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04-22-00513-CR
FOURTH COURT OF APPEALS
SAN ANTONIO, TEXAS
1/13/2023 2:08 PM

Nos. 04-22-00513-CR, 04-22-00514-CR, 04-22-00515-CR, 04-22-00516-CR, 04-22-00517-CR, 04-22-00518-CR, & 04-22-00519-CR (Consolidated)

IN THE FOURTH COURT OF APPEALS
SAN ANTONIO, TEXAS

THE STATE OF TEXAS,
Appellant,

v.

JAIME FRANCISCO FLORES, GRACIE YVETTE LOPEZ, CRISTAL ANN RAMIREZ, MARTIN ELI PEREZ, RODNEY ANTHONY ORTIZ, AND ENRIQUE CIBRIAN,
Appellees.

On Appeal from the 229th Judicial District Court
Duval County, Texas

BRIEF OF APPELLEES

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Oral Argument Requested

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STATEMENT OF THE CASE

Nature of the Case:	Criminal indictments for alleged violation of Texas Penal Code Section 20.05(a)(1)(A).[1]
Trial Court:	Hon. Baldemar Garza, 229th District Court, Duval County
Course of Proceedings:	Defendants Jaime Francisco Flores, Gracie Yvette Lopez, Cristal Ann Ramirez, Martin Eli Perez, Rodney Anthony Ortiz, and Enrique Cibrian moved to quash the indictments on four independent grounds. Each of these grounds is based on a constitutional infirmity in Section 20.05(a)(1)(A): (1) the statute violates the Fourth Amendment; (2) it is preempted by federal law; (3) it is unconstitutionally vague; (4) its enforcement violates the Equal Protection Clause. 1RR14-17.
Trial Court Disposition:	After an evidentiary hearing, the trial court quashed the indictments against all defendants.[2]
Parties in the Court of Appeals:	*Appellant*: State of Texas *Appellees*: Flores, Lopez, Ramirez, Perez, Ortiz, and Cibrian. These seven appeals (two for Ortiz) were consolidated.

[1] *See* Flores.CR.8-9; Lopez.CR.6; Ortiz(517).CR.6; Ortiz(518).CR.6; Cibrian.CR.5; Ramirez.CR.6; Perez.CR.6. In these consolidated appeals, there is only one reporter's record, but each Appellee has a separate clerk's record. Each citation to a clerk's record, therefore, includes the relevant Appellee's surname. Because Appellee Ortiz has two clerk's records, each citation to an Ortiz clerk's record includes the last three digits of the relevant cause number in this Court.

[2] *See* Flores.CR.256; Lopez.CR.148; Ortiz(517).CR.136; Ortiz(318).CR.134; Cibrian.CR.132; Ramirez.CR.162; Perez.CR.144.

ISSUES PRESENTED

1. A statute that criminalizes conduct protected by the Fourth Amendment is invalid. The Fourth Amendment provides a right to avoid law enforcement when there is no reasonable suspicion of criminal activity. Is Section 20.05(a)(1)(A) of the Penal Code—which criminalizes innocent concealment of a person from law enforcement—unconstitutional?

2. Under the Supremacy Clause, states may not enforce a statute that mirrors or supplements a comprehensive federal statutory scheme. Section 20.05(a)(1)(A), as enforced, overlaps with the comprehensive federal immigration laws regulating alien transport. Is the Texas statute preempted?

STATEMENT OF FACTS

I. Appellees were arrested for violation of Texas's human smuggling statute.

Appellees were arrested after being stopped either for violation of traffic laws[3] or in response to reports that they were transporting undocumented migrants.[4] All were indicted solely for violation of Texas Penal Code Section 20.05(a)(1)(A), Texas's human smuggling statute, which currently provides that:

> (a) A person commits an offense if the person knowingly:
>
> > (1) uses a motor vehicle, aircraft, watercraft, or other means of conveyance to transport an individual with the intent to:
> >
> > > (A) conceal the individual from a peace officer or special investigator…

TEX. PENAL CODE § 20.05(a)(1)(A).[5]

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[3] *See* Flores.CR.8; 2RR811 (Lopez), 815 (Cibrian), 821 (Flores), 837 (Ortiz).

[4] *See* 2RR826-28 (Perez).

[5] *See* Flores.CR.8-9; Lopez.CR.6; Ortiz(517).CR.6; Ortiz(518).CR.6; Cibrian.CR.5; Ramirez.CR.6; Perez.CR.6. All Appellees except Ortiz were indicted for violation of a previous version of Section 20.05(a)(1)(A), effective before September 1, 2021. *See* Flores.CR.8-9; Lopez.CR.6; Cibrian.CR.5; Ramirez.CR.6; Perez.CR.6. The only difference is that the former version of the statute required the additional element of intent to obtain a pecuniary benefit. TEX. PENAL CODE § 20.05 (West 2015). This difference does not impact the issues in this appeal.

Appellees moved to quash the indictments. 1RR14-17.[6] After an evidentiary hearing, the trial court granted the motions.[7] The State appealed.

II. History of human smuggling legislation in Texas.

A. Texas's first human smuggling statute was enacted in 1999.

The Texas Legislature first enacted human smuggling legislation in 1999. Although the law did not explicitly require the humans being transported to be undocumented, its stated intent was to target "coyotes" transporting undocumented people across the Rio Grande River and through Texas and exposing them to dangerous conditions.[8] In line with this purpose, the original bill criminalized only those who exposed their passengers to "a substantial likelihood" of "suffer[ing] serious bodily injury or death." TEX. PENAL CODE § 20.05(a)(2) (West 1999).

B. The Legislature expanded the law in 2011.

Twelve years later, the Legislature broadened Section 20.05 and added enhancement provisions. TEX. PENAL CODE § 20.05 (West 2011). Under the updated law, risk of injury to the passenger was no longer an element of the offense. *See id.*

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[6] *See also* Flores.CR.120-42, 197; Lopez.CR.78; Ortiz(517).CR.38-44, 77; Ortiz(318).CR.40-43, 79; Cibrian.CR.28-50, 78; Ramirez.CR.47, 108; Perez.CR.27, 91.

[7] *See* Flores.CR.256; Lopez.CR.148; Ortiz(517).CR.136; Ortiz(318).CR.134; Cibrian.CR.132; Ramirez.CR.162; Perez.CR.144.

[8] Sen. Eliot Shapleigh Testimony before Senate Criminal Justice Committee (May 12, 1999), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=26&clip_id=7866 at approx. 11:46 (introduction, amendment, and passage of S.B. 1885)

Merely using a motor, air, or water vehicle with the intent to conceal someone from a "peace officer or special investigator" was now a felony. *Id*. Moreover, the conduct escalated to a third-degree felony when the passengers were exposed to bodily harm, or the State proved the smuggler would receive a pecuniary benefit. *Id*.

The amendment's stated purpose was to increase the penalties for transporting undocumented people.[9]

C. In 2015, the Legislature further increased penalties for human smuggling.

Four years later, as part of a larger omnibus border security bill that included appropriations and restructuring of the Department of Public Safety, the Legislature further amended the human smuggling law. Texas policymakers had decided that the state would assume responsibility for securing the border.[10] Because of a "failed federal government that has refused to address the issues to tackle those problems. .

