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IN THE SUPREME COURT OF THE UNITED STATES

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CHAMBER OF COMMERCE OF THE UNITED :

STATES, ET AL., :

Petitioners :

v. : No. 09-115

MICHAEL B. WHITING, ET AL. :

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Washington, D.C.

Wednesday, December 8, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of Petitioners.

NEAL KUMAR KATYAL, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioners.

MARY R. O'GRADY, ESQ., Solicitor General, Phoenix, Arizona; on behalf of Respondents.

| | C O N T E N T S | |
|----|---------------------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | CARTER G. PHILLIPS, ESQ. | |
| 4 | On behalf of the Petitioners | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | NEAL KUMAR KATYAL, ESQ. | |
| 7 | On behalf of the United States, as | |
| 8 | amicus curiae, supporting Petitioners | 19 |
| 9 | ORAL ARGUMENT OF | |
| 10 | MARY R. O'GRADY, ESQ. | |
| 11 | On behalf of the Respondents | 28 |
| 12 | REBUTTAL ARGUMENT OF | |
| 13 | CARTER G. PHILLIPS, ESQ. | |
| 14 | On behalf of the Petitioners | 53 |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 09-115, Chamber of Commerce v. Whiting.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

In 1986 Congress converted what had been before that time a merely peripheral concern of immigration policy, that is how to regulate worker authorization, and converted it into a core concern of immigration policy by the passage of the -- of the Immigration Reform and Control Act.

This Court has characterized that change in legislation as providing a comprehensive scheme for dealing with those issues, and that characterization is obviously apt because Congress provided for an exhaustive and exclusively Federal method of bringing to the attention of Federal authorities, problems and worker authorization, the method by which those matters should be investigated, the method by which they should be adjudicated, all of which are controlled as a matter

1 of Federal, exclusive Federal activity; and indeed the
2 ultimate judicial review goes exclusively to the Federal
3 courts of appeals.

4 The sanctioning provisions are very explicit
5 and they are very clear, and they are very balanced; and
6 for a good reason. Congress realized in this context
7 that if you over-enforce in one direction, that is if
8 you try to deter the hiring of unauthorized workers, you
9 run a very serious risk of causing employers to err on
10 the side of not hiring others who are in fact authorized
11 but who may fall into protected classes. And so
12 Congress very carefully calibrated the penalties on both
13 sides so that the employer essentially would play it
14 straight down the middle and hire the best people for
15 the job under these circumstances, while of course
16 complying if at all possible with the Federal
17 requirements.

18 And so it's against that backdrop --

19 JUSTICE SCALIA: Why is that a problem if,
20 as -- as the Federal statute requires and the State
21 statutes require, you -- you have to show an intent to
22 hire an unauthorized worker? Isn't -- isn't that what
23 the State statutes here require?

24 MR. PHILLIPS: Well, the State statute has
25 two components to it. One is knowing and one is intent.

1 But --

2 JUSTICE SCALIA: Right.

3 MR. PHILLIPS: But I don't see how that --

4 JUSTICE SCALIA: Right. So why is that a
5 problem for -- for the business? I mean he's safe so
6 long as he doesn't intentionally hire an unauthorized
7 worker.

8 MR. PHILLIPS: Well, I think part of the
9 problem is that there -- it is never 100 percent clear
10 precisely who is and who is not an authorized worker.
11 And I think what Congress said was -- I'm not going to
12 deal with this problem in the kind of granular way you
13 are looking at it, Justice Scalia, which is specifically
14 at each of the individual employment decisions. You are
15 going to look at the generality of situations and
16 realize that if you put on one side of the scale what
17 Arizona has done here, which is to say that you can --
18 you can essentially have the death penalty to the
19 business, that is complete eliminate the business's
20 right to exist; and on the other side of the scale, a
21 \$250 fine, it would -- it would be pretty remarkable to
22 say, well, I'm going to hide behind the intent and
23 knowing requirements and instead simply avoid if at all
24 possible the risk of Arizona's sanctions being imposed
25 upon me.

1 JUSTICE SCALIA: Well, I think what Arizona
2 would answer to that is: Well, that's the only option
3 the Federal Government left us.

4 MR. PHILLIPS: Well, I'm quite sure that
5 that's what Arizona will say.

6 JUSTICE SCALIA: They excluded everything
7 else. We might have used reticulated penalties or, you
8 know, enforced the Federal law ourselves, but they
9 forbade that. But they did allow us to enforce the law,
10 immigration laws, through licensing, right? So it all
11 essentially comes down to -- to the licensing issue,
12 doesn't it?

13 MR. PHILLIPS: Right. It does ultimately
14 does come down to "through licensing" laws and -- the --
15 the -- part of the -- and the fundamental problem
16 obviously with Arizona's scheme here is that this is not
17 a licensing law. This is a worker authorization
18 sanctioning law.

19 JUSTICE KENNEDY: When I picked up this --
20 this brief and looked at this case, I thought: Oh,
21 well, licensing, that is a defined term; I will look in
22 Corpus Juris Secundum or ALR or something. But it
23 really isn't. Your brief indicates you start with
24 dictionaries, fair enough. You indicate what Federal
25 licensing laws are. But I see no limitation on what the

1 State can decide is a license in any jurisprudential
2 principle that you cited.

3 MR. PHILLIPS: Right. Justice Kennedy, I
4 think the better way to try to -- to grapple with the
5 meaning of the licensing law or whether it ought to be
6 construed broadly to allow the State wide authority to
7 engage in supplemental enforcement in this, or narrowly
8 in order to say that what really ought to happen in this
9 context is, if you deal with a situation where the
10 Federal Government has enacted -- I'm sorry -- has
11 enforced a provision and imposed a penalty through the
12 Federal scheme, that then as a supplement to that the
13 State does in fact have the authority to add something
14 over and above what it -- what the Federal Government
15 has done.

16 But it seems to me quite remarkable to think
17 that Congress intended through a parenthetical referring
18 to "through licensing laws" to allow the State to adopt
19 an entire alternative shadow enforcement mechanism,
20 non-administrative decision-making process, completely a
21 State-run operation; and even at the end, the sanction
22 is not -- is not imposed ultimately in effect by the --
23 by any regulating entity. It is ordered by a State
24 court.

25 JUSTICE SCALIA: That would be remarkable

1 only because nobody would think that with this scheme in
2 place, the Federal Government would not enforce it. Of
3 course no one would have expected that. But what
4 Arizona says has occurred here is that the scheme in
5 place has not been enforced, and Arizona and other
6 States are in serious trouble financially and for other
7 reasons because of -- of unrestrained immigration. And
8 therefore, they had to take this very massive -- I agree
9 this step is massive, and one wouldn't have expected it
10 to occur under this statute, but expectations change
11 when the Federal Government has -- has simply not
12 enforced the immigration restrictions.

13 MR. PHILLIPS: Justice Scalia, I -- I
14 understand the point and I understand the motivation for
15 why Arizona did what it did. But the -- the problem is
16 the statute was enacted in 1986 and that's when the
17 preemption standards were put in place. And the --
18 again, the notion -- if you look at the way the
19 structure of the statute -- and this also responds in
20 some ways to Justice Kennedy's question how should you
21 read licensing, since it's not a self-defining
22 concept -- is if you -- is that first Congress said very
23 specifically that immigration laws should be enforced
24 uniformly, which says that there shouldn't be 40,000
25 different localities offering up their view of licensing

1 and -- and the additional 50 States.

2 Second of all, and this part I think is
3 particularly telling in terms of this massive State
4 scheme that's been adopted, which is that under section
5 1324a(b)(5) which is in 134a of the -- of the appendix,
6 Congress specifically outlaws the use of the I-9 form.
7 And in some ways this goes to your question,
8 Justice Scalia, because it would be inconceivable that
9 the State can in fact enforce knowing and intentional
10 decisionmaking without having access to the I-9 form,
11 because that's --

12 JUSTICE ALITO: Could I ask you this
13 question to get back to the issue of whether this is a
14 licensing law?

15 MR. PHILLIPS: Sure.

16 JUSTICE ALITO: "Licensing" is not an
17 unknown term. States and municipalities issue all sorts
18 of licenses. For example, I think here in the District
19 of Columbia every business has to have a general
20 business license, isn't that right?

21 MR. PHILLIPS: That is true, Justice Alito.

22 JUSTICE ALITO: Now, if the District of
23 Columbia were, after having enacted this requirement
24 some years ago, were to pass a new ordinance saying and
25 "if you knowingly hire an illegal alien, your general

1 business license can be forfeited," would that not --
2 would that cease to be a licensing law?

3 MR. PHILLIPS: Well, I -- I think the answer
4 to that specific hypothetical is that's still not a
5 licensing law, because it doesn't tie the grant of the
6 license to the revocation powers. I think Congress -- I
7 think Congress means for the States to adopt something
8 more specific than that, although I do
9 think eventually --

10 JUSTICE KENNEDY: Why is it -- this is the
11 same question you are answering. Why is it suddenly not
12 a license because the -- because the State imposes an
13 additional condition, where it was a license before?

14 MR. PHILLIPS: Well, I think the question is
15 whether it is a licensing law within the meaning of what
16 Congress intended. I mean -- the -- the reality is,
17 Justice Alito, there is -- there is no common definition
18 of license, and various States --

19 JUSTICE BREYER: Actually, there is. I
20 mean, I -- it seemed to me when I read this, it sounded
21 a little familiar, and I think whoever wrote it in
22 Arizona copied it out of the Administrative Procedure
23 Act. I mean, you read the definition of "license" in
24 the Administrative Procedure Act and this is awfully
25 close.

1 MR. PHILLIPS: Right. I understand that,
2 Justice Breyer, and I agree with that. But the problem
3 is, is that the -- the Federal law, it doesn't talk
4 about actions with -- with respect to licenses. It
5 talks about licensing laws and --

6 JUSTICE BREYER: That's right. It might
7 have meant something different; Congress might have.
8 But what is, then -- I read the SCIU brief. I thought
9 that was pretty interesting. Is that something you
10 adopt as what the Congress did mean? I mean, what do
11 you think Congress did mean, and what evidence is there?
12 If it didn't mean the APA definition, what evidence is
13 there for that?

14 MR. PHILLIPS: Well, the SEIU brief does a
15 very nice job of explaining the -- the particular focus
16 of Congress, obviously, on the Agricultural Workers
17 Protection Act, and in particular -- which has
18 tremendous significance in terms of narrowing the
19 State's authority here, because obviously in their
20 conforming amendments in that context --

21 JUSTICE SCALIA: It could have named that,
22 if that's it meant.

23 MR. PHILLIPS: I'm sorry, Your Honor?

24 JUSTICE SCALIA: It could have named that,
25 that particular licensing scheme, if that's what it

1 meant. But it didn't name it. It said licensing
2 generally.

3 What did it intend to add to that? Barbers'
4 licenses, beauticians' licenses? How would any of this
5 have anything to do with the immigration laws?

6 MR. PHILLIPS: Well, I think what it -- what
7 Congress actually had in mind and what is the most
8 natural reading of the licensing law is the fairly
9 common situation where somebody violates Federal law,
10 usually on the criminal side, and a State licensing
11 entity finds out about a conviction of the Federal
12 crime, and says: Oh, wait a second, we don't want
13 people to have licenses under these circumstances, and
14 therefore --

15 JUSTICE SCALIA: That's what they are
16 saying. That's exactly what they are saying. We -- we
17 have --

18 MR. PHILLIPS: Well, no, no.
19 Justice Scalia, there is a vast difference between that
20 and what they are saying.

21 JUSTICE SCALIA: I think it's very common to
22 talk about authority to do business within a State as --
23 as a license. You say "licensed to do business in" so
24 many States. It's a common expression.

25 Now, I have -- maybe you will persuade me

1 otherwise, but I have no doubt that insofar as this law
2 limits the authority to do business within the State, it
3 is a -- it is a licensing law. It's a little harder
4 extending licensing to formation of a corporation, but
5 when you issue a corporation charter you really do two
6 things. You create the corporation and enable the
7 limitation of liability that creates; and secondly, you
8 authorize that new creature to do business within your
9 State. So at least half of that corporation law is
10 licensing, it seems to me.

11 Now, if that's what I think, what --

12 MR. PHILLIPS: Actually, Justice Scalia, can
13 I stop you there?

14 JUSTICE SCALIA: Yes. Go on.

15 MR. PHILLIPS: Because I think, actually, if
16 you just received the articles of incorporation, that
17 doesn't actually in all States necessarily give you the
18 opportunity to do business. It just simply gives you
19 the right to exist, and you may very well need to get a
20 separate document in order to actually do business in a
21 particular State.

22 JUSTICE SCALIA: But you do not need the
23 kind of a document that an out-of-State corporation
24 needs.

25 MR. PHILLIPS: No, you don't need that.

1 That's true. That's true. But the reality is that
2 nobody, I think -- and common sense and common use of
3 the term, thinks of articles of incorporation or charter
4 of partnership or any of those as documents -- as
5 licensing, which suggests that the State --

6 JUSTICE SOTOMAYOR: Could I -- could I --

7 MR. PHILLIPS: I'm sorry?

8 JUSTICE SOTOMAYOR: -- just -- just focus
9 the question? Because we keep talking about whether the
10 APA-type definition of licensing is what Congress
11 intended or not, but you don't disagree that Congress at
12 least intended that if someone violated the Federal law
13 and hired illegal aliens of Hispanic -- undocumented
14 aliens and was found to have violated it, that the State
15 can revoke their license, correct, to do business?

16 MR. PHILLIPS: Yes. I don't disagree with
17 that, Justice Sotomayor.

18 JUSTICE SOTOMAYOR: So it really doesn't
19 matter whether they are revoking their right to do
20 business in the State. And they can only revoke their
21 charter or their articles of incorporation if they're --
22 if they were filed in that State. They wouldn't have
23 power to revoke a Delaware --

24 MR. PHILLIPS: They can't do it in Delaware,
25 right.

1 JUSTICE SOTOMAYOR: All right. So it's
2 stopping them from doing business. So really, the only
3 conflict you are talking about is not the power to stop
4 them from doing business, because you accept that this
5 saving clause gives them the power to do that, to revoke
6 the right to do business. What you are talking about is
7 a conflict in the adjudication of that issue.

