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 Supreme Court of the State of Colorado

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS 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 *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF")[1] is a nonprofit Illinois corporation founded in 1981. From its inception, EFELDF has consistently defended federalism – including the ability of state and local government to protect their communities and to maintain order – and promoted adherence to the U.S. Constitution. In

[1] *Amicus* files this brief with the written consent by all parties, with 10 days' prior written notice; pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

that effort, EFELDF has opposed unlawful behavior like illegal entry into and residence in the United States and supported allowing state and local government to take steps to avoid the harms caused by illegal aliens. For these reasons, EFELDF has direct and vital interests in the issues raised here.

STATEMENT OF THE CASE

Colorado seeks this Court's review of the Colorado Supreme Court's holding that the federal Immigration and Naturalization Act ("INA"), as amended by the Immigration Reform & Control Act of 1986 ("IRCA"), preempts the state's prohibition of human smuggling. COLO. REV. STAT. §18-13-128(1). Dividing 4-3, the state court held that INA field and conflict preempts the human-smuggling law and, on that basis, reversed Fuentes-Espinoza's conviction under §18-13-128(1). Pet. App. 3a (majority); 28a (dissent).

Constitutional Background

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three forms of federal preemption: express, field, and conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). The latter two are species of implied preemption, where: "field pre-emption may be understood as a species of conflict pre-emption." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990).

Two presumptions underlie a court's parsing of statutes in implied-preemption cases. First, courts presume that statutes' plain wording "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). Second, courts apply a presumption

against federal preemption of state authority. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006). Thus, "[w]hen the [statutory] text … is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (interior quotations omitted). Finally, to the extent that the presumption applies, it applies not only to determining the *existence* of preemption, but also to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power over immigration. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica,* 424 U.S. 351, 354 (1976), this Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). Instead, in the field of immigration, "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe,* 457 U.S. 202, 225 (1982).

Statutory Background

INA §274(a)(1)(A)(ii)-(iii) prohibits transporting and harboring illegal aliens in furtherance of their continued violation of immigration laws:

> Any person who—
>
> …
>
> (ii) 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;
>
> (iii) 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, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> …
>
> shall be punished as provided in subparagraph (B).

8 U.S.C. §1324(a)(1)(A)(ii)-(iii).

Under §274(c), not only federal immigration agents designated by the Attorney General but also "all other officers whose duty it is to enforce criminal laws" may enforce §274.[2] *See* 8 U.S.C. §1324(c).

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[2] The Senate version of §274(c) provided that "all other officers *of the United States* whose duty it is to enforce criminal

Moreover, since 1996, the Racketeer Influenced and Corrupt Organization Act ("RICO") has included INA §274 as a predicate offense, PUB. L. NO. 104-132, Title IV, §433, 110 Stat. 1214, 1274 (1996) (enacting 18 U.S.C. §1961(1)(F)), thereby allowing enforcement not only by private parties but also in state court. *See* 18 U.S.C. §1964(c); *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990).

Beyond setting federal immigration policies, INA recognizes a state and local role in immigration enforcement. For example, 8 U.S.C. §1252c(a) authorizes "State and local law enforcement officials … to arrest and detain an individual" under certain circumstances "to the extent permitted by relevant State and local law," "[n]otwithstanding any other provision of [federal] law." Under 8 U.S.C. §1357(g)(10)'s savings clause, the absence of state-federal enforcement agreements under §1357(g) does not preclude state and local government's involving themselves with immigration-related enforcement, including "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens.

As signaled in the petition, human smuggling was a very publicly important issue in Colorado circa 2006. Pet. at 3. For example, in 2006, the Colorado State Patrol reportedly encountered an average of five hundred illegal aliens per week. April M. Washington

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laws" could enforce §274, but the Conference Committee struck "of the United States" to enable non-federal enforcement. *Gonzales v. City of Peoria,* 722 F.2d 468, 475 (9th Cir. 1983) (*citing* Conf. Rep. No. 1505, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1358, 1360, 1361) (emphasis added).

