NO. 12-1096 (L)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

STATE OF SOUTH CAROLINA; NIKKI HALEY, in her official capacity as the Governor of South Carolina

Defendants - Appellants

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

OPENING BRIEF OF APPELLANTS

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

JAMES EMORY SMITH, JR.
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

Counsel for Appellants

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

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 12-1096 Caption: USA v. State of South Carolina, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

State of South Carolina and Nikki Haley, in her official capacity as the Governor of South Carolina
(name of party/amicus)

who is Appellant, 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:

CERTIFICATE OF SERVICE

****

I certify that on February 3, 2012 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/ J. Emory Smith, Jr.
(signature)

Feb. 3, 2012
(date)

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

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 12-1099 Caption: Lowcountry Immigration Coalition, et al v. Haley, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Nikki Haley, in her official capacity as the Governor, etc.; Alan Wilson, in his official capacity, etc.
(name of party/amicus)

---

who is Appellant, 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:

CERTIFICATE OF SERVICE

****

I certify that on February 3, 2012 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/ J. Emory Smith, Jr.
(signature)

Feb. 3, 2012
(date)

11/17/2011
SCC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE (S)**

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

A. The District Court's Subject-Matter Jurisdiction

This Court has subject matter jurisdiction pursuant to the federal question jurisdiction of 28 U.S.C. § 1331, except that the Appellants contend that the private Lowcountry, *et al* Plaintiffs / Appellees (Lowcountry) do not have a private right of action to make a Supremacy Clause claim in this action.

B. The Court of Appeals Jurisdiction

Pursuant to 28 U.S.C Section 1292(a)(1), the Court of Appeals has jurisdiction of "(1) Interlocutory orders of the district courts of the United States . . . granting . . . injunctions." Accordingly, this Court has jurisdiction of the District Court's granting a preliminary injunction as to parts of the statute at issue including the order of November 15 on limited remand.

C. The Notice of Appeal

The Notice of Appeal was filed on January 18, 2012 as to the Order of the District Court entered on December 22, 2012. The Notice of Appeal was filed December 7, 2012 as to the November 15 Order.

D. Appeal is from Order Granting Preliminary Injunction

Because parts of the statutes were enjoined by the issuance of the preliminary injunction, this Court has jurisdiction. *See*, part B, *supra.*

STATEMENT OF ISSUES

1. Whether the District Court erred in concluding that the private plaintiffs/ appellees (Lowcountry) have a right of action under 42 U.S.C. §1983?
2. Whether the District Court erred in ruling that Lowcountry can assert Supremacy Clause and Fourth and Fourteenth Amendment claims pursuant to 42 U.S.C. §1983?
3. Whether the District Court erred in ruling that the Eleventh Amendment does not bar the Lowcountry suit?
4. Whether the District Court erred in using its equity jurisdiction to issue an injunction to prevent enforcement of a state criminal statute?
5. Whether the District Court erred in ruling that the Lowcountry and the United States have overcome the presumption against preemption?
6. Whether the District Court erred in ruling that Lowcountry and the United States have made a clear showing that they will likely succeed on the merits of their challenge to subsections 4(B) and (D) of Act 69 which address transportation and harboring of unlawful immigrants and subsections 4(A) and (C) of Act 69 which address self-transportation and harboring by unlawful immigrants?
7. Whether the District Court erred in ruling that Lowcountry and the United States made a clear showing that they would likely succeed on the merits of

their challenge to §§5 (failure to carry alien registration) and 6(B)(2)(possession or use of counterfeit identification for purpose of proof of lawful presence)?

8. Whether the District Court erred in determining that the §§4, 5 and 6(B)(2) are preempted under Federal law?

9. Whether the District Court erred in in issuing a preliminary injunction on the basis of his findings regarding foreign policy impact?

10. Whether the District Court erred in determining that Lowcountry plaintiffs had made a clear showing that they will likely suffer irreparable injury should §§4, 5, and 6(B)(2) become effective, that the balance of equities tip in their favor and that the public interest is served by the grant of preliminary injunctive relief?

11. Whether the District Court erred in issuing a preliminary injunction as to §§4, 5, and 6((B)(2) of Act 69 and S.C. Code Ann. §16-9-460 which initially adopted provisions found in §§4(B) and (D) of Act 69?

12. Whether, on limited remand in its Order of November 15, 2012, the District Court erred in leaving in place the preliminary injunction of §§4, 5, and 6((B)(2) of Act 69 and S.C. Code Ann. §16-9-460.

13. Whether maintaining the injunction of §§4, 5 and 6(B)(2) is inconsistent with principles of Federalism recognized in *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012)?

14. Whether, the Court of Appeals should rule on the merits of the facial constitutionality of §§4,5 and 6(B)(2)?

STATEMENT OF THE CASE

The initial appeals in these suits were consolidated by Order of this Court on January 25, 2012 and December 15, 2012. Joint Appendix (JA), p. 1632. The suits challenge the constitutionality of various sections of South Carolina's Act 69, 2011 S.C. Acts, related to immigration. JA p. 101 (Copy of Act).

The Lowcountry Immigration Coalition suit was brought by a group of individual and organizational plaintiffs (Lowcountry) against the Attorney General and the Governor. JA p. 39. The other suit was brought by the United States against the State and the Governor[1]. JA p. 126. Following the filing of motions for a preliminary injunction and supporting and opposing memoranda, and the holding of oral argument, the District Court issued an order on December 22, 2011 that enjoined Act 69 §4 (transportation and harboring of unlawful immigrants by others and by action taken themselves), §5 (failure to carry alien registration) and

[1] The term "the State" is used in this brief to reference collectively the Appellants / Defendants Governor, Attorney General and State.

§6(authorization to determine immigration status, reasonable suspicion, procedures, and data collection on motor vehicle stops) including §6(B)(2)(possession or use of counterfeit identification for purpose of proof of lawful presence). JA p. 1340, *United States v. S. Carolina*, 840 F. Supp. 2d 898 (D.S.C. 2011). The Court also enjoined S.C. Code Ann. §16-9-460 which initially adopted provisions found in §§4(B) and (D) of Act 69. *Id.*

While the appeal of the December 22, 2011 order was pending and before the Appellants' brief was filed, this Court remanded this case to the District Court to afford that court an opportunity to reexamine its opinion in light of the decision in *Arizona v. United States*, 567 U.S. ____, 132 S. Ct. 2492 (2012). Order, August 16, 2011, JA p. 1386. Following briefing and oral argument, the District Court issued an order dated November 15, 2012, in which the Court dissolved the preliminary injunction of §6 of Act 69, except as to §6(B)(2), and left "in place all other aspects of the preliminary injunction issued on December 22, 2011." JA p. 1614, ___F. Supp. 2d___, 2012 WL 5897321. The Defendants-Appellants then appealed the November 15, Order.

STATEMENT OF FACTS

Lowcountry asked the United States District Court to take the extraordinary step of enjoining Act 69 before it took effect on January 1, 2012. Those Plaintiffs asked for an injunction of the Act in its entirety but focused on sections

1,4, 5, 6, and 7 in particular. The United States moved for a preliminary injunction of four parts of Act 69, sections 4, 5, 6 and 15. USA v. State and Haley. (C/A No. 2:11-cv-2958). As noted in the Statement of the Case, the District Court consolidated the cases.

The Act concerns, but does not regulate illegal immigration which, as this Court can take judicial notice, is a concern for many citizens and elected officials in this country and this State. *See also, Arizona v. United States*, *supra*. A total of 20 sections, including a savings clause, a severability clause, and the effective date, govern a variety of traditional State interests. JA pp. 101. Rather than interfering or conflicting with Federal immigration law, Act 69 addresses State concerns and aids the Federal government. The State opposed the preliminary injunction of any part of Act 69.

In this action, Lowcountry alleges that Act 69 violates the Supremacy Clause and Fourth Amendment, because it will "subject South Carolinians - including U.S. citizens and noncitizens with permission from the federal government to remain in the United States - to unlawful interrogations, prolonged detentions and arrests." JA p. 39. Lowcountry fears that the Act's enforcement will result in criminal prosecutions and penalties for giving aliens rides or carrying them to appointments or providing services to them. In addition, Lowcountry alleges that the Act's enforcement may cause them to be stopped and arrested for

not carrying registration papers or for transporting undocumented immigrants in violation of Act 69's harboring provisions. Lowcountry's Complaint asks the Court to "[e]njoin [d]efendants from enforcing" the Act.

