1   IN THE SUPREME COURT OF THE UNITED STATES

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

3   ARIZONA, ET AL.,   :

4   Petitioners   : No. 11-182

5   v.   :

6   UNITED STATES   :

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

8   Washington, D.C.

9   Wednesday, April 25, 2012

10

11   The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:07 a.m.

14 APPEARANCES:

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

16   Petitioners.

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

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

19   Respondent.

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C O N T E N T S

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

2   (10:07 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

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

5   States.

6   Mr. Clement.

7   ORAL ARGUMENT OF PAUL D. CLEMENT

8   ON BEHALF OF THE PETITIONERS

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

10   please the Court:

11   The State of Arizona bears a

12   disproportionate share of the costs of illegal

13   immigration. In addressing those costs, Arizona

14   borrowed the Federal standards as its own and attempted

15   to enlist state resources in the enforcement of the

16   uniform Federal immigration laws.

17   Notwithstanding that, the United States took

18   the extraordinary step of seeking a preliminary

19   injunction to enjoin the statute as impliedly preempted

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

21   agreed with respect to four provisions, but only by

22   inverting fundamental principles of federalism.

23   The Ninth Circuit, essentially, demanded

24   that Arizona point to specific authorization in Federal

25   statute for its approach. But that gets matters

1   backwards.

2   A state does not need to point to Federal

3   authorization for its enforcement efforts. Rather, the

4   burden is on the parties seeking to preempt a duly

5   enacted state law to point to some provision in

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

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

8   obvious.

9   There are multiple provisions of the Federal

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

11   facilitate state and local efforts to communicate with

12   Federal immigration officials, in order to ascertain the

13   immigration status of individuals.

14   So, for example, 1373(c) specifically

15   requires that Federal immigration officials shall

16   respond to inquiries from state and local officials

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

18   further. That provision says that no Federal agency or

19   officer may prohibit or in any way restrict the ability

20   of state and local officers to communicate with Federal

21   immigration officers to ascertain somebody's immigration

22   status.

23   Indeed, if the DHS had --

24   JUSTICE SOTOMAYOR: Mr. Clement --

25   MR. CLEMENT: Yes.

1   JUSTICE SOTOMAYOR: -- could I interrupt?

2   And turning to 2(B), could you tell me what the state's

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

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

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

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

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

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

9   cause to arrest that individual for some other crime?

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

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

12 essentially, stopped for some other infraction. And

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

14 try to identify immigration status, then that can

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

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

17   MR. CLEMENT: Sure.

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

19 there just one moment?

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

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

22 police officer would have the discretion to make that

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

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

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

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

2   individuals are arrested and held for other crimes,

3   often, there's an immigration check that most states do

4   without this law.

5   And to the extent that the government wants

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

7   detainer. This process is different. How is it

8   different?

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

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

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

12   only the issue of how long you can detain somebody

13   because I think the Federal government takes the rather

14   unusual position that, even though these stops and these

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

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

17   JUSTICE SOTOMAYOR: No, I understand that's

18   their argument. I can question them about that.

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

20   JUSTICE SOTOMAYOR: But I want to get to

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

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

23   it's been done in the past. Whenever anyone is

24   detained, a call could be made. What I see as critical

25   is the issue of how long and under -- and when is the

1   officer going to exercise discretion to release the

2   person?

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

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

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

6   systematic inquiry has to take any longer than the

7   ad hoc inquiry.

8   And, indeed, Section 2 -- in one of its

9   provisions -- specifically says that it has to be

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

11   both immigration law and civil rights law.

12   So, there --

13   JUSTICE SOTOMAYOR: What happens if -- this

14   is the following call -- the call to the -- to the

15   Federal government. Yes, he's an illegal alien. No, we

16   don't want to detain him.

17   What does the law say -- the Arizona law

18   say, with respect to releasing that individual?

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

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

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

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

23   any reason to continue to detain the person for state

24   law purposes.

25   I mean, it could be that the original

1 offense that the person was pulled over needs to be

2 dealt with or something like that.

3   JUSTICE SOTOMAYOR: I'm putting all of this

4 outside of -- of -- the --

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

6 talking about is simply what happens then, for purposes

7 of the Federal immigration consequences, the answer is

8 nothing. The individual, at that point, is released.

9   And that, I think, can be very well

10 illustrated by Section 6 -- I don't want to change the

11 subject unnecessarily, but there is arrest authority for

12 somebody who has committed a public offense, which means

13 that it's a crime in another state and in Arizona, but

14 the person can't be arrested for that offense,

15 presumably, because they have already served their

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

17 authority given to the officer to hold that person if

18 they are deportable for that offense.

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

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

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

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

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

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

25 individual is released because there is no independent

1   basis in that situation for the state officer to

2   continue to detain the individual at all.

3   JUSTICE GINSBURG: But how would the state

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

5   sometimes a complex inquiry.

6   MR. CLEMENT: Well, Justice Ginsburg, I

7   think there's two answers to that. One is -- you're

8   right, sometimes, it's a complex inquiry. Sometimes,

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

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

11   to the question is, by hypothesis, there is going to be

12   inquiry made to the Federal immigration authorities,

13   either the Law Enforcement Support Center or a 287 --

14   287(g) officer.

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

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

17   offense or at least a substantially likely removable

18   offense.

19   JUSTICE KENNEDY: Suppose it takes two weeks

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

21   state for that whole period of time --

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

23   JUSTICE KENNEDY: -- just under Section 6?

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

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

1   provisions, you have the Fourth Amendment backing up the

2   limits, and I think so --

3   JUSTICE KENNEDY: What -- what would be the

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

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

6   until they figure out whether this is a removable

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

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

9   or --

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

11   reasonable inquiry. And I think that, under these

12   circumstances, what we know from the record here is

13   that, generally, the immigration status inquiry is

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

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

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

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

18   Center.

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

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

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

22   it says any person who is arrested shall have the

23   person's immigration status determined before the person

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

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

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

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

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

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

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

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

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

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

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

10   Section 2(B)?

11   Do you want to represent that or not?

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

13   that --

14   JUSTICE BREYER: All right. Now, if you

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

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

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

18   represent --

19   JUSTICE BREYER: What?

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

21   be detained any longer than the Fourth Amendment allows.