& Tillie Fong, *17 Suspected Illegals in Wreck*, ROCKY MOUNTAIN NEWS, Mar. 21, 2006, at 5A. In response, the Colorado Legislature passed Senate Bill 206 with a unanimous vote in the state senate and a 56-9 margin in the state house of representatives. COLO. SEN. J., at 784 (Apr. 6, 2006); COLO. HOUSE J., at 1659 (May 2, 2006). In pertinent part, Senate Bill 206 enacted Colorado's prohibition of human smuggling:

> 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(1).

SUMMARY OF ARGUMENT

While its primacy on immigration issues is clear, the federal government lacks a police power to address the serious public-safety issues that Colorado's human-smuggling law seeks to address. As such, the local impacts of illegal aliens fall squarely on state and local government. That factor highlights the importance of this Court's resolving the significant circuit split over the scope of state and local police power to address the local impacts of illegal immigration. *See* Section I, *infra*.

As Colorado explains, the circuits are deeply split on the appropriate preemption standards to apply to immigration. Pet. at 10-16. This divide results from reading *Arizona v. U.S.,* 132 S.Ct. 2492 (2012), over-broadly to overturn not only *DeCanas* but also

Chamber of Commerce of U.S. v. Whiting, 131 S.Ct. 1968 (2011). This Court should grant the writ both to resolve the split in authority between the circuits and to clarify that *Arizona* limited its field-preemption holdings to alien registration and its conflict-preemption holding to employee-based sanctions and non-federal removal determinations. *See* Section II, *infra.* On the merits, Section III, *infra*, emphasizes that the presumption against preemption applies, (Section III.A, *infra)* and why the Colorado Supreme Court erred in finding both conflict (Section III.B.1, *infra)* and field (Sections III.B.2-3, *infra)* preemption.

ARGUMENT

I. THE ISSUES RAISED HERE ARE EXTRAORDINARILY IMPORTANT.

Before showing why the decision below provides an appropriate vehicle to review the preemption issues raised here, *amicus* EFELDF emphasizes the extraordinary importance of these issues. While preemption issues always present important issues of competing sovereignties, these preemption issues also go to the very power of state and local government to protect public safety with the police power. Moreover, the federal circuits and state appellate courts are split on state and local authority to address these issues. Only this Court can resolve those splits in authority.

The authority to combat illegality is at the core of traditional police powers: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). "[T]he structure and limitations of federalism ... allow the States great latitude under their police powers to legislate as to the protection of

the lives, limbs, health, comfort, and quiet of all persons." *Gonzales*, 546 U.S. at 270 (interior quotations omitted). Indeed, "[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are primarily, and historically, ... matter[s] of local concern." *Medtronic*, 518 U.S. at 475 (interior quotations omitted). If allowed to stand, the lower court's preemption ruling would deny Colorado the "right to protect itself," *Jacobson*, 197 U.S. at 27, which even includes protecting illegal aliens from the predations of the human smugglers. Pet. App. at 28a (Eid, J., dissenting). Thus, the state powers at issue are critical.

By contrast, the federal government lacks a corresponding police power: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison*, 529 U.S. 598, 618-19 (2000). Accordingly, courts must be certain that federal immigration law covers an issue before cavalierly displacing the only government with the authority and will to protect the public from harm.

While the concern expressed here blends with the state-sovereignty and public-health rationales for the presumption against preemption, Section III.A, *infra*, it bears emphasis here because of the unusual seriousness. This Court should resolve the deep split over the extent to which state and local government have the authority to address illegal immigration's local impacts, particularly where the enacted federal immigration laws do not clearly and manifestly preempt state and local action. If Congress wants to

preempt these state and local laws unambiguously, Congress is free to do so. Until then, it falls to this Court to ensure that lower courts do not substitute themselves for Congress in the law-making process.

II. THIS COURT SHOULD RESOLVE THE TENSION BETWEEN *WHITING* AND *ARIZONA* ON INA PREEMPTION.

Although Arizona prevailed sweepingly in *Whiting* and only partially in *Arizona*, both decisions support Colorado here. Nonetheless, some lower courts have interpreted *Arizona* over-broadly, resulting in erroneous preemption findings here and elsewhere. *Georgia Latino Alliance for Human Rights (GLAHR) v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012); *U.S. v. Alabama*, 691 F.3d 1269 (11th Cir. 2012); *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524 (5th Cir. 2013) (*en banc*); *but see Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013). This Court should grant the writ to resolve the split in the lower appellate courts and to clarify *Arizona* in the context of *Whiting* and *DeCanas*.

