NO. 17-1084

In the
Supreme Court of the United States

STATE OF COLORADO,
Petitioner,
v.

BERNARDINO FUENTES-ESPINOZA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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Respondent rests his opposition to the Petition on three contentions: (1) the Colorado Supreme Court's decision was correct and is in accord with *Arizona v. United States*, 567 U.S. 387 (2012); (2) the question presented is unimportant; and (3) there is no conflict among lower courts. Br. in Opp. 1–12. All three contentions are wrong; indeed, Respondents' arguments only emphasize the need for this Court to grant the Petition.

Additionally, this case arises after a trial and two rounds of appeals, in which state courts authoritatively interpreted and applied Colorado's now-invalidated human smuggling statute to a concrete set of facts. Thus, unlike previous cases that presented similar issues but involved abstract, facial challenges to state laws, this case is an excellent vehicle for addressing the nationally important, unanswered question of whether the Immigration and Nationality Act (the "INA") forbids States from enacting legislation on the subject of human smuggling.

I. The court below misread *Arizona* to significantly expand the scope of implied field and conflict preemption under the Immigration and Nationality Act.

Respondent asserts that the Colorado Supreme Court's decision below is "in accord with *Arizona v. United States*." Br. in Opp. 4. This would be true only if *Arizona* significantly expanded implied preemption under the INA, with respect to both field and conflict preemption principles. Nothing in

Arizona or this Court's other decisions supports that reading.

Field Preemption. Field preemption is a drastic intrusion on state policymaking authority—particularly when, as here, it is implied by courts, rather than explicitly imposed by Congress. The doctrine of implied field preemption forecloses state legislation in *the entire area* in which a federal statute operates, leaving no room for the state police power. *See, e.g., Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015). Given the breadth of implied field preemption, this Court has been cautious in finding Congress to have silently occupied an entire field of public concern. Indeed, an overly broad understanding of the doctrine "would undercut the principle that it is Congress rather than the courts that preempts state law." *See, e.g.*, *Chamber of Commerce v. Whiting,* 563 U.S. 582, 607 (2011) (internal quotations omitted); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) ("[W]e begin our analysis with the assumption that the historic police powers of the States [are] not to be superseded …." (internal quotation marks omitted)).

Consistent with this Court's cautionary approach to implied field preemption, *Arizona* did not identify any new "fields" that Congress silently occupied to the exclusion of state policymaking power. Although *Arizona* invalidated three state statutory provisions, it struck down only *one of them* on field preemption grounds: a provision that punished an alien's failure to "carry an alien registration document." 567 U.S. at 400–03. This particular state law intruded into the field of "alien

registration," the *only* immigration-related field Congress has entirely occupied to the exclusion of the States. *Id.* at 401 (citing *Hines v. Davidowitz*, 312 U.S. 52, 70, 74 (1941)). In explicitly declining to wield the doctrine of field preemption with respect to the other state statutes at issue in *Arizona*, this Court confirmed that field preemption under federal immigration law is narrow, not broad. *See id.* at 403–10.

Yet the majority opinion below announced that the INA preempts not only the field of alien registration but *three additional fields*—"transportation, concealment, and inducement of illegally present aliens"—leaving "no room for the states to supplement" federal law within those areas. Pet. App. 20a. That holding directly contravenes not only *Arizona* but also the nearly eighty years of settled law on which *Arizona*'s field preemption holding was based. 567 U.S. at 401 (citing this Court's 1941 decision in *Hines*). In the words of Justice Eid's dissenting opinion below, "*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 (Eid, J., dissenting).

Conflict Preemption. In addition to holding that Colorado's human smuggling statute is field preempted, the Colorado Supreme Court determined that the statute violates principles of conflict preemption. Pet. App. 25a. According to the Colorado Supreme Court, while Colorado's statute

seeks to protect the victims of human smuggling, "nothing" in the INA indicates a congressional intent to pursue the same end. *Id.* at 27a. Therefore, the majority held, because Colorado's scheme criminalizes a broader range of conduct and involves a different "method of enforcement," it conflicts with the objectives of the INA and is preempted. *Id.* at 27a.

