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

REPLY 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

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This reply brief of all Appellants (State) responds to arguments in the Response Briefs of Appellees Lowcountry Immigration Coalition, et al. (Lowcountry) and the United States.

I

LOWCOUNTRY PLAINTIFFS / APPELLEES HAVE NO RIGHT OF ACTION TO SEEK AN INJUNCTION

Lowcountry Plaintiffs rely on cases that have addressed preemption claims made by private parties, but they point to no Supreme Court or Fourth Circuit case in which the Courts have ruled, over objection, that a private party has a direct right of action under the Supremacy Clause in the absence of a statute authorizing such a claim. They argue that they have support from a footnote in *Shaw v. Delta Air Lines, Inc.*, 485 U.S. 85, 96 n. 14 (1983) and another in *Lawrence Co. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 259 n. 6 (1985), but these cases were readily distinguished, as follows, in *Legal Envtl. Assistance Found., Inc. v. Pegues*, (*LEAF*) 904 F.2d 640, 643 (11th Cir. 1990)[footnotes omitted]

> LEAF cites dicta in footnotes from *Shaw v. Delta Air Lines* and *Franchise Tax Board v. Construction Laborers Vacation Trust*, which suggest that a federal cause of *action* might be implied to permit a declaratory adjudication that federal law pre-empts a contrary state law, even if the federal statute does not expressly provide a cause of action.
>
> 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*. This jurisdictional view of the Supremacy Clause was best stated by the Second Circuit in *Andrews v. Maher*:
>
> > 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. . . .
>
> When the federal right in question is derived from the Constitution, it is obviously for the courts to determine both the scope of the right and the adequacy of the remedy, whether the remedy is a matter of constitutional common law or statute. When, however, the right at issue is purely the creation of a federal *statute*, the judicial role is different. As the Supreme Court stated in *Davis v. Passman*:
>
> > 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, and *Cort* set out the criteria through which this intent could be discerned.

Although as recognized in the Appellants' Opening brief, the Eleventh Circuit, rejected a similar argument in the case regarding Georgia's immigration related case, that Opinion did not even cite *LEAF*. The Supreme Court has even stated that "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 [28 U.S.C.A. § 1343(3) (West)." *Chapman v. Houston*

Welfare Rights Org., 441 U.S. 600, 615 (1979); *See also, Mashpee Tribe v. Watt*, 542 F. Supp. 797, 806 (D. Mass. 1982) aff'd, 707 F.2d 23 (1st Cir. 1983)("The Supremacy Clause does not support direct causes of action, however. It only gives priority to federal rights created by a federal statute when they conflict with state law." Citing *Chapman*). The Court of Appeals for the Fourth Circuit quoted *Chapman* in *Maryland Pest Control Ass'n v. Montgomery County, Md.*, 884 F.2d 160, 162 (4th Cir. (1989).

Although Lowcountry claims that the Fourth Circuit "has allowed private parties to seek injunctive relief on the basis of preemption claims (Lowcountry Brief at p. 34)," the cases do not appear to address whether the Supremacy Clause provides an independent right of action. *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 125 (4th Cir. 2008); *Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150, 157 (4th Cir. 2010). Lowcountry cites *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) and *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642-43 (2002), but those cases did not address the question of whether a private action exists.[1] Although *Verizon* found subject

[1] "The Commission contends that since the Act does not create a private cause of action to challenge the Commission's order, there is no jurisdiction to entertain such a suit. We need express no opinion on the premise of this argument. 'It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case.'" *Verizon*, 535 U.S. at 642-643.

matter jurisdiction, the presence of jurisdiction does not alter the fact that Plaintiff has no right of action for injunctive relief in this action.

