1   IN THE SUPREME COURT OF THE UNITED STATES

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3   ARIZONA, ET AL.,   :

4   Petitioners   :   No. 11-182

5   v.   :

6   UNITED STATES   :

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

8   Washington, D.C.

9   Wednesday, April 25, 2012

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:07 a.m.

14   APPEARANCES:

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

16   Petitioners.

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

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

19   Respondent.

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1   C O N T E N T S

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

2   (10:07 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

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

5   States.

6   Mr. Clement.

7   ORAL ARGUMENT OF PAUL D. CLEMENT

8   ON BEHALF OF THE PETITIONERS

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

10   please the Court:

11   The State of Arizona bears a

12   disproportionate share of the costs of illegal

13   immigration. In addressing those costs, Arizona

14   borrowed the Federal standards as its own, and attempted

15   to enlist State resources in the enforcement of the

16   uniform Federal immigration laws.

17   Notwithstanding that, the United States took

18   the extraordinary step of seeking a preliminary

19   injunction to enjoin the statute as impliedly preempted

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

21   agreed with respect to four provisions, but only by

22   inverting fundamental principles of federalism.

23   The Ninth Circuit essentially demanded that

24   Arizona point to specific authorization in Federal

25   statute for its approach. But that gets matters

3

1   backwards.

2   A State does not need to point to Federal

3   authorization for its enforcement efforts. Rather, the

4   burden is on the parties seeking to preempt a duly

5   enacted State law to point to some provision in

6   statutory law that does the preempting. Now, the United

7   States can't really do that here, and the reason is

8   obvious.

9   There are multiple provisions of the Federal

10   immigration law that go out of their way to try to

11   facilitate State and local efforts to communicate with

12   Federal immigration officials in order to ascertain the

13   immigration status of individuals.

14   So, for example, 1373(c) specifically

15   requires that Federal immigration officials shall

16   respond to inquiries from State and local officials

17   about somebody's immigration status. 1373(a) goes even

18   further. That provision says that no Federal agency or

19   officer may prohibit or in any way restrict the ability

20   of State and local officers to communicate with Federal

21   immigration officers to ascertain somebody's immigration

22   status.

23   Indeed, if the DHS had --

24   JUSTICE SOTOMAYOR: Mr. Clement --

25   MR. CLEMENT: Yes.

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1   JUSTICE SOTOMAYOR: -- could I interrupt,

2   and turning to 2(B), could you tell me what the State's

3   view is -- the Government proposes that it should be

4   read on its face one way, and I think the State is

5   arguing that there's a narrower way to read it. But am

6   I to understand that under the State's position in this

7   action, the only time that the inquiry about the status

8   of an individual rises is after they've had probable

9   cause to arrest that individual for some other crime?

10   MR. CLEMENT: That's exactly right, Justice

11   Sotomayor. So this only operates when somebody's been

12   essentially stopped for some other infraction, and then

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

14   identify immigration status, then that can happen.

15   Of course, one of the things that --

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

17   MR. CLEMENT: Sure.

18   JUSTICE SOTOMAYOR: -- just stop you there

19   just one moment?

20   That's what I thought. So presumably, I

21   think your argument is, that under any circumstance, a

22   police officer would have the discretion to make that

23   call. Seems to me that the issue is not about whether

24   you make the call or not, although the Government is

25   arguing that it might be, but on how long you detain the

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1   individual, meaning -- as I understand it, when

2   individuals are arrested and held for other crimes,

3   often there's an immigration check that most States do

4   without this law.

5   And to the extent that the government wants

6   to remove that individual, they put in a warrant of

7   detainer.

8   This process is different. How is it

9   different?

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

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

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

13   only the issue of how long you can detain somebody.

14   Because I think the Federal Government takes

15   the rather unusual position that even though these stops

16   and these inquiries, if done on an ad hoc basis, become

17   preempted if they're done on a systematic basis --

18   JUSTICE SOTOMAYOR: No, I understand that's

19   their argument. I can question them about that.

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

21   JUSTICE SOTOMAYOR: But I want to get to

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

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

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

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

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1 how long, and under -- and when is the officer going to

2 exercise discretion to release the person?

3   MR. CLEMENT: And with respect, I don't

4 think section 2(B) really speaks to that, which is to

5 say, I don't think section 2(B) says that the systematic

6 inquiry has to take any longer than the ad hoc inquiry.

7   And, indeed, section 2, in one of its

8 provisions, specifically says that it has to be

9 implemented in a way that's consistent with Federal,

10 both immigration law and civil rights law.

11   So, there -- what --

12   JUSTICE SOTOMAYOR: What happens if -- this

13 is the following call -- the call to the -- to the

14 Federal Government. Yes, he's an illegal alien. No, we

15 don't want to detain him.

16   What does the law say, the Arizona law say,

17 with respect to releasing that individual?

18   MR. CLEMENT: Well, I don't know that it

19 speaks to it in specific terms, but here's what I

20 believe would happen, which is to say, at that point,

21 then, the officer would ask themselves whether there's

22 any reason to continue to detain the person for State

23 law purposes.

24   I mean, it could be that the original

25 offense that the person was pulled over needs to be

7

1   dealt with or something like that.

2   JUSTICE SOTOMAYOR: I'm putting all of this

3   outside of --

4   MR. CLEMENT: But -- but if what we're

5   talking about is simply what happens then for purposes

6   of the Federal immigration consequences, the answer is

7   nothing. The individual at that point is released.

8   And that, I think, can be very well

9   illustrated by section 6 -- I don't want to change the

10   subject unnecessarily, but there's an arrest authority

11   for somebody who's committed a public offense, which

12   means that it's a crime in another State and in Arizona,

13   but the person can't be arrested for that offense,

14   presumably because they've already served their sentence

15   for the offense; and then there's new arrest authority

16   given to the officer to hold that person if they are

17   deportable for that offense.

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

19   clear what would happen, is an inquiry would be made to

20   the Federal officials that would say, do you want us to

21   transfer this person to your custody or hold this person

22   until you can take custody? And if the answer is no,

23   then that's the end of it. That individual is released,

24   because there's no independent basis in that situation

25   for the State officer to continue to detain the

1 individual at all.

2   JUSTICE GINSBURG: But how would the State

3 officer know if the person is removable? I mean, that's

4 sometimes a complex inquiry.

5   MR. CLEMENT: Well, Justice Ginsburg, I

6 think there's two answers to that. One is, you're

7 right, sometimes it's a complex inquiry, sometimes it's

8 a straightforward inquiry. It could be murder, it could

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

10 the question is by hypothesis, there's going to be

11 inquiry made to the Federal immigration authorities,

12 either the Law Enforcement Support Center or a 287(g)

13 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 2 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 think --

22   JUSTICE KENNEDY: -- just under section 6?

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

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

25 provisions, you have the Fourth Amendment backing up the

9

1   limits, and I think so whatever --

2   JUSTICE KENNEDY: What -- what would be the

3   standard? You're the attorney for the -- for the alien,

4   he -- they're going to hold him for 2 weeks until they

5   figure out whether this is a removable offense. And you

6   say, under the Fourth Amendment, you cannot hold

7   for -- what? More than a reasonable time or --

8   MR. CLEMENT: Yes. Ultimately, it's a

9   reasonable inquiry. And I think that under these

10   circumstances, what we know from the record here is that

11   generally the immigration status inquiry is something

12   that takes 10 or 11 minutes. I mean, so it's

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

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

15   on average if it's the Law Enforcement Support Center.

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

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

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

19   it says any person who is arrested shall have the

20   person's immigration status determined before the person

21   is released. So I wonder if they've arrested a citizen,

22   he's Hispanic-looking, he was jogging, he has a

23   backpack, he has water in it and Pedialyte, so they

24   think, oh, maybe this is an illegal person. It happens

25   he's a citizen of New Mexico, and so the driver's

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1   license doesn't work.

2   And now they put him in jail. And are

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

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

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

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

7   section 2(B)?

8   Do you want to represent that or not?

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

10   that. What I do want to represent --

11   JUSTICE BREYER: All right. Now, if you

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

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

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

15   represent --

16   JUSTICE BREYER: What?

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

18   be detained any longer than the Fourth Amendment allows.

19   JUSTICE BREYER: Oh, fine.

20   MR. CLEMENT: And -- but, well --

21   JUSTICE BREYER: But the Fourth

22   Amendment -- for -- I mean, that's another question. I

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

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

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

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

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

3   more. So now what I want to know is what in practice

4   will happen?

