APPENDIX

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APPENDIX A

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2017 CO 98

Supreme Court Case No. 13SC128
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 08CA1231

Petitioner:
Bernardino Fuentes-Espinoza,
v.
Respondent:
The People of the State of Colorado.

Judgment Reversed
en banc
October 10, 2017

JUSTICE GABRIEL delivered the Opinion of the Court.*
JUSTICE EID dissents, and JUSTICE COATS and JUSTICE BOATRIGHT join in the dissent

* This opinion was originally assigned to another Justice but was reassigned to Justice Gabriel on June 15, 2017.

¶1 In this case, petitioner Bernardino Fuentes-Espinoza challenges his convictions under Colorado's human smuggling statute, section 18-13-128, C.R.S. (2017), on the ground that that statute is preempted by the federal Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2017) ("INA").[1] The court of appeals division below did not consider Fuentes-Espinoza's preemption argument because it was unpreserved. People v. Fuentes-Espinoza, 2013 COA 1, ¶ 16, ___ P.3d ___. We, however, choose to exercise our discretion to review that argument and conclude that the INA preempts section 18-13-128 under the doctrines of both field and conflict preemption.

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[1] Specifically, we granted certiorari to review the following issues:

1. Whether the Immigration and Nationality Act preempts Colorado's human smuggling statute and the trial court therefore was without jurisdiction.

2. Whether the court of appeals erred in holding that the appellant waived the claim that the Colorado human smuggling statute is preempted by the Federal Immigration and Nationality Act.

3. Whether Colorado's human smuggling statute requires the prosecution to prove that the defendant was, in fact, engaged in smuggling humans in violation of the immigration law.

¶2 In reaching this conclusion, we agree with a number of federal circuit courts that have reviewed the same INA provisions at issue here and have determined that those provisions create a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens and thus evince a congressional intent to occupy the field criminalizing such conduct. In addition, applying the analyses set forth in those federal decisions, we conclude that section 18-13-128, like the state human smuggling statutes at issue in the federal cases, stands as an obstacle to the accomplishment and execution of Congress's purposes and objectives in enacting its comprehensive framework.

¶3 Accordingly, we reverse the division's judgment and remand this case for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶4 In 2007, Fuentes-Espinoza was walking along the Las Vegas Strip when an individual approached him and offered him $500 to drive several family members from Phoenix to Kansas. Fuentes-Espinoza accepted the offer, and he and a friend rode to Phoenix with the man who had made the offer. When the group arrived in Phoenix, Fuentes-Espinoza and his friend were dropped off at an apartment, where they waited for the man to return.

¶5 That evening, the man returned with a van full of people. The man gave Fuentes-Espinoza $600

in travel money, as well as a map that had the man's telephone number on it. Fuentes-Espinoza, his friend, and the people in the van then set off on the trip to Kansas.

¶6 En route, Fuentes-Espinoza stopped at a gas station in Wheat Ridge, Colorado to get gas and to repair a broken taillight. As pertinent here, he went into the station to pay and gave the clerk a one-hundred-dollar bill, which apparently had been included in the travel money that Fuentes-Espinoza had received. The clerk determined that the bill was counterfeit and called the police.

¶7 An officer responded to the gas station, and as he approached, two individuals from the van took off running and, apparently, were not apprehended. The officer then arrived at the station, and after speaking with the clerk, he questioned Fuentes-Espinoza about the counterfeit bill and the people in the van. Fuentes-Espinoza told inconsistent stories about where he had obtained the counterfeit bill and where he was going, and the officer arrested him for passing the bill.

¶8 The officer then spoke with the people in the van and requested identification from them. After doing so, the officer spoke with his supervisor to report on his investigation and to get further instructions. The supervisor told the officer to bring the group to the police station, and the officer did so. The officer then called the human smuggling hotline,

and the hotline sent representatives to the station to assist.

¶9. The People ultimately charged Fuentes-Espinoza with one count of forgery (for passing the counterfeit bill) and seven counts of human smuggling in violation of section 18-13-128.

¶10. Under section 18-13-128, a person commits a class 3 felony

> if, for the purpose of assisting another person to enter, remain in, or travel through the United States or the state of Colorado in violation of immigration laws, he or she provides or agrees to provide transportation to that person in exchange for money or any other thing of value.

§ 18-13-128(1), (2). Class 3 felonies carry a presumptive sentencing range of four to twelve years' imprisonment. § 18-1.3-401(1)(a)(V)(A), C.R.S. (2017).

¶11. The case proceeded to trial, and a jury ultimately acquitted Fuentes-Espinoza of forgery but convicted him on each of the human smuggling counts. The court subsequently sentenced him to concurrent four-year terms on each of the seven counts.

¶12. Fuentes-Espinoza appealed, and as pertinent here, he argued for the first time that federal law

preempts section 18-13-128. He further asserted that section 18-13-128 required the People to prove that the people he had transported were present in violation of the immigration laws. The division rejected both arguments and, in a split decision, affirmed Fuentes-Espinoza's convictions. Fuentes-Espinoza, ¶¶ 2–3, 61.

¶13 Regarding the preemption issue, the majority concluded that Fuentes-Espinoza's arguments were not properly before the court because Fuentes-Espinoza had not made those arguments before the trial court. Id. at ¶¶ 10–16.

¶14 Regarding the question of what section 18-13-128 required the People to prove, the majority noted that "by including the actor's purpose as an element of the crime, [section 18-13-128] emphasizes the actor's intent, rather than the outcome of his or her actions." Id. at ¶ 30. Thus, in the majority's view, the People were required to prove only that the actor had the purpose of assisting another person to enter, remain in, or travel through the United States or Colorado in violation of immigration laws, and not that the passengers allegedly being smuggled were actually present in the United States or Colorado in violation of those laws. Id. at ¶¶ 27, 39.

¶15 Judge Casebolt dissented. In his view, the division was required to address Fuentes-Espinoza's preemption argument, regardless of whether it was properly preserved, because the argument implicated the court's subject matter jurisdiction. Fuentes-

Espinoza, ¶¶ 63–64 (Casebolt, J., dissenting). Alternatively, Judge Casebolt stated that he would review the unpreserved claim for plain error. Id. at ¶¶ 66–67.

¶16 Turning then to the merits of the preemption claim, Judge Casebolt noted that the INA provides "a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens." Id. at ¶ 76. In support of this position, he discussed a number of federal circuit court decisions in which the courts had concluded that the INA preempted the state smuggling laws before them under the doctrines of field and conflict preemption. Id. at ¶¶ 76–80. Based on the analyses set forth in those cases, Judge Casebolt concluded that (1) "the INA covers every aspect of the Colorado statute"; (2) in enacting the INA, Congress articulated a "clear purpose of ousting state authority from the field of transporting aliens"; and (3) section 18-13-128 "stands as an obstacle to accomplishing Congress's objective of creating a comprehensive scheme governing the movement and harboring of aliens." Id. at ¶¶ 85–87. Accordingly, he determined that the INA preempted section 18-13-128 under the doctrines of both field and conflict preemption and thus would have reversed Fuentes-Espinoza's conviction. Id. at ¶¶ 82, 91.

¶17 Fuentes-Espinoza then sought, and we granted, certiorari.

II. Analysis

¶18 We begin by addressing the question of issue preservation and the applicable standard of review. We then discuss the pertinent principles of preemption law, as well as the Supreme Court's decision in Arizona v. United States, 567 U.S. 387 (2012), and other apposite federal authority. Finally, we apply the principles set forth in the foregoing authority and conclude that, like the statutes at issue in those cases, section 18-13-128 is preempted by the INA.

Issue Preservation and Standard of Review

¶19 We have long made clear that we will exercise our discretion to review unpreserved constitutional claims when we believe that doing so would best serve the goals of efficiency and judicial economy. See, e.g., Hinojos-Mendoza v. People, 169 P.3d 662, 667 (Colo. 2007); People v. Wiedemer, 852 P.2d 424, 433 n.9 (Colo. 1993). Because we believe that reviewing Fuentes-Espinoza's unpreserved preemption claim would serve those goals here, we exercise our discretion to do so. As a result, we need not consider whether Fuentes-Espinoza waived that claim.

¶20 The question of whether a federal statute preempts state law presents an issue of law that we review de novo. See, e.g., Russo v. Ballard Med. Prods., 550 F.3d 1004, 1010 (10th Cir. 2008); People

in Interest of C.Z., 2015 COA 87, ¶ 10, 360 P.3d 228, 233.

B. Preemption Principles and Pertinent Case Law

¶21 The Supremacy Clause of the United States Constitution provides that federal law "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. As a result, it has long been settled that Congress has the power to preempt state law. Arizona, 567 U.S. at 399.

¶22 In determining whether federal statutes preempt state law, we are "guided by two cornerstones." Ga. Latino All. for Human Rights v. Governor of Ga., 691 F.3d 1250, 1263 (11th Cir. 2012) (quoting Wyeth v. Levine, 555 U.S. 555, 565 (2009)). First, Congress's purpose is the "ultimate touchstone in every pre-emption case." Id. (quoting Wyeth, 555 U.S. at 565). Second, we must presume that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id. (quoting Wyeth, 555 U.S. at 565).

¶23 The United States Supreme Court has recognized three forms of federal preemption, namely, express, field, and conflict preemption. See Arizona, 567 U.S. at 399.

¶24 A state law is expressly preempted when Congress "withdraw[s] specified powers from the States by enacting a statute containing an express preemption provision." Id.

¶25 Under the field preemption doctrine, in turn, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." Id. Congress's intent to preempt a particular field may be inferred "from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

¶26 Finally, under the conflict preemption doctrine, "state laws are preempted when they conflict with federal law." Id. Such a conflict exists (1) when compliance with both federal and state law is physically impossible and (2) 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.'" Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

¶27 In Arizona, 567 U.S. at 398–407, the Supreme Court applied the foregoing principles in the context of the federal government's regulation of, among

other things, alien registration. That case is instructive here.

¶28 In Arizona, the federal government challenged (1) section 5(C) of an Arizona statute, which section 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 or independent contractor," Id. at 403 (quoting Ariz. Rev. Stat. Ann. § 13-2928(C) (2017)); and (2) section 3 of the same Arizona statute, which prohibited the "willful failure to complete or carry an alien registration document . . . in violation of [federal law]," Id. at 400 (quoting Ariz. Rev. Stat. Ann. § 13-1509(A) (2017)). The Supreme Court concluded that federal law preempted both sections. Id. at 403, 406–07.