Lowcountry contends that *Day v. Bond*, 500 F. 3d 1127 (10th Cir. 2007) merely addresses whether a Federal statute can be enforced rather than whether a challenge can be maintained directly under the Supremacy Clause, but the organization reads the case too narrowly. The case considered whether, for purposes of standing, 8 U.S.C. §1623 "creates a private cause of action." 500 F.3d at 1138. "To have standing, then, the Plaintiffs must possess a private, individualized right conferred by §1623." *Id.* To the extent that *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir 2004) supports the existence of a direct action under the Supremacy Clause, it is not the law in the Fourth Circuit nor has the United States Supreme Court so ruled. Even some Tenth Circuit judges have recognized that a right of action under the Supremacy Clause has not been determined by the Supreme Court 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).

Contrary to Lowcountry's assertion, the State does not contend that Lowcountry has alleged a cause of action under 42 U.S.C. §1983 alone. The State's opening brief is intended to argue instead that Plaintiff's §1983 claim would not support their preemption claim. Brief of State at pp. 13 and 14.

Lowcountry references the District Court's initial Order (United States v. S. Carolina, 840 F. Supp. 2d 898, 910 (D.S.C. 2011) modified in part, CIV.A. 2:11-2958, 2012 WL 5897321 (D.S.C. Nov. 15, 2012)) referring to Plaintiffs' identification of rights under the immigration statutes and the Fourth and Fourteenth Amendments; however, the Court did not rely on those Amendments to support the preliminary injunction it issued, and neither the Supremacy Clause nor federal statutes on which the Court based its ruling authorize a private right of action.

Lowcountry challenges the Opening Brief's application of the dissent in *Douglas v. Ind. Living Center of Southern Cal.*, 132 S.Ct. 1204, 1213 (2012) (Roberts, C. J. dissenting), but the dissent, as follows, made clear its view that an independent cause of action does not spring from the Supremacy Clause and that a federal statutory cause of action is necessary to raise such a claim:

> 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*, 536 U.S. 273, 286 (2002). 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."

132 S. Ct. at 1212.

Although the dissent included the following statement that might suggestion an allowance of a suit to enjoin a threatened action, the issue remains undecided by the highest Court in the land:

> This is not to say that federal courts lack equitable powers to enforce the supremacy of federal law when such action gives effect to the federal rule, rather than contravening it. The providers and beneficiaries rely heavily on cases of this kind, most prominently Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Those cases, however, present quite different questions involving "the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law." Virginia Office for Protection and Advocacy v. Stewart, 563 U.S. ——–, ——, 131 S.Ct. 1632, 1642, 179 L.Ed.2d 675 (2011) (KENNEDY, J., concurring). Nothing of that sort is at issue here; the respondents are not subject to or threatened with any enforcement proceeding like the one in Ex parte Young. They simply seek a private cause of action Congress chose not to provide.

132 S. Ct. 1204, 1213.

These issues are discussed at length in the article, Dustin M. Dow, Dustin M. Dow, *The Unambiguous Supremacy Clause*, 53 B.C. L. Rev. 1009 (2012)[footnotes omitted] including the following excerpt:

> Nevertheless, no lower court determination that the Supremacy Clause confers a cause of action has ever been overturned by the Supreme Court, in part because the Court's position remains unclear. The contemporary approach derives from an early-twentieth-century case, *Ex parte Young*, in which the Court established in 1908 that jurisdiction properly exists when a plaintiff prospectively seeks relief from a state law or regulation in violation of, or preempted by, the Fourteenth Amendment of the federal Constitution. In relying so substantially on the jurisdictional approval of *Ex parte Young* in contemporary preemption suits without probing for a cause of action, the Court laid the foundation that leads to the question of whether the

Supremacy Clause implies a cause of action in explicit, prospective preemption suits.

Id. at p. 1022. This article makes clear that the issue of whether the Supremacy Clause permits a prospective injunctive relief absent statutory authorization remains undecided by the Supreme Court.