8 MR. PHILLIPS: Right, and the enforcement
9 and investigation.

10 JUSTICE SOTOMAYOR: So I'm -- you know, how
11 they define "license" or not is irrelevant to me. Walk
12 me through whether -- what expressly preempts that
13 adjudication right --

14 MR. PHILLIPS: Right.

15 JUSTICE SOTOMAYOR: -- or what implicitly
16 preempts that adjudication right.

17 MR. PHILLIPS: Right.

18 JUSTICE SOTOMAYOR: Because that is, for me,
19 what the center of this question is.

20 MR. PHILLIPS: Right. I think there are
21 three pieces of evidence that respond directly to what
22 you asked, Justice Sotomayor.

23 First is Congress in section 115 of the
24 statute specifically says enforcement should be uniform,
25 which suggests to me that this ought to be exclusively a

1 Federal investigation and -- and adjudication process.

2 Two, the point I was making earlier about
3 the I-9 form. Those forms cannot be used in any --

4 JUSTICE SCALIA: Excuse me. Don't depart
5 from that . What does that mean, "enforcement shall be
6 uniform"?

7 MR. PHILLIPS: I'm sorry?

8 JUSTICE SCALIA: What does that mean,
9 "enforcement shall be uniform"?

10 MR. PHILLIPS: The enforcement of the
11 immigration laws shall be uniform. Congress stated that
12 as a -- as an overarching principle --

13 JUSTICE SCALIA: Is that any different
14 from --

15 MR. PHILLIPS: -- when it enacted section
16 115.

17 JUSTICE SCALIA: -- from what is the assumed
18 situation with respect to all Federal rules? Are
19 Federal laws not to be applied uniformly?

20 MR. PHILLIPS: Well, no, I -- I mean, I
21 think it depends on the circumstances. I can imagine a
22 lot of -- I mean, this is -- remember, we are talking
23 about immigration policy and immigration law here, and
24 in general, you would expect that to be pretty much
25 uniform. But this Court in De Canas had decided that

1 there are some elements of it that were not, and
2 Congress is simply reinforcing the basic notion that
3 enforcement of it ought to be uniform.

4 JUSTICE ALITO: Doesn't the exception for
5 licensing mean that this isn't going to be completely
6 uniform? One jurisdiction may take the position that a
7 restaurant that employs illegal aliens may lose its
8 restaurant license -- its license to operate. Another
9 one may take a different position. So it's not going to
10 be the same.

11 MR. PHILLIPS: Right. But -- but, Justice
12 Alito, I think that's why it's terribly important to
13 limit, to narrow as much as possible -- and it's fully
14 consistent with congressional intent -- the need to get
15 a full sanction done by the Federal government and then
16 just an add-on on the licensing side, rather than an
17 entire regime to enforce State law.

18 JUSTICE SOTOMAYOR: But it can't be
19 uniformity of sanction, because the court permitted
20 licensing sanctions.

21 MR. PHILLIPS: Right, there -- but only at
22 that point.

23 JUSTICE SOTOMAYOR: So let's go back to my
24 question of adjudication. What you are saying is what's
25 specifically preempted is the right to adjudicate --

1 MR. PHILLIPS: Investigate.

2 JUSTICE SOTOMAYOR: -- whether someone has
3 hired undocumented aliens, correct?

4 MR. PHILLIPS: Yes, Justice Sotomayor.
5 And -- and the last thing I would say to that was the
6 conforming amendments with respect to the Agricultural
7 Workers' Protection Act was the situation where the
8 Department of Labor, which used to engage in
9 adjudication as well, was divested of that authority.
10 It seems quite unlikely Congress meant to give that
11 authority to the States and take it from the Department
12 of Labor.

13 JUSTICE SCALIA: I don't see the problem in
14 diverse adjudication. Wouldn't there be a Federal
15 question presented if a company claimed that it was
16 deprived of the ability to do business because of a
17 mistaken interpretation of Federal law, that the person
18 it hired was not an authorized person?

19 MR. PHILLIPS: But Arizona doesn't
20 purport --

21 JUSTICE SCALIA: Wouldn't that be a Federal
22 question that -- that could be --

23 MR. PHILLIPS: Well, Arizona doesn't purport
24 to be enforcing Federal law here. It has an independent
25 State law basis for the actions that it takes. So that

1 would not arise under Federal law.

2 JUSTICE SCALIA: Doesn't the State law basis
3 refer to the Federal law?

4 MR. PHILLIPS: No, it -- actually, I don't
5 think it --

6 JUSTICE SCALIA: I thought it tracked it.

7 MR. PHILLIPS: It tracks it, but it doesn't
8 incorporate it. It doesn't purport to be applying it.
9 It's the same standards, but it's still a matter of
10 State law. It's not a Federal -- it's not Federal -- it
11 doesn't arise under Federal law.

12 I'd like to reserve the balance of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 General Katyal.

15 ORAL ARGUMENT OF NEAL KUMAR KATYAL,
16 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING PETITIONERS

18 GENERAL KATYAL: Thank you,
19 Mr. Chief Justice, and may it please the Court:

20 Nearly a quarter of a century ago, Congress
21 declared Federal employer sanctions central, not
22 peripheral, to the policy of immigration law. Congress
23 broadly swept away State and local laws, preempting any
24 sanction upon those who employ unauthorized aliens, with
25 the sole exception being a mere parenthetical for

1 licensing and similar laws.

2 CHIEF JUSTICE ROBERTS: Just to pose there,
3 we've had a little discussion about what licensing laws
4 are, but we haven't talked at all about those last two
5 words, "and similar laws." It seems to me that whatever
6 wiggle room or ambiguity there may be in saying whether
7 this is a license or not, Congress swept pretty broadly.
8 It said, not just licensing laws, but licensing and
9 similar laws.

10 GENERAL KATYAL: First let me tell you,
11 Mr. Chief Justice, what we think a licensing law is and
12 then deal with the "similar" question.

13 We think a licensing law, as Congress
14 defined it in IRCA, was the traditional licensing laws
15 that were in place in 1986. Those were largely farm
16 labor contractor laws. They were aimed at fitness to do
17 business, and they had a few essential characteristics
18 in those laws.

19 CHIEF JUSTICE ROBERTS: I'm sorry. Let me
20 just -- I mean, businesses had to have licensing laws
21 pretty much across the board, right? You couldn't set
22 up a -- I don't know, an electrical contracting business
23 if you weren't licensed to do business or met the
24 requirements for an electrician. It wasn't just
25 agricultural.

1 GENERAL KATYAL: Oh, absolutely. But I
2 think that this licensing law looks very different from
3 the ones you are referring to or the farm labor
4 contractor ones for a number of reasons. The first is
5 licensing laws issue licenses. They are generally about
6 the issuance of licenses, not simply ones in which
7 licenses are revoked. Second, they are ones in which
8 the issuance of the license, the criteria for issuance
9 is the same as the criteria for revocation.

10 JUSTICE SCALIA: Excuse me. Are you saying,
11 and I think the Petitioner here may have been saying as
12 well, that if you have a licensing law that permits the
13 revocation of the license, the revocation is not a
14 licensing law?

15 GENERAL KATYAL: No. What I'm saying is --

16 JUSTICE SCALIA: Suppose I have a licensing
17 law which says if you do this your license will be
18 revoked. Does that remain an a licensing law?

19 GENERAL KATYAL: In general itself that is
20 not a licensing law. Licensing laws share a number of
21 characteristics. Now, we can debate about whether
22 subtracting one or another of those characteristics --

23 JUSTICE SCALIA: Why make exception for
24 licensing laws therefore if you can't evoke a license
25 under it?

1 GENERAL KATYAL: Because, Justice Scalia,
2 Congress wanted to preserve the States traditional power
3 for licensing laws, which were about business to do
4 business. And what Arizona has done --

5 JUSTICE SCALIA: Once you are in you can do
6 whatever you like, you think that is what Congress
7 meant? You can pass upon their fitness when you issue
8 the license, but once its issued they can do whatever
9 they like, is that what you are telling me?

10 GENERAL KATYAL: No. I think that the
11 criteria would be the same for issuance and revocation.

12 JUSTICE SCALIA: And revocation. Okay. So
13 that raises the question what does it make, why does it
14 make any difference if the revocation provision is
15 contained in the narrow licensing law or if there is a
16 general State law which says all licenses that are
17 issued may be revoked for certain reasons?

18 GENERAL KATYAL: Because, Justice Scalia,
19 what Congress was trying to do was preserve the State's
20 and localities traditional power for fitness to do
21 business. And one good indicia that fitness to do
22 business is not was what at issue in the particular law
23 is that they will let businesses operate, they will
24 license them without any care whatsoever as to whether
25 they have a history of violating the particular

1 provisions.

2 JUSTICE SCALIA: So they should just --
3 Arizona should just amend all its licensing laws to
4 require what they now require when the license is
5 issued, and to say in each specific licensing law, that
6 it can be revoked for the same -- on the same.

7 GENERAL KATYAL: Justice Scalia, that would
8 solve that problem. Now there are other hallmarks of
9 licensing law.

10 CHIEF JUSTICE ROBERTS: Even if they said
11 and you have to renew your license every year or every
12 six months?

13 GENERAL KATYAL: That is correct. That
14 itself, I don't think, is relevant to whether the
15 licensing law -- the other hallmarks are that they have
16 discretionary adjudication by an expert body, that it's
17 not mandatory, that it is generally aimed at
18 qualifications to do business.

19 CHIEF JUSTICE ROBERTS: You don't disagree
20 that whether or not a company hires illegal workers is
21 related to quality or asserted ability to do business or
22 qualification?

23 GENERAL KATYAL: A State could certainly
24 make that part of its genuine fitness to do business
25 law. Now, here Arizona hasn't done that. And we know

1 that because the criteria for issuance of the license
2 are entirely divorced from the criteria for revocation
3 of the license. And if Arizona really believed,
4 Mr. Chief Justice, what you are saying, which is that
5 it's relevant to the -- the violation is relevant to
6 whether they can do business or not, they allow every
7 single one of these entities to get the license.

8 JUSTICE SOTOMAYOR: Your argument sounds to
9 me like, look at the law and see what its purpose is.
10 If the purpose is to regulate undocumented aliens, then
11 it's struck down. If it happens to put its revocation
12 provisions in its licensing law, then its okay. It
13 doesn't make much sense to me.

14 GENERAL KATYAL: Justice Sotomayor, I'm not
15 talking about purpose. I'm saying look at the face of
16 the statute and see what is --

17 JUSTICE SOTOMAYOR: The face of the statute
18 talks only about if you hire undocumented aliens your
19 license is revoked.

20 GENERAL KATYAL: Right. So that looks like
21 a punishment statute. There are essentially two boxes
22 here --

23 JUSTICE SOTOMAYOR: But the savings clause
24 says that it is okay. Civil or criminal sanctions other
25 than through licensing and similar laws.

1 GENERAL KATYAL: Right. And this is not a
2 licensing law. Congress essentially had two boxes in
3 1986. One was the traditional fitness to do business
4 laws and the other was what Congress --

5 JUSTICE SOTOMAYOR: If we disagree with you,
6 could you answer the question I posed to your adversary,
7 which is what makes the adjudication of status
8 preempted?

9 GENERAL KATYAL: Absolutely. The Federal
10 adjudication is expressly -- State adjudication of a
11 Federal violation is expressly preempted as well as
12 impliedly so for three reasons. The first is that
13 Congress in developing IRCA in the comprehensive scheme
14 set out a series of procedures, Federal adjudication
15 with an ALJ, all sorts of different regulations to the
16 jot and tittle. And what Arizona does here is what
17 40,000 different localities can do if this law is
18 upheld, which is have --

19 JUSTICE SOTOMAYOR: At the time the statute
20 was passed there were many, many State laws that
21 adjudicated revocation of licenses. Perhaps not many
22 have addressed the issue of hiring undocumented aliens,
23 but many State laws existed that independently
24 adjudicated revocations. What in the legislative
25 history or in the words of the statute show that

1 Congress intended in any way to limit those
2 adjudications?

3 GENERAL KATYAL: It's undoubtedly the case
4 that without the parenthetical, the mere parenthetical
5 savings clause, that Arizona-like laws would be swept
6 away as sanctions -- that these are sanctions imposed.
7 So the question is whether the licensing law phrase
8 saves that. And I think it saves the State adjudication
9 and I think the answer to that is no, because to read
10 the statute that way is to permit all of those states to
11 have their own laws, and it's undoubtedly the case that
12 Congress wanted to sweep away the DeCanas-style State
13 statutes that were in place that imposed sanctions on
14 employers.

15 CHIEF JUSTICE ROBERTS: Counsel, just so I
16 make sure I understand your approach. You're saying
17 that Arizona had a law saying you have to have a license
18 to do business. And then it became aware of a problem
19 that it wasn't aware of before, it found out a lot of
20 employers were employing child labor and they didn't
21 know they would do that. And they say we can revoke
22 your license if you're determined to have employed child
23 labor, that that would not be okay? But it would be
24 okay if in the original licensing thing they said and
25 you had can't employ child labor.

1 GENERAL KATYAL: Well, I think that the
2 answer depends on what Congress is trying to get at. In
3 1986 we know what Congress was trying to get at with
4 respect to State enforcement of immigration laws. They
5 broadly swept away the DeCanas-style laws and they said
6 for the I-9 provisions, which President Reagan described
7 as the keystone of the act, that I-9 documents can't be
8 used in any procedure besides IRCA procedures.

9 JUSTICE KENNEDY: But the Chief Justice
10 insists on an answer to his own question, but it seems
11 to me his question is why isn't that still a licensing
12 law?

13 GENERAL KATYAL: If it has independent
14 adjudication it is swept away by the first parts of the
15 H2 statute which say, which say the provisions of this
16 section preempt any State or local law imposing civil or
17 criminal sanctions.

18 JUSTICE KENNEDY: But in the child labor
19 example, why isn't that an addition to a regulatory
20 licensing scheme so that it's a licensing law.

21 GENERAL KATYAL: Because if I understand --
22 I may not understand the hypothetical, but the word
23 provisions refers to the entire subset, the entire
24 statute in IRCA including the procedural protections,
25 the procedures that follow for Federal enforcement of

1 immigration laws.

2 CHIEF JUSTICE ROBERTS: If you -- excuse me.
3 You tried earlier to talk about the two boxes and you
4 said something would be preempted by the first clause.
5 Anything, civil and criminal sanctions are allowed if
6 they are imposed through licensing and similar laws.
7 There are not two boxes. The State can do what's in the
8 first part so long as it does it through licensing or
9 similar laws.