¶29 Regarding section 5(C), the Court began by noting that the federal Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324a (2017), (1) made it illegal for employers knowingly to hire, recruit, refer, or continue to employ unauthorized workers and (2) required employers to verify the employment authorization status of prospective employees. Arizona, 567 U.S. at 404. The Court observed that IRCA enforced these provisions through criminal or civil penalties on employers but that it imposed no criminal sanctions on employees unless they obtained employment through fraudulent means. Id. at 404–05. Employees were principally subject only to civil penalties. Id. at 404.

¶30 In light of the foregoing, the Court concluded that IRCA preempted section 5(C) because enforcing section 5(C) "would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens." Id. at 406. Notably, in reaching this conclusion, the Court recognized that section 5(C) "attempt[ed] to achieve one of the same goals as federal law—the deterrence of unlawful employment." Id. The Court determined, however, that section 5(C) "involve[d] a conflict in the method of enforcement" because it imposed "criminal penalties on aliens who seek or engage in unauthorized employment," whereas IRCA had rejected such penalties. Id. Accordingly, section 5(C) posed "an obstacle to the regulatory system Congress chose" and, consequently, was preempted under the doctrine of conflict preemption. Id. at 406–07.

¶31 The Court then discussed section 3 of the Arizona statute, which, as noted above, prohibited the "willful failure to complete or carry an alien registration document . . . in violation of [federal law]." Id. at 400. The Court held that this section, too, was preempted, based on the fact that Congress "ha[d] occupied the field of alien registration," thus leaving no room for state regulation. Id. at 401.

¶32 In so ruling, the Court rejected Arizona's argument that section 3 was not preempted because "the provision ha[d] the same aim as federal law and adopt[ed] its substantive standards." Id. at 402. In the Court's view, "[p]ermitting the State to impose its own penalties for the federal offenses here would

conflict with the careful framework Congress adopted." Id. Moreover, the penalties imposed by the state statute were inconsistent with those provided by federal law. Id. at 402–03. For example, under federal law, the failure to carry registration papers was a misdemeanor that could be punished by a fine, imprisonment, or a term of probation. Id. at 403 (citing 8 U.S.C. § 1304(e) (2017); 18 U.S.C. § 3561 (2017)). The Arizona statute, in contrast, precluded probation as a possible sentence (and also prohibited the possibility of a pardon). Id. (citing Ariz. Rev. Stat. Ann. § 13-1509(D) (2017)). The Court concluded that these conflicts "simply underscore[d] the reason for field preemption." Id.

¶33 Since the Supreme Court's decision in Arizona, a number of federal circuit courts have applied the principles set forth therein to strike down state human smuggling statutes on preemption grounds.

¶34 For example, in Georgia Latino Alliance, 691 F.3d at 1256–57, the plaintiffs challenged several provisions of Georgia's Illegal Immigration and Enforcement Act of 2011. That statute criminalized (1) transporting or moving an "illegal alien," (2) concealing or harboring an "illegal alien," and (3) inducing an "illegal alien" to enter the state of Georgia. Id. at 1263 (citing Ga. Code Ann. §§ 16-11-200(b), 16-11-201(b), 16-11-202(b) (2017)). The Eleventh Circuit concluded that the INA likely preempted each of these provisions. Id. at 1267.

¶35 The court began by noting that "[t]he INA provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens." Id. Within that framework, 8 U.S.C. § 1324(a)(1)(A)(ii)–(iv) provides that it is a federal crime for any person (1) to transport or move an unlawfully present alien within the United States; (2) to conceal, harbor, or shield an unlawfully present alien from detection; or (3) to encourage or induce an alien to come to, enter, or reside in the United States. Ga. Latino All., 691 F.3d at 1263. In addition, 8 U.S.C. § 1324(c) permits local law enforcement officers to arrest those who violate these provisions of federal law, but under 8 U.S.C. § 1329, federal courts have exclusive jurisdiction to prosecute these crimes and to interpret the boundaries of the federal statute. Ga. Latino All., 691 F.3d at 1263–64. 8 U.S.C. § 1324(e) then mandates a community outreach program to "educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section." Ga. Latino All., 691 F.3d at 1264. And 8 U.S.C. § 1325 imposes civil and criminal penalties for unlawful entry into the United States, and 8 U.S.C. §§ 1323 and 1328 authorize criminal penalties for individuals who bring aliens into the United States and who import aliens for immoral purposes. Ga. Latino All., 691 F.3d at 1264.

¶36 Construing these provisions together, the Eleventh Circuit concluded that (1) "the federal government has clearly expressed more than a

'peripheral concern' with the entry, movement, and residence of aliens within the United States"; (2) "the breadth of these laws illustrates an overwhelmingly dominant federal interest in the field"; and (3) "Congress has provided a 'full set of standards' to govern the unlawful transport and movement of aliens." Id. (quoting DeCanas v. Bica, 424 U.S. 351, 360 (1976); Arizona, 567 U.S. at 401).

¶37 The court further concluded that the Georgia statute presented an obstacle to the execution of the federal statutory scheme. Id. at 1265. In support of this conclusion, the court observed that the INA confines the prosecution of federal immigration crimes to federal courts and limits the power to pursue those cases to the United States Attorney, whereas the Georgia statute allowed for parallel state enforcement that was "not conditioned on respect for the federal concerns or the priorities that Congress had explicitly granted executive agencies the authority to establish." Id. This conflict was exacerbated by the fact that the state statute's enticement provision created a new crime that was unparalleled in the federal scheme. Id. at 1266. And, the court noted, the state statute's provisions concerning harboring and transporting unlawfully present aliens constituted an attempted complement to the INA that was "inconsistent with Congress's objective of creating a comprehensive scheme governing the movement of aliens within the United States." Id.

¶38 In light of the foregoing, the court determined that the plaintiffs had met their burden of showing a likelihood of success on their claim that Georgia's statute was preempted by federal law. Id. at 1267; see also United States v. Alabama, 691 F.3d 1269, 1285–88 (11th Cir. 2012) (relying heavily on Georgia Latino Alliance in concluding that the INA preempted a similar Alabama human smuggling provision).

¶39 In United States v. South Carolina, 720 F.3d 518, 530–32 (4th Cir. 2013), the Fourth Circuit reached a similar result in a case involving a South Carolina law making it a felony (1) to "transport, move or attempt to transport" or to "conceal, harbor or shelter" a person "with intent to further that person's unlawful entry into the United States" or (2) to help that person avoid apprehension or detection. The court reasoned that the pertinent sections were preempted under field preemption principles "because the vast array of federal laws and regulations on this subject is 'so pervasive . . . that Congress left no room for the States to supplement it.'" Id. at 531 (quoting Arizona, 567 U.S. at 399). Additionally, the court concluded that the sections were "conflict preempted" because "there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on

the same subject." Id. (quoting Arizona, 567 U.S. at 399).[2]

¶40 And in Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1022–29 (9th Cir. 2013), the Ninth Circuit determined that under both field and conflict preemption principles, the INA preempted an Arizona statute that attempted to criminalize transporting, concealing, harboring, or attempting to harbor an unauthorized alien if the offender knew or recklessly disregarded the fact that the person was in the country illegally. Regarding field preemption, the court agreed with the cases discussed above that the breadth of the federal laws governing the movement and harboring of aliens reflects the federal government's overwhelmingly dominant federal interest in that field. Id. at 1026. Regarding conflict preemption, the court concluded that Arizona's statute (1) provided additional and different state penalties for harboring unauthorized aliens than did the INA and thus disrupted Congress's carefully calibrated scheme, (2) divested federal authorities of the exclusive power to prosecute crimes concerning the transportation or harboring of unauthorized aliens, and (3) criminalized conduct not covered by the federal harboring provision. Id. at 1026–28. Accordingly, the Arizona statute stood "as an obstacle to the accomplishment and execution of the full purposes

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[2] We note that the court deemed this a conflict preemption analysis, although Arizona included such an analysis under the rubric of field preemption.

and objectives of Congress" and therefore was preempted under the conflict preemption doctrine. Id. at 1026, 1029.

¶41 With the foregoing legal principles and authorities in mind, we turn to the argument now before us.

C. Application

¶42 Here, Fuentes-Espinoza contends that the INA preempts section 18-13-128 under both field and conflict preemption principles. We agree.

1. Field Preemption

¶43 With respect to field preemption, as noted above, we may infer Congress's intent to preempt a particular field when it has created "a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Arizona, 567 U.S. at 399 (quoting Rice, 331 U.S. at 230). For several reasons, we conclude that such a framework of regulation and such a federal interest exist here.

¶44 First, we note, as did the Supreme Court in Arizona, 567 U.S. at 394–95, that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," and "[f]ederal governance of immigration and alien status is extensive and complex."

¶45 Second, we agree with the federal circuit court cases discussed above that the INA established a comprehensive framework for penalizing the transportation, concealment, and inducement of unlawfully present aliens. See Valle del Sol, 732 F.3d at 1026; South Carolina, 720 F.3d at 531; Ga. Latino All., 691 F.3d at 1263.

¶46 For example, 8 U.S.C. § 1324, entitled, "Bringing in and harboring certain aliens," provides:

> [Any person who] knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law [shall be punished as provided in subparagraph (B)].

8 U.S.C. § 1324(a)(1)(A)(ii).

¶47 This statute also (1) criminalizes the aiding or abetting of the above-mentioned conduct, 8 U.S.C. § 1324(a)(1)(A)(v)(II); (2) creates an extensive punishment scheme, see 8 U.S.C. § 1324(a)(1)(B)(i)–(iv); (3) discusses evidentiary considerations for determining whether a violation has occurred, 8 U.S.C. § 1324(b)(3); and (4) mandates the creation of an outreach program to educate the public on the

penalties for violations of the foregoing provisions, 8 U.S.C. § 1324(e).

¶48 In addition, the INA imposes civil and criminal penalties on aliens themselves for unlawful entry into the United States, see 8 U.S.C. § 1325, and authorizes criminal penalties for individuals who bring aliens into the United States, aid or assist the entry of inadmissible aliens, or import aliens for immoral purposes, see 8 U.S.C. §§ 1323, 1327, 1328.

¶49 Lastly, 8 U.S.C. § 1324(c) expressly permits local law enforcement officers to arrest those who violate that statute's provisions, but 8 U.S.C. § 1329 expressly grants to United States district courts jurisdiction of all causes brought by the United States that arise under the pertinent subsection and provides that "[i]t shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States."

¶50 In our view, when read together, these provisions evince Congress's intent to maintain a uniform, federally regulated framework for criminalizing and regulating the transportation, concealment, and inducement of unlawfully present aliens, and this framework is so pervasive that it has left no room for the states to supplement it. See Arizona, 567 U.S. at 399.

¶51 Accordingly, we conclude that the INA preempts section 18-13-128 under the doctrine of field preemption.

