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IN THE SUPREME COURT OF THE UNITED STATES

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ARIZONA, ET AL., :

Petitioners : No. 11-182

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Wednesday, April 25, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of  
Petitioners.

DONALD B. VERRILLI, JR., ESQ., Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
Respondent.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-182, Arizona v. the United States.  
Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT  
ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The State of Arizona bears a disproportionate share of the costs of illegal immigration. In addressing those costs, Arizona borrowed the Federal standards as its own, and attempted to enlist State resources in the enforcement of the uniform Federal immigration laws.

Notwithstanding that, the United States took the extraordinary step of seeking a preliminary injunction to enjoin the statute as impliedly preempted on its face before it took effect. The Ninth Circuit agreed with respect to four provisions, but only by inverting fundamental principles of federalism.

The Ninth Circuit essentially demanded that Arizona point to specific authorization in Federal statute for its approach. But that gets matters

1 backwards.

2 A State does not need to point to Federal  
3 authorization for its enforcement efforts. Rather, the  
4 burden is on the parties seeking to preempt a duly  
5 enacted State law to point to some provision in  
6 statutory law that does the preempting. Now, the United  
7 States can't really do that here, and the reason is  
8 obvious.

9 There are multiple provisions of the Federal  
10 immigration law that go out of their way to try to  
11 facilitate State and local efforts to communicate with  
12 Federal immigration officials in order to ascertain the  
13 immigration status of individuals.

14 So, for example, 1373(c) specifically  
15 requires that Federal immigration officials shall  
16 respond to inquiries from State and local officials  
17 about somebody's immigration status. 1373(a) goes even  
18 further. That provision says that no Federal agency or  
19 officer may prohibit or in any way restrict the ability  
20 of State and local officers to communicate with Federal  
21 immigration officers to ascertain somebody's immigration  
22 status.

23 Indeed, if the DHS had --

24 JUSTICE SOTOMAYOR: Mr. Clement --

25 MR. CLEMENT: Yes.

1 JUSTICE SOTOMAYOR: -- could I interrupt,  
2 and turning to 2(B), could you tell me what the State's  
3 view is -- the Government proposes that it should be  
4 read on its face one way, and I think the State is  
5 arguing that there's a narrower way to read it. But am  
6 I to understand that under the State's position in this  
7 action, the only time that the inquiry about the status  
8 of an individual rises is after they've had probable  
9 cause to arrest that individual for some other crime?

10 MR. CLEMENT: That's exactly right, Justice  
11 Sotomayor. So this only operates when somebody's been  
12 essentially stopped for some other infraction, and then  
13 at that point, if there's reasonable suspicion to try to  
14 identify immigration status, then that can happen.

15 Of course, one of the things that --

16 JUSTICE SOTOMAYOR: Can I -- can I --

17 MR. CLEMENT: Sure.

18 JUSTICE SOTOMAYOR: -- just stop you there  
19 just one moment?

20 That's what I thought. So presumably, I  
21 think your argument is, that under any circumstance, a  
22 police officer would have the discretion to make that  
23 call. Seems to me that the issue is not about whether  
24 you make the call or not, although the Government is  
25 arguing that it might be, but on how long you detain the

1 individual, meaning -- as I understand it, when  
2 individuals are arrested and held for other crimes,  
3 often there's an immigration check that most States do  
4 without this law.

5 And to the extent that the government wants  
6 to remove that individual, they put in a warrant of  
7 detainer.

8 This process is different. How is it  
9 different?

10 MR. CLEMENT: Well, it's different in one  
11 important respect, Justice Sotomayor, and that's why I  
12 don't think that the issue that divides the parties is  
13 only the issue of how long you can detain somebody.

14 Because I think the Federal Government takes  
15 the rather unusual position that even though these stops  
16 and these inquiries, if done on an ad hoc basis, become  
17 preempted if they're done on a systematic basis --

18 JUSTICE SOTOMAYOR: No, I understand that's  
19 their argument. I can question them about that.

20 MR. CLEMENT: Okay. But -- so that's --

21 JUSTICE SOTOMAYOR: But I want to get to  
22 how -- assuming your position, that doing it on  
23 a -- there's nothing wrong with doing it as it's been  
24 done in the past. Whenever anyone is detained, a call  
25 could be made. What I see as critical is the issue of

1 how long, and under -- and when is the officer going to  
2 exercise discretion to release the person?

3 MR. CLEMENT: And with respect, I don't  
4 think section 2(B) really speaks to that, which is to  
5 say, I don't think section 2(B) says that the systematic  
6 inquiry has to take any longer than the ad hoc inquiry.

7 And, indeed, section 2 -- in one of its  
8 provisions -- specifically says that it has to be  
9 implemented in a way that's consistent with Federal,  
10 both immigration law and civil rights law.

11 So, there --

12 JUSTICE SOTOMAYOR: What happens if -- this  
13 is the following call -- the call to the -- to the  
14 Federal Government. Yes, he's an illegal alien. No, we  
15 don't want to detain him.

16 What does the law say, the Arizona law say,  
17 with respect to releasing that individual?

18 MR. CLEMENT: Well, I don't know that it  
19 speaks to it in specific terms, but here's what I  
20 believe would happen, which is to say, at that point,  
21 then, the officer would ask themselves whether there's  
22 any reason to continue to detain the person for State  
23 law purposes.

24 I mean, it could be that the original  
25 offense that the person was pulled over needs to be

1 dealt with or something like that.

2 JUSTICE SOTOMAYOR: I'm putting all of this  
3 outside of --

4 MR. CLEMENT: But -- but if what we're  
5 talking about is simply what happens then for purposes  
6 of the Federal immigration consequences, the answer is  
7 nothing. The individual at that point is released.

8 And that, I think, can be very well  
9 illustrated by section 6 -- I don't want to change the  
10 subject unnecessarily, but there is arrest authority for  
11 somebody who has committed a public offense, which means  
12 that it's a crime in another State and in Arizona, but  
13 the person can't be arrested for that offense presumably  
14 because they have already served their sentence for the  
15 offense; and then there is new arrest authority given to  
16 the officer to hold that person if they are deportable  
17 for that offense.

18 Now, I think in that circumstance, it's very  
19 clear what would happen, is an inquiry would be made to  
20 the Federal officials that would say, do you want us to  
21 transfer this person to your custody or hold this person  
22 until you can take custody? And if the answer is no,  
23 then that's the end of it. That individual is released,  
24 because there is no independent basis in that situation  
25 for the State officer to continue to detain the



1 individual at all.

2 JUSTICE GINSBURG: But how would the State  
3 officer know if the person is removable? I mean, that's  
4 sometimes a complex inquiry.

5 MR. CLEMENT: Well, Justice Ginsburg, I  
6 think there's two answers to that. One is, you're  
7 right, sometimes it's a complex inquiry, sometimes it's  
8 a straightforward inquiry. It could be murder, it could  
9 be a drug crime. But I think the practical answer to  
10 the question is by hypothesis there is going to be  
11 inquiry made to the Federal immigration authorities,  
12 either the Law Enforcement Support Center or a 287(g)  
13 officer. And presumably, as a part of that inquiry,  
14 they can figure out whether or not this is a removable  
15 offense or at least a substantially likely removable  
16 offense.

17 JUSTICE KENNEDY: If it takes two weeks to  
18 make that determination, can the alien be held by the  
19 State for that whole period of time --

20 MR. CLEMENT: Oh, I don't --

21 JUSTICE KENNEDY: -- just under section 6?

22 MR. CLEMENT: I don't think so, Your Honor,  
23 and I think that, you know, what -- in all of these  
24 provisions, you have the Fourth Amendment backing up the  
25 limits, and I think so --

1 JUSTICE KENNEDY: What -- what would be the  
2 standard? You're the attorney for the alien, he -- they  
3 are going to hold him for two weeks until they figure  
4 out whether this is a removable offense, and you say,  
5 under the Fourth Amendment, you cannot hold for -- what?  
6 More than a reasonable time or --

7 MR. CLEMENT: Yes, ultimately, it's a  
8 reasonable inquiry. And I think that under these  
9 circumstances what we know from the record here is that  
10 generally the immigration status inquiry is something  
11 that takes 10 or 11 minutes. I mean, so it's not --  
12 we're not talking about something -- or no more than 10  
13 if it's a 287(g) officer and roughly 11 minutes on  
14 average if it's the Law Enforcement Support Center.

15 JUSTICE BREYER: How do they have -- well,  
16 the same question, but -- but I'm trying to think of  
17 examples. Example one is the person is arrested. Now,  
18 it says any person who is arrested shall have the  
19 person's immigration status determined before the person  
20 is released. So I wonder if they have arrested a  
21 citizen, he's Hispanic-looking, he was jogging, he has a  
22 backpack, he has water in it and Pedialyte, so they  
23 think, oh, maybe this is an illegal person. It happens  
24 he's a citizen of New Mexico, and so the driver's  
25 license doesn't work.

1                   And now they put him in jail. And are  
2 you -- can you represent to us -- I don't know if you  
3 can or not -- can you represent to us he will not stay  
4 in jail in detention for a significantly longer period  
5 of time than he would have stayed in the absence of  
6 section 2(B)? Do you want to represent that or not?

7                   MR. CLEMENT: I don't want to represent  
8 that --

9                   JUSTICE BREYER: All right. Now, if you  
10 cannot represent that -- and I'm not surprised you don't  
11 want to -- I mean, I don't know --

12                  MR. CLEMENT: Sure, sure. But what I can  
13 represent --

14                  JUSTICE BREYER: What?

15                  MR. CLEMENT: -- is that he's not going to  
16 be detained any longer than the Fourth Amendment allows.

17                  JUSTICE BREYER: Oh, fine.

18                  MR. CLEMENT: And --

19                  JUSTICE BREYER: But the Fourth Amendment --  
20 for -- I mean, that's another question. I don't know  
21 how long the Fourth Amendment allows. I don't know on  
22 that. There probably is a range of things. But we do  
23 know that a person ordinarily, for this crime, X, would  
24 have been released after a day. Oh, you know, the  
25 Fourth Amendment would have allowed more. So now what I

1 want to know is what in practice will happen?

2           From your representation, I think that there  
3 will be a significant number of people -- some of whom  
4 won't be arrested; it takes 11 minutes for some. For  
5 citizens, it might take two hours, it might take two  
6 days. Okay. There will be a significant number of  
7 people who will be detained at the stop, or in prison,  
8 for a significantly longer period of time than in the  
9 absence of 2(B). Is that a fair conclusion?

