No. 17-1084

In the Supreme Court of the United States

STATE OF COLORADO,
Petitioner,

v.

BERNARDINO FUENTES-ESPINOZA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, INDIANA, KANSAS, MICHIGAN, MONTANA, NEBRASKA, NEW MEXICO, OKLAHOMA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, under principles of implied preemption, the federal Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, precludes states from enacting legislation to prohibit human smuggling.

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INTEREST OF *AMICI CURIAE*[1]

This case presents an important question concerning the preemptive scope of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq.*, and the states' ability to legislate alongside Congress to combat the common enemy of human smuggling. Human smuggling is a nationwide issue that reaches families and communities in every state. The states, as well as the federal government, have a compelling interest in protecting immigrants, their families, and the community at large from the exploitative and dangerous practices of human smugglers and the secondary harms of their large-scale criminal networks. The states also have a compelling interest in combatting those who prey upon vulnerable immigrants in other ways, including as unscrupulous employers, landlords, and sex traffickers.

Some *amici* states have enacted anti-smuggling laws that have been found preempted by the federal courts of appeals. Others lie within these same circuits and are therefore unable to pass human smuggling statutes of their own. Others still have enacted anti-smuggling statutes that remain in effect but are in danger of preemption should their federal circuit follow the reasoning of the Colorado Supreme Court and the circuits on which it relied. A final group of states have not yet passed an anti-smuggling statute nor do they lie within a circuit that has already found preemption

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[1] Amici states submit this brief pursuant to Supreme Court Rule 37.4. Counsel of record for all parties received timely notice of the amici states' intent to file this brief.

but have an interest in knowing whether they may adopt such a statute in the future.

Whether, and to what extent, the states may complement Congress's efforts to punish human smugglers and other exploitive third parties is unsettled in light of the disagreement over the INA's preemptive force. The Colorado Supreme Court and the Fourth, Ninth, and Eleventh Circuits have held that state human smuggling statutes are preempted. In addition, the Third and Fifth Circuits have held that the INA's harboring provisions preempt state laws prohibiting renting to unauthorized aliens. By contrast, the Eighth Circuit held that a law prohibiting renting to unauthorized aliens is not preempted. The *amici* states urge this Court to grant certiorari to resolve this conflict and to confirm that states may assist in the battle against human smuggling and other exploitation of vulnerable immigrants.

ARGUMENT

For preemption purposes, there is a world of difference between immigration laws that focus directly on aliens themselves and immigration laws that target "third parties" such as human smugglers, landlords, employers, and others who may exploit immigrants. Whereas this Court has often applied field and obstacle preemption principles to invalidate state laws directly regulating aliens, *see Arizona v. United States*, 567 U.S. 387 (2012); *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941), it has usually upheld state laws that target third parties who interact with aliens, *see Chamber of Commerce v. Whiting*, 563 U.S. 582, 587 (2011); *DeCanas v. Bica*, 424 U.S. 351, 353 (1976).

Despite this fundamental distinction, the Colorado Supreme Court and circuit courts covering 23 states have applied this Court's direct-regulation rulings to invalidate anti-smuggling and other laws that train on third parties. The consequences are significant. The Colorado Supreme Court and the Fourth, Ninth, and Eleventh Circuits have already invalidated five state human smuggling statutes, and their reasoning could be used to preempt at least six more. And the decisions threaten other state laws targeting third parties who exploit aliens and chill states from enacting such laws. These decisions prevent states from exercising their legitimate police powers to protect immigrants, their families, and the community at large from exploitation by coyotes, slumlords, and predatory employers. This Court should grant *certiorari* and hold that Colorado's human smuggling law, and others like it, are not preempted by the INA.

I. The decisions by the Colorado Supreme Court and three federal courts of appeals invalidated, or threaten to invalidate, 12 states' efforts to combat human smuggling and other third-party conduct such as harboring and renting to unauthorized aliens.