The United States alleges that, in violation of the Supremacy Clause, Act 69 "will cause the detention and harassment of authorized visitors, immigrants, and citizens who do not have or carry identification documents specified by the statute or who otherwise will be swept within Act No. 69's rigid approach of universal, undifferentiated enforcement." JA p. 128. In the view of the United States, enforcement of certain provisions of the State Act interfere with immigration law and policies and are thus preempted.

In its December 22, 2011 Order, the District Court largely agreed with plaintiffs as to their preemption challenges as to certain sections and issued a preliminary injunction against Sections 4, 5 and 6 of the Act. The District Court found that Lowcountry asserted sufficient allegations to state a claim under § 1983. With respect to the United States, the lower court found that "the Attorney General has broad and sufficient power to assert claims, such as those before the Court, which defend and affirm the national government's powers and prerogatives regarding the conduct of foreign relations, foreign commerce and a uniform system of naturalization." *Id.* at 912.

Since the District Court issued its 2011 Order, the United States Supreme

Court issued its Opinion in *Arizona v. United States*, *supra*, regarding parts of an Arizona statute that are similar to two South Carolina provisions at issue in the instant case. That Court ruled that the Arizona District Court improperly enjoined a statute, Ariz.Rev.Stat. Ann. § 11–1051(B), that "requires state officers to make a 'reasonable attempt ... to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'" 132 S. Ct. at 2507.

On limited remand, the South Carolina District Court applied the holding of *Arizona* to the status-checking provisions of Act 69, in particular Sections 6(A), (B)(1), (C)(1)-(3), and (D), concluded that "an injunction at this stage of the litigation is not appropriate, and . . . dissolve[d] its preliminary injunction regarding these provisions." JA p. 1625 (Order at p. 12). The Court "recognize[d] the possibility that §6(C)(4) can be interpreted and enforced in a manner consistent with federal law. . . [and found] that, at this stage of the litigation, it is appropriate to dissolve the injunction as to Section 6(C)(4)." JA p. 1627 (Order at p. 14). The Court maintained the preliminary injunction of the remaining part of §6 regarding the use of false identification, §6(B)(2) and §§4 and 5.

SUMMARY OF ARGUMENT

Before this Court reaches the merits of the issues regarding the enjoined provisions of South Carolina law, it must address two threshold problems with the exercise of Federal equity jurisdiction in this case. The first of these problems with the actions of the District Court in this case is that is that the private Lowcountry plaintiffs have no congressionally created right of action to seek an injunction here. The second problem is that a federal court should not enjoin threatened state criminal proceedings where, as here, the federal issue, including preemption, could be raised as a defense in that proceeding. The first of these defects bars the Lowcountry plaintiffs. The second defect bars both the Lowcountry and United States actions.

Even if, *arguendo,* the above defenses did not bar these actions, the District Court's rulings enjoining parts of Act 69 should be overturned. Relying on *Arizona*, the District Court of South Carolina has now, on limited remand, lifted the injunction of section of Act 69 except for §6(B)(2) regarding false identification. The District Court should also have lifted the injunction of §4, regarding harboring, and §6(B)(2) because the *Arizona* Opinion and related authority demonstrates that Lowcountry and the United States have no likelihood of success as to those sections. As discussed *infra*, the State recognizes that

Arizona upheld the injunction of a section similar to §5 of Act 69 regarding failure to carry registration documents, but Appellants do not otherwise concede that this section is properly subject to a preliminary injunction, and they preserve all their defenses as to it.

The Supreme Court recognized that while, "Arizona may have understandable frustrations with the problems caused by illegal immigration . . ., the State may not pursue policies that undermine federal law." 132 S. Ct. at 2510. "The issue [in that case, therefore, was] whether, under preemption principles, federal law permit[ed] Arizona to implement the state-law provisions in dispute." The South Carolina provisions at issue do not undermine federal law for the reasons discussed below, and federal law permits it to implement §§4 and 6(B)(2). The State also maintains its defenses to §5 while recognizing the Supreme Court's ruling regarding the related Arizona provision.

The State also respectfully requests that the Court proceed to a ruling on the merits of these provisions at issue. This challenge is facial only, and all the necessary information is before the Court for a ruling. The State maintains that these provisions are constitutional.

ARGUMENT

I

STANDARD OF REVIEW FOR ALL ISSUES

"Ordinarily, the entry of a preliminary injunction is reviewed for abuse of discretion[,] (*See MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir.2001)) [but when the defendants] raise only legal questions . . . . ., this court applies a de novo standard of review." *Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc*., 276 F.3d 187, 191 (4th Cir. 2002). Because the issues raised by the State on appeal are legal, the de novo standard should apply; however, even under the abuse of discretion standard, the State should prevail.

II

CONGRESS CREATED NO RIGHT OF ACTION FOR THE LOWCOUNTRY PLAINTIFFS IN THIS MATTER AND THE COURT ERRED IN USING ITS EQUITY JURISDICTION TO ISSUE AN INJUNCTION TO PREVENT ENFORCEMENT OF A STATE CRIMINAL STATUTE

In granting the preliminary injunction prohibiting enforcement of Sections 4, 5 and 6(B)(2) of Act 69[2], the District Court overlooked two fundamental principles

[2] The State recognizes that the Supreme Court in *Arizona, supra*, upheld the injunction of an Arizona statute similar to South Carolina's section 5 regarding failure to carry registration documents, but the State preserves its defenses. *See, infra*. Because the *Arizona* ruling was in a case that apparently did not include private plaintiffs as here, The Supreme Court's Opinion does not prevent this Court from finding that no right of action exists for the private Lowcountry plaintiffs as to §5 as well as the other sections at issue.

of constitutional law and equity jurisdiction and jurisprudence. First, in concluding that the Lowcountry Plaintiffs possess a right of action in equity, the decision below disregards a basic constitutional rule: "Congress, not the Judiciary decides whether there is a private right of action to enforce a federal statute …." A court "under its general equitable powers" which creates such a right of action "would raise the most serious concerns regarding both the separation of powers … and federalism …." *Douglas v. Ind. Living Center of Southern Cal.*, 132 S.Ct. 1204, 1213 (2012) (Roberts, C. J. dissenting). Second, a preliminary injunction issued by a federal court of equity intrudes upon state criminal proceedings in contravention of the longstanding rule that "equity will not interfere to prevent the enforcement of a [state] criminal statute even though unconstitutional …." *Spielman Motor Sales, Inc. v. Dodge*, 296 U.S. 89, 95 (1935). Moreover, this rule is particularly applicable in this case where the complaints of both Lowcountry and the United States rest largely upon hypotheticals, contingencies and speculation. For these reasons, the District Court wrongly used its jurisdiction in equity to issue a preliminary injunction, and thus erred in so granting it.

A

Congress Created No Right of Action for the Lowcountry Plaintiffs To Seek an Injunction

The lower court erred in concluding that Lowcountry and the United States possess a right of action to seek an injunction where Congress has created no such

right. Such conclusion violates separation of powers. As Chief Justice Roberts recently recognized in *Douglas v. Ind. Living Center, supra,* "[a] court of equity may not 'create a remedy in violation of law, or even without the authority of law.'" (quoting *Rees v. Watertown*, 10 Wall. 107, 122 (1874). *See also Thomas v. Whalen*, 962 F.2d 358, 362 (4th Cir. 1992), "'[c]ourts of equity can no more disregard statutory and constitutional requirements than can courts of law.'"] Moreover, as explained in *U.S. v. Philadelphia*, 644 F.2d 187, 192 n. 1 (3d Cir. 1980) "… a more stringent test should be employed when a party claims an implied right to an injunction, which is an extraordinary remedy, than when he seeks damages."

Lowcountry possesses no congressionally created right of action to seek an injunction here. As the Supreme Court has emphasized, "'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a cause of action in favor of the person.'" *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979), quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979). Further, as this Court has recognized, "enactment of [28 U.S.C. §] 1331 did not of itself create any cause of action … ." *Cale v. City of Covington*, 586 F.2d 311, 313 (4th Cir. 1978).