2. Conflict Preemption

¶52 We further conclude that the INA preempts section 18-13-128 under the doctrine of conflict preemption.

¶53 As noted above, a state law is preempted under conflict preemption principles when, as pertinent here, the challenged state law stands as an obstacle to the accomplishment and execution of Congress's purposes and objectives in enacting a federal statute. See Arizona, 567 U.S. at 399. Here, for several reasons, we conclude that section 18-13-128 stands as an obstacle to the accomplishment and execution of Congress's purposes and objectives in enacting the INA's various provisions related to the transportation, concealment, and inducement of unlawfully present aliens.

¶54 First, section 18-13-128 conflicts with the INA's carefully delineated scheme for punishing conduct related to the transportation of unlawfully present aliens. For example, a violation of section 18-13-128 carries a minimum sentence of four years and a maximum sentence of twelve years. See § 18-13-128(2) (classifying a violation of the statute as a class 3 felony); § 18-1.3-401(1)(a)(V)(A) (providing the presumptive penalty range for class 3 felonies). In contrast, many of the INA's anti-smuggling provisions do not mandate a minimum term of imprisonment. See, e.g., 8 U.S.C. § 1324(a)(1)(B)(i)–(iv) (providing for fines as one penalty option). Indeed, a violation of the INA's anti-smuggling

provisions can result in both a lesser minimum penalty (e.g., a fine) and a lesser maximum penalty than section 18-13-128's presumptive four- to twelve-year sentencing range. See 8 U.S.C. § 1324(a)(1)(B)(i)–(ii), (a)(2)(A), (a)(2)(B).

¶55 Similarly, unlike section 18-13-128, the INA allows offenders who act for the purpose of commercial advantage or private financial gain to be punished differently from those who do not. Compare 8 U.S.C. § 1324(a)(1)(B)(i), with 8 U.S.C. § 1324(a)(1)(B)(ii); and compare 8 U.S.C. § 1324(a)(2)(A), with 8 U.S.C. § 1324 (a)(2)(B)(ii).

¶56 The INA also (1) distinguishes between transportation within the United States and transportation into the United States, see 8 U.S.C. §§ 1324(a)(1)(B)(i)–(ii), 1324(a)(2)(A), and (2) lists circumstances (e.g., knowledge of an alien's intent to commit certain offenses against the United States or a state and the fact that the alien was not immediately on arrival brought and presented to an appropriate immigration officer) that may warrant the imposition of greater or lesser penalties, see 8 U.S.C. § 1324(a)(2)(A), § 1324(a)(2)(B)(i)–(iii). Neither section 18-13-128 nor Colorado's general sentencing statutes specifically identify such circumstances as grounds to impose greater or lesser penalties in the context of alien smuggling.

¶57 These differing provisions for punishment stand as an obstacle to the accomplishment and execution of Congress's full purposes and objectives

not just because they are different, but because they undermine Congress's careful calibration of punishments for the crimes proscribed. See Valle del Sol, 732 F.3d at 1027 (explaining that the provision of additional and different state penalties under Arizona's statute for harboring unauthorized aliens disrupts the congressional calibration and creates a conflict with Congress's legislative plan).

¶58 Second, section 18-13-128 criminalizes a different range of conduct than does the INA. Under the INA, a person commits alien smuggling if, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, [that person] transports, or moves or attempts to transport or move such alien within the United States." 8 U.S.C. § 1324(a)(1)(A)(ii) (emphasis added). This language affirmatively requires a defendant to know or recklessly disregard a fact, namely, that the smuggled person "has come to, entered, or remains in the United States in violation of law." Id. As a result, under federal law, the prosecution must prove that "the alien was present in violation of law." United States v. Franco-Lopez, 687 F.3d 1222, 1226 (10th Cir. 2012); see also United States v. Hernandez, 913 F.2d 568, 569 (8th Cir. 1990) (per curiam) (Among other things, "[t]he government was required to prove . . . the alien was in the United States in violation of the law."); United States v. Alvarado-Machado, 867 F.2d 209, 212 (5th Cir. 1989) ("The aliens' status is an element of the crime of transporting illegal aliens.").

¶59 In contrast, as the People assert and the division below determined, Fuentes-Espinoza, ¶¶ 25–39, section 18-13-128 criminalizes certain behavior of people who act with the purpose of assisting others to enter, remain in, or travel through the United States or Colorado in violation of immigration laws. Specifically, as noted above, that statute provides, in pertinent part:

> A person commits smuggling of humans if, for the purpose of assisting another person to enter, remain in, or travel through the United States or the state of Colorado in violation of immigration laws, he or she provides or agrees to provide transportation to that person in exchange for money or any other thing of value.

§ 18-13-128(1) (emphasis added).

¶60 Under the plain language of this statute, a person who acts with the pertinent purpose could be convicted even absent a finding that the alien whom he or she was assisting was actually violating immigration laws. As a result, although, as the People argue, both the federal and state statutes criminalize certain conduct by human smugglers, section 18-13-128 adds a new set of prohibited activities and thus "sweeps more broadly than its federal counterpart." See Valle del Sol, 732 F.3d at 1028–29. In doing so, the Colorado statute disrupts Congress's objective of creating a uniform scheme of

punishment because some smuggling activities involving unauthorized aliens are now punishable in Colorado but not elsewhere. See Id.

¶61 For these reasons, we conclude that, like the human smuggling statutes invalidated in a number of recent federal circuit court opinions, section 18-13-128 is preempted by the INA under principles of conflict preemption.

¶62 We are not persuaded otherwise by the People's contention that any differences between section 18-13-128 and the INA are minor and permissible because section 18-13-128 still "mirrors federal objectives and furthers a legitimate state goal." Plyler v. Doe, 457 U.S. 202, 225 (1982). As the Supreme Court has observed, "The fact of a common end hardly neutralizes conflicting means." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379 (2000); see also Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge, 403 U.S. 274, 287 (1971) ("Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy."). Indeed, in Arizona, 567 U.S. at 406, the Court explicitly recognized that although the Arizona statute at issue "attempt[ed] to achieve one of the same goals as federal law—the deterrence of unlawful employment"—this was not enough to save it from preemption because the state statute still involved "a conflict in the method of enforcement."

¶63 The same is true here. Although section 18–13–128 might "mirror" some of the goals and

objectives articulated in the INA, it criminalizes distinct conduct and provides for greater penalties than does the INA. Accordingly, section 18-13-128 stands as an obstacle to (1) the calibration of penalties articulated by Congress for punishing the transportation, concealment, and inducement of unlawfully present aliens and (2) the uniformity of enforcement contemplated by the federal scheme.

¶64 We likewise are unpersuaded by the People's attempt to frame the purpose of the INA's human smuggling provisions as being primarily aimed at protecting aliens from the dangers of human smuggling and not at creating a uniform system to penalize the transportation, concealment, and inducement of unlawfully present aliens. Although, as the People assert, 8 U.S.C. § 1324(1)(A)(ii) criminalizes conduct by human smugglers, that provision also reflects Congress's concern with aliens' unlawful conduct.

¶65 Specifically, as noted above, that section provides that any person who

> knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports or moves or attempts to transport or move such an alien within the United States by means of transportation or otherwise, in furtherance of such violation of law

> [shall be punished as provided in subparagraph (B) of that statute].

(Emphasis added.)

¶66 In our view, this language reveals a principal concern with the alien's unlawful conduct. Thus, the statute punishes third-parties for acting "in furtherance of" the alien's unlawful acts. We see nothing in this statutory language, however, indicating a congressional intent to protect aliens from human smuggling.

III. Conclusion

¶67 For these reasons, we conclude that the INA preempts section 18-13-128 under the doctrines of field and conflict preemption. Accordingly, the judgment of the court of appeals is reversed, and the case is remanded with instructions that Fuentes-Espinoza's convictions under section 18-13-128 be vacated and for further proceedings consistent with this opinion.

JUSTICE EID dissents, and JUSTICE COATS and JUSTICE BOATRIGHT join in the dissent.

JUSTICE EID, dissenting.

¶68 After today's decision, the State of Colorado can no longer protect the victims of human smuggling operations by declaring human smuggling to be a crime. The majority reasons that Colorado's human smuggling statute, § 18-13-128, C.R.S. (2017), penalizes "the transportation, concealment, and inducement of unlawfully present aliens," and therefore must be preempted by federal law. See maj. op. ¶ 2. The majority, however, misses the point of Colorado's human smuggling statute, which is to protect, not punish, the passengers of human smuggling operations regardless of their immigration status. In this way, the Colorado human smuggling statute is critically different from the federal law on the subject, which focuses on punishing the defendant driver as an aider and abettor of the passenger's violation of federal immigration laws. Because Colorado and federal law do not focus on the same conduct, the Colorado human smuggling statute does not stand as an obstacle to, and is therefore not preempted by, federal law. Accordingly, I respectfully dissent from the majority's opinion holding otherwise.

¶69 The majority first concludes that section 18-13-128 is preempted under principles of field preemption by the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101–1537 (2017). Maj. op. ¶¶ 1, 43. Citing Arizona v. United States, 567 U.S. 387 (2012), the majority notes that the federal government "has broad, undoubted power over the

subject of immigration and the status of aliens," and that its "governance of immigration and alien status is extensive and complex." Id. at ¶ 44 (quoting Arizona, 567 U.S. at 394–95). The majority opinion seems to suggest that Arizona could be read or the proposition that the federal government has entirely occupied the field of regulating immigration and alien status, such that any law that might incidentally impact aliens is preempted. See Id. at ¶¶ 43–45. But Arizona is not so broad.

¶70 The Supreme Court in Arizona carefully limited its field preemption analysis to the particular field of alien registration. See Arizona, 567 U.S. at 401–03. In addressing section 3 of the Arizona act at issue, which criminalized the failure to carry an alien registration document, the Court explained that federal law "provide[s] a full set of standards governing alien registration." Id. at 401. Further, it concluded that, "with respect to the subject of alien registration, Congress intended to preclude States from 'complement[ing] the federal law,'" id. at 403 (emphasis added) (quoting Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941)). The Court did not hold that Congress has fully occupied all fields in any way connected to aliens or immigration. Indeed, the Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted." DeCanas v. Bica, 424 U.S. 351, 355 (1976), superseded by statute, Immigration Reform and Control Act of 1986, 100 Stat. 3359, as recognized in Chamber of Commerce v. Whiting, 563 U.S. 582,

588–90 (2011). And while the Court did acknowledge in Arizona that federal law has become more comprehensive since DeCanas, see Arizona, 567 U.S. at 404, again, it was careful to limit its field preemption analysis to the specific field of alien registration. Id. at 403. Because Colorado's human smuggling statute in no way involves alien registration, Arizona simply offers no support for the majority's conclusion that the Colorado human smuggling statute is field preempted.