Twelve states have enacted human smuggling statutes that target third parties who seek to exploit unauthorized aliens. Most prohibit three classes of third-party activity: transporting or moving an unauthorized alien, concealing or harboring an unauthorized alien, and encouraging an unauthorized alien to enter the state. Colorado's statute, for example, 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.

Colo. Rev. Stat. § 18-13-128.

The Colorado Supreme Court held that this provision was field and conflict preempted by 8 U.S.C. § 1324, which makes it a federal crime for a person to transport or conceal from detection (or attempt to do so) an alien when the person knows, or recklessly disregards the fact that, the alien is unauthorized. Five other states' human smuggling laws have been found preempted by federal courts:

- **Alabama.** Ala. Code § 31-13-13 (held preempted in *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012)).
- **Arizona**. Ariz. Rev. Stat. § 13-2929 (found preempted in *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013)).
- **Georgia.** Georgia Code Ann. §§ 16-11-200, -201, -202) (held preempted in *Georgia Latino Alliance for Human Rights* ("GLAHR") *v. Georgia*, 691 F.3d 1250 (11th Cir. 2012)).
- **South Carolina.** S.C. Code Ann. § 16-9-460 (held preempted in *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013)).

- **Utah.** Utah Code Ann. § 76-10-2901 (held preempted in *Utah Coalition of La Raza v. Herbert*, 26 F. Supp. 3d 1125 (D. Utah 2014)).

Six statutes remain in effect:

- **Missouri.** Mo. Rev. Stat. § 577.675.
- **Florida.** Fla. Sta. ch. 787.07.
- **Indiana.** Ind. Code. § 35-44.1-5-4.
- **Oklahoma.** Okl. St. Ann. tit. 21, § 446.
- **Tennessee.** Tenn. Code Ann. § 39-17-114.
- **Texas.** Tex. Penal Code Ann. § 20.05.[2]

At least one state statute defines smuggling or harboring to prohibit landlords from renting to unauthorized aliens. *See* Ala. Code § 31-13-13.[3] Courts have also reviewed a number of local landlord ordinances, with conflicting results. The Third and Fifth Circuits held that the INA's anti-harboring provisions preempted ordinances that prohibited

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[2] The U.S. District Court for the Western District of Texas held this statute preempted, relying on circuit decisions including *Valle del Sol*. *Cruz v. Abbott*, 177 F. Supp. 3d 992, 1004 (W.D. Tex. 2016). The Fifth Circuit vacated the decision and reversed for lack of standing. *Cruz. v. Abbott*, 849 F.3d 594, 602 (5th Cir. 2017).

[3] Others expressly or implicitly exempt landlords from their smuggling statutes. See Ind. Code. § 35-44.1-5-4(C) ("A landlord that rents real property to a person who is an alien does not violate this section as a result of renting the property to the person."); *Cruz*, 849 F.3d at 600 (interpreting Tex. Penal Code Ann. § 20.05 to include a "covertness" requirement that exempted most landlords).

landlords from renting to unauthorized aliens. *See Hernandez v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013); *Villas at Parkside v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013). In contrast, the Eighth Circuit upheld the City of Fremont, Nebraska's anti-landlord ordinance against field and conflict preemption challenges. *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013).

II. The Colorado Supreme Court and three federal courts of appeals have fundamentally misapprehended this Court's preemption jurisprudence by treating human smuggling and other state laws that target third parties the same, for preemption purposes, as state laws that directly regulate immigration.

The distinction between the direct regulation of immigration, which is focused on aliens themselves, and laws that target third parties who exploit or otherwise interact with aliens runs throughout this Court's jurisprudence. The Court has usually found the former type of regulation preempted, often based on its conclusion that the federal government has occupied the particular field. By contrast, the Court has generally permitted states to regulate third parties who interact with unauthorized aliens, even in the face of preemption challenges.

The Colorado Supreme Court's fundamental error in this case was conflating the two lines of cases and treating a "third party" regulation the same as a direct regulation of aliens. The Fourth, Ninth, and Eleventh Circuits made the same category error in holding state human-smuggling statutes preempted. This Court's intervention is needed to restore uniformity among the

lower courts and bring an end to the unwarranted invalidation of these important state laws.