[9] The author, Representative Charlie Hildebrand, explained, "this bill targets smugglers . . . criminal organizations large and small generate millions of dollars in profits from this enterprise and we have smugglers facilitating the transport of illegal immigrants across international borders." Rep. Charlie Hildebrand Testimony before House Committee on Criminal Jurisprudence (Mar. 22, 2011), https://tlchouse.granicus.com/MediaPlayer.php?view_id=26&clip_id=3880 at approx. 2:01:30 (introduction, amendment, and passage of H.B. 260). In the Senate Committee on Criminal Justice, then-Senator (and bill sponsor) Dan Patrick was similarly to the point. He said, "the legislation is directed at smugglers. Smugglers facilitate the transport of illegal immigrants across international borders." Sen. Dan Patrick Testimony before Senate Committee on Criminal Justice (May 12, 2011), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=12&clip_id=1726 at approx. 4:40 (introduction, amendment, and passage of H.B. 260).

[10] Julian Aguilar, *Abbott Signs Sweeping Border Security Bill*, THE TEXAS TRIBUNE (June 9, 2015, 3:00 PM), https://www.texastribune.org/2015/06/09/abbott-signs-sweeping-border-security-bill/.

. . Texas is doing what it can do by passing this border security plan." *Id*. To that end, S.B. 11 appropriated $310 million to hire additional state troopers and create transnational intelligence centers to combat gang activity; it also "increase[d] penalties for human smuggling." *Id*.

The 2015 amendment to Section 20.05 both expanded and contracted liability, while substantially increasing penalties. Previously a state jail felony, human smuggling was promoted to a third degree felony. TEX. PENAL CODE § 20.05 (West 2015). And enhancements now applied when the "smuggled" individuals were exposed to or suffered various levels of harm. *Id*. §§ 20.05(b)(1)–(2). The Legislature narrowed liability by making the "pecuniary benefit" enhancement provision into an element of the base-level offense. *Id*. § 20.05(a)(1)(A). The Legislature also added a "harboring" provision that depended on federal immigration law for a person who:

> with the intent to obtain a pecuniary benefit, . . . encourages or induces a person to enter or remain in this county *in violation of federal law* by concealing, harboring, or shielding that person from detection.

Id. § 20.05(a)(2) (emphasis added). Again, the stated intent of the amendments was to "curb the smuggling of people" across the border. [11]

[11] Dennis Bonnen Testimony before House Committee on Homeland Security & Public Safety (Mar. 11, 2015), https://tlchouse.granicus.com/MediaPlayer.php?view_id=37&clip_id=10105 at approx. 2:00 (introduction, amendment, and passage of H.B. 11 Part I).

The amendments to Section 20.05 were controversial. Public officials, civil liberties organizations, and religious leaders offered testimony during the legislative session. A large contingent of pastors registered their opposition because the amendments threatened to criminalize their ministry.[12] They feared that driving an undocumented parishioner to and from church or providing a meal would subject them to prosecution and, at the very least, lead to racial profiling.[13] Lawmakers responded that the law targeted only those who transport undocumented people.

Lawyers also alerted the Legislature to constitutional defects. A law professor pointed out that the statute's definition of "smuggling" criminalized innocent conduct.[14] Attorneys from civil liberties organizations explained that the proposed statute would be preempted by federal immigration statutes, citing Supreme Court and federal circuit court decisions.[15] Despite the many objections, the bill passed.

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[12] *Id*. (Sammy Garcia Testimony at approx. 1:16:30–1:21:10); (Eddie Benjavar Testimony at approx. 1:21:20–1:27:45); (Juve Prado Testimony at approx. 1:28:35–1:44:40).

[13] *Id*.; *see also* Allen Ramirez Testimony before House Committee on Homeland Security & Public Safety (Mar. 11, 2015), https://tlchouse.granicus.com/MediaPlayer.php?view_id=37&clip_id=10116 at approx. 50:30—52:00; Marina Reyes at approx. 38:40—50:05 (introduction, amendment, and passage of H.B. 11 Part II).

[14] Prof. Bill Beardall Testimony before Senate Subcommittee Border Security (May 18, 2015), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=30&clip_id=10168 at approx. 52:30—55:20 (introduction, amendment, and passage of H.B. 11).

[15] *Id*. (Matt Simpson Testimony at approx. 5:23–57:26); (Celina Moreno Testimony at approx. 59:30–1:01:45); *see also* Celina Moreno Testimony before House Committee on Homeland Security & Public Safety (Mar. 11, 2015), https://tlchouse.granicus.com/MediaPlayer.php?view_id=37&clip_id=10116 at approx. 1:08:20—1:20:16 (introduction, amendment, and passage of H.B. 11 Part II).

D. A federal district court held Section 20.05 was preempted by federal immigration law.

A group of plaintiffs that included residential landlords and organizations providing shelter or other services to immigrants immediately sued to invalidate the harboring provisions on preemption grounds. Judge David Ezra concluded that two types of preemption applied: field preemption and conflict preemption. *Cruz v. Abbott*, 177 F.Supp.3d 992, 1009–17 (W.D. Tex. 2016), *rev'd in part on other grounds*, *Cruz v. Abbott*, 849 F.3d 594, 598–99, 602 (5th Cir. 2017). While the challenge targeted the "harboring" provision, Judge Ezra held that both the harboring *and transport* provisions were field preempted: "it is clear that Congress created a federal statutory scheme regarding the harboring *and transporting* of undocumented aliens so pervasive that it left no room in this area for the state of Texas to supplement it." *Id.* at 1013 (emphasis added).

In reaching a conclusion that the Texas statute was conflict preempted, Judge Ezra found three impermissible inconsistencies between the federal and state harboring regimes. First, the state law demanded that state troopers and state officials determine an individual's immigration status, which only the federal government may do. *Id*. at 1014–15. Second, the state harboring law provided different, and often harsher, penalties than the federal law. *Id*. at 1016. Third, because the laws contained different text, affirmative defenses, and scopes of liability, the state criminalized immigration conduct that the federal government had left alone. *Id*. at 1014–15.

In response, the State argued that H.B. 11 was not preempted by federal immigration law because state law seeks to *protect* migrants. Their argument, Judge Ezra wrote, missed the point. Whether "H.B. 11's harboring provisions are labelled 'anti-smuggling' or 'anti-harboring' is without distinction—the conduct the harboring provisions are attempting to regulate is the same, and that conduct is field preempted by the [Immigrant Naturalization Act]." *Id*. at 1014. Judge Ezra explained that immigration preemption does not turn on whether the provision specifically targets an immigrant's conduct; the relevant inquiry is whether "'the scheme governing the crimes associated with the movement of unauthorized aliens in the United States,' contained within § 1324 and the [Immigration Naturalization Act], 'provides a "full set of standards" designed to work as a 'harmonious whole.'" *Id*. at 1013 (citing *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1024–25 (9th Cir. 2013)). Surveying the overwhelming precedent that analogous state laws were preempted, Judge Ezra held the harboring provision unconstitutional and issued a preliminary injunction against its enforcement. *Id*.

The Fifth Circuit reversed the decision on other grounds, holding that the plaintiffs lacked standing because they had not yet suffered an injury-in-fact. *Cruz v. Abbott*, 849 F.3d 594, 598–99, 602 (5th Cir. 2017). Plaintiffs did not "demonstrate a credible threat of prosecution." *Id*. at 602. The Fifth Circuit did not reach the merits of the preemption issue.

E. In 2021, the Legislature again amended Section 20.05.

In March 2021, the Governor announced Operation Lone Star to "combat the smuggling of people and drugs into Texas" from Mexico.[16] The following month, the Legislature began debating amendments to the smuggling provision.