10 GENERAL KATYAL: Right. And our position is
11 that this is not a licensing law because it doesn't bear
12 any of the indicia of a traditional licensing law.

13 CHIEF JUSTICE ROBERTS: Is it similar to a
14 licensing law?

15 GENERAL KATYAL: No, I don't think so.
16 Congress when they used similar meant to side step the
17 schematic debate about whether something is a
18 certificate as some of the farm labor contractor statutes
19 use that term or a license.

20 JUSTICE SCALIA: No, no, that's all right.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Ms. O'Grady.

23 ORAL ARGUMENT OF MARY R. O'GRADY

24 ON BEHALF OF THE RESPONDENTS

25 MS. O'GRADY: Thank you. Mr. Chief Justice,

1 and may it please the Court:

2 Through their police powers, States
3 traditionally have the authority to regulate the conduct
4 of employers within their jurisdiction to determine what
5 conduct warrants issuance of a State license and to
6 determine what conduct justifies suspending or revoking
7 such a license. And although Congress preempted some of
8 our traditional authority when it enacted IRCA in 1986,
9 it preserved significant State authority through the
10 savings clause that permits a State to impose sanctions
11 through licensing and similar laws.

12 JUSTICE GINSBURG: Have you answered the
13 anomaly that Arizona cannot impose a fine even in a
14 modest amount, but it can revoke someone's license to do
15 business?

16 MS. O'GRADY: Your Honor, we think that
17 looking at the savings clause -- we don't view it as an
18 anomaly. The structure that Congress established is one
19 that the State's authority is determined by the nature
20 of the sanction that we choose to impose. We don't have
21 the authority to -- they -- they took away our authority
22 to impose civil monetary and criminal sanctions, but
23 preserved our authority to impose sanctions under this
24 law.

25 JUSTICE KENNEDY: But underlying Justice

1 Ginsburg's question is why would Congress want to do
2 that?

3 MS. O'GRADY: Well, I think it makes sense,
4 Your Honor, because in terms of licensing, it -- it
5 provides some accountability, because we are the
6 entities that establish policy for our licensees and we
7 are the ones accountable for whether that business
8 remains in business or whether we are taking it away
9 from them.

10 JUSTICE SCALIA: Perhaps Congress never
11 expected that the States would have to resort to such
12 massive measures, and they probably wouldn't have if --
13 if the law had been uniformly enforced and vigorously
14 enforced; right?

15 You -- you didn't -- didn't have any notion
16 of doing this sort of thing in 1986, did you?

17 MS. O'GRADY: Your Honor, certainly we
18 waited until 2007.

19 JUSTICE SCALIA: So maybe Congress wasn't
20 worried about it because it seemed very unlikely that
21 anything like that would occur.

22 MS. O'GRADY: Perhaps. But I think also
23 that Congress was recognizing what this Court recognized
24 in De Canas, was that unauthorized employment has
25 significant local consequences, so they did not want to

1 fully preempt State law. They wanted to preserve the
2 authority --

3 JUSTICE BREYER: The main -- the main
4 anomaly it seemed to me to be this, that in the Federal
5 Act, as -- that was the first point that the Chamber
6 made, that it's a fairly careful balance. There are a
7 group of people in Arizona, they may look as if they
8 come from Mexico or speak with an Hispanic accent, and
9 you are not certain whether they in fact are illegals or
10 that they are legal. Now, think of that category.

11 Congress has passed a statute that gives the
12 employer just as much incentive to verify, so there is
13 no discrimination, as to dismiss, so there is no illegal
14 hiring. It's absolutely balanced. A \$1,000 fine for
15 the one, a \$1,000 fine for the other.

16 So Arizona comes along and says: I'll tell
17 you what, if you discriminate, you know what happens to
18 you, nothing? But if you hire an illegal immigrant,
19 your business is dead. That's just one thing they do.
20 Now, how can you reconcile that intent to prevent
21 discrimination against people because of their
22 appearance or accent -- how do you reconcile that with
23 Arizona's law?

24 If you are a businessman, every incentive
25 under that law is to call close questions against hiring

1 this person. Under the Federal law every incentive is
2 to look at it carefully.

3 MS. O'GRADY: Your Honor, a couple of
4 points. First in terms of how our law works, we do have
5 a prohibition against investigating any complaint that
6 is based solely upon race. So if we get a complaint
7 that says those people all look Mexican or Hispanic,
8 that does not get investigated under Arizona law, first.
9 We also have criminal penalties if frivolous complaints
10 are filed.

11 Beyond that, we have the use of E-Verify
12 which is an added protection for employers to prevent
13 the hiring of unauthorized aliens. So if they use
14 E-Verify, if they are in good faith compliance with the
15 I-9 process, they have no risk of exposure under Arizona
16 law just as true under Federal law.

17 JUSTICE SOTOMAYOR: I'm -- doesn't it
18 frustrate the congressional intent when the Federal law
19 says that the I-9 can be used for no purpose other than
20 the Federal adjudication of whether a violation has
21 occurred or not? Doesn't it frustrate that law to have
22 the States raise a defense that depends on forcing
23 someone to disclose something that the Federal law
24 protects?

25 I mean, this is a vicious circle. Federal

1 law says you can't do the I-9, you can't use it for any
2 purpose other than the Federal adjudication. Now you
3 are creating a defense that says, you have to supply us
4 with something that Federal law otherwise protects from
5 disclosure.

6 MS. O'GRADY: Your Honor, we don't think
7 that the Federal law prohibits the use of an I-9 -- of
8 the I-9 -- an employer's use of the I-9 in a State
9 proceeding, that these can be used under the Federal
10 proceeding or in the State.

11 But beyond that, if at some point in an
12 actual enforcement action it was determined that Federal
13 law did have that impact, they would still have that
14 defense available to them. They would just have, to you
15 know, prove it up in a different way other than use the
16 form.

17 JUSTICE SOTOMAYOR: That doesn't answer my
18 point. Doesn't it frustrate Federal law when the
19 Federal law says that I-9 can be used for no purpose
20 other than the Federal adjudication of the status of
21 employees? I think that's --

22 MS. O'GRADY: Here's -- here is what the law
23 says: It may not be used for purposes other than for
24 enforcement of this chapter. And we believe that
25 a State enforcement action under the authority for

1 preserving sanctions through licensing and similar laws,
2 would fall within that. So we think they should be able
3 to use that; the employer should be able to use that.

4 JUSTICE ALITO: Isn't there -- isn't there a
5 difference in saying that it may not be used for any
6 purpose other than for enforcement of this chapter and
7 other provisions of Federal law on one hand; and on the
8 other hand saying it may not be used for any purpose
9 other than in a Federal proceeding? The enforcement --
10 the I-9 certainly could be used in a Federal proceeding
11 by the employer. Would that then -- would that be used
12 for the enforcement of the Federal law? I wouldn't
13 think so.

14 MS. O'GRADY: That's true, Your Honor.
15 That --

16 JUSTICE BREYER: Is the I-9 -- I do have a
17 question on the I-9. I'm not certain. I thought under
18 Federal law that if the employee -- the employer isn't
19 certain, but the employee says, here's my Social
20 Security card, here's the driver's license. The
21 employer looks at that, he's home free, is that right?

22 But under Federal -- under your law, under
23 Arizona law, he's not home free, and, moreover --
24 because he -- it may -- he's not home free, he still
25 could be prosecuted. Is that right or not?

1 MS. O'GRADY: No, that is not right, Your
2 Honor.

3 JUSTICE BREYER: So if shows the driver's
4 license under -- under Arizona law, if the -- if he
5 shows a driver's license and Social Security card, the
6 worker, the employer looks at it, the employer cannot be
7 prosecuted?

8 MS. O'GRADY: Well, Your Honor --

9 JUSTICE BREYER: Yes or no?

10 MS. O'GRADY: We would need the evidence
11 that the person knowingly employed the unauthorized
12 alien, and a good faith defense --

13 JUSTICE BREYER: All right. So -- I thought
14 in reading it that it creates some kind of presumption,
15 but he's not home free?

16 MS. O'GRADY: No, Your Honor. The -- but
17 the substantive --

18 JUSTICE BREYER: But under Federal law he is
19 home free.

20 MS. O'GRADY: The substantive requirements
21 under Arizona law and Federal law are the same. We are
22 imposing no new obligations.

23 JUSTICE BREYER: So then he's home free?
24 Look, I don't -- I'm trying to understand. Maybe there
25 is not enough time to explain it, but I thought Federal

1 law requires this E-9 business or whatever that E review
2 is. And I was worried about the E review which it
3 seemed to require because it seemed to me in 20 percent
4 of the cases where the notice is, this guy is not
5 authorized; we don't have any record that he is
6 authorized to work -- 20 percent of those are wrong and
7 he is authorized to work.

8 So the employer who follows that is really
9 going to fire 20 percent of the people who will be
10 absolutely entitled to work. And so I would just like
11 to you address those points, as you wish.

12 MS. O'GRADY: Okay. And let me walk through
13 how our law works to see if this addresses the concern.
14 So the -- Arizona doesn't change anything in terms of
15 the use of the I-9. We retain the same defense that is
16 in the Federal law for good faith compliance with the
17 I-9. We do require employers to use E-Verify although
18 we don't impose a sanction on the employer if they don't
19 use E-Verify.

20 JUSTICE GINSBURG: Can you explain that,
21 E-Verify, because this is a Federal resource, and the
22 Federal Government has said we want this to be
23 voluntary. How can Arizona take a Federal resource,
24 which the Federal government says is voluntary except in
25 certain circumstances, and turn it into something that

1 is mandatory?

2 MS. O'GRADY: We think the -- that question
3 is answered by looking at the conflict preemption
4 analysis, because Congress didn't address the role of
5 the States with regard to E-Verify. And we aren't --

6 JUSTICE GINSBURG: I don't get into any
7 preemption or not, but Arizona wants to use a Federal
8 resource. And the Fed makes it available if the
9 employer can use it voluntarily, but not mandatorily.
10 How can -- how can Arizona set the rules on the use of a
11 Federal resource?

12 MS. O'GRADY: Your Honor, we can -- as long
13 as it's not a burden to the objectives of Congress, we
14 think that we can require employers within our
15 jurisdiction to use E-Verify.

16 JUSTICE SCALIA: Do -- do you make it
17 mandatory?

18 MS. O'GRADY: Well, our statute says you
19 shall use E-Verify. We don't impose a penalty against
20 employers who fail to use it. The consequences are the
21 same as they are under Federal law.

22 JUSTICE SCALIA: You just -- you just don't
23 get the safe harbor. Isn't that the only consequence?

24 MS. O'GRADY: That's right. You don't get
25 the safe harbor under E-Verify. Now -- for the use of

1 E-Verify. We did add after this lawsuit was filed some
2 additional requirements similar to what they have under
3 the Federal system where you can't get State contracts,
4 you can't get State grants.

5 JUSTICE KENNEDY: But you are taking the
6 mechanism that Congress said will be a pilot program
7 that is optional and you are making it mandatory. It
8 seems to me that's almost a classic example of a State
9 doing something that is inconsistent with a Federal
10 requirement.

11 MS. O'GRADY: Well, again, we look at the
12 test for conflict preemption in terms of, does this make
13 it impossible to comply with Federal law? No, it is
14 really a question of, are we interfering with
15 Congress's -- excuse me, the Federal government's
16 ability to achieve its goals? And the goal in
17 developing E-Verify is to have a more effective
18 verification system.

19 JUSTICE BREYER: If they fail to do it, then
20 they cannot receive any, quote, "grant, loan, or
21 performance-based incentive," end quote, from the State.
22 That's what the law says, isn't it?

23 MS. O'GRADY: That's what -- and that was
24 added after this lawsuit was filed.

25 JUSTICE BREYER: I would think that the

1 answer to Justice Scalia's question is, yes, there is
2 that penalty. It isn't simply hortatory.

3 MS. O'GRADY: Well, there's no penalty in
4 terms of --

5 JUSTICE BREYER: You don't go to jail. What
6 you do is you lose any grant, loan, or performance-based
7 incentive. Is that right?

8 MS. O'GRADY: That is true under current
9 law. That is not what the plaintiffs' challenge --

10 JUSTICE SCALIA: Does this lawsuit challenge
11 that?

12 MS. O'GRADY: It does not, Your Honor. They
13 just challenge the --

14 JUSTICE SCALIA: You are under the old law,
15 and the only sanction is you lose the safe harbor, if
16 that's a sanction.

17 MS. O'GRADY: That's right. That's right,
18 Your Honor.

19 JUSTICE SOTOMAYOR: So in answer to
20 Justice Breyer's earlier question, in fact, relying on
21 the I-9 does not provide a safe harbor, because under
22 the E-Verify system you can't just rely on the I-9 forms
23 and statutes. You have to rely on the E-Verify.

24 MS. O'GRADY: Well, Your Honor, we have the
25 same -- it's modelled after the Federal law. So just as

1 Federal law has a defense for employers who in good
2 faith follow I-9, so does the State law.

3 JUSTICE ALITO: The Federal law and the
4 State law do seem to be exactly the same on this point,
5 but I have -- I don't understand how these two
6 provisions fit together when E-Verify is used.

7 Suppose an employer -- the first thing the
8 employer does is receive the forms from the employee,
9 from the I-9 process. He looks at the forms. Well,
10 they reasonably seem to be authentic. So that employer
11 now has the good faith defense that's provided under --
12 by the I-9 process, under both Federal law and State
13 law.

14 But under both Federal law and State law,
15 the employee -- employer either must or may also use the
16 e-verification system. The employer gets back a notice
17 of non-authorization. But what -- and that creates,
18 supposedly, a rebuttable presumption under both systems
19 that the employee is not authorized to work.

20 How does that fit together? If you have a
21 complete defense for having used the I-9 process in good
22 faith, the whole e-verification process seems to be
23 irrelevant under both Federal law and State law. I
24 don't understand how they fit together.

25 MS. O'GRADY: And Justice Alito, we haven't

1 wrestled that in practical application, and I'm not
2 aware of them reaching that point under the Federal
3 system, either, but -- because it does seem at some
4 point, if you -- that the system should work, that if
5 you have used I-9 and you get back a final
6 non-confirmation, not a tentative non-confirmation, that
7 that employee is unauthorized, that that, you know,
8 seems like it should carry greater weight in an
9 enforcement action. But as a -- as an -- on an
10 as-applied basis, I'm not sure how that plays out in an
11 actual enforcement action.

