Nos. 12-1096, 12-1099, 12-2514, 12-2533

UNITED STATES COURT OF THE APPEALS
FOR THE FOURTH CIRCUIT

LOWCOUNTRY IMMIGRATION COALITION, ET AL.,

Plaintiffs - Appellees,
v.

NIKKI HALEY, IN HER OFFICIAL CAPACITY AS THE GOVERNOR OF SOUTH CAROLINA,
ALAN WILSON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL
OF THE STATE OF SOUTH CAROLINA,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT CHARLESTON

RESPONSE BRIEF OF APPELLEES LOWCOUNTRY IMMIGRATION COALITION, ET AL.,

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Counsel for Appellees

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

LOWCOUNTRY IMMIGRATION COALITION
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

CERTIFICATE OF SERVICE

****

I certify that on March 12, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ - Karen C. Tumlin
(signature)

March 12, 2013
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

MUJERES DE TRIUNFO
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

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(date)

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No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

NUEVOS CAMINOS
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

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/s/ - Karen C. Tumlin
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(date)

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

SOUTH CAROLINA VICTIM ASSISTANCE NETWORK
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

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/s/ - Karen C. Tumlin
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

SOUTH CAROLILNA HISPANIC LEADERSHIP COUNCIL
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

SERVICE EMPLOYEES INTERNATIONAL UNION
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

SOUTHERN REGIONAL JOINT BOARD OF WORKERS UNITED
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

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No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

JANE DOE, No. 1
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

CERTIFICATE OF SERVICE

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No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

JANE DOE, No. 2
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

CERTIFICATE OF SERVICE

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/s/ - Karen C. Tumlin
(signature)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

JOHN DOE, No. 1
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

CERTIFICATE OF SERVICE

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/s/ - Karen C. Tumlin
(signature)

March 12, 2013
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 12-1099 Caption: LOWCOUNTRY IMMIGRATION COALITION, et al., v. NIKKI HALEY, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

YAHAIRA BENET-SMITH
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

KELLER BARRON
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

JOHN MCKENZIE
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

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Counsel for: Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

SANDRA JONES
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

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Signature: /s/ - Karen C. Tumlin Date: March 12, 2013

Counsel for: Appellees

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JURISDICTIONAL STATEMENT

1. The district court properly had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 over Lowcountry-Appellees' ("Lowcountry Plaintiffs'") claims under the U.S. Constitution, as well as under 42 U.S.C. §§ 1981 and 1983.

2. Lowcountry Plaintiffs agree with State-Appellants ("South Carolina" or "the State") that this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Whether the district court properly found that the United States and Lowcountry Plaintiffs were likely to succeed on the merits of their challenges that Act 69 §§ 4, 5, and 6(B)(2) are preempted under federal law.

2. Whether federal courts are barred from considering Lowcountry Plaintiffs' Supremacy Clause challenge to §§ 4, 5, and 6(B)(2).

3. Whether the district court was correct to exercise its jurisdiction to issue the injunction in this case.

STATEMENT OF FACTS

On June 27, 2011, the South Carolina General Assembly passed Act 69, a comprehensive package of state criminal laws and procedures regulating immigration. Joint Appendix ("J.A.") at 63. Like similar legislation in Arizona, Alabama, Georgia, Indiana, and Utah, South Carolina's Act 69 sought to respond to the perceived failure of the federal government to secure the nation's borders by

criminalizing various aspects of the daily lives of unauthorized immigrants in the state, as well as the conduct of those who interact with them. *Id*. at 63-64. Both Lowcountry Plaintiffs and the United States challenged certain provisions of Act 69 as preempted by federal law. Lowcountry Plaintiffs raised additional constitutional challenges to Act 69, which are not at issue in this appeal. *Id*. at 93-96.

The United States District Court for the District of South Carolina entered a preliminary injunction against certain provisions of Act 69 on December 22, 2011, finding that Lowcountry Plaintiffs and the United States were likely to succeed in showing that numerous provisions of Act 69 are preempted by federal law, including: (1) § 4, which amended an existing state law crime related to harboring and transporting unauthorized individuals and created a new state law crime of "self-harboring" and "self-transporting"; (2) § 5, which created a South Carolina-specific alien registration penal scheme; (3) § 6(A), which required police to investigate immigration status during otherwise lawful stops; and (4) § 6(B)(2), which criminalized the display or possession of fraudulent immigration-related documents. J.A. at 1360-67. The State of South Carolina and its Governor (collectively, "South Carolina" or "the State") appealed the district court's order to this Court.

On June 25, 2012, the Supreme Court decided *Arizona v. United States*, 132 S. Ct. 2492 (2012), which examined the constitutionality of Arizona's attempt to enact a state immigration enforcement scheme. Arizona's law, S.B. 1070, contained several provisions analogous, and in some cases virtually identical, to provisions in Act 69. Applying field and conflict preemption principles, the Supreme Court struck down three of the four challenged provisions of S.B. 1070, including provisions that would have penalized individuals for failing to carry their alien registration documents, made it a crime to work without authorization, and allowed for the warrantless arrest of individuals suspected of being in the country without authorization. *Id*. at 2503-07. The fourth provision, which the Supreme Court declined to preliminarily enjoin on preemption grounds in a facial challenge, requires state and local officers to verify the immigration status of those individuals who are otherwise lawfully stopped and for whom there is reasonable suspicion to believe they are in the United States without authorization. *Id*. at 2510.

After the Supreme Court's ruling in *Arizona*, the district court entered an indicative ruling on July 9, 2012, noting that the decision raised "substantial issues" regarding the district court's earlier ruling. *Id*. at 1645. This Court granted a limited remand on August 16, 2012, to allow the district court to reexamine its preliminary injunction in light of the *Arizona* decision. J.A. at 1388-89. On

remand from this Court, on November 15, 2012, the district court largely reaffirmed its earlier preliminary injunction ruling pursuant to *Arizona*, but allowed portions of § 6 to take effect. J.A. at 1614-29. The State now appeals the district court's November 15, 2012 order.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion by preliminarily enjoining §§ 4, 5, and 6(B)(2) of Act 69. The district court twice ruled that South Carolina's attempt to create its own immigration enforcement scheme is unconstitutional. After the Supreme Court's decision in *Arizona*, the district court reexamined and largely reaffirmed its previous grant of a preliminary injunction. *See* J.A. at 1629; *see also Arizona,* 132 S. Ct. 2492. In particular, the district court reasoned that independent state immigration crimes, like those created by §§ 4, 5, and 6(B)(2), are both field and conflict preempted under the Supreme Court's reasoning in *Arizona.* J.A. at 1617-1622. The district court's decision to enjoin these provisions was correct in all respects, and the State's arguments to the contrary are unavailing.

Like the state law immigration crimes addressed by the Supreme Court in *Arizona*, Act 69's §§ 4, 5, and 6(B)(2) are both field and conflict preempted. As demonstrated below, federal immigration laws comprehensively regulate the underlying conduct the state of South Carolina seeks to criminalize—the

harboring, transporting, and inducement of unauthorized immigrants; requirements placed on non-citizens to register with the federal government; and the use or possession of fraudulent registration documents. As a result, federal regulation in these areas leaves no room for state regulation. Act 69 also conflicts with and undermines federal immigration law in numerous ways, including by allowing the State to criminally prosecute immigrants the federal government has determined not to prosecute, along with those who assist them.

Indeed, state harboring and alien registration laws of this sort are so clearly preempted that federal courts across the country have uniformly enjoined them, both before *Arizona* and since. *See, e.g.*, *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1335-36 (N.D. Ga. 2011), *aff'd*, 691 F.3d 1250, 1263-67 (11th Cir. 2012) ("*GLAHR*"); *United States v. Alabama*, 813 F. Supp. 2d 1282, 1334-36 (N.D. Ala. 2011), *aff'd*, 691 F.3d 1269, 1285-88 (11th Cir. 2012), *petition for cert. filed*, (U.S. Jan. 15, 2013) (No. 12-884).