A. Culminating in *Arizona v. United States*, this Court's preemption cases have consistently distinguished between laws that directly regulate unauthorized aliens and those that target third parties.

Earlier cases. The leading decision holding preempted a state law directly regulating aliens is *Hines v. Davidowitz*, 312 U.S. 52 (1941). In *Hines*, this Court concluded that the federal Alien Registration Act preempted a Pennsylvania statute requiring every adult alien in the state to register once a year. *Id.* at 74. The Court found that the federal government's "full and exclusive responsibility for the conduct of affairs with foreign sovereigns" requires "federal power in the field affecting foreign relations be left entirely free from local interference." *Id.* at 63. This included regulating the treatment of another country's nationals within the United States. *Id.* Because "the regulation of aliens" is "intimately blended and intertwined with responsibilities of the national government," the Court ruled that the Alien Registration Act was sufficient to occupy the entire field of alien registration to the exclusion of state statutes. *Id.* at 66–69.

Several decades later, when faced with a state law regulating third parties, not the aliens themselves, the Court reached the opposite result. In *DeCanas v. Bica*, 424 U.S. 351 (1976), the Court held that the INA did not preempt a California law forbidding employers from hiring unauthorized aliens. The Court explained that, although Congress has the exclusive power to "regulate immigration," it "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 this constitutional power, whether latent or exercised." *Id.* at 354–55. A "regulation of immigration" is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355. Thus, the mere "fact that aliens are the subject of a state statute" does not render the law a "regulation of immigration." *Id.* Turning to the California statute at issue, the Court held that, even if the law had an "indirect impact on immigration," that was not enough to place the law within the scope of Congress's power to exclusively regulate immigration. *Id.* at 355–56.

Nor, held the Court, was there any "specific indication in either the wording or the legislative history" of the INA that Congress intended to exclude the entire field of "harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." *Id.* at 358. Although the INA comprehensively legislated alien registration, it did not (as then written) "draw in the employment of illegal aliens as plainly within that central aim of federal regulation." *Id.* at 359 (citation and internal alterations omitted).

Recent decisions. This Court's recent cases maintain the distinction between direct regulation of immigration and regulation of third parties' ancillary conduct. In *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011), the Court upheld an Arizona law suspending or revoking business licenses to employers (quintessential third parties) hiring undocumented aliens. After concluding that Arizona's statute fell

within the saving clause of the anti-employer provisions of the Immigration Reform and Control Act ("IRCA"), the Court further concluded that IRCA did not impliedly preempt the Arizona statute. *Id.* at 611. A four-justice plurality explained that the Arizona law did not "upset[] the balance that Congress sought to strike when enacting IRCA" because "regulating in-state businesses through licensing laws" was not a "uniquely federal area[] of regulation" involving a "dominant federal concern." *Id.* at 604. Although "Arizona hopes that its law will result in more effective enforcement" of anti-employer regulations, its own statute did not "directly interfere[]" with IRCA.[4] *Id.* at 604. Independent of the savings clause, the Court rejected the argument that "Congress" 'intended the federal system to be exclusive,' and that any state system therefore necessarily conflicts with federal law." *Id.* at 600. In reaching this conclusion, the Court observed that conflict preemption requires a "high threshold"—a standard not met there. *Id.* at 607.

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[4] Justice Thomas did not join the part of the Court's opinion explaining why Arizona's law was not conflict preempted. Notably, Justice Thomas had previously rejected the entire concept of obstacle preemption because it allows federal courts "to vacate a judgment issued by another sovereign based on nothing more than assumptions and goals that were untethered from the constitutionally enacted federal law authorizing the federal regulatory standard that was before the Court." *Wyeth v. Levine*, 555 U.S. 555, 600 (2009) (concurring opinion). Even so, Justice Thomas created a majority for the result in *Whiting* when agreeing that Arizona's law "does not conflict with federal immigration law." 563 U.S. at 611.