12 CHIEF JUSTICE ROBERTS: Could you -- I
13 wasn't quite sure what she meant. Judge Schrader, in
14 her opinion for the court, emphasized that this statute
15 was being evaluated on its face and that -- she said in
16 as-applied, particular challenges might arise.

17 How would that work? If we determined this
18 was not preempted, how would -- on its face, how would
19 an as-applied challenge come about?

20 MS. O'GRADY: I think, Your Honor, perhaps
21 if we -- perhaps in terms of what are the outer limits
22 of our definition of "license," and they were saying
23 that we are outside the definition of licensing and
24 similar laws, in a particular case, perhaps that would
25 be an as-applied type challenge.

1 I think some of the I-9 concerns are perhaps
2 more appropriately resolved in a -- in a direct case
3 where that issue has arisen on an as-applied basis, and
4 I think she was concerned about some of the real
5 implementation questions that were wrapped into the
6 legal challenge.

7 But for the most part, I think the general
8 framework of our statute is appropriate for -- in this
9 challenge.

10 JUSTICE SCALIA: So you think after this
11 case we can look forward to the cases, one by one, for
12 all the various types of licenses? Those would be
13 as-applied challenges and would not have been resolved
14 by this case.

15 MS. O'GRADY: Your Honor, my hope is that
16 we --

17 JUSTICE SCALIA: We are really wasting our
18 time here, aren't we?

19 MS. O'GRADY: My hope is, Your Honor, that
20 we get sufficient guidance.

21 JUSTICE SOTOMAYOR: Wouldn't it be easier,
22 if that is Justice Scalia's concern, to take the
23 Solicitor General's position, that if you are
24 adjudicating good faith or intent differently in any way
25 from the Federal government, that it's granted? Isn't

1 that what waiting for an as-applied challenge means,
2 whether or not you are putting different requirements on
3 proving good faith?

4 MS. O'GRADY: No, Your Honor, and -- because
5 I was trying to give some examples of the kinds of
6 things that may come up as a practical matter, but I
7 think we can get the guidance from this Court. I hope
8 we can proceed in implementation --

9 JUSTICE SOTOMAYOR: Then let me ask the
10 question directly. If Arizona's system does not permit
11 an employer to rely on non-suspect documents, the I-9
12 documents that are permitted employers to rely on, the
13 Arizona system says, no, you can't rely on those. Is
14 that preempted or not?

15 You can't rely on I-9, or the Arizona system
16 says -- on the I-9 documents. Or the Arizona system
17 says, you can't hire someone who hasn't been approved
18 under the e-verification system. Is that preempted?

19 MS. O'GRADY: I think those would both be
20 problems. I think we need to be consistent with the --
21 the structure and the obligations that are imposed under
22 Federal law in terms of our sanctions provisions.

23 JUSTICE SCALIA: Excuse me. Are you
24 conceding that any variation from the Federal standards
25 for -- for criminal and civil liability is automatically

1 precluded?

2 I mean, as I read the exception, it's an
3 exception for State licensing and similar laws. And it
4 doesn't say, "So long as those licensing and similar
5 laws go no further than what the Federal government has
6 done." I mean, we often allow States to impose
7 regulatory requirements that go beyond the regulatory
8 requirements that the Federal government has imposed,
9 and that is not automatically considered to be
10 preempted. So why -- why are you conceding that Arizona
11 cannot go a whit beyond what the Federal government
12 says?

13 MS. O'GRADY: Because I think what Congress
14 preserved for us was our ability to impose sanctions,
15 including the suspension and revocation of State laws.
16 But I do think they established a uniform national
17 standard. I don't think we could, for example,
18 establish a strict liability offense in Arizona. We
19 would have to have a scienter requirement as they have
20 in Federal law.

21 JUSTICE BREYER: Now, what I was looking at
22 specifically is "Federal law says." If you look at the
23 driver's license and Social Security card, those are I-9
24 docs. Then the employer has established an affirmative
25 defense and has not violated the law. That's what it

1 says at cite 27A, okay? That is the Federal law.

2 Arizona law that I was reading -- maybe
3 there's another place I should read -- is it says, in
4 determining whether there is an unauthorized alien, the
5 court shall consider the Federal government's
6 determination. It creates a rebuttable presumption.
7 That means it might be rebutted.

8 Okay. So I see a difference there. And the
9 reason that that's relevant is because of my first
10 question. If you are an employer, prior to your law,
11 it's 50/50. I better verify because if I am
12 discriminating, you know, da, da, da, and it's not that
13 hard. I just look at the drivers' license and I look
14 at -- and I'm home free, and the Social Security card,
15 and if I hire an illegal immigrant, the same thing, da,
16 da, da. Okay? So same both ways.

17 So, your law. Employer, look at the
18 driver's license and Social Security, you are not home
19 free. Employer, if it turns out that you have been
20 hiring this illegal immigrant and he's not an American,
21 your business is finished. But what happens if I
22 discriminate, under our law? Nothing.

23 Now, that is the original point they made.
24 That's why I brought up this question of difference in
25 standards. And I want to be absolutely clear what your

1 answer to that is.

2 MS. O'GRADY: And I am hoping I am being
3 clear, Justice Breyer. We have the same standards as
4 Federal law. We have the same I-9 defense that's in
5 Federal law.

6 JUSTICE BREYER: Well, where? Where is it
7 in the statute, then? Because what I read were the
8 words "rebuttable presumption," and I might be reading
9 the wrong words. So tell me where it is.

10 MS. O'GRADY: Okay. Let me get to it, and
11 let me explain our rebuttable presumption while I find
12 the specific statutory cite.

13 JUSTICE ALITO: Well, it's on page 184 to
14 185 of the appendix petition, isn't it?

15 MS. O'GRADY: And 178(a) is the provision --
16 for the purposes of this section, employer that
17 establishes it has complied in good faith with the
18 requirements of 8 U.S.C. 1324a(b), establishes an
19 affirmative defense, et cetera. So that is the
20 provision that provides the I-9 defense. The rebuttable
21 presumption issue and this is how that comes into play.
22 We have to, in bringing an enforcement action, have to
23 rely, the State in making its case, has to rely on
24 information from the Federal Government regarding
25 whether someone is authorized or unauthorized. We have

1 to rely on that information from the Federal Government.
2 We bring our action in State court if we have
3 verification from the Federal Government that that
4 person is unauthorized. We have additional information
5 that we've established the scienter requirement, then we
6 bring our action. But the employer has an opportunity
7 to rebut the evidence that we've presented in a State
8 court proceeding. It may be, you know, that person
9 doesn't work for us or some other type of evidence. So
10 that is the role of that rebuttable presumption, Your
11 Honor.

12 JUSTICE BREYER: Okay, thank you. I see
13 that.

14 MS. O'GRADY: Certainly. So in terms of the
15 prior adjudication --

16 JUSTICE KENNEDY: Just so you know, I
17 interpret your answer as confirming the implication of
18 Justice Breyer's questions that there is a very
19 substantial difference in Federal and State law on this
20 point. I mean, you told about -- you know what lawsuits
21 are about. If you are home free, a driver's license and
22 Social Security inspection under Federal law and you're
23 not under State law, that is a difference.

24 MS. O'GRADY: And our standards are the
25 same. In subsection J, which we have the I-9

1 affirmative defense --

2 CHIEF JUSTICE ROBERTS: So you think you are
3 home free under State law?

4 MS. O'GRADY: To the extent that you should
5 be home free and you would have the benefit of that good
6 faith defense.

7 CHIEF JUSTICE ROBERTS: It's an affirmative
8 defense under both.

9 MS. O'GRADY: Yes, Your Honor.

10 JUSTICE BREYER: But the main point -- I
11 will check that. But I think maybe I was mistaken,
12 perhaps, and that I was looking at the other section.

13 MS. O'GRADY: That's right.

14 JUSTICE BREYER: But then we are still stuck
15 with this enormous discrepancy in penalty. I mean, I'm
16 characterizing it as enormous, but it seems like, you
17 know, it's even on discrimination versus under the
18 Federal law. It's not even, your business is out to
19 lunch, gone and on the other side it has nothing. What
20 about that one?

21 MS. O'GRADY: I think, Your Honor, that that
22 is the natural consequence of the savings clause that
23 Congress itself wrote --

24 JUSTICE BREYER: The savings clause itself,
25 the word licensing, not everyone looks at this, but I

1 did look at the legislative history and when you look at
2 that paragraph on page 39 of the red brief, it seems to
3 me that that paragraph says what it means. It says
4 precisely what it is. It says -- the first thing it
5 says is that, look, if you are found to have violated
6 this. Where is it? It's page, there it is. Suppose
7 somebody's been found to have violated the sanctions
8 provision in the Federal legislation. He has been found
9 by the Federal Government, then what the State does, it
10 can revoke his license. Okay. That's one thing. And
11 the second thing it says, it doesn't want to preempt
12 fitness to do business laws, such as State farm labor
13 contracting laws or forestry laws. In other words, its
14 thinking of some precise set of licenses. And that's
15 why this licensing thing was there and the very next
16 participant of this Federal law are conforming
17 amendments and those conforming amendments apply. The
18 departments of government that were concerned with
19 maintaining State farm labor contractual laws. Now, I
20 grant you, you have to go beyond the text, but some of
21 us do because we get enlightenment. And going beyond
22 that text, it seems to me we should go follow what that
23 house report says. Now, what is your response to that?

24 MS. O'GRADY: Well, first, of course, we
25 would focus on the text where Congress could have but

1 did not --

2 JUSTICE BREYER: I said yes, I got broad
3 licensing -- but let's deal with the part where you look
4 at their explanation as to why they put those words
5 there.

6 MS. O'GRADY: Okay. First, the farm labor
7 contractor is simply an example, and I think it says
8 such as an example of the type of licensing provisions
9 that existed at this time that addressed that. So
10 that's not an all inclusive universe of the sanctions --
11 of the licensing laws that might be subject to this.
12 They also don't specifically say there has to be a prior
13 Federal adjudication. The sentence has passive voice,
14 has been determined without specifying who is making
15 that determination and it specifically refers to State
16 and local processes that provide for the suspension and
17 revocation of State licenses. And then there is a
18 following sentence that says, you know, further, we
19 don't intend to disrupt laws such as these forestry and
20 other, you know, fitness to do business. We think this
21 is a fitness to do business law, in that we are
22 establishing as a State standard that if you engage in
23 this conduct of knowingly employing unauthorized aliens
24 we are going to have the ability to take an action
25 against that license that we have given you to do

1 business in our jurisdiction. So we think we fit within
2 that last sentence of the --

3 JUSTICE GINSBURG: Can you also explain the
4 I-9? You said it's the same as in the Fed. Home free
5 if you have documents, Social Security, driver's
6 license. But you also require the E-Verify. So how --
7 does the E-Verify information modify the I-9? How --
8 how do those two --

9 MS. O'GRADY: They work in our system, Your
10 Honor, as they do under the Federal law, under -- that
11 you get a rebuttable presumption if you -- in your favor
12 if you used E-Verify, the affirmative defense if you've
13 used I-9. And I am -- there is that caution; it is good
14 faith use of -- of the I-9 system. We do have examples
15 where for example if an employer is terminated because
16 they are unauthorized and they show up with a different
17 name and different papers 2 weeks later, you are not
18 going to be able to establish your good faith. So you
19 are home free but subject to that good faith limitation.
20 But we do incorporate the same obligations that exist
21 under Federal law.

22 And also, I wanted to address more on the
23 farm labor contractors and the amendments and what we
24 think that we are doing in those amendments was simply
25 dividing responsibility at the Federal level between the

1 Department of Labor and their processes that preexisted
2 IRCA, and what they were establishing in IRCA, and said
3 we are not going to have these determinations of whether
4 they -- the farm labor contractor has employed an
5 unauthorized alien through a Department of Labor
6 process; we are going to instead use the
7 IRCA-established process. But importantly what Congress
8 did not change in the agricultural worker regulations
9 was the provision that addresses State law. It said
10 before IRCA and after IRCA that those laws -- those
11 Federal laws only supplement the authority of the
12 States; and that means that they preserved all of the
13 States' authority that they had before IRCA in the area
14 of farm labor contractors. And that I think is
15 reinforced by the legislative history that -- that again
16 reinforces that those have been preserved through IRCA.

17 This is an area that has traditionally been
18 within the mainstream of State police power. We
19 acknowledge that Congress does have the authority to
20 preempt us, but they left important discretion in terms
21 of our ability to impose sanctions through licensing and
22 similar laws, and we are doing so by establishing this
23 scheme that provides for the suspension and revocation
24 of State licenses.

25 It's an important part of the balance that

1 Congress struck when it enacted IRCA by addressing what
2 State authority would exist after that congressional
3 enactment. We think the lower courts properly
4 determined the scope of that provision and unless there
5 are further questions, I thank you for your attention
6 this morning.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Phillips, you have 3 minutes remaining.

9 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

10 ON BEHALF OF THE PETITIONERS

11 MR. PHILLIPS: Thank you, Mr. Chief Justice,
12 and once again, may it please the Court:

13 I want to begin frankly where Justice
14 Sotomayor pointed me to before, which is the question of
15 whether or not there really is a basis for allowing the
16 States to independently investigate and to independently
17 adjudicate these matters. And what is the evidence that
18 Congress did not intend that?

19 Justice Breyer quoted from the House report,
20 recognizing not everybody accepts that; but it does seem
21 to me to articulate a very commonsense limitation that
22 says you have to have a Federal adjudication in the
23 first instance and once you have got that then the State
24 is allowed to add that sanction.

25 That -- that principle it seems to me is

1 reinforced by the limitation on what you can use the I-9
2 for. Justice Alito, you asked that question, but it
3 does seem to me quite clear that what Congress
4 envisioned in 1986 when it adopted this is you are going
5 to have an exclusively Federal enforcement scheme
6 including the adjudicatory process, and it is only in
7 that context you are allowed to use the I-9, and the
8 notion that the State could adopt a standard of
9 intentional or knowingly, and not be able to have the
10 I-9 materials available seems flatly at odds with each
11 other, and therefore it cannot be that Congress intended
12 under those circumstances to allow these matters to be
13 adjudicated in that particular fashion.

14 JUSTICE GINSBURG: What can -- Mr. Phillips,
15 what can the State do that would be complementary rather
16 than conflicting?