10           MR. CLEMENT: I don't think it is, Justice  
11 Breyer, and here's why it's not. Because even though  
12 there certainly are situations where State authorities  
13 will arrest somebody and then release them relatively  
14 rapidly, they generally don't release somebody until  
15 they can nail down their identity and whether or not  
16 they are likely to come to a court hearing at a  
17 subsequent --

18           JUSTICE SCALIA: Anyway, if this is a  
19 problem, is it an immigration law problem?

20           MR. CLEMENT: It --

21           JUSTICE SCALIA: Or is it a Fourth Amendment  
22 problem?

23           MR. CLEMENT: Justice Scalia, it is  
24 neither --

25           JUSTICE SCALIA: Is the Government's attack

1 on this that it violates the Fourth Amendment?

2 MR. CLEMENT: No, of course the Federal  
3 Government, that also has a lot of immigration arrests  
4 that are subject to the Fourth Amendment, is not making  
5 a Fourth Amendment claim here. And it's neither an  
6 immigration law concern or something that should be the  
7 basis for striking down a statute on its face.

8 JUSTICE BREYER: That's a  
9 different argument --

10 MR. CLEMENT: But I do want to -- but I do  
11 want to be responsive and make the point that I think  
12 the factual premise that this is going to -- 2(B) is  
13 going to lead to the elongation of a lot of arrests is  
14 not true.

15 JUSTICE BREYER: All right. Can I make the  
16 following statement in the opinion, and you will say  
17 that's okay. Imagine -- this is imaginary. "We  
18 interpret" -- imagine -- "we interpret Section 2(B) as  
19 not authorizing or requiring the detention of any  
20 individual under 2(B), either at the stop or in prison,  
21 for a significantly longer period of time than that  
22 person would have been detained in the absence of 2(B)."

23 Can I make that statement in an opinion, and  
24 you'll say, that's right?

25 MR. CLEMENT: I think what you could say --

1 JUSTICE BREYER: Can I say that?

2 MR. CLEMENT: I don't think you can say just  
3 that.

4 JUSTICE BREYER: No.

5 MR. CLEMENT: I think you can say something  
6 similar, though. I think you probably could say, look,  
7 this is a facial challenge. The statute's never gone  
8 into effect. We don't anticipate that Section 2(B)  
9 would elongate in a significant number of cases the  
10 detention or the arrest. I think you could say that.

11 And the reason is, as I indicated, it's  
12 something that happens even without this law that, when  
13 you arrest somebody, and there are some offenses that  
14 are -- you can arrest and release under State law, but  
15 before you release the individual, you generally want to  
16 ascertain that that individual is going to show up at  
17 the hearing, and that's what really distinguishes those  
18 cases where there's arrest and release from those cases  
19 where there's arrest and you book somebody.

20 Now, here's the other reason why I don't  
21 think factually this is going to elongate things.  
22 Because already in a significant number of booking  
23 facilities in Arizona, you already have the process that  
24 people are systematically run through immigration checks  
25 when they are booked as part of the booking process.

1 That's reflected in the record here in the Maricopa  
2 County system, that that's done by a 287(g) officer as a  
3 matter of routine.

4 The Federal Government doesn't like this  
5 statute, but they are very proud of their Secure  
6 Communities program. And their Secure Communities  
7 program also makes clear that everybody's that's booked  
8 at participating facilities is -- eventually has their  
9 immigration status checked.

10 And so I don't think that this immigration  
11 status check is likely to lead to a substantial  
12 elongation of the stops or the detentions. Now,  
13 obviously --

14 JUSTICE SOTOMAYOR: I want to make sure that  
15 I get a clear representation from you. If on a call to  
16 the Federal agency, the agency says, we don't want to  
17 detain this alien, that alien will be released or --  
18 unless it's under 6, is what you're telling me. Or  
19 under 6, 3, or some -- one other of Arizona's  
20 immigration clauses.

21 MR. CLEMENT: Exactly. Obviously, if this  
22 is somebody who was going, you know, 60 miles an hour in  
23 a 20-mile-an-hour school zone or something, they may  
24 decide wholly apart from the immigration issues, that  
25 this is somebody they want to bring back to the station.

1 But for the purposes of once they make the contact with  
2 Federal immigration officials, if the Federal  
3 immigration officials say, look, we have no interest in  
4 removing this person, we have no interest in prosecuting  
5 this person under the Federal criminal provisions, then  
6 that's the end of the Federal case --

7 JUSTICE SOTOMAYOR: All right. Then tell  
8 me --

9 JUSTICE SCALIA: You'll concede that the --  
10 that the State has to accept within its borders all  
11 people who have no right to be there, that the Federal  
12 Government has no interest in removing?

13 MR. CLEMENT: No, I don't accept that,  
14 Justice Scalia, but --

15 JUSTICE SCALIA: That's all the statute --  
16 and you call up the Federal Government, and te  
17 Federal -- yes, he's an illegal immigrant, but that's  
18 okay with us.

19 MR. CLEMENT: Well --

20 JUSTICE SCALIA: And the State has no power  
21 to close its borders to people who have no right to be  
22 there?

23 MR. CLEMENT: Well, Justice Scalia, here's  
24 my response, which is all of this discussion, at least  
25 as I've understood it, has been about 2(B) and to a



1 lesser extent 6.

2 Now, section 3 of the statute does provide  
3 an authority under State law to penalize somebody who  
4 has violated essentially the Federal registration  
5 requirement. So if that's -- as to that provision,  
6 there would be a State authority, even under these  
7 hypotheticals, to take action with respect to the  
8 individual --

9 JUSTICE KENNEDY: I think --

10 MR. CLEMENT: -- but not with respect to  
11 the Federal --

12 JUSTICE KENNEDY: I think Justice Scalia's  
13 question was the -- was the broader one, just as a  
14 theoretical matter. Can we say, or do you take the  
15 position that a State must accept within its borders a  
16 person who is illegally present under Federal law?

17 MR. CLEMENT: Well, and I think --

18 JUSTICE KENNEDY: And that is by reason of  
19 his alien --

20 MR. CLEMENT: And I think my answer to that  
21 is no. I think the reason my answer is no has more to  
22 do with our defense of section 3 and other provisions  
23 than it does with respect to the inquiry and arrest  
24 authority provisions, 2(B) and 6.

25 JUSTICE ALITO: Well, before you move on to

1 the registration requirement, could I take you back to  
2 an example that's similar to the one that Justice Breyer  
3 was referring to.

4 Let's someone -- let's say someone who is a  
5 citizen and a resident of New Mexico, has a New Mexico  
6 driver's license, drives across the border, is stopped  
7 for speeding, not 60 miles an hour in a 20-mile zone,  
8 but 10 miles over the speed limit on an interstate. And  
9 the officer, for some reason, thinks that this person  
10 may be an illegal alien. How would that work out?

11 If you do the records check, you're not  
12 going to get anything back, right, because the person is  
13 a citizen? So what -- where would the officer take it  
14 from there?

15 MR. CLEMENT: Well, if I can just kind of  
16 work back for a second. I mean, obviously, it's a  
17 pretty unusual circumstance where somebody produces an  
18 out-of-state driver's license, and that doesn't dispel  
19 reasonable suspicion for the officer; but, I'll take the  
20 hypo --

21 JUSTICE ALITO: Why would it dispel  
22 reasonable suspicion if it's -- if the officer knows  
23 it's a state that issues driver's licenses to aliens who  
24 are not lawfully --

25 MR. CLEMENT: And that might be a situation

1 where that's the case, and then -- then it wouldn't  
2 dispel the reasonable suspicion. But, say, in the  
3 average case, I think it would.

4           They would then go further. And then they  
5 would then make the inquiry to the Federal officials.  
6 And then if -- because of the fact that the individual  
7 actually is a citizen or something like that, then what  
8 would happen is at some point you'd get to the end of a  
9 permissible Terry stop, and the officer would release  
10 the individual.

11           Now, it might not be the end of the matter,  
12 because, of course, you know, they still have the name,  
13 they still have the ability to collect that information  
14 and try to continue the check as they move forward,  
15 taking down the information on the New Mexico driver's  
16 license.

17           But I think the important thing is that, you  
18 know, this statute doesn't authorize them to detain the  
19 individual, certainly beyond the -- the Fourth Amendment  
20 limits, and it really doesn't authorize them to do  
21 anything that the official couldn't do on an ad hoc  
22 basis without the statute.

23           Now it does do --

24           JUSTICE ALITO: That may be the case, and I  
25 would like to ask General Verrilli about that; but,

1 under the Fourth Amendment, presumably, if the officer  
2 can arrest, the state officer can arrest a person simply  
3 on the ground that the person is removable, which is  
4 what the Office of Legal Counsel opined some years ago,  
5 then presumably the officer could continue to detain  
6 that individual that I mentioned until they reached a  
7 point where the Terry stop becomes an arrest, at which  
8 time they would have to have probable cause.

9 But if they had probable cause to believe  
10 the person was removable, then they could hold the  
11 person, presumably, until the person's status was  
12 completely verified; isn't that correct?

13 MR. CLEMENT: I think that's correct,  
14 Your Honor.

15 Now, as we read section 6, because there's a  
16 pre-existing definition of public offense in Arizona  
17 law, we don't think this is kind of the full Office of  
18 Legal Counsel situation, where you have broad arrest  
19 authority for removable individuals. This is a  
20 relatively narrow slice of additional arrest authority  
21 that happens to give arrest authority for people that  
22 seem to fit the Federal government's priority, because  
23 it really is going to apply to criminal aliens.

24 But I don't -- I don't take any issue with  
25 what you're saying. I do think, though, it's important

1 to understand that 2(B) really doesn't give the officer  
2 an authority he didn't otherwise have.

3           It does do one thing that's very important,  
4 though, which it does have the effect of overriding  
5 local policies that actually forbade some officers from  
6 making those communications and -- because that's one of  
7 the primary effects of 2(B). It just shows how  
8 difficult the government's preemption argument is here,  
9 because those kind of local policies are expressly  
10 forbidden by Federal statute. 1373(a) and 8 U.S.C. 1644  
11 basically say that localities can't have those kind of  
12 sanctuary laws.

13           And so, one effect that 2(B) has is on a  
14 state level it basically says, look, you can't have  
15 local officers telling you not to make those inquiries,  
16 you must have those inquiries.

17           JUSTICE SOTOMAYOR: Counsel, could -- does  
18 section 6 permit an officer to arrest an individual who  
19 has overstayed a visitor's visa by a day? They are  
20 removable, correct?

21           MR. CLEMENT: They are removable. I don't  
22 think they would have committed a public offense --  
23 absent a very unusual situation, I don't think they  
24 would have committed a public offense under Arizona law.  
25 So I don't think there actually would be arrest

1 authority in that circumstance, as Justice Alito's  
2 question has --

3 JUSTICE SOTOMAYOR: What is the definition  
4 of public offense?

5 MR. CLEMENT: A public offense definition --  
6 it's actually -- it's a petition appendix -- well, I'm  
7 sorry.

8 The definition is basically that it's  
9 something that is a crime in another jurisdiction and  
10 also a crime in Arizona. And so, what makes this kind  
11 of anomalous is, normally, if something is a crime in  
12 Arizona, there's arrest authority for that directly.