¶71 With regard to other provisions of the Arizona law at issue, the Court in Arizona took a far narrower approach, considering whether each provision at issue conflicted with federal law to such a degree that it "stands as an obstacle" to federal law. 557 U.S. at 405 (quoting Hines, 312 U.S. at 67). Most relevant here, the Court applied such an approach in addressing section 5(C) of the Arizona law, which made it a state misdemeanor for "an unauthorized alien to knowingly apply for work." Id. at 403. The Supreme Court emphasized that the section stood as an obstacle to the regulatory system Congress chose because it ran contrary to a deliberate choice by Congress not to impose criminal penalties on aliens seeking work. Id. at 404–06. The Court observed that the legislative background of the relevant federal law, the Immigration Reform and Control Act of 1986, "underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." Id. at 405. The Court accordingly concluded that, because Congress

deliberately chose not to impose criminal penalties on those seeking employment, "[i]t follows that a state law to the contrary is an obstacle to the regulatory system Congress chose." Id. at 406.

¶72 The question here, then, is whether Congress determined that Colorado should be prevented from criminalizing the conduct that is the focus of the human smuggling statute, such that the statute runs contrary to a deliberate choice by Congress. The majority opinion offers no reason to believe that Congress possessed such intent when it passed the INA, let alone made a "deliberate choice" in this regard, such as was present in Arizona.

¶73 That is because the Colorado human smuggling statute and federal law focus on different conduct. The INA makes it a crime for anyone who, "knowing[ly] or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law." 8 U.S.C. § 1324(a)(1)(A)(ii) (emphasis added). Federal circuit courts have held that under the INA, the prosecution must prove "the fact" that the passenger was in the country in violation of law; the defendant either knew or recklessly disregarded that fact; and the defendant's transportation furthered the passenger's violation of the law. See maj. op. ¶ 58 (discussing the first two elements); see, e.g., United States v. Franco-Lopez, 687 F.3d 1222, 1226–

28 (10th Cir. 2012) (listing cases); United States v. Barajas-Chavez, 162 F.3d 1285, 1288–89 (10th Cir. 1999) (en banc) (listing cases). As such, the pertinent provision of the INA is akin to an aiding and abetting statute, with the defendant driver aiding and abetting the passenger's violation of the law.

¶74 By contrast, Colorado's human smuggling act does not require proof that the person transported was traveling in the country in violation of the law. See maj. op. ¶¶ 59–60. Under section 18-13-128, a defendant commits the crime of human smuggling if he provides transportation to a person for money, with the "purpose" of transporting that person in violation of the law, even if that person was not in fact traveling in violation of law. See § 18-13-128(1); maj. op. ¶¶ 59–60. Colorado's statute thus focuses on the conduct of the defendant driver, not on the passenger's status or conduct. In fact, the plain language of the statute indicates the purpose of Colorado's human smuggling statute is the protection, not punishment, of the passenger.

¶75 The majority implicitly recognizes this critical difference between the Colorado human smuggling statute and federal law, but entirely misses its significance. The majority concludes, for example, that under the plain language of the Colorado human smuggling statute, "a person who acts with the pertinent purpose could be prosecuted even absent a finding that the alien whom he or she was assisting was actually violating immigration laws." Maj. op. ¶ 60. In other words, the Colorado human

smuggling statute focuses on protecting the victims of human smuggling laws, rather than on the violation of immigration laws. Likewise, the majority concludes that federal law "reflects Congress's concern with aliens' unlawful conduct" in "punish[ing] third-parties for acting 'in furtherance of' the alien's unlawful acts.'" Id. at ¶¶ 64–66. In other words, the focus of the federal law is the unlawful conduct of the passengers and the fact that the defendant driver is helping them accomplish it. Indeed, the majority flat-out declares that federal law does not "indicat[e] a congressional intent to protect aliens from human smuggling." Id. at ¶ 66.

¶76 That is the whole point. Because the federal and state laws take aim at different conduct, there can be no conflict between them. Therefore, there is no evidence that the Colorado human smuggling statute stands as an obstacle to the accomplishment of Congress's purposes.

¶77 The majority largely relies upon several federal circuit court cases that find various state provisions to be conflict and field preempted. See maj. op. ¶¶ 34–40. But the state provisions at issue in those cases mirrored federal law in focusing on immigration law. For example, unlike Colorado's statute, each of the state laws at issue in those cases mirrored the INA's requirement of a defendant's knowledge or reckless disregard of the passenger's unlawful status. The INA, as noted above, provides that any person who "knowing[ly] or in reckless disregard of the fact that an alien has come to,

entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States . . . in furtherance of such violation of law" shall be punished. 8 U.S.C. § 1324(a)(1)(A)(ii). The law at issue in Georgia Latino Alliance for Human Rights v. Governor of Georgia similarly criminalized "knowingly and intentionally transport[ing] or mov[ing] an illegal alien . . . for the purpose of furthering the illegal presence of the alien in the United States." 691 F.3d 1250, 1256, 1263 (11th Cir. 2012) (quoting Ga. Code. Ann. § 16-11-200(b) (West 2017)). The South Carolina law considered by the Fourth Circuit made it a state felony to, "knowingly or in reckless disregard of the fact" that another person is in the country in violation of law, "transport, move, or attempt to transport that person." United States v. South Carolina, 720 F.3d 518, 523 n.2 (4th Cir. 2013) (quoting Act 69, 2011 S.C. Acts (S.B. 20)). And the laws at issue in Valle del Sol, Inc. v. Whiting, 732 F.3d 1006, 1012–13 (9th Cir. 2013), and United States v. Alabama, 691 F.3d 1269, 1277 (11th Cir. 2012), likewise required an offender to know or recklessly disregard the fact that a passenger was in the country unlawfully. Thus, the laws considered in the federal cases, like the INA, focused on violations of immigration law, and therefore stood as an obstacle to federal law.

¶78 Indeed, unlike Colorado's human smuggling statute, the state laws at issue in those cases represented broad attempts to regulate immigration. For instance, each law also criminalized other

actions resembling those penalized by the INA, see 8 U.S.C. § 1324(a)(1)(A), such as concealing, harboring, or shielding an alien from detection or inducing an alien to enter the state. See Ga. Latino Alliance, 691 F.3d at 1256; Alabama, 691 F.3d at 1277; South Carolina, 720 F.3d at 523; Valle del Sol, 732 F.3d at 1012–13. The state laws were also titled similarly to the relevant provision of the INA,[3] and they were passed as parts of legislative bills with stated immigration-related aims. The Arizona law, for example, was part of a bill "comprised of a variety of immigration-related provisions," which had the stated purpose of "mak[ing] attrition through enforcement the public policy of all state and government agencies in Arizona." Valle del Sol, 732 F.3d at 1012. The Georgia law, as the majority notes, see maj. op. ¶ 34, was included in "the Illegal Immigration Reform and Enforcement Act of 2011," which was intended to "address the problem of illegal

[3] The relevant provision of the INA is titled "Bringing in and harboring certain aliens." 8 U.S.C. § 1324. Arizona's law was titled, in pertinent part, "Unlawful transporting, moving, concealing, harboring or shielding of unlawful aliens." Ariz. Rev. Stat. Ann. § 13-2929 (2014). Alabama's was "Concealing, harboring, shielding, etc., unauthorized aliens," Ala. Code § 31-13-13 (2012); South Carolina's was "Unlawful entry into the United States; furthering illegal entry by or avoidance of detection of undocumented alien; penalties; exceptions," S.C. Code Ann. § 16-9-460 (2012); and the transportation-related portion of Georgia's law was titled "Transporting or moving illegal aliens; penalties," Ga. Code Ann. § 16-11-200 (West 2011).

immigration within the state,"[4] Ga. Latino Alliance, 691 F.3d at 1256. Under such circumstances, the federal circuit courts found the state laws to constitute impermissible "complements" to the INA. See Id. at 1266.

¶79 Because the same circumstances are not present here, the federal circuit cases are simply inapposite. Unlike the state laws at issue in those cases, Colorado's human smuggling statute does not mirror federal immigration law and then attempt to supplement it. Instead, as noted above, Colorado's statute singularly focuses on protecting passengers as the victims of human smuggling operations. As such, it is not an impermissible supplement to federal immigration law, but rather a permissible attempt to address the dangers that human smuggling poses to passengers.

¶80 As the majority points out, there are a number of additional differences between the Colorado human smuggling statute and the INA. Maj. op. ¶¶ 55–56. For example, Colorado's human smuggling statute makes the exchange of "money or any other thing of value" an element of the crime, § 18-13-128, rather than just a consideration in sentencing as it is

[4] Similarly, the South Carolina law was a component of an act passed "in response to a perceived failure of the United States to secure its southern border," South Carolina, 720 F.3d at 522, and the Alabama law was included in a bill with the stated purposes of discouraging illegal immigration within the state and maximizing enforcement of federal immigration laws, see Alabama, 691 F.3d at 1276.

under the INA, see 8 U.S.C. § 1324(a)(1)(B)(i)–(ii). But these differences simply underscore that the purpose of Colorado's human smuggling statute is to protect passengers from the dangers of human smuggling. Whereas the majority finds it problematic that Colorado's statute criminalizes "a different range of conduct than does the INA," see maj. op. ¶¶ 58–60, the difference in focus between the two statutes instead supports the conclusion that Congress, in enacting the INA, did not intend to preclude states from enacting laws such as Colorado's human smuggling statute.

¶81 At bottom, the majority seems to conclude that any deviation from federal law regarding "the transportation of unlawfully present aliens" must be preempted. See maj. op. ¶ 54. But as the Supreme Court has pointed out, state powers are "often exercised in concurrence with those of the National Government." United States v. Locke, 529 U.S. 89, 109 (2000). Indeed, a "high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal act." Whiting, 563 U.S. at 607 (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). Because this "high threshold" is far from met in this case, I respectfully dissent.

I am authorized to state that JUSTICE COATS and JUSTICE BOATRIGHT join in this dissent.

APPENDIX B

COLORADO COURT OF APPEALS

Court of Appeals No. 2008CA1231
Jefferson County District Court No. 07CR2072
Honorable M.J. Menendez, Judge
Honorable Charles T. Hoppin, Judge

The People of the State of Colorado,
Plaintiff-Appellee,
v.
Bernardino Fuentes-Espinoza,
Defendant-Appellant.

