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
Colorado Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 132 S.Ct. 2492, 2498 (2012) *citing* U.S. CONST., Art. I, § 8, cl. 4.

As relevant here, Congress exercised this power by creating a detailed law in the field of alien smuggling, criminalizing a variety of conduct, and enacting a comprehensive scheme for enforcing, prosecuting, and punishing these offenses. Under 8 U.S.C. § 1324(a)(1)(A)(ii)-(iv), it is a federal crime for any person to conceal, harbor, or shield an unlawfully present alien from detection; to encourage or induce an alien to come to, enter, or reside in the United States, or to transport an unlawfully present alien within the United States in furtherance of the alien's violation of federal immigration law. Conspiring or aiding in the commission of any of these acts is also criminalized. *Id.* §1324(a)(1)(A)(v). And section 1324(c) allows both federal and non-federal law enforcement officers to arrest for violating these alien smuggling laws, but the federal courts have exclusive jurisdiction to prosecute these crimes and interpret the federal statute. *Id*. §1329.

Nevertheless, to address a perceived increase in the number of undocumented aliens in the country and the perceived cost to the state of their presence, in 2006 Colorado enacted its own alien smuggling statute. Elizabeth Burger, *Immigration in Colorado: State Impact and Recent Legislation*, Colorado

Legislative Council Staff, No. 06-04 (May 26, 2006)[1] (explaining that the General Assembly's concern over "the increasing number of undocumented immigrants entering the country coupled with the cost to the state to provide certain services to undocumented immigrants led to the enactment of several bills in the 2006 legislative session" among them SB 06-206, later codified as § 18-13-128, C.R.S., the "human smuggling" statute at issue in this case). Under this statute, a person who provides (or agrees to provide) compensated transportation for the purpose of assisting another to enter, remain in, or travel through the United States (or Colorado) in violation of immigration laws commits a state felony prosecuted by a local district attorney in a state district court. Section 18-13-128, C.R.S.

In 2007, Mr. Fuentes-Espinoza, a construction worker who lived in Las Vegas, Nevada, was walking along the Las Vegas Strip looking for work when a man approached and offered him $500 to drive several family members from Phoenix to Kansas City. Fuentes-Espinoza agreed and together with a friend accompanied the man to Phoenix. Fuentes-Espinoza and his friend then set off in the man's van together with 7 passengers[2] and with instructions to call the man when they arrived in Kansas City. En route Fuentes-Espinoza stopped at a gas station in Colorado, paying for a purchase with a one-hundred dollar bill the man had given him for expenses. The bill turned out to be counterfeit and police were called. This prosecution and his conviction under Colorado's new human smuggling

[1] https://leg.colorado.gov/sites/default/files/06-04issuebrief_immigrcolorado.pdf
[2] The complaint charged 7 counts of violating the statute; one for each passenger.

statute followed and, on appeal, made its way to the Colorado Supreme Court. Pet. App. 3a-7a.

Like every federal appellate court that has considered attempts by states to create a state crime prosecutable in state courts for alien smuggling, and guided by this Court's decision in *Arizona*, the Colorado Supreme Court held Colorado's statute is preempted by federal law; specifically by the comprehensive federal scheme for criminalizing, prosecuting and punishing various acts involved in alien smuggling. Pet. App. A. *citing Arizona,* and *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012); *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) and *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013).

REASONS FOR DENYING THE WRIT

In 2012, this Court held, by a 6-3 vote, that an Arizona law that attempted to dictate immigration policy was preempted. In the wake of that decision, federal courts of appeal have consistently invalidated state "anti-smuggling" statutes enacted as part of the same movement that produced the law invalidated in *Arizona*. And this Court has recently and repeatedly denied petitions for writs of certiorari from States challenging those rulings. *See Valle del Sol, Inc. v. Whiting*, 723 F.3d 1006 (9th Cir. 2013), *cert. denied sub. nom Arizona v. Valle del Sol, Inc.*, 134 S.Ct. 1876 (2014) (No. 13-806); *United States v. Alabama*, 691 F.3d 1269 (11th

Cir. 2012), *cert. denied* 133 S.Ct. 2022 (2013) (No. 12-884). There is no reason for a different outcome here.