22   JUSTICE BREYER: Oh, fine.

23   MR. CLEMENT: And --

24   JUSTICE BREYER: But the Fourth Amendment --

25   since -- for -- I mean, that's -- that's another

1   question. I don't know how long the Fourth Amendment

2   allows. I don't know on that. There probably is a

3   range of things. But we do know that a person,

4   ordinarily, for this crime, X, would have been released

5   after a day.

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

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

8   practice, will happen?

9   You -- from your representation, I think

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

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

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

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

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

15   prison, for a significantly longer period of time than

16   in the absence of 2(B).

17   Is that a fair conclusion?

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

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

20   there certainly are situations where state authorities

21   will arrest somebody and then release them relatively

22   rapidly, they generally don't release somebody until

23   they can nail down their identity and whether or not

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

25   subsequent --

1   JUSTICE SCALIA: Anyway, if this is a

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

3   MR. CLEMENT: It --

4   JUSTICE SCALIA: Or is it a Fourth Amendment

5   problem?

6   MR. CLEMENT: Justice Scalia, it is

7   neither --

8   JUSTICE SCALIA: Is the Government's attack

9   on this that it violates the Fourth Amendment?

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

11   government, that also has a lot of immigration arrests

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

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

14   immigration law concern or something that should be the

15   basis for striking down a statute on its face.

16   JUSTICE BREYER: That's a

17   different argument --

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

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

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

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

22   not true.

23   JUSTICE BREYER: All right. Can I make the

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

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

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

2   not authorizing or requiring the detention of any

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

4   for a significantly longer period of time than that

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

6   Can I make that statement in an opinion, and

7   you'll say, that's right?

8   MR. CLEMENT: I think what you could say is

9   that --

10   JUSTICE BREYER: But can I say that?

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

12   that.

13   JUSTICE BREYER: No.

14   MR. CLEMENT: I think you can say something

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

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

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

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

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

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

21   something that happens even without this law that, when

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

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

24   before you release the individual, you generally want to

25   ascertain that that individual is going to show up at

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

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

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

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

5   think, factually, this is going to elongate things

6   because, already, in a significant number of booking

7   facilities in Arizona, you already have the process that

8   people are systematically run through immigration checks

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

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

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

12   matter of routine.

13   The Federal government doesn't like this

14   statute, but they are very proud of their Secure

15   Communities program. And their Secure Communities

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

17   at participating facilities is -- eventually has their

18   immigration status checked.

19   And so I don't think that this immigration

20   status check is likely to lead to a substantial

21   elongation of the stops or the detentions. Now,

22   obviously --

23   JUSTICE SOTOMAYOR: I want to make sure that

24   I have a clear representation from you. If, at a call

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

1   detain this alien, that alien will be released for --

2   unless it's under 6, is what you're telling me.

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

4   immigration crimes.

5   MR. CLEMENT: Exactly. Obviously, if this

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

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

8   decide, wholly apart from the immigration issues, that

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

10   But, for the purposes of once they make the

11   contact with Federal immigration officials, if the

12   Federal immigration officials say, look, we have no

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

14   prosecuting this person under the Federal criminal

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

16   the --

17   JUSTICE SOTOMAYOR: All right. Then tell

18   me --

19   JUSTICE SCALIA: So, you'll concede that the

20   -- that the state has to accept within its borders all

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

22   government has no interest in removing?

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

24   Justice Scalia, but --

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

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

2   the Federal government -- yes, he's an illegal

3   immigrant, but that's okay with us.

4   MR. CLEMENT: Well --

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

6   power to -- to close its -- its borders to -- to people

7   who have no right to be there?

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

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

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

11 a lesser extent, 6.

12   Now, Section 3 of the statute does provide

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

14 has violated, essentially, the Federal registration

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

16 there would be a state authority, even under these

17 hypotheticals, to take action with respect to the

18 individual --

19   JUSTICE KENNEDY: But, I think --

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

21 the Federal --

22   JUSTICE KENNEDY: I think Justice Scalia's

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

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

25 the position that a state must accept, within its

1   borders, a person who is illegally present under Federal

2   law?

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

4   JUSTICE KENNEDY: And that is by reason of

5   his alien --

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

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

8   do with our defense of Section 3 and other provisions

9   than it does with respect to the inquiry and arrest

10   authority provisions, 2(B) and 6.

11   JUSTICE ALITO: Well, before you move on to

12   the registration requirement, could I take you back to

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

14   was referring to?

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

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

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

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

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

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

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

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

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

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

25   from there?

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

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

3   pretty unusual circumstance, where somebody produces an

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

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

6   hypo --

7   JUSTICE ALITO: Why would it dispel

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

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

10   are not lawfully in that instance --

11   MR. CLEMENT: And that might be a situation

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

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

14   average case, I think it would.

15   They would then go further. And then they

16   would then make the inquiry to the Federal officials.

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

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

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

20   a permissible Terry stop, and the officer would release

21   the individual.

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

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

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

25   information and try to continue the check as they move

1   forward, taking down the information on the New Mexico

2   driver's license.

3   But I think the important thing is that --

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

5   the individual, certainly beyond the -- the Fourth

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

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

8   ad hoc basis without the statute.

9   Now, it does do --

10   JUSTICE ALITO: That -- that may be the

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

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

13   the officer can arrest -- the state officer can arrest a

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

15   removable, which is what the Office of Legal Counsel

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

17   could continue to detain that individual that

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

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

20   to have probable cause.

21   But, if they had probable cause to believe

22   the person was removable, then they could hold the

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

24   completely verified, isn't that correct?