In *Whiting*, this Court rejected preemption challenges both to state-law licensing sanctions against those who employ illegal aliens and to Arizona's mandating *under state law* employers' use of the federally optional E-Verify program. In doing so, this Court recognized that conflict-preemption analysis cannot be "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" without "undercut[ting] the principle that it is Congress rather than the courts that preempts

state law." *Whiting*, 131 S.Ct. at 1985 (interior quotations omitted). By finding other provisions of state law conflict-preempted in *Arizona*, this Court has opened two divergent modes of analysis, which this Court should reconcile.[3]

As this Court held in *Arizona*, "[c]urrent federal law is substantially different from the regime that prevailed when *DeCanas* was decided." *Arizona*, 132 S.Ct. at 2504 (rejecting *employee*-based criminal sanctions). Specifically, prior to IRCA, INA would have allowed both employee- and employer-based sanctions under *DeCanas*. According to *Arizona*, IRCA "struck" a "careful balance" by considering and rejecting employee-based sanctions vis-à-vis employer-based sanctions: "Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA … [b]ut Congress rejected them." *Id.* Based on IRCA's "text, structure, and history," this Court enforced that implied balance, relying on an inference that "Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment." *Id.* at 2505.

Under *Arizona*, then, Congress had to have considered and rejected an issue before courts could

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[3] In *Arizona,* this Court upheld a requirement to confirm immigration status during stops or arrests, but relied on field preemption to invalidate state-law crimes for failing to carry federally required registration documents and on conflict preemption to invalidate two provisions: (1) state-law crimes for illegal aliens' knowingly applying for work or working, and (2) state-law authorization for warrantless arrests of illegal aliens reasonably believed to be removable.

infer preemption from the perceived balance that a statute struck. *See Alabama*, 691 F.3d at 1300 (no conflict preemption in the absence of "legislative history, similar to that of IRCA, that would reflect a 'considered judgment' on the part of Congress 'that [such penalties] would be inconsistent with federal policy and objectives'") (*quoting Arizona*, 132 S.Ct. at 2504).[4] The question here is whether this *Arizona* difference with respect to employee-based crimes also encompasses the harboring, smuggling, and transport issues presented by this case. Because Congress engaged in no similar balancing for those issues, no conflict is present here.

Amicus EFELDF respectfully submits that perceiving "balance" under the prevent-or-frustrate strand of conflict preemption easily can "wander far from the statutory text" and improperly "invalidate[] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring). This Court should grant the writ to clarify when courts may bind state and local governments with implied-preemption results that Congress neither expressly enacted nor clearly and manifestly intended to enact.

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[4] The Alabama provision in question criminalized illegal aliens' applying for vehicle license plates, driver's licenses, identification cards, business licenses, commercial licenses, or professional licenses. *Id.* at 1297-1301.

III. COLORADO'S HUMAN-SMUGGLING LAW IS NOT PREEMPTED.

With that background, *amicus* EFELDF now demonstrates that neither the federal Constitution itself nor federal immigration law preempts human-smuggling laws like Colorado's human-smuggling law. Before evaluating the statutory issues, *amicus* EFELDF first outlines the presumption against preemption's application to INA preemption.

A. The presumption against preemption applies.

Although the Colorado Supreme Court *mentioned* the presumption against preemption, Pet. App. 10a, the state court did not *apply* that presumption with any rigor to assess INA's possible reach. Indeed, under *Arizona*, the presumption against preemption continues to apply in preemption cases, 132 S.Ct. at 2501 (majority), but – by giving the presumption "short shrift" in *Arizona*, 567 U.S. at 451 (Alito, J., concurring in part and dissenting in part) – the Court has confused the lower courts. *Compare Farmers Branch*, 726 F.3d at 566 (only 5 of 15 judges found presumption against preemption) *with Keller*, 719 F.3d at 943 (finding presumption 2-1). Under the presumption against preemption, Colorado's human-smuggling law can easily be read to coexist with INA.