5   From your representation, I think that there

6   will be a significant number of people -- some of whom

7   won't be arrested; it takes 11 minutes for some. For

8   citizens, it might take 2 hours, it might take 2 days.

9   Okay. There'll be a significant number of people who

10 will be detained at the stop, or in prison, for a

11 significantly longer period of time than in the absence

12 of 2(B).

13   Is that a fair conclusion?

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

15 Breyer, and here's why it's not. Because even though

16 there certainly are situations where State authorities

17 will arrest somebody and then release them relatively

18 rapidly, they generally don't release somebody until

19 they can nail down their identity, and whether or not

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

21 subsequent event --

22   JUSTICE SCALIA: Anyway, if this is a

23 problem, is it an immigration law problem?

24   MR. CLEMENT: It --

25   JUSTICE SCALIA: Or is it a Fourth Amendment

1   problem?

2   MR. CLEMENT: Justice Scalia, it is

3   neither --

4   JUSTICE SCALIA: Is the Government's attack

5   on this that it violates the Fourth Amendment?

6   MR. CLEMENT: No. Of course, the Federal

7   Government, that also has a lot of immigration arrests

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

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

10   immigration law concern or something that should be the

11   basis for striking down a statute on its face --

12   JUSTICE BREYER: That's a

13   different argument --

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

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

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

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

18   not true.

19   JUSTICE BREYER: All right. Can I make the

20   following statement in the opinion, and you will say

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

22   interpret" -- imagine -- "we interpret section 2(B) as

23   not authorizing or requiring the detention of any

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

25   for a significantly longer period of time than that

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

2   Can I make that statement in an opinion, and

3 you'll say, that's right?

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

5   JUSTICE BREYER: Can I say that?

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

7 that.

8   JUSTICE BREYER: No.

9   MR. CLEMENT: I think you can say something

10 similar, though. I think you probably could say, look,

11 this is a facial challenge. The statute's never gone

12 into effect. We don't anticipate that section 2(B)

13 would elongate in a significant number of cases the

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

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

16 something that happens even without this law that, when

17 you arrest somebody, and there are some offenses that

18 are -- you can arrest and release under State law, but

19 before you release the individual, you generally want to

20 ascertain that that individual is going to show up at

21 the hearing. And that's what really distinguishes those

22 cases where there's arrest and release from those cases

23 where there's arrest and you book somebody.

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

25 think factually, this is going to elongate things.

1   Because already in a significant number of booking

2   facilities in Arizona, you already have the process that

3   people are systematically run through immigration checks

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

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

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

7   matter of routine.

8   The Federal Government doesn't like this

9   statute, but they're very proud of their Secure

10   Communities program. And their Secure Communities

11   program also makes clear that everybody that's booked at

12   participating facilities is -- eventually has their

13   immigration status checked.

14   And so I don't think that this immigration

15   status check is likely to lead to a substantial

16   elongation of the stops or the detentions.

17   Now, obviously --

18   JUSTICE SOTOMAYOR: I want to make sure that

19   I get a clear representation from you. If at a call to

20   the Federal agency, the agency says, we don't want to

21   detain this alien, that alien will be released

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

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

24   immigration clauses.

25   MR. CLEMENT: Exactly. Obviously, if this

1   is somebody who was going, you know, 60 miles an hour in

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

3   decide wholly apart from the immigration issue that this

4   is somebody they want to bring back to the station.

5   But for the purposes of once they make the

6   contact with Federal immigration officials, if the

7   Federal immigration officials say, look, we have no

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

9   prosecuting this person under the Federal criminal

10 provisions, then that's the end of the Federal case of

11 the --

12   JUSTICE SOTOMAYOR: All right. Then tell

13 me --

14   JUSTICE SCALIA: So you'll -- you'll concede

15 that the -- that the State has to accept within its

16 borders all people who have no right to be there, that

17 the Federal Government has no interest in removing?

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

19 Justice Scalia, but --

20   JUSTICE SCALIA: That's all the

21 statute -- and you call up the Federal Government, and

22 the Federal -- yes, he's an illegal immigrant, but

23 that's okay with us.

24   MR. CLEMENT: Well --

25   JUSTICE SCALIA: And the State has no power

16

1   to close its borders to people who have no right to be

2   there?

3   MR. CLEMENT: Well, here -- Justice Scalia,

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

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

6   a lesser extent 6.

7   Now, section 3 of the statute does provide

8   an authority under State law to penalize somebody who

9   has violated essentially the Federal registration

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

11   there would be a State authority, even under these

12   hypotheticals, to take action with respect to the

13   individual --

14   JUSTICE KENNEDY: I think --

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

16   the Federal --

17   JUSTICE KENNEDY: I think Justice Scalia's

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

19   theoretical matter. Can we say, or do you take the

20   position, that a State must accept within its borders a

21   person who is illegally present under Federal law?

22   MR. CLEMENT: Well, and I think the --

23   JUSTICE KENNEDY: And that is by reason of

24   his alien issues --

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

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

2   do with our defense of section 3 and other provisions

3   than it does with respect to the inquiry and arrest

4   authority provisions, 2(B) and 6.

5   JUSTICE ALITO: Well, before you move on to

6   the registration requirement, could I take you back to

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

8   was referring to.

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

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

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

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

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

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

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

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

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

18   a citizen. So what -- where would the officer take it

19   from there?

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

21   work back for a second. I mean, obviously, it's a

22   pretty unusual circumstance where somebody produces an

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

24   reasonable suspicion for the officer. But, I'll take

25   the hypo that --

18

1   JUSTICE ALITO: Why would it dispel

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

3   it's a State that issues drivers' licenses to aliens who

4   are not lawfully --

5   MR. CLEMENT: And that might be a situation

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

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

8   average case, I think it would.

9   They would then go further. And then they

10   would then make the inquiry to the Federal officials.

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

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

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

14   permissible Terry stop, and the officer would release

15   the individual.

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

17   because, of course, you know, they still have the name,

18   they still have the ability to collect that information

19   and try to continue the check as they move forward,

20   taking down the information on the New Mexico driver's

21   license.

22   But I think the important thing is that, you

23   know, this statute doesn't authorize them to detain the

24   individual, certainly beyond the -- the Fourth Amendment

25   limits. And it really doesn't authorize them to do

19

1   anything that the official couldn't do on an ad hoc

2   basis without the statute.

3   Now, it does do --

4   JUSTICE ALITO: That may be the case, and I

5   would like to ask General Verrilli about that. But,

6   under the Fourth Amendment, presumably, if the officer

7   can arrest, the State officer can arrest a person simply

8   on the ground that the person is removable, which is

9   what the Office of Legal Counsel opined some years ago,

10   then presumably the officer could continue to detain

11   that individual that I mentioned until they reached a

12   point where the Terry stop becomes an arrest, at which

13   time, they would have to have probable cause.

14   But if they had probable cause to believe

15   the person was removable, then they could hold the

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

17   completely verified. Isn't that correct?

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

19   Your Honor.

20   Now, as we read section 6, because there's a

21   pre-existing definition of "public offense" in Arizona

22   law, we don't think this is kind of the full Office of

23   Legal Counsel situation, where you have broad arrest

24   authority for removable individuals. This is a

25   relatively narrow slice of additional arrest authority

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1   that happens to give arrest authority for people that

2   seem to fit the Federal government's priority, because

3   it really is going to apply to criminal aliens.

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

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

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

7   an authority he didn't otherwise have.

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

9   though, which it does have the effect of overriding

10   local policies that actually forbade some officers from

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

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

13   difficult the government's preemption argument is here,

14   because those kind of local policies are expressly

15   forbidden by Federal statute.

16   1373(a) and 8 U.S.C. 1644 basically say that

17   localities can't have those kind of sanctuary laws.

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

19   State level, it basically says, look, you can't have

20   local officers telling you not to make those inquiries,

21   you must have those inquiries.

22   JUSTICE SOTOMAYOR: Counsel, could -- does

23   section 6 permit an officer to arrest an individual who

24   has overstayed a visitor's visa by a day? They're

25   removable, correct?

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

2   think they would have committed a public

3   offense -- absent a very unusual situation, I don't

4   think they would have committed a public offense under

5   Arizona law. So I don't think there actually would be

6   arrest authority in that circumstance, as

7   Justice Alito's question has -- has --

8   JUSTICE SOTOMAYOR: What is the definition

9   of public offense?

10   MR. CLEMENT: A public offense

11   definition -- it's actually -- it's a petition

12   appendix -- well, I'm sorry.