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

1 Your Honor.

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

3 pre-existing definition of public offense in Arizona

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

5 Office of Legal Counsel situation, where you have broad

6 arrest authority for removable individuals. This is a

7 relatively narrow slice of additional arrest authority

8 that happens to give arrest authority for people that

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

10 really is going to apply to criminal aliens.

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

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

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

14 an authority he didn't otherwise have.

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

16 though, which it does have the effect of overriding

17 local policies that actually forbad some officers from

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

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

20 difficult the government's preemption argument is here

21 because those kind of local policies are expressly

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

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

24 sanctuary laws.

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

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

2   local officers telling you not to make those inquiries.

3   You must have those inquiries.

4   JUSTICE SOTOMAYOR: Counsel, could -- does

5   Section 6 permit an officer to arrest an individual who

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

7   removable, correct?

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

9   think they would have committed a public offense --

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

11   would have committed a public offense under Arizona law.

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

13   authority in that circumstance, as Justice Alito's

14   question has -- has --

15   JUSTICE SOTOMAYOR: What is the definition

16   of public offense?

17   MR. CLEMENT: A public offense definition --

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

19   sorry.

20   The definition is, basically, that it's

21   something that is a crime in another jurisdiction and

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

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

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

25   So what this really captures is people who

1 have committed a crime are no longer arrestable for the

2 crime because they have served their sentence or some

3 other peculiarity, but they are, nonetheless, removable

4 because of the crime. And so --

5   CHIEF JUSTICE ROBERTS: Counsel, maybe it's

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

7 particular Section 5(C).

8   Now, that does seem to expand beyond the

9 Federal government's determination about the types of

10 sanctions that should govern the employment

11 relationship.

12   You talk about supply and demand. The

13 Federal government, of course, prohibits the employment,

14 but it also imposes sanctions with respect to

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

16 case, is imposing some significantly greater sanctions.

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

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

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

20 between removability, which is obviously a pretty

21 significant sanction for an alien, and the relatively

22 modest penalties imposed by Section 5(C).

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

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

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

1   preemption, obviously.

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

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

4   targets employment that is expressly forbidden by

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

6   essentially, the government is reduced to arguing that

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

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

9   didn't, generally speaking, impose restrictions on

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

11   preemptive inference from that.

12   JUSTICE SOTOMAYOR: Counsel --

13   JUSTICE KENNEDY: Would you agree

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

15   we can begin with the general principle that the Hines

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

17   ask our principal -- our primary function is to

18   determine whether, under the circumstances of this

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

20   the accomplishment and execution of the full purposes

21   and objectives of Congress?

22   Is -- is that an acceptable test from your

23   standpoint?

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

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

1   obviously have been subsequent cases, including DeCanas

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

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

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

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

6   JUSTICE KENNEDY: But -- but then the

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

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

9   enforcement of this statute, as Arizona describes it,

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

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

12 the government?

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

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

15 the Federal government for its word on these things.

16   You know, it's interesting, in DeCanas

17 itself, the SG said that that California statute was

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

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

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

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

22 hard.

23   And what they did is they established that

24 this is an area where the presumption against preemption

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

1   We have here a situation where there is an

2 express preemption provision, and it -- it only

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

4 express preemption provision clearly doesn't apply here.

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

6   JUSTICE SOTOMAYOR: Well, for those of us

7 for whom legislative history has some importance, there

8 seems to be quite a bit of legislative history that

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

10 discussed, and explicitly rejected.

11   MR. CLEMENT: Sure. And --

12   JUSTICE SOTOMAYOR: The preemption language

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

14 It seems odd to think that the Federal government is

15 deciding on employment sanctions and has unconsciously

16 decided not to punish employees.

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

18 there's a big difference between Congress deciding not

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

20 additional criminal prohibition and saying that that

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

22 remarkable additional step.

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

24 legislative history, for those who do, it really

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

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

2   They passed IRCA in 1986.

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

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

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

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

7   subject to removal for doing it.

8   In addition, Congress was told that most of

9   the aliens who get this unlawful work are already

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

11 subject to an independent criminal offense.

12   So, at that point, Congress is facing a

13 world where the employee is already subject to multiple

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

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

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

17 have an express preemption provision that says nothing

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

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

20   JUSTICE GINSBURG: They did -- they did

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

22 legislation regulates the supply side. That leaves the

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

24 question is whether anything beyond that is inconsistent

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

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

2   seeking work, that's a Federal crime.

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

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

5   more.

6   MR. CLEMENT: Two quick responses, and then

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

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

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

10   actually assist in regulating the employer's side

11   because what they are worried about is a fraudulent

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

13   employer to employing somebody who shouldn't be

14   employed.

15   The second thing is the more that you view

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

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

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

19   of the equation.

20   CHIEF JUSTICE ROBERTS: We'll give you

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

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

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

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

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

1   provision that is parallel to the Federal requirements

2   and imposes the same punishments as the Federal

3   requirement.

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

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

6   preemption even in those analogous circumstances. They

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

8   cases like Buckman, cases like --

9   JUSTICE KENNEDY: Would -- double

10 prosecutions be -- suppose that an alien were prosecuted

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

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

13   MR. CLEMENT: I think they could under

14 general double jeopardy principles and the dual

15 sovereignty doctrine. Obviously, if that was a

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

17 an as-applied challenge, if somebody was already

18 prosecuted under Federal law.

19   But, of course, this Court has confronted

20 exactly that argument, in California against Zook, where

21 you had the statute of California that prohibited

22 somebody operating as an interstate carrier without the

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

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

25 possibility of duplicative punishment, duplicative

1   prosecution. And this Court rejected that argument

2   there.

3   JUSTICE GINSBURG: Mr. Clement, it

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

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

6   Congress enacted a complete registration scheme which

7   the states cannot complement or impose even auxiliary

8   regulations.