17 MR. PHILLIPS: I -- it seems to me the
18 easiest -- and of course, this has nothing to do with
19 what Arizona does -- but the easiest is, if a -- an
20 employer is convicted of -- of violating IRCA and a
21 criminal sanction, and he happens to be a barber, and
22 the State licensing law says if you are convicted of a
23 -- of a Federal crime you will lose your license, it is
24 available to the State under those circumstances -- and
25 I think this is exactly what Congress had in mind -- to

1 issue a notice to show cause why that particular person
2 shouldn't have the license revoked and then go from
3 there.

4 JUSTICE SCALIA: Convicted by -- by a
5 Federal Government that hasn't gone after many
6 convictions.

7 MR. PHILLIPS: Justice Scalia --

8 JUSTICE SCALIA: That's the whole problem.

9 MR. PHILLIPS: Well no, but Justice Scalia,
10 it seems to me that the whole question here -- and first
11 of all, I don't think pre-emption can be a moving
12 target. I think you have to decide it on a basis of
13 what Congress had in front of it in 1986. But remember,
14 Congress was balancing three, at least, very difficult
15 problems: minimizing problems on the employers,
16 minimizing discrimination against people who are
17 permitted to be hired, and avoiding hiring people who
18 are not permitted to do so.

19 And how you properly reconcile that is very
20 difficult, but the one thing that seems to me clear is
21 that that was a choice that Congress meant to leave to
22 itself and to the Federal Government to sort out and not
23 to give the States the opportunity to come in where they
24 did.

25 And just say one last word E-Verify --

1 CHIEF JUSTICE ROBERTS: Well, except --
2 well, you are just kind of blinking over the Savings
3 Clause -- except through licensing and similar laws. So
4 that is not a real reservation by Congress of this power
5 to itself.

6 MR. PHILLIPS: Well, if you -- if you
7 interpret the Savings Clause as I do, which means truly
8 as a supplement to Federal -- Federal adjudication, then
9 it is a very narrow limitation on that basis, because at
10 that point you have already invoked the entirety of the
11 Federal scheme and it doesn't modify the balance on
12 those broader legal issues, Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.

15 (Whereupon at 12:02 p.m., the case in the
16 above-entitled matter was submitted.)

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|---|---|--|--|---|
| A | 50:9 | 17:7 18:3 19:24 24:10,18 25:22 32:13 50:23 | appendix 9:5 46:14 | 42:3,13 43:1 |
| ability 18:16 23:21 38:16 44:14 50:24 52:21 | addresses 36:13 52:9 | Alito 9:12,16,21 9:22 10:17 17:4 17:12 34:4 40:3 40:25 46:13 54:2 | application 41:1 | attention 3:22 53:5 |
| able 34:2,3 51:18 54:9 | addressing 53:1 | ALJ 25:15 | applied 16:19 | authentic 40:10 |
| above-entitled 1:12 56:16 | add-on 17:16 | allow 6:9 7:6,18 24:6 44:6 54:12 | apply 49:17 | authorities 3:22 |
| absolutely 21:1 25:9 31:14 36:10 45:25 | adjudicate 17:25 53:17 | allowed 28:5 53:24 54:7 | applying 19:8 | authority 7:6,13 11:19 12:22 13:2 18:9,11 29:3,8,9,19,21 29:21,23 31:2 33:25 52:11,13 52:19 53:2 |
| accent 31:8,22 | adjudicated 3:25 25:21,24 54:13 | allowing 53:15 | approach 26:16 | authorization 3:14,23 6:17 |
| accept 15:4 | adjudicating 42:24 | ALR 6:22 | appropriate 42:8 | authorize 13:8 |
| accepts 53:20 | adjudication 15:7 15:13,16 16:1 17:24 18:9,14 23:16 25:7,10 25:10,14 26:8 27:14 32:20 33:2,20 47:15 50:13 53:22 56:8 | alternative 7:19 | apt 3:20 | authorized 4:10 5:10 18:18 36:5 36:6,7 40:19 46:25 |
| access 9:10 | adjudications 26:2 | ambiguity 20:6 | area 52:13,17 | automatically 43:25 44:9 |
| accountability 30:5 | adjudicatory 54:6 | amend 23:3 | argument 1:13 2:2,5,9,12 3:4,7 19:15 24:8 28:23 53:9 | available 33:14 37:8 54:10,24 |
| accountable 30:7 | Administrative 10:22,24 | amendments 11:20 18:6 49:17,17 51:23 51:24 | arisen 42:3 | avoid 5:23 |
| achieve 38:16 | adopt 7:18 10:7 11:10 54:8 | American 45:20 | Arizona 1:23 5:17 6:1,5 8:4,5 8:15 10:22 18:19,23 22:4 23:3,25 24:3 25:16 26:17 29:13 31:7,16 32:8,15 34:23 35:4,21 36:14 36:23 37:7,10 43:13,15,16 44:10,18 45:2 54:19 | avoiding 55:17 |
| acknowledge 52:19 | adopted 9:4 54:4 | amicus 1:20 2:8 19:16 | Arizona's 5:24 6:16 31:23 43:10 | aware 26:18,19 41:2 |
| act 3:16 10:23,24 11:17 18:7 27:7 31:5 | adversary 25:6 | amount 29:14 | Arizona-like 26:5 | awfully 10:24 |
| Acting 1:18 | affirmative 44:24 46:19 48:1,7 51:12 | analysis 37:4 | articles 13:16 14:3,21 | a.m 1:14 3:2 |
| action 33:12,25 41:9,11 46:22 47:2,6 50:24 | ago 9:24 19:20 | anomaly 29:13 29:18 31:4 | articulate 53:21 | |
| actions 11:4 18:25 | agree 8:8 11:2 | answer 6:2 10:3 25:6 26:9 27:2 27:10 33:17 39:1,19 46:1 47:17 | asked 15:22 54:2 | B |
| activity 4:1 | agricultural 11:16 18:6 20:25 52:8 | answered 29:12 37:3 | asserted 23:21 | B 1:7 |
| actual 33:12 41:11 | aimed 20:16 23:17 | answering 10:11 | assumed 16:17 | back 9:13 17:23 40:16 41:5 |
| add 7:13 12:3 38:1 53:24 | AL 1:4,7 | APA 11:12 | as-applied 41:10 41:16,19,25 | backdrop 4:18 |
| added 32:12 38:24 | alien 9:25 35:12 45:4 52:5 | APA-type 14:10 | | balance 19:12 31:6 52:25 56:11 |
| addition 27:19 | aliens 14:13,14 | appeals 4:3 | | balanced 4:5 31:14 |
| additional 9:1 10:13 38:2 47:4 | | appearance 31:22 | | balancing 55:14 |
| address 36:11 37:4 51:22 | | APPEARANC... 1:15 | | barber 54:21 |
| addressed 25:22 | | | | Barbers 12:3 |
| | | | | based 32:6 |
| | | | | basic 17:2 |

| | | | | |
|---|--|--|---|--|
| <p>basis 18:25 19:2 41:10 42:3 53:15 55:12 56:9 bear 28:11 beauticians 12:4 behalf 1:16,20 1:23 2:4,7,11 2:14 3:8 19:16 28:24 53:10 believe 33:24 believed 24:3 benefit 48:5 best 4:14 better 7:4 45:11 beyond 32:11 33:11 44:7,11 49:20,21 blinking 56:2 board 20:21 body 23:16 boxes 24:21 25:2 28:3,7 Breyer 10:19 11:2,6 31:3 34:16 35:3,9,13 35:18,23 38:19 38:25 39:5 44:21 46:3,6 47:12 48:10,14 48:24 50:2 53:19 Breyer's 39:20 47:18 brief 6:20,23 11:8,14 49:2 bring 47:2,6 bringing 3:21 46:22 broad 50:2 broader 56:12 broadly 7:6 19:23 20:7 27:5 brought 45:24</p> | <p>burden 37:13 business 5:5,19 9:19,20 10:1 12:22,23 13:2,8 13:18,20 14:15 14:20 15:2,4,6 18:16 20:17,22 20:23 22:3,4,21 22:22 23:18,21 23:24 24:6 25:3 26:18 29:15 30:7,8 31:19 36:1 45:21 48:18 49:12 50:20,21 51:1 businesses 20:20 22:23 businessman 31:24 business's 5:19</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calibrated 4:12 call 31:25 Canas 16:25 30:24 card 34:20 35:5 44:23 45:14 care 22:24 careful 31:6 carefully 4:12 32:2 carry 41:8 CARTER 1:16 2:3,13 3:7 53:9 case 3:4 6:20 26:3,11 41:24 42:2,11,14 46:23 56:14,15 cases 36:4 42:11 category 31:10 cause 55:1 causing 4:9 caution 51:13</p> | <p>cease 10:2 center 15:19 central 19:21 century 19:20 certain 22:17 31:9 34:17,19 36:25 certainly 23:23 30:17 34:10 47:14 certificate 28:18 cetera 46:19 challenge 39:9 39:10,13 41:19 41:25 42:6,9 43:1 challenges 41:16 42:13 Chamber 1:3 3:4 31:5 change 3:17 8:10 36:14 52:8 chapter 33:24 34:6 characteristics 20:17 21:21,22 characterization 3:19 characterized 3:17 characterizing 48:16 charter 13:5 14:3 14:21 check 48:11 Chief 3:3,9 19:13 19:19 20:2,11 20:19 23:10,19 24:4 26:15 27:9 28:2,13,21,25 41:12 48:2,7 53:7,11 56:1,13 child 26:20,22,25 27:18</p> | <p>choice 55:21 choose 29:20 circle 32:25 circumstances 4:15 12:13 16:21 36:25 54:12,24 cite 45:1 46:12 cited 7:2 civil 24:24 27:16 28:5 29:22 43:25 claimed 18:15 classes 4:11 classic 38:8 clause 15:5 24:23 26:5 28:4 29:10,17 48:22 48:24 56:3,7 clear 4:5 5:9 45:25 46:3 54:3 55:20 close 10:25 31:25 Columbia 9:19 9:23 come 6:14 31:8 41:19 43:6 55:23 comes 6:11 31:16 46:21 Commerce 1:3 3:5 common 10:17 12:9,21,24 14:2 14:2 commonsense 53:21 company 18:15 23:20 complaint 32:5,6 complaints 32:9 complementary 54:15</p> | <p>complete 5:19 40:21 completely 7:20 17:5 compliance 32:14 36:16 complied 46:17 comply 38:13 complying 4:16 components 4:25 comprehensive 3:18 25:13 conceding 43:24 44:10 concept 8:22 concern 3:12,14 36:13 42:22 concerned 42:4 49:18 concerns 42:1 condition 10:13 conduct 29:3,5,6 50:23 confirming 47:17 conflict 15:3,7 37:3 38:12 conflicting 54:16 conforming 11:20 18:6 49:16,17 Congress 3:11 3:20 4:6,12 5:11 7:17 8:22 9:6 10:6,7,16 11:7,10,11,16 12:7 14:10,11 15:23 16:11 17:2 18:10 19:20,22 20:7 20:13 22:2,6,19 25:2,4,13 26:1 26:12 27:2,3 28:16 29:7,18 30:1,10,19,23</p> |
|---|--|--|---|--|

| | | | | |
|---|---|--|--|--|
| <p>31:11 37:4,13 38:6 44:13 48:23 49:25 52:7,19 53:1,18 54:3,11,25 55:13,14,21 56:4 congressional 17:14 32:18 53:2 Congress's 38:15 consequence 37:23 48:22 consequences 30:25 37:20 consider 45:5 considered 44:9 consistent 17:14 43:20 construed 7:6 contained 22:15 context 4:6 7:9 11:20 54:7 contracting 20:22 49:13 contractor 20:16 21:4 28:18 50:7 52:4 contractors 51:23 52:14 contracts 38:3 contractual 49:19 Control 3:16 controlled 3:25 converted 3:11 3:14 convicted 54:20 54:22 55:4 conviction 12:11 convictions 55:6 copied 10:22 core 3:14</p> | <p>corporation 13:4 13:5,6,9,23 Corpus 6:22 correct 14:15 18:3 23:13 counsel 19:13 26:15 28:21 53:7 56:13 couple 32:3 course 4:15 8:3 49:24 54:18 court 1:1,13 3:10 3:17 7:24 16:25 17:19 19:19 29:1 30:23 41:14 43:7 45:5 47:2,8 53:12 courts 4:3 53:3 create 13:6 creates 13:7 35:14 40:17 45:6 creating 33:3 creature 13:8 crime 12:12 54:23 criminal 12:10 24:24 27:17 28:5 29:22 32:9 43:25 54:21 criteria 21:8,9 22:11 24:1,2 curiae 1:20 2:8 19:16 current 39:8</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 da 45:12,12,12 45:15,16,16 De 16:25 30:24 dead 31:19 deal 5:12 7:9 20:12 50:3 dealing 3:19</p> | <p>death 5:18 debate 21:21 28:17 DeCanas-style 26:12 27:5 December 1:10 decide 7:1 55:12 decided 16:25 decisionmaking 9:10 decisions 5:14 decision-making 7:20 declared 19:21 defense 32:22 33:3,14 35:12 36:15 40:1,11 40:21 44:25 46:4,19,20 48:1 48:6,8 51:12 define 15:11 defined 6:21 20:14 definition 10:17 10:23 11:12 14:10 41:22,23 Delaware 14:23 14:24 depart 16:4 Department 1:19 18:8,11 52:1,5 departments 49:18 depends 16:21 27:2 32:22 deprived 18:16 described 27:6 deter 4:8 determination 45:6 50:15 determinations 52:3 determine 29:4,6 determined</p> | <p>26:22 29:19 33:12 41:17 50:14 53:4 determining 45:4 developing 25:13 38:17 dictionaries 6:24 difference 12:19 22:14 34:5 45:8 45:24 47:19,23 different 8:25 11:7 16:13 17:9 21:2 25:15,17 33:15 43:2 51:16,17 differently 42:24 difficult 55:14,20 direct 42:2 direction 4:7 directly 15:21 43:10 disagree 14:11 14:16 23:19 25:5 disclose 32:23 disclosure 33:5 discrepancy 48:15 discretion 52:20 discretionary 23:16 discriminate 31:17 45:22 discriminating 45:12 discrimination 31:13,21 48:17 55:16 discussion 20:3 dismiss 31:13 disrupt 50:19 District 9:18,22 diverse 18:14 divested 18:9</p> | <p>dividing 51:25 divorced 24:2 docs 44:24 document 13:20 13:23 documents 14:4 27:7 43:11,12 43:16 51:5 doing 15:2,4 30:16 38:9 51:24 52:22 doubt 13:1 drivers 45:13 driver's 34:20 35:3,5 44:23 45:18 47:21 51:5 D.C 1:9,16,19</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 36:1,2 earlier 16:2 28:3 39:20 easier 42:21 easiest 54:18,19 effect 7:22 effective 38:17 either 40:15 41:3 electrical 20:22 electrician 20:24 elements 17:1 eliminate 5:19 emphasized 41:14 employ 19:24 26:25 employed 26:22 35:11 52:4 employee 34:18 34:19 40:8,15 40:19 41:7 employees 33:21 employer 4:13 19:21 31:12 34:3,11,18,21</p> |
|---|---|--|--|--|