13   The definition is basically that it's

14   something that is a crime in another jurisdiction and

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

16   anomalous is normally, if something is a crime in

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

18   So what this really captures is people who

19   have committed a crime are no longer arrestable for the

20   crime because they have served their sentence or some

21   other peculiarity, but they're nonetheless removable

22   because of the crime.

23   CHIEF JUSTICE ROBERTS: Counsel, maybe it's

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

25   particular, section 5(C).

1   Now, that does seem to expand beyond the

2   Federal Government's determination about the types of

3   sanctions that should govern the employment

4   relationship.

5   You talk about supply and demand. The

6   Federal Government, of course, prohibits the employment,

7   but it also imposes sanctions with respect to

8   application for work. And the State of Arizona, in this

9   case, is imposing some significantly greater sanctions.

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

11 different sanctions. I mean, you know, it's a little

12 bit -- kind of hard to weigh the difference between

13 removability, which is obviously a pretty significant

14 sanction for an alien, and the relatively modest

15 penalties imposed by section 5(C).

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

17 something that there's no direct analog in Federal law.

18 But I -- but that's not enough to get you to preemption,

19 obviously.

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

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

22 targets employment that is expressly forbidden by

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

24 essentially, the government is reduced to arguing that

25 because in 1986 when Congress passed IRCA, it only

23

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

2   didn't, generally speaking, impose restrictions on

3   employees, that somehow they're going to draw a

4   preemptive inference from that.

5   JUSTICE SOTOMAYOR: Counsel --

6   JUSTICE KENNEDY: Would you agree

7   that -- would you accept as a working hypothesis that we

8   can begin with the general principle that the Hines v.

9   Davidowitz language controls here, and we're going to

10   ask -- our principal -- our primary function is to

11   determine whether, under the circumstances of this

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

13   the accomplishment and execution of the full purposes

14   and objectives of Congress?

15   Is that an acceptable test from your

16   standpoint?

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

18   test. I mean, Justice Kennedy, you know, there

19   obviously have been subsequent cases, including DeCanas

20   and Whiting, that give additional shape and color to

21   that test, but I don't have any -- I don't have any real

22   quarrel with that test.

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

24   JUSTICE KENNEDY: But then the government on

25   this section is going to come and say, well, there may

 1   be -- this must be -- this -- the enforcement of this

 2   statute, as Arizona describes it, will be in

 3   considerable tension with our -- with our basic

 4   approach. Isn't that what I'm going to hear from the

 5   government?

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

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

 8   the Federal Government for its word on these things.

 9   You know, it's interesting, in DeCanas

10   itself, the SG said that that California statute was

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

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

13   have the SG tell us it's preempted, that's good enough

14   for us. They went beyond that, and they looked hard.

15   And what they did is they established that

16   this is an area where the presumption against preemption

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

18   We have here a situation where there is an

19   express preemption provision, and it -- it only

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

21   express preemption provision clearly doesn't apply here.

22   So the only thing they have is this

23   inference --

24   JUSTICE SOTOMAYOR: Well, for those of us

25   for whom legislative history has some importance, there

1   seems to be quite a bit of legislative history that

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

3   discussed and explicitly rejected.

4   MR. CLEMENT: Sure.

5   JUSTICE SOTOMAYOR: The preemption language

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

7   It seems odd to think that the Federal Government is

8   deciding on employment sanctions and has unconsciously

9   decided not to punish employees.

10   MR. CLEMENT: But, Justice Sotomayor,

11   there's a big difference between Congress deciding not

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

13   additional criminal prohibition, and saying that that

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

15   remarkable additional step.

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

17   legislative history -- for those who do, it really

18   supports us -- because here's what Congress confronted.

19   I mean, they started thinking about this problem in

20   1971. They passed IRCA in 1986.

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

22   world. It's already unlawful, as a matter of Federal

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

24   work. And if they seek this unlawful work, they are

25   subject to removal for doing it.

26

1   In addition, Congress was told that most of

2   the aliens who get this unlawful work are already

3   here -- they illegally entered, so they're already

4   subject to an independent criminal offense.

5   So at that point, Congress is facing a world

6   where the employee is already subject to multiple

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

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

9   they address the employer's side of the equation, they

10   have an express preemption provision that says nothing

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

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

13   JUSTICE GINSBURG: But they did provide -- I

14   mean, your position was the Federal legislation

15   regulates the supply side. That leaves the demand side

16   open. But there is regulation, and the question is

17   whether anything beyond that is inconsistent with the

18   Federal -- it's not just that the person is removable,

19   but if they use false documents in seeking work, that's

20   a Federal crime.

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

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

23   more.

24   MR. CLEMENT: Two quick responses, and then

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

1   The first is that if you look at what they

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

3   actually assist in regulating the employer's side.

4   Because what they're worried about is a fraudulent

5   document that then is used essentially to trick the

6   employer into employing somebody who shouldn't be

7   employed.

8   The second thing is, the more that you view

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

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

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

12 of the equation.

13   CHIEF JUSTICE ROBERTS: We'll give you

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

15 have to say about section 3 before you sit down.

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

17 I appreciate the opportunity to do that.

18   I do think as to section 3, the question is

19 really -- it's a provision that is parallel to the

20 Federal requirements, and imposes the same punishments

21 as the Federal requirement.

22   So it's generally not a fertile ground for

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

24 preemption even in those analogous circumstances.

25 They're the cases that the government is forced to rely

1 on. Cases like Buckman, cases like --

2   JUSTICE KENNEDY: Would double prosecutions

3 be -- suppose that an alien were prosecuted under

4 Federal law for violating basically the terms of 3,

5 could the States then prosecute him as well?

6   MR. CLEMENT: I think they could under

7 general double jeopardy principles and the dual

8 sovereignty doctrine. Obviously, if that was of

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

10 an as-applied challenge if somebody was already

11 prosecuted under Federal law.

12   But, of course, this Court has confronted

13 exactly that argument in California v. Zook, where you

14 had the statute of California that prohibited somebody

15 operating as an interstate carrier without the ICC

16 license. It was raised -- well, you know, you have to

17 let just the Feds enforce that law. Otherwise, there's

18 the possibility of duplicative punishment, duplicative

19 prosecution.

20   And this Court rejected that argument there.

21   JUSTICE GINSBURG: Mr. Clement, it

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

23 you is Hines, which said the registration

24 scheme -- Congress enacted a complete registration

25 scheme which the States cannot complement or impose even

 1   auxiliary regulations. So I don't see the alien

 2   registration as a question of obstacle preemption, but

 3   appeal preemption that alien -- we don't want competing

 4   registration schemes. We want the registration scheme

 5   to be wholly Federal.

 6   MR. CLEMENT: Well, Justice Ginsburg, I

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

 8   Kennedy's characterization of the relevant language in

 9   Hines, because although there's some general discussion

10   there of field preemption, when the Court actually

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

12   obstacle preemption.

13   And here's where I think there's a critical

14   difference between what the Court had before it in Hines

15   and what you have before you here.

16   In Hines, Pennsylvania passed its statute

17   before Congress passed the alien registration statute.

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

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

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

21   conflict between the provisions of the Pennsylvania

22   registration law and the Federal registration law. And

23   this Court struck it down on that preemption basis.

24   Here, it's quite different. Arizona had

25   before it the Federal statute. It looked at the precise

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1 provisions in the Federal statute. It adopted those

2 standards as its own, and then it imposed parallel

3 penalties for the violation of the State equivalent.

4   And so I think the right analysis is really

5 the analysis that this Court laid out in its Whiting

6 decision, which says that in these kinds of cases, what

7 you look for is whether or not the State scheme directly

8 interferes with the operation of the Federal scheme.

9   JUSTICE SOTOMAYOR: Can I ask you something?

10   JUSTICE ALITO: Well, in that instance --

11   CHIEF JUSTICE ROBERTS: Justice Alito.

12   JUSTICE ALITO: In that regard, we are told

13 that there are some important categories of aliens who

14 can't obtain registration, cannot obtain Federal

15 registration, and yet they're people that nobody would

16 think should be removed. I think someone with a pending

17 asylum application would fall into that category.

18   How would section 3 apply there?

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

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

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

22 that individual in that category would be subject to

23 prosecution under 1304 and 1306. And if I understand,

24 you know, the Government's position, there are certain

25 people where, you know, they can't really get a

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1   registration document because of the narrow class that

2   they're in.

3   And as I understand it, it is not a

4   violation of either 1304 or 1306 to not get a

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

6   one. So you're not liable for the willful failure to

7   get a registration document, and when you don't have a

8   registration document to carry, you don't run afoul of

9   1306 on the carry --

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

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

12   registration.