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

10   question of obstacle preemption, but appeal preemption

11   that alien -- we don't want a competing registration

12   scheme. We want the registration scheme to be wholly

13   Federal.

14   MR. CLEMENT: Well, Justice Ginsburg, I

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

16   Kennedy's characterization of the relevant language in

17   Hines because, although there is some general discussion

18   there of field preemption, when the Court actually

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

20   obstacle preemption.

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

22   difference between what the Court had before it in Hines

23   and what you have before you here.

24   In Hines, Pennsylvania passed its statute

25   before Congress passed the alien registration statute.

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

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

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

4   a conflict between the provisions of the Pennsylvania

5   registration law and the Federal registration law. And

6   this Court struck it down on that preemption basis.

7   Here it's quite different. Arizona had

8   before it the Federal statute. It looked at this

9   precise provision in the Federal statute. It adopted

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

11 penalties for the violation of the state equivalent.

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

13 really the analysis that this Court laid out in its

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

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

16 scheme directly interferes with the operation of the

17 Federal scheme.

18   JUSTICE SOTOMAYOR: Can I ask you something?

19   JUSTICE ALITO: Well, in that --

20   CHIEF JUSTICE ROBERTS: Justice Alito.

21   JUSTICE ALITO: In that regard, we are told

22 that there are some important categories of aliens who

23 can't obtain registration -- cannot obtain Federal

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

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

1   pending asylum application would fall into that

2   category.

3   How would Section 3 apply there?

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

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

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

7   that individual in that category would be subject to

8   prosecution under 1304 and 1306. And, if I

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

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

11   get the registration document because of the narrow

12   class that they are in.

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

14   violation of either 1304 or 1306 to not get a

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

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

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

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

19   run afoul of 1306 in the --

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

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

22   registration.

23   MR. CLEMENT: Well, sure.

24   JUSTICE ALITO: And it would -- but --

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

1 narrow class we were talking about.

2   JUSTICE ALITO: I understand that. I

3 understand the distinction you're drawing, that you

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

5 couldn't have gotten a registration.

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

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

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

9 mean, they are already guilty of one Federal misdemeanor

10 by the illegal entry.

11   JUSTICE ALITO: Right.

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

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

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

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

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

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

18 individual is not subject to prosecution under the

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

20 prosecution under the state statute.

21   CHIEF JUSTICE ROBERTS: Thank you,

22 Mr. Clement.

23   General Verrilli.

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

25   ON BEHALF OF THE RESPONDENT

1   GENERAL VERRILLI: Mr. Chief Justice, and

2   may it please the Court --

3   CHIEF JUSTICE ROBERTS: Before you get into

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

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

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

7   saw none of that in your brief.

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

9   Mr. Chief Justice.

10   CHIEF JUSTICE ROBERTS: Okay. So this is

11   not a case about ethnic profiling.

12   GENERAL VERRILLI: We're not making any

13   allegation about racial or ethnic profiling in the case.

14   Mr. Clement is working hard this morning to

15   portray SB 1070 as an aid to Federal immigration

16   enforcement. But the very first provision of the

17   statute declares that Arizona is pursuing its own policy

18   of attrition through enforcement and that the provisions

19   of this law are designed to work together to drive

20   unlawfully present aliens out of the state.

21   That is something Arizona cannot do because

22   the Constitution vests exclusive --

23   JUSTICE SOTOMAYOR: General, could you

24   answer Justice Scalia's earlier question to your

25   adversary? He asked whether it would be the

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

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

3 borders a person who's here illegally.

4   GENERAL VERRILLI: That is our position,

5 Your Honor. It is our position because the Constitution

6 vests exclusive authority over immigration matters with

7 the national government.

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

9 gives authority over naturalization, which we've

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

11 government can set forth the rules concerning who

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

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

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

15 if it does not include the ability to defend your

16 borders?

17   GENERAL VERRILLI: Your Honor, the -- the

18 Framers vested in the national government the authority

19 over immigration because they understood that the way

20 this nation treats citizens of other countries is a

21 vital aspect of our foreign relations. The national

22 government, and not an individual state --

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

24 national government. Arizona is not trying to kick out

25 anybody that the Federal government has not already said

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

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

3   state shall without the consent of Congress lay any

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

5   says, "what may be absolutely necessary for executing

6   its inspection laws."

7   The Constitution recognizes that there is

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

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

10 incoming shipments to exclude diseased material.

11   GENERAL VERRILLI: But they cannot do what

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

13 elevate one consideration above all others. Arizona is

14 pursuing a policy that -- that maximizes the

15 apprehension of unlawfully present aliens, so they can

16 be jailed as criminals in Arizona, unless the Federal

17 government agrees to direct its enforcement resources to

18 remove the people that Arizona has identified.

19   JUSTICE ALITO: Well, if the state does --

20   CHIEF JUSTICE ROBERTS: That's a question of

21 enforcement priorities.

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

23 different set of enforcement priorities, and their

24 objective was to protect, to the maximum extent

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

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

2 something about, in other words, different than the

3 current policy.

4   Does that mean, in that situation, the

5 Arizona law would not be preempted?

6   GENERAL VERRILLI: I think the mandatory

7 character of the Arizona law and the mandatory character

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

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

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

11 any official in the state of Arizona who is not

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

13 1070, to the maximum extent possible, does create a

14 conflict.

15   But I do think the most fundamental point

16 about Section 2 is to understand its relationship to the

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

18 statute to identify the class of people who Arizona is

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

20 are employed, also under Section 5.

21   JUSTICE ALITO: Well, I have the same

22 question as the Chief Justice. Suppose that the Federal

23 government changed its priorities tomorrow, and it

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

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

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

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

3   Would -- would the Arizona law then be un-preempted?

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

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

6   the national level because it's the national government

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

8   state that pays the price --

9   JUSTICE SCALIA: Do you have any example

10   where -- where enforcement discretion has the effect of

11   preempting state action?