JUDGMENT AFFIRMED
January 17, 2013

¶1. Defendant, Bernardino Fuentes-Espinoza, was charged with, and convicted of, transporting seven passengers in violation of Colorado's human smuggling statute, section 18-13-128, C.R.S. 2012. None of these alleged passengers was available to testify at trial, and the prosecution did not establish whether any of them was illegally present in the United States.

¶2. On appeal, defendant asks us to decide two issues regarding Colorado's human smuggling statute. First, is the statute preempted by federal immigration law? Second, does the statute require the prosecution to prove, beyond a reasonable doubt, that the person being smuggled was illegally present

in the United States? We answer both of these questions "no."

¶3. We also disagree with defendant's three other contentions. As a result, we affirm.

I. Analysis

A. The Trial Court's Jurisdiction Was Not Preempted by Federal Law

¶4. Defendant argues that Colorado's human smuggling statute is preempted by federal law. He concedes that he did not preserve this issue for appellate review by presenting it to the trial court.

¶5. Defendant contends, however, that federal preemption of a criminal statute provides a jurisdictional bar to prosecution that cannot be waived. *See State v. Perry*, 697 N.E.2d 624, 627 (Ohio 1998)(stating in dicta that "preemption is a jurisdictional bar to prosecution").

¶6. Our supreme court has not addressed whether federal preemption is a jurisdictional — and therefore a nonwaivable — defense. *See Town of Carbondale v. GSS Props.*, LLC, 169 P.3d 675, 683 (Colo. 2007)(addressing state preemption of local law, but recognizing "that preemption involving federal law may raise a separate set of issues"). Nevertheless, *GSS Properties* identified a useful framework that has been employed by courts considering federal preemption.

> Courts considering the matter have held that the waivability of a preemption defense depends entirely on the nature of the alleged preemption. If, as in most cases, the alleged preemption would simply alter the applicable substantive law governing the case, then preemption is waivable. . . .
>
> Conversely, if preemption "affects the choice of *forum* rather than the choice of law," then preemption is akin to a jurisdictional challenge and therefore is not waivable.
>
> Thus, the United States Supreme Court in *International Longshoremen's Association* held that preemption was not waivable because the federal statute in question preempted state law *and* provided that federal courts were the exclusive fora for litigating claims under the statute.

GSS Properties, 169 P.3d at 682 (citations omitted)(quoting *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 545-46 (Tex. 1991)).

¶7 *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), addressed preemption of state jurisdiction by the National Labor Relations Act (NLRA), citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The Court held that

> when a state proceeding or regulation is claimed to be pre-empted by the NLRA under *Garmon*, the issue is a choice-of-forum rather than a choice-of-law question. As such, it is a question whether the State or the Board has jurisdiction over the dispute. If there is pre-emption under *Garmon*, then state jurisdiction is extinguished.

Int'l Longshoremen's Ass'n, 476 U.S. at 391. Having concluded that the issue involved jurisdictional preemption, the Court further held that "when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court," state procedural rules notwithstanding. *Id.* at 393.

¶8. Significantly, the Court emphasized that not all preemption claims are necessarily jurisdictional:

> We note that this conclusion derives from congressional intent as delineated in our prior decisions. Thus, our decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws. The nature of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-empting statute.

Id. at 391 n.9.

¶9. This distinction leads us to conclude that the *GSS Properties* framework can be applied to issues of federal preemption. Therefore, we must determine whether the preemption argument urged by defendant is jurisdictional — affecting choice of forum — or substantive — affecting choice of law. To the extent that defendant's argument involves jurisdictional preemption, we must address it.

¶10 Conversely, we conclude that defendant's arguments regarding substantive preemption are not properly before us. *People v. Cagle*, 751 P.2d 614, 619 (Colo. 1988), holds generally that "[it] is axiomatic that this court will not consider constitutional issues raised for the first time on appeal." Our supreme court cited *Cagle* for this proposition as recently as two years ago. *Martinez v. People*, 244 P.3d 135, 139 (Colo. 2010)(declining to reach an argument based on the Colorado Constitution because it was not raised below).

¶11 The supreme court has also stated that it will not address the constitutionality of a statute if such an attack "is not presented to the trial court and is [instead] raised for the first time on appeal." *People v. Lesney*, 855 P.2d 1364, 1366 (Colo. 1993); *accord People v. Martinez*, 634 P.2d 26, 32 (Colo. 1981). However, the supreme court has also held that, in certain circumstances, it will review unpreserved constitutional challenges to statutes to "promote efficiency and judicial economy." *Hinojos-Mendoza v. People*, 169 P.3d 662, 667-68 (Colo. 2007); *see also*

People v. Wiedemer, 852 P.2d 424, 433 n.9 (Colo. 1993).

¶12 Divisions of this court are split on when to review unpreserved constitutional errors. For example, as the majority in *People v. Tillery*, 231 P.3d 36, 47-48 (Colo. App. 2009), *aff'd on other grounds sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011), points out, some divisions have declined to consider unpreserved double jeopardy claims, while others have proceeded to do so by applying plain error principles.

¶13 Some divisions review unpreserved constitutional attacks on statutes that they conclude can be determined by referring to the existing record, but they decline to review others that would require a more fully developed record to resolve. *People v. Devorss*, 277 P.3d 829, 834 (Colo. App. 2011); *People v. Greer*, 262 P.3d 920, 929-30 (Colo. App. 2011).

¶14 Other divisions have simply declined to review unpreserved constitutional attacks on statutes. *People v. Baker*, 178 P.3d 1225, 1235 (Colo. App. 2007); *People v. Shepherd*, 43 P.3d 693, 701 (Colo. App. 2001); *People v. Boyd*, 30 P.3d 819, 820 (Colo. App. 2001).

¶15 At least two judges have written separately to express their differing views about when and how unpreserved attacks on the constitutionality of statutes should be reviewed on appeal. *Greer*, 262 P.3d at 933-37 (J. Jones, J., specially concurring);

Tillery, 231 P.3d at 55-56 (Bernard, J., specially concurring).

¶16 We are persuaded by *Lesney* and *Cagle*, and so we conclude that we will not consider the unpreserved constitutional attack on the statute in this case involving substantive preemption. *See Tillery*, 231 P.3d at 55 (Bernard, J., concurring)("plain error review in Colorado does not encompass unpreserved constitutional attacks on statutes").

¶17 However, we recognize that the dissent in this case relies on reasonable authority when it proceeds to address the issue that we decline to consider. Because different divisions of this court continue to resolve this question differently, it is our respectful hope that our supreme court will resolve this dispute in the near future.

1. Jurisdictional Versus Substantive Preemption in the Context of Immigration Law

> [W]hether Congress has preempted state court *jurisdiction* is not to be confused with whether it has preempted state *legislative action*. The former involves only the question whether a state court has the power to entertain a particular cause; the latter involves the further question whether a state may enact substantive legislation governing

> the subject matter of the particular cause.

In re Jose C., 198 P.3d 1087, 1095 (Cal. 2009)(emphasis in original).

a. Jurisdictional Preemption

¶18 Congress has granted federal courts jurisdiction over criminal matters relating to immigration. *See* 8 U.S.C. § 1329 ("The district courts of the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this subchapter."). Although the statute grants jurisdiction to federal courts, it does not expressly exclude state court jurisdiction. The absence of language ousting state courts of their presumptive jurisdiction "is strong, and arguably sufficient, evidence that Congress had no such intent." *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990); cf. *Int'l Longshoremen's Ass'n*, 476 U.S. at 389 (by creating and vesting jurisdiction in the National Labor Relations Board, Congress excluded not only state courts but also federal courts from adjudicating certain cases subject to the NLRA*); accord DeCanas v. Bica*, 424 U.S. 351, 355 (1976)("the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by [the exclusive federal] constitutional power" to regulate immigration); *see also Arizona v. United States*, 567 U.S. ___, ___, 132 S.Ct. 2492, 2500-01 (2012)(preemption occurs when

(1) Congress expressly withdraws specified powers from states; (2) Congress determines that it will exclusively regulate a particular field; or (3) the laws of a state conflict with federal law).

¶19 We therefore conclude that federal immigration law does not inherently preempt state court jurisdiction over all matters touching on issues of immigration.

b. Substantive Preemption

¶20 The question of substantive preemption asks "whether, though state court jurisdiction exists, Congress has preempted states from substantively regulating immigration matters, and in particular alien smuggling." *In re Jose C.*, 198 P.3d at 1097. A statute may be substantively preempted if (1) the statute actually regulates immigration, *DeCanas*, 424 U.S. at 354-55; (2) the clear and manifest purpose of Congress was to preclude state regulation touching aliens in general, *Id.* at 356-58; or (3) the state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law. *Id.* at 363; *see also State v. Barragan-Sierra*, 196 P.3d 879, 889-91 (Ariz. Ct. App. 2008)(applying *DeCanas* and holding that Arizona's human smuggling statute is not preempted by federal immigration law); *State v. Flores*, 188 P.3d 706, 710-11 (Ariz. Ct. App. 2008)(same); but *see* Eric M. Larsson, Annotation, *Preemption of State Statute, Law, Ordinance, or Policy with Respect to Law Enforcement or Criminal Prosecution as to Aliens*,

75 A.L.R. 6th 541 § 6 (2012)(discussing decisions from different jurisdictions that hold state human smuggling statutes to be preempted by federal immigration laws).

2. Application

¶21 Here, to the extent that defendant contends that the trial court's authority to adjudicate the charges against him was jurisdictionally preempted, his argument fails.

¶22 In substance, defendant argues that Colorado's human smuggling statute is preempted under the *DeCanas* test. Thus, his challenge is properly characterized as a claim of substantive preemption. As discussed above, however, defendant did not preserve the issue of substantive preemption for appellate review, and, therefore, we decline to address it.

B. The Human Smuggling Statute Does Not Require Proof That the Defendant's Passenger Violated Immigration Laws

¶23 Defendant raises several challenges to his convictions that turn on the question whether Colorado's human smuggling statute requires the prosecution to prove that the person to be transported actually violated federal immigration laws. We conclude that such proof is not required.

1. Standard of Review

¶24 Statutory interpretation is a question of law we review de novo. *People v. Garcia*, 113 P.3d 775, 780 (Colo. 2005). Our goal is to give effect to the legislative intent. *People v. Martinez*, 70 P.3d 474, 477 (Colo. 2003). We begin with the statutory language, reading words and phrases in context and giving them their commonly accepted and understood meanings. *Id.*; *People v. Vecellio*, 2012 COA 40, ¶ 14. "If the statutory language is clear and unambiguous, we do not engage in further statutory analysis and apply the statute as written." *Vecellio*, ¶ 14. "Only when the language is ambiguous may we consider extraneous sources, such as legislative history, to arrive at the proper meaning." *Rickstrew v. People*, 822 P.2d 505, 509 (Colo. 1991).