By contrast, in *Arizona v. United States*, 567 U.S. 387 (2012), the Court found preempted several provisions of an Arizona law, S.B. 1070, that directly regulated unauthorized aliens. Section 3 of S.B. 1070 criminalized the failure to comply with federal alien-registration requirements. Relying on *Hines*, the Court found that the INA created a "full set of standards" for alien registration that form "a harmonious whole." *Id.* at 401. The Court thus concluded that "the Federal Government has occupied the field of alien registration," which field preempted § 3. *Id.* at 401–02. The Court then noted in dicta that § 3 conflicted with congressional purpose by preventing a uniform policy of immigration enforcement throughout the nation and by depriving immigration officials the needed discretion to decline removal on a case-by-case basis. *See id.* Further, § 3 allowed for greater penalties than the INA, upsetting Congress's balance of immigration enforcement against its foreign policy aims. *Id.*

The Court next addressed § 5(C) of S.B. 1070, which prohibited unauthorized aliens from seeking or obtaining employment. The Court found this direct regulation of aliens to be conflict preempted. *Id.* at 406. The Court observed that the federal statute dealing with alien employment, IRCA, chose to impose penalties on employers but not employees. *Id.* at 404. Based on legislative history characterizing employee sanctions as "unnecessary and unworkable," the Court treated the absence of employee sanctions as a "deliberate choice." *Id.* at 405. It then ruled that the "Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens." *Id.* at 410.

Lastly, the Court found preempted § 6 of S.B. 1070, which authorized state and local officers to arrest anyone suspected of having committed an offense making them removable from the United States. *Id.* at 410. The Court concluded that this direct regulation of aliens interfered with Congress's diplomatic aims by depriving federal officials of discretion in removal actions.[5] *Id.*

B. The Colorado Supreme Court and several federal courts of appeals misread *Arizona* to hold that federal law preempts the field of laws prohibiting human smuggling.

This Court does not infer field preemption lightly, finding it only when "the nature of the regulated subject matter permits no other conclusion, or…Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). This is no less true simply because the subject of the legislation involves immigration. *See DeCanas*, 424 U.S. at 355 (expressing the same standard). The Colorado Supreme Court and the Fourth, Ninth, and Eleventh Circuits nonetheless held that Congress preempted the field of human smuggling. They did so by making a fundamental category error: they relied on this Court's decisions involving direct regulation of immigration even though

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[5] The Court did not find § 2(b) to be facially preempted because it was not clear that the rule requiring officers to verify a suspect's immigration status would pose an obstacle to Congressional policy under all circumstances. *Id.* at 410. However, the Court did allow for the possibility that the lower courts could find the section preempted as applied. *Id.* at 415.

they were assessing state laws that regulated third parties.

For example, the Colorado Supreme Court and the circuits on which it relied made much of *Arizona*'s conclusion that Congress intended to facilitate effective and dynamic foreign relations by creating a uniform immigration policy with discretion concentrated in the hands of federal officials. Pet. App. 20a; *Valle del Sol*, 732 F.3d at 1027; *South Carolina*, 720 F.3d at 531; *GLAHR*, 691 F.3d at 1264. These courts claimed that Congress's broad foreign policy rationale evidenced an intent to occupy the entire field of immigration regulation. *See* Pet. App. 20a (justifying field preemption on Congress's desire for uniformity); *Valle del Sol*, 732 F.3d at 1023 (relying on Congress's enumerated power to "establish a uniform Rule of Naturalization"); *GLAHR*, 691 F.3d at 1264 (holding that Congress expressed an "overwhelmingly dominant federal interest" in the "entry, movement, and residence of aliens within the United States").