13   MR. CLEMENT: Well, sure.

14   JUSTICE ALITO: But --

15   MR. CLEMENT: But that's not the narrow

16   class we were talking about.

17   JUSTICE ALITO: No, I understand that. I

18   didn't understand the distinction you were drawing, that

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

20   you couldn't have gotten a registration.

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

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

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

24   mean, they're already guilty of one Federal misdemeanor

25   by the illegal entry.

1   JUSTICE ALITO: Right.

2   MR. CLEMENT: But at the point that they

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

4   independent violation.

5   So maybe I need to fix what I said and say,

6   look, if you're somebody who -- if you did go to

7   register, would be told: You're fine, but we can't give

8   you a registration document, then that individual's not

9   subject to prosecution under the Federal statute,

10   therefore wouldn't be subject to prosecution under the

11   State statute.

12   CHIEF JUSTICE ROBERTS: Thank you,

13   Mr. Clement.

14   General Verrilli.

15   ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

16   ON BEHALF OF THE RESPONDENT

17   GENERAL VERRILLI: Mr. Chief Justice, and

18   may it please the Court:

19   CHIEF JUSTICE ROBERTS: Before you get into

20   what the case is about, I'd like to clear up at the

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

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

23   saw none of that in your brief.

24   GENERAL VERRILLI: That's correct.

25   CHIEF JUSTICE ROBERTS: Okay. So this is

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1   not a case about ethnic profiling.

2   GENERAL VERRILLI: We're not making any

3   allegation about racial or ethnic profiling in the case.

4   Mr. Clement is working hard this morning to

5   portray S.B. 1070 as an aid to Federal immigration

6   enforcement. But the very first provision of the

7   statute declares that Arizona is pursuing its own policy

8   of attrition through enforcement, and that the

9   provisions of this law are designed to work together to

10   drive unlawfully present aliens out of the State.

11   That is something Arizona cannot do, because

12   the Constitution vests exclusive --

13   JUSTICE SOTOMAYOR: General, could you

14   answer Justice Scalia's earlier question to your

15   adversary? He asked whether it would be the

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

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

18   borders a person who's here illegally.

19   GENERAL VERRILLI: That is our position,

20   Your Honor. It is our position because the Constitution

21   vests exclusive authority over immigration matters with

22   the national government.

23   JUSTICE SCALIA: Well, all that means, it

24   gives authority over naturalization, which we've

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

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1   Government can set forth the rules concerning who

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

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

4   has -- has no power?

5   What -- what does sovereignty mean if it

6   does not include the ability to defend your borders?

7   GENERAL VERRILLI: Your Honor, the Framers

8   vested in the national government the authority over

9   immigration because they understood that the way this

10   nation treats citizens of other countries is a vital

11   aspect of our foreign relations. The national

12   government, and not an individual State --

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

14   national government. Arizona is not trying to kick out

15   anybody that the Federal government has not already said

16   do not belong here.

17   And -- look, the Constitution

18   provides -- even -- even with respect to the Commerce

19   Clause -- "No State shall without the consent of

20   Congress lay any imposts or duties on imports or exports

21   except," it says, "what may be absolutely necessary for

22   executing its inspection laws."

23   The Constitution recognizes that there is

24   such a thing as State borders, and the States can police

25   their borders, even to the point of inspecting incoming

1   shipments to exclude diseased material.

2   GENERAL VERRILLI: But they cannot do what

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

4   elevate one consideration above all others. Arizona is

5   pursuing a policy that maximizes the apprehension of

6   unlawfully present aliens so they can be jailed as

7   criminals in Arizona unless the Federal Government

8   agrees to direct its enforcement resources to remove the

9   people that Arizona has identified.

10   CHIEF JUSTICE ROBERTS: Well, if that State

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

12   priorities.

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

14   different set of enforcement priorities, and their

15   objective was to protect to the maximum extent possible

16   the borders. And so anyone who is here illegally, they

17   want to know about and they want to do something about.

18   In other words, different than the current policy.

19   Does that mean in that situation, the

20   Arizona law would not be preemptive?

21   GENERAL VERRILLI: I think the mandatory

22   character of the Arizona law and the mandatory character

23   of the obligations it imposes, especially as backed by

24   this extraordinary provision in section 2(H), which

25   imposes civil penalties of up to $5000 a day on any

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1 official in the State of Arizona who is not following

2 section 2 or, as we read it, the rest of S.B. 1070, to

3 the maximum extent possible, does create a conflict.

4   But I do think the most fundamental point

5 about section 2 is to understand its relationship to the

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

7 statute to identify the class of people who Arizona is

8 then committed to prosecute under section 3, and if they

9 are employed, also under section 5.

10   JUSTICE ALITO: Well, I have the same

11 question as the Chief Justice. Suppose that the Federal

12 Government changed its priorities tomorrow, and it

13 said -- they threw out the ones they have now, and they

14 said the new policy is maximum enforcement. We want to

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

16 want to -- we want their immigration status verified.

17   Would the Arizona law then be un-preemptive?

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

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

20 the national level because it's the national government

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

22 State that pays the price --

23   JUSTICE SCALIA: Do you have any example

24 where -- where enforcement discretion has the effect of

25 preempting State action?

 1   GENERAL VERRILLI: Well, I think we should

 2   think about section 3 of the law, Your Honor. I think

 3   it will help illustrate the point --

 4   JUSTICE SCALIA: I'll point out another case

 5   of ours where we've said that essentially the preemption

 6   of State law can occur, not by virtue of the Congress

 7   preempting, but because the Executive doesn't want this

 8   law enforced so -- so rigorously, and that preempts the

 9   State from enforcing it vigorously.

10   Do we have any cases --

11   GENERAL VERRILLI: I think the preemption

12   here -- focusing for a moment on section 3 -- the

13   preemption here flows from judgments of Congress, from

14   the registration system that Congress set up in sections

15   1301 through 1306, from the decision of Congress in

16   section 1103 in the law to vest the Secretary of DHS and

17   the Attorney General with the authority to make the

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

19   JUSTICE SCALIA: Well, they do that with

20   all -- all Federal criminal statutes. And you

21   acknowledge that as a general matter, States can enforce

22   Federal criminal law, which is always entrusted to the

23   Attorney General.

24   GENERAL VERRILLI: They can make -- they can

25   engage in detention in support of the enforcement of

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1   Federal law. That's what the OLC opinion from 2002

2   says. It does not say that they can prosecute under

3   Federal law and make their own decisions. That's a far

4   different matter.

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

6   what's wrong with section 3 of this Act, in that --

7   CHIEF JUSTICE ROBERTS: Well, but you say

8   that the Federal Government has to have control over who

9   to prosecute, but I don't see how section 2(B) says

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

11   Federal Government, here's someone who is here

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

13   discretion to prosecute for Federal immigration offenses

14   rests entirely with the Attorney General.

15   GENERAL VERRILLI: That's correct, but with

16   respect to -- and I will -- but let me address something

17   fundamental about section 2. That is true, but I think

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

19   Section 1 of this statute says that

20   sections 2 and 3 and 5 are supposed to work together to

21   achieve this policy of attrition through enforcement.

22   And so what section 2 does is identify a population that

23   the State of Arizona is going to prosecute under

24   section 3 and section 5.

25   CHIEF JUSTICE ROBERTS: Right. So apart

39

1   from section 3 and section 5, take those off the table,

2   you have no objection to section 2.

3   GENERAL VERRILLI: We do, Your Honor; but,

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

5   more point about 3 and 5, please. The -- I

6   think -- because I think it's important to understand

7   the dilemma that this puts the Federal Government in.

8   Arizona has got this population, and

9   they've -- and they're by law committed to maximum

10   enforcement. And so the Federal Government's got to

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

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

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

14   our priorities --

15   CHIEF JUSTICE ROBERTS: Exactly. And the

16   Federal Government has to decide where it's going to use

17   its resources.

18   And what the State is saying, here are

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

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

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

22   to you.

23   That's why I don't see the problem with

24   section 2(B).

25   GENERAL VERRILLI: Here's the other

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

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

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

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

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

6   CHIEF JUSTICE ROBERTS: Only under section 3

7 and section 5.

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

9 what you're talking about is taking somebody whose only

10 offense is being unlawfully present in the country and

11 putting them in jail for up to 6 months, or somebody

12 who --

13   CHIEF JUSTICE ROBERTS: Well, let's

14 say you're worried about --

15   GENERAL VERRILLI: -- or like 30 days,

16 forgive me; 6 months for employment.

17   CHIEF JUSTICE ROBERTS: There you go.

18 Right. For the notification, what could possibly be

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

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

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

22 during that period by having the Arizona arresting

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

24 find out if this person is here illegally, because the

25 Federal law says the Federal agency has to answer my

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1   question?