The 2021 amendments broadened liability by deleting an element in the statute: that the smuggler operate for a "pecuniary benefit." TEX. PENAL CODE § 20.05(a). Once again, the amendment's stated purpose was to make it easier to prosecute immigrant smugglers.[17]

The multiple legislative debates on the smuggling provision over the past two decades demonstrate that the provision targets those who transport undocumented people. Enforcement has followed the same track: the smuggling provision has been employed primarily, if not exclusively, against individuals who transport undocumented people. *See* 1RR60-61.

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[16] Press Release, Office of the Texas Governor, Governor Abbott, DPS Launch "Operation Lone Star" To Address Crisis at Southern Border (Mar. 6, 2021), https://gov.texas.gov/news/post/governor-abbott-dps-launch-operation-lone-star-to-address-crisis-at-southern-border.

[17] Sen. Hinojosa Testimony before Senate Committee on Criminal Justice (Apr. 15, 2021), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=30&clip_id=10168 at approx. 1:08:25—1:10:12; statement of Kleberg and Kennedy Cnty Dist. Atty. John Hubert at approx. 1:10:23—1:14:33; statement of Brooks Cnty. Sheriff Benny Martinez at approx. 1:15:15—1:18:51 (introduction, amendment, and passage of S.B. 576); *see also* Rep. Lanzano Testimony before House of Representatives of State Affairs (May 20, 2021), https://tlchouse.granicus.com/MediaPlayer.php?view_id=46&clip_id=20816 at approx. 14:30 (introduction, amendment, and passage of S.B. 576).

SUMMARY OF THE ARGUMENT

Section 20.05(a)(1)(A) of the Penal Code is invalid for two reasons. First, it violates the Fourth Amendment because it authorizes arrest (a quintessential seizure) for constitutionally-protected behavior. Individuals have a right to avoid the police if there is no reasonable suspicion that they have done something unlawful. Consequently, assisting an innocent person to exercise their constitutional right to avoid the police by concealing them cannot be criminalized by the State consistent with the Fourth Amendment. That is exactly what Section 20.05(a)(1)(A) does. It is, therefore, invalid.

Because this is a facial challenge, it does not matter that the person concealed in some instances may *not* be innocent because that circumstance is already covered by other laws, namely the federal alien transport law (for which state officers may make arrests) and laws criminalizing assisting and harboring fugitives. Because of the existence of those other laws, the only function of Section 20.05(a)(1)(A) is to criminalize conduct protected by the Fourth Amendment.

Second, Section 20.05(a)(1)(A) is preempted by federal immigration law. Under United States Supreme Court precedent, a State may not pass an immigration law where the federal government has already acted on the matter. Texas endeavors to do just that through its human smuggling law. Federal immigration law already pervasively regulates the movement of undocumented migrants in the Immigration

Naturalization Act, a core immigration concern. Texas seeks to duplicate and increase liability for immigrant transport.

Specifically, Texas Penal Code Section 20.05(a)(1)(A), makes it a crime to "knowingly…transport an individual with the intent to…conceal the individual from a peace officer or special investigator"—mirroring a federal statute that makes it a crime to knowingly or recklessly transport, harbor, or attempt to conceal an undocumented migrant. 8 U.S.C. §§ 1324(a)(1)(A)(ii) – (iii).

Texas is not the first state to try such a maneuver. Five other states have attempted to pass state human smuggling laws that overlap with federal immigration statutes. Federal and state courts have held those state laws preempted every time. Under that weighty precedent, Section 20.05(a)(1)(A) is preempted.

Because Section 20.05(a)(1)(A) is invalid, the trial court's order quashing the indictments should be affirmed.

ARGUMENT

I. Texas Penal Code Section 20.05(a)(1)(A) is facially invalid under the Fourth Amendment.

The State blithely dismisses Appellees' Fourth Amendment challenge as an overbreadth complaint that can only be brought under the First Amendment. State Br. at 25. As demonstrated by Appellees' supplemental brief below,[18] and their argument at the hearing on the motion to quash, 1RR17, the challenge was brought squarely under the Fourth Amendment. Section 20.05(a)(1)(A) violates the Fourth Amendment of the United States Constitution[19] and the corresponding provision of the Texas Constitution.[20]

A. The Fourth Amendment grants a right to innocently avoid law enforcement.

The Fourth Amendment prohibits unreasonable "seizures" to safeguard "[t]he right of the people to be secure in their persons." *Torres v. Madrid*, 141 S.Ct. 989,

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[18] *See* Flores.CR.197; Lopez.CR.78; Ortiz(517).CR.77; Ortiz(518).CR.79; Cibrian.CR.78; Ramirez.CR.108; Perez.CR.91.

[19] The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[20] *See* TEX. CONST. art. I, § 9 ("SEARCHES AND SEIZURES. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.").

993 (2021). Here, Appellees do not challenge the traffic stops as violative of the Fourth Amendment; they challenge their arrests. An arrest is the "quintessential seizure of the person." *Id*. at 995 (internal quotation marks and citation omitted).

The Fourth Amendment protects individuals from restraints and intrusions upon their liberty when the government does not harbor a legitimate basis. *See e.g. Terry v. Ohio*, 392 U.S. 1 (1968) ("'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'") (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

Applied to encounters with law enforcement, the individual has a "constitutional right to walk away and not answer any questions put to him without such action creating reasonable suspicion in the mind of the officer that criminal activity was afoot." *Gurrola v. State*, 877 S.W.2d 300, 303 (Tex. Crim. App. 1994) (citing *Florida. v. Royer*, 460 U.S. 491 (1983)). Because an innocent individual has a constitutional right to avoid the police, it follows that assisting an innocent person to avoid the police must also be protected by the Fourth Amendment. In that circumstance, the person assisting innocent concealment shares the Fourth Amendment's protection.

B. Section 20.05(a)(1)(A) criminalizes protected conduct.

Texas Penal Code § 20.05(a)(1)(A) creates a felony out of protected conduct: the right to assist an innocent person to avoid police, *i.e.*, when the statute does not require that the person avoiding police is suspected of any criminal activity or legitimately in the crosshairs of law enforcement. Because this is a facial challenge, it does not matter that the person concealed in some instances may *not* be innocent because that circumstance is already covered by other laws, namely the federal alien transport law (for which state officers may make arrests) and laws criminalizing assisting and harboring fugitives. *See infra*, Part I.C.

The current human smuggling law includes three elements. An individual commits an offense when they "[1] knowingly use[] a motor vehicle, aircraft, watercraft, or other means of conveyance [2] to transport an individual [3] with the intent to conceal the individual from a peace officer or special investigator." TEX. PENAL CODE § 20.05(a)(1)(A).

Critically, the crime targets the conduct of the driver alone, not that of the passenger. The crime is that the driver knowingly transported a person with intent to conceal them from law enforcement. The law does not require the police to have a legitimate or cognizable reason to discover the person being concealed, thus authorizing an arrest for constitutionally protected activity.

The adjacent harboring provision, § 20.05(a)(1)(B), provides the constitutional counterpoint because it requires that the passenger is concealed for a nefarious—rather than innocent—reason. Subsection (a)(1)(B) criminalizes someone who "[1] knowingly uses a motor vehicle, aircraft, watercraft, or other means of conveyance [2] to transport an individual [3] with the intent to flee from a person the actor knows is a peace officer or special investigator *attempting to lawfully arrest or detain* the actor." TEX. PENAL CODE § 20.05(a)(1)(B) (emphasis added).[21] In (a)(1)(B), the Legislature included the additional element that the police have a lawful reason to arrest the passenger, and the driver is aware the police are attempting to detain or arrest the passenger. That additional element satisfies the Fourth Amendment. Thus, while subsection (a)(1)(B) validly criminalizes a driver assisting the escape of a passenger the police have a legitimate, constitutional reason to detain, subsection (a)(1)(A) unconstitutionally makes a felony out of transporting someone with intent to innocently conceal them.

