

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	DONALD B. VERRILLI, JR., ESQ.	
7	On behalf of the Respondent	33
8	REBUTTAL ARGUMENT OF	
9	PAUL D. CLEMENT, ESQ.	
10	On behalf of the Petitioners	75
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:07 a.m.)

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

Mr. Clement.

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

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

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

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

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

1 backwards.

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

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

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

23 Indeed, if the DHS had --

24 JUSTICE SOTOMAYOR: Mr. Clement --

25 MR. CLEMENT: Yes.

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

10 MR. CLEMENT: That's exactly right, Justice
11 Sotomayor. So this only operates when somebody's been,
12 essentially, stopped for some other infraction. And
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

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

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

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

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.

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 the 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

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

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

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 forbid 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.

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

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

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

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

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

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

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

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.

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

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

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

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

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?

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 to 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 --

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

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.

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

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

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.

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

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

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

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 --

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

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

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

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.

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

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

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

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

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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A	<p>adopted 31:5</p> <p>adversary 34:22</p> <p>affirmatively 68:24</p> <p>afoul 32:15</p> <p>agency 4:18 15:22,22 42:7 42:9,12 45:17 54:18 65:2,3 67:7 77:24 78:18</p> <p>aggressive 69:19</p> <p>agnostic 80:16</p> <p>ago 20:12</p> <p>agree 24:9</p> <p>agreed 3:21</p> <p>agrees 36:14</p> <p>aid 34:12</p> <p>AL 1:3</p> <p>alien 7:14 9:19 10:4 15:23,23 18:1,17 23:17 29:6 30:5,7,21 45:14,18,24 46:4 57:23 68:1 71:9 73:16 78:20,21 79:3,8</p> <p>aliens 19:5 21:6 27:5 31:18 34:17 36:12 64:25 72:10 80:17</p> <p>Alito 18:7 19:3 20:6 31:15,16 31:17 32:16,20 32:23 33:7 37:18 43:7,21 44:3,11 52:20 53:15,24 58:6</p> <p>Alito's 22:9</p> <p>allegation 34:10 46:7</p> <p>allowed 12:4</p> <p>allows 11:20,25</p> <p>amateur 51:21</p> <p>ameliorate 49:8</p>	<p>49:10</p> <p>amended 59:3</p> <p>Amendment 9:25 10:6 11:20,23,25 12:4 13:2,7,10 13:11 20:2,8 79:15</p> <p>analog 23:20</p> <p>analogous 29:2</p> <p>analogy 54:4 79:23</p> <p>analysis 31:8,9</p> <p>anomalous 22:19</p> <p>answer 8:6,23 9:9 18:2,3 34:21 42:9,12 45:10 48:24 49:5 50:1 55:10,12 67:20 78:10</p> <p>answerable 57:7</p> <p>answers 9:6 47:4</p> <p>anticipate 14:14</p> <p>antifraud 74:8</p> <p>anybody 35:22 52:2</p> <p>anyway 12:24 47:15 51:12 54:23</p> <p>apart 16:5 40:9</p> <p>appeal 30:6</p> <p>APPEARAN... 1:14</p> <p>appendix 22:14 47:2 76:13</p> <p>application 23:11 31:22 58:11,11 59:14 62:10,11 68:21 68:22 78:2</p> <p>applies 25:21</p> <p>apply 21:6 25:25 31:24 32:1 74:25</p>	<p>appreciate 28:20</p> <p>apprehend 50:12</p> <p>apprehended 76:21</p> <p>apprehension 36:12 55:25</p> <p>approach 3:25 25:7</p> <p>appropriate 72:24</p> <p>approval 80:1,3 80:6</p> <p>April 1:9</p> <p>area 25:20 52:9</p> <p>argued 80:23</p> <p>arguing 5:5,25 24:2</p> <p>argument 1:12 2:2,5,8 3:3,7 5:21 6:18 13:15 21:16 29:16,22 33:21 34:2 42:11 44:12 49:3,3 52:3,6,16,18 56:13,20,25 73:7,10 75:13 77:4</p> <p>arguments 48:19</p> <p>arises 71:21</p> <p>Arizona 1:3 3:4 3:11,13,24 7:16 8:12 15:4 20:24 22:7,18 22:20 23:11 25:5 31:3 34:14,18,23 35:10,10,21 36:9,10,13,15 37:2,4,8,15,25 40:7,17 42:3,6 43:9,9 44:13 44:14,16 46:10 46:14 50:1,14</p>	<p>61:9,21,25 62:22 63:16 65:2 69:6,19 70:12 72:19 74:19</p> <p>Arizona's 15:25 24:15 71:16</p> <p>arrest 5:9 8:10 8:15 12:19 14:16,19,20,24 14:25 18:5 20:9,9,15 21:2 21:3,4 22:1,8 22:20 45:20 53:4</p> <p>arrestable 22:22</p> <p>arrested 6:2 8:13 10:20,21 10:23 12:9 37:23 43:13 45:15 61:6 67:6 71:9 77:25 78:19</p> <p>arresting 42:6 53:10</p> <p>arrests 13:9,19 42:3 46:22 52:23</p> <p>ascertain 4:12 4:21 14:22</p> <p>aside 45:21 56:13</p> <p>asked 34:22 48:13</p> <p>asking 48:12 49:6</p> <p>aspect 35:18</p> <p>asserting 48:3</p> <p>assist 28:6</p> <p>assume 61:11,24 65:4 66:6 69:18</p> <p>assuming 6:21 54:20</p> <p>asylum 31:22 58:11 59:11 68:21 78:2</p>
----------	---	---	--	---

as-applied 29:13	51:24 60:11,12	11:13,18,21,23	80:25 81:1	33:17,20,23,25
attack 13:6	banks 51:14,15	12:17 13:14,21	cases 14:15,24	34:6,7 36:16
attempted 3:14	based 53:10	14:7,10 18:9	14:25 24:22	37:19 39:16
76:17	58:16	48:10 49:9	29:1,3,4,4	40:9,24 41:9
attention 44:22	basic 25:7	54:14 55:6,9	31:11 38:19	41:14,21,25
attorney 10:3	basically 21:19	brief 34:4 61:19	42:18 54:5	42:17,22,25
39:1,7,23	21:22 22:16	63:1 64:24	70:7	49:16,18,24,25
51:18 55:18,20	29:7	briefly 75:17	categories 31:18	50:16 51:5
59:5,21	basis 6:15,16	bring 16:6 54:4	58:7 67:23	54:9,12 56:17
attrition 34:15	8:25 13:13	76:2 78:23	68:11,14,18	57:15,18 62:19
40:5	20:4 29:12	79:4	category 31:23	67:19 71:3,15
authorities 9:11	31:2 43:25	bringing 44:21	32:3 60:23	71:20,23 72:6
12:18 55:14	46:4 59:20,25	broad 21:1	68:19 69:1,2	75:8,9,11,15
77:3 79:12	69:24	broader 17:19	cause 5:9 20:16	80:13,22
authority 8:10	bear 76:3	Buckman 29:4	20:17 53:10	chiefs 51:6
8:16 17:9,12	bearing 70:1	79:23	68:2	Circuit 3:20,23
18:6 21:2,3,4	bears 3:11	burden 4:4	causing 63:11	circumstance
21:10 22:9,20	beds 68:16	business 47:13	Center 9:12	5:21 8:18
35:3,6,15 39:1	behalf 1:15,18		10:17 47:4	18:24 22:9
56:6 62:1	2:4,7,10 3:8	C	centers 68:16	43:1 53:25
authorization	33:22 75:14	C 2:1 3:1	central 48:5	circumstances
3:24 4:3	believe 7:20	California 25:13	70:2 72:11	10:11 24:14
authorize 19:25	20:17 45:11	29:16,17	certain 32:6	29:2 52:11
20:2	belong 35:10,23	call 5:23,24 6:23	certainly 12:18	66:22 73:1,2
authorized 79:8	belongs 35:9	7:13,13 15:22	20:1 23:13	77:15
authorizing	benefits 62:14	16:22 27:24	42:20 47:22	citizen 10:24
13:25	beyond 20:1	42:7,18 43:24	62:9 76:20	11:2 18:12,20
auxiliary 30:3	23:4 25:17	45:17,17 54:24	challenge 14:13	19:14 65:24
average 10:16	27:20 69:25	55:4 65:2 67:7	29:13 42:23	66:3,8,11,12
19:10 67:17	big 26:14	67:17 78:10,18	79:13,14	66:13,21
avoid 59:13 69:8	bilateral 71:4	78:23	change 8:9	citizens 12:10
a.m 1:13 3:2	bit 23:15 26:4	calling 47:16	56:18	35:17 47:20
81:1	book 14:25	calls 46:23 50:1	changed 37:20	48:7 64:10
	booked 15:6,13	67:15	72:9	66:23
B	booking 15:3,6	captures 22:21	character 37:4,4	city 76:23,23
B 1:17 2:6 33:21	books 62:11	care 43:22 59:5	characterizati...	civil 7:10 37:7
back 16:6 18:8	border 18:13	carrier 29:18	30:12	54:1 63:25
18:19,23 43:18	43:20 70:11	carry 32:14 78:4	charged 78:20	claim 13:11
48:11 53:18	borders 16:16	carrying 55:21	check 6:3 15:17	58:15,17,18
68:13 69:12,20	17:2,22 34:25	case 3:4 16:12	18:18 19:21	64:1 79:23
backed 37:6	35:13 36:5,6	19:8,10 20:7	50:3,12 65:18	clarity 58:8
43:2 54:1	36:22	23:12,24 24:15	65:19,19	class 32:8,22
backing 9:25	borrowed 3:14	34:1,8,10	checked 15:15	37:15
backpack 10:25	bother 50:2	38:14 42:15	76:22	Clause 35:24
backwards 4:1	Branch 49:14	43:24 53:8	checks 15:5	78:17
balance 64:17	Brett 76:13	54:2 59:20	Chief 3:3,9 23:1	clauses 16:1
bank 51:20,21	Breyer 10:18	77:20 79:13	28:16,19 31:16	clear 8:19 15:13

