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IMMIGRATION LAW BY PROXY: THE CASE OF COLORADO'S HUMAN SMUGGLING CRIME

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INTRODUCTION

As the United States Supreme Court has repeatedly reiterated since the late nineteenth century, immigration law is an area of federal dominance. The power “to forbid the entrance of foreigners . . . or to admit them only in such cases and upon such conditions as it may see fit to prescribe[.]”¹ the Court wrote in 1892, “is vested in the national government.”² More recently, the Court explained in 2012 that the federal government has “broad, undoubted power over the subject of immigration.”³

Despite the federal government’s expansive reach in immigration law, the states nonetheless retain authority that allows them to play an important role in migrants’ lives. Through their traditional powers to adopt criminal statutes and police their communities, states can indirectly—but intentionally—inject themselves into the incidents of ordinary life as a migrant. In a number of ways, Colorado has done just that. One notable example is a criminal prohibition against human smuggling, a challenge to which is currently pending before the Colorado Supreme Court.⁴ This essay begins by addressing that statute’s reach. It then proceeds to discuss the statute’s treatment in the Colorado Court of Appeals and the challenges against it pending before the Colorado Supreme Court. The essay closes by placing the human smuggling provision within a broader context in which states criminalize immigration-related activity.

I. STATE INVOLVEMENT IN HUMAN SMUGGLING CONTROL

As a government of limited powers, the federal government’s broad reach in immigration law is rather exceptional. The norm, in contrast, is for the states to regulate most areas of law. Reflecting this, the states retain substantial authority to criminalize a broad range of undesirable conduct. In recent years, many states have used this general authority to

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1. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (alteration in original) (citation omitted).

2. *Id.*

3. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

4. *Fuentes-Espinoza v. People*, No. 13SC128, 2014 WL 1190061 (Colo. Mar. 24, 2014).

specifically target illicit movement of people within their boundaries.⁵ These laws tend to take two forms: those that are frequently described as “trafficking” laws and those described as “smuggling” laws. The former prohibit transporting people for the purpose of introducing them into the sex trade, slavery, or involuntary servitude.⁶ The latter prohibit “the importation of people into a country via the deliberate evasion of immigration laws.”⁷

Colorado joined the state-level anti-human smuggling trend in 2006. The statute enacted that year, Colorado Revised Statute § 18-13-128, 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.”⁸

The statute’s application effectively turns on a question of federal immigration law because it requires intent to assist someone who is present in the United States in violation of immigration law. It is not, however, strictly a law about immigration in that it does not regulate the entry, exclusion, or forced removal of a particular person. Instead, it focuses the state’s resources on criminalizing a key piece of the migration process. Without someone to provide transportation services, most newly arrived migrants could not get very far physically or in meeting the ultimate objectives many migrants share of earning a livelihood and reuniting with family. They would largely be confined to the location where they find themselves at the moment where they are initially present in the United States in violation of federal immigration laws. For many migrants this would mean the geographic location near the border where they entered clandestinely. For others, however, it would mean an inability to move far from the location where they found themselves at the moment their temporary authorization expired or where they engaged in some conduct that put them in conflict with immigration laws. Obviously none of these are common or, in migrants’ eyes, suitable options.

5. See, e.g., ARIZ. REV. STAT. ANN. § 13-2319 (2010); OKLA. STAT. ANN. tit. 21, § 446(A)-(B) (2010); FLA. STAT. ANN. § 787.07 (2012); MO. ANN. STAT. § 577.675 (West 2008).

6. Trafficking Victims Protection Act of 2000, P.L. 106-386, § 102(a) (codified at 22 U.S.C. § 7101(a)); see ARIZ. REV. STAT. § 13-2319(F)(3) (2010); COLO. REV. STAT. § 18-13-128 (2006); see Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2981 (2006).

7. U.S. DEP’T OF HOMELAND SECURITY, U.S. Immigration & Customs Enforcement: Investigating Illegal Movement of People and Goods, *Human Smuggling*, <http://www.ice.gov/human-smuggling> (last accessed Feb. 12, 2015); see Immigration and Nationality Act (INA) of 1952 § 274(a)(1)(A), 8 U.S.C. § 1324(a)(1)(A) (1986).