But *Arizona* nowhere suggests a Congressional intent to prevent States like Colorado from attempting to address the serious problem of human smuggling within their borders. *Arizona* struck down as conflict preempted a law attempting to regulate "the employment of unauthorized aliens" and a law allowing local law enforcement to arrest aliens who are federally removable (but have not necessarily committed a crime). 567 U.S. at 403–04, 407. At the same time, the Court declined to strike down a state statute that required law enforcement officers to "determine the immigration status of any person they stop, detain, or arrest." *Id*. at 411. Thus, as it did with respect to field preemption, *Arizona* followed a cautious, careful approach to conflict preemption, ensuring that States have the ability to enact legislation if its "enforcement [will not] in fact conflict[ ] with federal immigration law and its objectives." *Id*. at 416.

Here, neither the Colorado Supreme Court majority nor Respondent have attempted to explain how Congress's decision *not* to protect aliens from the dangers and exploitation of human smuggling

necessarily infers an intent to prevent the States from doing just that.[1] To the contrary, because "the Colorado human smuggling statute focuses on protecting the victims of human smuggling,"

[1] Respondent suggests that Colorado's human smuggling bill was not in fact enacted to protect human smuggling victims, and was instead enacted to "address a perceived increase in the number of undocumented aliens in the country." Br. in Opp. 1. For support, Respondent cites an "Issue Brief," which is an online publication from Colorado's non-partisan Legislative Council Staff intended to "provide a brief overview of issues addressed by the General Assembly and other policy issues of general interest." Colo. Legislative Council Staff, *Issue Briefs*, https://bit.ly/2qu51F2 (last visited April 13, 2018). Even assuming that an unofficial document from career legislative staff is relevant to determining legislative intent, Respondent cites the wrong portion of the issue brief. In specifically discussing Senate Bill 06-206, Colorado's human smuggling law, the issue brief explains that the law was enacted "[i]n response to recent media reports drawing attention to persons who assist undocumented aliens to illegally enter the United States (so-called 'coyotes')." Colo. Legislative Council Staff, Issue Brief No. 06-04, *Immigration in Colorado: State Impact and Recent Legislation* (May 25, 2006), *available at* https://bit.ly/2qrWu5I (last visited April 13, 2018). The statute, in other words, was motivated by dangers posed by human smugglers, not illegal immigration more generally.

In any event, the majority opinion below held, as a matter of state law, that Colorado's human smuggling statute was intended to protect human smuggling victims. Pet. App. 27a. The dissent agreed, based on the statute's plain language. *Id.* at 32a (Eid, J., dissenting) ("[T]he plain language of the statute indicates the purpose of Colorado's human smuggling statute is the protection, not punishment, of the passenger."). Respondent's misreading of an unofficial "Issue Brief" does not overcome the actual record.

"federal and state laws take aim at different conduct" and "there can be no conflict between them." Pet. App. 32a–33a (Eid, J., dissenting).

The Colorado Supreme Court's conflict preemption holding compounds the nationwide uncertainty about the preemptive reach of the INA. The implication of the opinion's analysis is that States are prohibited from enacting even those laws that *benefit* undocumented immigrants. Pet. App. 27a (holding that Colorado's human smuggling statute was preempted because "[w]e see nothing … indicating a congressional intent to protect aliens from human smuggling"). As explained in the Petition, several States, including Colorado, offer undocumented immigrants benefits such as driver licenses. Pet. 18–19. Implicitly calling those laws into question through an overly broad conflict preemption analysis is contrary to *Arizona*. 567 U.S. at 398 ("Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.").

II. The scope of implied preemption in the wake of *Arizona* is important to States like Colorado that have exercised their sovereign authority to combat human smuggling.