<p>15:21 34:1 55:10 62:12 74:5 75:5 78:25 clearly 25:25 Clement 1:15 2:3,9 3:6,7,9 4:24,25 5:10 5:17 6:9,19 7:2 7:18 8:4 9:5,21 9:23 10:9 11:11,16,19,22 12:16 13:1,4,8 13:16 14:6,8 14:11 16:2,19 16:25 17:4,16 17:24 18:2,22 19:7 20:21 22:4,13 23:13 24:20 25:9 26:7,13 28:2 28:19 29:9,24 30:10 31:25 32:19,21 33:2 33:8,18,19 34:11 45:16 48:13 58:23 67:14 72:14 75:11,13,15 78:7,12,22 79:4,9,11 80:15,23 clerks 54:4 close 17:2 closed 67:6 colleagues 45:11 collect 19:20 color 24:24 come 12:22 25:3 51:19 53:18,19 56:15 58:9 65:8 66:23 68:13 Commerce 35:24 commits 69:6 committed 8:11</p>	<p>22:5,7,22 37:16 40:18 53:11 68:11 communicate 4:11,20 communicated 78:13 communicating 76:9 communication 55:24 77:3 communicatio... 21:14 Communities 15:12,12 Community 77:2 competing 30:7 complaining 70:12 complement 30:3 complete 30:2 completely 20:20 27:10 complex 9:4,7 64:19 complicated 68:8 components 45:13 comprehensive 72:12,15,16,23 computer 65:11 65:15 concede 16:15 concern 13:12 29:12 48:7 52:9,10 71:3 72:11 73:14 concerned 47:14 62:7 concerning 35:8 concerns 62:1,4 64:21 74:16 conclusion 12:15 56:4</p>	<p>conditions 58:14 conduct 70:24 conflict 30:25 37:11 43:5 55:3 73:9 74:25 77:22 80:10 Confrontation 78:17,17 confronted 26:21 29:15 confused 45:9,9 Congress 24:3 24:17 26:14,21 27:4,8 30:2,21 35:25 38:16,22 38:23,24 56:5 72:9,9,21,24 73:5,12,17,23 74:5,8,13,15 75:4 consent 35:25 consequences 8:6 consider 26:19 considerable 25:6 consideration 36:10 64:20 consistent 7:9 Constitution 34:19 35:2,23 36:4 49:13 constitutional 48:22 constraints 68:15 contact 16:8 contains 55:16 context 56:8 continue 7:22 9:1 19:21 20:13 continuing 61:4 control 39:17 44:14 55:20 controls 24:12</p>	<p>cooperate 51:2 cooperating 44:22 50:9 cooperation 45:3 55:24,25 56:2,7,8,14 70:5,7 cooperative 62:17,21 correct 20:20,21 22:3 34:5 39:24 50:8 53:8,9,23 58:24 62:8 65:3 67:13 71:22 costs 3:12,13 Counsel 20:11 21:1,25 23:1 24:8 countries 35:17 48:8 64:10 69:13,20 country 32:17 33:3 35:9,10 38:5 41:19 47:22 50:6 51:11 52:11 58:10,13,14 60:21 62:23 70:1,7,24 County 15:8 couple 69:17 course 5:15 13:8 19:19 23:9 29:1,15 32:16 51:25 52:4,5 62:3 63:5,23 64:15 74:21 court 1:1,12 3:10 12:22 25:14 29:15,22 30:14,18 31:2 31:9 33:24 64:16 70:6 72:12 74:23 75:16 76:4</p>	<p>Court's 72:4 cover 80:19 covered 80:17 covers 77:20 create 37:10 crime 5:9 8:12 9:9 12:3 22:17 22:18,19,22,23 22:25 27:23 45:15 51:15 53:11 58:19,20 crimes 6:2 criminal 16:11 21:6 26:16 27:7 39:4,6 59:6 60:9,24 73:18,19,25 74:9 criminalize 60:5 criminalizes 60:15 criminalizing 60:8 72:18 criminally 73:2 criminals 36:13 51:10 critical 6:24 30:17 current 36:25 custody 8:21,22 56:20 cut 56:11</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 1:15 2:3,9 3:1 3:7 75:13 database 65:23 66:11,14,18,20 66:22 databases 65:17 65:18 67:1 Davidowitz 24:12 day 12:3 22:2 37:7 61:5 days 12:11 33:9 41:23 61:2,6</p>
--	---	--	---	---

<p>deal 40:21 dealt 8:1 DeCanas 24:22 25:12,14 75:3 decide 16:5 40:20,25 71:9 decided 26:9,12 deciding 26:11 26:14 decision 26:17 31:10 38:24 41:4,4 50:5,19 60:4 70:24 71:16 72:10,22 72:23 76:4 decisions 38:3 39:12 50:11,14 50:14 71:16 declaration 47:2 47:5 76:12 declarations 51:5 declares 34:14 defeat 42:23 77:19 defend 35:12 defense 18:4 definition 20:24 22:11,13,16 delicate 64:19 deliver 57:11 deluge 80:5 demand 23:8 27:19 demanded 3:23 Department 1:18 63:2 deploy 40:21 deportable 8:17 deportation 80:18 departing 69:9 deputize 55:18 described 72:12 describes 25:5 designed 34:16 desires 44:16</p>	<p>detain 5:25 6:12 7:15,22 9:1 15:23 19:25 20:13 45:23 48:25 detained 6:23 11:20 12:12 14:3 detainer 6:7 detention 11:7 13:25 14:16 39:9 55:25 68:16 detentions 15:18 determination 9:19 23:5 determine 24:14 53:5 determined 10:22 detriment 40:22 device 80:1,3 DHS 4:23 38:25 difference 23:15 26:14 30:18 53:24 different 6:7,8,9 13:15 23:14 31:3 36:20,24 39:13 52:7 56:10 60:17 65:8,17,17 difficult 21:16 dilemma 40:15 direct 23:20 36:14 direction 43:10 55:20 directly 22:20 31:12 disagree 77:7 discovered 66:19 discretion 5:22 7:1 38:8 39:22 59:17,22 discretionary</p>	<p>44:10 discussed 26:6 discussing 74:17 discussion 17:5 30:13 diseased 36:7 dispel 18:25 19:3,9 disproportion... 3:12 disregard 44:16 disruption 61:22,22 distinction 32:24 distinguishes 14:23 divides 6:11 doctrine 29:11 document 28:8 32:7,11,13,14 33:13 documents 27:22 Doe 66:7 doing 6:21,22 27:3 44:1,15 44:21,25 47:16 60:7,18 64:1 74:1 dominant 52:9 DONALD 1:17 2:6 33:21 double 29:5,10 draw 24:6 drawing 32:24 drive 34:16 61:8 driver's 11:3 18:13,25 19:5 19:23 67:4 drives 18:13 driving 42:4 50:19 drug 9:9 43:19 drunk 42:3 50:18 dual 29:10</p>	<p>duly 4:4 duplicative 29:21,21 duties 36:1 D.C 1:8,15,18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 34:21 50:10 76:4 easier 57:12 echo 75:25 economic 61:22 effect 3:20 14:14 21:12,21 26:17 38:8 79:20 80:20 effective 45:7 effectively 51:7 55:16 63:22 effects 21:15 63:18 70:24 effort 49:12,18 49:19 51:9 efforts 4:3,11 62:17,21 72:18 eight 65:17 either 9:12 14:1 32:10 68:1 EI 76:17 elevate 36:10 elongate 14:15 15:2 elongation 13:19 15:18 emergency 61:22 employed 28:10 37:17 employee 27:1,9 employees 24:6 26:5,12,15 44:15 72:16 73:1,20,25 74:10 80:17 employee's 27:14 28:5,12</p>	<p>28:14 75:6 employer 27:10 28:9 73:15 employers 72:15 73:3 80:19 employer's 24:4 25:24 27:12 28:6 73:13,17 73:24 75:2,4 employing 28:9 employment 23:6,9,25 26:11 41:24 72:10,19,21,22 80:11,16 enact 60:4 62:8 62:10 enacted 4:5 30:2 55:13 75:3 enforce 29:20 39:6 45:6 49:12,19,21 50:9 57:22 61:14 62:10 63:3,12,24,25 70:15 enforced 38:17 39:2 58:2 enforcement 3:15 4:3 9:12 10:16 25:5 34:13,15 36:14 36:17,20 37:22 38:8 39:10 40:5,19 43:8 43:23 44:20,23 47:3 49:15 56:7,9,19 59:16,22 69:19 75:18,20,25 76:2 77:4 enforcing 38:18 51:13 57:6 63:14 64:12,15 64:18 engage 39:9 62:17,21 63:21</p>
---	---	---	--	--