But as *DeCanas* made clear, laws unrelated to which aliens may enter or remain in the country are not "regulation[s] of immigration." 424 U.S. at 355. *Arizona*'s foreign relations rationale therefore loses its force beyond its direct immigration context. Although foreign governments plainly have an interest in the treatment of their nationals inside the United States, there is no reason to think they would also have an interest in how smugglers, traffickers, landlords and other third-party exploiters are treated. Because of this, a unitary response to human smuggling is not necessary to effectively conduct foreign relations, nor must prosecutorial discretion be concentrated in a

single, federal entity. Even if foreign governments have some abstract interest in the prosecution of third parties who exploit their nationals, that interest would be no greater than in the prosecution of anyone else who commits a crime against an alien. Yet this Court has never preempted a state criminal statute simply because the victim may be an alien.

The Eighth Circuit recognized as much when holding that *DeCanas* and *Whiting*—not *Hines* and *Arizona*—controlled the analysis of a statute governing landlords, which it held not preempted. The court explained that "[l]aws designed to deter, or even prohibit, unlawfully present aliens from residing within a particular locality are not tantamount to immigration laws establishing who may enter or remain in the country." *Keller*, 719 F.3d at 941. Justice Eid, dissenting in the decision below, further observed that *Arizona* "carefully limited its field preemption analysis to the particular field of alien registration.…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." Pet. App. 29a-30a. The Colorado Supreme Court and the circuits on which it relied failed to identify any feature of the INA that unmistakably demonstrates Congress's intent to create exclusively federal uniformity in the prosecution of human smugglers. The mere fact that anti-smuggler laws indirectly concern immigration is not enough to infer that Congress intended to prohibit concurrent state legislation. *DeCanas*, 424 U.S. at 355.

The Colorado Supreme Court also overextended *Arizona*'s observation that "[f]ederal governance of immigration and alien status is extensive and complex." Pet. App. 18a (citing *Arizona*, 567 U.S. at 394–95); *accord Valle del Sol*, 732 F.3d at 1024. Underlying this analysis are two errors. First, the poor fit of the foreign relations rationale to third-party regulation means that Congress's creation of a "full set of standards" in the field of alien registration has no bearing on whether Congress also meant to completely occupy the field of human smuggling or any other ancillary crime that might have some link to unauthorized immigration.

Second, the complexity of Congress's overall regulation of immigration is not by itself enough to show an intent to completely exclude concurrent state prosecution of human smuggling. This Court rarely finds field preemption based on a federal statute's complexity alone. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting). In light of the complexity of many congressional acts in the modern administrative state, inferring field preemption from complexity alone would foreclose most state concurrent legislation. In *New York State Dept. of Soc. Services v. Dublino*, 413 U.S. 405, 415 (1973), the Court therefore rejected "the contention that pre-emption is to be inferred merely from the comprehensive character" of a statute because "[g]iven the complexity of the matter addressed by Congress in [the statute at issue], a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent." *Id.*

This is equally true in the immigration context. *DeCanas* explained that Congress must do more than simply set an immigration standard to implicitly leave no room for concurrent state action. 424 U.S. at 359. The Court was unmoved by the argument that the INA's scope preempted state employer regulations because the "comprehensiveness of legislation governing entry and stay of aliens was to be expected in light of the nature and complexity of the subject." *Id.*

The Colorado Supreme Court failed to appreciate this principle. The court listed as evidence of the comprehensiveness of the INA's anti-smuggler provision that Congress also criminalizes aiding and abetting the smuggling offenses, provides a punishment for the offenses, "discusses evidentiary considerations for determining whether a violation has occurred," and creates an outreach program for victims. Pet. App. 19a-20a. But these are standard features of most criminal laws, where such "complexity" is to be expected. If this evidence sufficed, and all that was required for field preemption was that Congress made some conduct a criminal offense, there would hardly be any concurrent criminal jurisdiction at all. That, however, is not our system. *Heath v. Alabama*, 474 U.S. 82, 92–93 (1985) (reaffirming the "dual sovereignty doctrine" where both the state and federal governments may convict an offender for the same crime, consistent with the Fifth Amendment).

C. The Colorado Supreme Court and several federal courts of appeals misread *Arizona* to find conflict preemption of state laws prohibiting human smuggling.