13 So what this really captures is people who  
14 have committed a crime are no longer arrestable for the  
15 crime because they have served their sentence or some  
16 other peculiarity, but they are nonetheless removable  
17 because of the crime.

18 CHIEF JUSTICE ROBERTS: Counsel, maybe it's  
19 a good time to talk about some of the other sections, in  
20 particular section 5(C).

21 Now, that does seem to expand beyond the  
22 Federal government's determination about the types of  
23 sanctions that should govern the employment  
24 relationship.

25 You talk about supply and demand. The

1 Federal government, of course, prohibits the employment,  
2 but it also imposes sanctions with respect to  
3 application for work. And the State of Arizona, in this  
4 case, is imposing some significantly greater sanctions.

5 MR. CLEMENT: Well, it's certainly imposing  
6 different sanctions. I mean, you know, it's a little  
7 bit -- kind of hard to weigh the difference between  
8 removability, which is obviously a pretty significant  
9 sanction for an alien, and the relatively modest  
10 penalties imposed by section 5(C).

11 But I take the premise that 5(C) does  
12 something that there is no direct analog in Federal law.  
13 But I -- but that's not enough to get you to preemption,  
14 obviously.

15 And one of the things that makes 5(C), it  
16 seems to us, a weak case for preemption is that it only  
17 targets employment that is expressly forbidden by  
18 Federal law. And so, then we look at, you know,  
19 essentially the government is reduced to arguing that  
20 because in 1986 when Congress passed IRCA, it only  
21 focused on the employer's side of the equation and  
22 didn't, generally speaking, impose restrictions on  
23 employees, that somehow they are going to draw a  
24 preemptive inference from that.

25 JUSTICE SOTOMAYOR: Counsel --

1 JUSTICE KENNEDY: Would you agree that --  
2 would you accept as a working hypothesis that we can  
3 begin with the general principle that the Hines v.  
4 Davidowitz language controls here, and we're going to  
5 ask our principal -- our primary function is to  
6 determine whether, under the circumstances of this  
7 particular case, Arizona's law stands as an obstacle to  
8 the accomplishment and execution of the full purposes  
9 and objectives of Congress? Is that an acceptable test  
10 from your standpoint?

11 MR. CLEMENT: I think it's an acceptable  
12 test. I mean, Justice Kennedy, you know, there  
13 obviously have been subsequent cases, including DeCanas  
14 and Whiting, that give additional shape and color to  
15 that test, but I don't have any -- I don't have any real  
16 quarrel with that test.

17 And here's why I don't think that --

18 JUSTICE KENNEDY: But then the government on  
19 this section is going to come and say, well, there may  
20 be -- this must be -- this -- the enforcement of this  
21 statute, as Arizona describes it, will be in  
22 considerable tension with our -- with our basic  
23 approach; isn't that what I'm going to hear from the  
24 government?

25 MR. CLEMENT: It may be what you're going to



1 hear, Justice Kennedy, but I don't think you just take  
2 the Federal government for its word on these things.

3           You know, it's interesting, in DeCanas  
4 itself, the SG said that that California statute was  
5 preempted. And in DeCanas, this Court didn't say, well,  
6 you know, we've got this language from Hines, and we  
7 have the SG tell us it's preempted, that's good enough  
8 for us. They went beyond that, and they looked hard.

9           And what they did is they established that  
10 this is an area where the presumption against preemption  
11 applies. So, that seems one strike in our favor.

12           We have here a situation where there is an  
13 express preemption provision, and it -- it only  
14 addresses the employer's side of the ledger. So the  
15 express preemption provision clearly doesn't apply here.  
16 So the only thing they have is this inference --

17           JUSTICE SOTOMAYOR: Well, for those of us  
18 for whom legislative history has some importance, there  
19 seems to be quite a bit of legislative history that  
20 the -- that the idea of punishing employees was raised,  
21 discussed and explicitly rejected.

22           MR. CLEMENT: Sure.

23           JUSTICE SOTOMAYOR: The preemption language  
24 would be geared to what was decided to be punished.  
25 It seems odd to think that the Federal government is

1 deciding on employment sanctions and has unconsciously  
2 decided not to punish employees.

3 MR. CLEMENT: But, Justice Sotomayor,  
4 there's a big difference between Congress deciding not  
5 as a matter of Federal law to address employees with an  
6 additional criminal prohibition, and saying that that  
7 decision itself has preemptive effect. That's a rather  
8 remarkable additional step.

9 And here's why I think, if you consider the  
10 legislative history, for those who do, it really  
11 supports us, because here's what Congress confronted. I  
12 mean, they started thinking about this problem in 1971.  
13 They passed IRCA in 1986.

14 At that point, here's the state of the  
15 world. It's already unlawful, as a matter of Federal  
16 law, for the employee to get -- to have this unlawful  
17 work; and, if they seek this unlawful work, they are  
18 subject to removal for doing it.

19 In addition, Congress was told that most of  
20 the aliens who get this unlawful work are already  
21 here -- they illegally entered, so they are already  
22 subject to an independent criminal offense.

23 So at that point, Congress is facing a world  
24 where the employee is already subject to multiple  
25 prohibitions. The employer is completely scot-free as a

1 matter of Federal law. And so at that point, in 1986,  
2 they address the employer's side of the equation, they  
3 have an express preemption provision that says nothing  
4 about any intent of preempting the employee's side of  
5 the ledger, and in that I don't think --

6 JUSTICE GINSBURG: They did provide -- I  
7 mean, your position was the Federal legislation  
8 regulates the supply side. That leaves the demand side  
9 open. But there is regulation, and the question is  
10 whether anything beyond that is inconsistent with the  
11 Federal -- it's not just that the person is removable,  
12 but if they use false documents in seeking work, that's  
13 a Federal crime.

14 So we have the -- what you call the supply  
15 side is regulated, but you want to regulate it more.

16 MR. CLEMENT: Two quick responses, and then  
17 I'd like to save time for rebuttal, Justice Ginsburg.

18 The first is that if you look at what they  
19 regulate on the employee's side, it's really things that  
20 actually assist in regulating the employer's side.  
21 Because what they are worried about is a fraudulent  
22 document that then is used essentially to trick the  
23 employer into employing somebody who shouldn't be  
24 employed.

25 The second thing is the more that you view

1 IRCA as actually regulating part of the employee's side,  
2 then I think the more persuasive it is that the express  
3 preemption provision doesn't reach the employee's side  
4 of the equation.

5 CHIEF JUSTICE ROBERTS: We'll give you  
6 plenty of rebuttal time, but I'd like to hear what you  
7 have to say about section 3 before you sit down.

8 MR. CLEMENT: Thank you, Mr. Chief Justice.  
9 I appreciate the opportunity to do that. I do think as  
10 to section 3, the question is really -- it's a provision  
11 that is parallel to the Federal requirements and imposes  
12 the same punishments as the Federal requirement.

13 So it's generally not a fertile ground for  
14 preemption. But of course, there are cases that find  
15 preemption even in those analogous circumstances. They  
16 are the cases that the government is forced to rely on,  
17 cases like Buckman, cases like --

18 JUSTICE KENNEDY: Would double prosecutions  
19 be -- suppose that an alien were prosecuted under  
20 Federal law for violating basically the terms of 3,  
21 could the States then prosecute him as well?

22 MR. CLEMENT: I think they could under  
23 general double jeopardy principles and the dual  
24 sovereignty doctrine. Obviously, if that was a  
25 particular concern to you, that might be the basis as an

1 as-applied challenge if somebody was already prosecuted  
2 under Federal law.

3 But, of course, this Court has confronted  
4 exactly that argument in California against Zook, where  
5 you had the statute of California that prohibited  
6 somebody operating as an interstate carrier without the  
7 ICC license. It was raised, you know, you have to let  
8 just the Feds enforce that law. Otherwise, there is a  
9 possibility of duplicative punishment, duplicative  
10 prosecution. And this Court rejected that argument  
11 there.

12 JUSTICE GINSBURG: Mr. Clement, it  
13 seems that the -- I would think the largest hurdle for  
14 you is Hines which said, the registration scheme --  
15 Congress enacted a complete registration scheme which  
16 the States cannot complement or impose even auxiliary  
17 regulations. So I don't see the alien registration as a  
18 question of obstacle preemption, but appeal preemption  
19 that alien -- we don't want competing registration  
20 schemes. We want the registration scheme to be wholly  
21 Federal.

22 MR. CLEMENT: Well, Justice Ginsburg, I  
23 think that's part of the reason why I accepted Justice  
24 Kennedy's characterization of the relevant language in  
25 Hines. Because although there is some general

1 discussion there of field preemption, when the Court  
2 actually states what its holding is, it does state it in  
3 terms of obstacle preemption.

4 And here's where I think there is a critical  
5 difference between what the Court had before it in Hines  
6 and what you have before you here.

7 In Hines, Pennsylvania passed its statute  
8 before Congress passed the alien registration statute.  
9 So not surprisingly, you know, they weren't -- they  
10 weren't soothsayers in Pennsylvania. They couldn't  
11 predict the future. So when it got up here, there was a  
12 conflict between the provisions of the Pennsylvania  
13 registration law and the Federal registration law. And  
14 this Court struck it down on that preemption basis.

15 Here it's quite different. Arizona had  
16 before it the Federal statute. It looked at the precise  
17 provisions in the Federal statute. It adopted those  
18 standards as its own, and then it imposed parallel  
19 penalties for the violation of the State equivalent.

20 And so I think the right analysis is really  
21 the analysis that this Court laid out in its Whiting  
22 decision, which says that in these kinds of cases, what  
23 you look for is whether or not the State scheme directly  
24 interferes with the operation of the Federal scheme.

25 JUSTICE SOTOMAYOR: Can I ask you something?

1 JUSTICE ALITO: Well, in that --

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: In that regard, we are told  
4 that there are some important categories of aliens who  
5 can't obtain registration, cannot obtain Federal  
6 registration, and yet they are people that nobody would  
7 think should be removed. I think someone with a pending  
8 asylum application would fall into that category.

9 How would section 3 apply there?

10 MR. CLEMENT: I think it probably wouldn't  
11 apply. There's two provisions that might make it  
12 inapplicable. The first question you'd ask is whether  
13 that individual in that category would be subject to  
14 prosecution under 1304 and 1306. And if I understand,  
15 you know, the Government's position, there are certain  
16 people where, you know, they can't really get the  
17 registration document because of the narrow class that  
18 they are in.