2. Analysis

¶25 Section 18-13-128(1), C.R.S. 2012, provides:

> *A person commits smuggling of humans if*, for the purpose of assisting another person to enter, remain in, or travel through the United States or the state of Colorado in violation of immigration laws, *he or she provides or agrees to provide* transportation to that person in exchange for money or any other thing of value.

(Emphasis added.)

¶26 Interpreting similar language in Colorado's conspiracy statute, a division of this court held that a person may be guilty of conspiracy even where his or her accomplice merely feigns agreement. *See Vecellio*, 2012 COA 40, ¶ 18. Section 18-2-201(1), C.R.S. 2012, provides that *"[a] person commits conspiracy to commit a crime if*, with the intent to promote or facilitate its commission, *he agrees* with another person" to engage in criminal conduct. (Emphasis added.) The division held that the statute's focus on "the actions of a single actor agreeing with another" showed the legislature's intent to criminalize such conduct regardless whether the second party actually shared the defendant's criminal intent. *Id.* This "approach is justified, in part, because a person plotting a crime with a feigning accomplice has a guilty mind." *Id.* at ¶ 23.

¶27 Other language in section 18-13-128(1) also emphasizes the defendant's state of mind. The prosecution must prove that the defendant had "*the purpose of assisting another person* to enter, remain in, or travel through the United States or the state of Colorado in violation of immigration laws." § 18-13-128(1) (emphasis added). The plain meaning of the phrase "for the purpose of" "indicates an anticipated result that is intended or desired." *Colo. Ethics Watch v. City & Cnty. of Broomfield*, 203 P.3d 623, 625 (Colo. App. 2009)(citing *Webster's Third New International Dictionary* 1946 (2008)). Thus, by including the defendant's purpose as an element of the offense, the statute further evinces the

legislature's intent to criminalize the defendant's conduct based on his or her guilty mind, independent of the actions or intent of another person.

¶28 We reject defendant's contention that the statute's references to the person to whom an accused provides or agrees to provide transportation establish that the prosecution must prove an actual violation of immigration laws by that person. We do so for three reasons.

¶29 First, as discussed above, the statute's focus is on the actions of a single actor providing or agreeing to provide transportation to another person.

¶30 Second, by including the actor's purpose as an element of the crime, the statute emphasizes the actor's *intent*, rather than the outcome of his or her actions. To require proof that the accused's intended passenger actually violated immigration laws "would improperly conflate the distinct concepts of purpose and effect." *Colo. Ethics Watch*, 203 P.3d at 625.

¶31 Third, we disagree with defendant's assertion that, when the human smuggling statute is read as a whole, the nonelemental subsections demonstrate that the passenger's actual immigration status is central to a determination of guilt.

¶32 Section 18-13-128 further provides, in relevant part:

> (3) A person commits a separate offense for each person to whom he or she

> provides or agrees to provide transportation in violation of subsection (1) of this section.
>
> (4) Notwithstanding the provisions of section 18-1-202 [the general criminal venue statute], smuggling of humans offenses may be tried in any county in the state where a person who is illegally present in the United States who is a subject of the action is found.

¶33 Defendant argues that (1) the creation of a separate offense for each of the accused's passengers, and (2) the reference to "a person who is illegally present . . . who is a subject of the action" compel a conclusion that the legislature intended to require proof of the passenger's illegal presence as an element of the offense.

¶34 However, an analogous argument was implicitly rejected by another division of this court when it interpreted similar language in Colorado's child enticement statute.

¶35 In *Vecellio*, the defendant was convicted of child enticement after he arranged to meet with a mother and her thirteen-year-old daughter for sex. 2012 COA 40, ¶¶ 2-5. In reality, the "mother" was an undercover police officer, and the "daughter" did not exist. *Id.* The child enticement statute provides, in relevant part:

> A person commits the crime of enticement of a child if he or she invites or persuades, or attempts to invite or persuade a child under the age of fifteen years to enter any vehicle, building, room, or secluded place with the intent to commit sexual assault or unlawful sexual contact upon said child. It is not necessary to a prosecution for attempt under this subsection (1) that *the child* have perceived the defendant's act of enticement.

§ 18-3-305(1), C.R.S. 2012 (emphasis added).

¶36 Despite references in the statute to "said child" and "the child," a division of this court held that the evidence was sufficient to sustain the defendant's conviction, even though the "child" he attempted to entice did not exist. *Vecellio*, 2012 COA 40, ¶¶ 46-48.

¶37 Here, the provision establishing that a defendant may be charged with a separate offense for each actual or intended passenger remains focused on the actions of the accused. The venue provision of the human smuggling statute refers to "a person who is illegally present in the United States who is a subject of the action." However, this provision is concerned with venue and does not add an element to the offense of human smuggling. Accord § 18-1-202(11), C.R.S. 2012 (venue is not an element of an offense).

¶38 Thus, neither provision changes the definition of the offense by adding an element — the passenger or intended passenger's illegal presence — or by shifting the focus from the defendant's actions and purpose.

¶39 We therefore conclude that section 18-13-128 does not require the prosecution to prove that the defendant's passenger or intended passenger was illegally present in the United States or Colorado in violation of immigration laws. Further, because this meaning is evident in the plain language of the statute, we may not consider the parties' arguments regarding legislative history. *See Rickstrew*, 822 P.2d at 509.

¶40 Based on these conclusions, we necessarily reject defendant's assertions that

- the trial court erred by not instructing the jury that the prosecution must prove that defendant's passengers were violating immigration laws;
- the trial court erred by not instructing the jury, in answer to its question, that the prosecution must prove that the passengers were illegal immigrants;
- the prosecutor committed misconduct by telling the jury that the prosecution was not required to prove that the passengers were violating immigration laws;

- the prosecutor committed misconduct by citing legislative history in support of his arguments to the trial court without disclosing that he had testified at a House committee hearing on the bill that became section 18-13-128; and

- the evidence was insufficient to support defendant's convictions because it did not establish that his passengers had violated immigration laws.

C. Sufficient Evidence Supported the Convictions

¶41 Defendant contends that the evidence was insufficient to support his convictions because it did not establish that he transported any of the persons named in the complaint. We disagree.

¶42 We review the sufficiency of evidence de novo. *People v. Rincon*, 140 P.3d 976, 983 (Colo. App. 2005).

> [C]hallenges to the sufficiency of the evidence to support a criminal conviction require a reviewing court to determine whether the evidence, both direct and circumstantial, when viewed as a whole and in a light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crime beyond a reasonable doubt.

People v. Taylor, 723 P.2d 131, 134 (Colo. 1986).

¶43 When reviewing for sufficiency of the evidence, a court must give the prosecution the benefit of every reasonable inference that might be drawn from the evidence. *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988), *abrogated on other grounds by Erickson v. People*, 951 P.2d 919, 923 (Cob. 1998).

¶44 Here, defendant and the seven alleged passengers were taken into custody outside a gas station and convenience store. The arresting officer testified that

- the female passenger and another alleged passenger had been inside defendant's van;
- a third alleged passenger stood next to defendant while he fixed a taillight on the van;
- three more alleged passengers were using a pay phone outside the convenience store;
- a seventh alleged passenger approached the group while they were speaking with the officer; and
- the seven alleged passengers told the officer their names, and six of them provided identification.

The arresting officer also testified about statements that defendant made after the officer asked him who the people in the van were. Defendant stated that

- the "female" was his cousin and the rest were his friends;

and

- they all were returning from Las Vegas.

The officer looked into the van and saw that

- there were no additional clothes;
- there was no luggage; and
- there was a water bottle containing a liquid that looked like urine.

An FBI agent interviewed defendant after the arrest. Defendant told the agent that

- he was driving the van because a man named Eric Castel had approached him in Las Vegas, Nevada, and offered him $500 to drive members of Mr. Castel's family from Phoenix, Arizona, to Kansas City;
- defendant would be paid when he delivered the people to their destination in Kansas City;
- Mr. Castel drove defendant to Phoenix, where Mr. Castel asked him to wait in an unfurnished apartment;
- Mr. Castel returned with the van, and it was full of people;

- Mr. Castel gave defendant $600 in travel money, and a map with a designated route;
- Mr. Castel also gave him a cellular telephone number, which defendant was to call if anyone in the van tried to leave before its final destination;
- defendant realized that he "wasn't going to be . . . transporting" Mr. Castel's family members, but, instead, he thought he would be transporting "[i]llegal aliens";
- he only knew one of the people in the van;
- the only statement he made to them when he got in the van was "hello";
- when the police officer approached the convenience store, two people who had been in the van ran away and were not apprehended;
- including the two people who fled, there had been eleven people in the van; and
- defendant did not get paid because he did not deliver the people to Kansas City.

¶45 In addition, the store clerk testified that defendant entered the store with a group of seven or eight people and that defendant either gave them money or paid for their purchases directly.

¶46 Viewed in the light most favorable to the prosecution, this evidence supports a reasonable

inference that the seven persons named in the complaint were traveling together in defendant's van. We therefore conclude that sufficient evidence supported defendant's convictions.

D. Confrontation Clause

¶47 Defendant contends that the trial court erred by allowing the arresting officer to testify that, when the seventh alleged passenger approached, the officer "found out that he was a passenger." We perceive no reversible error.

¶48 Confrontation Clause violations are trial errors. *Raile v. People*, 148 P.3d 126, 133 (Colo. 2006). Where, as here, a defendant raises a timely confrontation objection, we review under the constitutional harmless error standard, asking whether the error was harmless beyond a reasonable doubt. *Id.* The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 US 275, 279 (1993). "[A] reviewing court must look at the trial as a whole and decide whether there is a reasonable probability that the defendant could have been prejudiced by the error." *People v. Fry*, 92 P.3d 970, 980 (Colo. 2004).

¶49 Assuming, without deciding, that it was error to admit the officer's statement, we conclude for several reasons that any such error was harmless beyond a reasonable doubt.

¶50 First, even without the officer's statement, sufficient evidence supports defendant's convictions as to the seventh passenger because (1) defendant was accompanied by a group of at least seven persons in the convenience store; (2) defendant paid for purchases made by the members of his group; and (3) the seventh person named in the complaint demonstrated his membership in the group by approaching them while the other six members of the group were speaking with the officer. *See Blecha v. People*, 962 P.2d 931, 942 (Colo. 1998)(factors to consider in harmless error analysis of confrontation violation include the importance of the witness's testimony to the prosecution's case and whether the testimony was cumulative).

