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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

STATE OF SOUTH CAROLINA, et al.,
*Defendants-Appellants*.

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

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# BRIEF FOR THE FEDERAL APPELLEE

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**STUART F. DELERY**
*Principal Deputy Assistant Attorney General*

**WILLIAM N. NETTLES**
*United States Attorney*

**BETH S. BRINKMANN**
*Deputy Assistant Attorney General*

**MARK B. STERN**
**BENJAMIN M. SHULTZ**
**DANIEL TENNY**
**JEFFREY E. SANDBERG**
*(202) 514-1838*
*Attorneys, Appellate Staff*
*Civil Division, Room 7215*
*U.S. Department of Justice*
*950 Pennsylvania Avenue, NW*
*Washington, DC 20530*

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## JURISDICTIONAL STATEMENT

This is an action by the United States to set aside, as preempted by federal law, certain provisions of a South Carolina state statute, Act 69. *See* U.S. Const. art. VI, cl. 2. A group of private parties also brought a challenge to certain provisions of Act 69.

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1345. On December 22, 2011, the district court issued a single order in both the federal government's case and the private parties' case that preliminarily enjoined several provisions of South Carolina Act 69. On January 18, 2012, the defendants timely appealed from that order in both cases. *See* Fed. R. App. P. 4(a)(1)(B). This Court consolidated the appeals. Order, Jan. 25, 2012.

On August 16, 2012, this Court remanded the case to the district court to allow that court to reexamine its order in light of the Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012). On November 15, 2012, the district court dissolved the preliminary injunction regarding a portion of one of the provisions that it had previously enjoined, and otherwise left the preliminary injunction in place. On December 7, 2012, the defendants timely appealed from that order in both district-court cases. *See* Fed. R. App. P. 4(a)(1)(B). This Court consolidated the new appeals with the original ones filed in this Court. Order, Dec. 17, 2012.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE ISSUES PRESENTED

Whether the district court abused its discretion in issuing a preliminary injunction against provisions of South Carolina Act 69 that, as part of that State's attempt to establish an independent immigration-enforcement scheme, (1) make it a state crime for an alien to violate a provision of federal law that requires certain aliens to carry federal registration documentation; (2) make it a state crime to display or possess false identification for the purpose of offering proof of lawful presence in the United States; and (3) make it a state felony for an unlawfully present alien to allow himself to be transported, concealed, or harbored within the State with intent to further his unlawful entry or to avoid apprehension, and for others to transport, conceal, or harbor such an alien.

## STATEMENT OF THE CASE

In 2011, South Carolina passed Act 69, a statute that purports to regulate a variety of matters related to immigration. The United States filed suit to enjoin operation of various provisions of the state statute because they individually and collectively constitute an impermissible attempt by South Carolina to engage in immigration regulation that is preempted by federal law. Private parties also brought suit to challenge provisions of Act 69.

On the United States' motion, the district court issued a preliminary injunction against the three provisions that are the subject of this appeal. Each of the provisions at issue purports to create a state crime for immigration-related conduct, subject to prosecution in state courts by state officials outside the direction and control of the federal government.

After South Carolina noticed an appeal from the preliminary injunction, this Court remanded the case to allow the district court to reconsider its ruling in light of the Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012). In *Arizona*, the Supreme Court affirmed a preliminary injunction against two Arizona enactments that purported to create state crimes for immigration-related conduct. The Court also affirmed a preliminary injunction against another provision of Arizona law that would have authorized state officers to make warrantless arrests of certain aliens suspected of being subject to removal under federal law. The Supreme Court

vacated a preliminary injunction against a provision that requires state officers to verify the immigration status of certain persons who are stopped, detained, or arrested.

On remand, the district court left in place its preliminary injunction with respect to the provisions at issue in this appeal. It dissolved its preliminary injunction with regard to a provision that requires South Carolina officers to verify immigration status in certain circumstances. The State appealed the court's new order, and this Court consolidated the appeals. The United States and the private parties have not appealed, and the partial dissolution of the preliminary injunction is therefore not before this Court.

## STATEMENT OF FACTS

### I. The Federal Immigration Scheme.[1]

**A.** "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S. Ct. at 2498. Pursuant to that power, Congress enacted the Immigration and Nationality Act ("INA"), Pub. L. No. 82-414, 66 Stat. 163 (1952), as amended, 8 U.S.C. §§ 1101 *et seq.*, and other federal immigration laws, which together constitute "a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of

[1] Pertinent statutes are reproduced in an addendum to this brief.

aliens lawfully in the country.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas v. Bica*, 424 U.S. 351, 353, 359 (1976)).

The INA generally requires aliens to register upon entering the United States. 8 U.S.C. §§ 1201, 1301, 1302. Aliens who are registered and are at least eighteen years old must carry with them any registration certificate or receipt they receive from the federal government. *Id.* § 1304(e). Failure to carry one's registration document is a federal misdemeanor. *Id.* The federal scheme also includes civil and criminal penalties for those who create, use, or possess fraudulent documents for the purpose of satisfying alien registration requirements or certain other requirements contained in federal immigration law. *Id.* § 1324c; 18 U.S.C. § 1546. The Supreme Court explained in *Arizona v. United States* that "[t]he framework enacted by Congress leads to the conclusion . . . that the Federal Government has occupied the field of alien registration." *Arizona*, 132 S. Ct. at 2502. Because the federal government has occupied the field, "even complementary state regulation is impermissible." *Id.*

The federal immigration scheme also includes a comprehensive set of criminal sanctions for persons who facilitate the unlawful entry, residence, or movement of aliens within the United States. *See* 8 U.S.C. § 1323 (penalizing the unlawful bringing of aliens into the United States); *id.* § 1324 (penalizing the bringing in, transporting, or harboring within the United States of certain aliens); *id.* § 1327 (penalizing those who aid or assist certain inadmissible aliens to enter the country); *id.* § 1328 (penalizing

those who import aliens for immoral purposes). Federal law thus contains a "full set of standards to govern the unlawful transport and movement of aliens." *United States v. Alabama*, 691 F.3d 1269, 1286 (11th Cir. 2012) (internal quotation marks omitted). The federal scheme does not make an alien's mere unlawful presence in the United States a federal crime, *see Arizona*, 132 S. Ct. at 2505, although aliens may be criminally prosecuted for unlawful entry or re-entry into the United States, *see* 8 U.S.C. § 1325 (penalizing improper entry); *id.* § 1326 (penalizing unauthorized re-entry following removal).