19 And as I understand it, it is not a  
20 violation of either 1304 or 1306 to not get a  
21 registration document when you're somebody who can't get  
22 one. So you're not liable for the willful failure to  
23 get a registration document, and when you don't have a  
24 registration document to carry, you don't run afoul of  
25 1306 in the --

1 JUSTICE ALITO: Well, of course, if you've  
2 entered the country illegally, you can't get a  
3 registration.

4 MR. CLEMENT: Well, sure.

5 JUSTICE ALITO: But --

6 MR. CLEMENT: But that's not the narrow  
7 class we were talking about.

8 JUSTICE ALITO: I understand that. I  
9 understand the distinction you're drawing, that you  
10 can't be prosecuted for lack of a registration if you  
11 couldn't have gotten a registration.

12 MR. CLEMENT: Well, if you're in -- no, if  
13 you're in the country lawfully, I mean, you can try to  
14 register. And so somebody who enters illegally -- I  
15 mean, they are already guilty of one Federal misdemeanor  
16 by the illegal entry.

17 JUSTICE ALITO: Right.

18 MR. CLEMENT: But at the point that they  
19 stay 30 days and don't try to register, then that's an  
20 independent violation. So maybe I need to fix what I  
21 said and say, look, if you're somebody who -- if you did  
22 go to register, would be told: You're fine, but we  
23 can't give you a registration document, then that  
24 individual is not subject to prosecution under the  
25 Federal statute, therefore, wouldn't be subject to



1 prosecution under the State statute.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 Mr. Clement.

4 General Verrilli?

5 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
6 ON BEHALF OF THE RESPONDENT

7 GENERAL VERRILLI: Mr. Chief Justice, and  
8 may it please the Court:

9 CHIEF JUSTICE ROBERTS: Before you get into  
10 what the case is about, I'd like to clear up at the  
11 outset what it's not about. No part of your argument  
12 has to do with racial or ethnic profiling, does it? I  
13 saw none of that in your brief.

14 GENERAL VERRILLI: That's correct.

15 CHIEF JUSTICE ROBERTS: Okay. So this is  
16 not a case about ethnic profiling.

17 GENERAL VERRILLI: We're not making any  
18 allegation about racial or ethnic profiling in the case.

19 Mr. Clement is working hard this morning to  
20 portray SB 1070 as an aid to Federal immigration  
21 enforcement. But the very first provision of the  
22 statute declares that Arizona is pursuing its own policy  
23 of attrition through enforcement and that the provisions  
24 of this law are designed to work together to drive  
25 unlawfully present aliens out of the State.

1                   That is something Arizona cannot do because  
2 the Constitution vests exclusive --

3                   JUSTICE SOTOMAYOR: General, could you  
4 answer Justice Scalia's earlier question to your  
5 adversary? He asked whether it would be the  
6 Government's position that Arizona doesn't have the  
7 power to exclude or remove -- to exclude from its  
8 borders a person who's here illegally.

9                   GENERAL VERRILLI: That is our position,  
10 Your Honor. It is our position because the Constitution  
11 vests exclusive authority over immigration matters with  
12 the national government.

13                  JUSTICE SCALIA: All that means, it gives  
14 authority over naturalization, which we've expanded to  
15 immigration. But all that means is that the Government  
16 can set forth the rules concerning who belongs in this  
17 country. But if, in fact, somebody who does not belong  
18 in this country is in Arizona, Arizona has no power?  
19 What does sovereignty mean if it does not include the  
20 ability to defend your borders?

21                  GENERAL VERRILLI: Your Honor, the Framers  
22 vested in the national government the authority over  
23 immigration because they understood that the way this  
24 nation treats citizens of other countries is a vital  
25 aspect of our foreign relations. The national

1 government, and not an individual State --

2 JUSTICE SCALIA: But it's still up to the  
3 national government. Arizona is not trying to kick out  
4 anybody that the Federal government has not already said  
5 do not belong here. And the Constitution provides --  
6 even -- even with respect to the Commerce Clause -- "No  
7 State shall without the consent of Congress lay any  
8 imposts or duties on imports or exports except," it  
9 says, "what may be absolutely necessary for executing  
10 its inspection laws."

11 The Constitution recognizes that there is  
12 such a thing as State borders and the States can police  
13 their borders, even to the point of inspecting incoming  
14 shipments to exclude diseased material.

15 GENERAL VERRILLI: But they cannot do what  
16 Arizona is seeking to do here, Your Honor, which is to  
17 elevate one consideration above all others. Arizona is  
18 pursuing a policy that maximizes the apprehension of  
19 unlawfully present aliens so they can be jailed as  
20 criminals in Arizona unless the Federal Government  
21 agrees to direct its enforcement resources to remove the  
22 people that Arizona has identified.

23 CHIEF JUSTICE ROBERTS: Well, if that state  
24 does -- well, that's a question of enforcement  
25 priorities.

1 Well, let's say that the government had a  
2 different set of enforcement priorities, and their  
3 objective was to protect to the maximum extent possible  
4 the borders; and, so anyone who is here illegally, they  
5 want to know about and they want to do something about,  
6 in other words, different than the current policy.

7 Does that mean in that situation the Arizona  
8 law would not be preemptive?

9 GENERAL VERRILLI: I think the mandatory  
10 character of the Arizona law and the mandatory character  
11 of the obligations it imposes, especially as backed by  
12 this extraordinary provision in section 2(H), which  
13 imposes civil penalties of up to \$5000 a day on any  
14 official in the State of Arizona who is not following  
15 section 2 or, as we read it, the rest of S.B. 1070, to  
16 the maximum extent possible, does create a conflict.

17 But I do think the most fundamental point  
18 about section 2 is to understand its relationship to the  
19 other provisions in the statute. Section 2 is in the  
20 statute to identify the class of people who Arizona is  
21 then committed to prosecute under section 3 and, if they  
22 are employed, also under section 5.

23 JUSTICE ALITO: Well, I have the same  
24 question as the Chief Justice. Suppose that the Federal  
25 Government changed its priorities tomorrow, and it

1 said -- they threw out the ones they have now, and they  
2 said the new policy is maximum enforcement, we want to  
3 know about every person who's stopped or arrested, we  
4 want to -- we want to their immigration status verified.  
5 Would the Arizona law then be un-preempted?

6 GENERAL VERRILLI: No, I think it's still a  
7 problem, Your Honor. These decisions have to be made at  
8 the national level because it's the national government  
9 and not -- it's the whole country and not an individual  
10 state that pays the price --

11 JUSTICE SCALIA: Do you have any example  
12 where -- where enforcement discretion has the effect of  
13 preempting state action?

14 GENERAL VERRILLI: Well, I think we should  
15 think about section 3 of the law, Your Honor. I think  
16 it will help illustrate the point --

17 JUSTICE SCALIA: I'll point out another case  
18 of ours where we've said that essentially the preemption  
19 of state law can occur, not by virtue of the Congress  
20 preempting, but because the Executive doesn't want this  
21 law enforced so -- so rigorously, and that preempts the  
22 state from enforcing it vigorously.

23 Do we have any cases --

24 GENERAL VERRILLI: I think the preemption  
25 here -- focusing for a moment on section 3 -- the

1   preemption here flows from judgments of Congress, from  
2   the registration system that Congress set up in sections  
3   1301 through 1306, from the decision of Congress in  
4   section 1103 in the law to vest the Secretary of DHS and  
5   the Attorney General with the authority to make the  
6   judgments about how this law is going to be enforced --

7                   JUSTICE SCALIA: Well, they do that with  
8   all Federal criminal statutes. And you acknowledge that  
9   as a general matter, states can enforce Federal criminal  
10  law, which is always entrusted to the Attorney General.

11                   GENERAL VERRILLI: They can make -- they can  
12  engage in detention in support of the enforcement of  
13  Federal law. That's what the OLC opinion from 2002  
14  says. It does not say that they can prosecute under  
15  Federal law and make their own decisions. That's a far  
16  different matter.

17                   And it really goes to the heart, I think, of  
18  what's wrong with section 3 of this Act, in that --

19                   CHIEF JUSTICE ROBERTS: Well, but you say  
20  that the Federal Government has to have control over who  
21  to prosecute, but I don't see how Section 2(B) says  
22  anything about that at all. All it does is notify the  
23  Federal Government, here's someone who is here  
24  illegally, here's someone who is removable. The  
25  discretion to prosecute for Federal immigration offenses

1 rests entirely with the Attorney General.

2 GENERAL VERRILLI: That's correct, but with  
3 respect to -- and let me address something fundamental  
4 about section 2. That is true, but I think it doesn't  
5 get at the heart of the problem here.

6 Section 1 of this statute says that  
7 sections 2 and 3 and 5 are supposed to work together to  
8 achieve this policy of attrition through enforcement.  
9 And so what section 2 does is identify a population that  
10 the State of Arizona is going to prosecute under section  
11 3 and section 5.

12 CHIEF JUSTICE ROBERTS: Right. So apart  
13 from section 3 and section 5, take those off the table,  
14 you have no objection to section 2.

15 GENERAL VERRILLI: We do, Your Honor; but,  
16 before I take 3 and 5 off the table, if I could make one  
17 more point about 3 and 5, please. The -- I think --  
18 because I think it's important to understand the dilemma  
19 that this puts the Federal Government in.

20 Arizona has got this population, and  
21 they've -- and they're by law committed to maximum  
22 enforcement. And so the Federal Government's got to  
23 decide, are we going to take our resources, which we  
24 deploy for removal, and are we going to use them to deal  
25 with this population, even if it is to the detriment of

1 our priorities --

2 CHIEF JUSTICE ROBERTS: Exactly. The  
3 Federal Government has to decide where it's going to use  
4 its resources.

5 And what the state is saying, here are  
6 people who are here in violation of Federal law, you  
7 make the decision. And if your decision is you don't  
8 want to prosecute those people, fine, that's entirely up  
9 to you.

10 That's why I don't see the problem with  
11 section 2(B).

12 GENERAL VERRILLI: Here's the other  
13 half -- here's the other half of the equation, Mr. Chief  
14 Justice, which is that they say if you're not going to  
15 remove them, we are going to prosecute them. And that  
16 means that the -- and I think this does get at the heart  
17 of why this needs to be an exclusive national power --

18 CHIEF JUSTICE ROBERTS: Only under section 3  
19 and section 5.

20 GENERAL VERRILLI: Yes, but those are -- but  
21 what you're talking about is taking somebody whose only  
22 offense is being unlawfully present in the country and  
23 putting them in jail for up to 6 months, or somebody  
24 who --

25 CHIEF JUSTICE ROBERTS: Well, let's



1 say you're worried about --

2 GENERAL VERRILLI: -- or like 30 days,  
3 forgive me; 6 months for employment.

4 CHIEF JUSTICE ROBERTS: There you go.  
5 Right. For the notification, what could possibly be  
6 wrong if Arizona arrests someone, let's say for drunk  
7 driving, and their policy is you're going to stay in  
8 jail overnight no matter what, okay, what's wrong during  
9 that period by having the Arizona arresting officer say,  
10 I'm going to call the Federal agency and find out if  
11 this person is here illegally, because the Federal law  
12 says the Federal agency has to answer my question?