<p>69:4 enjoin 3:19 enlist 3:15 entered 27:6 32:17 enters 33:4 entire 70:23 entirely 39:23 41:5 49:21 entity 54:16 entrusted 39:6 entry 33:6 equation 24:4 27:12 28:15 41:9 equivalent 31:7 especially 37:5 ESQ 1:15,17 2:3 2:6,9 essentially 3:23 5:12 17:10 24:2 28:8 38:14 60:23 established 25:19 ET 1:3 ethnic 34:3,8,10 eventually 15:14 everybody's 15:13 evidence 46:25 exactly 5:10 16:2 29:16 40:24 43:9 63:7 examining 73:11 example 4:14 10:20 18:9 38:7 53:2 60:12 76:12 examples 10:20 exceedingly 64:19 exclude 34:24 34:24 36:7 exclusion 74:24</p>	<p>exclusive 34:19 35:3 41:13 52:10 70:23 exclusively 57:24 59:17 63:20 excuse 62:18 executing 36:2 execution 24:16 executive 38:16 49:14 exempted 78:4 exemption 49:3 exercise 7:1 exercised 71:1 71:18 expand 23:4 expanded 35:7 expect 74:2 explain 51:7 explicitly 26:6 exploited 73:16 exploiter 73:15 exports 36:1 express 25:23,25 27:13 28:13 74:21,22 75:1 expressly 21:17 23:25 extent 6:5 17:7 36:21 37:10 44:20 63:24 extraordinary 3:18 37:6 59:25 60:3 63:17 74:18</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 3:20 5:4 13:13 facial 14:13 42:23 79:14 facilitate 4:11 facilities 15:4,14 facing 27:8 fact 19:13 35:9 59:10 70:11</p>	<p>factual 13:18 67:13 factually 15:2 failure 32:13 77:13 78:4 fair 12:15 fall 31:22 68:10 falls 52:24 false 27:22 families 74:3 far 39:13 55:23 69:21 74:14 farther 74:14 favor 25:21 FDA 79:23 80:1 80:6 feature 48:5 Federal 3:14,16 3:24 4:2,9,12 4:15,18,20 6:13 7:9,14 8:6 8:20 9:11 13:8 15:10,22 16:8 16:9,11,12,17 16:22,23 17:10 17:17,22 19:12 21:5,18 23:5,9 23:20 24:1 25:11 26:10,15 26:25 27:11,17 27:21,23 28:22 28:23 29:7,14 30:9 31:1,4,5 31:13,19 33:5 33:15 34:12 35:22 36:13 37:19 39:4,6 39:10,12,17,20 39:22 40:16,19 40:25 41:3 42:7,9,9,11,18 43:6,14,17,18 44:17,21,23 45:6 47:8 49:13,15,19,20 50:10,22,24 51:13,14,14</p>	<p>52:8,9,10,25 53:1 54:14,17 54:18,19 55:2 55:15,17,17 56:6,9 57:7,7 57:11,22,24 58:2,4 59:18 60:5,9,12,15 61:3,13 62:17 62:21 63:12,14 63:20,25 65:2 65:3 73:18 74:8 76:1,9,10 77:3,17,24 78:1,6,10,10 78:13,18 79:12 79:17 80:5,8 federalism 3:22 Feds 29:20 feed 74:3 feels 70:24 fellow 47:3 fertile 28:25 field 30:14 73:6 73:9 74:24 figure 9:15 10:5 66:2 67:10 78:1 find 29:1 42:8 45:18 50:22 68:18 74:3 finding 77:19 fine 11:21 33:12 41:5 54:1 63:25 77:18 78:14 Finish 80:13 first 28:4 32:2 34:13 46:6 48:14 53:6,9 61:13,17 69:18 80:9,19 fiscal 47:5 fit 21:5 fix 33:10 flood 61:23 Florence 76:4</p>	<p>flows 38:22 focus 43:19,19 48:13 51:3,9 56:2 57:16 68:17 focused 24:4 48:11 67:22 71:15,15 focusing 38:21 45:11 follow 44:17 following 7:13 13:22 37:9 forbad 21:13 forbidden 21:18 23:25 force 80:8 forced 29:3 forces 80:6 forcing 56:18 foreign 35:18 48:8 63:18 64:6,20 69:7,9 71:17 74:16 forever 67:7 forget 63:1 forgive 41:24 form 74:6 forth 35:8 55:14 forward 19:22 four 3:21 Fourth 9:25 10:6 11:20,23 11:25 12:4 13:2,7,10,11 20:1,8 Framers 35:15 70:22 frankly 56:17 fraud 79:23 fraudulent 28:7 free 43:17 44:15 45:5 50:15 69:10 73:25 74:9 friend 58:23 72:14</p>
--	--	--	--	---

full 20:25 24:16	65:7,13,25	66:23 68:10	guilty 33:5	hold 8:16,21
fullest 63:24	66:5,8,12,17	69:20,21 71:10	76:18	10:4,7 20:18
function 24:13	67:9,12 68:7	71:25 77:23,25	guy 67:3	48:17
60:24,25	69:11,14,17	78:9,12 79:14		holding 30:15
functions 55:21	70:17,21 71:14	80:19	H	Honor 9:23
fundamental	71:22,24 72:7	good 23:2 25:16	half 41:9,9	20:22 35:2,14
3:22 37:12	73:8 75:8,9	54:12 77:2,19	happen 5:15	36:9 38:3,11
40:1 48:8 72:8	77:7 80:23	Good-bye 50:4	7:20 8:19 12:6	40:12 43:16
fundamentally	generally 10:12	gotten 33:1	19:15 61:6	47:1 70:17,18
72:9	12:20 14:21	govern 23:6	77:23	80:21
further 4:18	24:5 28:25	72:24	happened 54:21	hour 16:3 18:14
19:11	65:8	governed 57:25	54:22,23 76:8	hours 12:10
future 30:24	General's 59:22	government 5:3	happens 7:12	53:19
	getting 80:3	5:24 6:5,13	8:5 11:2 14:18	house 67:4
G	Ginsburg 9:2,5	7:14 13:9	21:4 54:23	human 58:17
g 3:1 55:22	27:16 28:3	15:10 16:18,22	65:2	humanitarian
gangs 43:19	29:24 30:10	23:9 24:2 25:3	harassing 47:13	64:21
geared 26:9	72:25	25:8,11 26:10	47:15	hundred 54:6
general 1:17	give 21:4,9	29:3 35:4,8,15	harassment	hurdle 29:25
20:7 24:11	24:23 28:16	35:19,21,22	46:6 47:9 48:5	hypo 19:2
29:10 30:13	33:13 61:25	36:14,19 37:20	56:25 57:1	hypothesis 9:10
33:20,23 34:5	65:3	38:4 39:17,20	hard 23:15	24:10
34:9,20 35:1	given 8:16 46:13	40:16,25 42:19	25:18 34:11	hypothetical
35:14 36:8	46:18	44:18 45:5,22	harder 57:12	44:24 61:11,12
37:3 38:2,10	gives 35:6	50:22,24 53:1	harmful 68:24	61:17,20
38:20 39:1,5,7	giving 76:1	54:16,17,18,19	hear 3:3 25:7,10	hypotheticals
39:8,23,24	Glidewell 76:13	55:17 56:6	28:17	17:13
40:12 41:8,16	go 4:10 19:11	57:24 59:18	hearing 12:22	
41:23 42:14,20	33:12 41:25	61:13 62:18,22	14:23	I
42:24 43:15	48:11 51:20,22	63:20 64:12	heart 39:14 40:2	ICC 29:19
44:2,4,8,9,19	62:6	67:21 73:19	41:12 58:3	ICE 48:24
45:1,9 46:1,5	goes 4:17 39:14	76:1,10,10	held 6:2 9:19	idea 26:5 69:3
46:18,25 47:11	going 6:25 9:10	77:17 78:6	73:2,3	identification
47:21 48:1,4	10:4 11:19	79:18 80:9,16	help 38:12 63:12	67:5
49:7,10,17,24	13:18,19 14:22	80:18	helpful 43:5	identified 36:15
50:8 51:1,16	15:2 16:3	governments	Hines 24:11	48:4
51:19,25 52:4	18:19 21:6	68:2	25:15 30:1,13	identifies 71:24
52:6,15,18	24:6,12 25:3,7	government's	30:18,20 46:6	identify 5:14
53:7,22 55:5,8	25:9 39:2 40:7	13:6 21:5,16	48:1,4 57:2	37:15 40:6
55:11,18,21	40:20,21,25	23:5 32:5	hiring 73:20	53:13 57:12
56:21 57:4,15	41:10,11 42:4	34:23 40:19	Hispanic-look...	68:1 76:11
57:18 59:5,7	42:7 43:24	44:22 75:21	10:24	identifying 51:9
59:23 60:2,10	45:22 48:17	Grand 66:7	history 26:3,4	65:9
60:13,16 62:3	50:18 51:22	greater 23:12	26:20	identity 12:21
62:9,10,11,20	59:10 62:19,22	71:6	hits 65:21	illegal 3:12 7:14
62:25 63:5,15	63:9,12,13,16	ground 20:10	hoc 6:15 7:6	11:1 16:23
64:14,23 65:4	63:21 64:3,5	28:25	20:4 75:22	18:17 33:6