I. The Colorado Supreme Court correctly decided this case in accord with *Arizona v. United States*.

1. Following the reasoning in this Court's decision in *Arizona*, the Colorado Supreme Court held that Colorado's statute was field and conflict preempted. As to field preemption, the Colorado Supreme Court noted the federal government's "broad, undoubted" powers over immigration and federal law's "extensive and complex" governance of immigration, and the Colorado Supreme Court agreed the Immigration and Naturalization Act "established a comprehensive framework for penalizing the transportation, concealment, and inducement of unlawfully present aliens" and evinced Congress's intent to maintain a uniform and federally regulated framework to govern this field. Thus, the Colorado Supreme Court concluded, Colorado's attempt to intrude into this federal scheme was field preempted. Pet App. 18a-20a.

The Colorado Supreme Court also concluded Colorado's "anti-smuggling" statute imposed an obstacle to "Congress's purposes and objectives" in enacting its alien smuggling and harboring laws. The Colorado Supreme Court noted Congress enacted a carefully delineated statute that, depending upon the conduct involved and harm caused, provided different punishments but that Colorado's statute did not, thereby undermining "Congress's careful calibration of punishments for the

crimes prescribed."[3] Additionally, the Court found that by criminalizing a broader range of conduct than that covered by the federal statute, "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." Pet. Ap. 21a-25a.[4]

2. Like the dissent below, the State argues this case is different from *Arizona* because Colorado enacted this statute "to protect undocumented immigrants." Pet. 16; Pet. App. 32a. This argument is unavailing as a matter of fact and law.

Contrary to the State's argument, the Colorado Supreme Court majority did not "acknowledg[e] that the purpose of Colorado's statute is to protect victims from 'the dangers of human smuggling'." Pet. 7 *citing* Pet. App. 26a-27a. The majority opinion makes no such acknowledgment; the cited and quoted part of its opinion discusses the *federal* statute and rejects the State's claim below that *its* primary

[3] Uniform governance of immigration matters serves the important national interest in maintaining stable foreign relations, as this Court recognized in *Arizona*. But governance of alien smuggling also serves another important national interest that requires uniformity as well: national security. Thus, the Intelligence Reform and Terrorism Prevention Act of 2004 included amendments to the federal alien smuggling statute and made other additions to federal control in this field. Pub. L. No. 108-458, 118 Stat. 3638 (2004) (amending the statute's punishment scheme, now codified as 8 U.S.C. §1324 (4) and establishing a Human Smuggling and Trafficking Center "…to improve effectiveness and convert all information to the Federal Government relating to … migrant smuggling, and trafficking of persons…". 8 U.S.C. §1777 (c)(3)).

[4] In addition to its broader sweep of smuggling conduct, Colorado's expansive criminal jurisdiction allows Colorado to prosecute crimes that are committed only partly in the state or that only qualify as attempt crimes in the state. § 18-1-201, C.R.S.; *see also People v. Chase*, 2013 COA 27, ¶¶ 18-27, 2013 WL 979519, at 3–5 (Colo.App. 2013) and *People v. Cullen*, 695 P.2d 750, 751 (Colo. App. 1984). Thus, Colorado's alien smuggling statute also reaches conduct taking place well beyond its borders.

purpose is protecting aliens. The majority opinion never opines on the purpose of Colorado's statute.

That leaves the State and dissent to proclaim the supposed purpose for enacting this law only by their *ipse dixit*. But neither the text of the statute nor its legislative history lends any support to this claim.

Colorado's statute was modelled after Arizona's SB 1070 and with the same underlying motive. Gabriel L. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 Duke L.J. 251, 253-254, 261-262, 315 fn.9 (November, 2011) (citing Colorado's § 18-13-128 as being among several "copycat" laws enacted by several states modelled on SB 1070 intending to "stem the flow of illegal immigration into their respective jurisdictions"); *see also* Elizabeth Burger, *Immigration in Colorado: State Impact and Recent Legislation*, *supra*. (citing the General Assembly's fiscal concerns because of a perceived influx of immigrants as the reason for the bill). Indeed, the bulk of the debate at the Colorado House Committee's hearing on what was then SB 06-206 was about creating additional felonies for any unauthorized alien who is transported and for any person who provides unpaid transport to two or more aliens. House Committee on State, Veterans and Military Affairs (April 18, 2006, 2:10 – 2:30 p.m.). In sum, the claim that Colorado's statute was enacted with beneficent intent toward undocumented immigrants is, at best, highly questionable.

