

TEXAS COURT OF APPEALS, FOURTH DISTRICT, SAN ANTONIO

Justin Michael Persinger v. The State of Texas

No. 04-24-00637-CR (Tex. App.—San Antonio Apr. 29, 2026) (mem. op.) · No. 04-24-00637-CR · Decided April 29, 2026

SUMMARY

The Fourth Court of Appeals of Texas affirmed Justin Michael Persinger’s conviction for smuggling of persons with intent to obtain a pecuniary benefit under Texas Penal Code section 20.05. The court rejected his as-applied field and conflict preemption challenges based on federal immigration law and his facial First Amendment challenge. The court issued the opinion as an unpublished memorandum opinion.

CASE DETAILS

|                       |                                                                                                                                        |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Texas Court of Appeals, Fourth District, San Antonio                                                                                   |
| WRITING FOR THE COURT | Lori Massey Brissette, Justice; Irene Rios, Justice; Lori I. Valenzuela, Justice                                                       |
| JURISDICTION          | Texas Court of Appeals, Fourth District, San Antonio                                                                                   |
| DECIDED               | April 29, 2026                                                                                                                         |
| DOCKET                | 04-24-00637-CR                                                                                                                         |
| DISPOSITION           | affirmed                                                                                                                               |
| PROCEDURAL POSTURE    | Appeal from a jury conviction for smuggling of persons with intent to obtain a pecuniary benefit under Texas Penal Code section 20.05. |
| STANDARD OF REVIEW    | Constitutional challenges, including preemption and facial-constitutionality challenges, are reviewed de novo.                         |
| PRECEDENTIAL VALUE    | Unpublished, nonprecedential memorandum opinion                                                                                        |
| PARTIES               | Justin Michael Persinger v. The State of Texas                                                                                         |

TOPICS

- preemption
- first amendment
- federalism
- criminal procedure
- appellate procedure

PRACTICE AREAS

- criminal law
- constitutional law
- immigration and federalism

## QUESTIONS PRESENTED

1. Whether Texas Penal Code section 20.05(a)(1)(A) was field preempted by federal law as applied to Persinger's prosecution.
2. Whether Persinger's prosecution under section 20.05(a)(1)(A) was conflict preempted by federal immigration law or federal prosecutorial discretion.
3. Whether section 20.05(a)(1)(A) facially violated the First Amendment.
4. Whether Persinger's as-applied First Amendment challenge was waived for inadequate briefing.

## HOLDINGS

1. Persinger's prosecution under Texas Penal Code section 20.05(a)(1)(A) was not field preempted because the statute did not require proof of the passengers' unlawful immigration status and criminalized conduct independent of that status.
2. Persinger's prosecution was not conflict preempted by federal law.
3. Section 20.05(a)(1)(A) does not facially violate the First Amendment because any unconstitutional applications are not substantial in comparison with the statute's constitutional applications.
4. Persinger waived his as-applied First Amendment challenge by failing to provide substantive analysis and record references.

## KEY QUOTATIONS

*“As to conflict preemption, state anti-smuggling and harboring laws that target non-citizens may be preempted if they conflict with federal immigration law.” (-4)*

*“Accordingly, for the reasons articulated in Roberts, we overrule Appellant’s First Amendment facial challenge.” (-5)*

## FACTUAL BACKGROUND

A Department of Public Safety trooper observed a passenger vehicle stop near an area known for smuggling, saw multiple people emerge from brush and enter the vehicle, and later saw six individuals flee after the vehicle stopped. The driver, Justin Michael Persinger, was arrested, and officers found identification cards from Mexico and Honduras in the vehicle. With Persinger's consent, the trooper photographed text messages coordinating the pickup and payment for transporting the individuals.

## PROCEDURAL HISTORY

Persinger was indicted in the 365th Judicial District Court of Maverick County for smuggling of persons with intent to obtain a pecuniary benefit. Following a jury trial, he was convicted and sentenced to four years' imprisonment. His motion for new trial was denied by operation of law, and he appealed, asserting field and conflict preemption and a facial First Amendment challenge.