<p>45:18,24 46:4 47:17 50:3,4 50:23 64:25 65:23 67:25 71:9 76:18 78:20,21 79:3 79:7 illegally 17:22 27:6 32:17 33:4 34:25 36:23 39:21 42:8,19 50:7 50:25 67:22 68:5 illustrate 38:12 illustrated 8:9 76:3 illustration 59:16 imaginary 13:23 imagine 13:23 13:24 79:20 80:20 immigrant 16:23 immigrants 47:17 61:24 immigration 3:13,16 4:10 4:12,13,15,17 4:21,21 5:14 6:3 7:10 8:6 9:11 10:12,22 12:25 13:9,12 15:5,15,16 16:1,5,8,9 34:12 35:3,7 35:16 37:24 39:22 44:20 47:8,19,25 48:6 50:10,20 50:21 52:10 55:15,21 60:24 60:25 61:15 63:3 64:1,19 67:1 68:17 72:11 76:22</p>	<p>78:13 impediments 57:10 implemented 7:9 implied 74:24 impliedly 3:19 importance 26:3 important 6:10 19:24 21:8,11 31:18 40:15 54:5 58:6,8 80:12 importantly 62:15,16,16 imports 36:1 impose 24:5 30:3 73:18,19 73:25 74:9 80:2 imposed 23:18 31:6 73:23 imposes 23:10 28:23 37:5,7 imposing 23:12 23:13 imposts 36:1 inapplicable 32:2 incarcerate 71:17 incarceration 63:22 64:4 69:5 include 35:12 including 24:22 incoming 36:7 65:14 incongruous 73:22 inconsistent 27:20 independent 8:24 27:7 33:10 46:3 indicated 14:17 indicates 47:5</p>	<p>indicators 74:13 individual 5:8,9 6:1,6 7:17 8:7 8:24 9:1 14:1 14:21,22 17:14 19:13,17 20:1 20:13 22:1 32:3 33:14 35:19 38:5 42:15,18 43:25 48:18 50:19 53:7,25 54:21 59:9 69:4 70:25 71:11 76:15,16 individually 44:1 individuals 4:13 6:2 21:2 68:20 inference 24:7 26:1 72:17 informal 55:24 55:25 information 19:21,22 52:22 65:9,11 76:2 80:6 infraction 5:12 infractions 76:6 initiate 71:10 injunction 3:19 innocuous 76:6 inordinate 63:10 inquiries 4:16 6:15 21:23,24 43:12 46:9 47:4,6 57:11 65:15 inquiry 5:7 7:5 7:6 8:19 9:4,7 9:8,11,14 10:10,12 18:5 19:12 53:1,6,9 53:12,21 54:2 54:16 inspecting 36:6</p>	<p>inspection 36:3 instance 45:3 instances 61:12 instructive 51:4 intending 56:5 intent 27:14 interest 16:10 16:10,18 58:2 58:3 64:12,15 64:18 80:5 interesting 25:12 interference 75:25 interferes 31:12 interfering 51:22 59:21 interpret 13:24 13:24 interpreted 48:23 49:4 interrupt 5:1 interstate 18:15 29:18 inverting 3:22 inviting 77:21 77:22 involves 64:20 64:21,21 involving 78:5 IRCA 24:3 26:23 28:12 irrespective 43:4 48:24 issue 5:23 6:11 6:12,24 21:7 78:24 79:15 issues 16:5 19:5 70:10,12 75:18 I-9 74:6</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jail 11:4,7 41:19 42:5 61:2,5 74:18 jailed 36:13 jails 69:10</p>	<p>jeopardy 29:10 job 74:3 jogging 10:24 John 66:7 Joint 47:2 76:13 JR 1:17 2:6 33:21 judges 68:17 77:16 judgment 73:23 74:14,14 judgments 38:22 39:2 72:25 73:5,12 jurisdiction 22:17 Justice 1:18 3:3 3:9 4:24 5:1,10 5:16,18 6:10 6:17,20 7:12 8:2 9:2,5,18,22 10:2,18 11:13 11:18,21,23 12:16,24 13:2 13:4,6,14,21 14:7,10 15:20 16:13,15,20,21 17:1,4,15,18 17:18,25 18:7 18:9 19:3 20:6 21:25 22:9,11 23:1 24:8,9,21 25:2,10 26:2,8 26:13 27:16 28:3,16,19 29:5,24 30:10 30:11 31:14,15 31:16,16,17 32:16,20,23 33:7,17,20,23 33:25 34:6,7 34:20,21 35:5 35:20 36:16 37:18,19 38:7 38:13 39:3,16 40:9,24 41:10 41:14,21,25</p>
--	--	--	---	---

42:17,22,25 43:7,21 44:3,8 44:11,24 45:2 45:8 46:2,16 46:21 47:7,12 47:24 48:2,10 49:9,16,18,24 49:25 50:16 51:5,12,18 52:2,5,7,13,16 52:20 53:15,24 54:9,12,14 55:6,9 56:10 57:3,15,19 58:6 59:2,19 59:24 60:3,8 60:11,14 61:10 61:18,20 62:4 62:6,19,25 63:2,7 64:11 64:23 65:5,10 65:22 66:1,6 66:10,15 67:3 67:10,19,20 69:8,12,15 70:14,19 71:3 71:15,20,23 72:6,25 73:6 73:10 75:8,10 75:11,15 77:21 78:8,16,22 79:1,6,10 80:13,22	Kennedy's 30:12 kept 59:12 key 57:20 kick 35:21 kind 18:22 20:25 21:17,19 22:18 23:15 67:2 77:1 kinds 31:10 74:16 know 7:18 9:3 9:24 10:11 11:5,15,25 12:1,2,4,5 16:3 19:19,25 23:14 24:1,21 25:12 25:15 29:19 30:22 32:5,6 36:23 37:23 45:10 49:5,19 50:6,25 51:19 51:21 53:17,21 59:10,11 64:24 65:1 69:25 71:8 79:14 knowledge 65:6 knows 19:4 70:6	22:7 23:20 24:1,15 26:15 27:1,11 29:7 29:14,20 31:1 31:1 34:16 37:2,4,25 38:11,15,17,25 39:2,6,10,12 40:18 41:3 42:9 43:2,8,14 44:5,6,13,23 45:7 47:3,8,25 49:13,15,19,20 50:10,20,21 51:13,14 54:4 57:7 60:9,14 60:15,24 61:3 63:13,14 64:1 64:15 71:7 72:12 74:6,20 79:24,25 80:2 80:7 lawfully 19:6 33:3 47:22 laws 3:16 21:20 36:3 47:20 48:6 59:6 61:15 62:8,10 62:11 63:3 64:13,19 70:15 75:3,5 law-abiding 74:2 lay 35:25 lead 13:19 15:17 69:20 leave 50:23 74:9 leaves 27:18 leaving 61:23 led 77:8 ledger 25:24 27:15 left 56:20 73:24 legal 20:11 21:1 50:3 66:10 legality 77:25 legislation 27:18	legislative 26:3 26:4,20 legislature 43:10,11 44:14 44:16,25 46:11 62:7,8 legitimate 62:1 62:4 64:12,14 LESC 49:22,25 lesser 17:7 let's 18:11,11 36:19 41:21 42:3 48:10 53:20 61:24 66:6 level 21:22 38:4 71:1,2,19 76:25 liability 46:4 73:25 liable 32:12 73:2 73:3 license 11:3 18:13,25 19:23 29:19 67:5 licenses 19:5 limit 18:15 limited 54:20 75:2 limits 10:1 20:2 line 44:9 listen 52:2 litany 77:9 little 23:15 45:8 67:19 68:7 lives 66:7 local 4:11,16,20 21:13,17,23 77:1 localities 21:19 locked 44:5,6 long 5:25 6:12 6:25 11:25 48:23 55:18 72:2 longer 7:5 11:7 11:20 12:13	14:2 22:22 48:18,25 look 14:13 16:9 21:22 24:1 28:4 31:11 33:11 43:18 49:25 54:14 66:18 69:10 76:12 looked 25:17 31:4 lot 13:9,19 59:4 lots 65:8 66:22 79:18
<hr/> K <hr/> keep 48:20 62:19 keeps 79:18 Kennedy 9:18 9:22 10:2 17:15,18,25 24:9,21 25:2 25:10 29:5 44:24 45:2 52:13,16 61:10 61:20 62:5,6 64:11 67:20	<hr/> L <hr/> lack 32:25 67:24 laid 31:9 landscape 72:9 language 24:12 25:15 26:8 30:12 largely 75:23 largest 29:25 Latinos 46:14 Laughter 54:11 66:4 law 4:5,6,10 6:4 7:10,10,16,17 7:23 9:12 10:16 12:25 13:12 14:18,20 17:9,23 20:25	lawfully 19:6 33:3 47:22 laws 3:16 21:20 36:3 47:20 48:6 59:6 61:15 62:8,10 62:11 63:3 64:13,19 70:15 75:3,5 law-abiding 74:2 lay 35:25 lead 13:19 15:17 69:20 leave 50:23 74:9 leaves 27:18 leaving 61:23 led 77:8 ledger 25:24 27:15 left 56:20 73:24 legal 20:11 21:1 50:3 66:10 legality 77:25 legislation 27:18	legislative 26:3 26:4,20 legislature 43:10,11 44:14 44:16,25 46:11 62:7,8 legitimate 62:1 62:4 64:12,14 LESC 49:22,25 lesser 17:7 let's 18:11,11 36:19 41:21 42:3 48:10 53:20 61:24 66:6 level 21:22 38:4 71:1,2,19 76:25 liability 46:4 73:25 liable 32:12 73:2 73:3 license 11:3 18:13,25 19:23 29:19 67:5 licenses 19:5 limit 18:15 limited 54:20 75:2 limits 10:1 20:2 line 44:9 listen 52:2 litany 77:9 little 23:15 45:8 67:19 68:7 lives 66:7 local 4:11,16,20 21:13,17,23 77:1 localities 21:19 locked 44:5,6 long 5:25 6:12 6:25 11:25 48:23 55:18 72:2 longer 7:5 11:7 11:20 12:13	<hr/> M <hr/> making 13:10 21:14 34:9 45:13 46:7 50:11,14 52:25 53:6,21 54:16 59:13 73:9 75:4 managed 69:24 mandatory 37:3 37:4 44:10 53:25 manner 45:7 70:15 Maricopa 15:7 market 80:3 mass 63:22 64:4 69:4,20 massive 61:21 match 66:24 material 36:7 matter 1:11 15:9 17:20 19:18 26:15,25 27:11 39:5,13 42:5 52:22 81:2 matters 3:25 35:3 maximize 77:3 maximizes 36:11 maximum 36:21