13 It seems an odd argument to say the Federal  
14 agency has to answer the state's question, but the state  
15 can't ask it.

16 GENERAL VERRILLI: Well, we're not saying  
17 the state can't ask it in any individual case. We  
18 recognize that section --

19 CHIEF JUSTICE ROBERTS: You think there are  
20 individual cases in which the state can call the Federal  
21 Government and say: Is this person here illegally?

22 GENERAL VERRILLI: Yes, certainly, but that  
23 doesn't make --

24 CHIEF JUSTICE ROBERTS: Okay. So doesn't  
25 that defeat the facial challenge to the Act?

1                   GENERAL VERRILLI: No. I don't think so,  
2 Mr. Chief Justice, because the -- I think the problem  
3 here is in that -- is in every circumstance as a result  
4 of section 2(B) of the law, backed by the penalties of  
5 section 2(H), the state official must pursue the  
6 priorities that the state has set, irrespective of  
7 whether they are helpful to or in conflict with the  
8 Federal priorities.

9                   And so --

10                  JUSTICE ALITO: Well, suppose that  
11 every -- suppose every law enforcement officer in  
12 Arizona saw things exactly the same way as the Arizona  
13 legislature. And so, without any direction from the  
14 legislature, they all took it upon themselves to make  
15 these inquiries every time they stopped somebody or  
16 arrested somebody.

17                  Would that be a violation of Federal law?

18                  GENERAL VERRILLI: No, it wouldn't be,  
19 Your Honor, because in that situation they would be free  
20 to be responsive to Federal priorities, if the Federal  
21 officials came back to them and said, look, we need to  
22 focus on gangs, we need to focus on this drug problem at  
23 the border --

24                  JUSTICE ALITO: But what if they said, well,  
25 we don't care what your priorities are; we have our

1 priorities, and our priority is maximum enforcement, and  
2 we're going to call you in every case? It was all done  
3 on an individual basis, all the officers were  
4 individually doing it --

5 GENERAL VERRILLI: Yes, well --

6 JUSTICE ALITO: -- that would be okay?

7 GENERAL VERRILLI: Well, if there's a -- if  
8 there's a state policy locked into law by statute,  
9 locked into law by regulation, then we have a problem.  
10 If it's not --

11 JUSTICE SOTOMAYOR: General --

12 GENERAL VERRILLI: -- I mean, the line is  
13 mandatory versus discretionary --

14 JUSTICE ALITO: That's what I can't  
15 understand because your argument -- you seem to be  
16 saying that what's wrong with the Arizona law is that  
17 the Arizona legislature is trying to control what its  
18 employees are doing, and they have to be free to  
19 disregard the desires of the Arizona legislature, for  
20 whom they work, and follow the priorities of the Federal  
21 Government, for whom they don't work.

22 GENERAL VERRILLI: But they -- but with  
23 respect to immigration enforcement, and to the extent  
24 all they're doing is bringing people to the Federal  
25 Government's attention, they are cooperating in the

1 enforcement of Federal law --

2 JUSTICE KENNEDY: But the hypothetical is  
3 that that's all the legislature is doing.

4 GENERAL VERRILLI: Well, except I think,  
5 Justice Kennedy, the problem is that it's not  
6 cooperation if in every instance the officers in the  
7 state must respond to the priorities set by the state  
8 government and are not free to respond to the priorities  
9 of the Federal officials who are trying to enforce the  
10 law in the most effective manner possible.

11 JUSTICE SOTOMAYOR: I'm sorry. I'm a little  
12 confused. General, I'm terribly confused by your  
13 answer. Okay? And I don't know that you're focusing in  
14 on what I believe my colleagues are trying to get to.

15 Making the -- 2(B) has two components, as I  
16 see it. Every person that's suspected of being an alien  
17 who's arrested for another crime -- that's what  
18 Mr. Clement says the statute means -- the officer has to  
19 pick up the phone and call -- and call the agency to  
20 find out if it's an illegal alien or not.

21 He tells me that unless there's another  
22 reason to arrest the person -- and that's 3 and 6, or  
23 any of the other provisions -- but putting those aside,  
24 we're going to stay just in 2(B), if the government  
25 says, we don't want to detain the person, they have to

1 be released for being simply an illegal alien, what's  
2 wrong with that?

3 GENERAL VERRILLI: Well --

4 JUSTICE SOTOMAYOR: Taking out the other  
5 provisions, taking out any independent state-created  
6 basis of liability for being an illegal alien?

7 GENERAL VERRILLI: I think there are three.  
8 The first is the -- the Hines problem of harassment.

9 Now, we are not making an allegation of  
10 racial profiling; nevertheless, there are already tens  
11 of thousands of stops that result in inquiries in  
12 Arizona, even in the absence of S.B. 1070. It stands to  
13 reason that the legislature thought that that wasn't  
14 sufficient and there needed to be more.

15 And given that you have a population in  
16 Arizona of 2 million Latinos, of whom only 400,000 at  
17 most are there unlawfully --

18 JUSTICE SCALIA: Sounds like racial  
19 profiling to me.

20 GENERAL VERRILLI: And they're -- and given  
21 that what we're talking about is the status of being  
22 unlawfully present --

23 JUSTICE SOTOMAYOR: Do you have the  
24 statistics as to how many arrests there are and how  
25 many -- and what the -- percentage of calls before the

1 statute?

2                   GENERAL VERRILLI: There is some evidence in  
3 the record, Your Honor. It's the -- the Palmatier  
4 declaration, which is in the Joint Appendix, was the --  
5 he was the fellow who used the run the Law Enforcement  
6 Support Center, which answers the inquiries. That --  
7 that declaration indicates that in fiscal year 2009,  
8 there were 80,000 inquiries and --

9                   JUSTICE SCALIA: What does this have to do  
10 with Federal immigration law? I mean, it may have to do  
11 with racial harassment, but I thought you weren't  
12 relying on that.

13                   GENERAL VERRILLI: The --

14                   JUSTICE SCALIA: Are you objecting to  
15 harassing the -- the people who have no business being  
16 here? Is that -- surely you're not concerned about  
17 harassing them. They have been stopped anyway, and all  
18 you're doing is calling up to see if they are illegal  
19 immigrants or not.

20                   So you must be talking about other people  
21 who have nothing to do with -- with our immigration  
22 laws. Okay? Citizens and -- and other people, right?

23                   GENERAL VERRILLI: And other -- and other  
24 people lawfully present in the country, certainly, but  
25 this is --

1 JUSTICE SCALIA: But that has nothing to do  
2 with the immigration law --

3 GENERAL VERRILLI: Hines is --

4 JUSTICE SCALIA: -- which is what you're  
5 asserting preempts all of this activity.

6 GENERAL VERRILLI: Hines identified this  
7 problem as harassment as -- as a central feature of  
8 preemption under the immigration laws because of the  
9 concern that the way this nation treats citizens of  
10 other countries is fundamental to our foreign relations.  
11 And this is a --

12 JUSTICE BREYER: Well, let's -- let me just  
13 go back, because I think -- I'm trying to get focused  
14 the question I think others are asking, and one way to  
15 focus it is the same question I asked Mr. Clement.

16 Think of 2(B), the first sentence. All  
17 right?

18 Now, I can think -- I'm not saying they are  
19 right, but if that means you're going to hold an  
20 individual longer than you would have otherwise, I can  
21 think of some arguments that it is preempted, and some  
22 replies. So keep that out of it.

23 Suppose that we were to say, that sentence,  
24 as we understand it, does not raise a constitutional  
25 problem as long as it is interpreted to mean that the

1 policeman, irrespective of what answer he gets from ICE,  
2 cannot detain the person for longer than he would have  
3 done in the absence of this provision.

4 Now, in your view, is there any preemption  
5 exemption -- argument against -- any preemption argument  
6 against that sentence as I have just interpreted it? I  
7 don't know what your answer is, and that's why I'm  
8 asking.

9 GENERAL VERRILLI: Yes. We would think it  
10 would ameliorate --

11 JUSTICE BREYER: And if so, what?

12 GENERAL VERRILLI: -- it would ameliorate  
13 the practical problem; but, there is still a structural  
14 problem here in that this is an effort to enforce  
15 Federal law. And the -- under the Constitution, it's  
16 the President and the Executive Branch that are  
17 responsible for the enforcement of Federal law --

18 CHIEF JUSTICE ROBERTS: It is --

19 GENERAL VERRILLI: -- and --

20 CHIEF JUSTICE ROBERTS: It is not an effort  
21 to enforce Federal law. It is an effort to let you know  
22 about violations of Federal law. Whether or not to  
23 enforce them is still entirely up to you.

24 If you don't want to do this, you just tell  
25 the person at LESC -- if that's the right -- is that the



1 right acronym?

2 GENERAL VERRILLI: It is, Mr. Chief Justice.

3 CHIEF JUSTICE ROBERTS: -- LESC, look, when  
4 somebody from Arizona calls, answer their question, and  
5 don't even bother to write it down. Okay? I stopped  
6 somebody else, is he legal or illegal, let me check --  
7 it's, oh, he's illegal. Okay, thanks, good-bye.

8 I mean, why -- it is still your decision.  
9 And if you don't want to know who is in this country  
10 illegally, you don't have to.

11 GENERAL VERRILLI: That's correct. But the  
12 process of -- the process of cooperating to enforce the  
13 Federal immigration law starts earlier, and it starts  
14 with the process of making the decisions about who to --  
15 who to stop, who to apprehend, who to check on.

16 And the problem -- the structural problem we  
17 have is that those decisions -- in the making of those  
18 decisions, Arizona officials are not free --

19 CHIEF JUSTICE ROBERTS: Under 2(B), the  
20 person is already stopped for some other reason. He's  
21 stopped for going 60 in a 20. He's stopped for drunk  
22 driving. So that decision to stop the individual has  
23 nothing to do with immigration law at all. All that has  
24 to do with immigration law is the -- whether or not they  
25 can ask the Federal Government to find out if this

1 person is illegal or not, and then leave it up to you.

2 It seems to me that the Federal Government  
3 just doesn't want to know who is here illegally or not.

4 GENERAL VERRILLI: No, I -- I don't think  
5 that's right. I think we want to be able to cooperate  
6 and focus on our priorities.

7 And one thing that's instructive in that  
8 regard, Mr. Chief Justice, are the declarations put into  
9 the record by the police chiefs from Phoenix and Tucson,  
10 both of whom I think explain effectively why S.B. -- the  
11 section 2(B) obligation gets in the way of the mutual  
12 effort to -- to focus on the priorities of identifying  
13 serious criminals so that they can be removed from the  
14 country.

15 JUSTICE SCALIA: Anyway, what -- what's  
16 wrong about the states enforcing Federal law? There is  
17 a Federal law against robbing Federal banks. Can it be  
18 made a state crime to rob those banks? I think it is.

