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Testimony of Attorney General Kris Kobach
Proponent for HB 2350
Senate Judiciary Committee
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Chairman Warren and members of the committee:

I come before you today not only as the Kansas Attorney General but also as an attorney and former law professor who has litigated a significant number of cases in the area of federal preemption, specifically with regard to federal immigration law.

I wholeheartedly support H.B. 2350, and I believe that it fills an important gap in Kansas criminal law. However, I have suggested a balloon amendment to the bill that rewords it in order to make it as defensible as possible, in the event that it is ever challenged in court as being preempted. The amendment achieves the same prohibition as the unamended bill does, but it does so with wording that matches the terminology of federal law. That is essential in defending any state statute against a preemption challenge. There can be no preemption when the state law is in perfect symmetry with federal law.

I won't bore you with all of the relevant precedents that my office would rely upon in defending this bill if it is ever challenged. But two are particularly salient.

First, in the recent case of *Kansas v. Garcia*, the Court held that federal law did not prevent Kansas from criminally prosecuting illegal aliens for identity theft. The Kansas law had been used to prosecute three illegal aliens who had stolen the social security numbers of other people.

Writing for the majority, Justice Alito rejected the argument that Kansas could not make criminal what is already criminal under federal law:

> "The mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption. From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today. In recent times, the reach of federal criminal law has expanded, and there are now many instances in which a prosecution for a particular course of conduct could be brought by either federal or state prosecutors. Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap, and there is no basis for inferring that federal criminal statutes preempt state laws whenever they overlap."

In fact, the likelihood of preemption goes down if the state law mirrors the terminology of federal law. That is the premise behind the amendment to HB 2350.

A second Supreme Court precedent that would be important in defending this bill is *United States v. Arizona*. It was in that case that the Court highlighted how important it is that a state defer to the federal government's determination of an alien's immigration status: "Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status. See § 1373(c)." *Arizona v. United States*, 132 S. Ct. 2492, 2508 (2012). That is why the amendment makes specific reference to 8 U.S.C. 1373(c).

That is a quick summary of why the amendment's rewriting will assist the Office of the Attorney General in defending this bill in Court. Although the wording is different, nevertheless the prohibited behavior is virtually the same.

Thank you.

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