¶51 Second, the officer made the statement to explain his motive for questioning the seventh person with the rest of the group. The statement was a brief reference in the context of lengthy testimony that spanned two days of trial.

¶52 Third, no further mention was made of the statement during the trial, and the prosecution did not allude to it in closing argument.

¶53 Fourth, defense counsel conceded in opening argument that defendant was transporting the people in the van; defendant's theory of defense was that he did not know the people were illegal immigrants.

¶54 We therefore conclude that there is no reasonable probability that defendant was prejudiced by the admission of the officer's statement.

E. The Prosecutor's Use of the Word "Lie" Does Not Warrant Reversal

¶55 Defendant contends that reversal is required because the prosecutor committed misconduct in closing argument by suggesting that defendant lied to police. We disagree.

¶56 "In this jurisdiction it is improper for a lawyer to use any form of the word 'lie' in characterizing for a jury a witness's testimony or his truthfulness." *Crider v. People*, 186 P.3d 39, 41 (Colo. 2008); *see also Domingo-Gomez v. People*, 125 P.3d 1043, 1050 (Colo. 2005)("The word 'lie' is such a strong expression that it necessarily reflects the personal opinion of the speaker. When spoken by the State's representative in the courtroom, the word 'lie' has the dangerous potential of swaying the jury from [its] duty to determine the accused's guilt or innocence on the evidence properly presented at trial.").

¶57 We review a violation of this tenet for harmless error. *Crider*, 186 P.3d at 43. Where

> the impropriety [is] limited to the prosecutor's use of an inflammatory term, as distinguished from drawing the jury's attention to the contradictory physical evidence in more neutral terms, the task of assessing the

> harmfulness of the error is similarly limited. The error must therefore be accounted harmless if there is no reasonable probability, in light of the physical evidence, that the differences between arguing that the defendant's contradictory statements were lies and arguing simply that they could not reasonably be believed, contributed to the jury's verdict.

Id. at 44.

¶58 Here, the prosecutor referred in closing argument to the fact that defendant had repeatedly and quickly changed his answers to the arresting officer's questions, giving conflicting explanations for his actions. The prosecutor characterized this as "making up stories" and stated:

> People need reasons to lie. He doesn't just compulsively make up stories here. He needed a reason to lie. And that reason was to protect himself.

¶59 Viewing the closing argument as a whole, we are convinced that there is no reasonable probability that the use of the word "lie" contributed to the jury's verdict in this case. As the trial court noted, the prosecutor "said lie, not liar." *See Crider*, 186 P.3d at 44 ("it was significant that the prosecutor did not refer to the defendant as a 'liar'"). Although the prosecutor made several references to "stories," he did not use any form of the word "lie" again. Under

these circumstances, the prosecutor's suggestion that defendant had a "reason to lie" was not so inflammatory as to give rise to a reasonable probability that "the differences between arguing that the defendant's contradictory statements were lies and arguing simply that they could not reasonably be believed . . . contributed to the jury's verdict." *Id.*

¶60 We therefore conclude that no reversible error occurred.

¶61 The judgment is affirmed.

JUDGE BOORAS concurs.
JUDGE CASEBOLT dissents.

JUDGE CASEBOLT dissenting.

¶62 I disagree with the majority's decision not to address defendant's preemption contention raised for the first time on appeal. In my view, the contention implicates the subject matter jurisdiction of our state courts and thus may be raised at any time. In any event, we may review the newly raised contention for plain error. Addressing that contention, I conclude that the provisions of the federal Immigration and Nationality Act preempt Colorado's smuggling of humans statute. Accordingly, I respectfully dissent.

I. Reviewability of Defendant's Contention

A. Subject Matter Jurisdiction

¶63 First, I perceive that whether a state statute is preempted by federal law presents an issue of subject matter jurisdiction. *See Thomas v. F.D.I.C.*, 255 P.3d 1073, 1078 (Colo. 2011) (stating that state law must yield to federal law when application of the two conflict; federal law preempts state jurisdiction where Congress so provides "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests" (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981))); *In re Marriage of Anderson*, 252 P.3d 490, 494 (Colo. App. 2010) (concluding that state courts lack subject matter jurisdiction to divide parties' Social Security benefits in a dissolution of marriage property distribution); *Osband v. United Airlines, Inc.*, 981 P.2d 616, 619 (Colo. App. 1998) (stating that "[i]f federal law preempts state law, the state trial court lacks subject matter jurisdiction to hear a claim"); *Thayer v. McDonald*, 781 P.2d 190, 190 (Colo. App. 1989) (stating that failure to assert the doctrine of federal preemption in the trial court does not preclude consideration on appeal because the defense of lack of subject matter jurisdiction may be asserted at any time, including on appeal); *cf. Town of Carbondale v. GSS Props., LLC*, 169 P.3d 675, 683 (Colo. 2007) (finding that whether a state statute preempts a local ordinance essentially turns on whether the

issue presents a choice of law or choice of forum question; however, whether a federal provision preempts a state law may raise a separate set of issues).

¶64 Hence, in my view, we must address defendant's contention. *See Herr v. People*, 198 P.3d 108, 111 (Colo. 2008) (stating that a challenge to a court's subject matter jurisdiction is not waivable and may be raised for the first time on appeal); *see also Consolidated Theatres, Inc. v. Theatrical State Emps. Union*, 447 P.2d 325, 331 (Cal. 1968); *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 568 (Fla. 2005) (noting that federal preemption is a question of subject matter jurisdiction); *Joe Nagy Towing, Inc. v. Lawless*, ___ So. 3d ___, ___, 2012 WL 4839853, at *3 (Fla. Dist. Ct. App. No. 2D10-4972, Oct. 12, 2012) (stating that even though the issue was not raised in trial court, federal preemption is a question of subject matter jurisdiction and therefore can be raised at any time, even for the first time on appeal); *Packowski v. United Food & Commercial Workers*, 796 N.W.2d 94, 98-99 (Mich. Ct. App. 2010); *Werner v. Plater-Zyberk*, 799 A.2d 776, 787 (Pa. Super. Ct. 2002) (concluding that federal preemption is a jurisdictional matter for a state court because it challenges subject matter jurisdiction and the competence of the court to reach the merits of the claims raised); *M & I Marshall & Isley Bank v. Guaranty Fin., MHC*, 800 N.W.2d 476, 483 (Wis. Ct. App. 2011) ("Federal preemption of a matter deprives a state court of subject matter jurisdiction." (quoting *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754, 756

(Wis. Ct. App. 1994))); *contra Int'l Longshoremen's Ass'n v. Davis*, 470 So. 2d 1215, 1216 (Ala. 1985), *aff'd on other grounds*, 476 U.S. 380 (1986); *Local 447 v. Feaker Painting, Inc.*, 788 N.W.2d 398, 2010 WL 2757376, at *3 (Iowa Ct. App. 2010) (unpublished table decision) (stating that federal preemption may or may not implicate the subject matter jurisdiction of the state court).

¶65 We review de novo whether a court has subject matter jurisdiction. *Thomas*, 255 P.3d at 1077. We also review issues of federal preemption de novo. *Timm v. Prudential Ins. Co.*, 259 P.3d 521, 525 (Colo. App. 2011).

B. Plain Error Review

¶66 Even if, as the majority contends, federal preemption does not implicate a court's subject matter jurisdiction, I would review for plain error. When, as here, a defendant fails to raise the issue in the trial court, we review for plain error. *See People v. Greer*, 262 P.3d 920, 931-39 (Colo. App. 2011) (J. Jones, J., specially concurring) (concluding that certain unpreserved constitutional claims should be reviewed on appeal for plain error); *see also Lucero v. People*, 2012 CO 7, ¶¶ 23-26 (addressing merger contention even though defendant failed to raise the issue in the trial court); *People v. Herron*, 251 P.3d 1190, 1192 (Colo. App. 2010) (addressing alleged double jeopardy error on plain error review).

¶67 "Plain" in this context is synonymous with "clear" or "obvious." *Lehnert v. People*, 244 P.3d 1180,

1185 (Colo. 2010). Plain error is error that is so clear-cut, so obvious, that a competent trial judge should be able to avoid it without benefit of objection. *People v. O'Connell*, 134 P.3d 460, 464 (Colo. App. 2005) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). Plain error requires reversal if, after a review of the entire record, a court can conclude with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *Lehnert*, 244 P.3d at 1185.

II. Analysis

¶68 Upon review, whether for presence of subject matter jurisdiction or for plain error, I conclude that federal law preempts section 18-13-128, C.R.S. 2012, under principles of field and conflict preemption. Furthermore, to the extent that review would be for plain error, I conclude that the error here is obvious and affects the fundamental fairness of the proceeding. Accordingly, I would reverse the judgment of conviction.

A. Law

¶69 Preemption may be either expressed or implied and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992).

¶70 There are generally three classes of preemption: express, field, and conflict preemption. *Id.* Absent express preemption language in the statute, field preemption occurs when a Congressional legislative scheme is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, *id.*, and conflict preemption occurs where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.*; *see Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs*, 199 P.3d 718, 723 (Colo. 2009) (stating that federal law preempts state law when Congress expresses clear intent to preempt state law; when there is outright or actual conflict between federal and state law; when compliance with both federal and state law is physically impossible; when there is an implicit barrier within federal law to state regulation in a particular area; when federal legislation is so comprehensive as to occupy the entire field of regulation; or when state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress) (citing *Dep't of Health v. The Mill*, 887 P.2d 993, 1004 (Colo. 1994)).

¶71 To determine the boundaries that Congress sought to occupy within the field, we look to the federal statute itself, read in the light of its constitutional setting and its legislative history. *DeCanas v. Bica*, 424 U.S. 351, 360 n.8 (1976).

¶72 In determining the extent to which federal statutes preempt state law, courts are guided by two cornerstones. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Second, we presume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Medtronic, Inc.*, 518 U.S. at 485); *see also Arizona v. United States*, ___ U.S. ___, ___, 132 S.Ct. 2492, 2501 (2012).

B. Application

¶73 "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization' and its inherent power as sovereign to control and conduct relations with foreign nations." *Arizona v. United States*, ___ U.S. at ___, 132 S.Ct. at 2498 (citations omitted) (quoting U.S. Const. art. I, § 8, cl. 4).

¶74 Furthermore, "[f]ederal governance of immigration and alien status is extensive and complex." *Id.* at ___, 132 S.Ct. at 2499. It includes specifying admission and exclusion of aliens, registration requirements, establishment of status, regulation of public benefits available to aliens,

removal, employment restrictions, and the granting or denial of asylum, among other things. *Id.* Federal agencies, including the Department of Homeland Security, Customs and Border Protection, and Immigration and Customs Enforcement are responsible for determining admissibility of aliens, securing the country's borders, and enforcing immigration related statutes. *Id.*

¶75 *Arizona v. United States* addressed the constitutionality of an Arizona statute relating to unlawful aliens, in particular, whether the Arizona statute was preempted by federal law. In holding that major parts of the statute were preempted, the Court noted that the Supremacy Clause gives Congress the power to preempt state law expressly, but absent express preemption, states are also precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance.