Although *U.S. v. Locke*, 529 U.S. 89, 90 (2000), links the presumption against preemption to "area[s] where there has been a history of significant federal presence," the presumption applies in *all* areas. *Wyeth*, 555 U.S. at 565 n.3. Federal courts "rely on [it] because respect for the States as independent sovereigns in our federal system leads [federal courts]

to assume that Congress does not cavalierly pre-empt [state law]." *Id.* (internal quotations omitted). Thus, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.*

Colorado's law here concerns areas of traditional local concern, including not only public safety but also common carriers, *U.S. v. Contract Steel Carriers, Inc.*, 350 U.S. 409, 412 (1956). *Morey v. Pub. Utils. Comm'n*, 629 P.2d 1061, 1062 n.2 (Colo. 1981), which is the type of state regulation that this Court has allowed, absent congressional action to the contrary. *DeCanas*, 424 U.S. at 354-55. Since the presumption against preemption applies, *DeCanas*, 424 U.S. at 357-58; *Arizona*, 132 S.Ct. at 2501, the lower court should have looked more closely at whether §18-13-128(1) permissibly overlapped with the corresponding INA provisions.

Even in the immigration context, federal laws are not preemptive absent "persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *DeCanas*, 424 U.S. at 356. Colorado's human-smuggling law says nothing about who may enter or remain in the U.S., and the primacy of federal enforcement is not undone by overlapping state and federal crimes and enforcement.

B. Federal immigration law does not preempt Colorado's human-smuggling law.

While the "power to regulate immigration is unquestionably exclusively a federal power." *DeCanas*, 424 U.S. at 354-55, that is irrelevant outside the

narrow field of regulating immigration. *See* Sections III.B.2-3, *infra*. As long as federal law has not *displaced* state or local regulation, the states are free to act. The question is not whether Congress *could have* preempted human-smuggling laws. The question is whether Congress *did* preempt them.

As a general rule under the federalist "system of dual sovereignty," "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin*, 493 U.S. at 458-59. In fields like immigration, where Congress has "superior authority in this field," Congress can displace the states' dual sovereignty by "enact[ing] a complete scheme of regulation" such that "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). As indicated below, INA does not displace state and local police power over human smuggling and related issues.

Although proponents of INA preemption argue that local ordinances upset federal immigration priorities, INA includes roles for state and local enforcement, both with respect to harboring specifically, 8 U.S.C. §1324(c), and determining immigration status generally.[5] 8 U.S.C. §§1252c(a), 1357(g)(10). These INA facets are inconsistent with an

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[5] Indeed, INA prohibits all levels of government from restricting state and local government's inquiring to federal immigration officials about individuals' immigration status and requires the federal government to respond to such inquiries. 8 U.S.C. §1373.

overarching federal displacement of states from all areas related in any way to illegal aliens, but they are not the only issues of federal law that undercut preemption here.

As relevant here, Congress has addressed harboring and transporting illegal aliens. 8 U.S.C. §1324(a)(1)(A)(ii). Unfortunately, the lower federal courts are widely split on how that federal law applies. On the one hand, "provid[ing] an apartment for the undocumented aliens" can fall within the federal crime of "harboring," *U.S. v. Tipton*, 518 F.3d 591, 594 (8th Cir. 2008), which "mean[s] 'any conduct tending to substantially facilitate an alien's remaining in the United States illegally.'" *U.S. v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 (5th Cir. 1982). "The purpose of the section is to keep unauthorized aliens from entering or *remaining* in the country [and] this purpose is best effectuated by construing 'harbor' to mean 'afford shelter to' and [we] so hold." *U.S. v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (emphasis in original). On the other hand, several circuits have held that housing does not equate to harboring. *Alabama*, 691 F.3d at 1285-88; *GLAHR*, 691 F.3d at 1263-67; *Farmers Branch*, 726 F.3d at 530; *Lozano*, 724 F.3d at 220.[6] It falls to this Court to clarify this

[6] The circuits are even split on the threshold issue of what "harboring" means. *Compare U.S. v. Ozcelik,* 527 F.3d 88, 100 (3d Cir. 2008) ("harboring" means conduct tending to "prevent government authorities from detecting the alien's unlawful presence"); *U.S. v. Kim,* 193 F.3d 567, 574 (2d Cir. 1999) (same) *with Rubio-Gonzalez,* 674 F.2d at 1073 n.5 ("the words 'harbor,' 'conceal' and 'shield from detection' are [not] synonymous," and "'harbor' is perhaps a somewhat broader concept than 'conceal' or 'shield from detection'"); *Tipton,* 518 F.3d at 594 (*quoted supra*).

widespread confusion on a critical issue of state and federal power.