Even if the State's assertions about the purpose of the statute were correct, it would have no bearing on the preemption analysis. Whatever the General Assembly's motive for enacting this statute, the key to preemption analysis is not purpose but effect. And the federal and state laws do not "take aim at different conduct." Pet. App. 32a. In essence, both criminalize the same conduct: namely, providing transport for the purpose of violating immigration law.

That the Colorado statute may make violations easier to prove[5] neither lessens its intrusion into the field occupied by the federal statute nor relieves its conflict with the federal scheme. And although supposedly only intended to protect aliens from the dangers of smuggling, Colorado's statute punishes all violations the same while the federal scheme imposes harsher punishment when serious bodily injury or death results. *Compare* §18-13-128 (2), C.R.S. *with* 8 U.S.C. § 1324 (a)(1)(B)(iii), (iv) and (4). So as the Colorado Supreme Court held, the conflict between the Colorado's single punishment for any type of violation and the federal statute's carefully calibrated punishment scheme "stands an obstacle to the accomplishment and execution of Congress's full purposes and objectives." Pet. App. 21a-23a (discussing the federal statute's lack of a minimum term of

[5] The supreme court reads Colorado's statute as not requiring the prosecution to prove at trial that the passengers were *in fact* illegally present, thus easing the prosecutor's burden. But the statute still requires the prosecution to prove the defendant provided transport with "*the purpose* of assisting another to enter, remain in or travel through the United States or the state of Colorado *in violation of the immigration laws*…" § 18-13-128 (emphasis added). And thus this evidentiary difference from the federal statute does not have the significance the State seems to impute to it. Pet. 7.

imprisonment, and differentiation of punishment depending upon the type of conduct involved).

II. There is no conflict concerning the preemption issue in this case.

The State attempts to conjure a conflict among the federal courts on the issue but there is none.

The State first cites *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), *cert. denied*, 134 S.Ct. 2140 (2014). But that case did not involve a state statute criminalizing alien smuggling or harboring; it concerned only a municipality's housing ordinance imposing civil penalties for renting to unauthorized aliens.

"[F]or three reasons," the latter type of law is different from the law here. *See* Br. In Opp. at 10, *Keller v. City of Fremont*, 134 S.Ct. 2140 (2014) (No. 13-1043). First, the law in *Keller* was a civil statute simply requiring conformance with federal law. The statute here, by contrast, is a criminal law imposing state criminal penalties. Second, the landlord/tenant law in *Keller* operated in an area of traditional police power. Not so here. Third, unlike the field of alien smuggling, the INA contains no detailed statutory scheme touching on a municipality's housing ordinances. *E.g., Lozano v. City of Hazleton*, 724 F.3d 297, 320 (3rd Cir. 2013) (noting that renting an apartment to an unauthorized alien in the normal course of business is not conduct covered by 8 U.S.C. §1324). Finally, it is worth noting that the plaintiffs sued for injunctive relief in *Keller* and thus the court "declined to

speculate whether the rental provisions might" be preempted when actually applied. *Keller*, 719 F.3d at 945.

In re Jose C., 188 P.3d 1087 (Cal. 2009) is also inapt. Pet. 15. That case did not involve a state's newly enacted criminal offense of alien smuggling nor did it involve specific legislation aimed at the field of immigration at all. Instead, *Jose C.* involved a proceeding under *existing* state law that simply allowed a state juvenile court to adjudge a juvenile a ward of the court for finding he violated *any* law, state or federal. And in any event, unlike the federal circuits that considered the specific preemption issue here, the California Supreme Court decided *In re Jose C.* three years before this Court issued its opinion in *Arizona v. United States*.