Lowcountry's §1983 claim as a vehicle to support their preemption argument fails. In *Gonzaga v. Doe*, 536 U.S. 273, 283 (2002), the Court "reject[ed]

the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." The *Gonzaga* Court explained that "… § 1983 merely provides a mechanism for enforcing individual rights 'secured,' elsewhere, i.e. rights independently 'secured by the Constitution and laws of the United States.' [O]ne cannot go into court and claim a 'violation of § 1983' - for § 1983 by itself does not protect anyone from anything.'" (quoting *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979)). In short, there is a substantial difference between federal statutes which create a federal "right" as opposed to "merely a violation of federal law." *Blessing v. Firestone*, 520 U.S. 329, 340 (1997). See also, *Pee Dee Health Care v. Sanford*, 509 F.3d 204, 210 n. 3 (4th Cir. 2007) ["*Blessing* stands for the proposition that violation of rights, not laws give rise to § 1983 actions."].

Lowcountry plaintiffs, in making their preemption arguments, cannot point to any federal law, including the Constitution's Supremacy Clause, which conveys any federal "right." There is "'far less reason to infer a private remedy in favor of individual persons where Congress, rather than drafting the legislation 'with an unmistakable focus in the benefited class, instead has framed the statute simply as a general prohibition or command to a federal agency." *Universities Research Assn., Inc. v. Couter*, 450 U.S. 754, 772 (1982), quoting *Cannon*, 441 U.S. *supra* at 690 n. 13. Thus, federal courts consistently conclude that various provisions of the

federal immigration laws convey no individual rights or a private cause of action. *Urbina-Mauricio v. I.N.S.*, 989 F.2d 1085 (9th Cir. 1993); *Chairez v. U.S. I.N.S.*, 790 F.2d 544 (6th Cir. 1986) [Immigration Act did not create private right of action for violation of its provisions concerning arrest of aliens unlawfully present]; *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975) [prohibition against harboring aliens solely a penal provision and creates no right of action], *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890 (10th Cir. 1972); *Parkell v. S.C.*, 687 F.Supp.2d 576, 590 (D.S.C. 2009) [provision making criminal the smuggling and harboring of aliens creates no right of action].

In *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), the Tenth Circuit addressed whether a nonresident citizen could sue to challenge a Kansas law allowing undocumented or illegal aliens to attend Kansas universities and pay in-state tuition. A federal law, 8 U.S.C. § 1623, limited illegal aliens' eligibility for higher education benefits based on residence. The argument was that the federal statute preempted the Kansas statute. However, the Tenth Circuit concluded that the federal statute created no private right of action and thus no claim pursuant to § 1983 could be asserted. Citing *Gonzaga* and *Blessing*, the Tenth Circuit concluded that "Plaintiffs held no legal right under § 1623 to assert preemption that was invaded by the implementation of K.S.A. § 76-731a, and the Plaintiffs' claim of such an individual legal right under § 1623 to support standing is legally invalid.

Thus, the Plaintiffs lack standing to assert a preemption claim based on such a supposed individual right." *Id*. at 1139. (emphasis added).

Secondly, the Supremacy Clause itself does not create a private right of action for Lowcountry's assertion of preemption. As this Court recognized in *Maryland Pest Control Assn. v. Montgomery Co., Md*., 894 F.2d 160, 162 (4th Cir. 1989), "the Supremacy Clause does not of itself create 'rights, privileges or immunities' within the meaning of § 1983 …." In rejecting the contention that § 1983 afforded a basis for the award of attorneys fees pursuant to § 1983 for a violation of the Supremacy Clause, the Fourth Circuit stated:

> [w]e begin our analysis by noting that the Supremacy Clause is, in effect, a limit on a state's power to interfere with matters of national concern. The Supremacy Clause is grounded in the allocation of power between federal and state governments and is not a source of, nor does it protect the individual rights which the Associations assert. For example, in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979), the Supreme Court held that the Supremacy Clause was not a substantive constitutional provision that created rights within the meaning of 28 U.S.C. § 1343(3). … 441 U.S. at 612-615, 99 S.Ct, at 1913-1915. The Court explained that "even though the clause is not a source of federal rights, it does not 'secure' federal rights by according them priority whenever they come in conflict with state law." 441 U.S. at 613, 99 S.Ct. at 1913 … The Court, however, added in explication: "an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim, 'secured by the Constitution' within the meaning of § 1343(3). Id. at 615, 99 S.Ct. at 1915. *In sum,* the *Supremacy Clause establishes the supremacy of federal state law and is not of itself a source of substantive constitutional rights.*

(emphasis added). See also, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) [Supremacy Clause is "not a source of any federal rights."]; *Swift & Co. v. Wickham*, 382 U.S. 111, 126 (1965) [Supremacy Clause not a 'substantive provision of the Constitution"]; *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) [Supremacy Clause '"not a source of any federal rights."']. Other decisions in this circuit are in accord. *See, Associated Bldrs. and Contractors, Inc. v. O'Connor*, 75 F.Supp.2d 440, 444 (D.Md. 1999) ["… there is no independent cause of action for Supremacy Clause violations."]; *Bio-Medical Applications of N.C., Inc. v. Electronic Data Systems Corp*. 412 F.Supp.2d 549, 552 (E.D. N.C. 2006); *Three Lower Counties Comm. Health Services, Inc. v. Md. Dept. of Health and Mental Hygiene*, 2011 WL 3740781 (D. Md. 2011) (unpublished) ["Neither the Supremacy Clause of the United States Constitution, nor the Medicaid statute itself … provide an independent cause of action."]; *Va. Hosp. Assn. v. Baliles*, 868 F.2d 653, 656 (4th Cir. 1989) ["section 1983 supplies VHA with no substantive rights."]; *Whittman v. State of Va.*, 2002 WL 32348410 (E.D. Va. 2002) ["But the Supremacy Clause provides neither an implied nor an express right of action."]; *Gottesman v. Batten*, 286 F.Supp.2d 604 (M.D.N.C.) [same].

The recent Supreme Court decision in *Douglas v. Ind. Living Center*, *supra* is particularly instructive. There, the Court granted *certiorari* to decide the issue of whether the Supremacy Clause itself creates a private right of action to assert

preemption. Although this issue was not reached by a majority of the Court because of a change in the posture of the cases following oral argument, four members in dissent did deem it appropriate to reach the Supremacy Clause issue. The Chief Justice, speaking for Justices Scalia, Thomas and Alito, concluded that no right of action is created by the Supremacy Clause:

> [T]he Supremacy Clause operates differently than other constitutional provisions. … The Supremacy Clause … is "not a source of any federal rights." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979); accord, *Dennis v. Higgins*, 498 U.S. 439, 450, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) (contrasting, in this regard, the Supremacy Clause and the Commerce Clause). The purpose of the Supremacy Clause is instead to ensure that, in a conflict with state law, whatever Congress says goes. See The Federalist, No. 33, p. 205 (C. Rossiter ed.1961) (A. Hamilton) (the Supremacy Clause "only declares a truth which flows immediately and necessarily from the institution of a federal government"). …
>
> Indeed, to say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence. We have emphasized that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action ." *Gonzaga Univ. v. Doe*, [*supra*]. This body of law would serve no purpose if a plaintiff could overcome the absence of a statutory right of action simply by invoking a right of action under the Supremacy Clause to the exact same effect. Cf. *Astra USA, Inc. v. Santa Clara County*, 563 U.S. ——, ——, 131 S.Ct. 1342, 1348, 179 L.Ed.2d 457 (2011) … .

Thus, there is ample authority in this Circuit that the Supremacy Clause itself conveys no private right of action. Moreover, at least four members of the Supreme Court are now on record as agreeing with that conclusion.

Nor does *Ex Parte Young*, 209 U.S. 123 (1908) afford Lowcountry a right to any relief. As this Court stated in *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 496 (4th Cir. 2005), "[t]he Supreme Court held in *Ex Parte Young* … that the Eleventh Amendment does not bar suit against a State official for prospective injunctive relief. In order to determine whether this doctrine applies, we 'need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (quoting *Verizon Md., Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002)).

The State recognizes that the Eleventh Circuit rejected a similar argument in the case challenging Georgia's immigration related statute. *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012)(*GLAHR*), but that Court appeared to rely on cases implying rights of action under Federal statutes rather than cases, as here addressing rights of action based solely on the Supremacy Clause. In fact, earlier 11th Circuit precedent not even cited by *GLAHR*, *Legal Environmental Assistance Foundation, Inc. v. Pegues*, 904 F.2d 640, 643 (11th Cir. 1990) made clear that any action for preemption

under the Supremacy Clause pursuant to *Ex Parte Young* is dependent upon whether the federal statute in question provides a private right of action and that "the Supremacy Clause does not grant an implied cause of action for the relief sought." The Court distinguished *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) and concluded that decision is not to the contrary:

> [a] leading treatise has concluded that "[t]he 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 officials who are threatening to violate the federal Constitution or laws." … These expressions, however, do no more than indicate that the Supremacy Clause provides federal jurisdiction … for a cause of action implied from the statute, a distinction noted more clearly in dicta in a more recent case, *Lawrence County v. Lead-Deadwood School District.* …. 469 U.S. 256, 259, n. 6 (1985) This jurisdictional view of the Supremacy Clause was best stated by the Second Circuit in *Andrews v. Maher*, … 525 F.2d 113 [119] (1975):
>
> > The Supremacy Clause does not secure rights to individuals; it states a fundamental structural principle of federalism. While that clause is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate. …
>
> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner. ... In each case, however, the question is the nature of the legislative intent informing a specific statute, ….

