

No. _____

In the Supreme Court of the United States

STATE OF COLORADO,
Petitioner,

v.

BERNARDINO FUENTES-ESPINOZA,
Respondent.

Application to the Honorable Sonia Sotomayor
for an Extension of Time to File a
Petition for Writ of Certiorari to the Colorado Supreme Court

In accordance with Rule 13(5) of the Rules of the Supreme Court, the State of Colorado moves for an extension of time of 21 days, to and including Monday, January 29, 2018, to file a petition for writ of certiorari to review an October 10, 2017 decision of the Colorado Supreme Court. The decision is attached as Exhibit 1.

The petition for writ of certiorari is currently due on January 8, 2018.

The jurisdiction of this Court is based on 28 U.S.C. § 1257(a).

Judgment Sought to be Reviewed

1. This case involves the preemptive scope of the federal Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2017) (“INA”).

2. Following trial, a jury convicted Bernardino Fuentes-Espinoza, the Respondent, of seven counts of human smuggling under a Colorado statute, Colo. Rev. Stat. § 18-13-128 (2017).

3. On direct appeal, the Respondent argued, among other issues, that Colo. Rev. Stat. § 18-13-128 is unconstitutional because it is preempted by the INA. A majority of the court of appeals held that the defendant waived his preemption claim by failing to raise it in the trial court. *See People v. Fuentes-Espinoza*, 2013 COA 1, ¶ 22.

4. The Colorado Supreme Court reversed in a 4-3 decision. *See Fuentes-Espinoza v. People*, 2017 CO 98. Exercising its discretion to review the unpreserved preemption issue, the majority held that Colorado's human smuggling statute was preempted under field preemption and conflict preemption. *Id.* at ¶ 67. According to the majority, the INA established a comprehensive framework for regulating the transportation, concealment, and inducement of unlawfully present aliens. *Id.* at ¶ 50. Therefore, the majority concluded, Congress had broadly preempted the field of any law bearing on the movement of undocumented immigrants. *Id.* The majority also held that Colorado's human smuggling statute violated conflict preemption because, although Colorado's statute seeks to protect the victims of human smuggling rather than interfere with federal immigration policy, nothing in the INA indicates a federal intent to protect aliens from human smuggling. *Id.* at ¶ 66.

5. Three Justices dissented. On the field preemption issue, the dissent recognized that this Court has preempted only the field of alien registration, leaving the States free to enact many other laws to protect public safety even when those laws implicate immigration issues. *Id.* at ¶ 70. Because Colorado's human smuggling statute in no way involves alien registration, the dissent would have held

that Colorado’s human smuggling statute is not field preempted. *Id.* On conflict preemption, the dissent emphasized that even under the majority’s interpretation of the relevant federal and state laws, there is no conflict. The majority agreed that the federal and state statutes are directed at different conduct, in that the INA is focused on aiding and abetting an immigration violation, whereas state law is focused on human smuggling itself. Thus, the dissent reasoned, federal law is not in conflict with Colorado’s law seeking to protect the victims of human smuggling. *Id.* at ¶¶ 75–77.

Reasons Why an Extension of Time is Justified

6. This case presents questions of fundamental importance to the State of Colorado and other States. Human smuggling is a dangerous crime that can impose inhumane conditions on victims. The victims of human smuggling are also vulnerable to fraud and other harmful behavior by smugglers. Under the Colorado Supreme Court’s decision, States like Colorado will no longer be able to enact or enforce laws against those that commit the crime of human smuggling.

7. Additionally, the Colorado Supreme Court has interpreted the INA in two novel respects and in a manner incompatible with this Court’s precedent. First, the Colorado Supreme Court held that the INA preempts the entire field of “criminalizing and regulating the transportation, concealment, and inducement of unlawfully present aliens.” *Fuentes-Espinoza*, 2017 CO 98, ¶ 50. This holding is inconsistent with this Court’s decision in *Arizona v. United States*, 567 U.S. 387 (2012), which held only that the INA preempts the field of alien *registration*—not

the field of any activity involving the movement of unlawfully present aliens, including by human smugglers. *See id.* at 401–03 (analyzing the INA and holding only that “the Federal Government has occupied the field of alien *registration*” (emphasis added)). Second, the Colorado Supreme Court held that unless the INA affirmatively evinces congressional intent on a particular subject—such as the subject of human smuggling—States are precluded from enacting laws in that area. *Fuentes-Espinoza*, 2017 CO 98, ¶ 66. But this is contrary to *De Canas v. Bica*, 424 U.S. 351 (1967), *abrogated by statute on other grounds*, *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582 (2011), where this Court recognized that unless there is a “specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general,” the States are free to regulate. *See id.* at 358.

8. This case also raises policy issues that are critically important to States like Colorado. If the Colorado Supreme Court’s reasoning is credited by other courts, a wide range of state laws would be vulnerable to preemption—including even those laws granting *protections* to undocumented foreign nationals, such as laws allowing those individuals to obtain driver licenses *See, e.g.*, Colo. Rev. Stat. § 42-2-505 (2017) (creating a program for granting driver licenses to undocumented immigrants).

9. Petitioner’s Counsel of Record, Colorado Solicitor General Frederick R. Yarger, will be arguing *Texas v. New Mexico and Colorado*, Orig. No. 141, in this Court on January 8, 2018. Because of the need to work on that case, other petition-

stage cases in this Court, and merits cases pending in the state and federal courts in Colorado, an extension of time is justified.

10. Counsel for the Respondent has indicated that the Respondent has no objection to the requested extension of time.

For these reasons, applicant the State of Colorado requests an extension of time of 21 days, to and including January 29, 2018, within which to file a petition for a writ of certiorari.

Respectfully submitted,

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