<p>37:10,22 40:18 43:23 mean 7:24 9:3 10:13 11:15,24 18:23 23:14 24:21 26:22 27:17 33:3,5 35:11 37:1 44:9 47:8 48:23 50:5 54:3 59:3 65:7 78:5 79:13 meaning 6:1 means 8:11 35:5 35:7 41:12 45:16 48:17 mentioned 20:14 merely 63:23 74:1,19 Mexicans 70:6 Mexico 11:2 18:12,12 19:22 70:2,4,11,16 migration 69:20 69:22 miles 16:3 18:14 18:15 million 46:14 mind 55:9 70:1 minute 72:5 minutes 10:13 10:16 12:9 67:14,16,16,17 67:18 75:12 misdemeanor 33:5 modest 23:18 moment 5:19 38:21 money 61:14,16 63:3 month 76:5 months 41:19,24 morning 3:4 34:11 move 18:7 19:21</p>	<p>52:21 56:23 57:3 multiple 4:9 27:9 murder 9:8 76:17 mutual 51:8</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 nail 12:21 name 19:20 65:3 65:9,18,19,20 names 66:2 narrow 21:3 32:7,22 narrower 5:5 nation 35:17 48:7 national 35:4,15 35:18,21 38:4 38:4 41:13 69:24 70:23 71:1,19 72:11 naturalization 35:6 nearly 63:2 necessary 36:2 80:3 need 4:2 33:10 43:19,19 53:8 77:18 needed 46:12 80:1 needs 7:25 41:13 59:17 63:19 64:15 69:24 70:25 neither 13:5,11 never 14:13 nevertheless 46:8 new 8:15 11:2 18:12,12 19:22 37:22 Ninth 3:20,23 nonimmigrati...</p>	<p>52:24 normally 22:19 notification 42:2 notify 39:19 Notwithstandi... 3:17 number 12:8,12 14:15 15:3 65:16</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objecting 47:12 69:13 objection 40:11 objective 36:21 objectives 24:17 obligation 51:8 54:19 60:6 62:13 63:23 obligations 37:5 52:12 obstacle 24:15 30:6,16 obtain 31:19,19 55:19 72:19 obvious 4:8 obviously 15:19 16:2 18:23 23:16,22 24:22 29:11 occasions 76:19 occur 38:15 odd 26:10 42:11 offenders 76:7 offense 7:25 8:11,13,15,17 9:16,17 10:6 20:24 22:5,7 22:12,13 27:7 41:18 52:24 61:4 offenses 14:19 39:22 68:12 Office 20:11 21:1 officer 4:19 5:22</p>	<p>6:25 7:21 8:16 8:25 9:3,13 10:15 15:8 18:16,20 19:1 19:4,16 20:9,9 20:12 21:9 22:1 42:7 43:8 45:16 52:23 76:12 78:19 officers 4:20,21 21:13,23 43:25 45:3 76:8 official 20:3 37:8 43:3 officials 4:12,15 4:16 8:20 16:8 16:9 19:12 43:18 45:6 50:15 55:15,18 57:8 78:13 oh 9:21 11:1,21 12:4 50:4 65:5 okay 6:19 12:11 13:23 16:24 34:7 42:5,22 44:3 45:10 47:20 50:2,4 63:7 75:22 OLC 39:10 once 16:7 ones 37:21 open 27:19 operate 74:24 operates 5:11 operating 29:18 operation 31:12 opined 20:12 opinion 13:22 14:4 39:10 opportunity 28:20 opposed 65:23 67:22 68:6 oral 1:11 2:2,5 3:7 33:21 order 4:12 62:23 64:22</p>	<p>ordinarily 12:2 origin 69:21 original 7:24 ought 59:2,9 68:25 72:17 outcome 69:21 outset 34:2 outside 8:3 out-of-state 18:25 overnight 42:5 override 76:25 overriding 21:12 overstayed 22:2</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 PAGE 2:2 Palmatier 47:1 parallel 28:22 31:6 park 67:5 part 9:14 15:6 28:12 30:11 34:2 69:23 participating 15:14 particular 23:3 24:15 29:12 69:9 79:22 parties 4:4 6:11 passed 24:3 26:23 30:20,21 passport 66:18 66:22 passports 66:19 patience 72:4 pattern 73:20 PAUL 1:15 2:3 2:9 3:7 75:13 pays 38:6 peculiarity 22:24 Pedialyte 10:25 penalize 17:9 penalties 23:18</p>
---	--	---	--	---

<p>31:7 37:7 43:2 pending 31:22 58:10,11 Pennsylvania 30:20,23,25 people 12:8,12 15:5 16:17 17:2 21:4 22:21 31:20 32:6 36:15 37:15 41:3,5 44:21 47:13,18 47:20,22 53:3 58:7,24 59:4 60:19,20,23 61:1,8 63:9 64:4 66:23 67:22 68:5 69:2,10 70:3,8 71:5 74:2 79:19 80:2,6,8 percent 70:3 percentage 46:23 63:10 71:6,6 perfectly 77:18 78:14 perform 60:24 period 9:20 11:7 12:13 14:2 42:6 permissible 19:16 permit 22:1 person 7:1,22,25 8:13,16,21,22 9:3 10:20,21 10:22 11:2 12:2 14:3 16:10,11 17:22 18:16,19 20:10 20:10,18,19 27:21 34:25 37:23 42:8,19 45:14,20,23 48:25 49:22 50:17,23 52:24</p>	<p>53:13,17 54:22 54:23 56:20 59:8,13 65:15 65:16,18 71:12 77:25 78:11 79:7 persons 56:1 57:13 58:20 68:9,23 person's 10:22 20:19 persuasive 28:13 petition 22:14 Petitioners 1:4 1:16 2:4,10 3:8 75:14 Phoenix 51:6 76:9,23 phone 45:17 54:24 pick 45:17 place 53:6,9 80:9 please 3:10 33:24 40:14 57:3 70:15 75:16 plenty 28:17 point 3:24 4:2,5 5:13 7:20 8:7 13:17 19:15 20:14 26:24 27:8,11 33:8 36:6 37:12 38:12,13 40:14 61:7 67:13 68:8 72:8 76:4 points 70:22 77:6 police 5:22 36:5 51:6 58:3 65:2 78:19 policeman 48:24 54:24 55:4 policies 21:13,17 77:1</p>	<p>policing 77:2 policy 34:14 36:11,25 37:22 40:5 42:4 44:5 53:25 72:11 76:23 77:4 population 40:6 40:17,22 46:13 62:14 69:5 71:25 portray 34:12 poses 64:5 position 5:6 6:14 6:21 17:21 27:17 32:5 34:23 35:1,2 73:15 77:12 possibility 29:21 possible 36:22 37:10 45:7 63:24 possibly 42:2 53:19 potential 79:15 power 17:2 34:24 35:11 41:13 58:3 63:19 70:22,23 70:25 71:18 powers 55:14 62:1 practical 9:9 49:11 57:9 63:17 practice 12:6 73:21 precise 31:5 preclude 55:24 76:8 precluded 72:18 predict 30:24 preempt 4:4 preempted 3:19 6:15 25:14,16 48:19 60:1 75:22 80:4 preempting 4:6</p>	<p>27:14 38:9,16 preemption 21:16 23:22,24 25:20,23,25 26:8 27:13 28:14 29:1,2 30:6,6,14,16 31:2 38:15,20 38:22 48:6 49:2,3 54:5 59:20 73:6,10 74:22,22,24 75:2,7 80:10 preemptive 24:7 26:17 37:2 75:5 79:20 80:20 preempts 38:18 48:3 preliminary 3:18 premise 13:18 23:19 presence 60:19 present 17:22 34:17 36:12 41:18 46:20 47:22 56:1 57:1 60:21 61:8 64:5 68:10 70:9 President 49:14 presumably 5:20 8:14 9:14 20:8,12,19 presumption 25:20 pretty 18:24 23:16 54:12 previous 76:19 previously 53:3 53:17,20 pre-existing 20:24 price 38:6 primary 21:15 24:13</p>	<p>principal 24:13 principle 24:11 principles 3:22 29:10 74:25 priorities 36:18 36:20 37:20 40:23 43:4,6 43:17,22,23 44:17 45:4,5 51:3,9 52:25 53:3 56:7,19 63:6,8 69:3 71:13 76:1,3 77:4 prioritization 67:24 priority 21:5 43:23 53:14 57:13 68:11,13 68:18 prison 12:13 14:1 private 59:12 probable 5:8 20:16,17 53:10 probably 12:1 14:12 31:25 66:2 problem 12:25 12:25 13:3 26:22 38:3 40:2 41:6 42:25 43:20 44:6 45:2 46:6 48:5,23 49:11 49:12 50:13,13 57:1,6 60:6 62:8 63:18 64:9 66:8,12 66:13 67:1 69:7,9,15,23 69:23 71:14,17 72:21,22 74:4 78:17 problems 62:24 63:12 64:7,8 71:4</p>
--	---	--	--	--