**B.** Federal immigration laws contemplate several ways in which States may cooperate with federal officials in immigration enforcement. As relevant here, Congress has expressly authorized state and local law-enforcement officers to make arrests for probable violations of the INA's prohibitions against transporting, concealing, or harboring unlawfully present aliens. *See* 8 U.S.C. § 1324(c). The prosecution of such offenses, however, is a matter within the sole discretion of federal officials.

Congress has also authorized the Department of Homeland Security ("DHS") to enter into formal cooperative agreements with States and localities, whereby appropriately trained and qualified state and local officers may perform specified functions of federal immigration officers. *See* 8 U.S.C. § 1357(g)(1)–(9). The state and local officers' activities "shall be subject to the direction and supervision of the

[Secretary of Homeland Security]." *Id.* § 1357(g)(3). A formal agreement is not required, however, for state and local officers to communicate with the federal government or "otherwise to cooperate with the [Secretary]" in certain respects. *Id.* § 1357(g)(10)(A)–(B). Accordingly, DHS has invited, and receives, assistance in a variety of contexts from state and local officials without a formal agreement. *See* DHS, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters (Sept. 2011).[2]

## II. Facts and Prior Proceedings.

**A.** In 2011, South Carolina passed Act 69, a twenty-provision statute addressing a variety of matters related to immigration. The district court explained that, in the view of the statute's proponents, the National Government had failed "to 'secure our southern border,' which 'really jeopardize[s] our national security.'" PI Op. 2 [JA 1341] (quoting Tr. of Senate Debate [JA 415]) (alteration in original). The "bill came about as a result of four public hearings" in which legislators "heard from people all around the state about the idea of[] dealing with the issue of illegal immigration." Tr. of Senate Debate [JA 404].

Three provisions of Act 69 are at issue in this appeal.

[2] *Available at* http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf.

**Section 5** of Act 69 creates a state misdemeanor for persons who fail to carry an alien registration document in violation of 8 U.S.C. § 1304. S.C. Code Ann. § 16-17-750.

**Section 6** of Act 69, as relevant here, makes it a state crime 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." S.C. Code Ann. § 17-13-170(B)(2).

**Section 4** of Act 69 recodified preexisting provisions of state law that make it a state "felony for a person who has come to, entered, or remained in the United States in violation of law to allow themselves to be transported, moved, or attempted to be transported within the State . . . 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." S.C. Code Ann. § 16-9-460(A). The statute also makes it a state felony for unlawfully present aliens to "conceal, harbor, or shelter themselves from detection" with the same intent. *Id.* § 16-9-460(C).

Section 4 includes parallel provisions that criminalize the conduct of third parties who "transport, move, or attempt to transport [an unlawfully present alien] within the State," *id.* § 16-9-460(B), or "conceal, harbor, or shelter [an unlawfully present alien] from detection," *id.* § 16-9-460(D), if they act "knowingly or in reckless

disregard of" the alien's unlawful presence in the United States, and "with intent to further that person's unlawful entry into the United States" or to "avoid[] apprehension or detection of that person's unlawful immigration status by state or federal authorities."[3]

**B.** The United States brought this action against the State of South Carolina and its Governor, contending that certain portions of Act 69 are preempted by federal law. Private parties also filed suit with respect to certain provisions of Act 69. The district court enjoined the operation of the three provisions currently at issue in a single order entered in both the suit by the United States and the private party action.

**1.** The district court observed that several provisions of the state statute "take what were previously only federal crimes subject to federal prosecution and federal enforcement procedures, and make them also state crimes subject to state prosecution and state enforcement procedures." PI Op. 20 [JA 1359].

[3] The district court ultimately denied the United States' request for preliminary injunctive relief as to two other provisions of Act 69, neither of which is at issue on appeal. First, on remand following the Supreme Court's decision in *Arizona*, the district court dissolved its preliminary injunction with respect to the portion of Section 6 of Act 69 that requires state officers to make a reasonable effort to ascertain whether certain persons stopped, detained, or arrested are lawfully present in the United States. S.C. Code Ann. § 17-13-170(A). Second, the district court declined to preliminarily enjoin Section 15 of Act 69, which makes it "unlawful for a person to make, issue, or sell, or offer to make, issue, or sell, a false, fictitious, fraudulent, or counterfeit picture identification that is for use by an alien who is unlawfully present in the United States." *Id.* § 16-13-480. Although the district court concluded that the United States would likely succeed on the merits of its challenge to Section 15, it concluded that the United States had not demonstrated irreparable harm adequate to warrant a preliminary injunction. The United States has not appealed these rulings.

With respect to the state registration provision contained in Section 5 of the South Carolina statute, the court concluded that "[t]here is little doubt that alien registration is a field under the exclusive control of the federal government," and that the issue presents "a classic case of field preemption." *Id.* at 25–26 [JA 1364–65]. The court also concluded, with respect to the provision in Section 6 of Act 69 about the possession or display of fraudulent picture identification as purported proof of lawful presence, that the "pervasive and comprehensive regulatory scheme regarding alien registration . . . includes the regulation of registration materials." *Id.* at 26 [JA 1365]. The court observed that in prosecuting the creation or use of fraudulent documents to prove immigration status, "the State would have the ability to initiate arrests and prosecutions and judicially interpret state law regarding alien registration." *Id.* Because "such matters need to be under [the federal government's] exclusive discretion and control," the court concluded that the United States was likely to succeed in its preemption challenge. *Id.*