Regardless of whether merely transporting or renting to illegal aliens – with nothing more – would constitute harboring, the statutory allowances for non-federal enforcement should nonetheless strongly suggest that Congress did not intend to preempt local regulation. Moreover, INA §274's inclusion as a RICO predicate offense allows enforcement in *state* court. *Tafflin*, 493 U.S. at 458 ("state courts have concurrent jurisdiction over civil RICO claims"). This subsequent enactment is both inconsistent with claims of federal preemption and "entitled to great weight in statutory construction" of the congressional intent in the original enactment. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969). Nothing in INA *expressly* conflicts with Colorado's human-smuggling law.

The RICO amendment further undermines any congressional intent to preempt state action on harboring and its local impacts:

> [I]n neither *Hines* nor [*Pennsylvania v. Nelson*, 350 U.S. 497 (1956)] was there affirmative evidence, as here, that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law. Furthermore, to the extent those cases were based on the predominance of federal interest in the fields of immigration and foreign affairs, there would not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to

> individuals whom the Federal Government has already declared cannot work in this country. Finally, the Pennsylvania statutes in *Hines* and *Nelson* imposed burdens on aliens lawfully within the country that created conflicts with various federal laws.

DeCanas, 424 U.S. at 363.[7] Here, as in *DeCanas*, the human-smuggling law directly affects only a local issue within the state's traditional police powers (here, transport or smuggling of illegal aliens, there employment of illegal aliens), which remedy local problems and do not implicate the wider areas of predominant federal interest.

1. Congress has not conflict-preempted local police-power regulation of human smuggling and transport.

A 4-3 Colorado Supreme Court found Colorado's human-smuggling law conflict preempted by INA's overlapping enforcement provisions. *Compare* Pet. App. 21a (majority) *with id.* 37a (Eid, J., dissenting). That holding reinforces an existing split in authority over the scope of conflict preemption under INA.

Conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added).

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[7] In *DeCanas,* as here with RICO, the "affirmative evidence" is a subsequently enacted statute that contemplated revoking registrations of farm labor contractors who employed illegal aliens. *DeCanas,* 424 U.S. at 361-62.

Because nothing prevents compliance with both federal immigration law and Colorado's law, Mr. Fuentes-Espinoza necessarily invokes the "prevent-or-frustrate" prong.

Notwithstanding federal primacy in *regulating immigration*, mere overlap with immigration does not necessarily displace state actions in areas of state concern. *DeCanas*, 424 U.S.at 354-55 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). With respect to its standards for assessing immigration status, the state law does not conflict in any way with federal determinations of immigration status. *Cf.* 8 U.S.C. §§1357(g)(10), 1373(a)-(c) (allowing state and local inquiries about immigration status). If those congressionally authorized inquiries do not frustrate congressional purposes in INA, as *Whiting* held, 131 S.Ct. at 1981 (Supremacy Clause does not require *identical* standards), it is difficult to see how Colorado's law could frustrate congressional purposes. It is enough for state law to "*closely* track[] [federal law] in all *material* respects." *Id.* (emphasis added). In areas of dual federal-state concern and *a fortiori* in ones of traditional state and local concern, Fuentes-Espinoza's arguments do not rise to the level of preemption.

Because the presumption against preemption continues to apply, this Court must presume that Congress did not intend to displace state and local authority, *Santa Fe Elevator*, 331 U.S. at 230, particularly where Congress subsequently *expanded* private enforcement on federal harboring-related issues. *See* 8 U.S.C. §1324(c); 18 U.S.C. §§1961(1)(F),

1964(c). To read *Arizona* as extending beyond its very specific employment-related context would unmoor that decision from its authority, its reasoning, and even the text of that decision.