19 GENERAL VERRILLI: I think it could, but I  
20 think that's quite --

21 JUSTICE SCALIA: But does the Attorney  
22 General come in and say, you know, we might really only  
23 want to go after the professional bank robbers? If it's  
24 just an amateur bank robber, you know, we're -- we're  
25 going the let it go. And the state's interfering with

1 our -- with our whole scheme here because it's  
2 prosecuting all these bank robbers.

3 GENERAL VERRILLI: Well, of course, no one  
4 would --

5 JUSTICE SCALIA: Now, would anybody listen  
6 to that argument?

7 GENERAL VERRILLI: Of course not.

8 JUSTICE SCALIA: Of course not.

9 GENERAL VERRILLI: But this argument is  
10 quite different, Justice Scalia, because here what we  
11 are talking about is that Federal registration  
12 requirement in an area of dominant Federal concern,  
13 exclusive Federal concern with respect to immigration,  
14 who can be in the country, under what circumstances, and  
15 what obligations they have --

16 JUSTICE KENNEDY: Now, are you talking about  
17 3 now or --

18 GENERAL VERRILLI: Yes.

19 JUSTICE KENNEDY: -- or does this argument  
20 relate to 2 as well?

21 GENERAL VERRILLI: This is an argument about  
22 section 3.

23 JUSTICE ALITO: Well, could I ask you this  
24 about 2, before you move on to that? How is a -- this  
25 is just a matter of information. How can a state

1 officer who stops somebody or who arrests somebody for a  
2 nonimmigration offense tell whether that person falls  
3 within the Federal removal priorities without making an  
4 inquiry to the Federal Government?

5 For example, I understand one of the  
6 priorities is people who have previously been removed,  
7 then that might be somebody who you would want to arrest  
8 and -- and remove. But how can you determine that  
9 without making the -- the inquiry in the first place?

10 GENERAL VERRILLI: Well, in any individual  
11 case, that's correct. You -- you would need to make the  
12 inquiry in the first place. It won't always be correct,  
13 if you're arresting somebody based on probable cause  
14 that they have committed a serious crime, and they --  
15 and they -- the inquiry into whether -- into their  
16 status will be enough to identify that person for  
17 priority --

18 JUSTICE ALITO: Well, what if they just,  
19 they stop somebody for a traffic violation, but they  
20 want to know whether this is a person who previously was  
21 removed and has come back or somebody who has just --  
22 just within the last few hours possibly come -- well,  
23 let's just -- somebody who's previously been removed?  
24 How can you know that without making an inquiry?

25 GENERAL VERRILLI: Well, I think -- I think

1 it's correct that you can't, but there is a -- there is  
2 difference, Justice Alito, I think, between the question  
3 of any individual circumstance and a mandatory policy  
4 backed by this civil fine, that you've got to make the  
5 inquiry in every case.

6 I mean, I think it's as though, if I can use  
7 an analogy, if you ask one of your law clerks to bring  
8 you the most important preemption cases from the last 10  
9 years, and they rolled in the last -- the last hundred  
10 volumes of the U.S. Reports and said, well, they are in  
11 there. That -- that doesn't make it --

12 CHIEF JUSTICE ROBERTS: What if they just  
13 rolled in Whiting?

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: That's a pretty good  
16 one.

17 JUSTICE BREYER: Look, in the Federal  
18 statute, it says in 1373 that nobody can prohibit or  
19 restrict any government entity from making this inquiry  
20 of the Federal Government. And then it says that the  
21 Federal Government has -- any agency -- and then it says  
22 the Federal has an obligation to respond.

23 Now, assuming the statute were limited as I  
24 say, so nothing happened to this individual, nothing  
25 happened to the person who's stopped that wouldn't have

1 happened anyway, all that happens is the person -- the  
2 policeman makes a phone call. Now that's what I'm  
3 trying to get at.

4 If that were the situation, and we said it  
5 had to be the situation, then what in the Federal  
6 statute would that conflict with, where we have two  
7 provisions that say any policeman can call?

8 GENERAL VERRILLI: So --

9 JUSTICE BREYER: What's the -- that's --  
10 that's where I'm trying to push you.

11 GENERAL VERRILLI: Yes.

12 JUSTICE BREYER: Because in my mind I'm not  
13 clear what your answer is to that.

14 GENERAL VERRILLI: I understand the  
15 question. And I think the answer is this: 1373 was  
16 enacted in 1996, along with 1357. And 1357 is the  
17 provision that sets forth the powers and authorities of  
18 Federal immigration officials.

19 It contains 1357(g), which effectively says  
20 that Federal -- that the Federal Government, the  
21 Attorney General, can deputize state officials, so long  
22 as they're -- they obtain adequate training and they are  
23 subject to the direction and control of the Attorney  
24 General in carrying out immigration functions.

25 Then the last provision, (g)(10), says that

1 nothing that we've said so far should be read to  
2 preclude informal cooperation, communication or other  
3 informal cooperation in the apprehension, detention and  
4 removal of unlawfully present persons; but, it's the  
5 focus on cooperation.

6           And I think you have to -- so I don't think  
7 you can read into 1373 the -- the conclusion that what  
8 Congress was intending to do was to shift from the  
9 Federal government to the states the authority to set  
10 enforcement priorities, because I think the cooperation  
11 in this context is cooperation in the service of the  
12 Federal enforcement.

13           JUSTICE SOTOMAYOR: Can I get to a different  
14 question? I think even I or someone else cut you off  
15 when you said there were three reasons why -- 2(B).

16           Putting aside your argument that this --  
17 that a systematic cooperation is wrong -- you can see  
18 it's not selling very well -- why don't you try to come  
19 up with something else?

20           Because I, frankly -- as the chief has said  
21 to you, it's not that it's forcing you to change your  
22 enforcement priorities. You don't have to take the  
23 person into custody. So what's left of your argument?

24           GENERAL VERRILLI: So let me just summarize  
25 what I think the three are, and then maybe I can move on

1 to sections 3 and 5.

2 With respect to -- with respect to 2, we  
3 think the harassment argument -- we think this is a more  
4 significant harassment problem than was present in  
5 Hines --

6 JUSTICE SOTOMAYOR: Please move --

7 GENERAL VERRILLI: With respect to -- in  
8 addition, we do think that there is a structural  
9 accountability problem in that they are enforcing  
10 Federal law but not answerable to the Federal officials.

11 And third, we do think there are practical  
12 impediments, in that the -- the result of this is to  
13 deliver to the Federal system a volume of inquiries that  
14 makes it harder and not easier to identify who the  
15 priority persons are for removal.

16 So those are the three reasons.

17 CHIEF JUSTICE ROBERTS: General, you have  
18 been trying valiantly to get us to focus on section 3,  
19 so maybe we should let you do that now.

20 GENERAL VERRILLI: Thank you, Mr. Chief  
21 Justice.

22 The -- I do think the key thing about  
23 section 3 is that we -- is that section 3 is purporting  
24 to enforce a federal registration requirement. That's a  
25 relationship between the alien and the United States



1 government that's exclusively a Federal relationship.  
2 It's governed by the terms of 1301 through 1306.

3 And the way in which those terms are  
4 enforced does have very significant Federal interest at  
5 its heart, and there is no state police power interest  
6 in that Federal registration relationship.

7 And I do think -- I think it's very  
8 important -- Justice Alito raised the question of these  
9 categories of people. I think it is quite important to  
10 get clarity on that.

11 The -- if you are -- if you have come into  
12 the country unlawfully, but you have a pending  
13 application for asylum, a pending application for  
14 temporary protective status because you would have to be  
15 removed to a country to which you can't be removed  
16 because of the conditions in the country, if you have a  
17 valid claim for relief under the Violence Against Women  
18 Act based on your treatment, if you have a valid claim  
19 for relief because you are a victim of human  
20 trafficking, if you have a valid claim for relief  
21 because you are the victim of a crime or a witness to a  
22 crime, all of those persons are in technical violation  
23 of 1306(a).

24 And -- and it seems to me they -- they are  
25 in violation of 1306(a), so my friend, Mr. Clement, is

1 not correct in saying that those are people who aren't  
2 in violation of 1306(a) and, therefore, aren't in  
3 violation of section 3. They are in violation.

4 JUSTICE SCALIA: Well, maybe 1306(a) ought  
5 to be amended, then. I mean, we have statutes out there  
6 that there a lot of people in violation of it and --  
7 well, the Attorney General will take care of it. Is  
8 that how we write our criminal laws?

9 GENERAL VERRILLI: But it's a situation in  
10 which no reasonable person would think that  
11 the individual ought to be prosecuted; and, yet, very  
12 often, the states aren't even going to know. In fact,  
13 about asylum status, they can't know because there are  
14 regulations that require that to be kept private to  
15 avoid retaliation against the person making the  
16 application.

17 And so, this is -- so this is -- this is, I  
18 think, a very strong illustration of why the enforcement  
19 discretion over section 3 needs to be vested exclusively  
20 in the Federal Government.

21 JUSTICE SCALIA: Again, I ask you, do you  
22 have any other case in which the basis for preemption  
23 has been you are interfering with the Attorney General's  
24 enforcement discretion?

25 GENERAL VERRILLI: Well, this is --

1 JUSTICE SCALIA: I think that's an  
2 extraordinary basis for saying that the state is  
3 preempted.

4 GENERAL VERRILLI: I think what is  
5 extraordinary about this, actually, Justice Scalia, is  
6 the state's decision to enact a statute purporting to  
7 criminalize the violation of a Federal registration  
8 obligation. And I think that's the problem here. And  
9 they are doing it for a reason --

10 JUSTICE SCALIA: It's not criminalizing  
11 anything that isn't criminal under Federal law.

12 GENERAL VERRILLI: But -- but what --

13 JUSTICE SCALIA: It's the bank. It's the  
14 Federal bank example --

15 GENERAL VERRILLI: Well, no.

16 JUSTICE SCALIA: -- a state law which  
17 criminalizes the same thing that the Federal law does.

18 GENERAL VERRILLI: I think it's quite  
19 different.

20 What they are doing here is using 1306(a) to  
21 get at the status of unlawful presence. The only people  
22 who can be prosecuted under section 3 are people who are  
23 unlawfully present in the country. That's what the  
24 statute says. And they are using it to get at that  
25 category of people to essentially use their state

1 criminal law to perform an immigration function.

2 And the immigration function is to try to --  
3 to prosecute these people. And, by the way, you can  
4 prosecute somebody, they can be put in jail for 30 days  
5 here; but, under Federal law, a violation of 1306(a) is  
6 a continuing offense. So, the day they get out of jail  
7 for that 30 days, they can be arrested again, and this  
8 can happen over and over again. And the point of this  
9 provision is to drive unlawfully present people out of  
10 the State of Arizona.

