IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

enforcement regarding the identification and apprehension of persons unlawfully present in the United States. Plaintiffs in the two separate actions assert similar, but not identical, constitutional challenges to various sections of Act 69 and seek to preliminarily enjoin the implementation of portions of the challenged state statute, which will otherwise become effective on January 1, 2012. All parties to this action have submitted extensive briefs relating to the pending motions for preliminary injunction, and the Court heard several hours of oral argument on December 19, 2011. The Court addresses these motions below.

Factual Background

The South Carolina General Assembly took up the matter of state immigration legislation in the 2011 legislative session because of a perceived failure of the United States to "secure our southern border," which "really jeopardize[s] our national security." (Dkt. No. 29-25 at 13).[1] The Act was designed to deal with "issues regarding folks being in South Carolina unlawfully [and] not having proper identification." (*Id.* at 2). The South Carolina Senate conducted four

who opposed the legislation stated during floor debate that the bill was "clear

state and local law enforcement officers making a traffic stop or arrest and having a "reasonable suspicion" that the person may be unlawfully present in the United States to "make a reasonable effort, when practicable, to determine whether the person is lawfully present in the United

Act 69 was considered and approved by the South Carolina General Assembly during a time period in which a number of states adopted similar immigration statutes and then faced legal challenges to the newly adopted legislation in federal court. The first state to adopt

(N.D. Ala. Sept. 28, 2011) *injunction pending appeal granted in part and denied in*

merits of their preemption challenges to the sections of Act 69 for which the plaintiffs have standing. Finally, the Court addresses the remaining elements of the preliminary injunction standard and the issue of remedy.

however, contest the standing of the private plaintiffs to assert a challenge to the Act in its entirety on the basis of the alleged impermissible impact on the nation's foreign affairs and the Act's alleged impermissible burdening of federal financial resources. Defendants also contest the standing of the private plaintiffs to assert challenges to Sections 1 and 7 of the Act.

The Court recognizes its duty to make an independent determination of standing notwithstanding the defendants' decision not to contest the plaintiffs' standing to assert challenges to Sections 4, 5, 6 and 15 of the Act. The complaint of the United States clearly sets forth the basis of its standing to challenge Sections 4, 5, 6 and 15 of the Act. *See* Compl. ¶¶ 2-6,

particularized since the operation of Sections 4, 5 and 6 of the Act may result in one or more private plaintiffs being arrested and detained at a local or state prison facility. *See Hispanic Interest Coal. of Ala.*, 2011 WL 5516953, at *44 (finding that private plaintiffs had standing to challenge a provision which only applied to detained persons where private plaintiffs showed

B. Federal Cause of Action and Jurisdiction

preempted by federal statutory or constitutional law, such seizure or deprivation of the person's freedom of movement would constitute a violation of the Fourth and Fourteenth Amendments of the United States Constitution. Third, the private plaintiffs assert that the unlawful implementation of a state criminal statute regulating immigration, when such a matter is

private plaintiffs, the court stated without equivocation that "the Immigration and Naturalization Act . . . creates a right enforceable under § 1983." *Ga. Latino Alliance for Human Rights*, 793 F. Supp. 2d at 1327.

The Court finds instructive the long line of cases involving federal court decisions addressing the state regulation of immigration, all of which involved alleged violations of federal rights and all of which were brought by private plaintiffs. In a case this past term, the United States Supreme Court addressed the right of the state of Arizona to adopt various employer sanctions relating to the employment of unlawfully present aliens. *See Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011). The challenge to the Arizona statute was brought by [redacted]

among the first and historically one of the most significant challenges to a state immigration statute in American history, the United States Supreme Court in *Chy Lung v. Freeman*, 92 US 275 (1875), struck on preemption grounds a California statute which permitted a state official to

The authority of the Attorney General to institute a suit was again challenged in *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925), which involved a plan of a local

government's authority over foreign affairs and immigration matters. 92 U.S. at 276-77. No legal developments since *Chy Lung* have diminished the Attorney General's authority to assert and defend the powers of the national government granted by the Constitution.

In sum, the Court finds that the Attorney General has broad and sufficient authority to

with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing *Ex parte Young*, 209 U.S. at 160-62). "A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy

"[p]ower to regulate immigration is unquestionably exclusively a federal power." As Justice

The Court should start any preemption analysis with a presumption against preemption. *Wyeth*, 555 U.S. at 565. This presumption is particularly strong where Congress has legislated in an area the states have traditionally occupied. *Id.* Conversely, the presumption against preemption is not strong in areas where the states have not traditionally legislated, most

D. Standards for Preliminary Injunction

A preliminary injunction is an "extraordinary and drastic remedy" and "is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 690 (2008). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). As the Fourth Circuit

has determined it has standing to challenge. The private plaintiffs, like the United States, have

conduct an inquiry into their status and take action should they determine that such persons are in fact unlawfully present. The United States asserts that such a state-mandated law enforcement scheme is contrary to federal immigration priorities, which focus upon unlawfully present persons who are national security and public safety risks, and would burden and disrupt federal immigration enforcement efforts and the national government's administration of foreign policy.