12   GENERAL VERRILLI: Well, I think we should

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

14   it will help illustrate the point --

15   JUSTICE SCALIA: I'm talking about another

16   -- another case of ours where we've said that,

17   essentially, the preemption of state law can occur, not

18   by virtue of the Congress preempting, but because the

19   executive doesn't want this law enforced so -- so

20   rigorously, and that preempts the state from enforcing

21   it vigorously.

22   Do we have any case that says that?

23   GENERAL VERRILLI: I think the preemption

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

25   preemption here flows from judgments of Congress, from

1   the registration system that Congress set up in Sections

2   1301 through 1306, from the decision of Congress in

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

4   the Attorney General with the authority to make the

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

6   JUSTICE SCALIA: Well, they do that with

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

8   acknowledge that, as a general matter, states can

9   enforce Federal criminal law, which is always entrusted

10   to the Attorney General.

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

12   they can engage in detention, in support of the

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

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

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

16   a far different matter.

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

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

19   CHIEF JUSTICE ROBERTS: Well, but you say

20   that the Federal government has to have control over who

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

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

23   Federal government, here's someone who is here

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

25   discretion to prosecute for Federal immigration offenses

1   rests entirely with the Attorney General.

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

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

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

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

6   The -- Section 1 of this statute says that

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

8   achieve this policy of attrition through enforcement.

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

10   the state of Arizona is going to prosecute under Section

11   3 and Section 5 --

12   CHIEF JUSTICE ROBERTS: Right. So, apart

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

14   you have no objection to Section 2?

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

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

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

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

19   that this puts the Federal government in.

20   Arizona has got this population, and

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

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

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

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

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

1   our priorities --

2   CHIEF JUSTICE ROBERTS: Exactly. You -- the

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

4   its resources.

5   And what the state is saying, here are

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

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

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

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

10   2(B).

11   GENERAL VERRILLI: Here's the other

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

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

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

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

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

17   CHIEF JUSTICE ROBERTS: Only under Section 3

18   and Section 5.

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

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

21   whose only offense is being unlawfully present in the

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

23   somebody who --

24   CHIEF JUSTICE ROBERTS: Let's

25   say you're worried about --

1   GENERAL VERRILLI: -- or like 30 days,

2   forgive me. 6 months for employment.

3   CHIEF JUSTICE ROBERTS: Right.

4   Right.

5   For the notification, what could possibly be

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

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

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

9   during that period, by having the Arizona arresting

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

11   find out if this person is here illegally because the

12   Federal law says the Federal agency has to answer my

13   question.

14   It seems an odd argument to say the Federal

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

16   can't ask it.

17   GENERAL VERRILLI: Well, we're not saying

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

19   recognize that section --

20   CHIEF JUSTICE ROBERTS: You think there are

21   individual cases in which the state can call the Federal

22   government and say, is this person here illegally?

23   GENERAL VERRILLI: Yes, certainly, but that

24   doesn't make --

25   CHIEF JUSTICE ROBERTS: Okay. So doesn't

1   that defeat the facial challenge to the Act?

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

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

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

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

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

7   priorities that the state has set, irrespective of

8   whether they are helpful to or in conflict with the

9   Federal priorities. And so --

10   JUSTICE ALITO: Suppose that

11   every -- suppose every law enforcement officer in

12   Arizona saw things exactly the same way as the Arizona

13   legislature. And so, without any direction from the

14   legislature, they all took it upon themselves to make

15   these inquiries every time they stopped somebody or

16   arrested somebody.

17   Would that be a violation of Federal law?

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

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

20   free to be responsive to Federal priorities, if the

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

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

23   problem at the border --

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

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

1   our priorities, and our priority is maximum enforcement,

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

3   done on an individual basis, all the officers were

4   individually doing it --

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

6   JUSTICE ALITO: -- that would be okay?

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

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

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

10   If it's not --

11   JUSTICE SOTOMAYOR: General, I am having --

12   GENERAL VERRILLI: -- the line is mandatory

13   versus discretionary --

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

15   understand because your argument -- you seem to be

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

17   the Arizona legislature is trying to control what its

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

19   disregard the desires of the Arizona legislature, for

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

21   government, for whom they don't work.

22   GENERAL VERRILLI: But they -- but, with

23   respect to immigration enforcement, and to the extent

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

25   Government's attention, they are cooperating in the

44

1   enforcement of Federal law --

2   JUSTICE KENNEDY: But the hypothetical is

3   that that's all the legislature is doing.

4   GENERAL VERRILLI: Well, except I think,

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

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

7   state must respond to the priorities set by the state

8   government and are not free to respond to the priorities

9   of the Federal officials who are trying to enforce the

10   law in the most effective manner possible.

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

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

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

14   focusing in on what I believe my colleagues are trying

15   to get to.

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

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

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

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

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

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

22   He tells me that, unless there's another

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

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

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

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

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

3   wrong with that?

4   GENERAL VERRILLI: Well --

5   JUSTICE SOTOMAYOR: Taking out the other

6   provisions, taking out any independent state-created

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

8   GENERAL VERRILLI: I think there are three.

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

10   Now, we are not making an allegation of

11   racial profiling; nevertheless, there are already tens

12   of thousands of stops that result in inquiries in

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

14   reason that -- that the legislature thought that that

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

16   And it -- given that you have a population

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

18   at most, are there unlawfully, there --

19   JUSTICE SCALIA: Sounds like racial

20   profiling to me.

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

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

23   unlawfully present, which --

24   JUSTICE SOTOMAYOR: Do you have the

25   statistics as to how many arrests there are and how

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

2   statute?

3   GENERAL VERRILLI: There is some evidence in

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

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

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

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

8   that declaration indicates that, in fiscal year 2009,

9   there were 80,000 inquiries and --

10   JUSTICE SCALIA: What does this have to do

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

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

13   weren't relying on that.

14   GENERAL VERRILLI: The --

15   JUSTICE SCALIA: Are you objecting to

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

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

18   about harassing them. They have been stopped anyway,

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

20   illegal immigrants or not.