The court found that the anti-harboring provisions of Section 4 similarly formed part of the "larger state effort to alter federal immigration enforcement priorities and to assert state control over such policy decisions" that "the Constitution of the United States and the INA have placed . . . in the hands of the national government." *Id.* at 23 [JA 1362]. In particular, the court observed that the portions of Section 4 that create a state crime for an unlawfully present alien to allow himself

to be transported, concealed, or harbored within the State have no federal counterpart and may be "unique in American law." *Id.* at 27 [JA 1366]. These provisions effectively criminalize an alien's mere unlawful presence in the country, and are "field and conflict preempted." *Id.* at 28 [JA 1367]. And with regard to the provisions of Section 4 that criminalize the transportation, concealment, and harboring of unlawfully present aliens by third parties, the court concluded that those provisions are preempted by federal law because they infringe on the comprehensive provisions of the INA in several respects. The court explained that "[t]he federal harboring and transporting statute, § 1324(a)(1)(A)(ii) and (iii), is part of a larger statutory scheme which addresses comprehensively the actions of third parties aiding and assisting unlawful aliens." PI Op. 21 [JA 1360]. The court reasoned that "Congress has expressly carved out a role for state and local law enforcement officers in this comprehensive statutory scheme," by authorizing "them to make arrests for § 1324 violations, while preserving control of prosecutions and judicial interpretation to federal officials." *Id.* at 21–22 [JA 1360–61]. The new state crimes would "disrupt this comprehensive federally controlled immigration enforcement scheme by placing state prosecutors in control of enforcement efforts . . . and permitting state judges to interpret the harboring and transporting statutes." *Id.* at 22 [JA 1361]. The court also noted that the South Carolina statute does not contain the safe harbor in federal law for certain acts by religious organizations, 8 U.S.C. § 1324(a)(1)(C), "creating the

potential scenario where a person acting lawfully under the federal harboring statute could be prosecuted by state officials for conduct expressly excepted from federal criminal law." PI Op. 22 [JA 1361].

**2.** The district court found that the enforcement of the state crimes created in Sections 4, 5, and 6 of Act 69 would cause irreparable injury to the United States, that the equities weigh in favor of the United States, and that the public interest would be served by a grant of preliminary injunctive relief. *Id.* at 37–41 [JA 1376–80]. The court declared that state prosecutions in these areas would "disrupt and conflict with the comprehensive federal enforcement scheme" and "could raise significant foreign relations issues." *Id.* at 38 [JA 1377]. The court therefore entered a preliminary injunction against the pertinent provisions of Sections 4, 5, and 6.

## SUMMARY OF ARGUMENT

The Supreme Court's recent decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), set out the principles that guide the preemption analysis in this case. The United States has broad authority to regulate the subject of immigration and the status of aliens. Individual States, by contrast, may not set their own immigration policies. To the contrary, the United States must speak with one voice on immigration matters, which are intertwined with our foreign relations and can affect the reciprocal treatment of Americans abroad.

Congress has exercised its broad authority over immigration matters by enacting a comprehensive scheme of requirements and prohibitions relating to immigration. Congress has set out a detailed alien-registration scheme, which States have no authority to supplement. Congress has also enacted a comprehensive scheme to address the consequences of unlawful entry and presence in the United States, and the conduct of third parties who assist aliens in circumventing the federal immigration laws. Congress assigned responsibility for the enforcement of these federal laws to federal officials, who can ensure that their enforcement actions are consistent with the Nation's foreign policy.

The state enactments at issue in this appeal impermissibly purport to impose state criminal penalties, outside the control and direction of the federal government, for violations of federal immigration law. The Supreme Court specifically confirmed in *Arizona* that States have no such authority to impose criminal penalties for violations of the federal alien-registration scheme, as South Carolina has attempted to do in Section 5 of Act 69. The State does not seriously dispute that this provision is preempted by federal law.

The same principles confirm the correctness of the district court's analysis of the other provisions at issue in this appeal. South Carolina similarly intrudes on federal prerogatives by imposing state criminal penalties on aliens who possess fraudulent documents designed to circumvent federal immigration laws. *See* Act 69,

§ 6, *codified at* S.C. Code Ann. § 17-13-170(B)(2). Congress has imposed civil and criminal penalties, enforceable by federal officials, for such conduct, and the State has no authority to supplement those penalties or to supersede the federal government's discretion in determining when to take enforcement action.

Congress has declined to impose criminal penalties on aliens merely for being present in the country unlawfully. South Carolina has no authority to impose such penalties, outside of federal control, in the guise of criminal provisions applicable to unlawfully present aliens who transport, conceal, or harbor themselves. *See* Act 69, § 4, *codified at* S.C. Code Ann. § 16-9-460(A), (C).

Nor does South Carolina have authority to create a state criminal regime that would operate in parallel with the comprehensive federal regulation of third parties who transport, conceal, or harbor unlawfully present aliens. *See* Act 69, § 4, *codified at* S.C. Code Ann. § 16-9-460(B), (D). The Eleventh Circuit has recognized, in upholding preliminary injunctions against similar state enactments, that Congress has made clear that the only role for States in this area is to make arrests for violations of federal law. Any prosecutions must take place in federal court, based on federal priorities and subject to the exercise of discretion by the federal officials charged with enforcing federal law.

The district court recognized that allowing a single State to intrude on federal prerogatives in these areas would cause irreparable harm to the federal government's

ability to speak with one voice on immigration matters and to conduct foreign policy. South Carolina only underscores its misunderstanding of the proper role for States in the immigration area when it invokes abstention principles applicable in determining whether a federal court's involvement would interfere with the interpretation of state law that should be carried out by state courts in the first instance. The issue here is not whether state courts should be permitted to interpret state law. The question, instead, is whether the South Carolina legislature has enacted legislation that is preempted by federal law because the state law intrudes on the power to regulate immigration committed by the Constitution to the National Government.

## STANDARD OF REVIEW

This Court "review[s] the decision to grant a preliminary injunction for abuse of discretion." *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004).