The State devotes the majority of its brief on appeal not to the merits, but to ancillary arguments that are unsupported by any precedent. Even though this Court unquestionably has jurisdiction to hear Lowcountry Plaintiffs' Supremacy Clause claims, *see, e.g.*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (addressing the merits of private plaintiffs' immigration preemption claims in a challenge to an Arizona statute), the State first argues that the district court abused

its discretion in entering a preliminary injunction against sections of Act 69 because there is no federal statutory cause of action explicitly authorizing Lowcountry Plaintiffs to bring immigration preemption claims against the State. *See* Appellants' Opening Brief ("State Br.") at 11-22. The State's argument is unsupported by even the *dissenting* opinion it cites in its opening brief, and was swiftly and rightly rejected by the district court.

The State then proceeds to argue that a hitherto-unappreciated facet of the Supreme Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971), establishes that the district court should not have considered the Lowcountry Plaintiffs' *or* the United States' preemption claims in this case, even though abstention is unquestionably *not* required under *Younger* and even though the Supreme Court decided similar claims in *United States v. Arizona* just last term. *See* State Br. at 22-37. The Supreme Court has insisted that federal courts have a virtually unflagging obligation to exercise their jurisdiction, and *Younger* represents only a narrow exception to this rule—not, as the State contends, a general presumption against entertaining challenges to state criminal laws. The State's argument would represent a massive and unjustifiable expansion of *Younger* and would require this Court to sweep aside much of the Supreme Court's jurisprudence explaining and applying both *Younger* and *Ex Parte Young*, 209 U.S. 123 (1908).

Accordingly, the Court should affirm the district court's preliminary injunction order.

ARGUMENT

I. Standard Of Review

The Court reviews for abuse of discretion the district court's grant of a preliminary injunction; factual conclusions are reviewed for clear error and purely legal matters are reviewed *de novo*.[1] *See E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004). The Court also reviews for abuse of discretion the district court's decision to exercise jurisdiction or to abstain from hearing a case. *See Life Partners, Inc. v. Morrison*, 484 F.3d 284, 301 (4th Cir. 2007).

II. Sections 4, 5, And 6(B)(2) Of Act 69 Are Preempted

The Supreme Court's decision in *Arizona* reaffirms the federal government's preeminent role in immigration matters. *See generally Arizona*, 132 S. Ct. 2492; *see also id*. at 2498 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Hines v. Davidowitz*, 312 U.S. 52, 64-66 (1941); *Graham v. Richardson*, 403 U.S. 365, 377-80 (1971); *Takahashi v. Fish & Game Comm'n*,

[1] Defendants contend that this Court should review the district court's decision to issue a preliminary injunction *de novo*. *See* State Br. at 11. As Lowcountry Plaintiffs explain, however, that is true only for purely legal issues, for example, the likelihood of Plaintiffs' success on the merits of their preemption claim.

334 U.S. 410, 418-20 (1948); *Truax v. Raich*, 239 U.S. 33, 42 (1915). Pursuant to that role, Congress enacted the Immigration and Nationality Act ("INA"), a "comprehensive federal statutory scheme for regulation of immigration and naturalization." *Whiting*, 131 S. Ct. at 1973 (quoting *DeCanas v. Bica*, 424 U.S. 351, 353 (1976)).

This comprehensive federal scheme is complicated, finely balanced, and multifaceted. *Arizona*, 132 S. Ct. at 2499 ("Federal governance of immigration and alien status is extensive and complex."). It reflects numerous policy goals including, for example, protecting non-citizens "from the possibility of inquisitorial practices and police surveillance." *Hines*, 312 U.S. at 74. Discretionary decisions by federal officials play an important role in this federal statutory scheme, and in "ensur[ing] that enforcement policies are consistent with this Nation's foreign policy." *Arizona*, 132 S. Ct. at 2499. Federal immigration law also includes numerous specialized regulatory regimes, including: (1) the alien registration system that Congress first established in 1940, *see Hines*, 312 U.S. at 74; 8 U.S.C. §§ 1301-06; (2) provisions specifically penalizing various forms of interaction with or assistance to unauthorized immigrants, including transporting, harboring, and inducement, *see* 8 U.S.C. § 1324; *see also* 8 U.S.C. §§ 1323, 1327-28; and (3) provisions criminalizing the use of fraudulent documents for immigration purposes, *see, e.g.*, 8 U.S.C. § 1306(d); 18 U.S.C. §§ 1028, 1424-26,

1542-44, 1546. As described below, the State's attempt to legislate in these areas through Act 69 intrudes upon fields fully occupied by Congress and conflicts with carefully balanced policy decisions, which only Congress has the authority to make.

In this case, the district court correctly applied these principles, finding that Act 69 §§ 4, 5, and 6(B)(2) are preempted by federal law.

A. Section 4 Is Preempted

Defendants provide no valid arguments as to why the district court's decision to enjoin § 4 should be reversed. The district court, like every other federal court that has addressed similar state law provisions, correctly held this provision preempted. Section 4 attempts to establish state immigration crimes for intentionally transporting, concealing, harboring, or sheltering a person who is unlawfully present. § 4(B) & (D) (codified at S.C. Code § 16-9-460(B), (D)). Section 4 also makes it a criminal offense for an unlawfully present person to allow himself or herself to be "transported or moved," or to be harbored or sheltered, to avoid apprehension or detection. § 4(A) & (C) (codified at § 16-9-460(A), (C)). Applying the preemption principles set out by the Supreme Court—most recently in *Arizona*—to the structure and content of federal immigration law, including its comprehensive treatment of harboring and similar conduct as well as

the limited enforcement role specifically designated for state and local law enforcement, compels the district court's conclusion that § 4 is preempted.

The district court's injunction against § 4 is simply one in a unanimous line of federal rulings enjoining state harboring and transporting laws modeled loosely after the federal harboring provision. In Alabama and Georgia, federal district courts found the challenged state laws likely preempted even before the Supreme Court's decision in *Arizona*. *See Alabama*, 813 F. Supp. 2d at 1335-36; *GLAHR*, 793 F. Supp. 2d at 1335-36.[2] After *Arizona*, the Eleventh Circuit affirmed the Alabama and Georgia district court decisions in unanimous panel decisions, and denied the states' petitions for rehearing and rehearing en banc. *Alabama*, 691 F.3d at 1285-88; *GLAHR*, 691 F.3d at 1263-67. And the district court in Arizona, revisiting the issue following the Supreme Court's decision, found that state's harboring and transporting provision preempted as well. J.A. at 1415-16 (*Valle del Sol v. Whiting*, No. CV 10-1061, slip op. at 8-9 (D. Ariz. Sept. 5, 2012), *appeal docketed*, No. 12-17152 (9th Cir. Sept. 25, 2012)). While these cases are not binding on this Court, it is striking that *none* of these decisions offers any support

[2] In addition, the district court in Utah issued a temporary restraining order on May 11, 2011 against a similar law in Utah. *Utah Coal. of La Raza v. Herbert*, No. 11-401 (D. Utah May 11, 2011). The law remains restrained while the district court considers plaintiffs' motion for a preliminary injunction.

for the State's position on appeal.[3] It was clear before *Arizona*, and it is even more clear after, that § 4 is preempted.

i. Section 4 Is Field Preempted

The district court correctly concluded that § 4 is field preempted. J.A. at 1619. Field preemption occurs when federal law establishes a "framework of regulation so pervasive that Congress left no room for the States to supplement it *or* where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 132 S. Ct. at 2501 (emphasis added; quotation and alteration marks omitted). Both of these tests are satisfied here.

As the Eleventh Circuit observed, "[t]he Supreme Court's recent decision in *Arizona v. United States* provides an instructive analogy" for consideration of state harboring laws. *GLAHR*, 691 F.3d at 1264. When the Supreme Court held that the current version of the federal alien registration system fully occupies the field in *Arizona*, and when it held that the earlier version of the alien registration system

[3] The State looks to the Arizona district court's pre-*Arizona* decision for support because that court initially refused to enjoin similar but, as the State concedes, much narrower, harboring provisions. State Br. at 40. The district court only declined to enjoin these provisions based on a much narrower preemption challenge. But regardless, the same Arizona district court subsequently enjoined Arizona's harboring provision as both field and conflict preempted, relying heavily on the Eleventh Circuit's rulings in *GLAHR* and *Alabama*, which in turn based its analysis on *Arizona*. J.A. at 1415-16 (*Valle del Sol*, slip op. at 8-9). There is *no* court, therefore, that currently agrees with the arguments that the State makes here.

occupied the field in *Hines*, it did so because "[t]he federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. [The federal system] was designed as a harmonious whole." *Arizona*, 132 S. Ct. at 2502 (quotation and alteration marks omitted).