21   So you must be talking about other people

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

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

24   GENERAL VERRILLI: And other -- and other

25   people lawfully present in the country, certainly, but

1   this is --

2   JUSTICE SCALIA: But that has nothing to do

3   with the immigration law --

4   GENERAL VERRILLI: Hines is --

5   JUSTICE SCALIA: -- which is -- which is

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

7   GENERAL VERRILLI: Hines identified this

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

9   preemption under the immigration laws because of the

10   concern that the way this nation treats citizens of

11   other countries is fundamental to our foreign relations.

12   And this is a --

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

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

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

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

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

18   right?

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

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

21   individual longer than you would have otherwise, I can

22   think of some arguments that it is preempted and some

23   replies. So keep that out of it.

24   Suppose that we were to say, that sentence,

25   as we understand it, does not raise a constitutional

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

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

3 cannot detain the person for longer than he would have

4 done in the absence of this provision.

5   Now, in your view, is there any preemption

6 exemption -- argument against -- any preemption argument

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

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

9 asking.

10   GENERAL VERRILLI: Yes. I -- we would

11 think it would ameliorate --

12   JUSTICE BREYER: And if so, what?

13   GENERAL VERRILLI: -- it would ameliorate

14 the practical problem. But there is still a structural

15 problem here in that this is an effort to enforce

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

17 the President and the Executive Branch that are

18 responsible for the enforcement of Federal law --

19   CHIEF JUSTICE ROBERTS: It is --

20   GENERAL VERRILLI: -- and --

21   CHIEF JUSTICE ROBERTS: It is not an effort

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

23 about violations of Federal law. Whether or not to

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

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

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

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

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

4   somebody from Arizona calls, answer their question, and

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

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

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

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

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

10   illegally, you don't have to.

11   GENERAL VERRILLI: That's correct. But the

12   process of -- the process of cooperating to enforce the

13   Federal immigration law starts earlier. And it starts

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

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

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

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

18   officials are not free --

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

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

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

22   driving. So that decision to stop the individual has

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

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

25   can ask the Federal government to find out if this

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

2   It seems to me that the Federal government

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

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

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

6 and focus on our priorities.

7   And one thing that's instructive in that

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

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

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

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

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

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

14 country.

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

16 wrong about the states enforcing Federal law? There is

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

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

19   GENERAL VERRILLI: I think it could, but I

20 think that's quite --

21   JUSTICE SCALIA: But does the Attorney

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

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

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

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

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

2   prosecuting all these bank robbers.

3   GENERAL VERRILLI: Well, of course, no one

4   would --

5   JUSTICE SCALIA: Now, would anybody listen

6   to that argument?

7   GENERAL VERRILLI: Of course not.

8   JUSTICE SCALIA: Of course not.

9   GENERAL VERRILLI: But this argument is

10 quite different, Justice Scalia, because here what we

11 are talking about is that Federal registration

12 requirement in an area of dominant Federal concern --

13 exclusive Federal concern, with respect to immigration,

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

15 what obligations they have --

16   JUSTICE KENNEDY: Now, are you talking about

17 3 now or --

18   GENERAL VERRILLI: Yes.

19   JUSTICE KENNEDY: -- or does this argument

20 relate to 2 as well?

21   GENERAL VERRILLI: This is an argument about

22 Section 3.

23   JUSTICE ALITO: Well, could I ask you this

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

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

1   officer who stops somebody or who arrests somebody for a

2   nonimmigration offense tell whether that person falls

3   within the Federal removal priorities without making an

4   inquiry to the Federal government?

5   For example, I understand one of the

6   priorities is people who have previously been removed,

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

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

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

10   GENERAL VERRILLI: Well, in any individual

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

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

13   if you're arresting somebody based on probable cause

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

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

16   status will be enough to identify that person for

17   priority --

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

19   they stop somebody for a traffic violation, but they

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

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

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

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

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

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

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

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

3   of any individual circumstance and a mandatory policy

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

5   inquiry in every case.

6   I think it's as though, if I can use an

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

8   the most important preemption cases from the last 10

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

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

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

12   CHIEF JUSTICE ROBERTS: What if -- what if

13   they just rolled in Whiting?

14   (Laughter.)

15   CHIEF JUSTICE ROBERTS: That's a pretty good

16   one.

17   JUSTICE BREYER: Look, in the Federal

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

19   restrict any government entity from making this inquiry

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

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

22   the Federal government has an obligation to respond.

23   Now, assuming the statute were limited, as I

24   say, so nothing happened to this individual, nothing

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

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

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

3 trying to get at.

4   If that were the situation, and we said it

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

6 statute would that conflict with, where we have two

7 provisions that say any policeman can call?

8   GENERAL VERRILLI: So --

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

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

11   GENERAL VERRILLI: Yes.

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

13 not clear what your answer is to that.

14   GENERAL VERRILLI: I think -- I understand

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

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

17 provision that sets forth the powers and authorities of

18 Federal immigration officials.

19   It contains 1357(g), which effectively says

20 that Federal -- that the Federal government, the

21 Attorney General, can deputize state officials, so long

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

23 are subject to the direction and control of the Attorney

24 General in carrying out immigration functions.

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

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

2 preclude informal cooperation, communication or other

3 informal cooperation in the apprehension, detention, and

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

5 focus on cooperation.

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

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

8 Congress was intending to do was to shift from the

9 Federal government to the states the authority to set

10 enforcement priorities because I think the cooperation

11 in this context is cooperation in the service of the

12 Federal enforcement.

13   JUSTICE SOTOMAYOR: Can I get to a different

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

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

16   Putting aside your argument that this --

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

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

19 up with something else?

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

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

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

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

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

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

1   can move on to sections 3 and 5.

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

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

4   more significant harassment problem than was present in

5   Hines --

6   JUSTICE SOTOMAYOR: I -- please move more --

7   GENERAL VERRILLI: With respect to -- in

8   addition, we do think that there is a structural

9   accountability problem, in that they are enforcing

10 Federal law, but not answerable to the Federal

11 officials.