| | | | | |
|--|---|---|---|--|
| <p>35:6,6 36:8,18 37:9 40:7,8,10 40:15,16 43:11 44:24 45:10,17 45:19 46:16 47:6 51:15 54:20 employers 4:9 26:14,20 29:4 32:12 36:17 37:14,20 40:1 43:12 55:15 employer's 33:8 employing 26:20 50:23 employment 5:14 30:24 employs 17:7 enable 13:6 enacted 7:10 8:16 9:23 16:15 29:8 53:1 enactment 53:3 enforce 6:9 8:2 9:9 17:17 enforced 6:8 7:11 8:5,12,23 30:13,14 enforcement 7:7 7:19 15:8,24 16:5,9,10 17:3 27:4,25 33:12 33:24,25 34:6,9 34:12 41:9,11 46:22 54:5 enforcing 18:24 engage 7:7 18:8 50:22 enlightenment 49:21 enormous 48:15 48:16 entire 7:19 17:17 27:23,23</p> | <p>entirely 24:2 entirety 56:10 entities 24:7 30:6 entitled 36:10 entity 7:23 12:11 envisioned 54:4 err 4:9 ESQ 1:16,18,22 2:3,6,10,13 essential 20:17 essentially 4:13 5:18 6:11 24:21 25:2 establish 30:6 44:18 51:18 established 29:18 44:16,24 47:5 establishes 46:17,18 establishing 50:22 52:2,22 et 1:4,7 46:19 evaluated 41:15 eventually 10:9 everybody 53:20 evidence 11:11 11:12 15:21 35:10 47:7,9 53:17 evoke 21:24 exactly 12:16 40:4 54:25 example 9:18 27:19 38:8 44:17 50:7,8 51:15 examples 43:5 51:14 exception 17:4 19:25 21:23 44:2,3 excluded 6:6 exclusive 4:1</p> | <p>exclusively 3:21 4:2 15:25 54:5 excuse 16:4 21:10 28:2 38:15 43:23 exhaustive 3:21 exist 5:20 13:19 51:20 53:2 existed 25:23 50:9 expect 16:24 expectations 8:10 expected 8:3,9 30:11 expert 23:16 explain 35:25 36:20 46:11 51:3 explaining 11:15 explanation 50:4 explicit 4:4 exposure 32:15 expression 12:24 expressly 15:12 25:10,11 extending 13:4 extent 48:4 e-verification 40:16,22 43:18 E-Verify 32:11 32:14 36:17,19 36:21 37:5,15 37:19,25 38:1 38:17 39:22,23 40:6 51:6,7,12 55:25 E-9 36:1</p> <hr/> <p>F</p> <hr/> <p>face 24:15,17 41:15,18 fact 4:10 7:13 9:9 31:9 39:20 fail 37:20 38:19</p> | <p>fair 6:24 fairly 12:8 31:6 faith 32:14 35:12 36:16 40:2,11 40:22 42:24 43:3 46:17 48:6 51:14,18,19 fall 4:11 34:2 familiar 10:21 farm 20:15 21:3 28:18 49:12,19 50:6 51:23 52:4 52:14 fashion 54:13 favor 51:11 Fed 37:8 51:4 Federal 3:21,22 4:1,1,2,16,20 6:3,8,24 7:10 7:12,14 8:2,11 11:3 12:9,11 14:12 16:1,18 16:19 17:15 18:14,17,21,24 19:1,3,10,10 19:11,21 25:9 25:11,14 27:25 31:4 32:1,16,18 32:20,23,25 33:2,4,7,9,12 33:18,19,20 34:7,9,10,12 34:18,22 35:18 35:21,25 36:16 36:21,22,23,24 37:7,11,21 38:3 38:9,13,15 39:25 40:1,3,12 40:14,23 41:2 42:25 43:22,24 44:5,8,11,20 44:22 45:1,5 46:4,5,24 47:1 47:3,19,22</p> | <p>48:18 49:8,9,16 50:13 51:10,21 51:25 52:11 53:22 54:5,23 55:5,22 56:8,8 56:11 filed 14:22 32:10 38:1,24 final 41:5 financially 8:6 find 46:11 finds 12:11 fine 5:21 29:13 31:14,15 finished 45:21 fire 36:9 first 8:22 15:23 20:10 21:4 25:12 27:14 28:4,8 31:5 32:4,8 40:7 45:9 49:4,24 50:6 53:23 55:10 fit 40:6,20,24 51:1 fitness 20:16 22:7,20,21 23:24 25:3 49:12 50:20,21 flatly 54:10 focus 11:15 14:8 49:25 follow 27:25 40:2 49:22 following 50:18 follows 36:8 forbade 6:9 forcing 32:22 forestry 49:13 50:19 forfeited 10:1 form 9:6,10 16:3 33:16</p> |
|--|---|---|---|--|

| | | | | |
|--|---|--|--|---|
| <p>formation 13:4 forms 16:3 39:22 40:8,9 forward 42:11 found 14:14 26:19 49:5,7,8 framework 42:8 frankly 53:13 free 34:21,23,24 35:15,19,23 45:14,19 47:21 48:3,5 51:4,19 frivolous 32:9 front 55:13 frustrate 32:18 32:21 33:18 full 17:15 fully 17:13 31:1 fundamental 6:15 further 44:5 50:18 53:5</p> <hr/> <p style="text-align: center;">G</p> <p>G 1:16 2:3,13 3:1 3:7 53:9 general 1:18,22 9:19,25 16:24 19:14,18 20:10 21:1,15,19,19 22:1,10,16,18 23:7,13,23 24:14,20 25:1,9 26:3 27:1,13,21 28:10,15 42:7 generality 5:15 generally 12:2 21:5 23:17 General's 42:23 genuine 23:24 GINSBURG 29:12 36:20 37:6 51:3 54:14 Ginsburg's 30:1 give 13:17 18:10</p> | <p>43:5 55:23 given 50:25 gives 13:18 15:5 31:11 go 13:14 17:23 39:5 44:5,7,11 49:20,22 55:2 goal 38:16 goals 38:16 goes 4:2 9:7 going 5:11,15,22 17:5,9 36:9 49:21 50:24 51:18 52:3,6 54:4 good 4:6 22:21 32:14 35:12 36:16 40:1,11 40:21 42:24 43:3 46:17 48:5 51:13,18,19 government 6:3 7:10,14 8:2,11 17:15 36:22,24 42:25 44:5,8,11 46:24 47:1,3 49:9,18 55:5,22 government's 38:15 45:5 grant 10:5 38:20 39:6 49:20 granted 42:25 grants 38:4 granular 5:12 grapple 7:4 greater 41:8 group 31:7 guidance 42:20 43:7 guy 36:4</p> <hr/> <p style="text-align: center;">H</p> <p>half 13:9 hallmarks 23:8 23:15</p> | <p>hand 34:7,8 happen 7:8 happens 24:11 31:17 45:21 54:21 harbor 37:23,25 39:15,21 hard 45:13 harder 13:3 hear 3:3 hide 5:22 hire 4:14,22 5:6 9:25 24:18 31:18 43:17 45:15 hired 14:13 18:3 18:18 55:17 hires 23:20 hiring 4:8,10 25:22 31:14,25 32:13 45:20 55:17 Hispanic 14:13 31:8 32:7 history 22:25 25:25 49:1 52:15 home 34:21,23 34:24 35:15,19 35:23 45:14,18 47:21 48:3,5 51:4,19 Honor 11:23 29:16 30:4,17 32:3 33:6 34:14 35:2,8,16 37:12 39:12,18,24 41:20 42:15,19 43:4 47:11 48:9 48:21 51:10 56:12 hope 42:15,19 43:7 hoping 46:2</p> | <p>hortatory 39:2 house 49:23 53:19 hypothetical 10:4 27:22 H2 27:15</p> <hr/> <p style="text-align: center;">I</p> <p>illegal 9:25 14:13 17:7 23:20 31:13,18 45:15 45:20 illegals 31:9 imagine 16:21 immigrant 31:18 45:15,20 immigration 3:13 3:15,16 6:10 8:7,12,23 12:5 16:11,23,23 19:22 27:4 28:1 impact 33:13 implementation 42:5.43:8 implication 47:17 implicitly 15:15 impliedly 25:12 important 17:12 52:20,25 importantly 52:7 impose 29:10,13 29:20,22,23 36:18 37:19 44:6,14 52:21 imposed 5:24 7:11,22 26:6,13 28:6 43:21 44:8 imposes 10:12 imposing 27:16 35:22 impossible 38:13 incentive 31:12 31:24 32:1 38:21 39:7 including 27:24</p> | <p>44:15 54:6 inclusive 50:10 inconceivable 9:8 inconsistent 38:9 incorporate 19:8 51:20 incorporation 13:16 14:3,21 independent 18:24 27:13 independently 25:23 53:16,16 indicate 6:24 indicates 6:23 indicia 22:21 28:12 individual 5:14 information 46:24 47:1,4 51:7 insists 27:10 insofar 13:1 inspection 47:22 instance 53:23 intend 12:3 50:19 53:18 intended 7:17 10:16 14:11,12 26:1 54:11 intent 4:21,25 5:22 17:14 31:20 32:18 42:24 intentional 9:9 54:9 intentionally 5:6 interesting 11:9 interfering 38:14 interpret 47:17 56:7 interpretation 18:17 investigate 18:1</p> |
|--|---|--|--|---|

| | | | | |
|---|--|---|--|---|
| <p>53:16 investigated 3:24 32:8 investigating 32:5 investigation 15:9 16:1 invoked 56:10 IRCA 20:14 25:13 27:8,24 29:8 52:2,2,10 52:10,13,16 53:1 54:20 IRCA-establis... 52:7 irrelevant 15:11 40:23 issuance 21:6,8 21:8 22:11 24:1 29:5 issue 6:11 9:13 9:17 13:5 15:7 21:5 22:7,22 25:22 42:3 46:21 55:1 issued 22:8,17 23:5 issues 3:19 56:12 I-9 9:6,10 16:3 27:6,7 32:15,19 33:1,7,8,8,19 34:10,16,17 36:15,17 39:21 39:22 40:2,9,12 40:21 41:5 42:1 43:11,15,16 44:23 46:4,20 47:25 51:4,7,13 51:14 54:1,7,10</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 47:25 jail 39:5 job 4:15 11:15 jot 25:16</p> | <p>Judge 41:13 judicial 4:2 Juris 6:22 jurisdiction 17:6 29:4 37:15 51:1 jurisprudential 7:1 Justice 1:19 3:3 3:9 4:19 5:2,4 5:13 6:1,6,19 7:3,25 8:13,20 9:8,12,16,21 9:22 10:10,17 10:19 11:2,6,21 11:24 12:15,19 12:21 13:12,14 13:22 14:6,8,17 14:18 15:1,10 15:15,18,22 16:4,8,13,17 17:4,11,18,23 18:2,4,13,21 19:2,6,13,19 20:2,11,19 21:10,16,23 22:1,5,12,18 23:2,7,10,19 24:4,8,14,17 24:23 25:5,19 26:15 27:9,9,18 28:2,13,20,21 28:25 29:12,25 29:25 30:10,19 31:3 32:17 33:17 34:4,16 35:3,9,13,18 35:23 36:20 37:6,16,22 38:5 38:19,25 39:1,5 39:10,14,19,20 40:3,25 41:12 42:10,17,21,22 43:9,23 44:21 46:3,6,13 47:12</p> | <p>47:16,18 48:2,7 48:10,14,24 50:2 51:3 53:7 53:11,13,19 54:2,14 55:4,7 55:8,9 56:1,13 justifies 29:6</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Katyal 1:18 2:6 19:14,15,18 20:10 21:1,15 21:19 22:1,10 22:18 23:7,13 23:23 24:14,20 25:1,9 26:3 27:1,13,21 28:10,15 keep 14:9 Kennedy 6:19 7:3 10:10 27:9 27:18 29:25 38:5 47:16 Kennedy's 8:20 keystone 27:7 kind 5:12 13:23 35:14 56:2 kinds 43:5 know 6:8 15:10 20:22 23:25 26:21 27:3 31:17 33:15 41:7 45:12 47:8 47:16,20 48:17 50:18,20 knowing 4:25 5:23 9:9 knowingly 9:25 35:11 50:23 54:9 KUMAR 1:18 2:6 19:15</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>labor 18:8,12</p> | <p>20:16 21:3 26:20,23,25 27:18 28:18 49:12,19 50:6 51:23 52:1,4,5 52:14 largely 20:15 law 6:8,9,17,18 7:5 9:14 10:2,5 10:15 11:3 12:8 12:9 13:1,3,9 14:12 16:23 17:17 18:17,24 18:25 19:1,2,3 19:10,11,22 20:11,13 21:2 21:12,14,17,18 21:20 22:15,16 22:22 23:5,9,15 23:25 24:9,12 25:2,17 26:7,17 27:12,16,20 28:11,12,14 29:24 30:13 31:1,23,25 32:1 32:4,8,16,16 32:18,21,23 33:1,4,7,13,18 33:19,22 34:7 34:12,18,22,23 35:4,18,21,21 36:1,13,16 37:21 38:13,22 39:9,14,25 40:1 40:2,3,4,12,13 40:14,14,23,23 43:22 44:20,22 44:25 45:1,2,10 45:17,22 46:4,5 47:19,22,23 48:3,18 49:16 50:21 51:10,21 52:9 54:22 laws 6:10,14,25</p> | <p>7:18 8:23 11:5 12:5 16:11,19 19:23 20:1,3,5 20:8,9,14,16 20:18,20 21:5 21:20,24 22:3 23:3 24:25 25:4 25:20,23 26:5 26:11 27:4,5 28:1,6,9 29:11 34:1 41:24 44:3 44:5,15 49:12 49:13,13,19 50:11,19 52:10 52:11,22 56:3 lawsuit 38:1,24 39:10 lawsuits 47:20 leave 55:21 left 6:3 52:20 legal 31:10 42:6 56:12 legislation 3:18 49:8 legislative 25:24 49:1 52:15 let's 17:23 50:3 level 51:25 liability 13:7 43:25 44:18 license 7:1 9:20 10:1,6,12,13 10:18,23 12:23 14:15 15:11 17:8,8 20:7 21:8,13,17,24 22:8,24 23:4,11 24:1,3,7,19 26:17,22 28:19 29:5,7,14 34:20 35:4,5 41:22 44:23 45:13,18 47:21 49:10 50:25 51:6</p> |
|---|--|---|--|---|