> The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. at ___, 132 S.Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¶76 The Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (INA), provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens. *Ga. Latino Alliance for Human Rights v. Governor*, 691 F.3d 1250, 1263-64 (11th Cir. 2012). The *Georgia Latino Alliance* court described the scope of the INA's criminal provisions, in the course of concluding that the INA "field preempted" a Georgia law prohibiting transportation of aliens:

> Pursuant to 8 U.S.C. § 1324(a)(1)(A)(ii)-(iv), it is a federal crime for any person to transport or move an unlawfully present alien within the United States; to conceal, harbor, or shield an unlawfully present alien from detection; or to encourage or induce an alien to "come to, enter, or reside in the United States." Any person who conspires or aids in the commission of any of those criminal activities is also punishable. *Id.* § 1324(a)(1)(A)(v). Section 1324(c) permits local law enforcement officers to arrest for these violations of federal law, but the federal courts maintain exclusive jurisdiction to prosecute for these crimes and interpret the boundaries of the federal statute. *See Id.* § 1329. Subsection (d) of § 1324 further dictates evidentiary rules governing prosecution of one of its enumerated offenses, and subsection (e)

> goes so far as to mandate a community outreach program to "educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section." Rather than authorizing states to prosecute for these crimes, Congress chose to allow state officials to arrest for § 1324 crimes, subject to federal prosecution in federal court. *See Id.* §§ 1324(c), 1329. In the absence of a savings clause permitting state regulation in the field, the inference from these enactments is that the role of the states is limited to arrest for violations of federal law.

691 F.3d at 1263-64 (footnote omitted).

¶77 The *Georgia Latino Alliance* court further noted that the comprehensive nature of the federal provisions was exemplified by how section 1324 fits within the larger context of federal statutes criminalizing acts undertaken by aliens and those who assist them in coming to or remaining within the United States:

> Regarding the aliens themselves, § 1325, for example, imposes civil and criminal penalties for unlawful entry into the United States. Congress has similarly authorized criminal penalties for individuals who bring aliens into the

> United States, *id.* § 1323, aid the entry of an inadmissible alien, *id.* § 1327, and import an alien for an immoral purpose, *id.* § 1328. In enacting these provisions, the federal government has clearly expressed more than a "peripheral concern" with the entry, movement, and residence of aliens within the United States, *see De Canas*, 424 U.S. at 360-61 . . . , and the breadth of these laws illustrates an overwhelmingly dominant federal interest in the field.

691 F.3d at 1264.

¶78 The *Georgia Latino Alliance* court also concluded that the Georgia statute presented an obstacle to the execution of the federal statutory scheme, and thus was "conflict preempted." *Id.* at 1265. The court noted that the federal provisions confined the prosecution of federal immigration crimes to federal court and thus limited the power to pursue those cases to the appropriate United States Attorney, *id.*, and that interpretation of the Georgia criminal provision by state courts and enforcement by state prosecutors unconstrained by federal law threatened the uniform application of the INA. *Id.* at 1266. In addition, the court concluded that the provisions of the Georgia statute criminalizing acts of harboring and transporting unlawfully present aliens constituted an impermissible complement to the INA that "is inconsistent with Congress's objective of creating a comprehensive scheme

governing the movement of aliens within the United States." *Id.*

¶79 In *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012), the Eleventh Circuit held that an Alabama provision criminalizing the transportation of unlawfully present aliens was preempted, based upon a very similar analysis. *Id.* at 1285-88.

¶80 In *United States v. South Carolina*, 840 F. Supp. 2d 898 (D.S.C. 2011), *modified*, ___ F. Supp. 2d ___ (D.S.C. 2012), the court held that a South Carolina statute criminalizing the transportation of aliens was preempted, employing an analysis similar to that of the Eleventh Circuit. The court concluded: "It is clear . . . that Congress adopted a scheme of federal regulation regarding the harboring and transporting of unlawfully present persons so pervasive that it left no room in this area for the state to supplement it. Thus, this is a classic case of field preemption." *Id.* at 916-17 (citation omitted).

¶81 Here, section 18-13-128(1), C.R.S. 2012, provides:

> A person commits smuggling of humans if, for the purpose of assisting another person to enter, remain in, or travel through the United States or the state of Colorado in violation of immigration laws, he or she provides or agrees to provide transportation to that person in exchange for money or any other thing of value.

¶82 Comparing the federal provisions to this Colorado statute, I conclude, for a number of reasons, that the latter is preempted by principles of field preemption and conflict preemption.

¶83 First, the Colorado provision regulates the same field that the federal statute does — transportation of illegal aliens through the United States. The INA makes it unlawful for any person to "transport[] or move[] or attempt[] to transport[] or move[]" an unlawfully present alien within the United States, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remain[ed] in the United States in violation of law." 8 U.S.C. § 1324(a)(1)(A)(ii). The Colorado statute essentially duplicates that provision by prohibiting any person from providing transportation to an alien in or through Colorado or the United States in exchange for money or any other thing of value for the purpose of assisting the alien in violating immigration laws. Indeed, the title of section 18-13-128 is "smuggling of humans," and 8 U.S.C. § 1101(a)(43)(N) states that the transportation offense described in 8 U.S.C. § 1324 "relat[es] to alien smuggling."

¶84 Furthermore, the Colorado provision specifically states that the perpetrator must provide transportation in exchange for money or anything else of value, and the federal provision essentially enhances the sentence of a perpetrator who violates 8 U.S.C. § 1324 and smuggles for commercial advantage or private financial gain. 8 U.S.C.

§ 1324(a)(1)(B)(i). In addition, the penalties for the crimes are similar. The Colorado provision provides that a violation is a class 3 felony, which may be punished by four to twelve years of imprisonment, *see* § 18-1.3-401(1)(a)(V)(A), C.R.S. 2012, and the federal provision provides for imprisonment for up to ten years when the transportation was done for the purpose of commercial advantage or private financial gain. 8 U.S.C. § 1324(a)(1)(B)(i).

¶85 In short, it is clear that the INA covers every aspect of the Colorado statute.

¶86 Second, by enacting the INA provisions, Congress has articulated a clear purpose of ousting state authority from the field of transporting aliens. 8 U.S.C. § 1324(c) permits local law enforcement officers to arrest for violations of the federal law, but the federal courts maintain exclusive jurisdiction to prosecute for these crimes and to interpret the boundaries of the federal statute. *See Ga. Latino Alliance*, 691 F.3d at 1264. Moreover, 8 U.S.C. § 1324(d) prescribes evidentiary rules governing prosecution of one of its enumerated offenses, and 8 U.S.C. § 1324(e) goes so far as to mandate a community outreach program to "educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section." These federal provisions "comprehensively address[] criminal penalties for these actions undertaken within the borders of the United States, and a state's attempt to intrude into this area is prohibited because Congress has adopted

a calibrated framework within the INA to address this issue." *Id.*; *cf. Pennsylvania v. Nelson*, 350 U.S. 497, 499 (1956) (concluding that state sedition act, which proscribed same conduct as the federal sedition act, was preempted by federal law; state's purported supplementation of federal law did not shield the state statute from federal preemption; and furthermore, Congress did not sanction concurrent legislation on the subject covered by the challenged state law).

¶87 Third, interpretation and application of section 18-13-128 by Colorado state courts would

> threaten the uniform application of the INA. Each time a state enacts its own parallel to the INA, the federal government loses "control over enforcement" of the INA, thereby "further detract[ing] from the integrated scheme of regulation created by Congress." *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 288-89 . . . (1986) . . . . Given the federal primacy in the field of enforcing prohibitions on the transportation, harboring, and inducement of unlawfully present aliens, the prospect of fifty individual attempts to regulate immigration-related matters cautions against permitting states to intrude into this area of dominant federal concern.

Ga. Latino Alliance, 691 F.3d at 1266. Therefore, the Colorado statute stands as an obstacle to accomplishing Congress's objective of creating a comprehensive scheme governing the movement and harboring of aliens, and thus is preempted.

¶88 Despite the above analysis, the People nevertheless contend that preemption does not occur here because section 18-13-128 does not regulate who may enter or remain in the United States. The truth of that contention, however, does not foreclose preemption. Instead, the contention relates to one prong of the three-prong *DeCanas* test, namely, whether the state statute actually regulates immigration. *See DeCanas*, 424 U.S. at 354-63 (state statutes related to immigration may be preempted (1) when the state statute actually regulates immigration; (2) if it was the clear purposes of Congress to preclude even harmonious state regulation touching on aliens in general; and (3) if the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress). Because the "actual regulation" prong is only one alternative way for preemption to occur, the People's contention is not persuasive.

¶89 For that same reason, the People's reliance on *State v. Barragan-Sierra*, 196 P.3d 879, 889 (Ariz. Ct. App. 2008), is likewise unpersuasive. There, the court determined that the Arizona human smuggling statute was not preempted by federal law under the first *DeCanas* prong because it did not regulate

immigration. As noted, however, that is not determinative under the other two prongs of *DeCanas*.

¶90 Moreover, the *Barragan-Sierra* court's decision that the Arizona human smuggling statute was not preempted because Congress had not made clear and manifest its purpose to prevent the states from adopting even harmonious regulations prohibiting the smuggling of illegal aliens does not withstand scrutiny in light of the substantial federal cases decided since *Barragan-Sierra* was announced, particularly *Arizona v. United States*. Likewise, I have significant doubt about the vitality of the Arizona court's additional conclusion that the Arizona statute was not preempted because it did not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA. *See* Eric M. Larsson, Annotation, *Preemption of State Statute, Law, Ordinance, or Policy with Respect to Law Enforcement or Criminal Prosecution as to Aliens*, 75 A.L.R. 6th 541, §§ 5-6 (2012) (cataloguing decisions); Ben Meade, Comment, *Interstate Instability: Why Colorado's Alien Smuggling Statute is Preempted by Federal Immigration Laws*, 79 U. Colo. L. Rev. 237 (2008).

¶91 In sum, I conclude that section 18-13-128 is preempted by federal law, given the sweep of not only this statute, but also federal legislation and regulation of the immigration field generally in the area of transportation of illegal aliens. I further

conclude that the Colorado statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA. Hence, I would reverse defendant's conviction, and therefore respectfully dissent.