## DISPOSITION

affirmed

#### CASES CITED

- Tex. Mut. Ins. Co. v. PHI Air Med., LLC, 610 S.W.3d 839, 846 (Tex. 2020)
- State v. Flores, 679 S.W.3d 232, 243, 245–47 (Tex. App.—San Antonio 2023, pet. ref'd)
- Ex parte Lo, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013)
- State ex rel. Lykos v. Fine, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011)
- Roberts v. State, No. 04-24-00485-CR, 2026 WL 290378, at \*2–9 (Tex. App.—San Antonio Feb. 4, 2026, no pet. h.)
- Kansas v. Garcia, 589 U.S. 191, 208–09, 211 (2020)
- Gutierrez v. State, 721 S.W.3d 639, 655, 657 (Tex. App.—Corpus Christi–Edinburg 2025, pet. ref'd)
- Arizona v. United States, 567 U.S. 387, 399 (2012)
- Wolfe v. State, 509 S.W.3d 325, 342–45 (Tex. Crim. App. 2017)

#### OPINION

#### PER CURIAM.

Fourth Court of Appeals San Antonio, Texas MEMORANDUM OPINION No. 04-24-00637-CR Justin Michael PERSINGER, Appellant v. The STATE of Texas, Appellee From the 365th Judicial District Court, Maverick County, Texas Trial Court No. 23-12-08710-MCRAJA Honorable Amado J. Abascal III, Judge Presiding Opinion by: Lori Massey Brissette, Justice Sitting: Irene Rios, Justice Lori I. Valenzuela, Justice Lori Massey Brissette, Justice Delivered and Filed: April 29, 2026 AFFIRMED Appellant Justin Michael Persinger appeals his conviction for one count of smuggling of persons with intent to obtain a pecuniary benefit under Texas Penal Code section 20.05(a)(1)(A) and (b)(1)(C).

Following a jury trial, Appellant was convicted and sentenced to four years' imprisonment. In his first and second issues, Appellant argues the statute is field and conflict preempted by federal law as applied to his prosecution.

In his third issue on appeal, Appellant 04-24-00637-CR argues section 20.05(a)(1)(A) facially violates the First Amendment. 1 We affirm Appellant's conviction. BACKGROUND At approximately 10:47 p.m. on May 4, 2023, Department of Public Safety Trooper Justin Craig was patrolling U.S. Highway 57 in Maverick County as part of Operation Lone Star. According to his testimony, while parked two to three miles north of the Border Patrol checkpoint, in an area known for smuggling, Trooper Craig observed a small passenger car stop on the shoulder of Highway 57.

Trooper Craig heard the car honk its horn and observed multiple people emerge from the brush and enter the vehicle. The driver, later identified as Justin Michael Persinger, conducted a U-turn

and began driving away from the area. While following the vehicle, Trooper Craig saw people turning around to look at him through the back windshield before “quickly crouch[ing] back down.” Before Trooper Craig initiated his emergency lights, Appellant suddenly stopped on the shoulder of the highway and six individuals ran out of the vehicle.

Trooper Craig focused on apprehending the driver, and arrested Appellant for human smuggling. The passengers were never located or identified, but Trooper Craig found two foreign identification cards, one from Mexico and one from Honduras, in Appellant’s vehicle.

After obtaining Appellant’s consent, Trooper Craig photographed Appellant’s text messages that coordinated the pickup and payment for transporting the individuals. Appellant was indicted for one count of smuggling of persons with intent to obtain a pecuniary benefit under Texas Penal Code section 20.05(b)(1)(C). Appellant was 1 Appellant’s motion for new trial and certain parts of Appellant’s brief assert an as-applied First Amendment challenge to Texas Penal Code 20.05(a)(1) (A).

However, Appellant’s brief only provides substantive analysis with respect to a facial First Amendment challenge. Because Appellant’s brief fails to provide substantive analysis or record references with respect to an as-applied First Amendment challenge, we hold that such a challenge is waived due to inadequate briefing. See TEX. R. APP. P. 38.1(i) (“The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.”); see also *Wolfe v. State*, 509 S.W.3d 325, 342–45 (Tex.

Crim. App. 2017) (holding court of appeals did not err by declining to consider matter appellant failed to brief). -2- 04-24-00637-CR convicted following a jury trial and the jury assessed punishment at four years’ imprisonment.

After conviction, Appellant filed a motion for new trial. The motion was denied by operation of law, and this appeal followed. STANDARDS OF REVIEW We review Appellant’s constitutional challenges de novo. See *Tex. Mut. Ins. Co. v. PHI Air Med., LLC*, 610 S.W.3d 839, 846 (Tex. 2020) (“Preemption is a question of law reviewed de novo.”); *State v. Flores*, 679 S.W.3d 232, 243 (Tex.