Texas's "human smuggling" provision does not even fit the traditional definition of smuggling, which requires that the transport of the cargo or person be illegal. Black's Law Dictionary defines "*smuggling*" as "[t]he crime of importing or exporting illegal articles or articles on which duties have not been paid." BLACK'S

[21] *See also* TEX. PENAL CODE § 38.05 (establishing offense of hindering apprehension or prosecution).

LAW DICTIONARY (11th ed. 2019). Moreover, "*[p]eople-smuggling*" is "[t]he crime of helping a person enter a country illegally in return for a fee." BLACK'S LAW DICTIONARY (11th ed. 2019). Section 20.05(a)(1)(A) does not require that the person being concealed is a fugitive from justice or even undocumented.

In *Brown v. Texas*, the Supreme Court reversed a conviction for violating a Texas statute making it a crime to refuse to identify oneself to a police officer. Texas's justifications were unavailing:

> [E]ven assuming [crime prevention] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it.

443 U.S. 47, 52 (1979). This case is analogous. Section 20.05(a)(1)(A)'s offense does not require any underlying criminal activity, or even any reasonable suspicion of criminal activity. The Fourth Amendment does not allow police to arrest—or even temporarily detain—someone who avoids contact with them by refusing to answer questions while walking on the street. Likewise, the Fourth Amendment does not permit criminal liability for concealing themselves from police if they have done nothing wrong. Consequently, the Fourth Amendment does not permit criminal liability for assisting such concealment, *i.e.*, concealing an innocent person.

Yet Section 20.05(a)(1)(A) authorizes arrest for innocent, protected conduct, as the law-enforcement officer who testified below confirmed:

> Q. Alright. Now, let's go back to just Section (A). If this is -- what we are dealing with today is just Section (A). Section (A), you have already told us, can make a parent on their way to a PTA meeting a criminal, can make, uh, a scout master with a kid in the backseat, can make somebody coming from the Elk's Lodge, uh, with, uh, a buddy who has had too much to drink and is hiding from maybe a law enforcement officer who he knows or believes he is related to, it makes the driver in each of those situations a potential felony, subject to arrest; right?
>
> A. Yes, sir.
>
> Q. That doesn't help us with any of these horror stories, does it?
>
> A. No, sir.
>
> Q. And I represent to you, sergeant, that's the reason that I subpoenaed you, that's the reason I wanted to hear from you today because I wanted to see whether or not I -- I was on the right track on that. This section 8 doesn't help law enforcement a bit. You can do everything that you are doing out there in the field with the rest of the statute. Section (A) makes, uh, on any given day, who knows how many people, uh, potential felons; isn't that correct?
>
> A. Yes.

1RR85-86.

Because Section 20.05(a)(1)(A) does not require that the person the driver intends to conceal (1) has committed a crime, (2) is under reasonable suspicion for committing a crime, *or* (3) is otherwise legitimately sought by police, its only function is to criminalize conduct protected by the Fourth Amendment. It is, therefore, invalid.

C. Section 20.05(a)(1)(A) is facially invalid.

Section 20.05(a)(1)(A)'s invalidity is facial because there are no circumstances in which the statute *by itself* operates constitutionally. A statute is facially invalid under the Fourth Amendment when it authorizes unconstitutional searches or seizures not otherwise permitted by other law. Thus, "the proper focus of the constitutional inquiry [are] searches [or seizures] that the law actually authorizes, not those for which it is irrelevant." *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015). The only applications a court must consider are those that "involve actual applications of the statute"—in other words, the situations when the statute *alone* justifies the Fourth Amendment intrusion. *Id*. at 419.

A few examples illustrate the analysis. Most recently, in *City of Los Angeles v. Patel*, the court struck down a state law that required motel operators to turn over guest records to the Los Angeles Police Department. The Court held the law was facially unconstitutional because it authorized blanket searches and seizures of private records without any pre-established reason, in violation of the Fourth Amendment. *Patel*, 576 U.S. at 420–21. It did not matter that in some cases law enforcement would have sufficient probable cause or consent to search the records—the law was facially invalid because it authorized seizures *when police otherwise had no legitimate basis*.

Payton v. New York provides another example. The Court struck down a New York law that allowed officers, without a warrant, to enter a private home to make any felony arrest. *Payton v. New York*, 445 U.S. 573, 574 (1980). Of course, cognizable exigencies (*e.g.*, hot pursuit, imminent destruction of evidence) may sometimes allow warrantless arrests in the home under the Fourth Amendment. But again, the possibility that unrelated Fourth Amendment doctrine may allow warrantless arrests in the home did not save the statute's blanket authorization of such arrests *regardless of exigencies*. *Id.* at 602 n. 55. The upshot was that New York's law facially failed because of the additional warrantless arrests now permitted. *See Patel*, 576 U.S. at 417 (describing *Payton* as a facially invalid statute).

Synthesizing the High Court's case law, whenever a law gives absolute authority to search or seize an individual without a legitimate reason, it facially violates the Fourth Amendment. *See e.g. Torres v. Puerto Rico*, 442 U.S. 465, 466 (1979) (holding that a Puerto Rico statute authorizing "police to search the luggage of any person arriving in Puerto Rico from the United States" was unconstitutional because it failed to require either probable cause or a warrant); *Ferguson v. Charleston*, 532 U.S. 67, 86 (2001) (holding that a hospital policy authorizing "nonconsensual, warrantless, and suspicionless searches" contravened the Fourth Amendment).

As the Court reiterated in *Patel*, when evaluating a facial challenge to a statute, the critical inquiry is: What *additional* searches or seizures does the challenged statute authorize? *Those* are the only searches and seizures that must be considered when examining constitutionality. In this case, federal statutes already prohibit transporting or concealing a person in this country without authorization. 8 U.S.C. §§ 1324(a)(1)(A)(ii) – (iii). And Texas already provides felony offenses for intentionally assisting fugitives in avoiding apprehension. Penal Code § 38.05 criminalizes harbor[ing] or conceal[ing] another with "intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense …."[22] Section 20.05(a)(1)(B) criminalizes using a means of transport with the intent to flee from a person "attempting to lawfully arrest or detain the actor."[23]

Thus, the *additional* seizures (*i.e.*, arrests) that subsection (a)(1)(A) authorizes—the only work the statute actually does—is in scenarios where Texas' "aiding fugitive" statutes (Texas Penal Code § 38.05 and Texas Penal Code § 20.05(a)(1)(B)) do *not* apply. *Patel*, 576 U.S. at 418–19 ("when addressing a facial

[22] *See* TEXAS PENAL CODE § 38.05 ("(a) A person commits an offense if, with intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense or, with intent to hinder the arrest, detention, adjudication, or disposition of a child for engaging in delinquent conduct that violates a penal law of the state, or with intent to hinder the arrest of another under the authority of a warrant or capias, he: (1) harbors or conceals the other; (2) provides or aids in providing the other with any means of avoiding arrest or effecting escape; or (3) warns the other of impending discovery or apprehension.").

[23] *See* TEXAS PENAL CODE § 20.05(a)(1)(B).

challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant"). The situations in which officers have a legitimate basis for a stop and investigation are not relevant to the constitutional inquiry because they are already addressed by other statutes. The only "actual application[]" of § 20.05(a)(1)(A) that can occur is when the officers do *not* otherwise have a constitutionally justifiable reason to investigate, *i.e.*, when the individual has every right to avoid the police. *Id*. at 419.