904 F.2d at 643-644. *See also, Wilderness Soc. v. Kane Co.*, Utah, 632 F.3d 1162, 1177 n. 2 (10th Cir. 2011) (en banc) (Gorsuch, Briscoe and O' Brien concurring in the judgment) [finding that a right of action under the Supremacy Clause has not

been determined by the Supreme Court]; *Indiana Protection and Advocacy Services v. Indiana Family*, 603 F.3d 365, 392 (7th Cir. 2010) (Easterbrook, dissenting) ["But to say (with regard to *Ex Parte Young*) that a claim against a state officer sidesteps sovereign immunity is not enough; plaintiffs still need a right of action. Most suits to which *Young* applies rest on § 1983; in *Verizon*, 47 U.S.C. §252(e)(6) supplied an express right of action; Advocacy Services lacks any equivalent"]. Leonard, "Where There's A Remedy, There's A Right: A Skeptics Critique of *Ex Parte Young*," 54 Syr. L. Rev. 215, 280 (2004) ["The Use of *Ex Parte Young* to permit enforcement of federal statutes when Congress has not authorized such claims, either expressly or by implication, upsets the separation of powers."].

An example of the Supreme Court requiring that there be a private right of action to private parties seeking to enforce federal statutory law through *Ex Parte Young* is *Brunner v. Ohio Republican Party*, 555 U.S. 5, 6 (2008). There, Plaintiff brought an *Ex Parte Young* suit against the Ohio Secretary of State challenging Ohio's compliance with the Help America Vote Act (HAVA). The lower court entered a temporary restraining order directing the Secretary of State to update Ohio's statewide Voter Registration Database to comply with HAVA. The Sixth Circuit refused the Secretary's Motion to vacate the TRO. However, the United States Supreme Court reversed concluding:

> Respondents, however, are not sufficiently likely to prevail on the question whether Congress has authorized the District Court to enforce § 303 in an action brought by a private litigant to justify the issuance of a TRO. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). We therefore grant the application for a stay and vacate the TRO.

The above authority makes clear that the Lowcountry plaintiffs have no private right of action in this case. Therefore, the preliminary injunction should be vacated as to them and their suit should be dismissed. The following ground also warrants reversal and dismissal as to the United States as well as Lowcountry.

B

The Court Should Not Have Issued an Injunction Based Upon Threatened or Anticipated Criminal Proceedings

As recognized in *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), "[i]t should never be forgotten that this slogan, 'Our Federalism' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." While, absent certain exceptions, *Younger* must be applied to require abstention and thus dismissal when criminal proceedings *are pending*, see, *Nivens v. Gilchrist*, 444 F.3d 237 (4th Cir. 2006), we are not asserting *Younger's* usually mandatory abstention here. What we are relying upon instead is that the *Younger* Court also addressed a federal court's *longstanding* restraint in exercising its equitable jurisdiction to enjoin *threatened or anticipated* state

criminal prosecutions or proceedings. Quoting *Fenner v. Boykin*, 271 U.S. 240, 243-244 (1926), as well as other precedents, *Younger* concluded:

> '*Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, and following cases have established the doctrine that, when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge to the validity of some statute, unless it plainly appears that this course would not afford adequate protection.
>
> These principles, made clear in the *Fenner* case, have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions. (emphasis added).

Justice Black, writing for the Court in *Younger*, *supra*, emphasized that to enjoin threatened state criminal proceedings, a finding of irreparable harm in its usual sense is insufficient, even in light of *Ex Parte Young*, *supra*:

> [i]n all of these cases the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is 'both great and immediate.' *Fenner, supra*. Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal

> prosecution. See, e.g., *Ex Parte Young*, *supra*, 209 U.S. at 145-147, 28 S.Ct. at 447-449 … .

401 U.S. at 46. (emphasis added). As Justice Black wrote in another case, *Watson v. Buck*, *supra*, "[t]he imminence of … a prosecution, even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity … ." 313 U.S. at 400. In short, "[m]inimal respect for the state processes … precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex Co. Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 431 (1982).

Recently, in *Bacon v. Neer*, 631 F.3d 875 (8th Cir. 2011), the Court affirmed the lower court's denial of a preliminary injunction, applying *Younger's* rule of federalism and restraint in the context of "an anticipated state criminal prosecution," the precise situation here. *Id*. at 879. Notwithstanding the state criminal case was not "pending," the Eighth Circuit concluded that an equity court should refrain from enjoining the threatened prosecution where no First Amendment right was being "chilled" by the threat thereof. The Court concluded the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution [are] not by themselves … considered irreparable in the special legal sense of that term." (quoting *Younger*, 401 U.S. 37, 46). *Id.*

Other decisions agree. In *Morales v. Trans World Air Lines*, 504 U.S. 374, 381 n. 1 (1992), the Court recognized that *Younger* "imposes heightened requirements for an injunction to restrain already pending *or an about-to-be*

pending state criminal action, or civil action involving important state interests." (emphasis added). *Morales* involved enforcement proceedings which were threatened; yet, the Court reserved judgment as to the principles of *Younger's* applicability in light of the fact *Younger* had not been argued and thus "the federal-state comity consideration underlying *Younger* are accordingly not implicated." *Id*. *See also*, *Wooley v. Maynard*, 430 U.S. 705, 712 (1977) ["… three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. This is quite different from a claim of federal equitable relief when a prosecution is threatened for the first time."]; *Roe v. Wade*, 410 U.S. 113, 126 (1973) ["no merit" under *Younger* in making distinction between physician's status as a "present state defendant" and his "status as a 'potential future defendant'"];*Fort Eustice Books, Inc. v. Beale*, 478 F.Supp. 1170, 1174 (D. Va. 1979) [*Younger* line of cases "makes clear that federal courts, as a matter of comity and federalism, will not exercise its equity jurisdiction against pending state criminal prosecutions, or threatened prosecutions, in the absence of bad faith on the part of the defendants."]. *Jernigan v. State of Mississippi*, 812 F.Supp. 688, 691 (S.D. Miss 1993) [notwithstanding *Steffel v. Thompson*, 415 U.S. 452 (1974) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), *Younger* still requires that "as a matter of equity" federal courts exercise restraint with respect to enjoining threatened state criminal prosecutions

when an adequate remedy at law exists and plaintiff will not suffer irreparable harm if denied equitable relief].

Rushia v. Town of Ashburnham, 701 F.2d 7, 9-10 (1st Cir. 1983), authored by then Circuit Judge Stephen Breyer, is particularly instructive. There, Judge Breyer applied the principles of *Younger* to a threatened, rather than a pending, state prosecution. The Court stated that "[s]ince there is presently no state prosecution pending, the controlling law is set forth in *Doran v. Salem Inn, Inc.* [*supra*]. While *Doran* held that "the near-absolute prohibition against a federal court enjoining an ongoing state criminal proceeding (set forth in *Younger* …) did not apply when the state criminal proceeding had not yet begun …," that *Doran* case nevertheless cautioned "'that a district court must carefully weigh the interests on both sides'" in view of the consequence or granting an junction against state criminal enforcement activities." Such injunction "'implicates the concern for federalism which lie at the heart of *Younger*. …'" While a District Court must exercise its discretion, still "the threat of imminent state prosecution ordinarily militates *against* the issuance of a federal injunction … . And, in *Doran*, the Court made clear that the considerations referred to in *Younger*," including the cost, anxiety and inconvenience of having to defend against a single criminal prosecution," are applicable "when the state prosecution is threatened but has not yet begun." Judge Breyer summarized for the First Circuit, as follows:

> it is clear that an injunction against a state criminal prosecution presents a different case … . These reasons boil down to saying that while a state prosecution may sound like serious injury to the ordinary ear, it does not normally in and of itself constitute 'irreparable injury' as a matter of law. The harm to the threatened defendant tends to be counterbalanced by the fact that the prosecution offers him a forum to make his legal arguments, by the fact that a state forum may be the more appropriate one, and by the comity considerations, recognized in *Younger*, that must make a federal court hesitate to enjoin a state criminal proceeding.