2   It seems an odd argument to say the Federal

3   agency has to answer the State's question, but the State

4   can't ask it.

5   GENERAL VERRILLI: Well, we're not saying

6   the State can't ask it in any individual case. We

7   recognize that section --

8   CHIEF JUSTICE ROBERTS: You think there are

9   individual cases in which the State can call the Federal

10   Government and say: Is this person here illegally?

11   GENERAL VERRILLI: Yes, certainly. But that

12   doesn't make --

13   CHIEF JUSTICE ROBERTS: Okay. So doesn't

14   that defeat the facial challenge to the Act?

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

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

17   here is in that -- is in every circumstance as a result

18   of section 2(B) of the law, backed by the penalties of

19   section 2(H), the State official must pursue the

20   priorities that the State has set, irrespective of

21   whether they are helpful to or in conflict with the

22   Federal priorities.

23   And so --

24   JUSTICE ALITO: Well, suppose that

25   every -- suppose every law enforcement officer in

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1 Arizona saw things exactly the same way as the Arizona

2 legislature. And so, without any direction from the

3 legislature, they all took it upon themselves to make

4 these inquiries every time they stopped somebody or

5 arrested somebody.

6   Would that be a violation of Federal law?

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

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

9 free to be responsive to Federal priorities, if the

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

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

12 problem at the border --

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

14 we don't care what your priorities are; we have our

15 priorities, and our priority is maximum enforcement, and

16 we're going to call you in every case? It was all done

17 on an individual basis, all the officers were

18 individually doing it --

19   GENERAL VERRILLI: Yes, well --

20   JUSTICE ALITO: -- that would be okay?

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

22 there's a State policy locked into law by statute,

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

24 If it's not --

25   JUSTICE SOTOMAYOR: General --

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

2   mandatory versus discretionary --

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

4   understand because your argument -- you seem to be

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

6   the Arizona legislature is trying to control what its

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

8   disregard the desires of the Arizona legislature, for

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

10   Government, for whom they don't work.

11   GENERAL VERRILLI: But they -- but with

12   respect to immigration enforcement, and to the extent

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

14   Government's attention, they are cooperating in the

15   enforcement of Federal law --

16   JUSTICE KENNEDY: But the hypothetical is

17   that that's all the legislature is doing.

18   GENERAL VERRILLI: Well, except I think,

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

20   cooperation if in every instance, the officers in the

21   State must respond to the priorities set by the State

22   government and are not free to respond to the priorities

23   of the Federal officials who are trying to enforce the

24   law in the most effective manner possible.

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

 1   confused. General, I'm terribly confused by your

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

 3   focusing in on what I believe my colleagues are trying

 4   to get to.

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

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

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

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

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

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

11   He tells me that unless there's another

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

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

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

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

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

17   wrong with that?

18   GENERAL VERRILLI: Well --

19   JUSTICE SOTOMAYOR: Taking out the other

20   provisions, taking out any independent State-created

21   basis of liability for being an illegal alien.

22   GENERAL VERRILLI: I think there are three.

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

24   Now, we are not making an allegation of

25   racial profiling. Nevertheless, there are already tens

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1   of thousands of stops that result in inquiries in

2   Arizona, even in the absence of S.B. 1070. It stands to

3   reason that the legislature thought that that wasn't

4   sufficient and there needed to be more.

5   And given that you have a population in

6   Arizona of 2 million Latinos, of whom only 400,000 at

7   most are there unlawfully --

8   JUSTICE SCALIA: Sounds like racial

9   profiling to me.

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

11   that what we are talking about is the status of being

12   unlawfully present --

13   JUSTICE SOTOMAYOR: Do you have the

14   statistics as to how many arrests there are and how

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

16   statute?

17   GENERAL VERRILLI: There is some evidence in

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

19   declaration, which is in the Joint Appendix, was

20   the -- he was the fellow who used the run the

21   Law Enforcement Support Center, which answers the

22   inquiries. That -- that declaration indicates that in

23   fiscal year 2009, there were 80,000 inquiries and --

24   JUSTICE SCALIA: What does this have to do

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

1   with racial harassment, but I thought you weren't

2   relying on that.

3   GENERAL VERRILLI: The --

4   JUSTICE SCALIA: Are you objecting to

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

6   here? Is that -- surely you're not concerned about

7   harassing them. They've been stopped anyway, and all

8   you're doing is calling up to see if they're illegal

9   immigrants or not.

10   So you must be talking about other people

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

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

13   GENERAL VERRILLI: And other -- and other

14   people lawfully present in the country, certainly, but

15   this is --

16   JUSTICE SCALIA: But that has nothing to do

17   with the immigration law --

18   GENERAL VERRILLI: Hines is --

19   JUSTICE SCALIA: -- which is what you're

20   asserting preempts all of this activity.

21   GENERAL VERRILLI: Hines identified this

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

23   preemption under the immigration laws because of the

24   concern that the way this nation treats citizens of

25   other countries is fundamental to our foreign relations.

1 And this is a --

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

3 go back, because I think -- I'm trying to get focused

4 the question I think others are asking, and one way to

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

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

7 right?

8   Now, I can think -- I'm not saying they're

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

10 individual longer than you would have otherwise, I can

11 think of some arguments that it is preempted, and some

12 replies. So keep that out of it.

13   Suppose that we were to say, that sentence,

14 as we understand it, does not raise a constitutional

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

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

17 cannot detain the person for longer than he would have

18 done in the absence of this provision.

19   Now, in your view, is there any preemption

20 exemption -- argument against -- any preemption argument

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

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

23 asking.

24   GENERAL VERRILLI: Yes. We would think it

25 would ameliorate --

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1   JUSTICE BREYER: And if so, what?

2   GENERAL VERRILLI: -- it would ameliorate

3   the practical problem; but, there's still a structural

4   problem here in that this is an effort to enforce

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

6   the President and the Executive Branch that are

7   responsible for the enforcement of Federal law --

8   CHIEF JUSTICE ROBERTS: It is --

9   GENERAL VERRILLI: -- and --

10   CHIEF JUSTICE ROBERTS: It is not an effort

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

12   about violations of Federal law. Whether or not to

13   enforce them is still entirely up to you.

14   If you don't want to do this, you just tell

15   the person at LESC -- if that's the right -- is that the

16   right acronym?

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

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

19   somebody from Arizona calls, answer their question, and

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

21   somebody else, is he legal or illegal, let me

22   check -- it's, oh, he's illegal. Okay, thanks,

23   good-bye.

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

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

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 1   illegally, you don't have to.

 2   GENERAL VERRILLI: That's correct. But the

 3   process of -- the process of cooperating to enforce the

 4   Federal immigration law starts earlier, and it starts

 5   with the process of making the decisions about who

 6   to -- who to stop, who to apprehend, who to check on.

 7   And the problem -- the structural problem we

 8   have is that those decisions -- in the making of those

 9   decisions, Arizona officials are not free --

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

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

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

13   driving. So that decision to stop the individual has

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

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

16   can ask the Federal Government to find out if this

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

18   It seems to me that the Federal Government

19   just doesn't want to know who's here illegally or not.

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

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

22   and focus on our priorities.

23   And one thing that's instructive in that

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

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

1 both of whom I think explain effectively why S.B. -- the

2 section 2(B) obligation gets in the way of the mutual

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

4 serious criminals so that they can be removed from the

5 country.

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

7 wrong about the States enforcing Federal law? There's a

8 Federal law against robbing Federal banks. Can it be

9 made a State crime to rob those banks? I think it is.

10   GENERAL VERRILLI: I think it could, but I

11 think that's quite --

12   JUSTICE SCALIA: But does the Attorney

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

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

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

16 going to let it go. And the State's interfering with

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

18 prosecuting all these bank robbers.

19   GENERAL VERRILLI: Well, of course, no one

20 would --

21   JUSTICE SCALIA: Now, would anybody listen

22 to that argument?

23   GENERAL VERRILLI: Of course not.

24   JUSTICE SCALIA: Of course not.

25   GENERAL VERRILLI: But this argument is

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1   quite different, Justice Scalia, because here what we

2   are talking about is that Federal registration

3   requirement in an area of dominant Federal concern,

4   exclusive Federal concern with respect to immigration:

5   Who can be in the country, under what circumstances, and

6   what obligations they have --

7   JUSTICE KENNEDY: Now, are you talking about

8   3 now or --

9   GENERAL VERRILLI: Yes.

10   JUSTICE KENNEDY: -- or does this argument

11   relate to 2 as well?

