1   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - - - - - - - - - - - - - x

3   ARIZONA, ET AL.,   :

4   Petitioners   :   No. 11-182

5   v.   :

6   UNITED STATES   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Wednesday, April 25, 2012

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:07 a.m.

14   APPEARANCES:

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

16   Petitioners.

17   DONALD B. VERRILLI, JR., ESQ., Solicitor General,

18   Department of Justice, Washington, D.C.; on behalf of

19   Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:07 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   this morning in Case 11-182, Arizona v. the United

5   States.

6   Mr. Clement.

7   ORAL ARGUMENT OF PAUL D. CLEMENT

8   ON BEHALF OF THE PETITIONERS

9   MR. CLEMENT: Mr. Chief Justice, and may it

10   please the Court:

11   The State of Arizona bears a

12   disproportionate share of the costs of illegal

13   immigration. In addressing those costs, Arizona

14   borrowed the Federal standards as its own and attempted

15   to enlist state resources in the enforcement of the

16   uniform Federal immigration laws.

17   Notwithstanding that, the United States took

18   the extraordinary step of seeking a preliminary

19   injunction to enjoin the statute as impliedly preempted

20   on its face before it took effect. The Ninth Circuit

21   agreed with respect to four provisions, but only by

22   inverting fundamental principles of federalism.

23   The Ninth Circuit, essentially, demanded

24   that Arizona point to specific authorization in Federal

25   statute for its approach. But that gets matters

3

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.

4

 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

13   then, at that point, if there's reasonable suspicion to

14   try to identify immigration status, then that can

15   happen. Of course, one of the things that --

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

17   MR. CLEMENT: Sure.

18   JUSTICE SOTOMAYOR: -- just stop -- stop you

19   there 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. This process is different. How is it

8   different?

9   MR. CLEMENT: Well, it's different in one

10   important respect, Justice Sotomayor, and that's why I

11   don't think that the issue that divides the parties is

12   only the issue of how long you can detain somebody

13   because I think the Federal government takes the rather

14   unusual position that, even though these stops and these

15   inquiries, if done on an ad hoc basis, become preempted

16   if they're done on a systematic basis --

17   JUSTICE SOTOMAYOR: No, I understand that's

18   their argument. I can question them about that.

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

20   JUSTICE SOTOMAYOR: But I want to get to

21   how -- assuming your position, that doing it on

22   a -- there's nothing wrong with doing it as it's been

23   done in the past. Whenever anyone is detained, a call

24   could be made. What I see as critical is the issue of

25   how long and under -- and when is the officer going to

6

1   exercise discretion to release the person?

2   MR. CLEMENT: And -- and, with respect, I

3   don't think Section 2(B) really speaks to that, which is

4   to say I don't think Section 2(B) says that the

5   systematic inquiry has to take any longer than the

6   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 -- what does the law say -- the Arizona

17   law say, 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 -- 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,

14   presumably, because they have already served their

15   sentence for the offense; and then there is new arrest

16   authority given to the officer to hold that person if

17   they are deportable for that offense.

18   Now, I think, in that circumstance, it's

19   very clear what would happen, is an inquiry would be

20   made to the Federal officials that would say, do you

21   want us to transfer this person to your custody or hold

22   this person until you can take custody? And if the

23   answer is no, then that's the end of it. That

24   individual is released because there is no independent

25   basis in that situation for the state officer to

1 continue to detain the 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,

8 it's a straightforward inquiry. It could be murder. It

9 could be a drug crime. But I think the practical answer

10 to 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 --

13 287(g) officer.

14 　　　　　And, presumably, as a part of that inquiry,

15 they can figure out whether or not this is a removable

16 offense or at least a substantially likely removable

17 offense.

18 　　　　　JUSTICE KENNEDY: Suppose it takes two weeks

19 to make that determination, can the alien be held by the

20 state for that whole period of time --

21 　　　　　MR. CLEMENT: Oh, I don't --

22 　　　　　JUSTICE KENNEDY: -- just under Section 6?

23 　　　　　MR. CLEMENT: I don't think so, Your Honor,

24 and I think that -- you know, what -- in all of these

25 provisions, you have the Fourth Amendment backing up the

9

1   limits, and I think so --

2   JUSTICE KENNEDY: What -- what would be the

3   standard? You're -- you're the attorney for the -- the

4   alien, he -- they are going to hold him for two weeks

5   until they figure out whether this is a removable

6   offense. And you say, under the Fourth Amendment, you

7   cannot hold for -- what? More than a reasonable time

8   or --

9   MR. CLEMENT: Yes, ultimately, it's a

10 reasonable inquiry. And I think that, under these

11 circumstances, what we know from the record here is

12 that, generally, the immigration status inquiry is

13 something that takes 10 or 11 minutes, I mean, so it's

14 not -- we're not talking about something -- or no more

15 than 10, if it's a 287(g) officer, and, roughly, 11

16 minutes on average if it's the Law Enforcement Support

17 Center.

18   JUSTICE BREYER: How do they have -- well,

19 the same question, but -- but I'm trying to think of

20 examples. Example one is the person is arrested. Now,

21 it says any person who is arrested shall have the

22 person's immigration status determined before the person

23 is released. So I wonder, if they have arrested a

24 citizen, he's Hispanic-looking. He was jogging. He has

25 a backpack. He has water in it and Pedialyte.

1   So they think, oh, maybe this is an illegal

2 person. It happens he's a citizen of New Mexico. And

3 so the driver's license doesn't work.

4   And, now, they put him in jail. And are

5 you -- can you represent to us -- I don't know if you

6 can or not -- can you represent to us he will not stay

7 in jail, in detention, for a significantly longer period

8 of time than he would have stayed in the absence of

9 Section 2(B)?

10   Do you want to represent that or not?

11   MR. CLEMENT: I don't want to represent

12 that --

13   JUSTICE BREYER: All right. Now, if you

14 cannot represent that -- and I'm not surprised you don't

15 want to -- I mean, I don't know --

16   MR. CLEMENT: Sure, sure. But what I can

17 represent --

18   JUSTICE BREYER: What?

19   MR. CLEMENT: -- is that he's not going to

20 be detained any longer than the Fourth Amendment allows.

21   JUSTICE BREYER: Oh, fine.

22   MR. CLEMENT: And --

23   JUSTICE BREYER: But the Fourth Amendment --

24 for -- I mean, that's -- that's another question. I

25 don't know how long the Fourth Amendment allows. I

                        11

1   don't know on that. There probably is a range of

2   things. But we do know that a person, ordinarily, for

3   this crime, X, would have been released after a day.

4   Oh, you know, the Fourth Amendment would have allowed

5   more. So, now, what I want to know is what, in

6   practice, will happen?

7   You -- from your representation, I think

8   that there will be a significant number of people --

9   some of whom won't be arrested. It takes 11 minutes for

10   some. For citizens, it might take two hours. It might

11   take two days. Okay. There will be a significant

12   number of people who will be detained, at the stop or in

13   prison, for a significantly longer period of time than

14   in the absence of 2(B).

15   Is that a fair conclusion?

16   MR. CLEMENT: I don't think it is, Justice

17   Breyer, and here's why it's not: Because, even though

18   there certainly are situations where state authorities

19   will arrest somebody and then release them relatively

20   rapidly, they generally don't release somebody until

21   they can nail down their identity and whether or not

22   they are likely to come to a court hearing at a

23   subsequent --

24   JUSTICE SCALIA: Anyway, if this is a

25   problem, is it -- is it an immigration law problem?

1   MR. CLEMENT: It --

2   JUSTICE SCALIA: Or is it a Fourth Amendment

3   problem?

4   MR. CLEMENT: Justice Scalia, it is

5   neither --

6   JUSTICE SCALIA: Is the Government's attack

7   on this that it violates the Fourth Amendment?

8   MR. CLEMENT: No, of course, the Federal

9   government, that also has a lot of immigration arrests

10   that are subject to the Fourth Amendment, is not making

11   a Fourth Amendment claim here. And it's neither an

12   immigration law concern or something that should be the

13   basis for striking down a statute on its face.

14   JUSTICE BREYER: That's a

15   different argument --

16   MR. CLEMENT: But I do want to -- but I do

17   want to be responsive and make the point that I think

18   the factual premise that this is going to -- 2(B) is

19   going to lead to the elongation of a lot of arrests is

20   not true.

21   JUSTICE BREYER: All right. Can I make the

22   following statement in the opinion -- and you will say

23   that's okay. Imagine -- this is imaginary. "We

24   interpret" -- imagine -- "we interpret Section 2(B) as

25   not authorizing or requiring the detention of any

13

1   individual under 2(B), either at the stop or in prison,

2   for a significantly longer period of time than that

3   person would have been detained in the absence of 2(B)."

4   Can I make that statement in an opinion, and

5   you'll say, that's right?

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

7   JUSTICE BREYER: But can I say that?

8   MR. CLEMENT: I don't think you can say just

9   that.

10   JUSTICE BREYER: No.

11   MR. CLEMENT: I think you can say something

12   similar, though. I think you probably could say that,

13   look, this is a facial challenge. The statute's never

14   gone into effect. We don't anticipate that Section 2(B)

15   would elongate, in a significant number of cases, the

16   detention or the arrest. I think you could say that.

17   And the reason is, as I indicated, it's

18   something that happens even without this law that, when

19   you arrest somebody -- and there are some offenses that

20   are -- you can arrest and release under state law, but

21   before you release the individual, you generally want to

22   ascertain that that individual is going to show up at

23   the hearing, and that's what really distinguishes those

24   cases, where there's arrest and release, from those

25   cases where there's arrest and you book somebody.

14

1   Now, here's the other reason why I don't

2   think, factually, this is going to elongate things

3   because, already, in a significant number of booking

4   facilities in Arizona, you already have the process that

5   people are systematically run through immigration checks

6   when they are booked as part of the booking process.

7   That's reflected in the record here in the Maricopa

8   County system, that that's done by a 287(g) officer as a

9   matter of routine.

10   The Federal government doesn't like this

11   statute, but they are very proud of their Secure

12   Communities program. And their Secure Communities

13   program also makes clear that everybody's that's booked

14   at participating facilities is -- eventually has their

15   immigration status checked.