This Court also has recognized that the principles of comity and federalism are applicable to threatened state criminal proceedings. In *Age of Majority Educational Corp. v. Preller*, 512 F.2d 1241, 1244 n. **, it was stated that "[i]t may be argued, based upon *Stefaneli v. Minard*, 342 U.S. 117 … (1951); *Douglas v. Jeannette*, 319 U.S. 157 … (1943); and *Speilman Motor Co. v. Dodge*, 295 U.S. 89 … (1934), that notions of comity mitigate against the right to injunctive relief to prevent a threatened criminal prosecution even though the prosecution has not begun when the action for federal injunctive relief is instituted." And, in *Spence v. Cole*, 137 F.2d 71, 72 (4th Cir. 1943), this Court reversed the lower court's granting of an injunction prohibiting enforcement of a town ordinance, alleged to be unconstitutional. The "injunction granted did not enjoin the prosecution of cases already pending in which plaintiffs were being prosecuted for violation of the ordinance, but restrained future prosecutions." The Fourth Circuit held that "there was no showing of irreparable injury as would warrant a court of equity in restraining criminal prosecutions; and there is no reason to think that the state

courts would not protect the constitutional rights of plaintiffs upon such proceedings being instituted." *See* also, *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983), overruled in part on other grounds, *Hodgers v. De La Vira*, 199 F.3d 1037 (9th Cir. 1999) ["(t)he Supreme Court has mandated that federal courts exercise restraint in issuing injunction against state officers engaged in criminal law enforcement." (citing *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)); *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) and *City of L.A. v. Lyons*, 461 U.S. 95 (1983)); *Antrican v. Odom*, 290 F.3d 178, 185 (4th Cir. 2002) [*Ex Parte Young* exceptions to be applied narrowly "so as not unduly to erode the important underlying doctrine of sovereign immunity while still protecting this supremacy of federal law."]; *Bragg v. W. Va. Coal Assn*., 248 F.3d 275, 292 (4th Cir. 2001) ["the Supreme Court has strictly limited the application of the *Ex Parte Young* doctrine to circumstances in which injunctive relief is necessary to 'give[] life to the Supremacy Clause."]. In short, there are numerous authorities including decisions in this circuit, which hold that it is inappropriate for a federal court to enjoin *threatened state criminal proceedings* where, as here, the federal issue, including preemption, could be raised as a defense in that proceeding.

These same rules of comity and federalism, where federal courts afford deference to threatened state criminal proceedings in injunction actions brought by private parties apply equally to the United States as plaintiff. As written over a

century ago, "[i]f the United States is a party plaintiff, its rights as such are no larger than the rights of an individual suitor … . Therefore, in the absence of statute, the United States can only ask such relief as equity accords a private citizen presenting a proper case." *Attorney General v. Rumford Chemical Works*, 32 F. 608, 610 (D.R.I. 1876). See also, *U.S. v. Michigan*, 508 F.Supp. 480, 488 (D. Mich. 1980), [even though an injunction is not barred by the Anti-Injunction Act, "because the statute is not applicable when the United States seeks the injunction … the injunction still may be refused on comity grounds."]; *U.S.* v. *Augspurger*, 452 F.Supp. 659, 668 (D.N.Y. 1978) ["… the general rules of comity do apply even when the United States is the plaintiff."].

Application of the principles of comity and federalism to the United States as plaintiff is demonstrated vividly in *U.S. v. Ohio*, 614 F.2d 101 (6th 1979). There, Ohio levied sales and use tax assessments against the contractors of various federal agencies. The government sued in federal court challenging the assessments and, on appeal, raising the issue that the assessments were unconstitutional in violation of the Supremacy Clause. However, applying *Railroad Commission v. Pullman Co*., 312 U.S. 496 (1941) and *Younger v. Harris, supra*, the Sixth Circuit concluded:

> [a]bstention from exercise of federal jurisdiction is not improper simply because the United States is the party seeking a federal forum. In *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957), the United States filed an action in district court

> to quiet title to certain mineral rights. Leiter had sought in state court to have itself declared the owner of the same rights; Leiter's claim was based on state law. The district court stayed the state proceedings, to which the United States was not a party.
>
> The Supreme Court, on appeal ordered abstention from immediate exercise of federal jurisdiction, saying:
>
> > (T)he fact that the United States is not a party to the state court litigation does not mean that the federal court should initiate interpretation of a state statute. In fact, where questions of constitutionality are involved and the Government contends that an application of the state statute adverse to its interests would be unconstitutional our rule has been precisely the opposite: "as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law.

614 F.2d at 104-105, quoting *Leiter*, 352 U.S. at 228-229. Thus, the principles of comity and federalism, including those set forth in *Younger*, apply to the United States here.

In this instance, the District Court afforded no deference to state criminal proceedings which are "threatened for the first time." *Wooley, supra*. Here, there is no allegation of bad faith or harassment such as in *Wooley*, nor are there First Amendment claims present. *See, Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987) ["… in the past few decades, the Supreme Court has upheld federal injunctions to restrain state criminal proceedings only where the threatened prosecution chilled exercise of First Amendment rights."]. No evidence exists that

the state courts could not protect the purported federal rights of plaintiffs. The lower court did not consider the time honored principle that a "federal district court should be slow to act 'where its powers are invoked to interfere by injunction with threatened criminal prosecutions in state court.'" *Cameron v. Johnson*, 390 U.S. 611, 618 (1968). The Court below did not consider that "[c]ourts have repeatedly recognized the very heavy presumption against enjoining pending or threatened criminal prosecution." *Downstate Stone Co. v. U.S.*, 651 F.2d 1234, 1238 (7th Cir. 1981). Indeed, the Court applied the ordinary criteria for granting a preliminary injunction, notwithstanding that the State argued below that the Supreme Court requires the exercise of restraint in issuing injunctions against state officers engaged in law enforcement. We argued below that federal courts may not intervene in state enforcement activities absent extraordinary circumstances that threaten immediate and irreparable injury." Instead, the District Court concluded that a preliminary injunction was necessary because "the operation of Sections 4, 5 and 6 of the Act [Act 69] may result in one or more private plaintiffs being arrested and detained at a state or local prison facility." JA p. 1348. With respect to the United States, the court below simply found that "the Attorney General has broad and sufficient authority to assert claims, such as those before the Court, which defend and affirm the national government's powers and prerogatives regarding the

conduct of foreign relations, foreign commerce and a uniform system of naturalization." *Id*. at ___.

Nowhere, however, did the District Court conclude that the injury to the Lowcountry or to the United States, is "irreparable" in the context of restraining state criminal proceeding because it is "both great and immediate" as required by the *Younger* cases. Nor did the Court impose a "heightened requirement for an injunction to restrain … about-to-be pending state criminal action …, *Morales v. Trans World Air Lines, supra* or find that "the threat to federally protected rights cannot be eliminated by [private plaintiffs'] defense against a single criminal prosecution." *Younger, supra*. Instead, in a non First Amendment case, the District Court simply applied the traditional requirements for a preliminary injunction, treating Act 69's criminal provisions no differently from any other law. This was in contravention of the fundamental, longstanding rule against a federal equity court's interference with threatened state criminal proceedings, and was thus error.

Younger and subsequent Supreme Court cases have likewise counseled considerable restraint by a federal court of equity with respect to facial attacks upon criminal statutes or law enforcement policies. *Younger* itself involved a facial challenge upon California's Syndicalism law. The Supreme Court cautioned that "… even when suits of this kind involve a 'case or controversy' sufficient to

satisfy Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies and requiring correction of these deficiencies *before a statute is put into effect*, is rarely if ever an appropriate task of the judiciary." 401 U.S., *supra* at 52. (emphasis added). In *O'Shea v. Littleton, supra,* in a class action seeking to enjoin alleged illegal practices of bond setting, sentencing and jury fee practices in criminal cases, the Supreme Court refused to uphold an injunction against such practices. The Court found no case or controversy because of the conjectural nature of the threatened injury; but it also concluded that, even if there were a case of controversy present, there should be no equitable relief based upon *Younger* principles. According to the Court, "[t]his seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* … and related cases sought to prevent." 414 U.S. at 500. Moreover, in *Lyons v. City of L.A.*, 461 U.S. 95 (1983) involved an action to enjoin alleged police practices of stopping motorists for a traffic or vehicle code violation and then applying a "chokehold" to that person who had offered no resistance. There, the Court held that, even assuming Article III standing to seek an injunction,"[w]e decline the invitation to slight the preconditions of equitable relief [which require] … a proper balance between state and federal authority … in the issuance of injunctions against state officers engaged in the administration of the state's criminal laws in the absence of

irreparable injury which is both great and immediate." (citing *Younger*). 461 U.S. at 112. *See also*, *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) [a "litigant must show more than the fact that state officials stand ready to perform their general duty to enforce laws." (citing *Poe v. Ullman*, 367 U.S. 497, 501 (1961)).