12   GENERAL VERRILLI: This is an argument about

13   section 3.

14   JUSTICE ALITO: Well, could I ask you this

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

16   is just a matter of information. How can a State

17   officer who stops somebody or who arrests somebody for a

18   nonimmigration offense tell whether that person falls

19   within the Federal removal priorities without making an

20   inquiry to the Federal Government?

21   For example, I understand one of the

22   priorities is people who have previously been removed,

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

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

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

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1   GENERAL VERRILLI: Well, in any individual

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

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

4   if you're arresting somebody based on probable cause

5   that they've committed a serious crime, and they -- and

6   they -- the inquiry into whether -- into their status

7   will be enough to identify that person for priority --

8   JUSTICE ALITO: Well, what if they just,

9   they stop somebody for a traffic violation, but they

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

11   removed and has come back, or somebody who's

12   just -- just within the last few hours possibly

13   come -- well, let's just -- somebody who's previously

14   been removed? How can you know that without making an

15   inquiry?

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

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

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

19   of any individual circumstance and a mandatory policy

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

21   inquiry in every case.

22   I mean, I think it's as though -- if I can

23   use an analogy, if you ask one of your law clerks to

24   bring you the most important preemption cases from the

25   last 10 years, and they rolled in the last -- the last

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1   hundred volumes of the U.S. Reports and said, well,

2   they're in there. That -- that doesn't make it --

3   CHIEF JUSTICE ROBERTS: What if they just

4   rolled in Whiting?

5   (Laughter.)

6   CHIEF JUSTICE ROBERTS: That's a pretty good

7   one.

8   JUSTICE BREYER: Look, in the Federal

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

10   restrict any government entity from making this inquiry

11   of the Federal Government. And then it says that the

12   Federal Government has -- any agency -- and then it says

13   the Federal Government has an obligation to respond.

14   Now, assuming the statute were limited as I

15   say, so nothing happened to this individual, nothing

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

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

18   policeman makes a phone call.

19   Now that's what I'm trying to get at.

20   If that were the situation, and we said it

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

22   statute would that conflict with, where we have two

23   provisions that say any policeman can call?

24   GENERAL VERRILLI: So --

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

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

2   GENERAL VERRILLI: Yes.

3   JUSTICE BREYER: Because in my mind, I'm not

4   clear what your answer is to that.

5   GENERAL VERRILLI: I understand the

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

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

8   provision that sets forth the powers and authorities of

9   Federal immigration officials.

10   It contains 1357(g), which effectively says

11   that Federal -- that the Federal Government, the

12   Attorney General, can deputize State officials, so long

13   as they're -- they obtain adequate training and they're

14   subject to the direction and control of the Attorney

15   General in carrying out immigration functions.

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

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

18   preclude informal cooperation, communication or other

19   informal cooperation in the apprehension, detention and

20   removal of unlawfully present persons.

21   But it's the focus on cooperation.

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

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

24   Congress was intending to do was to shift from the

25   Federal Government to the States the authority to set

1   enforcement priorities, because I think the cooperation

2   in this context is cooperation in the service of the

3   Federal enforcement.

4   JUSTICE SOTOMAYOR: Can I get to a different

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

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

7   Putting aside your argument that

8   this -- that a systematic cooperation is wrong -- you

9   can see it's not selling very well -- why don't you try

10   to come up with something else?

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

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

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

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

15   GENERAL VERRILLI: So let me just summarize

16   what I think the three are, and then maybe I can move on

17   to sections 3 and 5.

18   With respect to -- with respect to 2, we

19   think the harassment argument -- we think this is a more

20   significant harassment problem than was present in

21   Hines --

22   JUSTICE SOTOMAYOR: Please move more --

23   GENERAL VERRILLI: With respect to -- in

24   addition, we do think that there is a structural

25   accountability problem in that they are enforcing

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1   Federal law but not answerable to the Federal officials.

2   And third, we do think there are practical

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

4   deliver to the Federal system a -- a volume of inquiries

5   that makes it harder and not easier to identify who the

6   priority persons are for removal.

7   So those are the three reasons.

8   CHIEF JUSTICE ROBERTS: General, you have

9   been trying valiantly to get us to focus on section 3,

10   so maybe we should let you do that now.

11   GENERAL VERRILLI: Thank you, Mr. Chief

12   Justice.

13   The -- I do think the key thing about

14   section 3 is that we -- is that section 3 is purporting

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

16   relationship between the alien and the United States

17   government that's exclusively a Federal relationship.

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

19   And the way in which those terms are

20   enforced does have very significant Federal interest at

21   its heart, and there is no State police power interest

22   in that Federal registration relationship.

23   And I do think -- I think it's a very

24   important -- Justice Alito raised the question of these

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

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1   important to get clarity on that.

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

3   the country unlawfully, but you have a pending

4   application for asylum, a pending application for

5   temporary protective status because you would have to be

6   removed to a country to which you can't be removed

7   because of the conditions in the country, if you have a

8   valid claim for relief under the Violence Against Women

9   Act based on your treatment, if you have a valid claim

10   for relief because you are a victim of human

11   trafficking, if you have a valid claim for relief

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

13   crime, all of those persons are in technical violation

14   of 1306(a).

15   And -- and it seems to me they -- they are

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

17   is not correct in saying that those are people who

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

19   violation of -- of section 3. They are in violation.

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

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

22   there, that there a lot of people in violation of it

23   and -- well, the Attorney General will take care of it.

24   Is that how we write our criminal laws?

25   GENERAL VERRILLI: But it's a situation in

1   which no reasonable person would think that

2   the individual ought to be prosecuted, and yet, very

3   often, the States aren't even going to know. In fact,

4   about asylum status, they can't know because there are

5   regulations that require that to be kept private to

6   avoid retaliation against the person making the

7   application.

8   And so, this is -- so this is -- this is, I

9   think, a very strong illustration of why the enforcement

10   discretion over section 3 needs to be vested exclusively

11   in the Federal Government.

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

13   have any other case in which the basis for preemption

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

15   General's enforcement discretion?

16   GENERAL VERRILLI: Well, this is --

17   JUSTICE SCALIA: I think that's an

18   extraordinary basis for saying that the State is

19   preempted.

20   GENERAL VERRILLI: I think what's

21   extraordinary about this, actually, Justice Scalia, is

22   the State's decision to enact a statute purporting to

23   criminalize the violation of a Federal registration

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

25   they're doing it for a reason --

1   JUSTICE SCALIA: It's not criminalizing

2   anything that isn't criminal under Federal law.

3   GENERAL VERRILLI: But -- but what --

4   JUSTICE SCALIA: It's the bank. It's the

5   Federal bank example --

6   GENERAL VERRILLI: Well, no.

7   JUSTICE SCALIA: -- a State law which

8   criminalizes the same thing that the Federal law does.

9   GENERAL VERRILLI: I think it's quite

10   different.

11   What they're doing here is using 1306(a) to

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

13   who can be prosecuted under section 3 are people who are

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

15   statute says. And they're using it to get at that

16   category of people, to essentially use their State

17   criminal law to perform an immigration function.

18   And the immigration function is to try

19   to -- to prosecute these people. And, by the way, you

20   can prosecute somebody, they can be put in jail for 30

21   days here, but under Federal law, a violation of 1306(a)

22   is a continuing offense. So the day they get out of

23   jail for that 30 days, they can be arrested again, and

24   this can happen over and over again.

25   And the point of this provision is to drive

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1   unlawfully present people out of the State of Arizona.

2   JUSTICE KENNEDY: Suppose --

3   suppose -- well, assume these are two

4   hypothetical -- two hypothetical instances.

5   First, the Federal Government has said we

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

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

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

9   That's the first -- just hypothetical.

10   JUSTICE SCALIA: You said that in your

11   brief, didn't you?

12   JUSTICE KENNEDY: Also hypothetical is that

13   the State of Arizona has -- has a massive emergency,

14   with social disruption, economic disruption, residents

15   leaving the State because of flood of immigrants.

16   Let's just assume those two things.

17   Does that give the State of Arizona any

18   powers or authority or legitimate concerns that any

19   other State wouldn't have?

20   GENERAL VERRILLI: Of course, they have

21   legitimate concerns in that situation. And, Justice

22   Kennedy --

23   JUSTICE KENNEDY: And can they go to their

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

25   the legislature to enact laws to correct this problem?

1   GENERAL VERRILLI: They -- they certainly

2   can enact laws of general application. They can enforce

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

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

5   that they are under no obligation to provide any State

6   benefits to the population.