## ARGUMENT

## THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE UNITED STATES HAS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS, AND PROPERLY ENTERED A PRELIMINARY INJUNCTION

### A. Federal Law Establishes a Comprehensive Framework for Regulating Immigration.

**1.** "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S. Ct. at 2498. The "power to restrict, limit, [and] regulate . . . aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation[;] . . . whatever power a

state may have is subordinate to supreme national law." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

This exclusive allocation of authority to the National Government reflects in part the extent to which the regulation of immigration is intertwined with the conduct of foreign policy and the National Government's ability to speak "with one voice" in dealing with other nations. *Arizona*, 132 S. Ct. at 2506–07; *see also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000). "Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Arizona*, 132 S. Ct. at 2498. And "[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad." *Id.* It is the National Government that has ultimate authority to regulate the treatment of aliens while on American soil because it is the Nation as a whole, and not any single State, that must respond to the international consequences of such treatment.

Cognizant of these significant national interests, Congress has "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Whiting*, 131 S. Ct. at 1973 (quoting *DeCanas*, 424 U.S. at 353, 359). Although the Immigration and Nationality

Act ("INA") and other federal laws do not preempt "every state enactment which in any way deals with aliens," and "local regulation[s]" do not exceed state authority based on "some purely speculative and indirect impact on immigration," *DeCanas*, 424 U.S. at 355, it is equally clear that even a regulation in an area of traditional state authority is preempted if it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Arizona*, 132 S. Ct. at 2501 (quoting *Hines*, 312 U.S. at 67). Moreover, state enactments are preempted where they seek to regulate in a field where federal regulation is "'so pervasive . . . that Congress left no room for the States to supplement it'" or where there exists a "'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

**2.** Congress has created a comprehensive scheme of alien registration. *See Arizona*, 132 S. Ct. at 2501–02. In particular, Congress requires certain aliens to register, to notify the federal government of changes of address, and to carry proof of registration. *Id.* at 2502 (citing 8 U.S.C. §§ 1302, 1304, 1305). Congress enacted federal criminal penalties for failure to register or failure to carry a registration document. 8 U.S.C. §§ 1304(e), 1306(a). Congress also enacted specific civil and criminal penalties for document fraud, applicable to those who create, use, or possess fraudulent documents for the purpose of satisfying alien-registration requirements or

certain other requirements contained in federal immigration law. *Id.* § 1324c; 18 U.S.C. § 1546. The Supreme Court confirmed in *Arizona* that through these enactments, Congress "occupied the field of alien registration." *Arizona*, 132 S. Ct. at 2502.

Congress's comprehensive regulation of alien registration also reflects Congress's judgment that an alien's unlawful presence in this country, by itself, should not be a crime. Although aliens may be prosecuted for improper entry or unlawful re-entry into the United States, *see* 8 U.S.C. §§ 1325, 1326, Congress declined to create a federal crime for unlawfully remaining present in the United States. *See Arizona*, 132 S. Ct. at 2505. Instead, unlawfully present aliens are generally subject to civil removal proceedings carried out by appropriate federal officials. *See id.* at 2499 ("Removal is a civil, not criminal, matter.").

The INA also "provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens." *Alabama*, 691 F.3d at 1285 (internal quotation marks omitted). The federal scheme "tracks smuggling and related activities from their earliest manifestations (inducing illegal entry and bringing in aliens) to continued operation and presence within the United States (transporting and harboring or concealing aliens)." *United States v. Sanchez-Vargas*, 878 F.2d 1163, 1169 (9th Cir. 1989).

The Supreme Court made clear in *Arizona* that fundamental principles of field and conflict preemption preclude attempts by States to pursue their own policies of immigration enforcement by enacting state criminal penalties that supplant or elaborate upon the comprehensive scheme already enacted by Congress. The Supreme Court repeatedly stressed that state efforts to establish an immigration-enforcement scheme are preempted even if they faithfully "parallel . . . federal standards." *Arizona*, 132 S. Ct. at 2502; *see id.* (rejecting Arizona's argument that its enactment "survive[d] preemption because the provision has the same aim as federal law and adopts its substantive standards").

Throughout its opinion, the Supreme Court stressed that a "conflict in the method of enforcement . . . can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Id.* at 2505 (internal quotation marks omitted). The Court explained that a "principal feature of the removal system is the broad discretion exercised by [federal] immigration officials." *Id.* at 2499. "The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy . . . ." *Id.* The federal government would not be able to calibrate immigration-enforcement policies to reflect our Nation's foreign policy if each individual State were permitted to independently prosecute immigration offenses without regard to federal priorities and direction. *See also Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (recognizing that

Congress's exclusive authority to establish federal regulations governing immigration includes the sole authority to determine "the manner of their execution").

The Supreme Court also made clear that a state statute does not escape preemption on the ground, urged here by South Carolina, that the state measure constitutes an exercise of "state police powers" entitled to a presumption against preemption. *See* Appellants' Br. 41, 50–51. In evaluating Arizona's regulation of employment, the Supreme Court held that even regulations in an area of traditional state regulation cannot withstand preemption if they intrude on the federal regulation of immigration, which includes a comprehensive scheme for "combating the employment of illegal aliens." *Arizona*, 132 S. Ct. at 2504–05 (internal quotation marks omitted); *see also Garamendi*, 539 U.S. at 425–26 (holding preempted a state law regulating insurers because it interfered with the President's conduct of foreign affairs, notwithstanding traditional state authority over insurance); *Crosby*, 530 U.S. at 374–80 (invalidating a state enactment restricting the ability of state agencies to contract with companies doing business with Burma, notwithstanding traditional state authority over state-government contracting).