The district court properly held that § 4 "presents a classic case of field preemption because Congress . . . adopted a scheme of federal regulation regarding the harboring and transporting of unlawfully present persons so pervasive that it left no room in this area for the state to supplement it." J.A. at 1617. The federal laws regulating harboring and related conduct provide as complete a "set of standards" as do the alien registration provisions, and are similarly intended to form "a harmonious whole." *See Arizona*, 132 S. Ct. at 2502. Criminal sanctions directed at those who assist unauthorized immigrants in circumventing immigration laws have formed an integral part of the federal immigration statutes for over a century. *See United States v. Ozcelik*, 527 F.3d 88, 98-99 (3d Cir. 2008) (tracing history of 8 U.S.C. § 1324, including enactment of original version in 1907); *United States v. Sanchez-Vargas*, 878 F.2d 1163, 1168-70 (9th Cir. 1989) (same). Over that period, Congress has repeatedly adjusted and recalibrated the standards and penalties applicable to harboring and similar conduct, while federal courts further interpreted and applied the statutory language. *See, e.g.*, *United*

States v. Barajas-Montoya, 223 Fed. App'x. 293, 295 (4th Cir. 2007) (interpreting "reckless disregard" to include deliberate indifference); *United States v. Robinson*, No. 12-CR-00035, 2012 WL 6212608 (W.D. Va. Dec. 13, 2012) (discussing what evidence was sufficient to demonstrate concealing, harboring, or shielding an undocumented immigrant in order to incur criminal liability under § 1324).

There are now four statutes addressing the provision of assistance to individuals who lack authorization to come to or remain in the United States: 8 U.S.C. §§ 1323 (unlawfully bringing aliens into the United States), 1324 (bringing in or harboring certain aliens), 1327 (assisting certain inadmissible aliens to enter the country), and 1328 (importation of aliens for immoral purposes). *See also GLAHR*, 691 F.3d at 1264 (describing § 1324 as part of "the larger context of federal statutes criminalizing the acts undertaken by [unauthorized] aliens and those who assist them in coming to, or remaining within, the United States."); J.A. at 1415-16 (*Valle del Sol*, slip op. at 8-9) ("Federal immigration law creates a comprehensive system to regulate the transportation, concealment, movement, or harboring of unlawfully present people in the United States.") (citing 8 U.S.C. §§ 1324, 1329 and *GLAHR*, 691 F.3d at 1264).

Defendants state erroneously that the federal harboring statutes do not provide a full set of standards and "*simply* impose[] criminal penalties on the movement or concealment of the unauthorized alien." State Br. at 42-43 (emphasis

added). This is just not the case. Within this set of provisions, the federal harboring statute, 8 U.S.C. § 1324, provides "a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens." *GLAHR*, 691 F.3d at 1261; *accord Alabama*, 691 F.3d at 1286-87. Section 1324 defines prohibited activities, 8 U.S.C. § 1324(a)(1)(A)(i)-(v), (a)(1)(C), (a)(2), (a)(3)(A)-(B); sets forth a detailed set of graduated punishments for violations, § 1324(a)(1)(B)(i)-(iv), (a)(2)(A)-(B), (a)(3)(A), (a)(4), including asset forfeiture, § 1324(b); and prescribes special evidentiary rules and public notice requirements as part of its scheme to address harboring, § 1324(b)(3), (d), (e). Even standing alone—and still more when considered in context with §§ 1323, 1327, and 1328—§ 1324 is easily as comprehensive as the alien registration statutes at issue in *Arizona* and *Hines*. *See GLAHR*, 691 F.3d at 1264 ("Like the federal registration scheme addressed in *Arizona*, Congress has provided a 'full set of standards' to govern the unlawful transport and movement of aliens. The INA comprehensively addresses criminal penalties for these actions undertaken within the borders of the United States, and a state's attempt to intrude into this area is prohibited because Congress has adopted a calibrated framework within the INA to address this issue.") (internal citation omitted). Thus, the district court correctly found that § 4 would "infringe upon a comprehensive federal statutory scheme and would interfere with the federal government's supremacy in the realm of

immigration." J.A. at 1619.

Moreover, in § 1324(c), Congress spoke specifically to the question of state and local authority to regulate and punish harboring. Congress authorized state and local "officers whose duty it is to enforce criminal laws" to "make . . . arrests for a violation of any provision of this section." 8 U.S.C. § 1324(c); *see Arizona*, 132 S. Ct. at 2506 (noting that § 1324(c) sets out one of four limited circumstances in which state and local authorities may lawfully perform immigration enforcement duties). Congress's decision to provide this specific and limited state authority indicates that states have no inherent authority to act in this area because Congress has occupied the entire field and delegated only this narrow role to state actors. *See GLAHR*, 691 F.3d at 1264 ("Rather than authorizing states to prosecute for these crimes, Congress chose to allow state officials to arrest . . . subject to federal prosecution in federal court. . . . [T]he inference from these enactments is that the role of the states is limited to arrest for violations of federal law.").

Moreover, as the district court previously found, the self-transporting and self-harboring crimes of § 4 effectively criminalize unlawful presence, whereas under federal law unlawful presence is only a cause for civil sanctions. J.A. at 1366 (*United States v. South Carolina*, 840 F. Supp. 2d 898, 919 (D.S.C. 2011) modified in part, No. CV 11-2958, 2012 WL 5897321 (D.S.C. Nov. 15, 2012)) ("'the pre-emptive inference can be drawn—not from federal inaction alone, but

from inaction joined by action") (quoting *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)).

The State's attempted reliance on *DeCanas*, 424 U.S. at 355, *see* State Br. at 41-42, is unavailing. Unlike the strong federal interest in regulating immigration-related harboring, *DeCanas* emphasized that unauthorized employment was only a "peripheral concern" of the federal immigration law at that time, 424 U.S. at 360, and the Supreme Court's decision ultimately turned on the fact that Congress actually intended for states to be allowed to legislate in that area. *See Toll*, 458 U.S. at 13 n.18 (explaining *DeCanas*' reasoning). As noted by the Eleventh Circuit, "[i]n enacting these [harboring] 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 the breadth of these laws illustrates an overwhelmingly dominant federal interest in the field." *GLAHR*, 691 F.3d at 1264 (quoting *DeCanas*, 424 U.S. at 360–61). South Carolina's attempts to ignore *Arizona* and infer a broad anti-field-preemption principle from *DeCanas* is meritless, and is undermined by *DeCanas* itself.

In sum, it is abundantly clear that Congress has occupied the harboring and transporting field. As a result, "even complementary state regulation is impermissible." *Arizona*, 132 S. Ct. at 2502; *see also id.* ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even

if it is parallel to federal standards."); *accord GLAHR*, 691 F.3d at 1266 ("[T]he [Georgia] criminal acts of harboring and transporting unlawfully present aliens constitute an impermissible 'complement' to the INA that is inconsistent with Congress's objective of creating a comprehensive scheme governing the movement of aliens within the United States.") (citing *Hines*, 312 U.S. at 66-7); *Alabama*, 691 F.3d at 1287 ("Alabama is prohibited from enacting concurrent state legislation in this field of federal concern."); J.A. at 1416 (*Valle del Sol*, No. CV 10-1061, slip op.) (federal government's dominant interest "leav[es] no room for state legislation in the field").