The *Ex Parte Young* exception is not applicable here, as to the Supremacy Clause claim because neither that clause nor Federal immigration law gives the Lowcountry Plaintiffs an enforceable Federal right. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)("Our decisions repeatedly have emphasized that the Young doctrine rests on the need to promote the vindication of federal rights."); *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011)("In order to invoke the *Ex parte Young* exception to sovereign immunity, a state agency needs two things: first, a federal right that it possesses against its parent State."); *see*, *Verizon , supra*, 535 U.S. at 645 ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."). For these reasons, including the absence of a definitive ruling from the Supreme Court, Appellants respectfully request that this Court rule that Lowcountry has no cause of action to maintain the present suit.

II

THE COURT SHOULD NOT HAVE ISSUED AN INJUNCTION AS TO THREATENED OR ANTICIPATED CRIMINAL PROCEEDINGS

Even if, *arguendo*, Lowcountry could bring this action without Congressional authorization, the Court should have abstained from considering either that case or the United States' action under principles of comity and federalism in *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). Lowcountry's response simply engages in baseless hyperbole in claiming that the Appellants' argument is "radical and far-reaching" (Brief at p. 41). While the State recognized that the aspect of *Younger* requiring "near-absolute"[2] abstention as to most pending proceedings was not applicable because applicable parts of the law were enjoined before they took effect and prosecutions could be instituted, the State emphasized these *Younger* principles of restraint and federalism apply to threatened or anticipated proceedings which is the situation in the instant case. These principles also apply to the United States' action as discussed in the State's opening brief *U.S. v. Ohio*, 614 F.2d 101 (6th 1979).

Although claiming that it faces irreparable harm, and that it should not have to wait for state court action to challenge the law at issue, Lowcountry argues that abstention should not apply because no proceedings have been instituted. Lowcountry obviously recognizes that proceedings are threatened because it cites

[2] *Rushia v. Town of Ashburnham, Mass.*, 701 F.2d 7, 9 (1st Cir. 1983).

to the Court's Order's finding that Plaintiffs face a "real risk" of state prosecution (840 F. Supp. 2d at 918) and, in their memoranda in the District Court referred to the threat of prosecution (J.A. pp. 206, 207 (Memorandum in Support of P.I. (pp. 42 and 43); J.A. pp. 1166, 1167 (Memorandum on Limited Remand at pp. 28, 29). Despite these alleged risks and threats of prosecution and the State interests that would be involved in such proceedings, the District Court proceeded to a temporary injunction without consideration of the restraining *Younger* factors and without giving the State any opportunity to implement the law.

The authority cited in the State's Opening brief makes clear that *Younger* principles of comity and federalism apply to anticipated or threatened proceedings. *See,eg, Younger v. Harris*, 401 at 45 (1971)[3]; *Morales v. Trans World Air Lines*, 504 U.S. 374, 381 n. 1 (1992) ("an about-to-be pending state criminal action"); *Roe v. Wade*, 410 U.S. 113, 126 (1973) ("'potential future defendant'"); *Bacon v. Neer*, 631 F.3d 875 (8th Cir. 2011)("an anticipated state criminal prosecution"). While, as explained by then Second Circuit Court Judge Breyer in *Rushia v. Town of Ashburnham, supra,* note 2, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) held that the "near-absolute prohibition against a federal court enjoining an ongoing

[3] In *Fenner v. Boykin*, 271 U.S. 240 (1926), . . . [t]he Court. . .made clear that a suit, even with respect to state criminal proceedings not yet formally instituted, could be proper only under very special circumstances . . . principles, made clear in the *Fenner* case, have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions) *Id.*

state criminal proceeding" (set forth in Younger …) did not apply when the state criminal proceeding had not yet begun … the Court [in Doran] made clear that the considerations referred to in *Younger* remain relevant, although the comity consideration is not determinative, when the state prosecution is threatened but has not yet begun." *Rushia*, 701 F2d at 9. *Doran* cautioned "'that a district court must weigh carefully the interests on both sides. [A temporary injunction] prohibit[s] state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court [which] seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*." 422 U.S. at 931.