And yet that is precisely how *Arizona* is playing out in the lower federal courts. For example, the *en banc* Fifth Circuit split 10-5 to find a rental ordinance conflict preempted, whereas an Eighth Circuit panel split 2-1 to reject conflict preemption for a similar ordinance. *Compare Farmers Branch*, 726 F.3d at 537 n.17, 559, 586 *with Keller*, 719 F.3d at 942. The Fifth Circuit majority's conflict-preemption analysis allows judicial policy choices to inform the process of interpreting acts of Congress, thereby creating the real danger – from a separation-of-powers perspective – of the Judiciary's "sit[ting] as a super-legislature, and creat[ing] statutory distinctions where none were intended." *Securities Industry Ass'n v. Bd. of Governors of Fed'l Reserve Sys.*, 468 U.S. 137, 153 (1984). This is contrary to *Whiting* and in no way compelled by *Arizona.*

Similarly, the Eleventh Circuit held that INA preempts state laws creating state-law crimes for harboring illegal aliens. *Alabama*, 691 F.3d at 1285-88; *GLAHR*, 691 F.3d at 1263-67. Those Eleventh Circuit decisions conflict with decisions from the California Supreme Court and Ninth Circuit, as well as the Eighth Circuit's reasoning in *Keller*. Specifically, the decisions erred in finding 8 U.S.C. §1329 to establish exclusive federal jurisdiction over prosecutions: §1329 applies by its terms only to "all causes, civil and criminal, *brought by the United States*" (emphasis added). Contrary to the Eleventh

Circuit's view, "section 1324(c) expressly allows for state and local enforcement." *In re Jose C.*, 45 Cal.4th 534, 552, 198 P.3d 1087, 1099 (Cal. 2009); *City of Peoria*, 722 F.2d at 475 (§1324's text and legislative history establish that "federal law does not preclude local enforcement of the criminal provisions of [INA]"), *overruled on another ground by Hodgers–Durgin v. De La Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999). Only this Court can clarify the lower courts' confusion over the scope of preemption in this area.

Amicus EFELDF respectfully submits that the no-preemption rationale should prevail. Congress not only removed the restriction against state-and-local enforcement, *see* note 2, *supra* (discussing legislative history where Congress removed a limitation that only federal officers could enforce §274), but also allowed *state-court* and even *private* enforcement via RICO. *Tafflin*, 493 U.S. at 458; 18 U.S.C. §§1961(1)(F), 1964(c). That is inherently inconsistent with preemption based on the primacy of federal enforcement.

2. Congress has not field-preempted local police-power regulation of human smuggling or transport.

In addition to finding the human-smuggling law conflict-preempted, the Colorado Supreme Court also found it field-preempted. This additional holding is pernicious because it prevents the legislature from revisiting the issue to cure any conflict – if one existed – with federal law.

The scope of field preemption here has split the federal circuits. For example, while only two judges (of fifteen) in the *en banc* Fifth Circuit supported field

preemption – and an Eighth Circuit panel unanimously rejected it – a Third Circuit panel unanimously found similar ordinances field preempted. *Compare*, *e.g.*, *Farmers Branch*, 726 F.3d at 537 n.17, 543 *and Keller*, 719 F.3d at 960 *with Lozano*, 724 F.3d at 316-17. Thus, the issue of INA's field-preemptive scope is an important and recurring issue on which appellate courts are deeply split.

By way of background, field preemption precludes state and local regulation of conduct in fields that Congress – acting within its authority – has marked for exclusive federal governance. *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 115 (1992). Thus, "an authoritative federal determination that the area is best left *un*regulated … would have as much pre-emptive force as a decision *to* regulate." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002) (emphasis in original). Neither situation applies here.

Typically, to foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. For example, *Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Sprietsma*, 537 U.S. at 67 (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n*, 552 U.S. 364, 367-68, 373 (2008) (statute intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). But courts also can infer field preemption "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." *Arizona*, 132 S.Ct. at 2501 (internal quotations omitted, alterations in original). In place of a door-closing congressional determination, however, federal law includes not only door-opening savings clauses but also enforcement by *private* parties and enforcement *in state court* for harboring.