12   And, third, we do think there are practical

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

14 deliver to the Federal system a volume of inquiries that

15 makes it harder and not easier to identify who the

16 priority persons are for removal.

17   So those are the three reasons.

18   CHIEF JUSTICE ROBERTS: General, you have

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

20 so maybe we should let you do that now.

21   GENERAL VERRILLI: Thank you, Mr. Chief

22 Justice.

23   The -- I do think the key thing about

24 Section 3 is that we -- is that Section 3 is purporting

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

1   relationship between the alien and the United States

2   government that's exclusively a Federal relationship.

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

4   And the way in which those terms are

5   enforced does have very significant Federal interest at

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

7   in that Federal registration relationship.

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

9   important -- Justice Alito raised the question of these

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

11 important to get clarity on that.

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

13 the country unlawfully, but you have a pending

14 application for asylum, a pending application for

15 temporary protective status, because you -- you would

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

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

18 you have a valid claim for relief under the Violence

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

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

21 trafficking, if you have a valid claim for relief

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

23 crime, all of those persons are in technical violation

24 of 1306(a).

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

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

2   is not correct in saying that those are people who

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

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

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

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

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

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

9   that how we write our criminal laws?

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

11   situation in which no reasonable person would think that

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

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

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

15   regulations that require that to be kept private, to

16   avoid retaliation against the person making the

17   application.

18   And so, this -- so this is -- this is, I

19   think, a very strong illustration of why the enforcement

20   discretion over Section 3 needs to be vested exclusively

21   in the Federal government.

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

23   have any other case in which the basis for preemption

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

25   General's enforcement discretion?

1   GENERAL VERRILLI: Well, this is --

2   JUSTICE SCALIA: I think that's an

3   extraordinary basis for saying that the state is

4   preempted.

5   GENERAL VERRILLI: I think what is

6   extraordinary about this, actually, Justice Scalia, is

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

8   criminalize the violation of a Federal registration

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

10   they are doing it for a reason --

11   JUSTICE SCALIA: It's not criminalizing

12   anything that isn't criminal under Federal law.

13   GENERAL VERRILLI: But -- but what --

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

15   It's the Federal bank example --

16   GENERAL VERRILLI: Well.

17   JUSTICE SCALIA: -- a state law, which

18   criminalizes the same thing that the Federal law does.

19   GENERAL VERRILLI: I think it's quite

20   different.

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

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

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

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

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

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

2   criminal law to perform an immigration function.

3   And the immigration function is to try to --

4   to prosecute these people. And, by the way, you can

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

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

7   a continuing offense.

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

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

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

11   to drive unlawfully present people out of the state of

12   Arizona.

13   JUSTICE KENNEDY: Suppose -- suppose --

14   well, assume these are two hypothetical -- two

15   hypothetical instances.

16   First, the Federal government has said, we

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

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

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

20   That's the first -- just hypothetical.

21   JUSTICE SCALIA: You said that in your

22   brief, didn't you?

23   JUSTICE KENNEDY: Also -- also hypothetical

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

25   emergency with social disruption, economic disruption,

1 residents leaving the state because of flood of

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

3   Does that give the state of Arizona any

4 powers or authority or legitimate concerns that any

5 other state wouldn't have?

6   GENERAL VERRILLI: Of course, they have

7 legitimate concerns in that situation. Justice

8 Kennedy --

9   JUSTICE KENNEDY: And can they go to their

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

11 the legislature to enact laws to correct this problem?

12   GENERAL VERRILLI: They -- they certainly

13 can enact laws of general application. They can enforce

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

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

16 that they are under no obligation to provide any state

17 benefits to the -- the population.

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

19 can -- not most importantly, but as importantly, they

20 can engage in cooperative efforts with the Federal

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

22   CHIEF JUSTICE ROBERTS: No, keep going.

23   GENERAL VERRILLI: They can -- they can

24 engage in cooperative efforts with the Federal

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

1   and around the country, in order to address these

2   problems.

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

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

5   said that the Justice Department doesn't get nearly

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

7   you say that?

8   GENERAL VERRILLI: Of course, we have to set

9   priorities. There are only --

10   JUSTICE SCALIA: Exactly. Okay. So the

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

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

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

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

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

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

17 enforcing Federal law.

18   GENERAL VERRILLI: Well -- well, what I

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

20 extraordinary, that has significant real and practical

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

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

23 exclusively in the Federal government.

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

25 effectively, in mass incarceration because the

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

2   to enforce Section 2 to the fullest possible extent at

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

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

5   in Section 3 and in Section 5.

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

7   situation of mass incarceration of people who are

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

9   very serious risk of raising significant foreign

10   relations problems.

11   And these problems are real. It is the

12   problem of reciprocal treatment of the

13   United States citizens in other countries.

14   JUSTICE KENNEDY: So you're saying the

15   government has a legitimate interest in not enforcing

16   its laws?

17   GENERAL VERRILLI: No. We have a legitimate

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

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

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

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

22   immigration laws is exceedingly delicate and complex,

23   and it involves consideration of foreign relations, it

24   involves humanitarian concerns, and it also involves

25   public order and public safety.

1   JUSTICE SOTOMAYOR: General, when -- when --

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

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

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

5   happens when the Arizona police call the Federal agency.

6   They give the Federal agency a name, correct?

7   GENERAL VERRILLI: I assume so, yes.

8   JUSTICE SOTOMAYOR: Oh, you don't really

9   have knowledge of what --

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

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

12   will get a name and some other identifying information.

13   JUSTICE SOTOMAYOR: All right. And what

14   does the computer have? What information does your

15   system have?

16   GENERAL VERRILLI: Yes. So the way this

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

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

19   terminal. And that person searches a number of

20   different databases. There are eight or ten different

21   databases, and that person will check the name against

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

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

24   any hits.