The principle that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States," *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), noted by the State, *see* Appellants' Br. 43, similarly has no bearing on the issues presented here. South Carolina recognizes

that its statute does not authorize South Carolina courts to adjudicate *federal* immigration offenses. The State explains that it is "South Carolina's enforcement of its own law" that is at issue in this case. *See* Appellants' Br. 43. It is therefore undisputed that this case concerns state criminal statutes, prosecuted at the discretion of state officials, to be adjudicated in state courts.[4]

If South Carolina's position were accepted, every state and local government would be free to enact its own criminal immigration penalties, whatever the effect on the operation of the federal immigration scheme. *See Arizona*, 132 S. Ct. at 2502 ("If § 3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, diminishing the Federal Government's control over enforcement and detracting from the integrated scheme of regulation created by Congress.") (brackets and internal quotation marks omitted).

[4] South Carolina's attempt to derive doctrinal support from *Plyler v. Doe*, 457 U.S. 202 (1982), is unavailing. *See* Appellants' Br. 45. In *Plyler*, the Supreme Court invalidated on equal-protection grounds a State's attempt to condition free attendance at public schools on proof of lawful admission into the country. The Court acknowledged 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*, 457 U.S. at 225. The Court held, however, that the state law at issue did not fall within this limited authority, and expressly rejected the State's principal argument that its law was justified by Congress's disapproval of the aliens' unlawful entry. The Court emphasized that the challenged law did not correspond to any "identifiable congressional policy," *id.*, and did not "operate harmoniously within the federal program," *id.* at 226. It also explained that the federal government's alienage classifications "may be intimately related to the conduct of foreign policy [and] to the federal prerogative to control access to the United States," and that "[n]o State may independently exercise a like power"; States instead must "follow . . . federal direction." *Id.* at 219 n.19.

Such efforts would undermine the uniform application of federal law and open the door to harassment of aliens, international controversy, and possible retaliation against United States citizens in foreign countries.

### B. Each of the Three Provisions of South Carolina Act 69 at Issue in this Appeal Is Preempted by Federal Law.

The district court correctly concluded that the United States demonstrated a likelihood of success on the merits in its challenge to each of the three provisions at issue in this appeal.

#### 1. Section 5 of Act 69 is not materially distinguishable from the state registration provision held preempted in *Arizona*.

In *Arizona*, the Supreme Court affirmed a preliminary injunction against an Arizona provision that, like Section 5 of Act 69, made noncompliance with federal alien-registration requirements a state misdemeanor. The Court explained that "the Federal Government has occupied the field of alien registration," with the result that "even complementary state regulation is impermissible." *Arizona*, 132 S. Ct. at 2502.

The Supreme Court's analysis is fully applicable to Section 5, which likewise seeks to impose state criminal penalties for violations of federal alien-registration requirements. South Carolina does not contend that its registration provision is

materially distinguishable from the registration provision at issue in *Arizona,* and does not challenge the district court's analysis of Section 5.[5]

**2. Section 6, which criminalizes the possession of fraudulent identification as proof of lawful presence is—like Section 5—preempted as an impermissible state attempt to criminalize violations of federal immigration law.**

The State may not penalize violations of federal registration requirements by the alternative means of criminalizing possession of fraudulent identification documentation "for the purpose of offering proof of the person's lawful presence in the United States." Act 69, § 6, *codified at* S.C. Code Ann. § 17-13-170(B)(2). Congress has determined that the possession or use of fraudulent immigration documents should be addressed by federal officials, who may seek civil penalties under 8 U.S.C. § 1324c or subject violators to criminal prosecution under 18 U.S.C. § 1546.

The state enactment thus does not "address[] ordinary fraud," Appellants' Br. 49–50, but rather constitutes the State's attempt to enforce federal provisions designed to prevent aliens from circumventing federal immigration law. South Carolina does not deny that it is seeking to impose its own penalties for violations of federal law, instead urging that the "federal counterpart" to the state enactment is 8 U.S.C. § 1324c. *See* Appellants' Br. 49. As evidenced by 8 U.S.C. § 1324c, as well as the federal criminal provision that the State ignores, *see* 18 U.S.C. § 1546, protecting

[5] The State apparently is attempting to preserve its argument in the event that the Supreme Court again addresses the validity of this type of registration provision. *See* Appellants' Br. 52–53.

the integrity of the federal immigration scheme is an exclusively federal function, and not the purview of the States. *See also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) ("Policing fraud against federal agencies is hardly a field which the States have traditionally occupied . . . .") (internal quotation marks omitted).

Just as South Carolina may not independently prosecute violations of the federal registration provisions, South Carolina has no authority to impose criminal penalties on those who, in the State's view, are violating related federal requirements that are enforced at the discretion of federal officials. The Supreme Court in *Arizona* made clear that "[p]ermitting the State to impose its own penalties" for violations of federal registration requirements would "conflict with the careful framework Congress adopted." *Arizona*, 132 S. Ct. at 2502.

**3. The federal immigration scheme precludes state prosecutions for the transportation, concealing, or harboring of unlawfully present aliens by themselves or by third parties.**

Although the State implicitly recognizes that it has no authority to punish unlawfully present aliens for failing to carry registration documents, it claims authority to punish them, under Section 4 of Act 69, for "allow[ing] themselves to be transported . . . 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," or for concealing or harboring themselves with the same intent. Act 69, § 4, *codified at* S.C. Code Ann. § 16-9-460(A), (C). The district

court properly reasoned that, because "[i]t is hard to imagine that an unlawfully present person would not necessarily be required to move or shelter himself as incident to living in a particular location or community," these provisions are "the legal and practical equivalent to criminalizing unlawful presence." PI Op. 27 n.6 [JA 1366 n.6].

The State correctly recognizes that federal law does not impose criminal penalties merely for "self harboring," *i.e.*, remaining in the country unlawfully. *See* Appellants' Br. 46. Rather, under federal law, removable aliens are subject to civil removal proceedings, including possible detention during the pendency of such proceedings. The commencement of such proceedings "involve[s] policy choices that bear on this Nation's international relations." *Arizona*, 132 S. Ct. at 2499. South Carolina does not explain why the State's imprisoning of aliens based merely on the State's determination that they are unlawfully present, without regard to federal priorities or foreign policy considerations, would not "conflict with the careful framework Congress adopted," *id.* at 2502.