Specifically, INA allows state and local government to coordinate with the federal government on immigration status, *see* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c), and preserves enforcement authority with respect to harboring. 8 U.S.C. §1324(c). Civil RICO even allows *private* enforcement with respect to harboring and related immigration issues. *See* 18 U.S.C. §§1961(1)(F), 1964(c). As long as a state or local law does not constitute "alien registration" under *Arizona*, federal law cannot *field preempt* state and local involvement.

Unlike the human-smuggling law here, the field-preempted alien registration regimes in *Hines* and *Arizona* applied only to aliens and – more importantly – related to alien-registration issues exclusively within the federal government's power (*i.e.*, carrying state registration documents in *Hines* and state-law punishment for not carrying federal registration documents in *Arizona*). *Hines*, 312 U.S. at 65-66; *Arizona*, 132 S.Ct. at 2502-03. In each case, the legislative end was registration, and the requirements applied only to aliens. Here, the human-smuggling law applies to a field – transportation for hire – that

is well within Colorado's police power and has nothing to do with federal alien-registration laws. If it does not conflict preempt the human-smuggling law, INA plainly does not field preempt it.

3. The Constitution does not preempt Colorado's human-smuggling law.

In addition to the *statutory* questions at issue in the Colorado Supreme Court's decision, plaintiffs who raise preemption arguments against state or local laws often cast the preemption as a *constitutional* issue of non-federal regulation of immigration. *Compare Farmers Branch*, 726 F.3d at 537 n.17, 543, 550, 560, 568 *with Lozano*, 724 F.3d at 315. Indeed, the Colorado Supreme Court's sweeping holding as to field preemption would give pause to any legislature contemplating any legislation related to immigration, regardless of whether a specific INA provision overlapped with the proposed legislation.

To avoid chilling state legislatures' exercise of their police power, it is important to stress that states have broad constitutional authority to regulate illegal aliens, so long as the regulation is not a "regulation of immigration" in conflict with the plenary power of Congress to regulate immigration. U.S. CONST. art. I, §8, cl. 4; *DeCanas*, 424 U.S. at 354. The mere fact that a state law "in any way deals with aliens" will not render it "*per se* pre-empted by this constitutional power." *DeCanas*, 424 U.S. at 355. Parties favoring preemption cannot rely on unexercised constitutional *authority* of Congress – as distinct from particular statutes like INA or IRCA – to find preemption.

Under *DeCanas*, 424 U.S. at 355, 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." For *illegal* aliens, states and localities may address impacts within their borders:

> Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any 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, 457 U.S. at 229. "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" *Plyler*, 457 U.S. at 223. The distinction between illegal aliens and regulating immigration is central to understanding Colorado's latitude to regulate here.

By making illicit – and very dangerous – transport more difficult to obtain, human-smuggling laws might discourage some illegal aliens from coming to or remaining in a state. But such laws have no direct effect on illegal aliens in the state. Even more importantly for preemption purposes, these human-smuggling laws are indifferent to whether a departing illegal alien relocates *within the U.S.*

While a preemptive federal statute is plainly within the federal power to enact, Congress has not asserted that authority in INA or IRCA. Moreover, the Executive Branch often has not enforced its existing powers with any particular vigor. Those two abdications leave state and local government to deal with

the very real implications of illegal aliens in their jurisdictions, regardless of any future federal action or inaction.

The divide between lax federal enforcement priorities on the one hand and both federal law and local priorities on the other hand highlights federalism's central tenet,[8] which permits state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth*, 555 U.S. at 583 (interior quotations and citations omitted) (Thomas, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. Unless and until Congress amends

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[8] *Arizona* rejected the proposition that the federal Executive's enforcement priorities – as distinct from federal law – can preempt state or local action. *Arizona,* 132 S.Ct. at 2508. If anything, it is the lax federal enforcement that frustrates INA's congressional intent, not the legitimate actions by state and local government to battle the local effects of lax federal enforcement.

federal immigration law to resolve these issues, nothing in the Constitution itself preempts a state from using its police power to solve its local problems.

By contrast, the Colorado Supreme Court's theory is that the constitutional authority of Congress over immigration – whether or not that authority is exercised – can "field preempt" Colorado's human-smuggling law. Under that theory, however, the state laws at issue in *DeCanas* and *Whiting* would have been preempted, as well. That, of course, is not the law.

CONCLUSION

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

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