1. The presumption against preemption applies to police power regulations of conduct involving aliens.

It is well settled that "in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the Court] start[s] with the assumption 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." *Wyeth*, 555 U.S. at 565 (citation and internal alterations omitted). Rooted in "respect for the States as independent sovereigns," this presumption "assumes that Congress does not cavalierly pre-empt state-law [legislation]." *Id.* at 565 n.3. Improperly relying on cases involving direct regulation of aliens, the Colorado Supreme Court and federal courts of appeals failed to adhere to that principle.

The Colorado Supreme Court paid lip service to the presumption, Pet. App. 9a, but never applied it when deciding that Colorado's human smuggling law posed an obstacle to Congress's objectives. Some federal circuits have done the same. *See Valle del Sol*, 732 F.3d at 1023; *Alabama*, 691 F.3d at 1282. Others have gone further and explicitly held that the presumption does not apply because the human smuggling statute was not an exercise of state police powers. *See South Carolina*, 720 F.3d at 529 (holding "the presumption against preemption does not apply here because

immigration is an area traditionally regulated by the federal government"); *GLAHR*, 691 F.3d at 1265, n.11 (same). Both approaches are inconsistent with this Court's decisions, including decisions addressing state laws that regulate third parties who interact with aliens.

This Court has acknowledged that "[d]espite the exclusive federal control of this Nation's borders," states retain some "power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns." *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982). This Court therefore did not hesitate to apply the presumption in *DeCanas*, holding that states possess "broad authority under their police power" to regulate employer conduct, even when prohibiting the hiring of unauthorized aliens. 424 U.S. at 355.

Moreover, the specific nature of the state interests in combatting human smuggling demonstrates why the presumption *does* apply here. By definition, statutes that punish smugglers do not involve alien registration and do not directly regulate aliens at all. It is entirely possible for states to target non-alien third parties for reasons falling within the traditional police power. In this very case, the dissent explained that Colorado's human smuggling law was enacted to "protect[] the victims of human smuggling." Pet. App. 33a (Eid., J., dissenting). In its petition, Colorado describes in detail the real and sometimes life-threatening danger that immigrants find themselves in at the hands of *coyote* smugglers. Pet. 16–19. Likewise, aliens face exploitation by predatory employers and often rent

substandard housing from unscrupulous landlords. The states' clear interest in protecting these victims—for-hire passengers, employees, and tenants—do not evaporate simply because they are immigrants. To be sure, many states likely "hope[] that [their] law will result in more effective enforcement" of federal immigration laws. *Whiting*, 563 U.S. at 607. But the strong, parallel interest in protecting vulnerable victims is enough to justify the states' use of their historic police powers.

It is no answer that "immigration is an area traditionally regulated by the federal government." *South Carolina*, 720 F.3d at 529. The presumption "does not rely on the absence of federal regulation." *Wyeth*, 555 U.S. at 606 n.3. The states have long sought to protect passengers through common carrier legislation, to protect employees through labor laws, and to protect renters through landlord-tenant statutes, not to mention imposing criminal punishment for kidnapping and civil liability for false imprisonment. Just as *DeCanas* looked to the states' historic regulation of business employment generally to justify applying the presumption against preemption to a law barring the employment of unauthorized aliens, 424 U.S. at 355, so too does the states' historic protection of passengers, employees, and tenants justify applying the presumption here.

2. State police power regulations that do not apply to aliens themselves pose no obstacle to Congress's immigration objectives.

The Colorado Supreme Court and three federal circuits again failed to account for this Court's third-party immigration cases when holding that state human smuggling statutes conflict with the INA. When evaluating conflict preemption, this Court asks whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. Justice Thomas has warned, however, that obstacle preemption may allow courts "to vacate a judgment issued by another sovereign based on nothing more than assumptions and goals that were untethered from constitutionally enacted federal law." *Wyeth*, 555 U.S. at 600 (Thomas, J., concurring). As a result, this Court has emphasized that "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.