As stated in *Gurrola* and *Royer*, the Fourth Amendment gives people the right to avoid the police unless and until the State shows a good enough reason to stop them. Section 20.05(a)(1)(A) strips people of this right. Texas has already addressed the legitimate concern of aiding fugitives in Texas Penal Code Sections 38.05 and 20.05(a)(1)(B). The right to innocently avoid the police is protected by the Fourth Amendment, but Section 20.05(a)(1)(A) makes assisting such innocent avoidance a felony. Section 20.05(a)(1)(A) is, therefore, unconstitutional on its face.

II. Section 20.05(a)(1)(A) is preempted by federal immigration statutes.

Under the Supremacy Clause, federal law trumps conflicting state law. *Arizona v. United States*, 567 U.S. 387, 399 (2012); U.S. CONST. art. IV, § 2. Congress also has the power to preempt state law by withdrawing specific actions

from the state's ambit of authority. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

A federal law may preempt a state law in three ways: (1) express preemption; (2) field preemption; and (3) conflict preemption. *Est. of Miranda v. Navistar, Inc*., 23 F.4th 500, 504 (5th Cir. 2022). The three types of preemption are distinct:

> First, express preemption occurs when Congress adopts express language defining the existence and scope of pre-emption. Second, field preemption occurs when Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation. Finally, conflict preemption occurs where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. at 504 (internal footnotes, quotations and citations omitted).

In determining a federal statute's preemptive reach, congressional purpose is "the ultimate touchstone." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotation and citation omitted). Congress's intent is discerned primarily from statutory text and surrounding framework. *Id*. at 486. "Also relevant is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707, 713 (Tex. App.—Dallas 2012, no pet.) (citing *Medtronic*, 518 U.S. at 486).

A. In the immigration context, the federal government's authority is at its apex, while state police power is at its nadir.

Generally, courts "'start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.'" *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). But "[a]n assumption of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 90 (2000). For over a century, the federal government has exercised preeminence in immigration matters. *See Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1264 (11th Cir. 2012) ("*GLAHR*").

This federal dominance dates back at least to the late nineteenth century, when the Supreme Court addressed localized efforts to interfere with immigration. These cases distilled the core, exclusive federal powers over immigration.

In 1876, citing the inextricable relationship between immigration and foreign affairs, the Supreme Court held that a California state employee could not summarily detain a vessel of Chinese immigrants. *Chy Lung v. Freeman*, 92 U.S. 275, 278 (1875). As the Court explained, the treatment of foreign nationals carries grave international consequences because foreign governments demand answers on behalf of their citizens. *Id*. at 279. Therefore, "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to

Congress, and not the States. . . . If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations." *Id*. at 280. The federal government's immigration power derived not only from the Naturalization Clause, but also the Constitution's Foreign Powers Clauses. *Fong Yue Ting v. United States*, 149 U.S. 698, 711–12 (1893) (listing foreign policy powers to include the President's executive power and authority as Commander in Chief, and the federal government's power to make treaties, appoint ambassadors and foreign officials, regulate commerce, levy tariffs, raise armies, and maintain navies); U.S. CONST. art. I, §§ 8–10; art. II, § 2.

Only four decades later, the Supreme Court declared that "[t]he authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government." *Truax v. Raich*, 239 U.S. 33, 42 (1915). This was an exception to the States' traditionally broad police powers: "[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (emphasis added) (internal citations and quotations omitted). Thus, a state has little, if any, authority to adopt and enforce statutes relating to core immigration powers where the federal government has exerted dominion.

B. State statutes that mirror or complement federal immigration statues are preempted.

Where immigration is concerned, a state loses its customary broad concurrent jurisdiction to make and enforce criminal laws. In *Hines*, the Supreme Court struck down a Pennsylvania alien registration scheme because the federal government already had enacted a comprehensive regulatory scheme. 312 U.S. at 68. As the Court explained, when it comes to the power to "restrict, limit, regulate, and register aliens, . . . [a]ny concurrent state power that may exist is restricted to the narrowest limits." *Id*. Thus, the Supremacy Clause forbid any state law that, "complement[ed] the federal law, or enforce[d] additional or auxiliary regulations." *Id*. at 66–67; *see also Kansas v. Garcia*, 140 S.Ct. 791, 798 (2020) (recognizing that federal statutes preempted concurrent state statutes addressing employment of undocumented immigrants).

And, in *Arizona v. United States*, the Supreme Court struck down Arizona's duplication of a federal immigration misdemeanor—failure to procure immigration papers—in the state criminal law. 567 U.S. 387, 401 (2012). Even though "the [state] provision ha[d] the same aim as federal law and adopt[ed] its substantive standards," the state version was field-preempted by the federal government's alien registration scheme. *Id*. at 402.

In *Kansas v. Garcia*, by contrast, a state prosecution of an undocumented immigrant for identity theft was not preempted because "using another person's

Social Security number on tax forms threatens harm that has no connection with immigration law." 140 S.Ct. at 805. Kansas prosecuted the immigrants under state law for using fraudulent Social Security numbers on state tax withholding forms. *Id*. at 798–99. The Kansas Supreme Court held the prosecution was preempted because federal law "provides that I–9 forms and 'any information contained in or appended to such form[s] may not be used for purposes other than for enforcement of' the [Immigration Naturalization Act] or other listed federal statutes." *Id*. at 800 (quoting 8 U.S.C. § 1324a(b)(5)). According to that court, because the information was listed on the I-9, its misuse on any other form could also not be prosecuted. *Id*.

The Supreme Court disagreed, concluding that the state law was not preempted because it operated in an entirely different sphere from the federal law. The federal law at issue occupied the "field of fraud on the federal employment verification system," whereas the state prosecution was based solely on falsification of federal and state tax forms, which "play[] no part in the process of determining whether a person is authorized to work." *Id*. at 804 (quotations and citation omitted). "Instead, those documents are part of the apparatus used to enforce federal and state income tax laws." *Id*. (concluding no express preemption); *see also id*. at 804–05 (concluding no implied preemption). Ultimately, there was no preemption because "[t]he submission of taxwithholding forms is *fundamentally unrelated* to the federal employment verification system." *Id*. at 804–05 (emphasis in original).

In sum, although "in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests," *id*. at 806, state statutes that duplicate federal immigration law are a notable exception. Where immigration is concerned, state law that mirrors or complements existing federal law is preempted. *See Arizona*, 567 U.S. at 401; *Hines*, 312 U.S. at 66–67. On the other hand, state laws are not preempted if they only "peripheral[ly]" touch upon the immigration realm where the federal government has not spoken. *DeCanas v. Bica*, 424 U.S. 351, 359 (1976)[24]; *see also Kansas*, 140 S.Ct. at 806.

C. Every court to review similar statutes has held that they are preempted.

Texas is not the first state to attempt to criminalize the transport of undocumented people. Federal courts have invalidated human smuggling laws in Arizona, Georgia, Alabama, Colorado, and South Carolina. *See GLAHR*, 691 F.3d at 1258–60; *United States v. South Carolina*, 720 F.3d 518, 531 (4th Cir. 2013) ; *United States v. Alabama*, 691 F.3d 1269, 1286 (11th Cir. 2012), *cert. denied*, 569 U.S. 968 (2013); *Valle del Sol Inc.*, 732 F.3d at 1024; *Fuentes-Espinoza v. People*, 408 P.3d 445, 452 (Colo. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 1698

[24] In *DeCanas*, the Supreme Court upheld a California labor law that prohibited employers from knowingly hiring an undocumented migrant. At the time, no federal law squarely addressed the employment of undocumented migrants. That changed after Congress passed the Immigration Reform and Control Act (IRCA), which specifically regulated employment of undocumented migrants. As a result, *DeCanas*'s holding was abrogated because federal law changed, but its reasoning remains valid. *Arizona*, 567 U.S. at 404.