South Carolina also argues that 8 U.S.C. § 1329, which grants jurisdiction to the district courts over all civil and criminal cases brought by the United States arising under Title II of the INA, leaves room for concurrent state prosecutorial authority of these violations because it limits prosecution of violations of the federal law to federal prosecutors when in federal court only, leaving untouched "South Carolina's enforcement of its own law," and not divesting *state courts* of concurrent authority to adjudicate violations of the federal law. State Br. at 43-44. Nothing could be further from the truth. First, "[e]ven if a State may make violation of federal law a crime in some instances, it cannot do so in a field . . . that has been occupied by federal law." *Arizona*, 132 S. Ct. at 2502; *GLAHR*, 691 F.3d at 1264; *Alabama*, 691 F.3d at 1286. Second, the very specific, limited role that

Congress expressly provided for state and local officers—to make *arrests only* for violations of the federal harboring statute—demonstrates that Congress specifically considered the role of both the states and the federal government in this area. 8 U.S.C. §1324(c). In doing so, Congress did not provide for and did not intend any concurrent enforcement authority over these crimes.

Finally, the State argues that the Court should apply a presumption against preemption in its analysis. State Br. at 41. This argument flatly contradicts controlling precedent: "an 'assumption' of nonpre-emption 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, 108 (2000). Therefore, while the State has a number of state criminal laws upon which it can rely to protect the public safety of its residents, it cannot create parallel state laws in an attempt to wrest control over the comprehensive federal scheme governing harboring and transporting for its own ends. As was the case with the state registration law overturned in *Arizona*, were § 4 to take effect, "the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, 132 S. Ct. at 2503. Like *Arizona*, this case does not turn on presumptions. Section 4 is clearly field preempted.

ii. Section 4 Is Conflict Preempted

The district court also correctly held that § 4 was conflict preempted. Conflict preemption exists where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and is not avoided by simply having the same "ultimate goal" as federal law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 103 (1992) (citations and quotations omitted). Section 4 is conflict preempted because "[p]ermitting the State to impose its own penalties for the federal offenses here would create conflict with the careful framework Congress adopted." J.A. at 1617-18 (citing *Arizona*, 132 S. Ct. at 2502). Moreover, South Carolina's attempt to create state law based penalties where no federal corollary exists through §§ 4(A) and (C)'s creation of the new "self-harboring" provisions "*necessarily* conflict[s] with federal policy judgments relating to removability, and [is] therefore preempted by federal law." J.A. at 1620 (emphasis added).

The crux of the State's arguments against conflict preemption is that South Carolina's provisions simply "mirror federal objectives and further legitimate state goals." State Br. at 45-46 (citing *Plyler v. Doe*, 457 U.S. 202, 225 (1982)). The district court properly rejected these arguments, finding that § 4 conflicts with federal law in many of the same ways as the provisions at issue in *Arizona*. In *Arizona*, the Supreme Court found two sections of S.B. 1070 conflict preempted:

(1) S.B. 1070 § 6, which attempted to expand the warrantless arrest authority of state and local officers to permit arrests for civil immigration violations, and (2) S.B. 1070 § 5(C), which criminalized work by unauthorized workers. *Arizona*, 132 S. Ct. at 2503-07. Act 69 § 4 similarly conflicts with federal law.

First, § 4 allows state and local authorities to engage in immigration enforcement activities that exceed the specific and limited role envisioned by Congress. In finding S.B. 1070's § 6 conflict preempted, the Supreme Court in *Arizona* explained that the INA "specifies limited circumstances in which state officers may perform the functions of an immigration officer," which include the "authority to *arrest*" for violations of the federal harboring statute. *Id*. at 2506 (citing 8 U.S.C. § 1324(c)); *See also* J.A. at 1360 (*South Carolina*, 840 F. Supp. 2d at 917). Like S.B. 1070 § 6, Act 69 § 4 exceeds the State's limited authority by placing in state and local hands, decisions about whether to prosecute individuals for transporting and harboring offenses, and the resulting penalties. By exceeding the authority delegated by Congress, § 4 conflicts with Congress' scheme.

Second, § 4 of Act 69 "conflict[s] with the careful framework Congress adopted" by giving South Carolina "the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal priorities." *Arizona*, 132 S. Ct. at 2502-03 (citations and quotations

omitted). Contrary to the State's conclusory statement that "no conflict exists as to enforcement," State Br. at 45, the mere fact that § 4 authorizes a separate state scheme for enforcement—subject to the discretion of state officials only and unbeholden to federal policies and priorities—automatically creates a clear and insurmountable conflict. *See Arizona*, 132 S. Ct. at 2502-03. This conflict exists regardless of the State's proffered goal. Thus, the district court correctly concluded that § 4 conflicts with federal law. *See* J.A. at 1619-20; s*ee also GLAHR*, 691 F.3d at 1266 ("interpretation of [state crimes] . . . by the state courts and enforcement by state prosecutors unconstrained by federal law threaten[s] the uniform application of the INA"); *Gade*, 505 U.S. at 98, 103 (conflict preemption exists where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" regardless of whether it shares the same "ultimate goal").

Third, Act 69 § 4 presents an additional conflict because it prohibits a different and broader range of conduct than is regulated by federal law. As the Eleventh Circuit pointed out in upholding the injunction against a similar provision in Georgia, conflict preemption "is exacerbated by the inconsistency between [the state statute] . . . and provisions of federal law." *GLAHR*, 691 F.3d at 1266; *see also Arizona*, 132 S. Ct. at 2503 (holding that S.B. 1070 § 3 is conflict preempted because of the "inconsistency between § 3 and federal law with respect to

penalties"). Section 4 is inconsistent with federal law in a number of ways. First, it fails to provide exceptions for conduct that federal law has historically exempted, including, for example, acts undertaken by family members. *Compare* 8 U.S.C. §1227(a)(1)(E)(iii) *with* Act 69 § 4(G)-(H). Moreover, contrary to the State's blanket argument that "[n]o conflict exists as to the religious exemption," *see* State Br. at 45, the State's safe harbor provision differs significantly from the federal corollary. *Compare* Act 69 § 4(G) *with* 8 U.S.C. § 1324(a)(1)(C). The district court was correct, therefore, to find that § 4 "creat[es] the potential scenario where a person acting lawfully under the federal harboring statute could be prosecuted by state officials for conduct expressly excepted from federal criminal law." J.A. at 1361 (*South Carolina*, 840 F. Supp. 2d at 916).

Further, § 4 criminalizes conduct that Congress explicitly intended not to criminalize. By criminalizing the acts of "self-harboring" and "self-transporting," § 4(A) and (C) essentially "criminalize removable aliens' presence in the state, and do so despite the Supreme Court's affirmation in *Arizona* that '[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." J.A. at 1620 (quoting *Arizona*, 132 S. Ct. at 2505). The responsibility for regulating unlawful presence is constitutionally reserved to the federal government. *See DeCanas*, 424 U.S. at 354-55. And the federal government has elected *not* to criminalize mere unlawful presence alone or ordinary activities by unlawfully

present individuals. It is difficult to imagine what sort of conduct an individual who is unlawfully present could engage in on a daily basis without violating § 4. *See* J.A. at 1366 n.6 ("It is hard to imagine that an unlawfully present person would not necessarily be required to move or shelter himself as incident to living in a particular location or community.") Simply allowing yourself to be driven to school or merely renting or living in an apartment could fit within the statutory prohibition on sheltering oneself from detection, despite the fact that Congress has elected *not* to criminalize such acts. J.A. at 1366-67 (*South Carolina*, 840 F. Supp. 2d at 925). By criminalizing self-transporting and self-harboring, South Carolina has for all intents and purposes required those without proof of lawful status to leave the state or face criminal liability for engaging in routine daily activities.

The State's assertion, unsupported by any explanation, that § 4 requires more than "simple presence" to trigger enforcement does not relieve § 4 of its inherent conflict with federal law based on the section's plain text. State Br. at 46; *see Alabama*, 691 F.3d at 1288 (in striking down a similar "self-harboring provision as conflict preempted by 8 U.S.C. §1324(a) found that "by its text, appears to prohibit an unlawfully present alien from even agreeing to be a passenger in a vehicle"); *see also United States v. Hernandez-Rodriguez*, 975 F.2d 622, 626 (9th Cir. 1992) (holding in a criminal prosecution under 8 U.S.C. § 1324

that the passengers cannot be considered "participants in the offense" because they are not criminally responsible under the statute).