8. S.B. 06-206, 65th Gen. Assemb., 2nd Reg. Sess. (Colo. 2006) (codified at COLO. REV. STAT. § 18-13-128).

II. COLORADO COURT OF APPEALS DECISION

Given its broad reach, it is not surprising that Colorado's statute has met resistance in the state courts. Though there has only been one reported prosecution applying § 18-13-128, the case threatens the statute's viability. That case resulted from an incident in which Bernardino Fuentes-Espinoza was convicted of smuggling seven individuals. The facts are murky, but it appears that a man named Castels or Casteo hired Fuentes-Espinoza to drive his supposed family members from Phoenix to Kansas City.⁹ En route, Fuentes-Espinoza tried to pay for a replacement taillight with a \$100 bill that Castels/Casteo provided and that turned out to be counterfeit. When a Wheat Ridge, Colorado police officer arrived, the officer arrested Fuentes-Espinoza on suspicion that the passengers were not authorized to be in the United States.¹⁰ Nothing in the record indicates why the police officer came to this conclusion and no evidence was provided about the immigration status of four of the seven passengers.¹¹ A Border Patrol officer testified that the other three passengers had the same or similar name as people he encountered near the Arizona-México border on an earlier date—how much earlier is unclear.¹²

In *People v. Fuentes-Espinoza*, the Colorado Court of Appeals upheld Fuentes-Espinoza's conviction in the face of a multi-pronged challenge.¹³ First, the court considered whether federal law preempts the state statute for two reasons: because federal law delegates jurisdiction over criminal immigration matters to federal courts and because it has prohibited the states from regulating migrant smuggling. The former is called jurisdictional preemption and the latter is known as substantive preemption. Substantive preemption is itself usually subdivided into three parts: express preemption, implied field preemption, and implied conflict preemption, only the latter two being raised in *Fuentes-Espinoza*.¹⁴ Turning first to Fuentes-Espinoza's jurisdictional preemption claim, the court concluded that federal law does not bar state courts from hearing "all matters touching on issues of immigration."¹⁵ Having determined that the state courts retain jurisdiction to hear cases involving some types of immigration-related activity that the state legislature has criminalized, the court then turned to whether federal law has preempted the substantive provisions of the human smuggling statute. That is, does federal immigration law preclude Colorado from enacting a human smuggling offense? Instead of deciding this question on the merits, the court conclud-

9. Opening Brief for Petitioner at 2, *Fuentes-Espinoza v. People*, 2014 WL 1190061 (Colo. 2014) (No. 2013SC128).

10. *Id.*

11. *Id.* at 3.

12. *Id.*

13. *People v. Fuentes-Espinoza*, No. 08CA1231, 2013 WL 174439, at *1 (Colo. App. Jan. 17, 2013).

14. *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012).

15. *Fuentes-Espinoza*, 2013 WL 174439, at *3.

ed that Fuentes-Espinoza had waived this argument by failing to present it at the trial court.¹⁶

Second, the Colorado Court of Appeals considered Fuentes-Espinoza's argument that a federal immigration law violation is an element of the smuggling offense.¹⁷ The court rejected that argument. It concluded that this is not an element in part by emphasizing the statute's focus on the defendant's mental state. "[B]y including the actor's purpose as an element of the crime," the court explained, "the statute emphasizes the actor's *intent*, rather than the outcome of his or her actions."¹⁸

III. COLORADO SUPREME COURT CONSIDERATION

At the time of this writing, Fuentes-Espinoza's case is under review by the Colorado Supreme Court.¹⁹ In his brief to the Supreme Court, Fuentes-Espinoza has disputed each of the Court of Appeals' conclusions. Federal immigration law pervasively regulates migrant smuggling; thus, under the implied field preemption theory, Colorado cannot do so as well he argues.²⁰ Moreover, he adds that the state statute conflicts with federal migrant smuggling laws by imposing a different sentencing scheme for virtually identical conduct, an argument under implied conflict preemption.²¹ Lastly, he claims that the statute requires that the prosecution prove that the people being smuggled were in fact present in the United States in violation of federal immigration law; a requirement that, if true, the prosecution clearly failed to meet.²² Several national nongovernmental organizations have jointly submitted an amicus brief in support of Fuentes-Espinoza, arguing that federal immigration law preempts Colorado's statute.²³ At the time of this writing, the government had not yet submitted its merits brief so it was impossible to know how they planned to respond. Oral arguments are expected in the spring of 2015.