proceedings 71:10	27:17 62:13	56:13	31:9 32:6	17:10 18:8
process 6:7 15:4 15:6 50:9,9,11 67:15,16 69:4	provides 35:23	<hr/> Q <hr/>	39:14 51:19	30:1,2,5,7,8,21
produces 18:24	provision 4:5,18 17:11 25:23,25 27:13 28:14,22 31:5 34:13 37:6 49:1 55:14,22 61:7 74:22,23 75:2 75:20 77:13 80:11	quarrel 24:25	65:1,5 69:11	31:1,1,19,20
professional 51:20	provisions 3:21 4:9 7:8 9:25 16:12 18:4,6 30:25 32:1 34:15 37:14 45:21 46:3 55:4 75:19	question 6:18 9:10 10:19 11:24 17:19 22:10 27:20 28:21 30:6 32:2 34:21 36:17 37:19 42:10,12 48:12 48:13 50:1 53:24 55:12 56:11 58:6	72:20 76:3 79:19,24	32:7,11,13,14 32:18,25 33:1 33:13 38:23 52:8 57:22 58:4 60:5 77:10
profiling 34:3,8 34:10 46:8,17	public 8:11 20:24 22:5,7 22:12,13 64:22 64:22	queue 67:15	reason 4:7 7:22 14:17 15:1 17:25 18:3,16 30:11 45:20 46:11 50:17 60:7 63:19 67:21 69:23 75:1,7 77:12 78:4	regulate 27:25 28:5
program 15:12 15:13	pull 76:5	quite 26:4 31:3 51:17 52:7 58:7 60:16 63:16 73:22	reasonable 5:13 10:7,10 19:1,4 19:9 59:8 74:15	regulated 27:25
prohibit 4:19 54:15	pulled 7:25 76:13	quick 28:2	reasons 56:12 57:14	regulates 27:18
prohibited 29:17	punish 26:12	racial 34:3,10 46:8,16 47:9	rebuttal 2:8 28:3,17 75:13	regulating 28:6 28:12
prohibition 26:16	punished 26:9	raise 48:22 64:5	reciprocal 64:9	regulation 27:19 44:6
prohibitions 27:10	punishing 26:5	raised 26:5 29:19 58:6	recognize 42:16 80:12	regulations 30:4 59:12
prohibits 23:9	punishment 29:21	raises 69:7 71:18	recognized 64:17	rejected 26:6 29:22
prohibits 23:9	punishments 28:23	raising 64:6	record 10:11 15:7 47:1 51:6	relate 52:17
proposes 5:3 74:20	purporting 57:21 60:4	range 12:1	records 18:18 79:7,18	relations 35:18 48:8 63:18 64:7,20 69:7,9 71:4,17 74:16
prosecute 29:8 37:16 39:11,18 39:22 40:7 41:5,11 61:1,2 68:5	purpose 74:7	rapidly 12:20	reduced 24:2	relationship 23:7 37:13 57:23,24 58:4
prosecuted 29:6 29:14 32:25 59:9 60:20 68:1,25 71:25	purposes 7:23 8:5 16:7 24:16	Rapids 66:7	reentry 76:18	relatively 12:19 21:3 23:17
prosecuting 16:11 51:24	pursue 43:3	reach 28:14	referring 18:10	release 7:1 12:19,20 14:20 14:21,24 19:16
prosecution 29:22 32:4 33:14,16 78:6 78:24 79:4	pursuing 34:14 36:11	reached 20:14	reflected 15:7	released 8:7,24 10:23 12:3 15:23 45:24
prosecutions 29:6 74:7	push 55:7	read 5:4,5 20:23 37:9 55:23 56:4 77:8	refutes 75:23	releasing 7:17
prosecutors 77:14	put 6:6 11:4 51:5 61:2 74:18	real 24:25 63:17 64:8	regard 31:17 51:5	relevant 30:12
protect 36:21	puts 40:16	realistic 69:18	regime 72:13,15 72:16	reliable 66:20
protected 68:22	putting 8:2 41:19 45:21	realizing 65:1	register 33:4,9 33:12 77:13,18 78:15 80:8	relief 58:15,17 58:18
protective 58:12		really 4:7 7:3 14:23 20:2 21:6,9 22:21 26:20 28:5,21	registered 78:11 79:19	rely 29:3
proud 15:11			registration	relying 47:10 78:18
provide 17:8				remain 64:25
				remarkable

<p>26:18 removability 23:16 removable 9:3 9:15,16 10:5 20:11,18 21:2 22:3,4,24 27:22 39:21 removal 27:3 40:21 52:25 56:1 57:13 70:9 71:10,16 remove 6:6 34:24 36:15 41:11 53:5 68:18 70:4,4 71:5,11,12 removed 31:21 51:10 53:3,18 53:20 58:13,14 68:1,12 removing 16:10 16:18 70:8 replies 48:20 Reports 54:7 represent 11:5,6 11:10,11,14,17 representation 12:7 15:21 require 59:12 71:11 requirement 17:11 18:8 28:24 52:9 57:22 requirements 28:22 74:8 requires 4:15 71:7 requiring 13:25 resident 18:12 residents 61:23 resource 68:15 resources 3:15 36:14 40:20 41:1 61:14,16 67:24 68:4</p>	<p>78:1 respect 3:21 6:10 7:2,17 17:13,16 18:5 23:10 35:24 39:25 44:20 52:10 56:24,24 57:4 68:9,23 73:1,7 74:17 respectfully 77:7 respond 4:16 45:4,5 54:19 Respondent 1:19 2:7 33:22 response 17:5 79:2 responses 28:2 responsible 49:15 responsive 13:17 43:17 rest 37:9 restrict 4:19 54:16 restrictions 24:5 73:24 rests 39:23 result 43:1 46:9 57:10 62:12 retaliation 59:13 right 5:10 9:7 11:13 13:21 14:5 16:13,17 17:3 18:19 31:8 33:7 40:9 42:1 47:20 48:15,17 49:23 49:23 51:2 64:25 65:10 71:14 72:20 rights 7:10 rigorously 38:17 rises 5:8 risk 63:25 64:6 rob 51:15</p>	<p>robber 51:21 robbers 51:20 51:24 robbing 51:14 ROBERTS 3:3 23:1 28:16 31:16 33:17,20 33:25 34:7 36:16 39:16 40:9,24 41:14 41:21,25 42:17 42:22 49:16,18 49:25 50:16 54:9,12 57:15 62:19 67:19 71:3,20,23 72:6 75:8,11 80:13,22 role 70:2 rolled 54:6,10 roughly 10:15 routine 15:9 76:14 rules 35:8 run 15:5 32:15 47:3 67:4</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 Salvador 76:17 sanction 23:17 sanctions 23:6 23:10,12,14 26:11 72:23 73:18,19 74:9 sanctuary 21:20 save 28:3 saw 34:4 43:9 saying 21:8 26:16 41:2 42:14 44:13 48:16 58:24 59:25 64:11 70:16,18,20,21 says 4:18 7:4,8 10:21 15:22 21:22 27:13</p>	<p>31:10 36:2 39:11,18 40:3 42:9 45:16,23 54:15,17,18 55:16,22 60:22 63:8 72:14 77:13 78:19 79:24 SB 34:12 37:9 46:10 51:7 Scalia 12:24 13:2,4,6 16:15 16:20,21 17:1 17:4 35:5,20 38:7,13 39:3 46:16 47:7,12 47:24 48:2 51:12,18 52:2 52:5,7 59:2,19 59:24 60:3,8 60:11,14 61:18 62:25 63:7 69:8,12,15 70:14,19 73:6 73:10 Scalia's 17:18 34:21 scheme 30:1,2,8 31:12,13 51:23 schemes 30:8 school 16:4 scot-free 27:10 searches 65:16 second 18:23 28:11 68:19 69:2 79:21 Secretary 38:25 section 7:3,4,7 8:9 9:22 11:9 13:24 14:14 17:8 18:4 20:23 22:1 23:3,18 25:3 28:18,21 31:24 37:6,9,13,14 37:16,17 38:11 38:21,25 39:15</p>	<p>39:18 40:1,3,6 40:7,8,10,10 40:11 41:6,14 41:15 42:16 43:2,3 51:8 52:19 57:16,21 57:21 59:1,17 60:20 63:23,24 64:2,2 69:6,6 72:3,5,6,8 74:17,20 77:6 79:5,22 sections 23:2 38:23 40:4 56:23 69:19 Secure 15:11,12 see 6:24 30:5 39:18 41:6 45:14 47:16 56:14 62:18 65:20 seek 27:2 72:19 79:25 seeking 3:18 4:4 27:23 36:9 74:1,10,19 selling 56:15 send 69:12 sentence 8:15 22:23 48:14,21 49:4 80:14 serious 51:10 53:11 64:6 68:12 76:7 served 8:14 22:23 serves 80:4 service 56:8 set 35:8 36:20 38:23 43:4 45:4 56:6 63:5 sets 55:14 SG 25:13,16 shape 24:23 share 3:12 shift 56:5 shipments 36:7</p>
--	--	---	---	--