7   But I think, most importantly, they

8   can -- and -- not most importantly, but as importantly,

9   they can engage in cooperative efforts with the Federal

10   Government --

11   Excuse me. I see my --

12   CHIEF JUSTICE ROBERTS: No, keep going.

13   GENERAL VERRILLI: They can -- they can

14   engage in cooperative efforts with the Federal

15   Government, of which there are many going on in Arizona

16   and around the country, in order to address these

17   problems.

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

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

20   said that the -- the Justice Department doesn't get

21   nearly enough money to enforce our immigration laws?

22   Didn't you say that?

23   GENERAL VERRILLI: Of course, we have to set

24   priorities. There are only --

25   JUSTICE SCALIA: Exactly. Okay.

1   So the State says, well, that may be your

2   priorities, but most of these people that you're not

3   going after, or an inordinate percentage of them, are

4   here in our State, and we don't like it. They're

5   causing all sorts of problems. So we're going to help

6   you enforce Federal law. We're not going to do anything

7   else. We're just enforcing Federal law.

8   GENERAL VERRILLI: Well, what I think

9   they're going to do in Arizona is something quite

10   extraordinary, that has significant real and practical

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

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

13   exclusively in the Federal Government.

14   What they're going to do is engage,

15   effectively, in mass incarceration, because the

16   obligation under section 2(H), of course, is not merely

17   to enforce section 2 to the fullest possible extent at

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

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

20   in section 3 and in section 5.

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

22   situation of mass incarceration of people who are

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

24   very serious risk of raising significant foreign

25   relations problems.

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1   And these problems are real. That is the

2   problem of reciprocal treatment of

3   United States citizens in other countries.

4   JUSTICE KENNEDY: So you're saying the

5   government has a legitimate interest in not enforcing

6   its laws?

7   GENERAL VERRILLI: No. We have a legitimate

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

9   to be -- but these -- this Court has said over and over

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

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

12   immigration laws is exceedingly delicate and complex,

13   and it involves consideration of foreign relations. It

14   involves humanitarian concerns, and it also involves

15   public order and public safety.

16   JUSTICE SOTOMAYOR: General, when --

17   when -- I know in your brief, you had -- you said that

18   there are some illegal aliens who have a right to remain

19   here. And I'm just realizing that I don't really know

20   what happens when the Arizona police call the Federal

21   agency.

22   They give the Federal agency a name,

23   correct?

24   GENERAL VERRILLI: I assume so, yes.

25   JUSTICE SOTOMAYOR: You don't really have

1   knowledge of what --

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

3   can come in lots of different ways, but generally,

4   they'll get a name and some other identifying

5   information.

6   JUSTICE SOTOMAYOR: All right. And what

7   does the computer have? What information does your

8   system have?

9   GENERAL VERRILLI: Yes. So the way this

10   works is there's a system for -- for incoming inquiries.

11   And then there's a person at a computer terminal. And

12   that person searches a number of different databases.

13   There are eight or ten different databases. And that

14   person will check the name against this one, check the

15   name against that one, check the name against the other

16   one, to see if there are any hits.

17   JUSTICE SOTOMAYOR: Well, how does that

18   database tell you that someone is illegal as opposed to

19   a citizen?

20   Today, if you use the name Sonia Sotomayor,

21   they'd probably figure out I was a citizen. But let's

22   assume it's John Doe, who lives in Grand Rapids. So

23   they're legal. Is there a citizen database?

24   GENERAL VERRILLI: The citizen problem is

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

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 1   database. If you --

 2   JUSTICE SOTOMAYOR: I'm sorry, there is or

 3   there isn't?

 4   GENERAL VERRILLI: There is not. If you

 5   have a passport, there's a database if you look

 6   "passports." So you could be discovered that way. But

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

 8   verify that you are a citizen unless you're in the

 9   passport database. So you have lots of circumstances in

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

11   match. There's no -- there's nothing suggesting in the

12   databases that they have an immigration problem of any

13   kind, but there's nothing to --

14   JUSTICE SOTOMAYOR: So if you run out of

15   your house without your driver's license or

16   identification and you walk into a park that's closed

17   and you're arrested, you -- they make the call to this

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

19   GENERAL VERRILLI: Yes, and I --

20   JUSTICE SOTOMAYOR: -- figure out if

21   you're --

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

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

24   Mr. Clement suggested that it takes 10

25   minutes to process these calls. That's true, but you're

1   in a queue for 60 minutes before it takes the 10 minutes

2   to process the call. So the average time is 70 minutes,

3   not 10 minutes.

4   CHIEF JUSTICE ROBERTS: I had a

5   little -- wasn't sure about your answer to Justice

6   Kennedy.

7   Is the reason that the government is not

8   focused on people who are here illegally as opposed to

9   the other categories you were talking about because of

10   prioritization or because of lack of resources?

11   You suggested that if the -- every illegal

12   alien that you identify is either removed or prosecuted,

13   that that would cause tensions with other governments.

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

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

16   prosecute the people who are simply here illegally as

17   opposed to something else.

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

19   complicated than that. I think the point is this, that

20   with respect to persons who are unlawfully present,

21   there are some who are going to fall in our priority

22   categories, there are those who have committed serious

23   offenses, there are those who have been removed and have

24   come back, and there are other priority categories.

25   Because we have resource constraints and

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

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

3   those priority categories. Find them, remove them.

4   There's a second category, and that is

5   individuals who are here in violation, technically of

6   1306(a), but who have a valid asylum application or

7   application for temporary protected status or

8   other -- and with respect to those persons that we think

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

10 ought to be prosecuted.

11   And then there is an additional category of

12 people who are not in the second category and not

13 priorities, and the form -- and we think there, the idea

14 that an individual State will engage in a process of

15 mass incarceration of that population, which we do think

16 is what section 2(H) commits Arizona to do under section

17 3, raises a significant foreign relations problem.

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

19 particular foreign relations problem by simply deporting

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

21   GENERAL VERRILLI: I really think --

22   JUSTICE SCALIA: And send them back to the

23 countries that are -- that are objecting.

24   GENERAL VERRILLI: This is a --

25   JUSTICE SCALIA: What's the problem with

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1   that?

2   GENERAL VERRILLI: Well, a couple of things.

3   First is, I don't think it's realistic to assume that

4   the aggressive enforcement of sections 3 and 5 in

5   Arizona is going to lead to a mass migration back to

6   countries of origin. It seems a far more likely outcome

7   it's going to be migration to other States. And that's

8   a significant problem. That's part of the reason why

9   this problem needs to be managed on a national basis.

10   Beyond that, I do think, you know,

11   the -- it's worth bearing in mind here that the country

12   of Mexico is in a central role in this situation.

13   Between 60 and 70 percent of the people that we remove

14   every year, we remove to Mexico. And in addition, we

15   have to have the cooperation of the Mexicans. And I

16   think as the Court knows from other cases, the

17   cooperation of the country to whom we are -- to which we

18   are removing people who are unlawfully present is vital

19   to be able to make removal work.

20   In addition, we have very significant issues

21   on the border with Mexico. And in fact, they're the

22   very issues that Arizona's complaining about in that --

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

24   enforce our laws in a manner that will please Mexico.

25   Is that what you're saying?

1   GENERAL VERRILLI: No, Your Honor, but what

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

3   JUSTICE SCALIA: It sounded like what you

4   were saying.

5   GENERAL VERRILLI: No, but what I am saying

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

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

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

9   individual State. And that's why the power needs to be

10   exercised at the national level and not the State level.

11   CHIEF JUSTICE ROBERTS: And your concern is

12   the problems that would arise in bilateral relations if

13   you remove all of these people, or a significant

14   percentage or a greater percentage than you are now.

15   Nothing in the law requires you to do that. All it does

16   is lets you know where -- that an illegal alien has been

17   arrested, and you can decide, we are not going to

18   initiate removal proceedings against that individual.

19   It doesn't require you to remove one more

20   person than you would like to remove under your

21   priorities.

22   GENERAL VERRILLI: Right, but the problem

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

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

25   incarcerate, and the foreign relations problem that that

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

2   at the national level.

3   CHIEF JUSTICE ROBERTS: And that arises

4   under 3 and 5.

5   GENERAL VERRILLI: Correct.

6   CHIEF JUSTICE ROBERTS: But not 2.

7   GENERAL VERRILLI: Well, 2 identifies the

8   population that's going to be prosecuted under 3 and 5.

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

10   I haven't said anything about section 5 yet. And I

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

12   spend a minute on section 5.