The district court properly based its decision to find § 4(A) and (C) preempted on the Supreme Court's reasoning in striking Arizona's attempt to criminalize unauthorized work: because Congress has chosen to treat such conduct as a civil matter. Thus the district court held that "[t]he *Arizona* decision only served to underscore that, in a realm where Congress has enacted a comprehensive framework for addressing a national issue and judged that a particular activity is best enforced as a civil matter, any effort by a State to criminalize that activity creates 'a conflict in the method of enforcement' that stands as 'an obstacle to the regulatory scheme Congress chose' and is, therefore, 'preempted by federal law.'" J.A. at 1620 (quoting *Arizona*, 132 S. Ct. at 2505).

Defendants argue that § 4 is not conflict preempted because "compliance with both federal and state law is not a physical impossibility," and thus does not stand as an obstacle to congressional intent. State Br. at 45. *Arizona* rejected this theory—that a state law "can survive preemption because the provision has the same aim as federal law and adopts its substantive standard"—finding it not only inconsistent with field preemption, but also "unpersuasive on its own terms." 132 S. Ct. at 2502; *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (rejecting the argument "that there is no real conflict between the statutes

because they share the same goals and because some companies may comply with both sets of restrictions").

In sum, § 4 imposes a significantly different and more expansive set of rules for interacting with individuals who may lack authorization than exists under the federal immigration law, and creates a new threat of state criminal prosecution for those suspected by authorities of being unauthorized. It goes far beyond the limited role carved out by Congress for state and local officers in the enforcement of harboring and transporting laws and, therefore, conflicts with federal law for many of the same reasons identified by the Supreme Court in finding Arizona's § 6 conflict preempted. *Arizona*, 132 S. Ct. at 2506. Section 4 also impermissibly usurps federal discretion and congressional choices regarding what immigration-related activity is to be criminalized and sanctioned, and the way in which the enforcement of those sanctions should be carried out. For all of these reasons, § 4 is conflict preempted.[4]

[4] The State also contends that the Lowcountry Plaintiffs have failed to establish that § 4 is unconstitutional as a facial matter under either of the Supreme Court's standards for facial challenges. State Br. at 47. First, the State contends that Plaintiffs cannot survive the "no set of circumstances" test set forth in *United States v. Salerno*, 481 U.S. 739 (1987). *Id.* The State also asserts that even if the Supreme Court's alternative formulation of whether the statute has "a plainly legitimate sweep" applies, Plaintiffs cannot satisfy it. *Id.* These arguments fail on all accounts. As an initial matter, the Supreme Court has not applied *Salerno* to preemption challenges, and indeed the Court addressed the merits of a preemption challenge without applying the "no set of circumstances" test just last term in

B. Section 5 Is Preempted

The State concedes, as it must, that Act 69 § 5, which makes failure to carry a certificate of alien registration a state misdemeanor, is virtually indistinguishable from § 3 of Arizona's S.B. 1070, which *Arizona* held preempted. 132 S. Ct. at 2503. Thus, the district court was correct in holding that "the Supreme Court's unequivocal statement that alien registration is field preempted by federal law" is binding precedent in support of its preliminary injunction against § 5, and the State does not, and cannot, argue otherwise.

C. Section 6(B)(2) Is Preempted

The district court correctly concluded that § 6(B)(2) is both field and conflict preempted. In arguing that the district court erred in enjoining § 6(B)(2), the State contends that § 6(B)(2) is not preempted for two reasons: because it addresses traditional state interests such as fraud, and because there is a presumption against preemption. Both arguments fail.

Arizona. 132 S. Ct. 2492. Similarly, the Supreme Court did not apply *Salerno* in several other recent preemption challenges including *Whiting*, 131 S. Ct. 1968, *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003), and *Crosby*, 530 U.S. 363. Moreover, as explained above, the challenged section of South Carolina's law does not have a plainly legitimate sweep. And there are no set of circumstances in which a preempted state law could validly apply.

i. Section 6(B)(2) Is Field Preempted

As with §§ 4 and 5 of Act 69, § 6(B)(2) is field preempted because federal criminal law comprehensively governs the field in which the State seeks to regulate—the possession or use of fraudulent documents for the purpose of demonstrating lawful immigration status—leaving no room for South Carolina to supplement it. *See, e.g.*, 8 U.S.C. § 1306(d) (false alien registration cards); § 1324(c) (penalties for document fraud); 18 U.S.C. § 1424-25 (false papers in naturalization proceedings); § 1028 (production, possession, or use of false identification documents); § 1426 (false naturalization, citizenship, or alien registration papers); § 1542-43 (forgery or false use of passport); § 1544 (misuse of passport); § 1546 (fraud and misuse of visas); § 911 (false claim to citizenship); *see also* J.A. at 200 (Pls.' Mot. for Prelim. Inj. at 36, n.30) (describing these and other federal statutory provisions concerning immigration document fraud). The breadth of this scheme makes clear that Congress intended the federal government to have sole authority in enforcing criminal provisions related to the possession and use of fraudulent immigration documents, particularly with respect to the use of such documents to commit other immigration law-related infractions. *See Arizona*, 132 S. Ct. at 2503; *Hines*, 312 U.S. at 74.

South Carolina unconvincingly attempts to distinguish § 6(B)(2) from federal statutes regulating this area by asserting that this provision's "direct effect

is on fraud, and Congress certainly has not occupied the field of fraud." *See* State Br. at 50-51. Likewise, the State's argument that this statute is not preempted because it also applies to the use of non-immigration based documents is similarly off base. Section § 6(B)(2)'s sole purpose is to regulate fraud *in the immigration context*, an area of paramount federal concern and one that Congress has comprehensively regulated. The State ignores the plain language of § 6(B)(2), which criminalizes the use or possession of a fraudulent document *only* when offered as "proof of the person's lawful presence in the United States." *Id.* (codified at S.C. Code § 17-13-170(B)(2)). The State's attempt to invoke a presumption against preemption by characterizing § 6(B)(2) as addressing only "ordinary fraud" and not "stray[ing] into the field of registration," State Br. at 50, fails because such a presumption is not triggered in an area of dominant federal concern, as is the case here. *See Locke*, 529 U.S. at 108. South Carolina is not simply regulating the use of false documents generally through § 6(B)(2), which it could do under traditional state powers, but instead, by its plain text § 6(B)(2) focuses only on fraud in the context of federal immigration regulation, an area where the states have no role. The comprehensive federal scheme regulating the use and possession of such fraudulent documents for immigration purposes compels the conclusion that § 6(B)(2) is field preempted.

ii. Section 6(B)(2) Is Conflict Preempted

Similar to §§ 4 and 5, § 6(B)(2) is also conflict preempted because it creates a parallel state enforcement system governing the area of immigration-related document fraud. *See Arizona*, 132 S. Ct. at 2503. By infringing on federal criminal immigration statutes and creating different penalties for state agents to charge and prosecute through the state criminal system, § 6(B)(2) conflicts with an area of exclusive federal control and, as such, is preempted. *See supra* Part II.C.i.

First, South Carolina would make independent decisions to prosecute individuals for violating § 6(B)(2), thereby infringing on the federal government's discretion regarding whether to pursue prosecution under the federal provisions.

Moreover, § 6(B)(2) creates "an inconsistency between [state law] and federal law with respect to penalties" and "[t]his state framework of sanctions creates a conflict with the plan Congress put in place." *Arizona*, 132 S. Ct. at 2503. South Carolina creates new state criminal penalties and fines for possessing or using false immigration documents not contemplated by Congress. *See* §6(B)(2)(a) (first offense is a misdemeanor carrying a fine of up to $100 or imprisonment of "not more than thirty days"); and §6(B)(2)(b) (subsequent offenses are a felony carrying a fine of up to $500 or imprisonment of "not more than five years."). And, these South Carolina-specific penalties are inconsistent with the analogous federal penalties. *Compare, e.g.*, §6(B)(2)(a) (imposing fine of

up to $100 or 30 days' imprisonment for first offense of using false identification) *with* 18 U.S.C. § 1546(a) (imposing imprisonment of up to 10 years for first offense in absence of aggravating circumstances). As a result, the South Carolina scheme "undermines the congressional calibration of force." *Crosby*, 530 U.S. at 380.