<p>show 14:22 78:9 79:7</p> <p>shows 21:15</p> <p>side 24:4 25:24 27:12,14,18,19 27:25 28:5,6 28:12,14 73:13 73:17,24 75:2 75:4,6</p> <p>sides 80:24</p> <p>significant 12:8 12:11 14:15 15:3 23:17 57:1 58:2 63:17 64:6 66:13 69:7,22 70:10 71:5 74:4</p> <p>significantly 11:7 12:13 14:2 23:12</p> <p>similar 14:12 18:9</p> <p>simply 8:5 20:10 45:24 61:14 68:5 69:9 76:1 77:5</p> <p>sit 28:18 67:7</p> <p>situation 8:25 19:7 21:1 22:6 25:22 37:1 43:16 55:1,2 59:8 62:4 64:4 70:2 73:14</p> <p>situations 12:18 77:9</p> <p>Sixth 79:15</p> <p>slice 21:3</p> <p>sloppiness 79:17 79:20</p> <p>social 61:22</p> <p>Solicitor 1:17 77:7</p> <p>somebody 6:12 8:11 12:19,20 14:19,25 16:3 16:6 17:9</p>	<p>18:24 28:9 29:13,18 32:11 33:4,11 35:9 41:17,20 43:12 43:13 50:1,3 52:23,23 53:4 53:10,16,18,20 61:2 76:5,14 77:9 78:14</p> <p>somebody's 4:17,21 5:11</p> <p>Sonia 66:2</p> <p>soothsayers 30:23</p> <p>sorry 22:15 45:8 66:15</p> <p>sort 77:22</p> <p>sorts 63:11</p> <p>Sotomayor 4:24 5:1,11,16,18 6:10,17,20 7:12 8:2 15:20 16:13 21:25 22:11 24:8 26:2,8,13 31:14 34:20 44:8 45:8 46:2 46:21 56:10 57:3 64:23 65:5,10,22 66:1,2,6,10,15 67:3,10 77:21 78:8,16,23 79:1,6,10</p> <p>sounded 70:19</p> <p>Sounds 46:16</p> <p>sovereignty 29:11 35:11</p> <p>speaking 24:5</p> <p>speaks 7:3,19</p> <p>specific 3:24 7:19 73:11</p> <p>specifically 4:14 7:8</p> <p>speed 18:15</p> <p>speeding 18:14</p> <p>spend 72:5</p>	<p>spent 78:1</p> <p>standard 10:3</p> <p>standards 3:14 31:6</p> <p>standpoint 24:19</p> <p>stands 24:15 46:10</p> <p>start 75:17</p> <p>started 26:22</p> <p>starts 50:10,10</p> <p>state 3:11,15 4:2 4:5,11,16,20 5:4 7:22 8:12 8:25 9:2,20 12:18 14:20 16:16 17:1,9 17:12,21 19:5 20:9 21:22 23:11 26:24 30:15 31:7,11 33:16 34:17 35:19,25 36:5 36:16 37:8 38:6,9,15,18 40:7 41:2 42:12,15,18 43:3,4 44:5 45:4,4 51:15 52:22 55:18 58:3 59:25 60:14,23 61:8 61:21,23,25 62:2,13 63:8 63:10 69:4 70:25 71:1 76:24,25 79:24 79:25 80:7</p> <p>statement 13:22 14:4 77:24</p> <p>states 1:1,6,12 3:5,17 4:7 6:3 29:8 30:3,15 36:5 39:5 51:13 56:6 57:23 59:10 64:10 69:22</p>	<p>72:18 73:17,25 74:9 76:18 80:2</p> <p>state's 5:2,6 42:12 51:22 60:4</p> <p>state-created 46:3</p> <p>station 16:6</p> <p>statistics 46:22</p> <p>status 4:13,17 4:22 5:7,14 10:12,22 15:15 15:17 20:19 37:25 46:19 53:13 58:12 59:11 60:19 68:22 76:19,22</p> <p>statute 3:19,25 13:13 15:11 16:22 17:8 19:25 20:4 21:18 25:5,13 29:17 30:20,21 31:4,5 33:15 33:16 34:14 37:14,15 40:3 44:5 45:16 46:24 54:15,20 55:3 60:4,22</p> <p>statutes 39:4 59:3</p> <p>statute's 14:13</p> <p>statutory 4:6</p> <p>stay 11:6 33:9 42:4 45:22</p> <p>stayed 11:8</p> <p>step 3:18 26:18</p> <p>stop 5:18,18 12:12 14:1 19:16 20:15 50:12,19 53:16 76:14</p> <p>stopped 5:12 18:13 37:23 43:12 47:15 50:2,17,18,18</p>	<p>54:22 76:19</p> <p>stops 6:14 15:18 46:9 52:23 76:22</p> <p>straightforward 9:8</p> <p>strike 25:21</p> <p>striking 13:13</p> <p>strong 59:16 74:12</p> <p>struck 31:2</p> <p>structural 49:11 50:13 57:5</p> <p>subject 8:10 13:10 27:3,7,9 32:3 33:14,15 55:20 80:18</p> <p>submit 76:24</p> <p>submitted 80:25 81:2</p> <p>subsequent 12:23 24:22</p> <p>substantial 15:17</p> <p>substantially 9:16</p> <p>sufficient 46:12</p> <p>suggested 67:14 67:25 72:25</p> <p>suggesting 66:25</p> <p>summarize 56:22</p> <p>supply 23:8 27:18,24</p> <p>support 9:12 10:16 39:9 47:4</p> <p>supports 26:21</p> <p>suppose 9:18 29:6 37:19 43:7,8 48:21 61:10,10</p> <p>supposed 40:4 80:9</p> <p>supposition 78:22</p>
---	---	--	--	---