Lowcountry contends that such principles of Federalism should not apply to this case because the State statutes at issue intrude on federal immigration powers. This argument addresses the merits of the case, and the State disputes that the provisions at issue are preempted. Instead, what is pertinent to considerations for the preliminary injunction are "the State's interest in enforcing its criminal laws, and . . . concerns for federalism which lie at the heart of *Younger*" *Doran, supra*.[4] As explained further in the Opening Brief, in issuing the preliminary injunction in

[4] Lowcountry attempts to rely on *Harper v. Pub. Serv. Comm'n of W.VA.*, 396 F.3d 348, 355 (4th Cir. 2005), but that case did not involve a criminal proceeding. Instead, it was a permitting matter involving who had a right to contract with towns for waste disposal. The Court found that the State's interests did not outweigh the considerable federal interests under its Commerce powers which justified "a narrower view of state interest in the abstention context." 396 F3d at 357.

this case, the District Court failed to give sufficient weight to those concerns and is inconsistent with *Younger* and its progeny and thereby abused its discretion.

III

SECTION 4 REGARDING HARBORING AND RELATED ACTIVITIES SHOULD NOT HAVE BEEN ENJOINED

A

This Section is not Field Preempted

"The intent to displace state law altogether [under field preemption] 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.'" *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). Federal harboring related law cannot be characterized as "so dominant" or "so pervasive" as to demonstrative exclusive governance of the movement or concealment of aliens within states.

Lowcountry contends that Section 4 is field preempted because related federal statutes provide a full set of standards, because Congress has delegated only a narrow role to the states to make arrests under 8 U.S.C. § 1324(c) and because §1329 does not permit States to prosecute their own harboring related laws. The United States argues some of the same points in a more summary fashion. None of these arguments support field preemption of §4.

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. . . ." *Arizona* 132 S. Ct. 2492, 2502 (2012). Lowcountry principally relies on 8 U.S.C. §1324, sub-section (a)(1)(A)(ii) and (iii) of which imposes criminal penalties on persons who transport, conceal or harbors unlawfully present aliens and subparagraph (v) imposes penalties for persons who engage in conspiracies to or aid and abet in the commission of any such acts. Lowcountry contends that either alone or considered with §§1323, 1327 and 1328 regarding entry of aliens, §1324 is as comprehensive as the alien registration scheme considered in *Arizona*. The harboring and registration provisions are not comparable and the result as to registration does not lead to the same conclusion as to harboring. Addressing registration, *Arizona* found that "Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." 132 S. Ct. at 2502. The Supreme Court quoted and applied *Hines v. Davidowitz,* 312 U.S. (1940) which "found that Congress intended the federal plan for registration to be a 'single integrated and all-embracing system.' *Id*., at 74. Because this 'complete scheme ... for the registration of aliens' touched on foreign relations, it did not allow the States to 'curtail or complement' federal law or to 'enforce additional or auxiliary regulations.'" 132 S. Ct. at 2501. That Congress

has imposed criminal penalties on the entry, transportation, concealment and harboring of aliens does not create a "single integrated and all-embracing system" similar to registration nor does it "touch[] on foreign relations." Both the Federal and State laws simply impose penalties on the movement and concealment of unlawfully present aliens which is not field preempted and not at all comparable to the unified system for registration addressed in *Arizona.*

Of guidance here is, *Fox v. Ohio*, 46 U.S. 410, 434 (1847) which held that the power of the United States over the minting and counterfeiting of money did not preclude a state from criminalizing the passing of counterfeited money. Although apparently no federal statute then specifically applied to the passing of counterfeit money, the Court indicated that the State would not be prohibited from enacting its own laws on the matter if similar federal legislation were adopted. ("offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration.") 46 U.S. 410 at 435. Similarly, the powers of the federal government regarding immigration do not preempt states from adopting legislation regarding the harboring and transportation of unlawfully present immigrants within their states of persons unlawfully present.