The Supreme Court's reasoning in *Arizona* applies equally to South Carolina's attempt to supplement the federal criminal statutes that prohibit third parties from transporting, concealing, or harboring unlawfully present aliens. States have no authority to establish their own criminal schemes to allow state prosecutors, wholly

outside of federal control, to bring charges in state courts against those suspected of assisting unlawfully present aliens.

In affirming preliminary injunctions against analogous state anti-harboring schemes in Alabama and Georgia, the Eleventh Circuit explained that "[l]ike the federal registration scheme addressed in *Arizona*, Congress has provided a full set of standards to govern the unlawful transport and movement of aliens," including "criminal penalties for these actions undertaken within the borders of the United States," with the result that "a state's attempt to intrude into this area is prohibited." *Alabama*, 691 F.3d at 1286 (citation and internal quotation marks omitted). The INA authorizes criminal penalties against individuals who conceal, harbor, or shield unlawfully present aliens from detection, 8 U.S.C. § 1324(a)(1)(A)(iii); those who encourage or induce aliens to enter the United States without lawful authorization, *id.* § 1324(a)(1)(A)(iv); those who transport an alien within the United States in furtherance of the alien's violation of federal immigration laws, *id.* § 1324(a)(1)(A)(ii); and those who assist or conspire in the commission of those acts, *id.* § 1324(a)(1)(A)(v). Congress also established penalties for smuggling or otherwise bringing aliens into the United States without lawful authorization, *see id.* §§ 1323, 1324(a)(1)(A)(i), 1324(a)(2), and for knowingly aiding or assisting certain inadmissible aliens to enter unlawfully, *id.* § 1327.

The Eleventh Circuit stressed that the federal laws, "[b]y confining the prosecution of federal immigration crimes to federal court . . . limit[] the power to pursue those cases to the appropriate United States Attorney." *Alabama*, 691 F.3d at 1287 (internal quotation marks omitted); *see* 8 U.S.C. § 1329. Contrary to that congressional directive—and like the criminal provisions enjoined by the Supreme Court in *Arizona*—Section 4 of Act 69 impermissibly purports to vest South Carolina with "the power to bring criminal charges against individuals" for engaging in conduct allegedly in violation of federal law "even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, 132 S. Ct. at 2503.

South Carolina's assertion of independent immigration-enforcement authority is particularly anomalous here because Congress has specifically delineated the appropriate role for States in enforcing the federal laws against transporting, concealing, and harboring unlawfully present aliens. The INA provides that arrests may be made for violations of those laws not only by federal officials designated by the Secretary of Homeland Security, but also by any other officials who enforce criminal laws, including state and local law-enforcement officers. 8 U.S.C. § 1324(c);

*cf. Arizona*, 132 S. Ct. at 2506 (recognizing that "§ 1324(c) [grants] authority to arrest for bringing in and harboring certain aliens").[6]

The federal statute contemplates no further state involvement other than such arrests, however, and does not authorize a parallel state regulatory regime with additional criminal penalties that are not subject to the exercise of federal prosecutorial discretion. The Eleventh Circuit thus observed that "[r]ather than authorizing states to prosecute for these crimes, Congress chose to allow state officials to arrest for § 1324 crimes, subject to federal prosecution in federal court." *Alabama*, 691 F.3d at 1285–86 (internal quotation marks omitted). "In the absence of a savings clause permitting state regulation in the field, the inference from these enactments is that the role of the states is limited to arrest for violations of federal law." *Id.* at 1286 (internal quotation marks omitted).

The provisions in Section 4 of Act 69 regarding the transporting, concealing, and harboring of unlawfully present aliens would be preempted even if they were congruent with federal law, and even if it could be assumed that state courts would construe them in a manner consistent with federal law. The district court thus properly enjoined Section 4 in all its applications.

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[6] Section 1324(c) provides that "all . . . officers whose duty it is to enforce criminal laws" shall have the "authority to make any arrests for a violation of any provision of [section 1324]." The legislative history makes clear Congress's intent that this statute be read to extend to state law-enforcement officials. *See* H.R. Rep. No. 82-1505, at 2 (1952) (Conf. Rep.); *see also* 98 Cong. Rec. 1414–15 (1952).

In any event, the schemes are *not* congruent, as South Carolina concedes. *See* Appellants' Br. 39 n.4, 44–45. Congress has expressly provided that it is *not* a violation of federal law for an agent or officer of a religious organization to transport or harbor an unlawfully present alien who serves as a volunteer minister or missionary. *See* 8 U.S.C. § 1324(a)(1)(C). As the State points out, the South Carolina provision contains a differently worded exception for certain churches or religious institutions. Appellants' Br. 45 (citing S.C. Code Ann. § 16-9-460(G)). The face of the statute thus reveals a deviation from federal law, which exacerbates the tension with federal law and priorities that is inherent in a separate scheme enforced by state prosecutors and construed by state courts.

### C. South Carolina's Remaining Challenges to the Preliminary Injunction Are Without Merit.

**1.** Having concluded that the United States had demonstrated a likelihood of success on the merits of its preemption claims, the district court properly granted a preliminary injunction as to the three provisions at issue in this appeal. The United States documented in a declaration from the Deputy Secretary of State that allowing a single State to implement its own immigration policy would cause irreparable harm to the constitutional order and jeopardize the federal government's ability to conduct foreign relations. *See, e.g.*, Burns Decl. 4–5 [JA 810–11]. The district court correctly concluded that the United States had demonstrated irreparable injury, that the balance

of equities tips in the United States' favor, and that the public interest would be served by a grant of preliminary injunctive relief.

South Carolina does not cast doubt on the district court's factual conclusions or balancing of interests, and declares that "the issues raised by the State on appeal are legal." Appellants' Br. 11. Instead, the State seeks to rely on *Younger v. Harris*, 401 U.S. 37 (1971), and related cases. The abstention principle announced in *Younger* prohibits federal courts from interfering with pending state proceedings in certain circumstances. But the State properly concedes, *see* Appellees' Br. 22, that *Younger* has no application where, as here, no state proceedings are pending. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930–32 (1975) (affirming preliminary injunction against state prosecution in those circumstances).