(2018).[25] These laws were preempted on field and conflict grounds. *Valle del Sol Inc.*, 732 F.3d at 1023–26 (field preempted); *GLAHR*, 691 F.3d at 1266.

These decisions were based on the Immigration Naturalization Act (INA), which extensively and pervasively regulates, how, when, where, and in what manner a third party can induce an alien to enter into, or transport an alien within, the United States. The INA criminalizes the transportation and harboring of migrants, making it a felony for:

> 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;

8 U.S.C. §§ 1324(a)(1)(A)(ii) – (iii) (emphasis added).

Federal law occupies the field of alien transport. The federal transport prohibition is part of a pervasive regulatory scheme regarding the movement of the

[25] Fourteen states joined in asking the Supreme Court to reverse Colorado Supreme Court's holding that the human smuggling statute was preempted. The Supreme Court denied certiorari. Texas's human smuggling law was cited in the states' brief as an example of an extant state smuggling law jeopardized by preemption. Brief of the States of Arizona, *et al*. as Amici Curiae in Support of Petitioner, *Colorado v. Fuentes-Espinoza*,—— U.S. ——, 138 S.Ct. 1698 (2018) (No. 17-1084).

undocumented in the United States. The INA also lays out criminal and civil penalties (1) for individuals who cross into the United States illegally, *id*. § 1323, (2) for unlawful entry into the country, *id*. § 1325, (3) for helping individuals who may not be admitted into the United State enter the country, *id*. § 1327, and (4) for importing individuals into the country for immoral purposes. *Id*. § 1328.

Congress has authorized a very limited role for local officials in enforcing this scheme; they may only arrest (but not prosecute) people for violations of immigration law. *See* 8 U.S.C. § 1324(c). "[T]he federal courts maintain exclusive jurisdiction to prosecute for these crimes and interpret the boundaries of the federal statute." *GLAHR*, 691 F.3d at 1263–64 (citing 8 U.S.C. § 1329).

GLAHR is the leading opinion repudiating state smuggling laws because of preemption. *See id.* The Eleventh Circuit began its analysis by describing the comprehensive web of federal laws that comprise immigration law. *Id.* Then, the court delivered an unequivocal holding:

> In enacting these provisions, the federal government has clearly expressed more than a 'peripheral concern' with the entry, movement, and residence of aliens within the United States, and breadth of these laws illustrates an overwhelmingly dominant federal interest in the field.

Id. at 1264 (internal citation omitted). The court held that complementary or supplementary state laws cannot co-exist with the federal smuggling statute. The federal law provides "a full set of standards to govern the unlawful transport and

movement of aliens . . . and a state's attempt to intrude into this area is prohibited because Congress has adopted a calibrated framework . . . to address this issue." *Id*. (internal quotation marks and citations omitted).

Subsequent decisions in South Carolina, Alabama, and Colorado endorsed and augmented *GLAHR*. The Fourth Circuit found "the Eleventh Circuit's reasoning persuasive" and held South Carolina's law was field preempted because the "vast array of federal laws and regulation on this subject . . . left no room for the States to supplement it." *South Carolina*, 720 F.3d at 531 (quoting *Arizona*, 567 U.S. at 400); *see also Alabama*, 691 F.3d at 1285–88. The Colorado Supreme Court followed these decisions, reasoning that "when read together, [the federal immigration] provisions evince Congress's intent to maintain a uniform, federally regulated framework for criminalizing and regulating the transportation, concealment, and inducement of unlawfully present aliens, and this framework is so pervasive that it has left no room for the states to supplement it." *Fuentes-Espinoza*, 408 P.3d at 452.

The courts also found conflict preemption. First, state smuggling laws create "an obstacle to the smooth functioning of federal immigration law" because they "improperly place in the hands of state officials the nation's immigration policy, and strip federal officials of the authority and discretion necessary in managing foreign affairs." *South Carolina*, 720 F.3d at 531–32. The "obstacle" traces back to the first principle of immigration preemption articulated by the Supreme Court in *Chy Lung*:

immigration implicates foreign affairs and must be dealt with both uniformly and deferentially to the Executive Branch. *See GLAHR*, 691 F.3d at 1265–66. State smuggling laws risk "the prospect of fifty individual attempts to regulate immigration-related matters." *Id.* at 1266. This undermines Congress's "calibrated framework within the INA to address" the transportation of migrants. *Id.* at 1264.

Additionally, the laws conflicted because they punished (1) more conduct than the federal smuggling law, and (2) carried greater punishment. In conflict preemption analysis, "[t]he fact of a common end hardly neutralizes conflicting means." *Crosby*, 530 U.S. at 379. The state laws often included "additional or auxiliary regulations" by omitting elements found in the federal law or adding additional smuggling crimes. *Alabama*, 691 F.3d at 1288 (conflict because Alabama added the crime of "conspiracy to be transported"); *Fuentes-Espinoza*, 408 P.3d at 452–53 (conflict because elements in state law differed from federal law).

Separately, conflict was imminent because state laws carried different remedies than federal law. Often, the state punishments were harsher than federal ones. *Id*. at 452 (state law carried mandatory minimum of four years in prison while federal law imposed no mandatory minimum). By prosecuting different immigration-related conduct that "Congress chose not to punish," state smuggling laws "pose[ ] an obstacle to the accomplishment of the 'full purposes and

objectives'" of federal immigration law. *Valle del Sol Inc.*, 732 F.3d at 1028 (quoting *Arizona*, 567 U.S. at 399),

Under this chorus of well-reasoned decisions that followed the Supreme Court's decision in *Arizona*, state alien transport laws like Texas's are preempted. These laws mirror and supplement federal immigration statutes and are therefore invalid. They bear no resemblance to the class of laws that, like Kansas's identity fraud statute, are "*fundamentally unrelated*" to federal immigration statutes and therefore are not preempted. *Kansas*, 140 S.Ct. at 805 (emphasis in original).

D. Like the alien transport laws in Arizona, Georgia, Alabama, Colorado, and South Carolina, Section 20.05(a)(1)(A) is field preempted.

Like the alien transport laws in other states, Section 20.05(a)(1)(A) is invalid. The field preemption question rests on whether the federal government has demonstrated more than a "peripheral concern" with the transport of aliens within its borders. *Cf. DeCanas*, 424 U.S. at 360. It has: the federal government has demonstrated a dominant interest in the movement and transport of aliens.

Section 20.05(a)(1(A) does not explicitly require that the person concealed be an undocumented immigrant. But, notably, the State does not argue that the statute is unrelated to immigration. Nor could it, persuasively. The Legislature's clear intent was to combat immigrant smuggling. *See supra* Statement of Facts, Part II. And that is also the on-the-ground reality. The primary, and perhaps the only, people the law

has been enforced against are individuals like Appellees accused of transporting concealed undocumented people in their vehicles. *See, e.g.*, Flores.CR.8; 2RR811, 815, 821, 826-28, 837.