16   And so I don't think that this immigration

17   status check is likely to lead to a substantial

18   elongation of the stops or the detentions. Now,

19   obviously --

20   JUSTICE SOTOMAYOR: I -- I want to make sure

21   that I get a clear representation from you. If, on a

22   call to the Federal agency, the agency says, we don't

23   want to detain this alien, that alien will be released

24   or -- unless it's under 6, is what you're telling me.

25   Or under 6, 3, or some -- one other of Arizona's

1   immigration clauses.

2   MR. CLEMENT: Exactly. Obviously, if this

3   is somebody who was going -- you know, 60 miles an hour

4   in a 20-mile-an-hour school zone or something, they may

5   decide, wholly apart from the immigration issues, that

6   this is somebody they want to bring back to the station.

7   But, for the purposes of once they make the

8   contact with Federal immigration officials, if the

9   Federal immigration officials say, look, we have no

10   interest in removing this person, we have no interest in

11   prosecuting this person under the Federal criminal

12   provisions, then that's the end of the Federal case --

13   JUSTICE SOTOMAYOR: All right. Well, then

14   tell me --

15   JUSTICE SCALIA: You'll concede that the --

16   that the state has to accept within its borders all

17   people who have no right to be there, that the Federal

18   government has no interest in removing?

19   MR. CLEMENT: No, I don't accept that,

20   Justice Scalia, but --

21   JUSTICE SCALIA: That's -- that's all the

22   statute -- and you call up the Federal government, and

23   te Federal -- yes, he's an illegal immigrant, but that's

24   okay with us.

25   MR. CLEMENT: Well --

1   JUSTICE SCALIA: And -- and the state has no

2   power to -- to close its -- its borders to -- to people

3   who have no right to be there?

4   MR. CLEMENT: Well, here, Justice Scalia,

5   here's my response, which is all of this discussion, at

6   least as I've understood it, has been about 2(B) and, to

7   a lesser extent, 6.

8   Now, Section 3 of the statute does provide

9   an authority, under state law, to penalize somebody who

10   has violated, essentially, the Federal registration

11   requirement. So if that's -- as to that provision,

12   there would be a state authority, even under these

13   hypotheticals, to take action with respect to the

14   individual --

15   JUSTICE KENNEDY: I think --

16   MR. CLEMENT: -- but not with respect to

17   the Federal --

18   JUSTICE KENNEDY: I think Justice Scalia's

19   question was the -- was the broader one, just as a

20   theoretical matter. Can we say -- or can -- do you take

21   the position that a state must accept, within its

22   borders, a person who is illegally present under Federal

23   law?

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

25   JUSTICE KENNEDY: And that is by reason of

17

1   his alien --

2   MR. CLEMENT: And I think my answer to that

3   is no. I think the reason my answer is no has more to

4   do with our defense of Section 3 and other provisions

5   than it does with respect to the inquiry and arrest

6   authority provisions, 2(B) and 6.

7   JUSTICE ALITO: Well, before you move on to

8   the registration requirement, could I take you back to

9   an example that's similar to the one that Justice Breyer

10   was referring to?

11   Let's someone -- let's say someone who is a

12   citizen and a resident of New Mexico, has a New Mexico

13   driver's license, drives across the border, is stopped

14   for speeding, not 60 miles an hour in a 20-mile zone,

15   but 10 miles over the speed limit on an interstate. And

16   the officer, for some reason, thinks that this person

17   may be an illegal alien. How would that work out?

18   If you do the records check, you're not

19   going to get anything back, right, because the person is

20   a citizen? So what -- where would the officer take it

21   from there?

22   MR. CLEMENT: Well, if I can just kind of

23   work back for a second? I mean, obviously, it's a

24   pretty unusual circumstance, where somebody produces an

25   out-of-state driver's license, and that doesn't dispel

18

1 reasonable suspicion for the officer. But I'll take the

2 hypo --

3   JUSTICE ALITO: Why would it dispel

4 reasonable suspicion if it's -- if the officer knows

5 it's a state that issues driver's licenses to aliens who

6 are not lawfully in the --

7   MR. CLEMENT: And that might be a situation

8 where that's the case, and then -- then it wouldn't

9 dispel the reasonable suspicion. But, say, in the

10 average case, I think it would.

11   They would then go further. And then they

12 would then make the inquiry to the Federal officials.

13 And then if -- because of the fact that the individual

14 actually is a citizen or something like that, then what

15 would happen is, at some point, you'd get to the end of

16 a permissible Terry stop, and the officer would release

17 the individual.

18   Now, it might not be the end of the matter

19 because, of course -- you know, they -- they still have

20 the name, they still have the ability to collect that

21 information and try to continue the check as they move

22 forward, taking down the information on the New Mexico

23 driver's license.

24   But I think the important thing is that --

25 you know, this statute doesn't authorize them to detain

1   the individual, certainly beyond the -- the Fourth

2   Amendment limits. And it really doesn't authorize them

3   to do anything that the official couldn't do on an

4   ad hoc basis without the statute.

5   Now, it does do --

6   JUSTICE ALITO: That -- that may be the

7   case, and I would like to ask General Verrilli about

8   that. But, under the Fourth Amendment, presumably, if

9   the officer can arrest -- the state officer can arrest a

10   person on -- simply on the ground that the person is

11   removable, which is what the Office of Legal Counsel

12   opined some years ago, then, presumably, the officer

13   could continue to detain that individual that

14   I mentioned, until they reached a point where the Terry

15   stop becomes an arrest. At which time, they would have

16   to have probable cause.

17   But, if they had probable cause to believe

18   the person was removable, then they could hold the

19   person, presumably, until the -- the person's status was

20   completely verified, isn't that correct?

21   MR. CLEMENT: I think that's correct,

22   Your Honor.

23   Now, as we read Section 6, because there's a

24   pre-existing definition of public offense in Arizona

25   law, we don't think this is kind of the -- the full

                              20

1   Office of Legal Counsel situation, where you have broad

2   arrest authority for removable individuals. This is a

3   relatively narrow slice of additional arrest authority

4   that happens to give arrest authority for people that

5   seem to fit the Federal government's priority because it

6   really is going to apply to criminal aliens.

7   But I don't -- I don't take any issue with

8   what you're saying. I do think, though, it's important

9   to understand that 2(B) really doesn't give the officer

10   an authority he didn't otherwise have.

11   It does do one thing that's very important,

12   though, which it does have the effect of overriding

13   local policies that actually forbad some officers from

14   making those communications and -- because that's one of

15   the primary effects of 2(B). It just shows how

16   difficult the government's preemption argument is here

17   because those kind of local policies are expressly

18   forbidden by Federal statute. 1373(a) and 8 U.S.C. 1644

19   basically say that localities can't have those kind of

20   sanctuary laws.

21   And so one effect that 2(B) has is, on a

22   state level, it basically says, look, you can't have

23   local officers telling you not to make those inquiries.

24   You must have those inquiries.

25   JUSTICE SOTOMAYOR: Counsel, could -- does

1   Section 6 permit an officer to arrest an individual who

2   has overstayed a visitor's visa by a day? They are

3   removable, correct?

4   MR. CLEMENT: They are removable. I don't

5   think they would have committed a public offense --

6   absent a very unusual situation, I don't think they

7   would have committed a public offense under Arizona law.

8   So I don't think there actually would be arrest

9   authority in that circumstance, as Justice Alito's

10   question has -- has --

11   JUSTICE SOTOMAYOR: What is the definition

12   of public offense?

13   MR. CLEMENT: A public offense definition --

14   it's actually -- it's a petition appendix -- well, I'm

15   sorry.

16   The definition is, basically, that it's

17   something that is a crime in another jurisdiction and

18   also a crime in Arizona. And so what makes this kind of

19   anomalous is, normally, if something is a crime in

20   Arizona, there's arrest authority for that directly.

21   So what this really captures is people who

22   have committed a crime are no longer arrestable for the

23   crime because they have served their sentence or some

24   other peculiarity, but they are, nonetheless, removable

25   because of the crime. And so --

1   CHIEF JUSTICE ROBERTS: Counsel, maybe it's

2   a good time to talk about some of the other sections, in

3   particular Section 5(C).

4   Now, that does seem to expand beyond the

5   Federal government's determination about the types of

6   sanctions that should govern the employment

7   relationship.

8   You talk about supply and demand. The

9   Federal government, of course, prohibits the employment,

10 but it also imposes sanctions with respect to

11 application for work. And the state of Arizona, in this

12 case, is imposing some significantly greater sanctions.

13   MR. CLEMENT: Well, it's certainly imposing

14 different sanctions. I mean -- you know, it's -- it's a

15 little bit -- kind of hard to weigh the difference

16 between removability, which is obviously a pretty

17 significant sanction for an alien, and the relatively

18 modest penalties imposed by Section 5(C).

19   But I take the premise that 5(C) does

20 something that there is no direct analog in Federal law.

21 But I -- but that -- that's not enough to get you to

22 preemption, obviously.

23   And one of the things that makes 5(C), it

24 seems to us, a weak case for preemption is that it only

25 targets employment that is expressly forbidden by

 1   Federal law. And so, then we look at -- you know,

 2   essentially, the government is reduced to arguing that

 3   because, in 1986, when Congress passed IRCA, it only

 4   focused on the employer's side of the equation and

 5   didn't, generally speaking, impose restrictions on

 6   employees, that, somehow, they are going to draw a

 7   preemptive inference from that.

 8   JUSTICE SOTOMAYOR: Counsel --

 9   JUSTICE KENNEDY: And would you agree

10   that -- would you accept, as a working hypothesis, that

11   we can begin with the general principle that the Hines

12   v. Davidowitz language controls here, and we're going to

13   ask our principal -- our primary function is to

14   determine whether, under the circumstances of this

15   particular case, Arizona's law stands as an obstacle to

16   the accomplishment and execution of the full purposes

17   and objectives of Congress?

18   Is -- is that an acceptable test from your

19   standpoint?

20   MR. CLEMENT: I think it's an acceptable

21   test. I mean, Justice Kennedy -- you know, there

22   obviously have been subsequent cases, including DeCanas

23   that -- and Whiting, that give additional shape and

24   color to that test, and -- but I don't have any -- I

25   don't have any real quarrel with that test.