Supreme 1:1,12	technically	9:24 10:1,10	third 57:9	turn 76:7
sure 5:17 11:16	68:20 77:10	10:19 11:1	thought 5:20	turning 5:2
11:16 15:20	tell 5:2 16:14	12:7,16 13:17	46:11 47:9	turns 76:16
26:7 32:19	49:22 52:24	14:6,8,11,12	63:1 72:24	two 9:6,18 10:4
67:20	65:23	14:16 15:2,16	thousands 46:9	12:10,11 28:2
surely 47:14	telling 15:24	17:15,18,24	three 46:5 56:12	32:1 45:13
surprised 11:14	21:23 25:16	18:2,3 19:10	56:22 57:14	55:3 61:11,11
surprisingly	tells 45:19	19:24 20:21,25	76:19	61:24 76:21
30:22	temporary	21:8 22:5,6,8	threw 37:21	77:6 79:16
suspected 45:14	58:12 68:22	24:20 25:1,10	time 5:7 9:20	types 23:5
suspicion 5:13	ten 65:17	26:10,19 27:15	10:7 11:8	
19:1,4,9	tens 46:8	28:13,20 29:9	12:13 14:2	U
system 15:8	tension 25:6	29:25 30:11,17	20:15 23:2	ultimately 10:9
38:23 57:11	tensions 68:2	31:8,21,21,25	28:3,17 43:12	unconsciously
65:12,14	terminal 65:16	37:3,12 38:2	67:17 72:2	26:11
systematic 6:16	terms 7:19 29:7	38:10,11,11,20	75:6 80:19	understand 5:6
7:5 56:14	30:15 57:25	39:14 40:2,14	times 74:23	6:1,17 21:9
75:23	58:1	40:15 41:12	Today 66:1	32:5,9,23,24
systematically	terribly 45:9	42:17,24,25	told 27:4 31:17	37:13 40:15
15:5	Terry 19:16	45:1 46:5	33:12 77:17	44:12 48:22
T	20:14	48:11,12,14,16	78:14	53:2 55:11
T 2:1,1	test 24:18,21,24	48:19 49:8	tomorrow 37:20	68:3
table 40:10,13	24:25	51:1,2,7,15,16	tort 79:24,25	understood 17:6
tackled 72:21	text 74:13	51:17 53:22,22	80:2	35:16
take 7:5 8:22	Thank 28:19	53:24 54:3	traffic 53:16	uniform 3:16
12:10,11 17:13	33:17,19 57:18	55:11,12 56:3	76:14	United 1:1,6,12
17:20 18:8,20	75:8,9,15	56:3,7,11,22	trafficking	3:4,17 4:6
19:1 21:7	80:21,22,24	56:25,25 57:5	58:18	57:23 64:10
23:19 25:10	Thanks 50:4	57:9,20 58:5,5	training 55:19	76:18
40:10,13,20	theoretical	58:7 59:8,16	transfer 8:21	unlawful 26:25
56:19 59:5	17:20	59:24 60:2,6	treatment 58:16	27:1,2,5 60:19
77:12,14	theory 75:21,23	60:16 62:15	64:9	80:16
takes 6:13 9:18	thing 19:24	63:16 67:13	treats 35:17	unlawfully
10:13 12:9	21:11 26:1	68:8,23,24	48:7	34:17 36:12
67:14,16	28:11 36:5	69:3,5,11,18	trick 28:8	41:18 46:15,20
talk 23:2,8	51:4 57:20	69:25 70:6	true 13:20 40:1	56:1 58:10
75:18	60:15 74:18	72:7,20 73:4,9	67:15	60:21 61:8
talking 8:5	75:19,24 79:21	73:11,22 74:1	try 4:10 5:14	64:5 68:9 70:8
10:14 32:22	things 5:15 12:2	74:4,12,25	19:21 33:3,9	unnecessarily
41:17 46:19	15:2 23:23	75:1,20,23	56:15 60:25	8:10
47:18 52:8,13	25:11 28:5	77:4,15,16,20	79:14	unusual 6:14
67:23 77:23	43:9 61:24	79:11,12,22	trying 10:19	18:24 22:6
targets 23:25	69:17 77:8	80:11	35:21 44:14	75:21
tax 72:4	79:16	thinking 26:22	45:6,11 48:11	un-preempted
te 16:23	think 5:4,21	73:4 79:22	54:25 55:7	38:1
technical 58:20	6:11,13 7:3,4	thinks 18:16	57:16 78:1	use 27:22 40:21
	8:8,18 9:6,9,23	80:4	Tucson 51:6	40:25 54:3

60:23 66:1 78:23 useful 73:4 U.S 54:7 U.S.C 21:18 62:12	versus 44:10 vest 38:25 vested 35:15 59:17 63:19 vests 34:19 35:3 victim 58:17,19 view 5:3 28:11 49:2 77:14 vigorously 38:18 violated 17:10 violates 13:7 violating 29:7 violation 31:7 32:10 33:10 41:3 43:14 53:16 58:20,23 58:25 59:1,1,4 60:5 61:3 68:20 74:7 77:11 79:25 violations 49:20 Violence 58:15 virtue 38:15 visa 22:2 visitor's 22:2 vital 35:18 70:9 volume 57:11 volumes 54:7	wanted 74:8 76:17 wants 6:5 warrant 6:6 Washington 1:8 1:15,18 wasn't 46:12 67:20 76:22 78:11 water 10:25 way 4:10,19 5:4 5:5 7:9 35:16 43:9 48:7,12 51:8 58:1 61:1 61:15 65:13 66:19,20 79:17 80:7 ways 65:8 weak 23:24 Wednesday 1:9 weeks 9:18 10:4 weigh 23:15 went 25:17 weren't 30:22 30:23 47:10 We'll 3:3 28:16 we're 8:4 10:14 24:12 34:9 42:14 43:24 45:22 46:19 51:21,21 62:7 63:12,13,13 71:15 73:9 77:25 78:8,9 78:12 80:19 we've 25:15 35:6 38:14 55:23 Whiting 24:23 31:10 54:10 wholly 16:5 30:8 willful 32:12,12 77:13 willfulness 77:15,20 wish 61:15,15 witness 58:19 Women 58:16	wonder 10:23 word 25:11 words 36:24 work 11:3 18:17 18:23 23:11 27:2,2,5,23 34:16 40:4 44:17,18 70:9 74:1,10,19 77:5 working 24:10 34:11 works 65:14 world 26:25 27:9 worried 28:7 41:22 worst 76:11,11 worth 70:1 73:11 wouldn't 19:8 31:25 33:15 43:15 54:22 62:2 74:10 78:24 write 50:2 59:6 wrong 6:22 39:15 42:3,5 44:13 45:25 51:13 56:14	18:15 54:5 55:22 67:14,16 67:17 10:07 1:13 3:2 1070 34:12 37:10 46:10 11 10:13,15 12:9 11-182 1:4 3:4 11:27 81:1 1103 38:25 1301 38:24 57:25 1304 32:4,10 1306 32:4,10,15 38:24 57:25 1306(a) 58:21,23 58:25 59:2 60:18 61:3 68:21 77:11,20 1357 55:13,13 1357(g) 55:16 1373 54:15 55:12 56:4 1373(a) 4:17 21:18 1373(c) 4:14 1621 62:12 1644 21:18 183 76:13 186 76:13 1971 26:22 1986 24:3 26:23 27:11 72:8,10 72:12 73:12 80:15 1996 55:13
V				
v 1:5 3:4 24:12 valiantly 57:16 valid 58:15,17 58:18 68:21 various 77:8 verified 20:20 37:25 76:20 verify 66:21 Verrilli 1:17 2:6 20:7 33:20,21 33:23 34:5,9 35:1,14 36:8 37:3 38:2,10 38:20 39:8,24 40:12 41:8,16 41:23 42:14,20 42:24 43:15 44:2,4,9,19 45:1 46:1,5,18 46:25 47:11,21 48:1,4 49:7,10 49:17,24 50:8 51:1,16,25 52:4,6,15,18 53:7,22 55:5,8 55:11 56:21 57:4,18 59:7 59:23 60:2,10 60:13,16 62:3 62:9,20 63:5 63:15 64:14 65:4,7,13,25 66:5,8,12,17 67:9,12 68:7 69:11,14,17 70:17,21 71:14 71:22,24 72:7 73:8 75:9 80:23	W			
	walk 67:5 want 6:20 7:15 8:9,21 11:10 11:11,15 12:5 13:16,17 14:21 15:20,23 16:6 27:25 30:7,8 36:23,23 37:22 37:24,24,24 38:17 41:5 45:23 49:22 50:6,25 51:2 51:20 53:4,17 68:4,17 72:4 76:11 77:1,2 78:25 80:9			
		X		
		x 1:2,7 12:3		
		Y		
		year 47:5 70:4 years 20:12 54:6		
		Z		
		zone 16:4 18:14 Zook 29:16		
		\$		
		\$5000 37:7		
		1		
		1 40:3 10 10:13,15		
			2	
			2 7:7 37:9,13,14 40:1,4,6,11 46:14 52:17,21 56:24 63:24 71:23,24,24 2(B) 5:2 7:3,4 11:9 12:14 13:18,24 14:1 14:3,14 17:6	

<p>18:6 21:9,15 21:21 39:18 41:7 43:2 45:13,22 48:14 50:16 51:8 56:12 2(H) 37:6 43:3 63:23 69:6 20 50:18 20-mile 18:14 20-mile-an-ho... 16:4 2002 39:11 2009 47:5 2012 1:9 25 1:9 287 9:12 287(g) 9:13 10:15 15:8</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 15:25 17:8 18:4 28:18,21 29:8 31:24 37:16 38:11,21 39:15 40:4,8 40:10,13,14 41:14 45:20 52:14,19 56:23 57:16,21,21 59:1,17 60:20 64:2 69:6,19 71:21,25 74:17 77:6 79:5,22 30 33:9 41:23 61:2,5 33 2:7</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>400,000 46:14</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 37:17 40:4,8 40:10,13,14 41:15 56:23 64:2 69:19 71:21 72:1,3,5 72:6,8 74:20</p>	<p>75:12 5(C) 23:3,18,19 23:23</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 8:9 9:22 15:24 15:25 17:7 18:6 20:23 22:1 41:19,24 45:20 60 16:3 18:14 50:18 67:16 70:3</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>70 67:17 70:3 75 2:10</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 21:18 62:12 80,000 47:6</p>			
---	---	--	--	--