11 JUSTICE KENNEDY: Suppose -- suppose --  
12 well, assume these are two hypothetical -- two  
13 hypothetical instances.

14 First, the Federal government has said, we  
15 simply don't have the money or the resources to enforce  
16 our immigration laws the way we wish. We wish we could  
17 do so, but we don't have the money or the resources.  
18 That's the first -- just hypothetical.

19 JUSTICE SCALIA: You said that in your  
20 brief, didn't you?

21 JUSTICE KENNEDY: Also hypothetical is that  
22 the State of Arizona has -- has a massive emergency with  
23 social disruption, economic disruption, residents  
24 leaving the State because of flood of immigrants. Let's  
25 just assume those two things.

1 Does that give the State of Arizona any  
2 powers or authority or legitimate concerns that any  
3 other state wouldn't have?

4 GENERAL VERRILLI: Of course, they have  
5 legitimate concerns in that situation. And, Justice  
6 Kennedy --

7 JUSTICE KENNEDY: And can they go to their  
8 legislature and say, we're concerned about this, and ask  
9 the legislature to enact laws to correct this problem?

10 GENERAL VERRILLI: They -- they certainly  
11 can enact laws of general application. They can enforce  
12 the laws of general application that are on the books.  
13 They already -- as a result of 8 U.S.C. 1621, it's clear  
14 that they are under no obligation to provide any state  
15 benefits to the population.

16 But I think, most importantly, they can --  
17 and -- not most importantly, but as importantly, they  
18 can engage in cooperative efforts with the Federal  
19 government --

20 Excuse me. I see my --

21 CHIEF JUSTICE ROBERTS: No, keep going.

22 GENERAL VERRILLI: They can -- they can  
23 engage in cooperative efforts with the Federal  
24 government, of which there are many going on in Arizona  
25 and around the country, in order to address these

1 problems.

2 JUSTICE SCALIA: General, didn't you say in  
3 your brief -- I forget where it was -- I thought you  
4 said that the Justice Department doesn't get nearly  
5 enough money to enforce our immigration laws? Didn't  
6 you say that?

7 GENERAL VERRILLI: Of course, we have to set  
8 priorities. There are only --

9 JUSTICE SCALIA: Exactly. Okay.

10 So the state says, well, that may be your  
11 priorities, but most of these people that you're not  
12 going after, or an inordinate percentage of them, are  
13 here in our state, and we don't like it. They are  
14 causing all sorts of problems. So we're going to help  
15 you enforce Federal law. We're not going to do anything  
16 else. We're just enforcing Federal law.

17 GENERAL VERRILLI: Well, what I think they  
18 are going to do in Arizona is something quite  
19 extraordinary, that has significant real and practical  
20 foreign relations effects. And that's the problem, and  
21 it's the reason why this power needs to be vested  
22 exclusively in the Federal government.

23 What they are going to do is engage,  
24 effectively, in mass incarceration, because the  
25 obligation under section 2(H), of course, is not merely

1 to enforce section 2 to the fullest possible extent at  
2 the -- at the risk of civil fine, but to enforce Federal  
3 immigration law, which is what they claim they are doing  
4 in section 3 and in section 5.

5 And so -- so, you're going to have a  
6 situation of mass incarceration of people who are  
7 unlawfully present. That is going to raise -- poses a  
8 very serious risk of raising significant foreign  
9 relations problems.

10 And these problems are real. It is the  
11 problem of reciprocal treatment of the  
12 United States citizens in other countries.

13 JUSTICE KENNEDY: So you're saying the  
14 government has a legitimate interest in not enforcing  
15 its laws?

16 GENERAL VERRILLI: No. We have a legitimate  
17 interest in enforcing the law, of course, but it needs  
18 to be -- but these -- this Court has said over and over  
19 again, has recognized that the -- the balance of  
20 interest that has to be achieved in enforcing the -- the  
21 immigration laws is exceedingly delicate and complex,  
22 and it involves consideration of foreign relations, it  
23 involves humanitarian concerns, and it also involves  
24 public order and public --

25 JUSTICE SOTOMAYOR: General, when -- when --

1 I know your brief, you had -- you said that there are  
2 some illegal aliens who have a right to remain here.  
3 And I'm just realizing that I don't really know what  
4 happens when the Arizona police call the Federal agency.

5 They give the Federal agency a name,  
6 correct?

7 GENERAL VERRILLI: I assume so, yes.

8 JUSTICE SOTOMAYOR: You don't really have  
9 knowledge of what --

10 GENERAL VERRILLI: Well, they -- I mean, it  
11 can come in lots of different ways, but generally they  
12 will get a name and some other identifying information.

13 JUSTICE SOTOMAYOR: All right. And what  
14 does the computer have? What information does your  
15 system have?

16 GENERAL VERRILLI: Yes. So the way this  
17 works is there is a system for -- for incoming  
18 inquiries. And then there is a person at a computer  
19 terminal. And that person searches a number of  
20 different databases. There are eight or ten different  
21 databases, and that person will check the name against  
22 this one, check the name against that one, check the  
23 name against the other one, to see if there are  
24 any hits.

25 JUSTICE SOTOMAYOR: Well, how does that



1 database tell you that someone is illegal as opposed to  
2 a citizen?

3 Today, if you use the names Sonya Sotomayor,  
4 they would probably figure out I was a citizen. But  
5 let's assume it's John Doe, who lives in Grand Rapids.  
6 So they are legal. Is there a citizen database?

7 GENERAL VERRILLI: The citizen problem is  
8 actually a significant problem. There isn't a citizen  
9 database. If you --

10 JUSTICE SOTOMAYOR: I'm sorry, there is or  
11 there isn't?

12 GENERAL VERRILLI: There is not. If you  
13 have a passport, there is a database if you look  
14 "passports." So you could be discovered that way. But  
15 otherwise there is no reliable way in the database to  
16 verify that you are a citizen unless you are in the  
17 passport database. So you have lots of circumstances in  
18 which people who are citizens are going to come up no  
19 match. There's no -- there is nothing suggesting in the  
20 databases that they have an immigration problem of any  
21 kind, but there's nothing to --

22 JUSTICE SOTOMAYOR: So if you run out of  
23 your house without your driver's license or  
24 identification and you walk into a park that's closed  
25 and you're arrested, you -- they make the call to this

1 agency. You could sit there forever while they --

2 GENERAL VERRILLI: Yes, and I --

3 JUSTICE SOTOMAYOR: Figure out if you're --

4 GENERAL VERRILLI: While I'm at it, there is  
5 a factual point I think I'd like to correct.

6 Mr. Clement suggested that it takes 10 minutes to  
7 process these calls. That's true, but you're in a queue  
8 for 60 minutes before it takes the 10 minutes to process  
9 the call. So the average time is 70 minutes, not 10  
10 minutes.

11 CHIEF JUSTICE ROBERTS: I had a little --  
12 wasn't sure about your answer to Justice Kennedy.

13 Is the reason that the government is not  
14 focused on people who are here illegally as opposed to  
15 the other categories we were talking about because of  
16 prioritization or because of lack of resources?

17 You suggested that if the -- every illegal  
18 alien that you identify is either removed or prosecuted,  
19 that that would cause tensions with other governments.  
20 So I -- I don't understand if it's because you don't  
21 have enough resources or because you don't want to  
22 prosecute the people who are simply here illegally as  
23 opposed to something else.

24 GENERAL VERRILLI: Well, it's a little more  
25 complicated than that. I think the point is this, that

1 with respect to persons who are unlawfully present,  
2 there are some who are going to fall in our priority  
3 categories, there are those who have committed serious  
4 offenses, there are those who have been removed and have  
5 come back, and there are other priority categories.

6 Because we have resource constraints and  
7 there are only so many beds in the detention centers and  
8 only so many immigration judges, we want to focus on  
9 those priority categories, find them, remove them.

10 There is a second category, and that is,  
11 individuals who are here in violation technically of  
12 1306(a), but who have a valid asylum application or  
13 application for temporary protected status or other --  
14 and with respect to those persons that we think would --  
15 it's affirmatively harmful to think that they ought to  
16 be prosecuted.

17 And then there is an additional category of  
18 people who are not in the second category and not  
19 priorities and the form -- and we think there, the idea  
20 that an individual State will engage in a process of  
21 mass incarceration of that population, which we do think  
22 is what section 2(H) commits Arizona to do under section  
23 3, raises a significant foreign relations problem.

24 JUSTICE SCALIA: Well, can't you avoid that  
25 particular foreign relations problem by simply deporting

1 these people? Look, free them from the jails --

2 GENERAL VERRILLI: I really think --

3 JUSTICE SCALIA: And send them back to the  
4 countries that are -- that are objecting.

5 GENERAL VERRILLI: This is a --

6 JUSTICE SCALIA: What's the problem with  
7 that?

8 GENERAL VERRILLI: Well, a couple of things.  
9 First is, I don't think it's realistic to assume that  
10 the aggressive enforcement of sections 3 and 5 in  
11 Arizona is going to lead to a mass migration back to  
12 countries of origin. It seems a far more likely outcome  
13 is going to be migration to other States. And that's a  
14 significant problem. That's part of the reason why this  
15 problem needs to be managed on a national basis.

16 Beyond that, I do think, you know, the --  
17 it's worth bearing in mind here that the country of  
18 Mexico is in a central role in this situation. Between  
19 60 and 70 percent of the people that we remove every  
20 year, we remove to Mexico. And in addition, we have to  
21 have the cooperation of the Mexicans. And I think as  
22 the Court knows from other cases, the cooperation of the  
23 country to whom we are -- to which we are removing  
24 people who are unlawfully present is vital to be able to  
25 make removal work.

1           In addition, we have very significant issues  
2 on the border with Mexico. And in fact, they are the  
3 very issues that Arizona is complaining about in that --

4           JUSTICE SCALIA: So we have to -- we have to  
5 enforce our laws in a manner that will please Mexico.  
6 Is that what you're saying?

7           GENERAL VERRILLI: No, Your Honor, but what  
8 it does -- no, Your Honor, I'm not saying that --

9           JUSTICE SCALIA: Sounded like what you were  
10 saying.

11           GENERAL VERRILLI: No, but what I am saying  
12 is that this points up why the Framers made this power  
13 an exclusive national power. It's because the entire  
14 country feels the effects of a decision -- conduct by an  
15 individual State. And that's why the power needs to be  
16 exercised at the national level and not the State level.

17           CHIEF JUSTICE ROBERTS: And your concern is  
18 the problems that would arise in bilateral relations if  
19 you remove all of these people, or a significant  
20 percentage or a greater percentage than you are now.  
21 Nothing in the law requires you to do that. All it does  
22 is lets you know where -- that an illegal alien has been  
23 arrested, and you can decide, we are not going to  
24 initiate removal proceedings against that individual.  
25 It doesn't require you to remove one more person than

1 you would like to remove under your priorities.