                          24

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

2   JUSTICE KENNEDY: But -- but then the

3   government on this section is going to come and say,

4   well, there may be -- this must be -- this -- the

5   enforcement of this statute, as Arizona describes it,

6   will be in considerable tension with our -- with our

7   basic approach; isn't that what I'm going to hear from

8   the government?

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

10   hear, Justice Kennedy, but I don't think you just take

11   the Federal government for its word on these things.

12   You know, it's interesting, in DeCanas

13   itself, the SG said that that California statute was

14   preempted. And, in DeCanas, this Court didn't say,

15   well, you know, we've got this language from Hines, and

16   we have the SG telling us it's preempted, that's good

17   enough for us. They went beyond that, and they looked

18   hard.

19   And what they did is they established that

20   this is an area where the presumption against preemption

21   applies. So that seems one strike in our favor.

22   We have here a situation where there is an

23   express preemption provision, and it -- it only

24   addresses the employer's side of the ledger. So the

25   express preemption provision clearly doesn't apply here.

1   So the only thing they have is this inference --

2   JUSTICE SOTOMAYOR: Well, for those of us

3   for whom legislative history has some importance, there

4   seems to be quite a bit of legislative history that

5   the -- that the idea of punishing employees was raised,

6   discussed, and explicitly rejected.

7   MR. CLEMENT: Sure. And --

8   JUSTICE SOTOMAYOR: The preemption language

9   would be geared to what was decided to be punished.

10   It seems odd to think that the Federal government is

11   deciding on employment sanctions and has unconsciously

12   decided not to punish employees.

13   MR. CLEMENT: But -- but, Justice Sotomayor,

14   there's a big difference between Congress deciding not

15   as a matter of Federal law to address employees with an

16   additional criminal prohibition and saying that that

17   decision itself has preemptive effect. That's a rather

18   remarkable additional step.

19   And here's why I think, if you consider the

20   legislative history, for those who do, it really

21   supports us because here's what Congress confronted. I

22   mean, they started thinking about this problem in 1971.

23   They passed IRCA in 1986.

24   At that point, here's the state of the

25   world: It's already unlawful, as a matter of Federal

26

1   law, for the employee to get -- to have this unlawful

2   work; and, if they seek this unlawful work, they are

3   subject to removal for doing it.

4   In addition, Congress was told that most of

5   the aliens who get this unlawful work are already

6   here -- they illegally entered, so they are already

7   subject to an independent criminal offense.

8   So, at that point, Congress is facing a

9   world where the employee is already subject to multiple

10   prohibitions. The employer is completely scot-free as a

11   matter of Federal law. And so, at that point, in 1986,

12   they address the employer's side of the equation. They

13   have an express preemption provision that says nothing

14   about any intent of preempting the employee's side of

15   the ledger. And, in that, I don't think --

16   JUSTICE GINSBURG: They did -- they did

17   provide -- I mean, your position was the Federal

18   legislation regulates the supply side. That leaves the

19   demand side open. But there is regulation, and the

20   question is whether anything beyond that is inconsistent

21   with the -- the Federal -- it's not just that the person

22   is removable, but, if they use false documents in

23   seeking work, that's a Federal crime.

24   So we have the -- what you call the supply

25   side is -- is regulated, but you want to regulate it

27

1   more.

2   MR. CLEMENT: Two quick responses, and then

3   I'd like to save time for rebuttal, Justice Ginsburg.

4   The first is that, if you look at what they

5   regulate on the employee's side, it's really things that

6   actually assist in regulating the employer's side

7   because what they are worried about is a fraudulent

8   document that then is used, essentially, to trick the

9   employer into employing somebody who shouldn't be

10   employed.

11   The second thing is the more that you view

12   IRCA as actually regulating part of the employee's side,

13   then I think the more persuasive it is that the express

14   preemption provision doesn't reach the employee's side

15   of the equation.

16   CHIEF JUSTICE ROBERTS: We'll give you

17   plenty of rebuttal time, but I'd like to hear what you

18   have to say about Section 3 before you sit down.

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

20   I appreciate the opportunity to do that. I do think, as

21   to Section 3, the question is really -- it's -- it's a

22   provision that is parallel to the Federal requirements

23   and imposes the same punishments as the Federal

24   requirement.

25   So it's, generally, not a fertile ground for

28

1   preemption. But, of course, there are cases that find

2   preemption even in those analogous circumstances. They

3   are the cases that the government is forced to rely on,

4   cases like Buckman, cases like --

5   JUSTICE KENNEDY: Would -- double

6   prosecutions be -- suppose that an alien were prosecuted

7   under Federal law for violating, basically, the terms of

8   3. Could the states then prosecute him as well?

9   MR. CLEMENT: I think they could under

10   general double jeopardy principles and the dual

11   sovereignty doctrine. Obviously, if that was a

12   particular concern to you, that might be the basis for

13   an as-applied challenge, if somebody was already

14   prosecuted under Federal law.

15   But, of course, this Court has confronted

16   exactly that argument, in California against Zook, where

17   you had the statute of California that prohibited

18   somebody operating as an interstate carrier without the

19   ICC license. It was raised -- you know, you have to let

20   just the Feds enforce that law. Otherwise, there is a

21   possibility of duplicative punishment, duplicative

22   prosecution. And this Court rejected that argument

23   there.

24   JUSTICE GINSBURG: Mr. Clement, it

25   seems that the -- I would think the largest hurdle for

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1   you is Hines, which said the registration scheme --

2   Congress enacted a complete registration scheme which

3   the states cannot complement or impose even auxiliary

4   regulations.

5   So I don't see the alien registration as a

6   question of obstacle preemption, but appeal preemption

7   that alien -- we don't want competing registration

8   schemes. We want the registration scheme to be wholly

9   Federal.

10   MR. CLEMENT: Well, Justice Ginsburg, I

11   think that's part of the reason why I accepted Justice

12   Kennedy's characterization of the relevant language in

13   Hines because, although there is some general discussion

14   there of field preemption, when the Court actually

15   states what its holding is, it does state it in terms of

16   obstacle preemption.

17   And here's where I think there is a critical

18   difference between what the Court had before it in Hines

19   and what you have before you here.

20   In Hines, Pennsylvania passed its statute

21   before Congress passed the alien registration statute.

22   So, not surprisingly -- you know, they weren't -- they

23   weren't soothsayers in Pennsylvania. They couldn't

24   predict the future. So, when it got up here, there was

25   a conflict between the provisions of the Pennsylvania

1   registration law and the Federal registration law. And

2   this Court struck it down on that preemption basis.

3   Here it's quite different. Arizona had

4   before it the Federal statute. It looked at this

5   precise provision in the Federal statute. It adopted

6   those standards as its own, and then it imposed parallel

7   penalties for the violation of the state equivalent.

8   And so I -- I think the right analysis is

9   really the analysis that this Court laid out in its

10 Whiting decision, which says that, in these kinds of

11 cases, what you look for is whether or not the state

12 scheme directly interferes with the operation of the

13 Federal scheme.

14   JUSTICE SOTOMAYOR: Can I ask you something?

15   JUSTICE ALITO: Well, in that --

16   CHIEF JUSTICE ROBERTS: Justice Alito.

17   JUSTICE ALITO: In that regard, we are told

18 that there are some important categories of aliens who

19 can't obtain registration -- cannot obtain Federal

20 registration; and, yet, there are people that nobody

21 would think should be removed. I think someone with a

22 pending asylum application would fall into that

23 category.

24   How would Section 3 apply there?

25   MR. CLEMENT: I think it probably wouldn't

1   apply. There's two provisions that might make it

2   inapplicable. The first question you'd ask is whether

3   that individual in that category would be subject to

4   prosecution under 1304 and 1306. And, if I

5   understand -- you know, the Government's position, there

6   are certain people where -- you know, they can't really

7   get the registration document because of the narrow

8   class that they are in.

9   And, as I understand it, it is not a

10   violation of either 1304 or 1306 to not get a

11   registration document when you're somebody who can't get

12   one. So you're not liable for the willful -- willful

13   failure to get a registration document. And, when you

14   don't have a registration document to carry, you don't

15   run afoul of 1306 in the --

16   JUSTICE ALITO: Well, of course, if you've

17   entered the country illegally, you can't get a

18   registration.

19   MR. CLEMENT: Well, sure.

20   JUSTICE ALITO: But --

21   MR. CLEMENT: But -- but that's not the

22   narrow class we were talking about.

23   JUSTICE ALITO: I understand that. I

24   understand the distinction you're drawing, that you

25   can't be prosecuted for lack of a registration, if you

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1 couldn't have gotten a registration.

2   MR. CLEMENT: Well, if you're in -- no, if

3 you're in the country lawfully, I mean, you can try to

4 register. And so somebody who enters illegally -- I

5 mean, they are already guilty of one Federal misdemeanor

6 by the illegal entry.

7   JUSTICE ALITO: Right.

8   MR. CLEMENT: But, at the point that they

9 stay 30 days and don't try to register, then that's an

10 independent violation. And so maybe I need to fix what

11 I said and say, look, if you're somebody who -- if you

12 did go to register, would be told, you're fine, but we

13 can't give you a registration document. Then that

14 individual is not subject to prosecution under the

15 Federal statute, therefore, wouldn't be subject to

16 prosecution under the state statute.

17   CHIEF JUSTICE ROBERTS: Thank you,

18 Mr. Clement.

19   MR. CLEMENT: Thank you.

20   CHIEF JUSTICE ROBERTS: General Verrilli?

21   ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

22   ON BEHALF OF THE RESPONDENT

23   GENERAL VERRILLI: Mr. Chief Justice, and

24 may it please the Court --

25   CHIEF JUSTICE ROBERTS: Before you get into
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1   what the case is about, I'd like to clear up at the

2   outset what it's not about. No part of your argument

3   has to do with racial or ethnic profiling, does it? I

4   saw none of that in your brief.

5   GENERAL VERRILLI: Where -- that's correct,

6   Mr. Chief Justice.

7   CHIEF JUSTICE ROBERTS: Okay. So this is

8   not a case about ethnic profiling.

9   GENERAL VERRILLI: We're not making any

10   allegation about racial or ethnic profiling in the case.

11   Mr. Clement is working hard this morning to

12   portray SB 1070 as an aid to Federal immigration

13   enforcement. But the very first provision of the

14   statute declares that Arizona is pursuing its own policy

15   of attrition through enforcement and that the provisions

16   of this law are designed to work together to drive

17   unlawfully present aliens out of the state.