The Colorado Supreme Court failed to respect this "high threshold." That court, as well as several circuits, concluded that Congress struck a "careful balance" in 8 U.S.C. § 1324 that limited the states' ability to adopt "additional or different" punishments. *See* Pet. App. 12a, 23a. The courts reached this conclusion based on *Arizona's* conclusion that Congress struck such a balance in the INA's alien registration provisions, based on its goal of facilitating foreign relations through uniformity and centralized discretion. *See* Pet. App. 21a; *Valle del Sol*, 732 F.3d at 1027 (holding *Arizona's* smuggling statute disrupted congressional

uniformity and gave its prosecutors "the ability to prosecute those who transport or harbor unauthorized aliens in a manner unaligned with federal immigration priorities"); *South Carolina*, 720 F.3d at 531 (holding a state smuggling law "strip[ped] federal officials of the authority and discretion necessary in managing foreign affairs"); *GLAHR*, 691 F.3d at 1266 (same). But as with their field preemption analysis, the Colorado Supreme Court, and the circuits on which it relied, shoehorned Congress's foreign relations purpose into the context of regulations that do not directly concern an alien's entry into the United States. Because there is no reason to conclude that Congress specifically valued uniformity or centralized discretion in the third-party immigration context, it was a mistake to find a conflict wherever the state law differed or allowed increased enforcement.

The Eighth Circuit recognized as much when concluding that the landlord ordinance at issue there did not "remove any alien from the United States (or even from the City)," meaning "federal immigration officials retain complete discretion to decide whether and when to pursue removal proceedings." *Keller*, 719 F.3d at 944. To hold otherwise would create a *per se* rule of conflict preemption for indirect immigration statutes because the very existence of a state statute—even one identical to the INA—would undermine uniformity and divest federal officials of their prosecutorial discretion. If Congress did not intend to occupy the entire field of indirect immigration enforcement, it cannot be the case that any concurrent state statute would necessarily undermine Congress's objectives anyway. Again, the Eighth Circuit recognized the problem, noting that such "broad" applications of obstacle preemption would have

invalidated the laws this Court upheld in *DeCanas* and *Whiting*. *See id.* at 944. Absent the foreign relations rationale unique to direct immigration cases, the obstacle preemption argument collapses.

The Colorado Supreme Court and the federal circuits upon which it relied likewise wrongly relied on *Arizona*'s idiosyncratic holding regarding § 5(c) of S.B. 1070, which prohibited unauthorized aliens from seeking or obtaining employment. In finding that provision preempted, the *Arizona* Court made an exception to the general rule against "infer[ing] from the mere existence of…a cost-effectiveness judgment" that a legislative body "intends to bar States from imposing stricter standards." *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 335 (2011). Such an inference "would treat all such federal standards as if they were maximum standards, eliminating the possibility that the federal agency seeks only to set forth a minimum standard potentially supplemented through" state law. *Id.* The legislative history may have shown that Congress, through IRCA, intended to ensure that unauthorized aliens would not be punished for obtaining employment. *See Arizona*, 567 U.S. at 405. But the Colorado Supreme Court could cite to no comparable legislative history for 8 U.S.C. § 1324, or any other basis for concluding that Congress specifically intended to foreclose supplemental state penalties for human smuggling. As the Eighth Circuit reasoned when rejecting the argument that an anti-landlord ordinance conflicted with the INA's harboring provisions, there was "no showing that Congress intended to preempt States and local governments from imposing different penalties for the violation of different state or local prohibitions simply because the

prohibited conduct is labeled 'harboring.'" *Keller*, 719 F.3d at 943.

The Colorado Supreme Court and the Fourth, Ninth, and Eleventh Circuits' reading of *Arizona* makes it virtually impossible for the states to adopt complementary legislation addressing human smuggling or any other third-party exploitation of immigrants. Indeed, their broad theory of obstacle preemption potentially ousts the states from any field even partially occupied by Congress. This Court's conflict preemption jurisprudence—both within and outside the immigration context—does not countenance that result. This Court should therefore grant *certiorari* to ensure that lower courts do not improperly use *Arizona* as a basis for holding all state third-party immigration statutes to be conflict preempted.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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