| | | | | |
|--------------------------|--------------------------|-------------------------|--------------------------|--------------------------|
| 54:23 55:2 | 22:20 25:17 | mean 5:5 10:16 | 9:17 | 43:21 51:20 |
| licensed 12:23 | long 5:6 28:8 | 10:20,23 11:10 | <hr/> | obviously 3:20 |
| 20:23 | 37:12 44:4 | 11:10,11,12 | N | 6:16 11:16,19 |
| licensees 30:6 | look 5:15 6:21 | 16:5,8,20,22 | N 2:1,1 3:1 | occur 8:10 30:21 |
| licenses 9:18 | 8:18 24:9,15 | 17:5 20:20 | name 12:1 51:17 | occurred 8:4 |
| 11:4 12:4,4,13 | 31:7 32:2,7 | 32:25 44:2,6 | named 11:21,24 | 32:21 |
| 21:5,6,7 22:16 | 35:24 38:11 | 47:20 48:15 | narrow 17:13 | odds 54:10 |
| 25:21 42:12 | 42:11 44:22 | meaning 7:5 | 22:15 56:9 | offense 44:18 |
| 49:14 50:17 | 45:13,13,17 | 10:15 | narrowing 11:18 | offering 8:25 |
| 52:24 | 49:1,1,5 50:3 | means 10:7 43:1 | narrowly 7:7 | Oh 6:20 12:12 |
| licensing 6:10,11 | looked 6:20 | 45:7 49:3 52:12 | national 44:16 | 21:1 |
| 6:14,17,21,25 | looking 5:13 | 56:7 | natural 12:8 | okay 22:12 24:12 |
| 7:5,18 8:21,25 | 29:17 37:3 | meant 11:7,22 | 48:22 | 24:24 26:23,24 |
| 9:14,16 10:2,5 | 44:21 48:12 | 12:1 18:10 22:7 | nature 29:19 | 36:12 45:1,8,16 |
| 10:15 11:5,25 | looks 21:2 24:20 | 28:16 41:13 | NEAL 1:18 2:6 | 46:10 47:12 |
| 12:1,8,10 13:3 | 34:21 35:6 40:9 | 55:21 | 19:15 | 49:10 50:6 |
| 13:4,10 14:5,10 | 48:25 | measures 30:12 | Nearly 19:20 | old 39:14 |
| 17:5,16,20 20:1 | lose 17:7 39:6,15 | mechanism 7:19 | necessarily | once 22:5,8 |
| 20:3,8,8,11,13 | 54:23 | 38:6 | 13:17 | 53:12,23 |
| 20:14,20 21:2,5 | lot 16:22 26:19 | mere 19:25 26:4 | need 13:19,22,25 | ones 21:3,4,6,7 |
| 21:12,14,16,18 | lower 53:3 | merely 3:12 | 17:14 35:10 | 30:7 |
| 21:20,20,24 | lunch 48:19 | met 20:23 | 43:20 | operate 17:8 |
| 22:3,15 23:3,5 | <hr/> | method 3:21,23 | needs 13:24 | 22:23 |
| 23:9,15 24:12 | M | 3:24 | never 5:9 30:10 | operation 7:21 |
| 24:25 25:2 26:7 | main 31:3,3 | Mexican 32:7 | new 9:24 13:8 | opinion 41:14 |
| 26:24 27:11,20 | 48:10 | Mexico 31:8 | 35:22 | opportunity |
| 27:20 28:6,8,11 | mainstream | MICHAEL 1:7 | nice 11:15 | 13:18 47:6 |
| 28:12,14 29:11 | 52:18 | middle 4:14 | non-administr... | 55:23 |
| 30:4 34:1 41:23 | maintaining | mind 12:7 54:25 | 7:20 | option 6:2 |
| 44:3,4 48:25 | 49:19 | minimizing 55:15 | non-authorizat... | optional 38:7 |
| 49:15 50:3,8,11 | making 16:2 38:7 | 55:16 | 40:17 | oral 1:12 2:2,5,9 |
| 52:21 54:22 | 46:23 50:14 | minutes 53:8 | non-confirmati... | 3:7 19:15 28:23 |
| 56:3 | mandatorily 37:9 | mistaken 18:17 | 41:6,6 | order 7:8 13:20 |
| limit 17:13 26:1 | mandatory 23:17 | 48:11 | non-suspect | ordered 7:23 |
| limitation 6:25 | 37:1,17 38:7 | modelled 39:25 | 43:11 | ordinance 9:24 |
| 13:7 51:19 | MARY 1:22 2:10 | modest 29:14 | notice 36:4 40:16 | original 26:24 |
| 53:21 54:1 56:9 | 28:23 | modify 51:7 | 55:1 | 45:23 |
| limits 13:2 41:21 | massive 8:8,9 | 56:11 | notion 8:18 17:2 | ought 7:5,8 15:25 |
| little 10:21 13:3 | 9:3 30:12 | monetary 29:22 | 30:15 54:8 | 17:3 |
| 20:3 | materials 54:10 | months 23:12 | number 21:4,20 | outer 41:21 |
| loan 38:20 39:6 | matter 1:12 3:25 | morning 3:4 53:6 | <hr/> | outlaws 9:6 |
| local 19:23 27:16 | 14:19 19:9 43:6 | motivation 8:14 | O | outside 41:23 |
| 30:25 50:16 | 56:16 | moving 55:11 | O 2:1 3:1 | out-of-State |
| localities 8:25 | matters 3:23 | municipalities | objectives 37:13 | 13:23 |
| | 53:17 54:12 | | obligations 35:22 | |

| | | | | |
|--|--|---|--|---|
| <p>overarching 16:12 over-enforce 4:7 O'Grady 1:22 2:10 28:22,23 28:25 29:16 30:3,17,22 32:3 33:6,22 34:14 35:1,8,10,16 35:20 36:12 37:2,12,18,24 38:11,23 39:3,8 39:12,17,24 40:25 41:20 42:15,19 43:4 43:19 44:13 46:2,10,15 47:14,24 48:4,9 48:13,21 49:24 50:6 51:9</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 46:13 49:2,6 papers 51:17 paragraph 49:2,3 parenthetical 7:17 19:25 26:4 26:4 part 5:8 6:15 9:2 23:24 28:8 42:7 50:3 52:25 participant 49:16 particular 11:15 11:17,25 13:21 22:22,25 41:16 41:24 54:13 55:1 particularly 9:3 partnership 14:4 parts 27:14 pass 9:24 22:7 passage 3:15 passed 25:20</p> | <p>31:11 passive 50:13 penalties 4:12 6:7 32:9 penalty 5:18 7:11 37:19 39:2,3 48:15 people 4:14 12:13 31:7,21 32:7 36:9 55:16 55:17 percent 5:9 36:3 36:6,9 performance-b... 38:21 39:6 peripheral 3:12 19:22 permit 26:10 43:10 permits 21:12 29:10 permitted 17:19 43:12 55:17,18 person 18:17,18 32:1 35:11 47:4 47:8 55:1 persuade 12:25 petition 46:14 Petitioner 21:11 Petitioners 1:5 1:17,21 2:4,8 2:14 3:8 19:17 53:10 Phillips 1:16 2:3 2:13 3:6,7,9 4:24 5:3,8 6:4 6:13 7:3 8:13 9:15,21 10:3,14 11:1,14,23 12:6 12:18 13:12,15 13:25 14:7,16 14:24 15:8,14 15:17,20 16:7 16:10,15,20</p> | <p>17:11,21 18:1,4 18:19,23 19:4,7 53:8,9,11 54:14 54:17 55:7,9 56:6 Phoenix 1:22 phrase 26:7 picked 6:19 pieces 15:21 pilot 38:6 place 8:2,5,17 20:15 26:13 45:3 plaintiffs 39:9 play 4:13 46:21 plays 41:10 please 3:10 19:19 29:1 53:12 point 8:14 16:2 17:22 31:5 33:11,18 40:4 41:2,4 45:23 47:20 48:10 56:10 pointed 53:14 points 32:4 36:11 police 29:2 52:18 policy 3:13,15 16:23 19:22 30:6 pose 20:2 posed 25:6 position 17:6,9 28:10 42:23 possible 4:16 5:24 17:13 power 14:23 15:3 15:5 22:2,20 52:18 56:4 powers 10:6 29:2 practical 41:1 43:6 precise 49:14</p> | <p>precisely 5:10 49:4 precluded 44:1 preempt 27:16 31:1 49:11 52:20 preempted 17:25 25:8,11 28:4 29:7 41:18 43:14,18 44:10 preempting 19:23 preemption 8:17 37:3,7 38:12 preempts 15:12 15:16 preexisted 52:1 presented 18:15 47:7 preserve 22:2,19 31:1 preserved 29:9 29:23 44:14 52:12,16 preserving 34:1 President 27:6 presumption 35:14 40:18 45:6 46:8,11,21 47:10 51:11 pretty 5:21 11:9 16:24 20:7,21 prevent 31:20 32:12 pre-emption 55:11 principle 7:2 16:12 53:25 prior 45:10 47:15 50:12 probably 30:12 problem 4:19 5:5 5:9,12 6:15 8:15 11:2 18:13</p> | <p>23:8 26:18 55:8 problems 3:22 43:20 55:15,15 procedural 27:24 procedure 10:22 10:24 27:8 procedures 25:14 27:8,25 proceed 43:8 proceeding 33:9 33:10 34:9,10 47:8 process 7:20 16:1 32:15 40:9 40:12,21,22 52:6,7 54:6 processes 50:16 52:1 program 38:6 prohibition 32:5 prohibits 33:7 properly 53:3 55:19 prosecuted 34:25 35:7 protected 4:11 protection 11:17 18:7 32:12 protections 27:24 protects 32:24 33:4 prove 33:15 provide 39:21 50:16 provided 3:20 40:11 provides 30:5 46:20 52:23 providing 3:18 proving 43:3 provision 7:11 22:14 46:15,20 49:8 52:9 53:4</p> |
|--|--|---|--|---|

| | | | | |
|--|---|---|--|--|
| <p>provisions 4:4 23:1 24:12 27:6 27:15,23 34:7 40:6 43:22 50:8</p> <p>punishment 24:21</p> <p>purport 18:20,23 19:8</p> <p>purpose 24:9,10 24:15 32:19 33:2,19 34:6,8</p> <p>purposes 33:23 46:16</p> <p>put 5:16 8:17 24:11 50:4</p> <p>putting 43:2</p> <p>p.m 56:15</p> <hr/> <p style="text-align: center;">Q</p> <p>qualification 23:22</p> <p>qualifications 23:18</p> <p>quality 23:21</p> <p>quarter 19:20</p> <p>question 8:20 9:7 9:13 10:11,14 14:9 15:19 17:24 18:15,22 20:12 22:13 25:6 26:7 27:10 27:11 30:1 34:17 37:2 38:14 39:1,20 43:10 45:10,24 53:14 54:2 55:10</p> <p>questions 31:25 42:5 47:18 53:5</p> <p>quite 6:4 7:16 18:10 41:13 54:3</p> <p>quote 38:20,21</p> <p>quoted 53:19</p> | <hr/> <p style="text-align: center;">R</p> <p>R 1:22 2:10 3:1 28:23</p> <p>race 32:6</p> <p>raise 32:22</p> <p>raises 22:13</p> <p>reaching 41:2</p> <p>read 8:21 10:20 10:23 11:8 26:9 44:2 45:3 46:7</p> <p>reading 12:8 35:14 45:2 46:8</p> <p>Reagan 27:6</p> <p>real 42:4 56:4</p> <p>reality 10:16 14:1</p> <p>realize 5:16</p> <p>realized 4:6</p> <p>really 6:23 7:8 13:5 14:18 15:2 24:3 36:8 38:14 42:17 53:15</p> <p>reason 4:6 45:9</p> <p>reasonably 40:10</p> <p>reasons 8:7 21:4 22:17 25:12</p> <p>rebut 47:7</p> <p>rebuttable 40:18 45:6 46:8,11,20 47:10 51:11</p> <p>REBUTTAL 2:12 53:9</p> <p>rebutted 45:7</p> <p>receive 38:20 40:8</p> <p>received 13:16</p> <p>recognized 30:23</p> <p>recognizing 30:23 53:20</p> <p>reconcile 31:20 31:22 55:19</p> <p>record 36:5</p> <p>red 49:2</p> | <p>refer 19:3</p> <p>referring 7:17 21:3</p> <p>refers 27:23 50:15</p> <p>Reform 3:16</p> <p>regard 37:5</p> <p>regarding 46:24</p> <p>regime 17:17</p> <p>regulate 3:13 24:10 29:3</p> <p>regulating 7:23</p> <p>regulations 25:15 52:8</p> <p>regulatory 27:19 44:7,7</p> <p>reinforced 52:15 54:1</p> <p>reinforces 52:16</p> <p>reinforcing 17:2</p> <p>related 23:21</p> <p>relevant 23:14 24:5,5 45:9</p> <p>rely 39:22,23 43:11,12,13,15 46:23,23 47:1</p> <p>relying 39:20</p> <p>remain 21:18</p> <p>remaining 53:8</p> <p>remains 30:8</p> <p>remarkable 5:21 7:16,25</p> <p>remember 16:22 55:13</p> <p>renew 23:11</p> <p>report 49:23 53:19</p> <p>require 4:21,23 23:4,4 36:3,17 37:14 51:6</p> <p>requirement 9:23 38:10 44:19 47:5</p> <p>requirements 4:17 5:23 20:24 35:20 38:2 43:2 44:7,8 46:18</p> | <p>requires 4:20 36:1</p> <p>reservation 56:4</p> <p>reserve 19:12</p> <p>resolved 42:2,13</p> <p>resort 30:11</p> <p>resource 36:21 36:23 37:8,11</p> <p>respect 11:4 16:18 18:6 27:4</p> <p>respond 15:21</p> <p>Respondents 1:23 2:11 28:24</p> <p>responds 8:19</p> <p>response 49:23</p> <p>responsibility 51:25</p> <p>restaurant 17:7 17:8</p> <p>restrictions 8:12</p> <p>retain 36:15</p> <p>reticulated 6:7</p> <p>review 4:2 36:1,2</p> <p>revocation 10:6 21:9,13,13 22:11,12,14 24:2,11 25:21 44:15 50:17 52:23</p> <p>revocations 25:24</p> <p>revoke 14:15,20 14:23 15:5 26:21 29:14 49:10</p> <p>revoked 21:7,18 22:17 23:6 24:19 55:2</p> <p>revoking 14:19 29:6</p> <p>right 5:2,4,20 6:10,13 7:3 9:20 11:1,6 13:19 14:19,25 15:1,6,8,13,14 15:16,17,20 17:11,21,25 20:21 24:20 25:1 28:10,20 30:14 34:21,25 35:1,13 37:24 39:7,17,17 48:13</p> | <p>risk 4:9 5:24 32:15</p> <p>ROBERTS 3:3 19:13 20:2,19 23:10,19 26:15 28:2,13,21 41:12 48:2,7 53:7 56:1,13</p> <p>role 37:4 47:10</p> <p>room 20:6</p> <p>rules 16:18 37:10</p> <p>run 4:9</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1</p> <p>safe 5:5 37:23,25 39:15,21</p> <p>sanction 7:21 17:15,19 19:24 29:20 36:18 39:15,16 53:24 54:21</p> <p>sanctioning 4:4 6:18</p> <p>sanctions 5:24 17:20 19:21 24:24 26:6,6,13 27:17 28:5 29:10,22,23 34:1 43:22 44:14 49:7 50:10 52:21</p> <p>saves 26:8,8</p> |
|--|---|---|--|--|