Finally, the State asserts a conflict between the decision here and the decision of the Arizona Court of Appeals in *State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008). But a conflict between the Colorado Supreme Court and an intermediate appellate court of another state hardly warrants this Court's attention. Moreover, the intermediate appellate court also did not have the benefit of this Court's opinion in *Arizona*. *Compare*, *e.g. Flores*, 188 P.3d at 712 (upholding Arizona law because "Arizona's objectives mirror federal objectives") with *Arizona*, 132 S. Ct. at 2502-2503 (rejecting Arizona's argument that its "provision has the same aim as federal law and adopts its substantive standards" because that argument "ignores the basic premise of field preemption" and "is unpersuasive on

its own terms"). After *Arizona* was decided, the state statute at issue in *Flores* was subsequently enjoined in federal district court on preemption grounds. Pet. 16.

In short, the State has not cited any case decided after the opinion in *Arizona* that conflicts with the Colorado Supreme Court decision here or with the other federal courts of appeal that have held that the alien smuggling statutes enacted by other states are field and conflict preempted.

III. The decision below does nothing to impede state and local law enforcement efforts to interdict alien smuggling.

The State offers no compelling practical reason why the question presented is important enough to warrant this Court's attention.

1. Just as in *United States v. Alabama* a handful of states led by Arizona claims in an *amicus* brief that review is necessary to decide whether states have the power to criminalize alien smuggling. There is no reason to give more credence to that recycled brief now than this Court afforded it then. Many of the state laws the brief cites – all adopted before *Arizona* – are enjoined (including Florida's by implication of the Eleventh Circuit's decision in *Alabama*), and the States offer no reason to believe the remaining laws are being meaningfully enforced in the wake of *Arizona*. And the federal government has made clear that "the Court's decision in *Arizona* is directly applicable to such laws." Br. In Opp. at 20, *Alabama v. United States*, 133 S.Ct. 2022 (2013) (No. 12-884). These laws "represent[] a clear intrusion

into an area occupied by Congress through the INA and conflict[] with federal law." *Id*. at 10.

2. Citing Colorado's statute creating a state patrol unit to address human smuggling, the State claims the Colorado Supreme Court's decision "invalidated [this] legislative effort." Pet. 3-4. But contrary to the State's claim, the decision below does nothing to curb Colorado law enforcement officers from interdicting alien smuggling. The federal scheme allows states to assist in federal efforts aimed at alien smugglers, but through arrest, not through enacting its own legislation for prosecution in its own courts. Pet. App. 20a, ¶49-50; see also *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (local law enforcement can arrest for violations of INA §1324). Thus the State's claim that dire consequences ensue from the Colorado Supreme Court's preemption holding – *e.g.* "States can no longer directly protect the victims of human smuggling…" Pet. 18 – is illusory. The INA prohibits all manner of alien smuggling, with a detailed schedule of punishments and contemplates several ways in which states may cooperate with federal officials in enforcing these laws. *E.g.,* 8 U.S.C. 1324(c) (authorizing arrests); 8 U.S.C. 1357(g)(1) (authorizing the Department of Homeland Security to enter into agreements with States whereby appropriately trained officers may perform specified functions of federal immigration officers). The decision of the Colorado Supreme Court does nothing to thwart efforts by state law enforcement officers to interdict alien smuggling.

3. Finally, the State claims that "[t]he clear implication [of the opinion below] is that the States are prohibited from enacting even those laws that *benefit* undocumented immigrants." Pet. 18 (emphasis in original). But as explained above, this issue is not presented by this case. The purpose of Colorado's law is not to protect undocumented immigrants. *See supra* at Part I.2.

At any rate, the paucity of support for the State's purported motive and the contradictory legislative history makes this case a poor vehicle to address the issue. And there are other developing cases that may squarely present this issue. *E.g.*, *United States v. State of California*, (E.D. Cal. No. 18-264) (complaint seeking declaration invalidating and enjoining three state laws enacted to benefit undocumented immigrants, alleging they are preempted by the INA under this Court's decision in *Arizona*)[6]; *see also* Katie Benner and Jennifer Medina, *Trump Administration Sues California Over Immigration Laws*, The New York Times, March 6, 2018.[7]

[6] Complaint online at: http://www.caed.uscourts.gov/caednew/assets/File/1-Complaint.pdf

[7] Online at: https://www.nytimes.com/2018/03/06/us/politics/justice-department-california-sanctuary-cities.html

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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