For the above reasons, the district court did not abuse its discretion by enjoining § 6(B)(2) upon finding that Plaintiffs were likely to succeed on their claim that this provision is both field and conflict preempted.

III. The District Court Correctly Found That The Plaintiffs Would Face Irreparable Harm In The Absence Of An Injunction And That The Balance Of Equities Tips In Plaintiffs' Favor

The State does not directly challenge the district court's finding that the Plaintiffs would suffer irreparable harm, and that the balance of equities tips in their favor, should the challenged sections of Act 69 take effect. Rather, the State argues conditionally that *if* "Section 4 is neither field nor conflict preempted, no irreparable harm can exist," *see* State Br. at 48-49, and the State does not address these factors for §§ 5 or 6(B)(2) at all. As detailed above, § 4 is preempted, defeating the State's only argument. Furthermore, the district court acted well within its discretion in finding that irreparable harm would result from the enforcement of §§ 4, 5, and 6(B)(2). J.A. at 1376-77 (840 F. Supp. 2d at 925-27). It found that due to inconsistencies between the federal harboring statute and § 4 of

Act 69, the Plaintiffs faced a "real risk" of state prosecution for conduct that would be lawful under federal law. *Id.* at 1377. This finding was not an abuse of discretion, and should not be disturbed on appeal. *See Child Evangelism Fellowship of Maryland, Inc. v. Montgomery Cnty. Pub. Sch.*, 373 F.3d 589, 593 (4th Cir. 2004)*; see also GLAHR*, 691 F.3d at 1269 (affirming district court's finding of irreparable harm where "plaintiffs are under the threat of state prosecution for crimes that conflict with federal law.").

In addition, the State claims that the injunction should not have issued because Lowcountry Plaintiffs could raise these constitutional claims as defenses in state court proceedings. *See* State Br. at 24-26. This argument must fail. The Supreme Court has long held that while state courts "are fully competent to adjudicate constitutional claims"—which compels federal courts generally to abstain from intervention in ongoing state criminal proceedings— "[i]n the absence of such a proceeding . . . a plaintiff may challenge the constitutionality of the state statute in federal court, assuming he can satisfy the requirements for federal jurisdiction." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975). As the Supreme Court has noted, "a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming

enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

Finally, to the extent that the State argues that there is a "heightened standard" for the issuance of a preliminary injunction even in the absence of a pending state criminal proceeding, this argument ignores and misconstrues precedent. *See* State Br. at 24-27. As the Supreme Court has made clear, once a court declines to abstain—as it correctly did in this case, *see* discussion *infra* Part IV.B.—it then applies the traditional preliminary injunction factors, subject to review only for abuse of discretion. *See Doran*, 422 U.S. at 931-32.

None of the cases cited by the State hold otherwise. The State cites to dicta in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), *see* State Br. at 24-25, but *Morales* was merely reciting the standard for *abstention*, not whether there was a heightened standard to issue an injunction when no prosecution is pending. *See Morales*, 504 U.S. at 381 n.1 ("We do not address whether the District Court should have *abstained* from entertaining this suit under the line of cases commencing with *Younger v. Harris* . . . .") (emphasis added). Indeed, *Morales* itself largely upheld an injunction against the enforcement of state laws that were preempted by federal statute, under the well-established principles of *Ex Parte Young*. *Id*. at 381, 391.

The district court did not err in finding that Plaintiffs would suffer irreparable harm in the absence of a preliminary injunction and that the balance of equities tips in their favor, and the State has failed to genuinely argue to the contrary.

IV. This Action Was Properly Before The District Court

A. Lowcountry Plaintiffs' Right To Challenge Act 69 As Preempted By Federal Law Is Well Established

The district court correctly found that the Lowcountry Plaintiffs have a private right of action to challenge Act 69 as preempted by federal law. The State's argument that Lowcountry Plaintiffs lack a private right of action has no merit and stands in direct contravention to well-established Supreme Court and Fourth Circuit precedent. *See* State Br. at 12-22.

The Supreme Court has clearly held that a "plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *see also Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 259 n.6 (1985) (noting error in the lower court's dismissal on jurisdictional grounds of a declaratory judgment action based on the Supremacy

Clause). Further, in preemption challenges, the Supreme Court has routinely ruled on the merits of private plaintiffs' claims both in the immigration context, most recently in *Whiting*, 131 S. Ct. 1968,[5] and in the context of myriad other federal statutes and constitutional provisions.[6]

Likewise, the Fourth Circuit has consistently allowed private parties to seek injunctive relief on the basis of preemption claims. *See, e.g.*, *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 127 (4th Cir. 2008) (finding that local zoning ordinance was preempted by the Natural Gas Act in a challenge brought by private contractors); *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010) (finding a municipal haul ordinance preempted in challenge brought by private railroad company). Other circuits have reached the same conclusion.[7]

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[5] *See also Shaw*, 463 U.S. 58; *Toll*, 458 U.S. 1; *DeCanas*, 424 U.S. 352; *Takahashi*, 334 U.S. 410; *Hines*, 312 U.S. 52.

[6] *See, e.g.*, *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635 (2002); *Gade*, 505 U.S. 88; *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

[7] *See Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006) (holding that a plaintiff's "right to bring an action seeking declaratory and injunctive relief from municipal regulation on the ground that federal law preempts that regulation is undisputed"); *Local Union No. 12004, USW v. Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004) (restating that "in suits against state officials for declaratory and injunctive relief, a plaintiff may invoke the jurisdiction of the federal courts by asserting a claim of preemption, even absent an explicit statutory cause of action."); *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 334 (5th Cir. 2005) (finding that it had "little difficultly in holding that [Plaintiffs] have an implied right of action to assert a preemption claim

The State nonetheless relies on a *dissenting* opinion in *Douglas v. Indep. Living Ctr. of So. Cal.*, 132 S. Ct. 1204, 1212 (2012), which urged a narrow view of private litigants' ability to enforce federal statutes enacted pursuant to the Spending Clause through preemption lawsuits, to argue that the Supreme Court, this Circuit, and other circuits have all been wrong to address the merits of preemption claims in non-Spending Clause cases like this one, because to do so "violates separation of powers." State Br. at 13. But even the *Douglas* dissent does not support the State's position, as the Eleventh Circuit recognized when it rejected the same argument in *GLAHR*, 691 F.3d at 1260-62. As the Eleventh Circuit explained, even the dissent on which the State now relies "did not purport to disturb the federal courts' power grounded in *Ex Parte Young* to address the 'pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law.'" [8] *Id.* at 1261 n.7 (quoting *Douglas*, 132 S. Ct. at 1213) (internal citations omitted). That was the precise situation the Eleventh Circuit faced in deciding private parties' claims against Georgia's similar immigration laws, and it is the same issue presented here. *See id.*

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seeking injunctive . . . relief); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994) (same); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) (finding that "[a] party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action").

[8] In fact, the State's *Younger* argument is predicated on exactly this point.

Thus, "Chief Justice Roberts's dissent is not in tension with" courts reaching the merits of such claims. *Id.*

Indeed, *Douglas* involved entirely distinct issues. *Douglas* concerned Medicaid, "a cooperative federal-state program" under which states must receive approval from a federal agency to qualify for funds and where Congress has clearly delineated how the federal government enforces the governing statutory provisions. 132 S. Ct. at 1208. The question of whether private plaintiffs may bring a preemption claim under such a statutory context—where states are invited to participate in the federal scheme and the mechanism to ensure that states comply with federal law has been congressionally articulated—is entirely distinguishable from the instant appeal where a state law intrudes upon an area of traditional federal concern like immigration.

