In a 5-4 decision in *Kansas v. Garcia* the Supreme Court held that the Immigration Reform and Control Act (IRCA) does not preempt state statutes that provide a basis for identity theft prosecutions when someone uses another person’s Social Security Number on their state and federal tax-withholding forms.

The IRCA requires employers to verify, using a federal work-authorization form, that an employee is authorized to work in the United States. The IRCA states that “any information contained in . . . such form[s] may not be used for purposes other than for enforcement of” the Immigration and Nationality Act or other specified provisions of federal law. A federal regulation separate from the IRCA requires new employees to complete tax-withholding forms.

The defendants in this case used social security numbers that weren’t their own when completing the I-9 form and federal (W-4) and state (K-4) tax withholding forms. They were convicted of violating a Kansas statute disallowing identity theft for using false identities when they completed their W-4s and K-4s.

The Kansas Supreme Court held that the IRCA prohibits Kansas from using any information contained within an I–9 as the basis for a state law identity theft prosecution. Here the false social security numbers included on the I-9s were also used on the W-4 and K-4 forms which were the basis of the convictions.

Justice Alito, writing for the majority, rejected this theory of what “contained in” means noting that under it no information included in an I-9 (name, address, phone number, etc.) “could ever be used by any entity or person for any reason.” Justice Alito continued: “This interpretation is flatly contrary to standard English usage. A tangible object can be ‘contained in’ only one place at any point in time, but an item of information is different. It may be ‘contained in’ many different places, and it is not customary to say that a person uses information that is contained in a particular source unless the person makes use of that source.”

The dissenting Justices agreed with the majority regarding its above analysis on express preemption. But they opined that the IRCA impliedly preempts the prosecutions because “Congress has occupied at least the narrow field of policing fraud committed to demonstrate federal work authorization.”

The dissent noted that in *Arizona v. United States* (2012) the Supreme Court invalidated a state law making it a crime for an unauthorized person to work because Congress chose not to criminally penalize those who work without authorization. According to the dissent even though the IRCA criminalizes non-compliance with the I-9, the IRCA “makes clear that only the Federal Government may prosecute people for misrepresenting their federal work-authorization status.” According to the majority, the IRCA fails to impliedly preempt “the field of fraud on the federal employment verification system” because the “submission of tax withholding forms is fundamentally unrelated to the federal employment verification system.”