In *Arizona*, the Supreme Court, in the various opinions written, expressed concern that a facial, preenforcement attack upon Arizona's statute may undermine principles of federalism. Justice Kennedy, in writing the opinion of the Court, recognized that "[t]he nature and timing of this case counsel caution in evaluating the validity of § 2(B). The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect." 132 S.Ct. at 2510. Similarly, Justice Scalia, in his opinion concurring in part and dissenting in part, emphasized that "[i]t is impossible" to make a finding without a factual record, with respect to "the manner in which Arizona is implementing these provisions - something the Government's preenforcement challenge has pretermitted." Citing *United States v. Salerno*, 481 U.S. 739, 745 (1987), Justice Scalia stated that the fact the Arizona law might operate unconstitutionally under "'some conceivable set of circumstances is insufficient to render it wholly invalid … .'" *Id*. at 2515. And, Justice Alito, also concurring and dissenting, echoed these sentiments, explaining that "[t]he trouble with this premature, facial challenge is that it affords Arizona no opportunity to implement

its law in any way that would avoid potential conflicts with federal law … . The point is that there are plenty of permissible applications of [Arizona] § 6, and the Court should not invalidate the statute at this point without at least some indication that Arizona has implemented it in a manner at odds with Congress' clear and manifest intent." *Id.* at 2534, citing *Salerno*.

Thus, in *Arizona*, the Court recognized that principles of federalism often preclude the issuance of broad-based injunctions in facial, preenforcement attacks upon state criminal statutes, particularly in a suit brought by the United States against a sovereign state. *See, Wash. State Grange v.Wash. State Repub. Party*, 552 U.S. 442, 451 (2008) ["Facial challenges threaten to short circuit the democratic process …."] Earlier, in *Younger, supra* 401 U.S. at 52, the Court likewise stated that "even when suits of this kind (facial attacks) involve a 'case or controversy' …, the task of analyzing a proposed statute, pinpointing its deficiencies and requiring correction of these deficiencies before the statute is put into effect, is rarely, if ever an appropriate task for the judiciary." According to *Younger*, a possible facial invalidity "does not in itself justify an injunction against good-faith attempts to enforce it." *Id*. at 54. Thus, because of the importance of federalism and comity, "'[t]he accused should first set up and rely upon his defense in the state courts ….'" *Id*. at 45, quoting *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926). Similarly, in *Douglas v. City of Jeannette*, 319 U.S. 157, 162 (1943), the

Court emphasized that a District Court may *sua sponte*, raise the question of the Court's lack of equity jurisdiction "where its powers are invoked to interfere by injunction with threatened criminal prosecution in a state Court." *See also, New York v. Ferber*, 458 U.S. 747, 768 (1982) ["as applied" analysis is far superior to "facial" invalidation because "it allows state courts the opportunity to construe a law to avoid constitutional infirmities" in the context of the criminal proceedings.]. In *Arizona*, as well as these earlier decisions, the Court has been fully cognizant of the importance of the sovereignty of a state.

Although the Court, in *Arizona*, upheld injunctions of several provisions of Arizona law including one similar to South Carolina's section 5, it does not appear to have considered *Younger arguments.* These arguments certainly counsel restraint in the issuance of an injunction in this facial challenge to South Carolina law. When the Supreme Court has not addressed provisions like South Carolina's sections 4 and 6(B)(2), an injunction should not have been issued as to those provisions, and the current preliminary injunction of them should be lifted.

C

The District Court Failed to Observe Restraints on Equity Power

The Supreme Court cautioned in another context in *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) that federal courts "should exercise the power to impose equitable remedies only sparingly, subject to clear rules guiding its use." Further,

the Court explained that "[t]wo clear restraints on the equity power - federalism and the separation of powers - derive from the very Form of Government. Federal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States."

Here, the District Court did not sufficiently recognize these restraints upon the federal equity power. The lower court enjoined what the plaintiffs claim are threatened criminal proceedings. In doing so, the District Court ignored the interests of federalism and comity, as well as the sovereignty of the State. It implied rights of action for Lowcountry plaintiffs, where this Court in *Montgomery County* held that such rights of action are without foundation. Separation of powers in this regard was not considered. For these reasons the federal equity power was erroneously invoked.

As discussed above, *Arizona's* upholding the injunction of provisions of *Arizona* does not brush aside these restraints as they apply in the instant case. When the Supreme Court has not addressed provisions similar to §§4 and 6(B)(2), and the State has strong arguments as to why they are not preempted equity counsels against the issuance of an injunction of these provisions of South Carolina law.

III

SECTION 4 ON HARBORING SHOULD NOT HAVE BEEN ENJOINED

Act 69, 4(A)and (C), now codified as S.C. Code Ann. §16-9-460, prohibit transportation, harboring and sheltering of themselves by illegal immigrants "with intent to further the person's unlawful entry into the United States or avoiding apprehension or detection of the person's unlawful immigration status by state or federal authorities" while sub-sections (B) and (D) (originally adopted in 2008 as §16-9-460) of this statute prohibit such actions by third parties as to illegal immigrants. JA pp. 106 and 107. Federal statute, 8 U.S.C. §1324(a)(1)(A) contains provisions somewhat similar to §§(B) and (D) of South Carolina's law.[3]

The South Carolina District Court found field and conflict preemption as to

---

[3] Section 1324(a)(1)(A) includes the following provision among others:

> Any person who. . .
>
> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> shall be punished as provided in subparagraph (B).

subsections A and C and B and D and field and conflict preemption as to subsections (A) and (C)[4]. J.A. at pp. 1363 and 1367. On limited remand, the District Court found that "Sections 4(B) and (D) infringe upon a comprehensive federal statutory scheme and would interfere with the federal government's supremacy in the realm of immigration." JA p. 1616 (Order at p.3). The Court further found that the provisions "would allow state officials to exercise discretion regarding the prosecution of person allegedly harboring or sheltering persons unlawfully present." *Id.* The Court also concluded, in its November, 2012 Order, that "[s]ections 4(A) and (C) necessarily conflict with federal policy judgments relating to removability, and are therefore preempted by federal law." JA p. 1617 (Order at p. 4).

A

Subsections B and D Are Neither Field Nor Conflict Preempted

The United States Supreme Court did not address provisions in Arizona law similar to §§B and D in its Opinion. Nevertheless, two Courts have misapplied the

[4] The District Court concluded that "[]there is no comparable federal statute, and . . . Plaintiffs argue convincingly that this provision is the equivalent of unlawful presence, which is [not] a federal crime. [footnote omitted] Instead, the federal government has made unlawful presence grounds for a civil removal proceeding, 8 U.S.C. §§ 1182(a)(6)(A)(i) and 1227(a)(1)(B) and (C), and has made unlawful presence an element of a criminal act only if the person has previously committed a felony and has been deported from, or voluntarily left, the United States after his or her conviction. Id. § 1252c(a). 840 F. Supp. 2d at 919.

rulings of that Court and other precedent to enjoin harboring provisions in Arizona, Georgia and Florida. South Carolina's harboring statute should be sustained as the federal government has not occupied the field as to harboring, and the federal and state statutes are not in conflict.

The Arizona District Court decision that the Supreme Court reviewed refused to enjoin the harboring provisions under A.R.S. § 13–2929 and apparently no appeal was taken as to that ruling. . The Arizona District Court found the Arizona statute to be " narrower than its federal counterpart because it requires that the person already be in violation of a criminal offense." *United States v. Arizona*, 703 F. Supp. 2d 980, 1002, n. 18 (D. Ariz. 2010). South Carolina's statute does not contain that limitation of the Arizona statute, but just as the Arizona District Court found as to that state's statute, the South Carolina law "does not attempt to regulate who should or should not be admitted into the United States, and it does not regulate the conditions under which legal entrants may remain in the United States." 703 F. Supp. 2d at 1003 (D. Ariz. 2010).