18   That is something Arizona cannot do because

19   the Constitution vests exclusive --

20   JUSTICE SOTOMAYOR: General, could you

21   answer Justice Scalia's earlier question to your

22   adversary? He asked whether it would be the

23   Government's position that Arizona doesn't have the

24   power to exclude or remove -- to exclude from its

25   borders a person who's here illegally.

1   GENERAL VERRILLI: That is our position,

2   Your Honor. It is our position because the Constitution

3   vests exclusive authority over immigration matters with

4   the national government.

5   JUSTICE SCALIA: Well, all that means -- it

6   gives authority over naturalization, which we've

7   expanded to immigration. But all that means is that the

8   government can set forth the rules concerning who

9   belongs in this country. But if, in fact, somebody who

10   does not belong in this country is in Arizona, Arizona

11   has -- has no power? What -- what does sovereignty mean

12   if it does not include the ability to defend your

13   borders?

14   GENERAL VERRILLI: Your Honor, the -- the

15   Framers vested in the national government the authority

16   over immigration because they understood that the way

17   this nation treats citizens of other countries is a

18   vital aspect of our foreign relations. The national

19   government, and not an individual state --

20   JUSTICE SCALIA: But it's still up to the

21   national government. Arizona is not trying to kick out

22   anybody that the Federal government has not already said

23   do not belong here. And the Constitution provides --

24   even -- even with respect to the Commerce Clause -- "No

25   state shall without the consent of Congress lay any

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1   imposts or duties on imports or exports except," it

2   says, "what may be absolutely necessary for executing

3   its inspection laws."

4   The Constitution recognizes that there is

5   such a thing as state borders, and the states can police

6   their borders, even to -- to the point of inspecting

7   incoming shipments to exclude diseased material.

8   GENERAL VERRILLI: But they cannot do what

9   Arizona is seeking to do here, Your Honor, which is to

10   elevate one consideration above all others. Arizona is

11   pursuing a policy that -- that maximizes the

12   apprehension of unlawfully present aliens, so they can

13   be jailed as criminals in Arizona, unless the Federal

14   government agrees to direct its enforcement resources to

15   remove the people that Arizona has identified.

16   CHIEF JUSTICE ROBERTS: Well, if that state

17   does -- well, that's a question of enforcement

18   priorities.

19   Well, let's say that the government had a

20   different set of enforcement priorities, and their

21   objective was to protect, to the maximum extent

22   possible, the borders. And so anyone who is here

23   illegally, they want to know about, and they want to do

24   something about, in other words, different than the

25   current policy.

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1   Does that mean, in that situation, the

2   Arizona law would not be preemptive?

3   GENERAL VERRILLI: I think the mandatory

4   character of the Arizona law and the mandatory character

5   of the obligations it imposes, in -- especially as

6   backed by this extraordinary provision in Section 2(H),

7   which imposes civil penalties of up to $5000 a day on

8   any official in the state of Arizona who is not

9   following Section 2 or, as we read it, the rest of SB

10   1070, to the maximum extent possible, does create a

11   conflict.

12   But I do think the most fundamental point

13   about Section 2 is to understand its relationship to the

14   other provisions in the statute. Section 2 is in the

15   statute to identify the class of people who Arizona is

16   then committed to prosecute under Section 3 and, if they

17   are employed, also under Section 5.

18   JUSTICE ALITO: Well, I have the same

19   question as the Chief Justice. Suppose that the Federal

20   government changed its priorities tomorrow, and it

21   said -- they threw out the ones they have now. And they

22   said the new policy is maximum enforcement, we want to

23   know about every person who's stopped or arrested, we

24   want to -- we want -- we want to their immigration

25   status verified. Would -- would the Arizona law then be

1   un-preempted?

2   GENERAL VERRILLI: No, I think it's still a

3   problem, Your Honor. These decisions have to be made at

4   the national level because it's the national government

5   and not -- it's the whole country and not an individual

6   state that pays the price --

7   JUSTICE SCALIA: Do you have any example

8   where -- where enforcement discretion has the effect of

9   preempting state action?

10   GENERAL VERRILLI: Well, I think we should

11   think about Section 3 of the law, Your Honor. I think

12   it will help illustrate the point --

13   JUSTICE SCALIA: I'll point out another --

14   another case of ours where we've said that, essentially,

15   the preemption of state law can occur, not by virtue of

16   the Congress preempting, but because the executive

17   doesn't want this law enforced so -- so rigorously, and

18   that preempts the state from enforcing it vigorously.

19   Do we have any cases --

20   GENERAL VERRILLI: I think the preemption

21   here -- focusing for a moment on Section 3 -- the

22   preemption here flows from judgments of Congress, from

23   the registration system that Congress set up in Sections

24   1301 through 1306, from the decision of Congress in

25   Section 1103 in the law to vest the Secretary of DHS and

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1   the Attorney General with the authority to make the

2   judgments about how this law is going to be enforced --

3   JUSTICE SCALIA: Well, they do that with

4   all -- with all Federal criminal statutes. And you

5   acknowledge that, as a general matter, states can

6   enforce Federal criminal law, which is always entrusted

7   to the Attorney General.

8   GENERAL VERRILLI: They -- they can make --

9   they can engage in detention, in support of the

10   enforcement of Federal law. That's what the OLC opinion

11   from 2002 says. It does not say that they can prosecute

12   under Federal law and make their own decisions. That's

13   a far different matter.

14   And it really goes to the heart, I think, of

15   what's wrong with Section 3 of this Act, in that --

16   CHIEF JUSTICE ROBERTS: Well, but you say

17   that the Federal government has to have control over who

18   to prosecute, but I don't see how Section 2(B) says

19   anything about that at all. All it does is notify the

20   Federal government, here's someone who is here

21   illegally, here's someone who is removable. The

22   discretion to prosecute for Federal immigration offenses

23   rests entirely with the Attorney General.

24   GENERAL VERRILLI: That's correct, but, with

25   respect to -- and I will -- let me address something

1   fundamental about Section 2. That is true, but I -- I

2   think it doesn't get at the heart of the problem here.

3   The -- Section 1 of this statute says that

4   Sections 2 and 3 and 5 are supposed to work together to

5   achieve this policy of attrition through enforcement.

6   And so what Section 2 does is identify a population that

7   the state of Arizona is going to prosecute under Section

8   3 and Section 5 --

9   CHIEF JUSTICE ROBERTS: Right. So, apart

10   from Section 3 and Section 5, take those off the table,

11   you have no objection to Section 2?

12   GENERAL VERRILLI: We do, Your Honor. But,

13   before I take 3 and 5 off the table, if I could make one

14   more point about 3 and 5, please? The -- I think --

15   because I think it's important to understand the dilemma

16   that this puts the Federal government in.

17   Arizona has got this population, and

18   they've -- and they're, by law, committed to maximum

19   enforcement. And so the Federal government's got to

20   decide, are we going to take our resources, which we

21   deploy for removal, and are we going to use them to deal

22   with this population, even if it is to the detriment of

23   our priorities --

24   CHIEF JUSTICE ROBERTS: Exactly. You -- the

25   Federal government has to decide where it's going to use

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1   its resources.

2   And what the state is saying, here are

3   people who are here in violation of Federal law, you

4   make the decision. And if your decision is you don't

5   want to prosecute those people, fine, that's entirely up

6   to you. That's why I don't see the problem with Section

7   2(B).

8   GENERAL VERRILLI: Here's the other

9   half -- here's the other half of the equation, Mr. Chief

10 Justice, which is that they say, if you're not going to

11 remove them, we are going to prosecute them. And that

12 means that the -- and I think this does get at the heart

13 of why this needs to be an exclusive national power --

14   CHIEF JUSTICE ROBERTS: Only under Section 3

15 and Section 5.

16   GENERAL VERRILLI: Yes, but those are -- but

17 what you're talking about is taking somebody whose --

18 whose only offense is being unlawfully present in the

19 country and putting them in jail for up to 6 months, or

20 somebody who --

21   CHIEF JUSTICE ROBERTS: Well, let's

22 say you're worried about --

23   GENERAL VERRILLI: -- or like 30 days,

24 forgive me. 6 months for employment.

25   CHIEF JUSTICE ROBERTS: There you go.

1   Right.

2   For the notification, what could possibly be

3   wrong, if Arizona arrests someone, let's say for drunk

4   driving, and their policy is you're going to stay in

5   jail overnight, no matter what, okay? What's wrong,

6   during that period, by having the Arizona arresting

7   officer say, I'm going to call the Federal agency and

8   find out if this person is here illegally because the

9   Federal law says the Federal agency has to answer my

10   question.

11   It seems an odd argument to say the Federal

12   agency has to answer the state's question, but the state

13   can't ask it.

14   GENERAL VERRILLI: Well, we're not saying

15   the state can't ask it in any individual case. We -- we

16   recognize that section --

17   CHIEF JUSTICE ROBERTS: You think there are

18   individual cases in which the state can call the Federal

19   government and say, is this person here illegally?

20   GENERAL VERRILLI: Yes, certainly, but that

21   doesn't make --

22   CHIEF JUSTICE ROBERTS: Okay. So doesn't

23   that defeat the facial challenge to the Act?

24   GENERAL VERRILLI: No. I don't think so,

25   Mr. Chief Justice, because the -- I think the problem

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1   here is in that -- is in every circumstance, as a result

2   of Section 2(B) of the law, backed by the penalties of

3   section 2(H), the state official must pursue the

4   priorities that the state has set, irrespective of

5   whether they are helpful to or in conflict with the

6   Federal priorities. And so --

7   JUSTICE ALITO: Well, suppose that

8   every -- suppose every law enforcement officer in

9   Arizona saw things exactly the same way as the Arizona

10   legislature. And so, without any direction from the

11   legislature, they all took it upon themselves to make

12   these inquiries every time they stopped somebody or

13   arrested somebody.