Several State Court cases support the conclusion that harboring related statutes are not field preempted by Congress. *In re Jose C.*, 45 Cal. 4th 534, 548,

198 P.3d 1087, 1099 (2009), in addressing federal immigration law generally and §1324 in particular, "concluded that [the Court could] discern no intent by Congress, in either its initial enactment or subsequent amendments of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1101–1537), to occupy the field of immigration law generally or alien smuggling in particular." *State v. Flores*, 188 P. 3d 706, 711 (AZ Ct. App. 2008) did not find any intent of Congress to "preclude even harmonious state regulation touching on aliens in general . . . [or] the smuggling of illegal aliens in particular."[5] *See also*, *State v. Barragan-Sierra*, 219 Ariz. 276, 287, 196 P.3d 879, 890 (Ct. App. 2008)(same ruling).

All Appellees point to §§1324(c) and 1329 as demonstrating field preemption. Section 1324(c) authorizes state and local law enforcement officers to make arrests for violations of §1324. Section 1329 provides that United States District Courts shall have jurisdiction of all cases arising under the provisions of this subchapter and provides that the United States attorneys shall prosecute such suits when brought by the United States. Neither of these provisions address nor limit similar State law provisions. They simply address responsibilities under Federal law. *People v. Barajas*, 81 Cal. App. 3d 999 (Ct. App. 1978) concluded

[5] "Arizona's human smuggling statute does not regulate immigration, because it does not regulate 'who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.' *See id.* The statute simply prohibits the knowing transportation of illegal aliens for profit or commercial purpose, requiring as an element of the offense that the persons transported be illegal aliens." 188 P.3d at 711.

that §1324 did not limit restrict State law enforcement from making arrests under other federal immigration provisions. Accordingly, §1324 should not limit arrest authority under State law. As to §1329, *Jose C., supra,* found no intent of Congress to deprive state courts of jurisdiction. Recently, the Colorado Court of Appeals found no such intent under §1329 and declined to address charges of substantive preemption of Colorado's human smuggling statute because the issue had not been properly raised below. *People v. Fuentes-Espinoza*, ___P. 3d. ___ 2013 COA 1, 2013 WL 174439 (January 17, 2013).

Federal harboring related legislation is simply not comparable to the registration provisions at issue in *Arizona* and demonstrates no intent whatsoever to occupy a field related to the movement of unlawfully present people within state borders. Accordingly, South Carolina harboring related provisions are not field preempted.

B

Section 4 is Not Conflict Preempted

Lowcountry argues that conflict exists on four grounds which are discussed below. Most of these arguments are covered above and have no more merit in the context of conflict preemption than they did as to field preemption. The United States makes similar arguments but much more briefly.

Lowcountry argues that conflict preemption exists because §4 permits

immigration enforcement activities that exceed the specific and limited role envisioned by Congress, by giving the State the power to bring criminal charges against individuals for violating federal law when federal officials might choose not to do so. Those Appellees contend that the section exceeds the limited authority under §1324(c) by giving State officials prosecution authority as to transportation and harboring offenses and that it authorizes a separate state scheme for enforcement subject to the discretion of state officials only.[6] As discussed above, §1324(c) does not limit the authority of State officers to arrest for other immigration violations under other Federal law and certainly does not do so as to the State law provisions at issue here.

The third ground contends that §4 prohibits a different and broader range of conduct than is regulated by federal law. One purported difference is an exception to federal law allowing the United States Attorney General the discretion to waive, deportation of family members who assist other aliens who enter or try to enter the country in violation of the law. 8 U.S.C. §1227(a)(1)(iii) South Carolina's §4 does not conflict with this federal law because the state law does not provide for deportation. The other alleged difference is the narrow exemption for aliens present in the United States to perform the vocation of a minister or missionary in

[6] Lowcountry also contends that the section authorizes criminal charges for violation of federal law, but the section imposes criminal penalties under State law.