| | | | | |
|--|---|---|---|--|
| <p>saving 15:5 savings 24:23 26:5 29:10,17 48:22,24 56:2,7 saying 9:24 12:16,16,20 17:24 20:6 21:10,11,15 24:4,15 26:16 26:17 34:5,8 41:22 says 8:4,24 12:12 15:24 21:17 22:16 24:24 31:16 32:7,19 33:1,3 33:19,23 34:19 36:24 37:18 38:22 43:13,16 43:17 44:12,22 45:1,3 49:3,3,4 49:5,11,23 50:7 50:18 53:22 54:22 scale 5:16,20 Scalia 4:19 5:2,4 5:13 6:1,6 7:25 8:13 9:8 11:21 11:24 12:15,19 12:21 13:12,14 13:22 16:4,8,13 16:17 18:13,21 19:2,6 21:10,16 21:23 22:1,5,12 22:18 23:2,7 28:20 30:10,19 37:16,22 39:10 39:14 42:10,17 43:23 55:4,7,8 55:9 Scalia's 39:1 42:22 schematic 28:17 scheme 3:18</p> | <p>6:16 7:12 8:1,4 9:4 11:25 25:13 27:20 52:23 54:5 56:11 Schrader41:13 scienter44:19 47:5 SCIU 11:8 scope 53:4 second 9:2 12:12 21:7 49:11 secondly 13:7 section 9:4 15:23 16:15 27:16 46:16 48:12 Secundum 6:22 Security 34:20 35:5 44:23 45:14,18 47:22 51:5 see 5:3 6:25 18:13 24:9,16 36:13 45:8 47:12 SEIU 11:14 self-defining 8:21 sense 14:2 24:13 30:3 sentence 50:13 50:18 51:2 separate 13:20 series 25:14 serious 4:9 8:6 set 20:21 25:14 37:10 49:14 shadow7:19 share 21:20 show4:21 25:25 51:16 55:1 shows 35:3,5 side 4:10 5:16,20 12:10 17:16 28:16 48:19</p> | <p>sides 4:13 significance 11:18 significant 29:9 30:25 similar 20:1,5,9 20:12 24:25 28:6,9,13,16 29:11 34:1 38:2 41:24 44:3,4 52:22 56:3 simply 5:23 8:11 13:18 17:2 21:6 39:2 50:7 51:24 single 24:7 situation 7:9 12:9 16:18 18:7 situations 5:15 six 23:12 Social 34:19 35:5 44:23 45:14,18 47:22 51:5 sole 19:25 solely 32:6 Solicitor 1:18,22 42:23 solve 23:8 somebody 12:9 somebody's 49:7 someone's 29:14 sorry 7:10 11:23 14:7 16:7 20:19 sort 30:16 55:22 sorts 9:17 25:15 Sotomayor 14:6 14:8,17,18 15:1 15:10,15,18,22 17:18,23 18:2,4 24:8,14,17,23 25:5,19 32:17 33:17 39:19 42:21 43:9 53:14 sounded 10:20</p> | <p>sounds 24:8 speak 31:8 specific 10:4,8 23:5 46:12 specifically 5:13 8:23 9:6 15:24 17:25 44:22 50:12,15 specifying 50:14 standard 44:17 50:22 54:8 standards 8:17 19:9 43:24 45:25 46:3 47:24 start 6:23 State 4:20,23,24 7:1,6,13,18,23 9:3,9 10:12 12:10,22 13:2,9 13:21 14:5,14 14:20,22 17:17 18:25 19:2,10 19:23 22:16 23:23 25:10,20 25:23 26:8,12 27:4,16 28:7 29:5,9,10 31:1 33:8,10,25 38:3 38:4,8,21 40:2 40:4,12,14,23 44:3,15 46:23 47:2,7,19,23 48:3 49:9,12,19 50:15,17,22 52:9,18,24 53:2 53:23 54:8,15 54:22,24 stated 16:11 states 1:1,4,13 1:20 2:7 8:6 9:1 9:17 10:7,18 12:24 13:17 18:11 19:16</p> | <p>22:2 26:10 29:2 30:11 32:22 37:5 44:6 52:12 52:13 53:16 55:23 State's 11:19 22:19 29:19 State-run 7:21 statues 28:18 status 25:7 33:20 statute 4:20,24 8:10,16,19 15:24 24:16,17 24:21 25:19,25 26:10 27:15,24 31:11 37:18 41:14 42:8 46:7 statutes 4:21,23 26:13 39:23 statutory 46:12 step 8:9 28:16 stop 13:13 15:3 stopping 15:2 straight 4:14 strict 44:18 struck 24:11 53:1 structure 8:19 29:18 43:21 stuck 48:14 subject 50:11 51:19 submitted 56:14 56:16 subsection 47:25 subset 27:23 substantial 47:19 substantive 35:17,20 subtracting 21:22 suddenly 10:11 sufficient 42:20 suggests 14:5</p> |
|--|---|---|---|--|

| | | | | |
|--|--|--|---|--|
| <p>15:25 supplement 7:12 52:11 56:8 supplemental 7:7 supply 33:3 supporting 1:21 2:8 19:17 Suppose 21:16 40:7 49:6 supposedly 40:18 Supreme 1:1,13 sure 6:4 9:15 26:16 41:10,13 suspending 29:6 suspension 44:15 50:16 52:23 sweep 26:12 swept 19:23 20:7 26:5 27:5,14 system 38:3,18 39:22 40:16 41:3,4 43:10,13 43:15,16,18 51:9,14 systems 40:18</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 8:8 17:6,9 18:11 36:23 42:22 50:24 takes 18:25 talk 11:3 12:22 28:3 talked 20:4 talking 14:9 15:3 15:6 16:22 24:15 talks 11:5 24:18 target 55:12 tell 20:10 31:16 46:9 telling 9:3 22:9</p> | <p>tentative 41:6 term 6:21 9:17 14:3 28:19 terminated 51:15 terms 9:3 11:18 30:4 32:4 36:14 38:12 39:4 41:21 43:22 47:14 52:20 terribly 17:12 test 38:12 text 49:20,22,25 thank 3:9 19:13 19:18 28:21,25 47:12 53:5,7,11 56:13 thing 18:5 26:24 30:16 31:19 40:7 45:15 49:4 49:10,11,15 55:20 things 13:6 43:6 think 5:8,11 6:1 7:4,16 8:1 9:2 9:18 10:3,6,7,9 10:14,21 11:11 12:6,21 13:11 13:15 14:2 15:20 16:21 17:12 19:5 20:11,13 21:2 21:11 22:6,10 23:14 26:8,9 27:1 28:15 29:16 30:3,22 31:10 33:6,21 34:2,13 37:2,14 38:25 41:20 42:1,4,7,10 43:7,19,20 44:13,16,17 48:2,11,21 50:7 50:20 51:1,24 52:14 53:3</p> | <p>54:25 55:11,12 thinking 49:14 thinks 14:3 thought 6:20 11:8 19:6 34:17 35:13,25 three 15:21 25:12 55:14 tie 10:5 time 3:12 19:12 25:19 35:25 42:18 50:9 tittle 25:16 told 47:20 tracked 19:6 tracks 19:7 traditional 20:14 22:2,20 25:3 28:12 29:8 traditionally 29:3 52:17 tremendous 11:18 tried 28:3 trouble 8:6 true 9:21 14:1,1 32:16 34:14 39:8 truly 56:7 try 4:8 7:4 trying 22:19 27:2 27:3 35:24 43:5 turn 36:25 turns 45:19 two 4:25 13:5 16:2 20:4 24:21 25:2 28:3,7 40:5 51:8 type 41:25 47:9 50:8 types 42:12</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimate 4:2 ultimately 6:13</p> | <p>7:22 unauthorized 4:8 4:22 5:6 19:24 30:24 32:13 35:11 41:7 45:4 46:25 47:4 50:23 51:16 52:5 underlying 29:25 understand 8:14 8:14 11:1 26:16 27:21,22 35:24 40:5,24 undocumented 14:13 18:3 24:10,18 25:22 undoubtedly 26:3,11 uniform 15:24 16:6,9,11,25 17:3,6 44:16 uniformity 17:19 uniformly 8:24 16:19 30:13 United 1:1,3,13 1:20 2:7 19:16 universe 50:10 unknown 9:17 unrestrained 8:7 upheld 25:18 use 9:6 14:2 28:19 32:11,13 33:1,7,8,15 34:3,3 36:15,17 36:19 37:7,9,10 37:15,19,20,25 40:15 51:14 52:6 54:1,7 usually 12:10 U.S.C 46:18</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:6 3:5 variation 43:24 various 10:18</p> | <p>42:12 vast 12:19 verification 38:18 47:3 verify 31:12 45:11 versus 48:17 vicious 32:25 view 8:25 29:17 vigorously 30:13 violated 14:12 14:14 44:25 49:5,7 violates 12:9 violating 22:25 54:20 violation 24:5 25:11 32:20 voice 50:13 voluntarily 37:9 voluntary 36:23 36:24</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 12:12 waited 30:18 waiting 43:1 walk 15:11 36:12 want 12:12 30:1 30:25 36:22 45:25 49:11 53:13 wanted 22:2 26:12 31:1 51:22 wants 37:7 warrants 29:5 Washington 1:9 1:16,19 wasn't 20:24 26:19 30:19 41:13 wasting 42:17 way 5:12 7:4 8:18 26:1,10 33:15</p> |
|--|--|--|---|--|

| | | | | |
|-------------------------|-------------------------|----------------------|--|--|
| 42:24 | <hr/> Y <hr/> | 50/50 45:11 | | |
| ways 8:20 9:7 | year 23:11 | 53 2:14 | | |
| 45:16 | years 9:24 | <hr/> 8 <hr/> | | |
| Wednesday 1:10 | <hr/> \$ <hr/> | 8 1:10 46:18 | | |
| weeks 51:17 | \$1,000 31:14,15 | | | |
| weight 41:8 | \$250 5:21 | | | |
| weren't 20:23 | <hr/> 0 <hr/> | | | |
| we've 20:3 47:5 | 09-115 1:6 3:4 | | | |
| 47:7 | <hr/> 1 <hr/> | | | |
| whatsoever | 100 5:9 | | | |
| 22:24 | 11:01 1:14 3:2 | | | |
| whit 44:11 | 115 15:23 16:16 | | | |
| Whiting 1:7 3:5 | 12:02 56:15 | | | |
| wide 7:6 | 1324a(b) 46:18 | | | |
| wiggle 20:6 | 1324a(b)(5) 9:5 | | | |
| wish 36:11 | 134a 9:5 | | | |
| word 27:22 48:25 | 178(a) 46:15 | | | |
| 55:25 | 184 46:13 | | | |
| words 20:5 25:25 | 185 46:14 | | | |
| 46:8,9 49:13 | 19 2:8 | | | |
| 50:4 | 1986 3:11 8:16 | | | |
| work 36:6,7,10 | 20:15 25:3 27:3 | | | |
| 40:19 41:4,17 | 29:8 30:16 54:4 | | | |
| 47:9 51:9 | 55:13 | | | |
| worker 3:13,23 | <hr/> 2 <hr/> | | | |
| 4:22 5:7,10 | 2 51:17 | | | |
| 6:17 35:6 52:8 | 20 36:3,6,9 | | | |
| workers 4:8 | 2007 30:18 | | | |
| 11:16 18:7 | 2010 1:10 | | | |
| 23:20 | 27A 45:1 | | | |
| works 32:4 36:13 | 28 2:11 | | | |
| worried 30:20 | <hr/> 3 <hr/> | | | |
| 36:2 | 3 2:4 53:8 | | | |
| wouldn't 8:9 | 39 49:2 | | | |
| 14:22 18:14,21 | <hr/> 4 <hr/> | | | |
| 30:12 34:12 | 40,000 8:24 | | | |
| 42:21 | 25:17 | | | |
| wrapped 42:5 | <hr/> 5 <hr/> | | | |
| wrestled 41:1 | 50 9:1 | | | |
| wrong 36:6 46:9 | | | | |
| wrote 10:21 | | | | |
| 48:23 | | | | |
| <hr/> X <hr/> | | | | |
| x 1:2,8 | | | | |