13   CHIEF JUSTICE ROBERTS: Section 5.

14   GENERAL VERRILLI: The -- I do think the

15   fundamental point about section 5 here is that in 1986,

16   Congress fundamentally changed the landscape. Congress

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

18   a central concern of national immigration policy. And

19   this Court has described the 1986 law as a comprehensive

20   regime.

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

22   that it may be a comprehensive regime for employers;

23   it's not a comprehensive regime for employees. And

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

25   that the States are precluded from criminalizing efforts

1 to seek or obtain employment in Arizona.

2   But I really think that's not right.

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

4 the problem of employment and made a decision, a

5 comprehensive decision, about the sanctions it thought

6 were appropriate to govern. And Congress did, as

7 Justice Ginsburg suggested, make judgments with respect

8 to the circumstances under which employees could be held

9 criminally liable, as well as the circumstances under

10 which employers could be held liable.

11   And I think it is useful in thinking about

12 the judgments Congress actually made --

13   JUSTICE SCALIA: You think field preemption;

14 is that your argument with respect to --

15   GENERAL VERRILLI: It's both. I think we're

16 making both a field and a conflict preemption argument

17 here, Justice Scalia. And the -- I think it's worth

18 examining the specific judgments Congress made in 1986.

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

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

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

22 the alien of being the exploited -- on the employer's

23 side, Congress said that States may not impose criminal

24 sanctions, and even -- and the Federal Government will

25 not impose criminal sanctions for the hiring of

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1   employees unless there's a pattern or practice.

2   It seems quite incongruous to think that

3   Congress, having made that judgment and imposed those

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

5   States free to impose criminal liability on employees

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

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

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

9   So I think that's a significant problem.

10   In addition, Congress made clear in the law

11   that the I-9 form could not be used for any other

12   purpose than prosecutions for violation of the Federal

13   antifraud requirements. And if Congress wanted to leave

14   States free to impose criminal sanctions on employees

15   for seeking work, they wouldn't have done that, it seems

16   to me.

17   So that I think there are strong indicators

18   in the text that Congress did make a judgment, and the

19   judgment was this far and no farther. And it's

20   reasonable that Congress would have done so, for the

21   same kinds of foreign relations concerns that I was

22   discussing with respect to section 3. It would be an

23   extraordinary thing to put someone in jail merely for

24   seeking work. And yet that's what Arizona proposes to

25   do under section 5 of its law.

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1   Now, of course, there is an express

2   preemption provision, but the express preemption

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

4   operate to the exclusion of implied preemption, field or

5   conflict.

6   So we do think those principles apply here.

7   We think there's a reason why the express

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

9   which is that after DeCanas laws had been enacted on the

10 employer's side, and with -- Congress was making clear

11 that those were preemptive, there were no laws on the

12 employee's side at the time.

13   And therefore, no reason for preemption.

14   CHIEF JUSTICE ROBERTS: Thank you, General.

15   GENERAL VERRILLI: Thank you, Mr. Chief

16 Justice.

17   CHIEF JUSTICE ROBERTS: Mr. Clement,

18 5 minutes.

19   REBUTTAL ARGUMENT OF PAUL D. CLEMENT

20   ON BEHALF OF THE PETITIONERS

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

22 and may it please the Court:

23   I'd like to start briefly with the

24 enforcement issues and then talk about the other

25 provisions.

1   The last thing I'll say about the

2   enforcement provision, since I do think that the

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

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

5   systematic, I think that theory largely refutes itself.

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

7   echo that there's no interference with enforcement

8   priorities by simply giving the Federal Government

9   information on which to bring their enforcement

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

11 point this Court made in its Florence decision earlier

12 this month, which is that sometimes you pull somebody

13 over for the most innocuous of infractions, and they

14 turn out to be the most serious of offenders.

15   And so if you preclude officers, as happened

16 in Phoenix, from communicating with the Federal

17 Government, the Federal Government will not be able to

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

19 example of this, look at the declaration of Officer

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

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

22 the individual.

23   Now, the individual it turns out was wanted

24 for attempted murder in El Salvador and was also guilty

25 of illegal reentry into the United States. He was

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1   stopped on three previous occasions, and his status was

2   not verified. Now, if it had been, he certainly would

3   have been apprehended. In at least two of the stops,

4   his immigration status wasn't checked because of a city

5   policy, City of Phoenix.

6   Now, if the State, I submit, can do

7   anything, it can at the State level override those kind

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

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

10   maximize communication with the Federal authorities. So

11   I think the enforcement policy and priorities argument

12   simply doesn't work.

13   As to section 3, two points about that.

14   One is, I respectfully disagree with the

15   Solicitor General as to whether the various things that

16   he led off -- read off -- the litany of situations where

17   somebody is -- technically doesn't have registration

18   would be a violation of 1306(a).

19   And the reason I take that position is that

20   provision says "a willful failure to register." Now,

21   maybe the prosecutors take the view that there's

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

23   many judges would. I think they would say that if

24   you've been told by the Federal Government that you're

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

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1 that would be good enough to defeat a finding of

2 willfulness.

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

4   JUSTICE SOTOMAYOR: But you're

5 inviting -- you're inviting the very sort of conflict

6 that he's talking about. Because what's going to happen

7 now is that if there's no statement by the Federal

8 agency of legality, the person is arrested, and now

9 we're going to have Federal resources spent on trying to

10 figure out whether they have an asylum application,

11 whether they have this, whether they have that, whether

12 they are exempted under this reason, whether the failure

13 to carry was accidental or not -- I mean, you are

14 involving the Federal Government in your prosecution.

15   MR. CLEMENT: Well --

16   JUSTICE SOTOMAYOR: Now, you may say we're

17 not, because all we're going to show is -- what? That

18 we got a Federal call -- we got a Federal answer that

19 the person wasn't registered?

20   MR. CLEMENT: No, we're going to say that we

21 communicated with the Federal immigration officials, and

22 they told us this is somebody who's perfectly fine and

23 doesn't have to register.

24   JUSTICE SOTOMAYOR: No -- no

25 Confrontation -- no Confrontation Clause problem with

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1   that? With relying on a call to a Federal agency and

2   the police officer says, you're arrested, you're

3   charged, it's not an illegal alien -- or it is an

4   illegal alien.

5   MR. CLEMENT: My supposition, Justice

6   Sotomayor, is that they would use that call to not bring

7   the prosecution, so the issue wouldn't even arise. But

8   I do want to be clear about --

9   JUSTICE SOTOMAYOR: No, no, no. How

10   about -- how about they get a response, yes, it's an

11   illegal alien?

12   MR. CLEMENT: And they bring a prosecution

13   under section 3 --

14   JUSTICE SOTOMAYOR: So how -- where do they

15   get the records that show that this person is an illegal

16   alien that's not authorized to be here?

17   MR. CLEMENT: I --

18   JUSTICE SOTOMAYOR: Who do they get it from?

19   MR. CLEMENT: I think they would get it from

20   the Federal authorities. I think it would be admitted.

21   There might be a challenge in that case. I mean, you

22   know, this is a facial challenge. I'm not going to try

23   to address that potential Sixth Amendment issue.

24   What I would like to say is two things.

25   One, if there's some sloppiness in the way the Federal

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1   Government keeps its records so that there's lots of

2   people that really should be registered but aren't, I

3   can't imagine that sloppiness has a preemptive effect.

4   The second thing I would say is that I do

5   think, in thinking about section 3 in particular, the

6   analogy is not the fraud on the FDA claim in Buckman,

7   it's really the State tort law that says that it's a

8   violation of State tort law to not even seek the

9   approval that's needed under the FDA for a device.

10   Now, States impose tort law for people that

11   market a device without getting the necessary approval,

12   and nobody thinks that's preempted, because it serves

13   the Federal interest. It doesn't have a deluge of

14   information. It forces people to get FDA approval. And

15   in the same way, this State law will force people to

16   register, which is what the Federal Government's

17   supposed to want in the first place, so there's no

18   preemption there. There's no conflict.

19   As to the employment provision, I do think

20   it's important to recognize that --

21   CHIEF JUSTICE ROBERTS: Finish your

22   sentence.

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

24   was not agnostic about unlawful employment by aliens.

25   The employees were already covered, and they were

1   subject to deportation. So the government said, we're

2   going to cover the employers for the first time. I

3   can't imagine why that would have preemptive effect.

4   Thank you, Your Honor.

5   CHIEF JUSTICE ROBERTS: Thank you,

6   Mr. Clement, General Verrilli.

7   Well argued on both sides.

8   Thank you.

9   The case is submitted.

10   (Whereupon, at 11:27 a.m., the case in the

11   above-entitled matter was submitted.)

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