Respondent claims that the Colorado Supreme Court's opinion is unimportant because it "does nothing to impede state and local law enforcement efforts to interdict alien smuggling." Br. in Opp. 10–12. Of course, the proceedings in this very case

rebut that claim. The majority opinion below invalidated Respondents' state-law conviction. That conviction was based on the efforts of local law enforcement officers who investigated the crime, in participation with the Colorado State Patrol's Smuggling and Trafficking Interdiction Unit (a unit that was staffed with 24 full-time employees and assigned a budget of over $1.5 million in 2006). Pet. 3–4. There is no question that the decision below "impede[d] state and local law enforcement efforts to interdict alien smuggling." *Id.*

Moreover, the practical significance of the legal approach articulated in the opinion below reaches well beyond Colorado. As the Amicus Brief by Arizona and 13 other States explains, "[f]ive other states' human smuggling laws have been found preempted." Am. Br. of Ariz., et al., 4–5. Indeed, negative precedent exists in jurisdictions covering "23 states." *Id.* at 3. Meanwhile, the fate of other similar state statutes is uncertain. *Id.* at 5. Decisions like the one below "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." *Id.* at 3. It is simply not true that rulings like the one below do "nothing to curb [state] law enforcement officers from interdicting alien smuggling." Br. in Opp. 11.

III. This Court's intervention is necessary to resolve a jurisdictional split regarding the preemptive reach of *Arizona*.

Respondent's assessment of the divide among courts across the county is inaccurate. Br. in Opp. 8–10.

The Colorado Supreme Court held that section 8 U.S.C. § 1324 broadly preempted the fields of "transportation, concealment, and inducement" of illegally present aliens. Pet. App. 20a. *Arizona*, meanwhile, was careful *not* to expand field preemption under the INA. The Colorado Supreme Court thus expanded an existing jurisdictional split, joining the Third, Fourth, Ninth, and Eleventh Circuits in opposing the Eighth Circuit and state courts in Arizona and California. *See* Pet. 11–14. As the Eighth Circuit held in a post-*Arizona* decision, the "expansive notion of constitutional and field preemption" set forth in opinions like the one below "is contrary to decisions of the Supreme Court" that take a narrower view of the INA's preemptive scope. *Keller v. City of Fremont*, 719 F.3d 931, 941 (8th Cir. 2013); *see also In re Jose C.*, 198 P.3d 1087, 1099 (Cal. 2009) (discerning "no intent by Congress … to occupy the field of immigration law generally or alien smuggling in particular").

Implicit in Respondent's argument is his concession that courts after *Arizona* have taken a different approach in addressing preemption issues, and arrived at different results, than courts before *Arizona*. Yet nothing in *Arizona* suggested that this Court sought to change the analytical model for

deciding preemption issues under the INA. This is precisely what *Keller*, a post-*Arizona* case, held. And, as explained above, *Arizona* was careful *not* to change the scope of field preemption under the INA. Lower courts thus face competing legal standards to apply when state human smuggling laws are challenged on preemption grounds. As Arizona's amicus brief explains, the split is real and significant: "[s]ix [state] statutes remain in effect," but may be subject to challenge at any time. Am. Br. of Ariz., et al., 5.

IV. This case is an excellent vehicle to decide whether States have authority, in the wake of *Arizona*, to legislate on the subject of human smuggling.

Finally, this case is an excellent vehicle to clarify the preemptive scope of the INA. Respondent points out that this Court denied petitions for writs of certiorari in two prior cases involving the validity of human smuggling statutes. Br. in Opp. 3–4. But those prior cases involved facial challenges to state human smuggling laws. *Valle del Sol, Inc. v. Whiting*, 723 F.3d 1006 (9th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).

This case, in contrast, arises from a criminal trial and two rounds of state appeals, through which Colorado's statute was applied to a concrete set of facts. Thus, there is no "uncertainty about what the law means and how it will be enforced," and here the Court has "the benefit of a definitive interpretation from the state courts." *Arizona*, 567 U.S. at 415. This case therefore presents the Court

with an ideal vehicle to address a question of national importance.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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