Fuentes-Espinoza and the amici who have sided with him present compelling claims. There is no question that federal immigration law has long included an anti-smuggling provision. The current language prohibits transporting, moving, or attempting to transport any migrant anywhere in the country knowing or recklessly disregarding the fact that the

16. *Id.* at *4.

17. *Id.* at *1.

18. *Id.* at *5.

19. Fuentes-Espinoza v. People, No. 13SC128, 2014 WL 1190061 (Colo. March 24, 2014).

20. Opening Brief for Petitioner at 4, 13, Fuentes-Espinoza v. People, 2014 WL 1190061, (Colo. 2014) (No. 2013SC128).

21. *Id.* at 4, 16–17.

22. *Id.* at 29–30.

23. Amended Brief for National Immigration Law Center et al. as Amici Curiae Supporting Petitioner, Fuentes-Espinoza v. People, (No. 13SC128), 2014 WL 1190061 (Colo. Mar. 24, 2014), available at <http://crimmigration.com/wp-content/uploads/2014/08/Fuentes-Espinoza-v-Colorado-Amicus-NILC.pdf>.

migrant is present in violation of law.²⁴ Whether Colorado is barred from legislating in this area—implied field preemption—turns on whether the federal anti-smuggling statutory scheme is sufficiently “broad and comprehensive,”²⁵ as the United States Supreme Court put it in a 1941 decision striking down a Pennsylvania requirement that migrants register with the state,²⁶ that “the federal system will be assumed to preclude enforcement of state laws on the same subject.”²⁷ The U.S. Court of Appeals for the Tenth Circuit has recognized that the federal statute “accounts for a broad range of circumstances that may result in an alien’s illegal presence in the United States.”²⁸ This recognition certainly supports a conclusion that the federal government has occupied the field of migrant smuggling, but the Colorado Supreme Court will have to decide for itself whether it agrees.

Meanwhile, Colorado’s statute is also at risk under the doctrine of implied conflict preemption. A state law is preempted under this doctrine if it impedes an important objective articulated by federal law.²⁹ As recently as 2012, the U.S. Supreme Court explained that a conflict occurs when state law imposes a greater penalty than federal law for the same activity.³⁰ An earlier U.S. Supreme Court case provides an even clearer assessment of implied conflict preemption: “States may not regulate activity that [federal law] protects, prohibits, or arguably protects or prohibits.”³¹ Colorado’s statute does just that. Under federal law, a single smuggling offense done for commercial advantage is punishable by up to ten years imprisonment or five years if not done for commercial advantage.³² In contrast, the Colorado smuggling offense can result in imprisonment for a minimum of four years and a maximum of twelve years, and no distinction is made between offenses involving commercial exchanges and those that do not.³³

In addition to these preemption concerns, the Colorado Supreme Court has agreed to consider whether the state law requires the prosecution to show that the smuggled individuals were present in the United States in violation of immigration law.³⁴ Federal anti-smuggling law treats a violation of immigration law as an element of the offense that the

24. INA § 274(a)(ii).

25. *Hines v. Davidowitz*, 312 U.S. 52, 69 (1941).

26. *Id.* at 59–60.

27. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

28. *United States v. Franco-Lopez*, 687 F.3d 1222, 1227 (10th Cir. 2012).

29. *See Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012).

30. *See id.* at 2503 (quoting *Wis. Dep’t of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986)).

31. *Wis. Dep’t of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986).

32. INA § 247(b)(i)-(ii).

33. COLO. REV. STAT. § 18-1.3-401(1)(a)(V)(A).

34. *Fuentes-Espinoza v. People*, No. 13SC128, 2014 WL 1190061 (Colo. March 24, 2014).

prosecution has to prove beyond a reasonable doubt,³⁵ but the Colorado Court of Appeals held that the state version does not include a similar requirement.³⁶ Simply acting with the purpose or desire to move a person in violation of immigration law is sufficient, the Court of Appeals held in Fuentes-Espinoza's case.³⁷

Affirming the Court of Appeals' conclusion would broaden the scope of Colorado's human smuggling offense so far as to render the word "smuggling" devoid of its ordinary meaning. Without requiring the prosecution to show that a defendant actually moved people who were not authorized to be in the United States, it would be possible to convict individuals even when they moved people who were authorized to be in the United States—a United States citizen, for example, who had no idea he was a United States citizen.³⁸ Indeed, there is no evidence that four of the seven individuals in the vehicle that Fuentes-Espinoza were in the United States without authorization and the evidence regarding the other three is tenuous at best.