The State argues that *Younger* is nonetheless relevant insofar as it suggests that courts should be cautious in accepting as irreparable harm "'the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution.'" Appellants' Br. 23 (quoting *Younger*, 401 U.S. at 46). *Younger* and other cases on which South Carolina relies are inapposite because they required courts to balance the harm to an individual of participating in state proceedings against the State's interest in resolving issues of state law in its own courts. The United States does not assert irreparable injury premised on any individual's burden in defending a prosecution brought by South Carolina. The United States sought an injunction because the South Carolina

provisions at issue infringe on the federal government's exclusive authority to regulate immigration and its ability to conduct the Nation's foreign relations. The issue here is not whether federal courts may interfere with proceedings in state courts. The question instead is whether the South Carolina legislature has enacted a statute that is preempted by federal law.

At the end of its brief, South Carolina goes so far as to argue that the government's lawsuit should be dismissed. In light of the State's explicit recognition that the *Younger* framework does not apply to this case, and the fact that several of the challenged provisions of Act 69 are not at issue in this appeal, the basis for this mistaken assertion is unclear.

**2.** South Carolina does not advance its argument by pointing out that the United States has brought a facial challenge. Appellants' Br. 34–36. The Supreme Court in *Arizona* recognized that the United States had brought a facial, preenforcement challenge and proceeded to affirm a preliminary injunction against both of the criminal provisions at issue in that case. Because Arizona was categorically barred from engaging in criminal proceedings in a particular context, a preliminary injunction was warranted. The district court correctly reached the same conclusion here.

**3.** Although South Carolina argues that the private plaintiffs have no cause of action, the State does not challenge the district court's conclusion that the United

States is entitled to bring suit on preemption grounds. *See* PI Op. 13–15 [JA 1352–54]; Appellants' Br. 9 (arguing that "the private Lowcountry plaintiffs have no congressionally created right of action," which "bars the Lowcountry plaintiffs"); *id.* at 2 (limiting this argument to Lowcountry plaintiffs); *id.* at 22 (stating that "the Lowcountry plaintiffs have no private right of action" and "the preliminary injunction should be vacated *as to them*") (emphasis added). Any contention that the United States lacks a cause of action is therefore waived. *See Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 153 n.6 (4th Cir. 2012) (argument waived because it was not adequately presented in opening brief); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (argument about existence of a valid cause of action does not affect the court's jurisdiction).

In any event, the district court properly concluded that the United States has a cause of action to challenge state enactments that interfere with the federal government's ability to determine and implement the Nation's immigration policy. Longstanding Supreme Court precedent authorizes the United States to institute actions to preserve its sovereign rights. *See, e.g.*, *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426 (1925) ("The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit."); *In re Debs*, 158 U.S. 564, 599 (1895) (holding that because the United States has power over interstate commerce, it is "within its competency to appeal to the civil courts for an inquiry and

determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions"); *see also United States v. Arlington County, Va.*, 669 F.2d 925, 929 (4th Cir. 1982) ("The United States can sue to enforce its policies and laws, even when it has no pecuniary interest in the controversy.").[7]

[7] *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977), is not to the contrary. In *Solomon*, the government filed suit "to redress the alleged deprivation of Eighth, Thirteenth and Fourteenth Amendment rights" of patients in a state hospital. *Id.* at 1123. Although this Court held that the government had no authority to file suit to enforce the rights of private individuals, that holding casts no doubt on the government's right to file suit to avoid infringement on its sovereign right to conduct foreign relations and to carry out immigration policy under a comprehensive scheme set out by Congress.

## CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

Respectfully submitted,

STUART F. DELERY
*Principal Deputy Assistant Attorney General*

WILLIAM N. NETTLES
*United States Attorney*

BETH S. BRINKMANN
*Deputy Assistant Attorney General*

MARK B. STERN
BENJAMIN M. SHULTZ
s/ Daniel Tenny
DANIEL TENNY
JEFFREY E. SANDBERG
*(202) 514-1838*
*Attorneys, Appellate Staff*
*Civil Division, Room 7215*
*U.S. Department of Justice*
*950 Pennsylvania Avenue, N.W.*
*Washington, DC 20530*

MARCH 2013

**CERTIFICATE OF SERVICE**

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

s/ Daniel Tenny
Daniel Tenny
Counsel for the United States

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief satisfies the requirements of Federal Rules of Appellate Procedure 32(a)(7)(C). I further certify that the font used is 14 point Garamond, for text and footnotes, and that the computerized word count for the foregoing brief is 7,884 words.

s/ Daniel Tenny
Daniel Tenny
Counsel for the United States

# ADDENDUM

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**S.C. Code Ann. § 16-9-460.**

(A) It is a felony for a person who has come to, entered, or remained in the United States in violation of law to allow themselves to be transported, moved, or attempted to be transported within the State or to solicit or conspire to be transported or moved within the State 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.

(B) It is a felony for a person knowingly or in reckless disregard of the fact that another person has come to, entered, or remained in the United States in violation of law to transport, move, or attempt to transport that person within the State or to solicit or conspire to transport or move that person within the State with intent to further that person's unlawful entry into the United States or avoiding apprehension or detection of that person's unlawful immigration status by state or federal authorities.

(C) It is a felony for a person who has come to, entered, or remained in the United States in violation of law to conceal, harbor, or shelter themselves from detection or to solicit or conspire to conceal, harbor, or shelter themselves from detection in any place, including a building or means of transportation, with intent to further that 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.

(D) It is a felony for a person knowingly or in reckless disregard of the fact that another person has come to, entered, or remained in the United States in violation of law to conceal, harbor, or shelter from detection or to solicit or conspire to conceal, harbor, or shelter from detection that person in any place, including a building or means of transportation, with intent to further that person's unlawful entry into the United States or avoiding apprehension or detection of that person's unlawful immigration status by state or federal authorities.