14   Would that be a violation of Federal law?

15   GENERAL VERRILLI: No, it wouldn't be,

16   Your Honor, because, in that situation, they would be

17   free to be responsive to Federal priorities, if the

18   Federal officials came back to them and said, look, we

19   need to focus on gangs, we need to focus on this drug

20   problem at the border --

21   JUSTICE ALITO: But what if they said, well,

22   we don't care what your priorities are; we -- we have

23   our priorities, and our priority is maximum enforcement,

24   and we're going to call you in every case? It was all

25   done on an individual basis, all the officers were

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1   individually doing it --

2   GENERAL VERRILLI: Well -- yes, well --

3   JUSTICE ALITO: -- that would be okay?

4   GENERAL VERRILLI: Well, if there's a -- if

5   there's a state policy locked into law by statute,

6   locked into law by regulation, then we have a problem.

7   If it's not --

8   JUSTICE SOTOMAYOR: General, I am having --

9   GENERAL VERRILLI: -- I mean, the line is

10   mandatory versus discretionary --

11   JUSTICE ALITO: That's what I can't

12   understand because your argument -- you seem to be

13   saying that what's wrong with the Arizona law is that

14   the Arizona legislature is trying to control what its

15   employees are doing, and they have to be free to

16   disregard the desires of the Arizona legislature, for

17   whom they work, and follow the priorities of the Federal

18   government, for whom they don't work.

19   GENERAL VERRILLI: But they -- but, with

20   respect to immigration enforcement, and to the extent

21   all they're doing is bringing people to the Federal

22   Government's attention, they are cooperating in the

23   enforcement of Federal law --

24   JUSTICE KENNEDY: But the hypothetical is

25   that that's all the legislature is doing.

1   GENERAL VERRILLI: Well, except I think,

2   Justice Kennedy, the problem is that it's not

3   cooperation if, in every instance, the officers in the

4   state must respond to the priorities set by the state

5   government and are not free to respond to the priorities

6   of the Federal officials who are trying to enforce the

7   law in the most effective manner possible.

8   JUSTICE SOTOMAYOR: I'm sorry. I'm a little

9   confused -- general, I'm terribly confused by your

10   answer. Okay? And -- and I don't know that you're

11   focusing in on what I believe my colleagues are trying

12   to get to.

13   Making the -- 2(B) has two components, as I

14   see it. Every person that's suspected of being an alien

15   who's arrested for another crime -- that's what

16   Mr. Clement says the statute means -- the officer has to

17   pick up the phone and call -- and call the agency to

18   find out if it's an illegal alien or not.

19   He tells me that, unless there's another

20   reason to arrest the person -- and that's 3 and 6, or

21   any of the other provisions -- but putting those aside,

22   we're going to stay just in 2(B), if the government

23   says, we don't want to detain the person, they have to

24   be released for being simply an illegal alien, what's

25   wrong with that?

45

1   GENERAL VERRILLI: Well --

2   JUSTICE SOTOMAYOR: Taking out the other

3   provisions, taking out any independent state-created

4   basis of liability for being an -- an illegal alien?

5   GENERAL VERRILLI: I think there are three.

6   The first is the -- the Hines problem of harassment.

7   Now, we are not making an allegation of

8   racial profiling; nevertheless, there are already tens

9   of thousands of stops that result in inquiries in

10   Arizona, even in the absence of SB 1070. It stands to

11   reason that -- that the legislature thought that that

12   wasn't sufficient and there needed to be more.

13   And it -- given that you have a population

14   in Arizona of 2 million Latinos, of whom only 400,000,

15   at most, are there unlawfully, there --

16   JUSTICE SCALIA: Sounds like racial

17   profiling to me.

18   GENERAL VERRILLI: And they're -- and given

19   that what we're talking about is the status of being

20   unlawfully present, which --

21   JUSTICE SOTOMAYOR: Do you have the

22   statistics as to how many arrests there are and how

23   many -- and what the -- percentage of calls before the

24   statute?

25   GENERAL VERRILLI: There is some evidence in

1   the record, Your Honor. It's the -- the Palmatier

2   declaration, which is in the Joint Appendix, was the --

3   he was the fellow who used the run the Law Enforcement

4   Support Center, which answers the inquiries. That --

5   that declaration indicates that, in fiscal year 2009,

6   there were 80,000 inquiries and --

7   JUSTICE SCALIA: What does this have to do

8   with Federal immigration law? I mean, it may have to do

9   with -- with racial harassment, but I thought you

10   weren't relying on that.

11   GENERAL VERRILLI: The --

12   JUSTICE SCALIA: Are you objecting to

13   harassing the -- the people who have no business being

14   here? Is that -- surely, you're -- you're not concerned

15   about harassing them. They have been stopped anyway,

16   and all you're doing is calling up to see if they are

17   illegal immigrants or not.

18   So you must be talking about other people

19   who have nothing to do with -- with our immigration

20   laws. Okay? Citizens and -- and other people, right?

21   GENERAL VERRILLI: And other -- and other

22   people lawfully present in the country, certainly, but

23   this is --

24   JUSTICE SCALIA: But that has nothing to do

25   with the immigration law --

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1   GENERAL VERRILLI: Hines is --

2   JUSTICE SCALIA: -- which is -- which is

3   what you're asserting preempts all of this activity.

4   GENERAL VERRILLI: Hines identified this

5   problem as harassment as -- as a central feature of

6   preemption under the immigration laws because of the

7   concern that the way this nation treats citizens of

8   other countries is fundamental to our foreign relations.

9   And this is a --

10   JUSTICE BREYER: Well, let's -- let me just

11   go back because I think -- I'm trying to get focused the

12   question, I think, others are asking. And one way to

13   focus it is the same question I asked Mr. Clement.

14   Think of 2(B), the first sentence. All

15   right?

16   Now, I can think -- I'm not saying they are

17   right -- but, if that means you're going to hold an

18   individual longer than you would have otherwise, I can

19   think of some arguments that it is preempted and some

20   replies. So keep that out of it.

21   Suppose that we were to say, that sentence,

22   as we understand it, does not raise a constitutional

23   problem as long as it is interpreted to mean that the

24   policeman, irrespective of what answer he gets from ICE,

25   cannot detain the person for longer than he would have

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1   done in the absence of this provision.

2   Now, in your view, is there any preemption

3   exemption -- argument against -- any preemption argument

4   against that sentence as I have just interpreted it? I

5   don't know what your answer is, and that's why I'm

6   asking.

7   GENERAL VERRILLI: Yes. I -- we would

8   think it would ameliorate --

9   JUSTICE BREYER: And if so, what?

10   GENERAL VERRILLI: -- it would ameliorate

11   the practical problem. But there is still a structural

12   problem here in that this is an effort to enforce

13   Federal law. And the -- under the Constitution, it's

14   the President and the Executive Branch that are

15   responsible for the enforcement of Federal law --

16   CHIEF JUSTICE ROBERTS: It is --

17   GENERAL VERRILLI: -- and --

18   CHIEF JUSTICE ROBERTS: It is not an effort

19   to enforce Federal law. It is an effort to let you know

20   about violations of Federal law. Whether or not to

21   enforce them is still entirely up to you. If you don't

22   want to do this, you just tell the person at LESC -- if

23   that's the right -- is that the right acronym?

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

25   CHIEF JUSTICE ROBERTS: -- LESC, look, when

1   somebody from Arizona calls, answer their question, and

2   don't even bother to write it down. Okay? I stopped

3   somebody else, is he legal or illegal, let me check --

4   it's -- oh, he's illegal. Okay. Thanks. Good-bye.

5   I mean, why -- it is still your decision.

6   And, if you don't want to know who is in this country

7   illegally, you don't have to.

8   GENERAL VERRILLI: That's correct. But the

9   process of -- the process of cooperating to enforce the

10   Federal immigration law starts earlier. And it starts

11   with the process of making the decisions about who to --

12   who to stop, who to apprehend, who to check on. And the

13   problem -- the structural problem we have is that those

14   decisions -- in the making of those decisions, Arizona

15   officials are not free --

16   CHIEF JUSTICE ROBERTS: Under 2(B), the

17   person is already stopped for some other reason. He's

18   stopped for going 60 in a 20. He's stopped for drunk

19   driving. So that decision to stop the individual has

20   nothing to do with immigration law at all. All that has

21   to do with immigration law is the -- whether or not they

22   can ask the Federal government to find out if this

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

24   It seems to me that the Federal government

25   just doesn't want to know who is here illegally or not.

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1   GENERAL VERRILLI: No, I -- I don't think

2   that's right. I think we want to be able to cooperate

3   and focus on our priorities.

4   And one thing that's instructive in that

5   regard, Mr. Chief Justice, are the declarations put into

6   the record by the police chiefs from Phoenix and Tucson,

7   both of whom I think explain effectively why SB -- the

8   Section 2(B) obligation gets in the way of the mutual

9   effort to -- to focus on the priorities of identifying

10   serious criminals, so that they can be removed from the

11   country.

12   JUSTICE SCALIA: Anyway, what -- what's

13   wrong about the states enforcing Federal law? There is

14   a Federal law against robbing Federal banks. Can it be

15   made a state crime to rob those banks? I think it is.

16   GENERAL VERRILLI: I think it could, but I

17   think that's quite --

18   JUSTICE SCALIA: But does the Attorney

19   General come in and say, you know, we might really only

20   want to go after the professional bank robbers? If it's

21   just an amateur bank robber, you know, we're -- we're

22   going to let it go. And the state's interfering with

23   our -- with our whole scheme here because it's

24   prosecuting all these bank robbers.

25   GENERAL VERRILLI: Well, of course, no one
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1   would --

2   JUSTICE SCALIA: Now, would anybody listen

3   to that argument?

4   GENERAL VERRILLI: Of course not.

5   JUSTICE SCALIA: Of course not.

6   GENERAL VERRILLI: But this argument is

7   quite different, Justice Scalia, because here what we

8   are talking about is that Federal registration

9   requirement in an area of dominant Federal concern --

10   exclusive Federal concern, with respect to immigration,

11   who can be in the country, under what circumstances, and

12   what obligations they have --

13   JUSTICE KENNEDY: Now, are you talking about

14   3 now or --

15   GENERAL VERRILLI: Yes.

16   JUSTICE KENNEDY: -- or does this argument

17   relate to 2 as well?

18   GENERAL VERRILLI: This is an argument about

19   Section 3.

20   JUSTICE ALITO: Well, could I ask you this

21   about 2, before you move on to that? How is a -- this

22   is just a matter of information. How can a state

23   officer who stops somebody or who arrests somebody for a

24   nonimmigration offense tell whether that person falls

25   within the Federal removal priorities without making an

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1   inquiry to the Federal government?