Testimony from law enforcement confirms this mode of enforcement. A sergeant with the Duval County Sheriff's Office testified that he understood that the purpose of the law was to target the transport of undocumented migrants. 1RR56-58. His decision to arrest someone for this offense turns entirely on whether the concealed passenger is likely to be undocumented:

> Q. What I am getting at is what makes you come to the conclusion that the driver is committing an offense is your determination that the passengers are illegal aliens.
>
> A. Yes. Once we start identifying the subjects, and subjects identify themselves as undocumented aliens, yes, sir.
>
> Q. Is that true of every such stop that you've made where you were going to arrest the driver under this particular statute?
>
> A. Yes.

1RR60-61. That this statute is utilized in the field solely to address transport of undocumented migrants is no surprise, as Section 20.05(a)(1)(A) is not needed to combat transportation or harboring of fugitives, as other Texas statutes cover that conduct. *See supra* Part I.C. The State concedes that concealing undocumented migrants is effectively an element of the offense.[26]

[26] State Br. at 27 ("Their conduct falls squarely within the set of conduct prohibited by the statute; they had ostensibly *illegal aliens* in their vehicles when they were pulled over, the *illegal aliens*

The Immigration Naturalization Act (INA) extensively and pervasively regulates, how, when, and where a third party can induce an alien to enter into or transport an alien within the United States. First, and most importantly, the INA already criminalizes the transportation and harboring of migrants. 8 U.S.C. §§ 1324(a)(1)(A)(ii) – (iii). Right off the bat, Texas's attempt to mirror federal immigration law runs into the same pitfalls outlined in *Hines*, and *Arizona*—a state does not have concurrent jurisdiction to enforce federal immigration laws.

Second, the smuggling law is not some newfangled federal contraption, but rather the product of a "calibrated framework" to address a longstanding immigration issue. *GLAHR*, 691 F.3d at 1264. A version of the federal smuggling law has been part of the "'extensive and complex' federal immigration scheme for over a century." *Valle del Sol Inc.*, 732 F.3d at 1025 (quoting *Arizona*, 567 U.S. at 395). The law evolved from prohibiting the "bringing in or landing of undocumented aliens" (original version in 1917) to criminalizing the transport of aliens within the United States (expanded in 1952). *United States v. Sanchez-Vargas*, 878 F.2d 1163, 1169 (9th Cir. 1989) (compiling various legislative and executive materials on version of the federal smuggling law). The 1952 expansion of the smuggling law was a direct response to the "economic displacements caused by the growing influx

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were plainly being 'transported' in a 'motor vehicle,' and the *aliens* were 'conceal[ed]' in a manner that hid them from 'a peace officer or special investigator.'") (emphasis added).

of undocumented alien workers from Mexico." *Id.* at 1169. Congressional debates focused on Mexicans entering the United States along the Rio Grande River and disappearing into the interior of the country without regulation. *Id*. Far from ignoring immigration concerns along the Southern Border, the federal government enacted smuggling laws precisely to address this immigration issue. The law's history "demonstrates Congress's intentional calibration of the appropriate breadth of the law and severity of the punishment." *Cruz*, 177 F.Supp.3d at 1013 (quotation marks and citation omitted) (holding the harboring provisions of Texas's smuggling law preempted), *rev'd in part on other grounds*, 849 F.3d 594 (5th Cir. 2017).

Finally, the federal smuggling law represents a mere filament in the intricate weave that regulates the movement of undocumented people within the country. Federal immigration law also lays out criminal and civil penalties (1) for individuals who cross into the United States illegally, *id*. § 1323, (2) for unlawful entry into the country, *id*. § 1325, (3) for helping individuals who may not be admitted into the United State enter the country, *id*. § 1327, and (4) for importing individuals into the country for immoral purposes. *Id*. § 1328. Congress has carefully defined the relationship between federal and state authorities in the execution of immigration law. Section 1324(c) authorizes local law enforcement to *arrest* people for violations of immigration law, but "the federal courts maintain exclusive jurisdiction to prosecute for these crimes and interpret the boundaries of the federal statute."

GLAHR, 69 F.3d at 1263–64 (citing 8 U.S.C. § 1329). Far from not contemplating a state's interest and action in federal immigration policy, federal law details and severely circumscribes the field of permitted state action.

Altogether, the text of the federal smuggling law, its extensive historical development, and the broader array of immigration laws that regulate the movement and transport of migrants establish field preemption. Judge Ezra was correct when he concluded that Texas's transport and harboring laws, including Section 20.05(a)(1)(A), were preempted: The "federal statutory scheme regarding the harboring and transporting of undocumented aliens so pervasive that it [leaves] no room in this area for the state of Texas to supplement it." *Cruz*, 177 F.Supp.3d at 1013.

Texas does not have concurrent jurisdiction to parrot or supplement federal smuggling law; any such efforts are preempted.

E. Section 20.05(a)(1)(A) poses an obstacle to federal immigration priorities and is conflict preempted.

State law conflicts with federal law where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. State smuggling laws, like Section 20.05(a)(1)(A), pose such an obstacle.

First, state smuggling laws create "the prospect of fifty individual attempts to regulate immigration-related matters" when history, the Constitution, and modern

jurisprudence all assign those responsibilities to the federal government. *GLAHR*, 691 F.3d at 1266. Uniformity is at the heart of immigration-preemption precedent, dating back to Supreme Court's warning that "a single State, [could], at her pleasure, embroil us in disastrous quarrels with other nations." *Chy Lung*, 92 U.S. at 280. In *Hines*, the Court signaled the importance of uniformity: The "one uniform national registration system" ensured migrants would be free from "inquisitorial practices and police surveillance" from parochial interests. 312 U.S. at 74. Fragmented state policies threaten equal protection and risk international conflict.

Conflict preemption applies because Section 20.05(a)(1)(A) criminalizes significantly more conduct and imposes stricter sanctions than the federal law. That the state and federal smuggling laws may share some purpose is immaterial because "[t]he fact of a common end hardly neutralizes conflicting means." *Crosby*, 530 U.S. at 379. On the contrary, "conflict is imminent whenever two separate remedies are brought to bear on the same activity." *Wisconsin Dep't of Indus., Lab. & Hum. Rels. v. Gould Inc.*, 475 U.S. 282, 286 (1986) (internal quotations and citation omitted). Conflict is "imminent" here. First, the basis of liability is different, and broader, than in the federal law. The federal law restricts liability to situations in which the transportation is "in furtherance" of the smuggling. 8 U.S.C. § 1324(a)(1)(A)(ii). Texas, on the other hand, potentially criminalizes anyone who gives an undocumented person a ride.

The statutory punishments conflict as well. The federal law prescribes a maximum punishment of ten years and includes no mandatory minimum. State law is more severe, prescribing a minimum punishment of two years in prison and maximum of ten (more—a maximum of 20 years to life—if enhancements apply). *See* TEX. PENAL CODE § 20.05(b). The harsher state sanctions pose yet another conflict with the federal immigration scheme. *See Arizona*, 567 U.S. at 402–03 (striking down Arizona registration law in part because it imposed harsher penalties than corresponding federal law). Section 20.05(a)(1)(A)'s broader liability and harsher penalties conflict with federal smuggling objectives.

Third, the state law conflicts with federal law by usurping power from the federal Executive Branch, where immigration enforcement decisions exclusively reside. *Alabama*, 691 F.3d at 1287. Texas upsets this balance by prosecuting individuals the Executive, in a superior role, may elect not to. *See GLAHR*, 691 F.3d at 1265; *Arizona*, 567 U.S. at 409.