Apparently these provisions of the Arizona statute were not challenged on appeal or on certiorari, but subsequent to the Supreme Court's decision in *Arizona,* the Arizona District Court issued a preliminary injunction as to Arizona's harboring provision in a different case based upon a different theory asserted by a different party. *Valle del Sol v. Whiting*, CV 10-1061-PHX-SRB (DCAZ,

September 5, 2012)(JA p. 1408), app. pending, 9th Cir., No. 12-17152. The Court found field preemption and conflict preemption of the harboring provisions because the law imposed State penalties in addition to federal penalties and gave State officials enforcement discretion rather than federal officials. Order at p. 9. *Valle del Sol* relied on the recent rulings by the Eleventh Circuit upholding preliminary injunctions of the harboring provisions in the Alabama and Georgia statutes. *GLAHR*, supra; *United States v. Alabama*, 691 F.3d 1269, 1284 (11th Cir. 2012). The Eleventh Circuit had found field and conflict preemption of Georgia harboring provisions in *GLAHR.* 691 F. 3d at 1264 and followed that decision to conclude that the Alabama harboring provisions were field and conflict preempted. *U.S. v. Alabama, supra.*

The above decisions, including that of the District Court of South Carolina are in error because, among other reasons, they are inconsistent with the rule recognized in *Arizona*, that "[i]n preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" 132 S. Ct. at 2501. The federal statutes pertaining to harboring indicate no such purpose of superseding state police powers nor do they indicate that the federal government has occupied a field as to harboring. Simply because the federal government has legislated in an area does not mean that it has occupied that field. "The Court has never held that every state

enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976)

Arizona characterized field preemption as follows:

> "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. . . [and that] [t]he intent to displace state law altogether can be inferred from a framework of regulation "so pervasive ... that Congress left no room for the States to supplement it" or where there is a "federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

132 S. Ct. at 2501. The Court concluded that the federal government had occupied the field of alien registration for the following reasons:

> The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. It was designed as a " 'harmonious whole.' " *Hines*, *supra*, at 72. Where Congress occupiesan entire field, as it has in the field of alien registration,even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. . . .

Arizona at 2502.

The federal statutes regarding harboring do not provide a "full set of standards" nor are they "designed as a whole" or reflective of a "congressional decision to foreclose any state regulation in the area. . . ." As to persons already in the country, 8 U.S.C. §1324(a)(1)(A), *supra,* simply imposes criminal penalties on

the movement or concealment of the unauthorized alien.

The Eleventh Circuit cited provisions in §1324(c)[5] authorizing local as well as federal law enforcement to arrest for these crimes and interpreted that statute together with §1329 as limiting prosecution to federal officials[6], but at issue in the instant case is South Carolina's enforcement of its own law. The Eleventh Circuit also said that the federal Courts had exclusive jurisdiction to "interpret the boundaries of the federal statute" (691 F3d at 1264), but §1329 indicates no intent to divest State courts of concurrent authority as to the federal law. *See, Tafflin v. Levitt*, 493 U.S. 455, 458-60, (1990);[7] *In re Jose C.*, 45 Cal. 4th 534, 548, 198 P.3d 1087, 1097 (2009), quoting

[5] Section 1324(c) provides that "[n]o officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws."

[6] Section 1329 provides, in part, that [t]he district courts of the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States.

[7] "Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. . . 'if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.'" *Id.*

Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 823 (1990).[8]

The Eleventh Circuit cited *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) in which the Supreme Court found a Pennsylvania sedition act to be preempted by a federal statute that preempted the related field. The harboring statutes do not approach the degree of federal regulation at issue in *Nelson* which found that the federal statute met each of the following tests:

> First, '(t)he scheme of federal regulation (is) so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' [350U.S. at 502] . . .
>
> Second, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of state laws on the same subject.' [350 U.S. at 504] . . .
>
> Third, enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program [350 U.S. at 505]

None of these tests support a finding of field preemption by the federal harboring provisions. At the same time, the State of South Carolina has a strong interest in protecting its people from dangers associated with criminal activity involved with harboring and related activities.

The South Carolina District Court also erred in finding conflict preemption

---

[8] "Title 8 United States Code section 1329 vests federal courts with jurisdiction but makes no mention of state courts. The absence of an express exclusion of state court jurisdiction 'is strong, and arguably sufficient, evidence that Congress had no such intent.' (*Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) While in some cases preemption may be found in the absence of an explicit textual directive based on legislative history or demonstrated incompatibility with federal interests, we discern no such history or incompatibility here, and Jose C. identifies none." *Id.*

as to the absence of a ministerial / religious denomination related exemption in South Carolina law that is present in §1324(a)(1)(C)), but South Carolina law does contain exemptions including "churches or other religious institutions that are recognized as 501(c)(3) organizations by the Internal Revenue Service." §4(G). On limited remand, the Court found that conflict in the discretion regarding prosecutions under South Carolina law harboring, but they do not conflict with federal law as discussed above as to field preemption.

Arizona set forth the following rules regarding conflict preemption:

> state laws are preempted when they conflict with federal law. . . This includes cases where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143, (1963), and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"

132 S.Ct. at 2501. Certainly, compliance with both federal and state law is not a physical impossibility nor does it stand as an obstacle to Congressional purposes and objectives. No conflict exists as to the religious exemption. As discussed above as to field preemption, no conflict exists as to enforcement.

The Supreme Court has recognized that "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). South Carolina's harboring provisions mirror federal objectives and

further legitimate state goals and should not have been enjoined.

B

Subsections A and C Are Not Field or Conflict Preempted

For the same reasons discussed as to §§ B and D, *supra*, §§ A and C should not be enjoined. The District Court, in its December, 2012 Order and November, 2011 Orders concluded that the provisions should be enjoined and equated them to criminalizing continuing presence in the State whereas the federal government treats the matter as grounds for civil removal. JA at pp. 1363, 1367 and p. 1616. Alabama has a somewhat comparable conspiracy provision, the injunction of which was upheld by the Eleventh Circuit. *U.S. v. Alabama*, 691 F. 3d at 1288.

Subsections A and C do not punish mere unlawful presence because they require more than simple presence. They require that the illegally present alien take action to transport, harbor or shelter themselves "with intent to further the person's unlawful entry into the United States or avoiding apprehension or detection of the person's unlawful immigration status by state or federal authorities." Barring such actions by aliens is not different from prohibiting such action by third parties as in subsections B and C. Although federal law does not appear to criminalize self harboring, the State statute is not an obstacle to federal law nor is it field precluded.

C

Section 4 Is Not Unconstitutional Under the Present Facial Challenge

Washington State Grange v. Washington State Republican Party, *supra*, 552 U.S.at 449- explained the Court's disfavor of facial challenges as follows:

> Under *United States v. Salerno*, 481 U.S. 739 (1987), a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.*, that the law is unconstitutional in all of its applications. *Id*., at 745. While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a " 'plainly legitimate sweep.' " *Washington v. Glucksberg*, 521 U.S. 702, 739–740, and n. 7 (1997) (STEVENS, J., concurring in judgments). . . .In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases. *See United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) Exercising judicial restraint in a facial challenge "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *Raines*, *supra*, at 22.

Certainly, under either standard considered in *Washington Grange,* §4 has a "plainly legitimate sweep" and Lowcountry cannot show that "no set of circumstances exists under which the Act would be valid." *Arizona* rejected the facial challenge to provisions of Arizona law regarding immigration status verification stating that "[w]ithout the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a

way that conflicts with federal law."[9] *Id.* Similarly, under *Arizona*, this Court should not assume that the harboring provisions will be construed or applied in a way that conflicts with federal law.

D

Section 4 Causes No Irreparable Harm to Lowcountry and the United States Nor Do the Balance of Equities Tip in their Favor and the Public Interest is Not Served by the Grant of Preliminary Injunctive Relief

When Section 4 is neither field nor conflict preempted, no irreparable harm can exist for the Lowcountry and the United States, the balance of equities do not tip in their favor, and the public interest is not served.[10] The District Court asserted that chaos would exist from conflicting state and federal laws, but when no such conflict exists, the chaos will not ensue nor will as expressed by the District Court, "foreign policy sensitivities" be harmed (840 F. Supp. 2d at 925). Moreover, as noted *supra*, in Argument I B regarding limitations on injunctions of threatened criminal prosecutions, " in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient

---

[9] *Arizona* continued with the following citation which is applicable here: "*Cf. Fox v. Washington*, 236 U.S. 273, 277 (1915) ("So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts" (citation omitted))."