2   For example, I understand one of the

3   priorities is people who have previously been removed,

4   then that might be somebody who you would want to arrest

5   and -- and remove. But how can you determine that

6   without making the -- the inquiry in the first place?

7   GENERAL VERRILLI: Well, in any individual

8   case, that's correct. You -- you would need to make the

9   inquiry in the first place. It won't always be correct,

10   if you're arresting somebody based on probable cause

11   that they have committed a serious crime, and they --

12   and they -- the inquiry into whether -- into their

13   status will be enough to identify that person for

14   priority --

15   JUSTICE ALITO: Well, what if they just --

16   they stop somebody for a traffic violation, but they

17   want to know whether this is a person who previously was

18   removed and has come back or somebody who has just --

19   just within the last few hours, possibly, come -- well,

20   let's just -- somebody who's previously been removed.

21   How can you know that, without making an inquiry?

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

23   it's correct that you can't, but there is a -- there is

24   difference, Justice Alito, I think, between the question

25   of any individual circumstance and a mandatory policy

1 backed by this civil fine, that you've got to make the

2 inquiry in every case.

3   I mean, I think it's as though, if I can use

4 an analogy, if you ask one of your law clerks to bring

5 you the most important preemption cases from the last 10

6 years, and they rolled in the last -- the last hundred

7 volumes of the U.S. Reports and said, well, they are in

8 there. That -- that doesn't make it --

9   CHIEF JUSTICE ROBERTS: What if -- what if

10 they just rolled in Whiting?

11   (Laughter.)

12   CHIEF JUSTICE ROBERTS: That's a pretty good

13 one.

14   JUSTICE BREYER: Look, in the Federal

15 statute, it says in 1373 that nobody can prohibit or

16 restrict any government entity from making this inquiry

17 of the Federal government. And then it says that the

18 Federal government has -- any agency -- and then it says

19 the Federal government has an obligation to respond.

20   Now, assuming the statute were limited, as I

21 say, so nothing happened to this individual, nothing

22 happened to the person who's stopped that wouldn't have

23 happened anyway, all that happens is the person -- the

24 policeman makes a phone call. Now, that's what I'm

25 trying to get at.

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1   If that were the situation, and we said it

2   had to be the situation, then what in the Federal

3   statute would that conflict with, where we have two

4   provisions that say any policeman can call?

5   GENERAL VERRILLI: So --

6   JUSTICE BREYER: What's the -- that's --

7   that's where I'm trying to push you.

8   GENERAL VERRILLI: Yes.

9   JUSTICE BREYER: Because, in my mind, I'm

10   not clear what your answer is to that.

11   GENERAL VERRILLI: I think -- I understand

12   the question. And I think the answer is this: 1373 was

13   enacted in 1996, along with 1357. And 1357 is the

14   provision that sets forth the powers and authorities of

15   Federal immigration officials.

16   It contains 1357(g), which effectively says

17   that Federal -- that the Federal government, the

18   Attorney General, can deputize state officials, so long

19   as they're -- they obtain adequate training, and they

20   are subject to the direction and control of the Attorney

21   General in carrying out immigration functions.

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

23   nothing that we've said so far should be read to -- to

24   preclude informal cooperation, communication or other

25   informal cooperation in the apprehension, detention, and

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1   removal of unlawfully present persons, but it's the

2   focus on cooperation.

3   And I think you have to -- so I don't think

4   you can read into 1373 the -- the conclusion that what

5   Congress was intending to do was to shift from the

6   Federal government to the states the authority to set

7   enforcement priorities because I think the cooperation

8   in this context is cooperation in the service of the

9   Federal enforcement.

10   JUSTICE SOTOMAYOR: Can I get to a different

11   question? I think even I or someone else cut you off

12   when you said there were three reasons why -- 2(B).

13   Putting aside your argument that this --

14   that a systematic cooperation is wrong -- you can see

15   it's not selling very well. Why don't you try to come

16   up with something else?

17   Because I, frankly -- as the Chief has said

18   to you, it's not that it's forcing you to change your

19   enforcement priorities. You don't have to take the

20   person into custody. So what's left of your argument?

21   GENERAL VERRILLI: So let me -- let me just

22   summarize what I think the three are, and then maybe I

23   can move on to sections 3 and 5.

24   The -- with respect to -- with respect to 2,

25   we think the harassment argument -- we think this is a

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1 more significant harassment problem than was present in

2 Hines --

3   JUSTICE SOTOMAYOR: I -- please move --

4   GENERAL VERRILLI: With respect to -- in

5 addition, we do think that there is a structural

6 accountability problem, in that they are enforcing

7 Federal law, but not answerable to the Federal

8 officials.

9   And, third, we do think there are practical

10 impediments, in that the -- the result of this is to

11 deliver to the Federal system a volume of inquiries that

12 makes it harder and not easier to identify who the

13 priority persons are for removal.

14   So those are the three reasons.

15   CHIEF JUSTICE ROBERTS: General, you have

16 been trying valiantly to get us to focus on Section 3,

17 so maybe we should let you do that now.

18   GENERAL VERRILLI: Thank you, Mr. Chief

19 Justice.

20   The -- I do think the key thing about

21 Section 3 is that we -- is that Section 3 is purporting

22 to enforce a Federal registration requirement. That's a

23 relationship between the alien and the United States

24 government that's exclusively a Federal relationship.

25 It's governed by the terms of 1301 through 1306.

1   And the way in which those terms are

2   enforced does have very significant Federal interest at

3   its heart. And there is no state police power interest

4   in that Federal registration relationship.

5   And I do think -- I think it's very

6   important -- Justice Alito raised the question of these

7   categories of people. I think it's -- it is quite

8   important to get clarity on that.

9   The -- if you are -- if you have come into

10 the country unlawfully, but you have a pending

11 application for asylum, a pending application for

12 temporary protective status, because you -- you would

13 have to be removed to a country to which you can't be

14 removed, because of the conditions in the country, if

15 you have a valid claim for relief under the Violence

16 Against Women Act based on your treatment, if you have a

17 valid claim for relief because you are a victim of human

18 trafficking, if you have a valid claim for relief

19 because you are the victim of a crime or a witness to a

20 crime, all of those persons are in technical violation

21 of 1306(a).

22   And -- and it seems to me. They -- they are

23 in violation of 1306(a), so my friend, Mr. Clement, just

24 is not correct in saying that those are people who

25 aren't in violation of 1306(a) and, therefore, aren't in

1   violation of -- of Section 3. They are in violation.

2   JUSTICE SCALIA: Well, maybe 1306(a) ought

3   to be amended, then. I mean, we have statutes out there

4   that there a lot of people in violation of it and --

5   well, the Attorney General will take care of it. Is

6   that how we write our criminal laws?

7   GENERAL VERRILLI: But -- but it's a

8   situation in which no reasonable person would think that

9   the individual ought to be prosecuted. And, yet, very

10   often, the states aren't even going to know, in fact,

11   about asylum status. They can't know because there are

12   regulations that require that to be kept private, to

13   avoid retaliation against the person making the

14   application.

15   And so, this is -- so this is -- this is, I

16   think, a very strong illustration of why the enforcement

17   discretion over Section 3 needs to be vested exclusively

18   in the Federal government.

19   JUSTICE SCALIA: Again, I ask you, do you

20   have any other case in which the basis for preemption

21   has been you are interfering with -- with the Attorney

22   General's enforcement discretion?

23   GENERAL VERRILLI: Well, this is --

24   JUSTICE SCALIA: I think that's an

25   extraordinary basis for saying that the state is

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1 preempted.

2   GENERAL VERRILLI: I think what is

3 extraordinary about this, actually, Justice Scalia, is

4 the state's decision to enact a statute purporting to

5 criminalize the violation of a Federal registration

6 obligation. And I think that's the problem here. And

7 they are doing it for a reason --

8   JUSTICE SCALIA: It's not criminalizing

9 anything that isn't criminal under Federal law.

10   GENERAL VERRILLI: But -- but what --

11   JUSTICE SCALIA: It's -- it's the bank.

12 It's the Federal bank example --

13   GENERAL VERRILLI: Well, no.

14   JUSTICE SCALIA: -- a state law, which

15 criminalizes the same thing that the Federal law does.

16   GENERAL VERRILLI: I think it's quite

17 different.

18   What they are doing here is using 1306(a) to

19 get at the status of unlawful presence. The only people

20 who can be prosecuted under Section 3 are people who are

21 unlawfully present in the country. That's what the

22 statute says. And they are using it to get at that

23 category of people, to, essentially, use their state

24 criminal law to perform an immigration function.

25   And the immigration function is to try to --
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1   to prosecute these people. And, by the way, you can

2   prosecute somebody, they can be put in jail for 30 days

3   here. But, under Federal law, a violation of 1306(a) is

4   a continuing offense.

5   So the day they get out of jail for that 30

6   days, they can be arrested again. And this can happen

7   over and over again. And the point of this provision is

8   to drive unlawfully present people out of the state of

9   Arizona.

10   JUSTICE KENNEDY: Suppose -- suppose --

11   well, assume these are two hypothetical -- two

12   hypothetical instances.

13   First, the Federal government has said, we

14   simply don't have the money or the resources to enforce

15   our immigration laws the way we wish. We wish we could

16   do so, but we don't have the money or the resources.

17   That's the first -- just hypothetical.

18   JUSTICE SCALIA: You said that in your

19   brief, didn't you?

20   JUSTICE KENNEDY: Also -- also hypothetical

21   is that the state of Arizona has -- has a massive

22   emergency with social disruption, economic disruption,

23   residents leaving the state because of flood of

24   immigrants. Let's just assume those two things.

25   Does that give the state of Arizona any

1   powers or authority or legitimate concerns that any

2   other state wouldn't have?

3   GENERAL VERRILLI: Of course, they have

4   legitimate concerns in that situation. And, Justice

5   Kennedy --

6   JUSTICE KENNEDY: And can they go to their

7   legislature and say, we're concerned about this, and ask

8   the legislature to enact laws to correct this problem?