In fact, even the *Douglas* dissent recognizes the justification underlying a private litigant's ability to challenge laws directly under the Supremacy Clause—the necessity of permitting plaintiffs to affirmatively obtain forward-looking relief from unconstitutional conduct. In many contexts, a direct action is the only way in which the supremacy of federal law could be established, and requiring litigants asserting a Supremacy Clause claim to wait for state court action would be grossly inefficient and could result in federal law being undermined by invalid state laws. *Douglas*, 132 S. Ct. at 1213 (Roberts, J., dissenting) (citing *Va. Office for Prot. &*

Advocacy v. Stewart, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring)). As the Supreme Court recognized, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."[9] *Green v. Mansour*, 474 U.S. 64, 68 (1985). Further, litigants frequently pursue both preemption theories and other constitutional claims together, and a rule barring affirmative advancement of preemption claims (*i.e.*, requiring preemption claims to be brought defensively only), while allowing claims based on a violation of constitutional *rights* to go forward in federal court under § 1983, would be inefficient and would undermine the effective vindication of federal law. For example, courts often turn to the preemption claim first to avoid reaching difficult constitutional questions. *See, Hines*, 312 U.S. 52 (holding Pennsylvania registration law for noncitizens preempted by federal legislation, and thus avoiding consideration of equal protection claims). Allowing private litigants to bring equitable claims through an action directly under the Supremacy Clause in affirmative litigation is not only sensible, but entirely consistent with Supreme Court precedent.

[9] Indeed, scholars have concluded that "the best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws." Wright et al., *Federal Practice and Procedure* § 3566, at 292 (3d ed. 2008).

The other cases cited by the State are even less helpful to its argument. In *Maryland Pest Control Association v. Montgomery County*, 884 F.2d 160 (4th Cir. 1989), for example, this Court simply found that the plaintiffs could not seek attorney's fees under 42 U.S.C. § 1988 for their Supremacy Clause claims. *Id.* at 162. That is entirely distinct from the question before this Court. In fact, in a previous decision in the very same case, this Court upheld the private plaintiffs' preemption challenges to the state law at issue without requiring the existence of a private right of action. *Maryland Pest Control Ass'n v. Montgomery County*, 822 F.2d 55 (4th Cir. 1987).

Furthermore, the cases the State cites for the proposition that "various provisions of the federal immigration laws convey no individual rights or a private cause of action" are inapposite for several reasons. *See* State Br. at 14-15. As an initial matter, these cases do not involve preemption challenges to state laws, but rather private plaintiffs' efforts to independently enforce the various provisions of the federal INA, including federal criminal provisions. *See Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975); *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890 (10th Cir. 1972); *Parkell v. South Carolina*, 687 F. Supp. 2d 576 (D.S.C. 2009). For example, in *Chairez v. INS*, the Sixth Circuit held that a private right of action to a damages claim for illegal detention did not exist under 8 U.S.C. § 1357 because Congress had separately provided in two statutory provisions that habeas

corpus was the appropriate remedy for the illegal detention of noncitizens. 790 F.2d 544, 545-48 (6th Cir. 1986).

Similarly, the State's reliance on *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), is misplaced. In *Day*, plaintiffs brought a challenge to a Kansas law alleging that it was preempted by a specific federal statutory provision, 8 U.S.C. § 1623. On appeal, the Tenth Circuit did not have before it a challenge under the Supremacy Clause, but instead only plaintiffs' attempt to affirmatively enforce a specific federal statute, 8 U.S.C. § 1623. Critically, the court did not hold that "private rights are not conferred under other provisions of the immigration code" nor did it conclude that such rights could not be protected under the Supremacy Clause. 500 F.3d at 1139. Moreover, the State ignores the Tenth Circuit's undisturbed precedent squarely holding that parties "may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp.*, 380 F.3d at 1266.

South Carolina also suggests inaccurately that Lowcountry Plaintiffs assert a cause of action under 42 U.S.C. § 1983 alone. State Br. at 13-14. Plaintiffs, however, also challenge Act 69 under the Supremacy Clause directly as well as under various other Constitutional provisions, including the Fourth and Fourteenth Amendments. *See* J.A. at 1350 (*South Carolina*, 840 F. Supp. 2d at 910) (holding that the private plaintiffs who were "potentially subject to arrest and incarceration

from arguably invalid state immigration statutes, have clearly identified rights under the Fourth and Fourteenth Amendments which can be asserted in such circumstances as presented here under § 1983" and that the INA created enforceable rights for persons subject to its provisions to be free from conflicting state provisions). For those reasons, Plaintiffs' § 1983 claim does not raise the problems addressed in *Gonzaga v. Doe*, 536 U.S. 273, 283 (2002). In *Gonzaga*, the Supreme Court held that the Family Educational Rights and Privacy Act ("FERPA") did not confer a private right of action because the text lacked the critical "rights-creating" language, addressed itself to the Secretary of Education rather than to the individuals on whom it purportedly conferred enforceable rights, and because Congress had expressly mandated the Secretary of Education to deal with violations of the Act. *Id*. at 284. Unlike FERPA, the comprehensive scheme of the INA "creates the right by persons subject to the INA to be free from state statutory provisions conflicting with or preempted by the federal Act," and nothing in the INA suggests an intention to foreclose a § 1983 remedy. J.A. at 1350 (*South Carolina*, 840 F. Supp. 2d at 910).

For the reasons discussed above, the district court properly found that the Lowcountry Plaintiffs had a private right of action to challenge Act 69 under the Supremacy Clause, as well as through civil rights claims under § 1983.

B. The District Court Correctly Exercised Equitable Jurisdiction Over the Case And *Younger* Is Inapplicable

The State's argument that the district court should not have exercised "equitable jurisdiction" here is similarly radical and far-reaching; it simply cannot be justified by *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. As the State acknowledges, *see* State Br. 34-36, if its argument is correct, the Supreme Court also abused its discretion by striking down two substantially similar state criminal statutes on preemption grounds in a pre-enforcement challenge in *Arizona v. United States* last term. But, as explained below, abstention is a very limited doctrine, and the district court here was obligated to hear the case that was properly before it. Furthermore, the state statutes at issue in this case relate to an area of predominant federal concern—the power to regulate immigration—and therefore any competing state interest must accede, even if *Younger* principles were somehow to apply.

i. Abstention Is A Limited Doctrine And, Absent The Strict *Younger* Factors, The District Court Must Exercise Its Equitable Jurisdiction

South Carolina concedes that *Younger*'s holding requiring abstention in certain circumstances is not applicable here. *See* State Br. at 22. Under *Younger*, abstention is appropriate where there is "(1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2)

implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit." *Nivens v. Gilchrist*, 319 F.3d 151, 153 (4th Cir. 2003) (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)).

As an initial matter, no proceedings have been instituted against the Lowcountry Plaintiffs in this case. For that reason alone, *Younger* abstention simply does not apply. 401 U.S. at 54; *see also Doran*, 422 U.S. at 930 (plaintiffs against whom no state proceedings were pending could obtain injunctive relief against unconstitutional state statute).

The district court had jurisdiction over Lowcountry Plaintiffs' claims that §§ 4, 5, and 6(B)(2) of Act 69 are preempted by federal law. *See supra* Part IV.A. South Carolina fails to confront the unambiguous Supreme Court and Fourth Circuit authority establishing that when a district court has jurisdiction over a claim, it may only decline to entertain the case under very limited circumstances. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule."). Unless a party is entitled to invoke abstention, "federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984); *see also Employers*

Res. Mgmt. Co., Inc. v. Shannon, 65 F.3d 1126, 1134 (4th Cir. 1995) ("Put simply, the doctrine of abstention is 'an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'") (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959)). The State's attempt to radically expand the *Younger* doctrine to limit the power of federal courts to enjoin unconstitutional state action cannot be reconciled with the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist.*, 424 U.S. at 817.

ii. The Overwhelming Federal Interest In Regulating Immigration-Related Crimes Precludes Abstaining Because Of Any State Interest Here

The State's appeal to abstract *Younger* principles and comity concerns are further misplaced in light of the overwhelming *federal* interest at stake in this case. The principle of comity upon which the State relies so heavily is rooted in "a proper respect for *state functions*," *Younger*, 401 U.S. at 44 (emphasis added), and it "encompasses those interests that the Constitution and our traditions assign primarily to the states," *Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 352 (4th Cir. 2005). However, as this Court explained in *Harper*, "[w]hen there is an overwhelming federal interest—an interest that is as much a core attribute of the national government as the list of important state interests are attributes of state sovereignty in our constitutional tradition—no state interest, for abstention

purposes, can be nearly as strong at the same time." *Id.* at 356. This case directly implicates the strong federal interest in exclusively regulating immigration-related crimes—an interest that the Supreme Court's opinion in *Arizona* makes clear is not among those traditionally committed to the states. *See discussion supra* Part II.