§1324(a)(1)(C)), but South Carolina law does contain exemptions for certain programs, services or assistances by "churches or other religious institutions that are recognized as 501(c)(3) organizations by the Internal Revenue Service." §4(G). Moreover, §4 should not even apply to a person subject to the federal exemption for ministerial or missionary services because §4 applies only to persons who seek to avoid or aid others in avoiding apprehension or detection or furthering their unlawful entry. Therefore, no conflict exists.

The fourth ground contends that §4(A) and (C) create crimes of "self-harboring" and "self-transportation" whereas the Supreme Court said in *Arizona* that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." 132 S. Ct. at 2506. As noted in the State's opening brief, barring unlawfully aliens from transporting, harboring or sheltering themselves is not different from prohibiting such actions by third parties under §B and C. Certainly, the aliens are not subject to prosecution for being simply present. They must undertake the affirmative acts to transport or conceal themselves for the purpose of avoiding apprehension or detection or furthering their unlawful entry. Moreover, the Federal statute includes conspiracy as a violation which possibly could reach those aliens who conspire with others to conceal, harbor, or shield themselves from detection. §1324 (a)(1)(A). Therefore, §§A and C are not in conflict with Federal law. Even if, *arguendo*, they were in conflict, this Court

should lift the injunction on §§(B) and (D), because the District Court has chosen in this case to lift or not to enjoin certain challenged sections of Act 69 such as §§6 and 15, and the statute contains a severability clause. Act 69, §19. JA 124.

Lowcountry invokes *Arizona*'s rejection of the premise that a provision can survive preemption "because [i]t has the same aim as federal law and adopts its substantive standards." 132 S. Ct. at 2502. This argument ignores that the quotation was applied to field preemption of the registration provisions of Arizona law, not a conflict issue.

Lowcountry and the United State have failed to demonstrate an impermissible conflict of §4 with Federal law. As stated in *United States v. Lanza*, 260 U.S. 377, 382 (1922), "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." Section 4 addresses offenses against the peace and dignity of South Carolina and may be punished by this state as well as by the federal government under its laws.

IV

THE INJUNCTION SHOULD BE LIFTED AS TO §6(2)(B) REGARDING POSSESSION OF FRAUDULENT IDENTIFICATION

Lowcountry and the United States contend that Section 6(B)(2) is preempted because it conflicts with Federal law regarding registration documents including 18 USC §1549 regarding fraud and misuse of visas and other documents. They contend that the provision puts the State in the position of prosecuting federal registration violations. Lowcountry also argues that field preemption as to registration matters and conflict preemption applies to this section by its creating different penalties and infringing on prosecutorial discretion. It rejects the States argument is that the provision is not field preempted because its purpose is addressing fraud, a State concern.

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 state and Federal law is not a physical impossibility. An individual is not in violation of either State or federal law if he or she does not use fraudulent identification. This simple fact

underscores that the purpose of the South Carolina provision is to address fraudulent documentation, not a preemptive federal field. The State has an interest in not having its law enforcement officers misled by fraudulent identification. Accordingly, the injunction should be lifted as to this provision.

V

THE COURT SHOULD RULE ON THE MERITS

Authority in the State's Opening Brief would permit this Court to rule on the merits of at least those individual provisions before this Court for review and the State's abstention and right of action defenses to this entire action. *See, Munaf v. Geren*, 553 U.S. 674, 691-92 (2008); *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 360-61 (4th Cir. 1998). The United States does not challenge this request. Only Lowcountry does so, and that party offers no valid reason not to do so. This case is a facial challenge so conducting discovery should not be necessary. The provisions at issue have been vigorously argued and developed by both sides in the District Court. Prolonging these proceedings as to those provisions serves no useful purpose. Therefore, the State respectfully requests that this Court rule on the merits.

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.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Assistant 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

March 27, 2013

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(s) James Emory Smith, Jr.

Attorney for Appellants

Dated: March 28, 2013

CERTIFICATE OF SERVICE

I certify that on March 28, 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

March 28, 2013
Date