9   GENERAL VERRILLI: They -- they certainly

10   can enact laws of general application. They can enforce

11   the laws of general application that are on the books.

12   They already -- as a result of 8 U.S.C. 1621, it's clear

13   that they are under no obligation to provide any state

14   benefits to the -- the population.

15   But I think, most importantly, they can --

16   and -- not most importantly, but as importantly, they

17   can engage in cooperative efforts with the Federal

18   government -- excuse me. I see my --

19   CHIEF JUSTICE ROBERTS: No, keep going.

20   GENERAL VERRILLI: They can -- they can

21   engage in cooperative efforts with the Federal

22   government, of which there are many going on in Arizona

23   and around the country, in order to address these

24   problems.

25   JUSTICE SCALIA: General, didn't you say in

1   your brief -- I forget where it was -- I thought you

2   said that the Justice Department doesn't get nearly

3   enough money to enforce our immigration laws? Didn't

4   you say that?

5   GENERAL VERRILLI: Of course, we have to set

6   priorities. There are only --

7   JUSTICE SCALIA: Exactly. Okay. So the

8   state says, well, that may be your priorities, but most

9   of these people that you're not going after -- or an

10   inordinate percentage of them, are here in our state,

11   and we don't like it. They are causing all sorts of

12   problems. So we're going to help you enforce Federal

13   law. We're not going to do anything else. We're just

14   enforcing Federal law.

15   GENERAL VERRILLI: Well -- well, what I

16   think they are going to do in Arizona is something quite

17   extraordinary, that has significant real and practical

18   foreign relations effects. And that's the problem, and

19   it's the reason why this power needs to be vested

20   exclusively in the Federal government.

21   They -- what they are going to do is engage,

22   effectively, in mass incarceration because the

23   obligation under Section 2(H), of course, is not merely

24   to enforce Section 2 to the fullest possible extent at

25   the -- at the risk of civil fine, but to enforce Federal

1   immigration law, which is what they claim they are doing

2   in Section 3 and in Section 5.

3   And so -- so you're going to have a

4   situation of mass incarceration of people who are

5   unlawfully present. That is going to raise -- poses a

6   very serious risk of raising significant foreign

7   relations problems.

8   And these problems are real. It is the

9   problem of reciprocal treatment of the

10   United States citizens in other countries.

11   JUSTICE KENNEDY: So you're saying the

12   government has a legitimate interest in not enforcing

13   its laws?

14   GENERAL VERRILLI: No. We have a legitimate

15   interest in enforcing the law, of course, but it needs

16   to be -- but these -- this Court has said, over and over

17   again, has recognized that the -- the balance of

18   interest that has to be achieved in enforcing the -- the

19   immigration laws is exceedingly delicate and complex,

20   and it involves consideration of foreign relations, it

21   involves humanitarian concerns, and it also involves

22   public order and public --

23   JUSTICE SOTOMAYOR: General, when -- when --

24   I know your brief, you had -- you said that there are

25   some illegal aliens who have a right to remain here.

1   And I'm just realizing that I don't really know what

2   happens when the Arizona police call the Federal agency.

3   They give the Federal agency a name, correct?

4   GENERAL VERRILLI: I assume so, yes.

5   JUSTICE SOTOMAYOR: Oh, you don't really

6   have knowledge of what --

7   GENERAL VERRILLI: Well, they -- I mean, it

8   can come in lots of different ways, but, generally, they

9   will get a name and some other identifying information.

10   JUSTICE SOTOMAYOR: All right. And what

11   does the computer have? What information does your

12   system have?

13   GENERAL VERRILLI: Yes. So the way this

14   works is there is a system for -- for incoming

15   inquiries. And then there is a person at a computer

16   terminal. And that person searches a number of

17   different databases. There are eight or ten different

18   databases, and that person will check the name against

19   this one, check the name against that one, check the

20   name against the other one, to see if there are

21   any hits.

22   JUSTICE SOTOMAYOR: Well, how does that

23   database tell you that someone is illegal, as opposed to

24   a citizen?

25   GENERAL VERRILLI: Well --

1   JUSTICE SOTOMAYOR: Today, if you use the

2 names Sonia Sotomayor, they would probably figure out I

3 was a citizen.

4   (Laughter.)

5   GENERAL VERRILLI: Well --

6   JUSTICE SOTOMAYOR: But let's assume it's

7 John Doe, who lives in Grand Rapids.

8   GENERAL VERRILLI: The citizen problem is

9 actually -- yes.

10   JUSTICE SOTOMAYOR: So they are legal. Is

11 there a citizen database?

12   GENERAL VERRILLI: The citizen problem is

13 actually a significant problem. There isn't a citizen

14 database. If you --

15   JUSTICE SOTOMAYOR: I'm sorry. There is or

16 there isn't?

17   GENERAL VERRILLI: There is not. If you

18 have a passport, there is a database if you look

19 passports. So you could be discovered that way. But,

20 otherwise, there is no reliable way in the database to

21 verify that you are a citizen, unless you are in the

22 passport database. So you have lots of circumstances in

23 which people who are citizens are going to come up no

24 match.

25   There's no -- there is nothing suggesting in

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1   the databases that they have an immigration problem of

2   any kind, but there's nothing to --

3   JUSTICE SOTOMAYOR: So the guy who is -- so

4   if you run out of your house without your driver's

5   license or identification and you walk into a park

6   that's closed and you're arrested, you -- they make the

7   call to this agency. You could sit there forever while

8   they --

9   GENERAL VERRILLI: Yes, and I --

10   JUSTICE SOTOMAYOR: -- figure out if

11   you're --

12   GENERAL VERRILLI: While I'm at it, there is

13   a factual point I think I'd like to correct.

14   Mr. Clement suggested that it takes 10 minutes to

15   process these calls. That's true, but you're in a queue

16   for 60 minutes before it takes the 10 minutes to process

17   the call. So the average time is 70 minutes, not 10

18   minutes. And --

19   CHIEF JUSTICE ROBERTS: I had a little --

20   wasn't sure about your answer to Justice Kennedy.

21   Is the reason that the government is not

22   focused on people who are here illegally, as opposed to

23   the other categories we were talking about, because of

24   prioritization or because of lack of resources?

25   You suggested that if the -- every illegal

1 alien that you identify is either removed or prosecuted,

2 that that would cause tensions with other governments.

3 So I -- I don't understand if it's because you don't

4 have enough resources or because you don't want to

5 prosecute the people who are simply here illegally, as

6 opposed to something else.

7   GENERAL VERRILLI: Well, it's a little more

8 complicated than that. I think the -- the point is

9 this: That with respect to persons who are unlawfully

10 present, there are some who are going to fall in our

11 priority categories. There are those who have committed

12 serious offenses. There are those who have been removed

13 and have come back. And there are other priority

14 categories.

15   Because we have resource constraints and

16 there are only so many beds in the detention centers and

17 only so many immigration judges, we want to focus on

18 those priority categories, find them, remove them.

19   There is a second category, and that is,

20 individuals who are here in violation, technically, of

21 1306(a), but who have a valid asylum application or

22 application for temporary protected status or other --

23 and, with respect to those persons that we think

24 would -- it's affirmatively harmful to think that they

25 ought to be prosecuted.

1   And then there is an additional category of

2   people who are not in the second category and not

3   priorities, and the -- and we think there, the idea that

4   an individual state will engage in a process of mass

5   incarceration of that population, which we do think is

6   what Section 2(H) commits Arizona to do under Section 3,

7   raises a significant foreign relations problem.

8   JUSTICE SCALIA: Well, can't you avoid that

9   particular foreign relations problem by simply deporting

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

11   GENERAL VERRILLI: I really think --

12   JUSTICE SCALIA: And send them back to the

13   countries that are -- that are objecting.

14   GENERAL VERRILLI: This is a -- this is a --

15   JUSTICE SCALIA: What's the problem with

16   that?

17   GENERAL VERRILLI: Well, a couple of things.

18   First is I don't think it's realistic to assume that the

19   aggressive enforcement of Sections 3 and 5 in Arizona is

20   going to lead to a mass migration back to countries of

21   origin. It seems a far more likely outcome is going to

22   be migration to other states. And that's a significant

23   problem. That's part of the reason why this problem

24   needs to be managed on a national basis.

25   Beyond that, I do think, you know, the --

1   it's worth bearing in mind here that the country of

2   Mexico is in a central role in this situation.

3   Between 60 and 70 percent of the people that

4   we remove every year, we remove to Mexico. And, in

5   addition, we have to have the cooperation of the

6   Mexicans. And I think, as the Court knows from other

7   cases, the cooperation of the country to whom we are --

8   to which we are removing people who are unlawfully

9   present is vital to be able to make removal work.

10   In addition, we have very significant issues

11   on the border with Mexico. And, in fact, they are the

12   very issues that Arizona is complaining about, in

13   that --

14   JUSTICE SCALIA: So we -- we have to -- we

15   have to enforce our laws in a manner that will please

16   Mexico? Is that what you're saying?

17   GENERAL VERRILLI: No, Your Honor, but what

18   it does -- no, Your Honor, I'm not saying that --

19   JUSTICE SCALIA: It sounded like what you

20   were saying.

21   GENERAL VERRILLI: No, but what I am saying

22   is that this points up why the Framers made this power

23   an exclusive national power. It's because the entire

24   country feels the effects of a decision -- conduct by an

25   individual state. And that's why the -- the power needs

1   to be exercised at the national level and not the state

2   level.

3   CHIEF JUSTICE ROBERTS: And your concern is

4   the problems that would arise in bilateral relations if

5   you remove all of these people -- or a significant

6   percentage or a greater percentage than you are now.

7   Nothing in the law requires you to do that.

8   All it does is lets you know where -- that

9   an illegal alien has been arrested, and you can decide,

10   we are not going to initiate removal proceedings against

11   that individual. It doesn't require you to remove one

12   more person than you would like to remove under your

13   priorities.

14   GENERAL VERRILLI: Right, but the problem

15   I'm focused on -- we're focused on, Mr. Chief Justice,

16   is not our removal decisions, but Arizona's decision to

17   incarcerate, and the foreign relations problem that that

18   raises. That's why this power has got to be exercised

19   at the national level.

20   CHIEF JUSTICE ROBERTS: And that -- and that

21   arises under 3 and 5?