(E) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be punished by a fine not to exceed five thousand dollars or by imprisonment for a term not to exceed five years, or both.

(F) A person who is convicted of, pleads guilty to, or enters into a plea of nolo contendere to a violation of this section must not be permitted to seek or obtain any professional license offered by the State or any agency or political subdivision of the State.

(G) This section does not apply to programs, services, or assistance including soup kitchens, crisis counseling, and intervention; churches or other religious institutions that are recognized as 501(c)(3) organizations by the Internal Revenue Service; or short-term shelters specified by the United States Attorney General, in the United States Attorney General's sole discretion after consultation with appropriate federal agencies and departments, which:

(i) deliver in-kind services at the community level, including through public or private nonprofit agencies;

(ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and

(iii) are necessary for the protection of life or safety.

Shelter provided for strictly humanitarian purposes or provided under the Violence Against Women Act is not a violation of this section, so long as the shelter is not provided in furtherance of or in an attempt to conceal a person's illegal presence in the United States.

(H) Providing health care treatment or services to a natural person who is in the United States unlawfully is not a violation of this section.

**S.C. Code Ann. § 16-17-750.**

(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.

(B) A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than one hundred dollars or imprisoned for not more than thirty days, or both.

**S.C. Code Ann. § 17-13-170(B)(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:

(a) for a first offense, is guilty of a misdemeanor, and, upon conviction, must be fined not more than one hundred dollars or imprisoned not more than thirty days; and

(b) for a second offense or subsequent offenses, is guilty of a felony, and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than five years.

**8 U.S.C. § 1304.**

(a) Preparation; contents
The Attorney General and the Secretary of State jointly are authorized and directed to prepare forms for the registration of aliens under section 1301 of this title, and the Attorney General is authorized and directed to prepare forms for the registration and fingerprinting of aliens under section 1302 of this title. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the police and criminal record, if any, of such alien; and (5) such additional matters as may be prescribed.

(b) Confidential nature
All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only (1) pursuant to section 1357(f)(2) of this title, and (2) to such persons or agencies as may be designated by the Attorney General.

(c) Information under oath
Every person required to apply for the registration of himself or another under this subchapter shall submit under oath the information required for such registration. Any person authorized under regulations issued by the Attorney General to register aliens under this subchapter shall be authorized to administer oaths for such purpose.

(d) Certificate of alien registration or alien receipt card
Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General.

(e) Personal possession of registration or receipt card; penalties
Every 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.

(f) Alien's social security account number
Notwithstanding any other provision of law, the Attorney General is authorized to require any alien to provide the alien's social security account number for purposes of inclusion in any record of the alien maintained by the Attorney General or the Service.

**8 U.S.C. § 1324.**

(a) Criminal penalties

(1) (A) Any person who--

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(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;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v) (I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs--

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A) (ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of Title 18) to, or places in jeopardy the life of, any person, be fined under Title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.

(C) It is not a violation of clauses (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs--

(A) be fined in accordance with Title 18 or imprisoned not more than one year, or both; or

(B) in the case of--

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under Title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3) (A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who--

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C) (i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a) of this section, the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of Title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) of this section has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No 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.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

**8 U.S.C. § 1324c.**

(a) Activities prohibited
It is unlawful for any person or entity knowingly--

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this chapter or to obtain a benefit under this chapter,

(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,

(3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter or obtaining a benefit under this chapter,

(4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section 1324a(b) of this title or obtaining a benefit under this chapter, or

(5) to prepare, file, or assist another in preparing or filing, any application for benefits under this chapter, or any document required under this chapter, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted, or

(6) (A) to present before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.

(b) Exception
This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under chapter 224 of Title 18.

(c) Construction
Nothing in this section shall be construed to diminish or qualify any of the penalties available for activities prohibited by this section but proscribed as well in Title 18.

(d) Enforcement

(1) Authority in investigations
In conducting investigations and hearings under this subsection--

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(2) Hearing

(A) In general
Before imposing an order described in paragraph (3) against a person or entity under this subsection for a violation of subsection (a) of this section, the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing
Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of Title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the

alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity has violated subsection (a) of this section, the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (3).

(3) Cease and desist order with civil money penalty

With respect to a violation of subsection (a) of this section, the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of--

(A) not less than $250 and not more than $2,000 for each document that is the subject of a violation under subsection (a) of this section, or

(B) in the case of a person or entity previously subject to an order under this paragraph, not less than $2,000 and not more than $5,000 for each document that is the subject of a violation under subsection (a) of this section.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(4) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection.

(5) Judicial review

A person or entity adversely affected by a final order under this section may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(6) Enforcement of orders

If a person or entity fails to comply with a final order issued under this section against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(7) Waiver by Attorney General

The Attorney General may waive the penalties imposed by this section with respect to an alien who knowingly violates subsection (a)(6) of this section if the alien is granted asylum under section 1158 of this title or withholding of removal under section 1231(b)(3) of this title.

(e) Criminal penalties for failure to disclose role as document preparer

(1) Whoever, in any matter within the jurisdiction of the Service, knowingly and willfully fails to disclose, conceals, or covers up the fact that they have, on behalf of any person and for a fee or other remuneration, prepared or assisted in preparing an application which was falsely made (as defined in subsection (f) of this section) for immigration benefits, shall be fined in accordance with Title 18, imprisoned for not more than 5 years, or both, and prohibited from preparing or assisting in preparing, whether or not for a fee or other remuneration, any other such application.

(2) Whoever, having been convicted of a violation of paragraph (1), knowingly and willfully prepares or assists in preparing an application for immigration benefits pursuant to this chapter, or the regulations promulgated thereunder, whether or not for a fee or other remuneration and regardless of whether in any matter within the jurisdiction of the Service, shall be fined in accordance with Title 18, imprisoned for not more than 15 years, or both, and prohibited from preparing or assisting in preparing any other such application.

(f) Falsely make

For purposes of this section, the term "falsely make" means to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted.

**18 U.S.C. 1546.**

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact--

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime

(as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses—

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.