Finally, conflict exists because state and local law enforcement is making immigration status judgments. The evidence shows that arrests for violation of Section 20.05(a)(1)(A) hinge on whether the passengers appear to be lawfully present in the country. 1RR60-61. Thus, law enforcement must engage in one of the "significant complexities involved in enforcing federal immigration law . . . whether a person is removable" in smuggling prosecutions. *Arizona*, 567 U.S. at 409. But

"[t]he federal government alone . . . has the power to classify non-citizens." *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 536 (5th Cir. 2013).

Texas has impermissibly delegated to state and local law enforcement an initial determination of an immigrant's lawful or unlawful status, "a blunt binary classification that is inconsistent with the extensive array of immigration status[es] provided under federal law and with the complex, often discretionary processes by which the federal government enforces and adjudicates immigration law." *Cruz*, 177 F.Supp.3d at 1015 (quoting *Farmers Branch*, 726 F.3d at 547 (Dennis, J. concurring)). Federal law already circumscribes how and when, in limited circumstances, state actors may make immigration arrests and how they can cooperate with immigration officials. *Farmers Branch*, 177 F.Supp.3d at 531. They may not exercise power unilaterally. Thus, Section 20.05(a)(1)(A) conflicts with federal immigration law.

F. The State's arguments against preemption lack merit.

1. The State does not address *Arizona* and its progeny.

The State does not confront—or even acknowledge the existence of—the significant body of case law that dooms Section 20.05(a)(1)(A). The State does not discuss *Arizona*, a controlling Supreme Court decision. Nor does the State acknowledge—much less grapple with—the multiple decisions in the wake of

Arizona that invalidate analogous state laws attempting to regulate transport of aliens.

Rather than confront the mountain of pertinent preemption case law in the immigration context, the state relies on a case involving the sale of avocadoes. *See* State Br. at 13 (citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963)).[27] Appellees concede that Texas can regulate avocadoes, but that is irrelevant to the issues in this case.

2. The State's invocation of human trafficking statutes fails.

The State cites federal statutes regarding a different subject matter—human *trafficking*—asserting that state participation is not preempted. State Br. at 14-15. That is beside the point. U.S. Immigration and Customs Enforcement states that "[h]uman trafficking and human smuggling are distinct criminal activities, and the terms are not interchangeable." U.S. Immigration and Customs Enforcement, *Human Trafficking and Smuggling* (Jan. 16, 2013), https://www.ice.gov/factsheets/human-trafficking (last visited Jan. 8, 2023).

[27] Besides the factual irrelevancy, *Fla. Lime & Avocado Growers, Inc.* does not provide the doctrinal support the State assigns. *See* State Br. at 15-16. The test for field preemption is not whether an "unambiguous congressional mandate" exists, as the State argues. The test, as cited in countless decisions, is (1) when there is statutory scheme "so pervasive ... that Congress left no room for the States to supplement it" or (2) 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." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). The State's alleged test would be indistinguishable from the separate doctrine of "express preemption." *Est. of Miranda*, 23 F.4th at 504 ("express preemption occurs when Congress adopts express language defining the existence and scope of pre-emption") (internal quotations and citations omitted).

"*Human trafficking*" is a form of slavery—the "illegal recruitment, transportation, transfer, harboring, or receipt of a person, esp. one from another country, with the intent to hold the person captive or exploit the person for labor, services, or body parts." BLACK'S LAW DICTIONARY (11th ed. 2019).[28] Trafficking is inherently exploitative and malignant; it includes "forced prostitution, forced marriages, sweat-shop labor, slavery, and harvesting organs from unwilling donors." *Id*. Trafficking has nothing to do with immigration; it is forced labor. None of the appellees are charged with, nor are appellees challenging, Texas's human trafficking law.

"*People smuggling*", on the other hand, is merely "helping a person enter a country illegally in return for a fee." BLACK'S LAW DICTIONARY (11th ed. 2019). By its very definition, smuggling is a core immigration concern because the activity concerns the movement of migrants. And while a smuggler *may sometimes* expose migrants to danger, the proscribed activity—the one at bar—is a consensual business transaction to enter and travel within a nation in violation of immigration law.

Unsurprisingly then, federal law treats trafficking and smuggling differently, allowing state cooperation and concurrent enforcement in the former but not the latter. Federal law specifically allows for state trafficking laws. 22 U.S.C. §§

[28] *See* TEX. PENAL CODE § 20A.02 (criminalizing human trafficking).

7105(c)(3)(A), (C); *see* State Br. at 14 (citing William Wilberforce Trafficking Victims Protection Reauthorization Act, 2008, Pub. L. No. 110-457, § 225(a), 122 Stat. 5044, 5072 (2008)). With regard to smuggling, however, federal law allows for only minimal state activity—state authorities may make arrests, but that is all. 8 U.S.C. § 1324(c).

Ultimately, the federal trafficking laws undermine the State's position. Congress knows how to permit state enforcement and did so in the federal trafficking arena. Congress's retention of exclusive control regarding alien smuggling stands in stark contrast.

3. The State's attempt to justify the smuggling statute with non-immigration purposes also fails.

Finally, the State argues that three non-immigration purposes justify Texas's human smuggling law. All three fail.

First, the State asserts that it must "punish[] those assisting fugitives fleeing justice." State Br. at 1. But assisting a fugitive is not an element of the offense described in Section 20.05(a)(1)(A). Nor could undocumented people be classified as fugitives. "As a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona*, 567 U.S. at 407. And "a system in which state officers may" make arrests "based on possible removability" is preempted. *Id.* at 410. Thus, section 20.05(a)(1)(A) does not involve fugitives.

And even were that not the case, the State already criminalizes assisting fugitives in other sections of the Penal Code. *See* TEX. PENAL CODE §§ 38.05 (prohibiting the aiding and abetting of fugitives), 20.05(a)(1)(B) (prohibiting transport of a passenger "with the intent to flee from a person the actor knows is a peace officer or special investigator attempting to lawfully arrest or detain the actor"). The State's purpose is thus fully accomplished without Section 20.05(a)(1)(A).

The State's second asserted interest—protecting law enforcement officers—fails for similar reasons. The Penal Code already criminalizes both assaulting and threatening a peace officer and imposes stiff penalties. *See* TEX. PENAL CODE §§ 22.01(b-2) (authorizing up to 20 years in prison for assault), 22.07(c-1) (authorizing up to two years in prison for a terroristic threat). With laws in place that directly address crimes against law enforcement, it is difficult to discern what indirect protection Section 20.05(a)(1)(A) offers—especially because federal law already empowers state law enforcement to conduct *arrests* for violation of the federal smuggling statute. If the State's proposition were accepted, then any criminal statute could be justified in this way, even those that the Supreme Court already has said are unconstitutional in *Arizona*. If the risks inherent in being a law enforcement officer were sufficient to justify state human smuggling laws, federal preemption in the immigration context would disappear.

Finally, the State cites an interest in protecting smuggled aliens. But that interest directly collides with the dominant federal statutes governing alien transport. It is not, as was the state identity theft statute in *Kansas*, "fundamentally unrelated" to a comprehensive federal immigration scheme. 140 S.Ct. at 804–05. To the contrary, that "interest" is directly related to the federal scheme. Therefore, it cannot forestall preemption. Additionally, the provision under review proscribes the mere transport of undocumented migrants, without more. Other sections, not presently challenged, specifically address the tragic scenarios the State cites. *See* TEX. PENAL CODE § 20.05(b).

CONCLUSION AND PRAYER

Appellees respectfully request that the Court affirm the trial court's orders quashing the indictments.

Respectfully submitted,

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