22   GENERAL VERRILLI: Correct.

23   CHIEF JUSTICE ROBERTS: But not 2?

24   GENERAL VERRILLI: Well, 2 -- 2 identifies

25   the population that's going to be prosecuted under 3 and

1   5.

2   I haven't -- I've been up here a long time.

3   I haven't said anything about Section 5 yet. And I

4   don't want to tax the Court's patience, but if I could

5   spend a minute on Section 5?

6   CHIEF JUSTICE ROBERTS: Section 5.

7   GENERAL VERRILLI: The -- I do think the

8   fundamental point about Section 5 here is that, in 1986,

9   Congress fundamentally changed the landscape. Congress

10   made a decision in 1986 to make the employment of aliens

11   a central concern of national immigration policy. And

12   this Court has described the 1986 law as a comprehensive

13   regime.

14   Now, what my friend, Mr. Clement, says, is

15   that it may be a comprehensive regime for employers;

16   it's not a comprehensive regime for employees. And,

17   therefore, it's -- there ought not be any inference here

18   that the states are precluded from criminalizing efforts

19   to seek or obtain employment in Arizona.

20   But I really think that's not right.

21   The -- employment is one problem. And Congress tackled

22   the problem of employment and made a decision -- a

23   comprehensive decision, about this -- the sanctions it

24   thought were appropriate to govern. And Congress did,

25   as Justice Ginsburg suggested, make judgments with

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1   respect to the circumstances under which employees could

2   be held criminally liable, as well as the circumstances

3   under which employers could be held liable.

4   And I think it is useful, in thinking about

5   the judgments Congress actually made --

6   JUSTICE SCALIA: So field preemption; is

7   that your argument with respect to --

8   GENERAL VERRILLI: It's -- it's both. I

9   think we're making both a field and a conflict

10   preemption argument here, Justice Scalia. And the --

11   and the -- I think it's worth examining the specific

12   judgments Congress made in 1986.

13   On the employer's side -- and, after all,

14   this is a situation in which the concern here is that

15   the employer is in a position of being the exploiter and

16   the -- the alien of being the exploited -- on the

17   employer's side, Congress said that states may not

18   impose criminal sanctions, and even -- and the Federal

19   government will not impose criminal sanctions for the

20   hiring of employees, unless there's a pattern or

21   practice.

22   It seems quite incongruous to think that

23   Congress, having made that judgment and imposed those

24   restrictions on the employer's side, would have left

25   states free to impose criminal liability on employees

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1 merely for seeking work, for doing what you, I think,

2 would expect most otherwise law-abiding people to do,

3 which is to find a job, so they can feed their families.

4 So I think that's -- that's a significant problem.

5   The -- in addition, Congress made clear in

6 the law that the I-9 form could not be used for any

7 other purpose than prosecutions for violation of the

8 Federal antifraud requirements. And, if Congress wanted

9 to leave states free to impose criminal sanctions on

10 employees for seeking work, they wouldn't have done

11 that, it seems to me.

12   So there, I think there are strong

13 indicators in the text that Congress did make a

14 judgment, and the judgment was this far and no farther.

15 And it's reasonable that Congress would have done so,

16 for the same kinds of foreign relations concerns that I

17 was discussing with -- with respect to Section 3. It

18 would be an extraordinary thing to put someone in jail

19 merely for seeking work. And, yet, that's what Arizona

20 proposes to do under Section 5 of its law.

21   Now, of course, there is an express

22 preemption provision, but the express preemption

23 provision, as this Court has said many times, does not

24 operate to the exclusion of implied preemption, field or

25 conflict. So we do think those principles apply here.

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1   We think there's a reason why the express

2   preemption provision was limited to the employer's side,

3   which is that, after DeCanas, laws had been enacted on

4   the employer's side, and with -- Congress was making

5   clear that those were preemptive, there were no laws on

6   the employee's side at the time and, therefore, no

7   reason for preemption.

8   CHIEF JUSTICE ROBERTS: Thank you, General.

9   GENERAL VERRILLI: Thank you, Mr. Chief

10   Justice.

11   CHIEF JUSTICE ROBERTS: Mr. Clement,

12   5 minutes.

13   REBUTTAL ARGUMENT OF PAUL D. CLEMENT

14   ON BEHALF OF THE PETITIONERS

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

16   and may it please the Court:

17   I'd like to start, briefly, with the

18   enforcement issues and then talk about the other

19   provisions. The last thing I'll say about the

20   enforcement provision, since I do think that the

21   Government's rather unusual theory that something that's

22   okay when done ad hoc becomes preempted when it's

23   systematic. I think that theory largely refutes itself.

24   But I will say one thing, which is to just

25   echo that there is no interference with enforcement

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1 priorities by simply giving the Federal government

2 information on which to bring their enforcement

3 priorities to bear. And this is really illustrated by a

4 point this Court made in its Florence decision earlier

5 this month, which is that, sometimes, you pull somebody

6 over for the most innocuous of infractions, and they

7 turn out to be the most serious of offenders.

8   And so if you preclude officers, as happened

9 in Phoenix, from communicating with the Federal

10 government, the Federal government will not be able to

11 identify the worst of the worst. And if you want an

12 example of this, look at the declaration of Officer

13 Brett Glidewell at Joint Appendix 183 to 186. He pulled

14 somebody over in a routine traffic stop and was shot by

15 the individual.

16   Now, the individual, it turns out, was

17 wanted for attempted murder in El Salvador and was also

18 guilty of illegal reentry into the United States. He

19 was stopped on three previous occasions and his status

20 was not verified. Now, if it had been, he certainly

21 would have been apprehended. In at least two of the

22 stops, his immigration status wasn't checked because of

23 the city policy, city of Phoenix.

24   Now, if the state, I submit, can do

25 anything, it can, at the state level, override those

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 1   kind of local policies and say, that's not what we want.

 2   Community policing is all well and good, but we want to

 3   maximize communication with the Federal authorities. So

 4   I think the enforcement policy and priorities argument

 5   simply doesn't work.

 6   As to Section 3, two points about that, one

 7   is, I respectfully disagree with the Solicitor General

 8   as to whether the various things that he led off -- read

 9   off, the litany of situations where somebody is --

10   technically doesn't have registration would be a

11   violation of 1306(a).

12   And the reason I take that position is that

13   provision says a willful failure to register. Now,

14   maybe the prosecutors take the view that there is

15   willfulness in those circumstances, but I don't think

16   many judges would. I think they would say that, if

17   you've been told by the Federal government that you're

18   perfectly fine here and you don't need to register, that

19   that would be good enough to defeat a finding of

20   willfulness. So I don't think 1306(a) covers this case.

21   JUSTICE SOTOMAYOR: But you're inviting --

22   you're inviting the very sort of conflict that he's

23   talking about because what's going to happen, now, is

24   that, if there is no statement by the Federal agency of

25   legality, the person is arrested, and, now, we're going

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1   to have Federal resources spent on trying to figure out

2   whether they have an asylum application, whether they

3   have this, whether they have that, whether they are

4   exempted under this reason, whether the failure to carry

5   was accidental or not -- I mean, you are involving the

6   Federal government in your prosecution.

7   MR. CLEMENT: Well --

8   JUSTICE SOTOMAYOR: Now, you may say we're

9   not because all we're going to show is -- what? That we

10   got a Federal call -- we got a Federal answer that the

11   person wasn't registered?

12   MR. CLEMENT: No, we're going to say that we

13   communicated with the Federal immigration officials, and

14   they told us this is somebody who's perfectly fine and

15   doesn't have to register. The --

16   JUSTICE SOTOMAYOR: No -- no

17   Confrontation -- no Confrontation Clause problem with

18   that? With relying on a call to a Federal agency and

19   the police officer says, you're arrested, you're

20   charged, it's not an illegal alien -- or it is an

21   illegal alien.

22   MR. CLEMENT: My supposition, Justice

23   Sotomayor, is that they would use that call to not bring

24   the prosecution, so the issue wouldn't even arise. But

25   I do want to be clear about --

1   JUSTICE SOTOMAYOR: No, no, no. How

2   about -- what -- how about they get a response, yes,

3   it's an illegal alien?

4   MR. CLEMENT: And they bring a prosecution

5   under Section 3 and then --

6   JUSTICE SOTOMAYOR: So how -- where do they

7   get the records that show that this person is an illegal

8   alien that's not authorized to be here?

9   MR. CLEMENT: I --

10   JUSTICE SOTOMAYOR: Who do they get it from?

11   MR. CLEMENT: I think they would get it from

12   the Federal authorities. I think it would be admitted.

13   There might be a challenge in that case. I mean -- you

14   know, this is a facial challenge. I'm not going to try

15   to address that potential Sixth Amendment issue.

16   What I would like to say is two things.

17   One, if there is some sloppiness in the way the Federal

18   government keeps its records, so that there's lots of

19   people that really should be registered, but aren't, I

20   can't imagine that sloppiness has a preemptive effect.

21   The second thing I would say is that I do

22   think, in thinking about Section 3 in particular, the

23   analogy is not the fraud on the FDA claim in Buckman.

24   It's really the state tort law that says that it's a

25   violation of state tort law to not even seek the

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1   approval that's needed under the FDA for a device.

2   Now, states impose tort law for people that

3   market a device without getting the necessary approval.

4   And nobody thinks that's preempted because it serves the

5   Federal interest. It doesn't have a deluge of

6   information. It forces people to get FDA approval.

7   And in the same way, this state law will

8   force people to register, which is what the Federal

9   government is supposed to want in the first place, so

10   there is no preemption there. There is no conflict.

11   As to the employment provision, I do think

12   it's important to recognize that --

13   CHIEF JUSTICE ROBERTS: Finish your

14   sentence.

15   MR. CLEMENT: -- before 1986, the -- the

16   government was not agnostic about unlawful employment by

17   aliens. The employees were already covered, and they

18   were subject to deportation. So the government said,

19   we're going to cover the employers for the first time.

20   I can't imagine why that would have preemptive effect.

21   Thank you, Your Honor.

22   CHIEF JUSTICE ROBERTS: Thank you,

23   Mr. Clement, General Verrilli. Well argued on both

24   sides. Thank you.

25   The case is submitted.

1   (Whereupon, at 11:27 a.m., the case in the

2   above-entitled matter was submitted.)

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