App.—San Antonio 2023, pet. ref’d) (holding the same); *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013) (“Whether a statute is facially constitutional is a question of law reviewed de novo.”). AS-APPLIED PREEMPTION In his first and second issues, Appellant argues that section 20.05(a)(1)(A) is field and conflict preempted by federal law as applied to his prosecution.

A. Applicable Law For as-applied constitutional challenges, we must determine whether there was a constitutional violation in the application of the statute to the defendant. See *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011) (“A litigant raising only an ‘as applied’

challenge concedes the general constitutionality of the statute, but asserts that the statute is unconstitutional as applied to his particular facts and circumstances.”).

This court analyzed a similar as-applied field and conflict preemption challenge to section 20.05(a)(1)(A) in *Roberts v. State*, No. 04-24-00485-CR, 2026 WL 290378, at \*5–9 (Tex. App.—San Antonio Feb. 4, 2026, no pet. h).

As such, while we will address the facts specific to Appellant’s case for his as-applied challenge, the legal principles discussed in *Roberts* guide our analysis here. -3- 04-24-00637-CR B. Analysis Appellant argues that federal law preempts section 20.05(a)(1)(A) as applied to his case because Congress completely ousted the States from regulating in the “field of noncitizen smuggling” and because Appellant’s prosecution conflicts with federal immigration laws and prosecutorial prerogatives.

As we stated in *Roberts*, “unlike the instances where courts have found state statutes to be field preempted, section 20.05(a)(1)(A) does not require prosecutors to prove a noncitizen’s illegal presence in the United States.” *Id.* at \*7.

Here, similarly, Appellant’s conviction did not turn on proof of the passengers’ immigration status. The evidence presented at trial focused on Appellant’s intent to conceal the individuals from all law enforcement and his intent to obtain a pecuniary benefit.

The State was not required to prove the passengers’ unlawful status or that Appellant knew his passengers’ actual immigration status. Therefore, because Appellant was prosecuted under a neutral statute, and his conduct was criminal regardless of the passengers’ immigration status, we hold that Appellant’s prosecution was not as-applied field preempted. See *Id.* at \*8; *Kansas v. Garcia*, 589 U.S. 191, 208–09 (2020); *State v. Flores*, 679 S.W.3d 232, 245 (Tex.

App.—San Antonio 2023, pet. ref’d). See also *Gutierrez v. State*, 721 S.W.3d 639, 655 (Tex. App.—Corpus Christi–Edinburg 2025, pet. ref’d) (holding section 20.05(a)(1)(A) was not as-applied field preempted where the evidence showed Appellant “was not convicted merely because of the citizenship status of the back seat passengers, but because she intended to conceal those individuals from law enforcement”).

As to conflict preemption, state anti-smuggling and harboring laws that target non-citizens may be preempted if they conflict with federal immigration law. See *Arizona v. United States*, 567 U.S. 387, 399 (2012) (describing conflict preemption as “cases where compliance with both -4- 04-24-00637-CR federal and state regulations is a physical impossibility” and “instances where the challenged law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”). “With an as-applied conflict preemption challenge, the application of the law must conflict with federal law’s comprehensive immigration scheme or with the federal

government’s discretion over immigration related prosecutions.” Roberts, 2026 WL 290378, at \*8 (citing Flores, 679 S.W.3d at 246–47).

However, evidence from Appellant’s trial does not show that his prosecution interfered with federal law or federal discretion over immigration-related prosecutions. Further, there is no evidence in the record to suggest that federal prosecutors wished to pursue federal charges against Appellant.

On this record, we hold that Appellant’s prosecution under section 20.05(a)(1)(A) was not preempted through conflict with federal law. See Roberts, 2026 WL 290378, at \*8; see also Kansas, 589 U.S. at 211 (“the mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption”); Gutierrez, 721 S.W.3d at 657 (citing Kansas in rejecting appellant’s as-applied conflict preemption argument regarding section 20.05(a)(1)(A)).

FIRST AMENDMENT Appellant, in his brief, argues section 20.05(a)(1)(A) facially violates the First Amendment to the United States Constitution. From our review, the arguments in this case are substantively the same as those in Roberts v. State, in which this Court rejected a First Amendment facial challenge and concluded that any unconstitutional applications of section 20.05(a)(1)(A) are not substantial in comparison to the constitutional ones.

2026 WL 290378, at \*2–4. Accordingly, for the reasons articulated in Roberts, we overrule Appellant’s First Amendment facial challenge. See id. -5- 04-24-00637-CR CONCLUSION We affirm the judgment of the trial court. Lori Massey Brissette, Justice DO NOT PUBLISH -6-