directive (Law Enforcement Directive No. 2018-6) on the ground that federal immigration law preempts the Directive. Among other things, the Directive limits the information that New Jersey law-enforcement officers may provide to immigration authorities and

prevents compliance with federal immigration detainers—requests that aliens in state custody continue to be detained pending federal immigration enforcement. The federal government argues that the Directive obstructs congressional objectives under the Immigration and Nationality Act (INA).

The federal government’s successful support for Kansas might hurt its case against New Jersey. Following *Kansas*, federal courts might conclude that the Directive makes it more difficult for federal immigration officers to locate and detain aliens potentially subject to removal, thus potentially frustrating congressional purposes in the INA, but that the text and structure of federal immigration statutes do not preempt the Directive.

‘Kansas v. Garcia’

Kansas prosecutors charged three individuals for using other people’s identifying information on their W-4 and/or K-4 (the Kansas W-4) tax forms. The defendants also used the same false information on their federal I-9 forms. Under the IRCA, states cannot prosecute based on information provided on I-9s because I-9s “and any information contained in” those forms can only be used to enforce the INA and other specified federal statutes. See 8 U.S.C. 1324a(b)(5). The defendants argued that the IRCA also prohibited prosecution based on their tax-withholding forms because they contained the same information as their I-9s. The Kansas Supreme Court agreed, and the U.S. Supreme Court granted Kansas’ petition for a writ of certiorari.

The United States government submitted amicus briefs supporting Kansas at both the certiorari and the merits stages, arguing that the IRCA did not expressly or impliedly preempt Kansas’ prosecutions. The government encouraged the Supreme Court to address implied preemption—which the defendants offered as an alternative ground to affirm—even though it was not the basis of the Kansas Supreme Court’s decision, in order to “provide valuable guidance to lower courts that have struggled to find a common rationale in addressing preemption claims.” Br. for United States as Amicus Curiae 18-19, Dec. 2018, *Kansas v. Garcia*, No. 17-834. The United States contended that the IRCA did not occupy the field (so-called “field preemption”) of unauthorized employment of aliens or use of false documents by aliens to obtain employment. See Br. for United States as Amicus Curiae Supporting Pet’r 23-28, May 2019, *Kansas v. Garcia*, No. 17-834. It also argued that there was no conflict preemption of the state statutes because: (1) prosecuting identity theft and related crimes does not conflict with any congressional purpose in the IRCA; (2) the state statutes did not usurp federal control since they did not regulate the unauthorized employment of aliens, and federal agents were involved in the investigations; and (3) the IRCA does not contain any deliberate choice against criminally punishing the use of another’s Social Security number. *Id.* at 28-30.

A five-member majority of the Supreme Court agreed with Kansas and the United States as to both express and implied preemption. Regarding the latter issue, the court noted that implied preemption “must be grounded in the text and structure of the statute at issue.” *Kansas v. Garcia*, 140 S.Ct. 791, slip. op. at 15 (Mar. 3, 2020) (internal quotation marks omitted). As to conflict preemption, one of the two types of implied preemption, the court held that mere

overlap between federal and state law was not enough. The court also stated that although federal authorities participated in the investigations and the federal government supported Kansas in the case, “the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption” because federal law, “not the criminal law enforcement priorities or preferences of federal officers,” has preemptive effect. *Id.* at 19.

Justice Clarence Thomas drafted a concurring opinion, in which Justice Neil Gorsuch joined. He argued that conflict preemption should be abandoned because “it impermissibly rests on judicial guesswork about broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law.” *Id.* at 2 (Thomas, J., concurring) (internal quotation marks omitted).

Immigrant Trust Directive

On Nov. 28, 2018, Attorney General Grewal issued the Immigrant Trust Directive, which was revised on Sept. 27, 2019. Among other things, the Directive limits the role that state and local officers can play in immigration enforcement, including (with certain exceptions) by prohibiting them from sharing non-public personally identifying information, providing notice of a detained individual’s upcoming release, and continuing the detention of an individual past the time he or she would otherwise be eligible for release from custody based solely on a civil immigration detainer request.

In September 2019, Cape May and Ocean Counties sued the attorney general seeking a declaration that the Directive is outside the scope of his authority and is preempted by federal immigration law. The federal government filed a statement of interest supporting the counties and, in February 2020, filed its own action against New Jersey. The government contends that the Directive is preempted because it frustrates immigration enforcement by preventing state officials from sharing “necessary information about individuals in their custody who are subject to removal proceedings or who are being investigated for violations of federal immigration law.” Compl. ¶13, Feb. 10, 2020, *United States v. New Jersey*, No. 3:20-cv-01364-FLW-TJB, ECF No. 1. The government further argues that its ability to locate, detain and remove aliens subject to removal depends on information-sharing from the states, which the Directive impedes. See Statement of Interest 11-13, Jan. 24, 2020, *Cty. of Ocean v. Grewal*, No. 3:19-cv-18083-FLW-TJB, ECF No. 25.

‘Kansas v. Garcia’ Works Against the Government’s Position on the Immigrant Trust Directive

Kansas v. Garcia strongly suggests that state law is not preempted solely because it conflicts with federal policies or makes federal law enforcement more difficult. Instead, the court looked to the text and structure of federal statutes to decide if they precluded Kansas from prosecuting. Because the federal statutes at issue did not themselves reflect a congressional choice that only federal authorities could prosecute the charged acts, there was no conflict preemption. The court further noted that it was irrelevant that federal authorities supported the state prosecutions because only federal law, not federal policies or preferences, have preemptive power under the Supremacy Clause. Instead of looking broadly to what Congress might have intended under immigration law—which Justice Thomas described in his

concurrency as “judicial guesswork”—the court took a decidedly textual approach to implied preemption, just as it does to express preemption.

The federal government’s position on implied preemption in its case against New Jersey’s Immigrant Trust Directive appears inconsistent with the principles it helped to establish in *Kansas v. Garcia*. The government contends that its inability to obtain information from state law-enforcement officials will make immigration enforcement more difficult in a manner that Congress did not intend. Although the government cites provisions of the INA in support of its arguments, those provisions speak primarily to federal immigration authorities’ responsibilities rather than states’ obligations to cooperate in immigration enforcement. Moreover, as New Jersey argues in opposition to the counties’ and federal government’s claims, the Tenth Amendment anticommandeering doctrine prohibits Congress from issuing orders to state officials or legislatures, *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S.Ct. 1461, 1467 (2018), and thus the INA could not direct state officers to assist with federal immigration enforcement or directly order state lawmakers to take or refrain from taking immigration-related action. Even if the INA were ambiguous on whether states were required to assist federal immigration enforcement, therefore, courts would avoid an interpretation that raises a serious anticommandeering problem.

In sum, whether the Directive is impliedly preempted depends on a textual analysis of the INA, assisted by the principle of constitutional avoidance, not on whether it makes federal immigration officers’ jobs more difficult. The United States’ implied-preemption arguments against the Directive appear guided more by the Trump Administration’s immigration policies and animus toward so-called “sanctuary states” than a fair application of the law that the government helped create in *Kansas v. Garcia*.