Rejecting the Court of Appeals' conclusion is not much better. Doing that would require police, prosecutors, defense attorneys, and judges to engage in immigration law analyses that they are ill equipped to perform. If a violation of federal immigration law is deemed an element of Colorado's human smuggling offense, then the law enforcement and judicial actors in the criminal justice system will be required to determine whether someone is actually violating immigration law. Police officers would need to take a potential immigration law violation into consideration when gauging reasonable suspicion to temporarily stop or probable cause to arrest. Likewise, prosecutors, defense attorneys, and judges would have to parse the intricacies of federal immigration law to determine a smuggled individual's status. Would they know that individuals who entered the country without authorization then violated a term of immigration law are just as out of compliance with immigration law as those who crossed into the United States clandestinely? Would they understand that many people who enter clandestinely later obtain permission to live and work here indefinitely? The examples could continue, all leading into an abyss of immigration law for state criminal justice system actors if the Colorado Supreme Court concludes that an immigration law violation is an element of the state's smuggling offense.

35. See *United States v. Franco-Lopez*, 687 F.3d 1222, 1227–28 (10th Cir. 2012) (collecting cases from the Fifth, Eighth, and Ninth Circuits); *United States v. Lopez-Moreno*, 420 F.3d 420, 438 (5th Cir. 2005).

36. *People v. Fuentes-Espinoza*, No. 08CA1231, 2013 WL 174439, at *1, *4–5 (Colo. App. Jan. 17, 2013).

37. *Id.*

38. See generally *United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012).

IV. CRIMINALIZATION OF MIGRATION TRENDS

Whatever the outcome of the Colorado Supreme Court's consideration of the state's human smuggling criminal offense, it is clear that in adopting the statute the state legislature was following a well-worn effort by state governments to regulate immigration indirectly—but no less importantly—than does the federal government. Given the expansive powers that the Supreme Court has repeatedly found to rest with the federal government rather than the state governments in this realm, states interested in dissuading immigration activity have had to turn to their traditional criminal policing powers. Some states, for example, have enacted criminal offenses that punish using certain documents to falsely claim United States citizenship or to conceal one's true immigration status.³⁹ Others have stripped state judges presiding over criminal matters from granting bail to unauthorized migrants, though the Ninth Circuit ultimately held that one state's attempt to do this, Arizona's, violated the Due Process Clause of the Fourteenth Amendment.⁴⁰

Colorado has not been immune to such maneuvers. Just two years after the state legislature added the human smuggling offense to the state penal code, the state witnessed a high profile immigration law enforcement operation that relied heavily on traditional criminal policing powers. In 2008, the Weld County Sheriff's Department seized roughly 5,000 client files from a tax preparer in Greeley known to serve the local migrant community. A number of individuals whose files were taken and examined were subsequently prosecuted for identity theft⁴¹ and criminal impersonation.⁴² The Colorado Supreme Court eventually concluded that the prosecutions could not stand because police obtained the tax files in violation of the U.S. Constitution's Fourth Amendment.⁴³

The fact that many of these efforts have later been deemed unconstitutional illustrates the legal perilousness with which sub-federal actors become involved in immigration law. On numerous occasions they have pushed the outer limits of state involvement in regulating immigration law only to later learn that they went too far. By then, however, lives have often been upturned. Colorado's human smuggling offense may soon become the next example.

39. See OR. REV. STAT. § 165.800(1), (4)(b)(D); WYO. STAT. ANN. § 6-3-615(a).

40. See ARIZ. CONST. art. II, § 22(A)(4) (*held unconstitutional* by *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 788 (9th Cir. 2014)); MO. ANN. STAT. § 544.470(2); *see also* UTAH CODE ANN. § 17-22-9.5(4) (creating rebuttable presumption that migrants are flight risks).

41. COLO. REV. STAT. § 18-5-902.

42. COLO. REV. STAT. § 18-5-113.

43. *People v. Gutierrez*, 222 P.3d 925, 940 (Colo. 2009).

CONCLUSION

It is too soon to know what awaits Colorado's human smuggling offense. Whatever its fate, the statute stands as a testament to Colorado legislators' attempt to alter migrants' ability to come to or remain in the state. In this way, Colorado's human smuggling statute is immigration law by proxy.