[10] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

unless it is 'both great and immediate.'" *Younger*, 401 U.S at 46.

IV

THE COURT IMPROPERLY ENJOINED SECTION 6(B)(2) OF ACT 69 REGARDING POSSESSION OR USE OF A FRAUDULENT ID

Act 69, §6(B)(2), now codified under S.C. Code Ann. § 17-13-170, provides as follows:

> (2) It is unlawful for a person to display, cause or permit to be displayed, or have in the person's possession a false, fictitious, fraudulent, or counterfeit picture identification for the purpose of offering proof of the person's lawful presence in the United States. A person who violates the provisions of this item [penalties for first offense misdemeanor and second offense felony follow]

This provision does not have a counterpart in *Arizona* which was addressed by the Supreme Court. A federal counterpart exists in 8 U.S.C.A. §1324c which provides in part as follows:

> (a) . . . It is unlawful for any person or entity knowingly-- (2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter . . . .

Although a federal statute does address this matter, the South Carolina statute does not intrude on or conflict with federal law.

Section 6(B)(2) should not be encompassed by the alien registration field

recognized by *Arizona*[11] because this statute addresses ordinary fraud. The District Court relied on *Arizona's* ruling regarding the field to maintain the preliminary injunction in the instant case, but §6(B)(2) relates to the field of registration only contextually. Its direct effect is on fraud, and Congress certainly has not occupied the field of fraud. When the document is fraudulent, it is not a registration document even though it may purport to be of that nature. Moreover, the statute at issue is not limited to false registration documents and could include other false identification such as fraudulent drivers licenses used when inquiry is made as to immigration status pursuant to §6(B)(1). Application of this statute to non-registration documents certainly does not stray into the field of registration. *See, Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-29 (1992)[12]

Moreover, the "presumption against preemption" doctrine applies because fraud is an area traditionally for state legislation. As stated in *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) "[i]n all pre-emption cases, and particularly in those in which

[11] "[T]he Federal Government has occupied the field of alien registration . . . [and] [w]here Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible." 132 S. Ct. at 2502.

[12] *Cipollone* stated that the "fraudulent-misrepresentation claims [of the petitioners in that case] that do arise with respect to advertising and promotions . . . [were] not pre-empted . . . [because] [s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation[,] the duty not to deceive. . . Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." Similarly, federal law shows no sign of wishing to insulate persons from state fraud charges.

Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the federal Act unless that was the clear and manifest purpose of Congress.' " Although Congress has a well-recognized role regarding immigration, it cannot be presumed to preempt State powers regarding fraud and has not done so for the reasons discussed above.

The District Court stated that "the state arrest and prosecution of persons with false identifications could generate tensions with foreign nations and retaliation against American nationals abroad, which support the argument of the United States that such matters need to be under its exclusive discretion and control and are field preempted." 840 F. Supp. 2d at 918. This speculation does not meet *Arizona's* test for field preemption which is that "[t]he intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive ... that Congress left no room for the States to supplement it' or where there is a 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" 132 S. Ct. at 2501.

When the states are permitted to inquire as to lawful status and rely on identification provided, state officers should be able to rely on the validity of the identification provided them statute is directed at fraud, its impact on the other the other factors such as harm to federal interests is doubtful. Therefore, the District

Court erred in finding that the United States had made a "clear showing" of irreparable harm from the provision, that the equities tipped in favor of the United States and that the public interest would be served by the grant of preliminary injunctive relief. 840 F. Supp. 2d at 927.

V

THE STATE RECOGNIZES THE SIMILARITIES BETWEEN SECTION 5, REGARDING FAILURE TO CARRY REGISTRATION, AND THE ENJOINED ARIZONA STATUTE BUT PRESERVES ITS DEFENSES

Section 5 of Act 69 is now codified as S.C. Code Ann. § 16-17-750 and provides as follows: "(A) It is unlawful for a person eighteen years of age or older to fail to carry in the person's personal possession any certificate of alien registration or alien registration receipt card issued to the person pursuant to 8 U.S.C. Section 1304 while the person is in this State." [13]

Arizona addressed a similar statute, Section 3 of S.B. 1070, that "create[d] a

---

[13] 8 U.S.C.A. § 1304(e) provides, as follows, that

> [e]very alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days, or both.

This provision appears to include a 2012 amendment adopted after the Supreme Court's decision.

new state misdemeanor [forbidding] the 'willful failure to complete or carry an alien registration document ... in violation of 8 United States Code section 1304(e) or 1306(a).' Ariz.Rev.Stat. Ann. §11–1509(A) (West Supp.2011)." 132 S. Ct. at 2501. [14] The Court found that "permitting the State to impose its own penalties for the federal offenses. . . would conflict with the careful framework Congress adopted." 132 S. Ct. at 2502. The Court found this provision to be preempted.

Although some differences exist between the South Carolina and Arizona statutes noted in footnote 14, *supra*, the State recognizes the similarities between the Arizona provisions found to be preempted in the Supreme Court's decision and those in South Carolina and the broad ruling of the Court's ruling regarding field preemption. Respectfully, the State does not concede or abandon any defenses to the challenge to the constitutionality of §5 should this provision or similar provisions in other states come before the Supreme Court for further review.

VI

THE COURT SHOULD RULE ON THE MERITS

This Court has the authority to rule on the merits of this case should it choose to do so. *Munaf v. Geren*, 553 U.S. 674, 691-92 (2008)("Review of a preliminary injunction 'is not confined to the act of granting the injunctio[n], but

[14] The Arizona statute differs from the South Carolina statute in that it also addresses failure to complete a registration document, refers to §1306(a) and removes the possibility of probation or parole which the Supreme Court found to be intrusive on the Federal scheme.

extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of [the] bill, and, if so, to directing a final decree dismissing it.'"); *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 360-61 (4th Cir. 1998).[15]

The instant suit is a facial challenge, and the rulings of the District Court on limited remand and of the Supreme Court in Arizona make clear that the Lowcountry and United States cannot prevail on the lifting of the injunction as to section 6 regarding the matters other than the use of false identification in section 6 (B)(2). Accordingly, this Court should dismiss this suit as to those provisions.

As to the provisions that remain subject to an injunction, further proceedings as to them would not advance the interests of the parties and arguments are before this Court which would permit it to rule on the merits and, in particular, to reject the facial challenges to these provisions. Moreover, the Lowcountry lacks a right of action in this suit. Accordingly, the Appellants respectfully request that this Court dismiss this suit.

[15] "Appellate adjudication of the underlying legal merits, on an appeal from the issuance of a preliminary injunction, is most clearly justified where not only does the injunction rest entirely upon a pure question of law, but it is plain that the plaintiff cannot prevail as a matter of the governing law. When this is apparent to the court of appeals, a defendant is, as the Supreme Court has observed for more than a century, entitled both to immediate relief and to relief from the expense of further litigation." *Id.*

CONCLUSION

The Appellants State of South Carolina, Governor Haley and Attorney General Wilson respectfully request that this Court reverse the District Court as to those matters that remain subject to a preliminary injunction, and that this Court issue a ruling dismissing this case.

ORAL ARGUMENT STATEMENT

Pursuant to Rule 34, FRAP, the Appellants State of South Carolina, Governor Haley and Attorney General Wilson respectfully request the opportunity for oral argument in this case. Oral argument is necessary to address fully the important constitutional and other issues in this case and to assist the Court.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General
Email: AGRCOOK@SCAG.GOV

/s/ J. Emory Smith, Jr.
JAMES EMORY SMITH, JR.
Assistant Deputy Attorney General
Email:
AGESMITH@SCAG.GOV
Post Office Box 11549
Columbia, South Carolina 29211
Phone: (803) 734-3680
Fax: (803) 734-3677
Counsel for Appellants

January 25, 2013

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1096L **Caption:** USA v State of South Carolina, et al

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   ☑ this brief contains 13,883 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains _____ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

   This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☑ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 [*identify word processing program*] in 14 Point Times New Roman [*identify font size and type style*]; **or**

   ☐ this brief has been prepared in a monospaced typeface using _____ [*identify word processing program*] in _____ [*identify font size and type style*].

(s) James Emory Smith, Jr.

Attorney for Appellants

Dated: January 25, 2013

CERTIFICATE OF SERVICE

I certify that on January 25, 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/ James Emory Smith, Jr.
Signature

January 25, 2013
Date