While the State certainly has an important interest in enforcing its ordinary criminal laws, and respect for the operation of an ongoing state criminal process was the driving force behind *Younger*, the sections of Act 69 at issue simply cannot be understood as ordinary state criminal statutes. Instead, they represent an attempt by South Carolina to intrude into an area of core federal power that the federal government has occupied, to the exclusion of the states. *See Arizona*, 132 S. Ct. at 2498 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."). Put simply, prosecuting immigration-based crimes has never been a "traditional area[] of paramount state concern." *See Harper*, 396 F.3d at 354 (quotation marks and citation omitted). Therefore, *Younger*'s comity concerns do not encompass a state's interest in enforcement of criminal immigration statutes. *See Arizona*, 132 S. Ct. at 2502 ("States may not enter, in any respect, an area the Federal Government has reserved for itself"); *Harper*, 396 F.3d at 356 ("[T]he notion of comity, so central to the abstention doctrine, is not strained when a federal court cuts off state

proceedings that entrench upon the federal domain.") (quoting *Zahl v. Harper*, 282 F.3d 204, 210 (3d Cir. 2002)) (quotation marks omitted).

In *Harper*, for example, this Court held that a district court improperly abstained from hearing a case that challenged the enforcement of a state agency's order under the Commerce Clause, despite the fact that state proceedings were arguably ongoing. 396 F.3d at 350-51. This Court held that, given the "peculiarly national interest—and therefore, more limited state interest," in the power to regulate interstate commerce, *id*. at 356, "the state interests at stake here do not fall among those the federal courts have repeatedly recognized as deserving of special respect and solicitude," *id*. at 350. This Court explained that district court review "in no way threatens the kind of comity that has always underpinned the *Younger* doctrine. No state's dignity could be offended by acknowledging the obvious point that the Framers consciously withdrew interstate commerce from the vast collection of interests that remain the primary responsibility of the states." *Id*. at 356.

This Court's reasoning in *Harper* is equally applicable here. The overwhelming federal government interest in the areas of harboring and transporting unauthorized immigrants, the registration of non-citizens, and the use of fraudulent documents to prove lawful presence in the United States precludes finding a comparably strong state interest. *See supra* Part II. The State's attempt

to cast the statutes enjoined by the district court as ordinary criminal statutes falling within its traditional purview is misleading. As this Court noted in *Harper*, "[w]ere we to permit a lofty level of generality as to how we identify the interests at stake, we would find that nearly anything could at least touch on something like the 'general welfare,' 'the public good' or 'public safety.' This would render a nullity the requirement that we ensure the state interest be important." *Id.* at 353.

In light of the overwhelming federal interest in regulating immigration-related crimes, the principles of comity do not tip the balance in favor of the State and against the district court's grant of injunctive relief in this case.

The Supreme Court's decision in *Arizona* establishes the propriety of the district court's exercise of its equity jurisdiction to enjoin sections of Act 69. The Court in *Arizona* upheld injunctions of two state criminal statutes on preemption grounds, notwithstanding arguments concerning federalism and state sovereignty similar to those advanced here by South Carolina. *See* 132 S. Ct. at 2503 (state statute criminalizing failure to complete or carry alien registration papers); *id.* at 2505 (state statute penalizing work by unauthorized alien). The State contends that the Supreme Court "does not appear to have considered *Younger* arguments" in *Arizona*. State Br. at 36. That *Younger* was not mentioned by name in the *Arizona* opinion, however, is immaterial—it is clear from the Court's careful analysis of the respective rights and interests of the state and federal government in the

immigration field that the Court considered and rejected a state's right to create criminal statutes that intrude into or conflict with the federal government's power over immigration. *See Arizona*, 132 S. Ct. at 2500-05. The *Arizona* decision makes clear that federal courts have a duty to exercise their jurisdictional powers to resolve preemption disputes as a general principle and in the very context at issue in this case.[10]

For all of the above reasons, the preliminary injunction withstands scrutiny under *Younger* and its progeny.

V. This Court Should Not Rule On The Merits At This Time

The State finally requests this Court to (1) take the extraordinary step to issue a final ruling on the merits as to the sections of the law at issue in this appeal, and (2) reach even further by entering a final ruling on sections of the law that are not at issue in this appeal. State Br. 53-54. Neither argument has any merit.

First, the Lowcountry Plaintiffs did not move for a preliminary injunction on the basis of all claims and theories presented in the original complaint, and as a result those claims are not before this Court. J.A. at 93-96 (Lowcountry Plaintiffs' Complaint); *see, e.g.*, *Wilson Clinic & Hosp., Inc. v. Blue Cross of S.C.*, 494 F.2d

[10] In another case decided last term, the Supreme Court held that a California penal statute was preempted by federal law, and reversed the Ninth Circuit's decision vacating the district court's preliminary injunction. *See National Meat Ass'n v. Harris*, 132 S. Ct. 965, 968 (2012). In so doing, the Court did not question the district court's power to enjoin enforcement of a preempted state criminal statute.

50, 56 (4th Cir. 1974) ("The only questions which arise under the special or limited appeal from an interlocutory decree granting a preliminary injunction are those which are necessarily involved by the allowance of the injunction pendente lite.") (quotation omitted); *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, Int'l*, 416 F.2d 633, 636-37 (4th Cir. 1969) ("On this appeal, aside from determining whether the district court had jurisdiction, our consideration is limited to deciding whether it abused its discretion in granting the interlocutory injunction"). This Court may not dismiss Lowcountry Plaintiffs' legal claims that are not at issue in this appeal.

Second, with regard to Act 69 § 6(A), the provision requiring local law enforcement to investigate whether a person is lawfully present during a lawful stop, Lowcountry Plaintiffs did seek an injunction of this section, but have not appealed the district court's denial. Therefore, that section therefore is not currently on appeal and this Court does not have jurisdiction to consider the State's extraordinary request for dismissal. *See Wilson Clinic & Hosp., Inc.*, 494 F.2d at 56; *Piedmont Aviation, Inc.*, 416 F.2d at 636-37. Moreover, the Supreme Court in *Arizona* made clear that enforcement of Arizona's analogous provision, § 2(B), could raise serious constitutional concerns, and those same concerns are present with regard to South Carolina's § 6(A). Thus, Lowcountry Plaintiffs should be allowed the opportunity to proceed with their challenge to § 6(A) and develop evidence regarding its application.

Finally, the purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held. "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."). In this case, there has been no motion to dismiss by the State and no opportunity for Lowcountry Plaintiffs to engage in discovery or to fully present their case. As a result, it is premature "to allow [the] [C]ourt to consider fully the grave, far-reaching constitutional questions presented" in any final ruling. *Brown v. Chote*, 411 U.S. 452, 457 (1973). It would be inappropriate, therefore, for the Court at the preliminary-injunction stage to give a final judgment on the merits. *See Gellman v. Maryland*, 538 F.2d 603, 605-06 (4th Cir. 1976).

CONCLUSION

For the foregoing reasons, the preliminary injunction should be affirmed.

Dated: March 12, 2013

Respectfully submitted,

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National Immigration Law Center

/s/ Michelle Lapointe
Southern Poverty Law Center

/s/ Andre Segura
American Civil Liberties Union Foundation
Immigrants' Rights Project

/s/ Victor Viramontes
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Educational Fund

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28.1(e)/32(a)(7)(C), I certify that the foregoing brief complies with the type-volume limitation prescribed by this Court's rules. The brief contains 11,904 words in Times New Roman font, 14-point size.

By /s/ Karen C. Tumlin
Karen C. Tumlin

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2013, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By /s/ Karen C. Tumlin
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