A. Challenges to State Criminalization of Federal Immigration Laws

1. Subsections 4(B) and (D)

Subsections 4(B) and (D) of Act 69 make it a state felony punishable by [redacted]

for § 1324 violations, while preserving control of prosecutions and judicial interpretation to

4469941, at *41-43. The district court reviewing the Georgia immigration statute, *Georgia Latino Alliance for Human Rights v. Deal*, reached a similar conclusion regarding Georgia's version of the harboring and transporting statute. The court, in granting a preliminary injunction, concluded that the Georgia statute was an attempt to "replace the discretionary and interpretative mechanism of the federal government" with control by the state government. 793 F. Supp. 2d at 1336. The district court concluded that this was not acceptable because state and federal officials

or protections of the Convention Against Torture, victims of trafficking who may have obtained authorization from the Attorney General granting "continued presence" in the United States, and I-918 petitioners for U-Visa status filed by survivors of serious crimes who are cooperating with law enforcement authorities. (*Id.* at 16; Dkt. No. 16-3 at 7-18). These classes of persons would

classic case of field preemption. Further, state enforcement of Section 5 creates the real risk that persons lawfully present in the United States but not in possession of federal alien registration materials would be subject to arrest, prosecution and incarceration, creating a conflict with federal law and an obstacle to the full implementation of the objectives of Congress. Thus, this law is also preempted pursuant to conflict and obstacle preemption.

Subsection 6(B)(2) and Section 15 address the making, selling and possession of counterfeit identification materials by persons unlawfully present in the United States. Subsection 6(B)(2) makes it unlawful for any person to possess or use a counterfeit ID as proof of lawful presence. Section 15 makes it unlawful to make or sell counterfeit identification to a person unlawfully present in the United States. Federal law makes it a crime to counterfeit

States has made a clear showing that it will likely succeed on the merits of its challenge to Section 15, thereby satisfying the first of four prongs for the grant of a preliminary injunction regarding these sections of the Act. The Court will address the balance of the preliminary injunction standards regarding these sections in the remedy portion of this Order.

[redacted]

present in the United States; (2) the alien has previously been convicted of a felony and was thereafter deported or left the country; (3) the alien has reentered the United States; and (4) the state or local law enforcement officer has confirmed the [redacted]

identification, such as a state issued driver's license, military identification or a United States passport. *Id.* § 6(B)(1). If the person subject to the law enforcement encounter does not possess one of the acceptable forms of identification, the "officer shall make a reasonable effort, when

16-5 at 4 n.4). The United States asserts that its enforcement efforts and immigration resources are directed toward those priority classes of unlawfully present persons and are fully absorbed in

range of delicate U.S. foreign relations interests." (Dkt. No. 16-2 at 5). Secretary Burns identifies three principal types of potential harms to American foreign interests from the South Carolina immigration statute: (1) "reciprocal and retaliatory treatment of U.S. citizens" with

[redacted]

"significant potential harm to the ability of U.S. citizens to travel, conduct business and live

[redacted]

It has long been recognized that "at some point an exercise of state power that touches on

of the United States, the power to pass such laws "belongs to Congress, and not the States." *Id.* at 280.

The intimate relationship between the conduct of foreign affairs and immigration policy

involving a challenge to the Alabama statute [redacted]

the agency. . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires."). Moreover, the Department's interpretation of the term "cooperate" comports with the overall structure of the INA (which places primary responsibility for immigration policy and enforcement on federal officials and limits state and local officials to narrow and specific responsibilities) and the long line of jurisprudence that recognizes the "power to regulate immigration is unquestionably . . . a federal power." *Whiting*, 131 S. Ct. at 1974 (citing *DeCanas*, 424 U.S. at 354).

[redacted]

with the Attorney General. Thus, § 1357(g)(10) does not provide the State a safe harbor for Act 69.

Section 6 is subject to both field preemption and obstacle preemption. First, the federal government's regulation of immigration enforcement is so pervasive and comprehensive that it has not left any room for the state to supplant it. *Gade*, 505 U.S. at 98. This area has long been

concerns of state officials without unduly burdening federal resources or disrupting the foreign affairs of the national government.[8]

Based upon the foregoing, the Court concludes that plaintiffs have made a clear showing that they will likely succeed on the merits of their challenge to Section 6 of Act 69. This satisfies

the first of four parts of the preliminary injunction standard. The balance of those preliminary

§ 1324, and were originally adopted in 2008 as S.C. Code § 16-9-460. Control of the prosecution and judicial interpretation of this area of statutory law has been traditionally a

[redacted]

state regime of prosecution and judicial interpretation for those harboring, sheltering and transporting unlawfully present persons will disrupt and conflict with the comprehensive federal

[redacted]

The Court concludes that plaintiffs have clearly shown that they will likely suffer irreparable injury should Section 5 be enforced. The Court further finds that the balance of equities clearly tips in favor of plaintiffs and that the grant of a preliminary injunction is in the public interest. Therefore, the Court grants a preliminary injunction enjoining the enforcement of Section 5 until further order of this Court.

C. Section 6

Section 6, excepting the provisions of Section 6(B)(2), mandates that every law enforcement encounter with any person be infused with consideration of the person's legal status in the United States. If the officer has a "reasonable suspicion" that the person may be unlawfully present, Section 6 directs the officer to undertake certain inquiries and actions where

Court grants a preliminary injunction enjoining the enforcement of Section 6 until further order of this Court, except as to 6(B)(2) which is specifically addressed below.[9]

Section 6(B)(2) makes it a state crime to possess or attempt to use a fraudulent I.D. for the purpose of establishing lawful presence in the United States. The United States asserts that federal law now exclusively regulates this area and that enforcement of this subsection would create an independent scheme of prosecution and judicial enforcement outside the control of the federal government and without regard to federal immigration enforcement priorities. The United States further asserts that discretionary decisions to treat certain matters as civil, rather than criminal, are carefully calibrated to accomplish immigration enforcement ends without unduly disrupting the nation's relations with foreign governments. Since the South Carolina

D. Section 15

Section 15 prohibits the making or selling of counterfeit I.D.s for the use of persons unlawfully present in the United States. Private plaintiffs do not challenge this section. The United States asserts that this area is already addressed by the comprehensive federal