2 GENERAL VERRILLI: Right, but the problem  
3 I'm focused on -- we're focused on, Mr. Chief Justice,  
4 is not our removal decisions, but Arizona's decision to  
5 incarcerate, and the foreign relations problem that that  
6 raises. That's why this power has got to be exercised  
7 at the national level.

8 CHIEF JUSTICE ROBERTS: And that arises  
9 under 3 and 5.

10 GENERAL VERRILLI: Correct.

11 CHIEF JUSTICE ROBERTS: But not 2.

12 GENERAL VERRILLI: Well, 2 identifies the  
13 population that's going to be prosecuted under 3 and 5.

14 I haven't -- I've been up here a long time.  
15 I haven't said anything about section 5 yet. And I  
16 don't want to tax the Court's patience, but if I could  
17 spend a minute on section 5.

18 CHIEF JUSTICE ROBERTS: Section 5.

19 GENERAL VERRILLI: The -- I do think the  
20 fundamental point about section 5 here is that in 1986,  
21 Congress fundamentally changed the landscape. Congress  
22 made a decision in 1986 to make the employment of aliens  
23 a central concern of national immigration policy. And  
24 this Court has described the 1986 law as a comprehensive  
25 regime.

1                   Now, what my friend, Mr. Clement, says, is  
2                   that it may be a comprehensive regime for employers;  
3                   it's not a comprehensive regime for employees. And  
4                   therefore, it's -- there ought not be any inference here  
5                   that the States are precluded from criminalizing efforts  
6                   to seek or obtain employment in Arizona.

7                   But I really think that's not right.  
8                   The -- employment is one problem. And Congress tackled  
9                   the problem of employment and made a decision, a  
10                  comprehensive decision, about the sanctions it thought  
11                  were appropriate to govern. And Congress did, as  
12                  Justice Ginsburg suggested, make judgments with respect  
13                  to the circumstances under which employees could be held  
14                  criminally liable, as well as the circumstances under  
15                  which employers could be held liable.

16                  And I think it is useful in thinking about  
17                  the judgments Congress actually made --

18                  JUSTICE SCALIA: So field preemption; is  
19                  that your argument with respect to --

20                  GENERAL VERRILLI: It's both. I think we're  
21                  making both a field and a conflict preemption argument  
22                  here, Justice Scalia. And the -- I think it's worth  
23                  examining the specific judgments Congress made in 1986.

24                  On the employer's side -- and, after all,  
25                  this is a situation in which the concern here is that

1 the employer is in a position of being the exploiter and  
2 the alien of being the exploited -- on the employer's  
3 side, Congress said that States may not impose criminal  
4 sanctions, and even -- and the Federal Government will  
5 not impose criminal sanctions for the hiring of  
6 employees unless there's a pattern or practice.

7           It seems quite incongruous to think that  
8 Congress, having made that judgment and imposed those  
9 restrictions on the employer's side, would have left  
10 States free to impose criminal liability on employees  
11 merely for seeking work, for doing what you I think  
12 would expect most otherwise law-abiding people to do,  
13 which is to find a job so they can feed their families.  
14 So I think that's a significant problem.

15           In addition, Congress made clear in the law  
16 that the I-9 form could not be used for any other  
17 purpose than prosecutions for violation of the Federal  
18 antifraud requirements. And if Congress wanted to leave  
19 States free to impose criminal sanctions on employees  
20 for seeking work, they wouldn't have done that, it seems  
21 to me.

22           So that I think there are strong indicators  
23 in the text that Congress did make a judgment, and the  
24 judgment was this far and no farther. And it's  
25 reasonable that Congress would have done so, for the



1 same kinds of foreign relations concerns that I was  
2 discussing with respect to section 3. It would be an  
3 extraordinary thing to put someone in jail merely for  
4 seeking work. And yet that's what Arizona proposes to  
5 do under section 5 of its law.

6 Now, of course, there is an express  
7 preemption provision, but the express preemption  
8 provision, as this Court has said many times, does not  
9 operate to the exclusion of implied preemption, field or  
10 conflict. So we do think those principles apply here.

11 We think there's a reason why the express  
12 preemption provision was limited to the employer's side,  
13 which is that after DeCanas laws had been enacted on the  
14 employer's side, and with -- Congress was making clear  
15 that those were preemptive, there were no laws on the  
16 employee's side at the time. And therefore, no reason  
17 for preemption.

18 CHIEF JUSTICE ROBERTS: Thank you, General.

19 GENERAL VERRILLI: Thank you, Mr. Chief  
20 Justice.

21 CHIEF JUSTICE ROBERTS: Mr. Clement,  
22 5 minutes.

23 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

24 ON BEHALF OF THE PETITIONERS

25 MR. CLEMENT: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 I'd like to start briefly with the  
3 enforcement issues and then talk about the other  
4 provisions. The last thing I'll say about the  
5 enforcement provision, since I do think that the  
6 Government's rather unusual theory that something that's  
7 okay when done ad hoc becomes preempted when it's  
8 systematic, I think that theory largely refutes itself.

9 But I will say one thing, which is to just  
10 echo that there is no interference with enforcement  
11 priorities by simply giving the Federal Government  
12 information on which to bring their enforcement  
13 priorities to bear. And this is really illustrated by a  
14 point this Court made in its Florence decision earlier  
15 this month, which is that sometimes you pull somebody  
16 over for the most innocuous of infractions and they turn  
17 out to be the most serious of offenders.

18 And so if you preclude officers, as happened  
19 in Phoenix, from communicating with the Federal  
20 Government, the Federal Government will not be able to  
21 identify the worst of the worst. And if you want an  
22 example of this, look at the declaration of Officer  
23 Brett Glidewell at Joint Appendix 183 to 186. He pulled  
24 somebody over in a routine traffic stop and was shot by  
25 the individual.

1                   Now, the individual it turns out was wanted  
2 for attempted murder in El Salvador and was also guilty  
3 of illegal reentry into the United States. He was  
4 stopped on three previous occasions and his status was  
5 not verified. Now, if it had been, he certainly would  
6 have been apprehended. In at least two of the stops,  
7 his immigration status wasn't checked because of the  
8 city policy, City of Phoenix.

9                   Now, if the State, I submit, can do  
10 anything, it can at the State level override those kind  
11 of local policies and say, that's not what we want.  
12 Community policing is all well and good, but we want to  
13 maximize communication with the Federal authorities. So  
14 I think the enforcement policy and priorities argument  
15 simply doesn't work.

16                   As to section 3, two points about that. One  
17 is, I respectfully disagree with the Solicitor General  
18 as to whether the various things that he led off -- read  
19 off, the litany of situations where somebody is --  
20 technically doesn't have registration would be a  
21 violation of 1306(a).

22                   And the reason I take that position is that  
23 provision says a willful failure to register. Now,  
24 maybe the prosecutors take the view that there is  
25 willfulness in those circumstances, but I don't think

1 many judges would. I think they would say that if  
2 you've been told by the Federal Government that you're  
3 perfectly fine here and you don't need to register, that  
4 that would be good enough to defeat a finding of  
5 willfulness. So I don't think 1306(a) covers this case.

6 JUSTICE SOTOMAYOR: You're inviting --  
7 you're inviting the very sort of conflict that he's  
8 talking about. Because what's going to happen now is  
9 that if there is no statement by the Federal agency of  
10 legality, the person is arrested, and now we're going to  
11 have Federal resources spent on trying to figure out  
12 whether they have an asylum application, whether they  
13 have this, whether they have that, whether they are  
14 exempted under this reason, whether the failure to carry  
15 was accidental or not -- I mean, you are involving the  
16 Federal Government in your prosecution.

17 MR. CLEMENT: Well --

18 JUSTICE SOTOMAYOR: Now, you may say we're  
19 not, because all we're going to show is -- what? That  
20 we got a Federal call -- we got a Federal answer that  
21 the person wasn't registered?

22 MR. CLEMENT: No, we're going to say that we  
23 communicated with the Federal immigration officials and  
24 they told us this is somebody who's perfectly fine and  
25 doesn't have to register.

1 JUSTICE SOTOMAYOR: No -- no  
2 Confrontation -- no Confrontation Clause problem with  
3 that? With relying on a call to a Federal agency and  
4 the police officer says, you're arrested, you're  
5 charged, it's not an illegal alien -- or it is an  
6 illegal alien.

7 MR. CLEMENT: My supposition, Justice  
8 Sotomayor, is that they would use that call to not bring  
9 the prosecution, so the issue wouldn't even arise. But  
10 I do want to be clear about --

11 JUSTICE SOTOMAYOR: No, no, no. How  
12 about -- how about they get a response, yes, it's an  
13 illegal alien?

14 MR. CLEMENT: And they bring a prosecution  
15 under section 3 --

16 JUSTICE SOTOMAYOR: So how -- where do they  
17 get the records that show that this person is an illegal  
18 alien that's not authorized to be here?

19 MR. CLEMENT: I --

20 JUSTICE SOTOMAYOR: Who do they get it from?

21 MR. CLEMENT: I think they would get it from  
22 the Federal authorities. I think it would be admitted.  
23 There might be a challenge in that case. I mean, you  
24 know, this is a facial challenge. I'm not going to try  
25 to address that potential Sixth Amendment issue.

1           What I would like to say is two things.  
2           One, if there is some sloppiness in the way the Federal  
3           Government keeps its records so that there's lots of  
4           people that really should be registered but aren't, I  
5           can't imagine that sloppiness has a preemptive effect.

6           The second thing I would say is that I do  
7           think, in thinking about section 3 in particular, the  
8           analogy is not the fraud on the FDA claim in Buckman,  
9           it's really the State tort law that says that it's a  
10          violation of State tort law to not even seek the  
11          approval that's needed under the FDA for a device.

12          Now, States impose tort law for people that  
13          market a device without getting the necessary approval,  
14          and nobody thinks that's preempted, because it serves  
15          the Federal interest. It doesn't have a deluge of  
16          information. It forces people to get FDA approval. And  
17          in the same way, this State law will force people to  
18          register, which is what the Federal Government is  
19          supposed to want in the first place, so there is no  
20          preemption there. There is no conflict.

21          As to the employment provision, I do think  
22          it's important to recognize that --

23                    CHIEF JUSTICE ROBERTS: Finish your  
24          sentence.

25                    MR. CLEMENT: -- before 1986, the Government

1 was not agnostic about unlawful employment by aliens.  
2 The employees were already covered, and they were  
3 subject to deportation. So the Government said, we're  
4 going to cover the employers for the first time. I  
5 can't imagine why that would have preemptive effect.

6 Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 Mr. Clement, General Verrilli. Well argued on both  
9 sides. Thank you.

10 The case is submitted.

11 (Whereupon, at 11:27 a.m., the case in the  
12 above-entitled matter was submitted.)

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