25   JUSTICE SOTOMAYOR: Well, how does that

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

2   a citizen?

3   GENERAL VERRILLI: Well --

4   JUSTICE SOTOMAYOR: Today, if you use the

5   names Sonia Sotomayor, they would probably figure out I

6   was a citizen.

7   (Laughter.)

8   GENERAL VERRILLI: Well --

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

10   John Doe, who lives in Grand Rapids.

11   GENERAL VERRILLI: The citizen problem is

12   actually -- yes.

13   JUSTICE SOTOMAYOR: So they are legal. Is

14   there a citizen database?

15   GENERAL VERRILLI: The citizen problem is

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

17   database. If you --

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

19   there isn't?

20   GENERAL VERRILLI: There is not. If you

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

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

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

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

25   passport database. So you have lots of circumstances in

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

2   match.

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

4   the databases that they have an immigration problem of

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

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

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

8   license or identification and you walk into a park

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

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

11 they --

12   GENERAL VERRILLI: Yes, and I --

13   JUSTICE SOTOMAYOR: -- figure out if

14 you're --

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

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

17 Mr. Clement suggested that it takes 10 minutes to

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

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

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

21 minutes. And --

22   CHIEF JUSTICE ROBERTS: I had a little --

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

24   Is the reason that the government is not

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

1 the other categories you were talking about, because of

2 prioritization or because of lack of resources?

3   You suggested that if the -- every illegal

4 alien that you identify is either removed or prosecuted,

5 that that would cause tensions with other governments.

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

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

8 prosecute the people who are simply here illegally, as

9 opposed to something else.

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

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

12 this: That with respect to persons who are unlawfully

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

14 priority categories. There are those who have committed

15 serious offenses. There are those who have been removed

16 and have come back. And there are other priority

17 categories.

18   Because we have resource constraints and

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

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

21 those priority categories, find them, remove them.

22   There is a second category, and that is,

23 individuals who are here in violation, technically, of

24 1306(a), but who have a valid asylum application or

25 application for temporary protected status or other --

1   and, with respect to those persons that we think

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

3   ought to be prosecuted.

4   And then there is an additional category of

5   people who are not in the second category and not

6   priorities, and the form and we think there, the idea

7   that an individual state will engage in a process of

8   mass incarceration of that population, which we do think

9   is what Section 2(H) commits Arizona to do under Section

10   3, raises a significant foreign relations problem.

11   JUSTICE SCALIA: Can't you avoid that

12   particular foreign relations problem by simply deporting

13   these people? Free them from the jails --

14   GENERAL VERRILLI: Look -- I really think --

15   JUSTICE SCALIA: And send them back to the

16   countries that are -- that are objecting.

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

18   JUSTICE SCALIA: What's the problem with

19   that?

20   GENERAL VERRILLI: Well, a couple of things.

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

22   aggressive enforcement of Sections 3 and 5 in Arizona is

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

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

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

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

2   needs to be managed on a national basis.

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

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

5   Mexico is in a central role in this situation.

6   Between 60 and 70 percent of the people that

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

8   addition, we have to have the cooperation of the

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

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

11   to which we are removing people who are unlawfully

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

13   In addition, we have very significant issues

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

15   very issues that Arizona is complaining about, in

16   that --

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

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

19   Mexico? Is that what you're saying?

20   GENERAL VERRILLI: No, Your Honor, but what

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

22   JUSTICE SCALIA: It sounded like what you

23   were saying.

24   GENERAL VERRILLI: No, but what I am saying

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

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

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

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

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

5   level.

6   CHIEF JUSTICE ROBERTS: And your concern is

7   the problems that would arise in bilateral relations if

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

9   percentage or a greater percentage than you are now.

10   Nothing in the law requires you to do that.

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

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

13   we are not going to initiate removal proceedings against

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

15   more person than you would like to remove under your

16   priorities.

17   GENERAL VERRILLI: Right, but the problem

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

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

20   incarcerate, and the foreign relations problem that that

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

22   at the national level.

23   CHIEF JUSTICE ROBERTS: And that -- and that

24   arises under 3 and 5?

25   GENERAL VERRILLI: Correct.

1   CHIEF JUSTICE ROBERTS: But not 2?

2   GENERAL VERRILLI: Well, 2 -- 2 identifies

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

4   5.

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

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

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

8   spend a minute on Section 5?

9   CHIEF JUSTICE ROBERTS: Section 5.

10   GENERAL VERRILLI: The -- I do think the

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

12   Congress fundamentally changed the landscape. Congress

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

14   a central concern of national immigration policy. And

15   this Court has described the 1986 law as a comprehensive

16   regime.

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

18   that it may be a comprehensive regime for employers;

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

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

21   that the states are precluded from criminalizing efforts

22   to seek or obtain employment in Arizona.

23   But I really think that's not right.

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

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

1   comprehensive decision, about this -- the sanctions it

2   thought were appropriate to govern. And Congress did,

3   as Justice Ginsburg suggested, make judgments with

4   respect to the circumstances under which employees could

5   be held criminally liable, as well as the circumstances

6   under which employers could be held liable.

7   And I think it is useful, in thinking about

8   the judgments Congress actually made --

9   JUSTICE SCALIA: -- think field preemption;

10   is that your argument with respect to this section?

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

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

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

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

15   judgments Congress made in 1986.

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

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

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

19   the -- the alien of being the exploited -- on the

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

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

22   government will not impose criminal sanctions for the

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

24   practice.

25   It seems quite incongruous to think that

1   Congress, having made that judgment and imposed those

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

3   states free to impose criminal liability on employees

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

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

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

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

8   The -- in addition, Congress made clear in

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

10   other purpose than prosecutions for violation of the

11   Federal antifraud requirements. And, if Congress wanted

12   to leave states free to impose criminal sanctions on

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

14   that, it seems to me.

15   So there, I think there are strong

16   indicators in the text that Congress did make a

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

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

19   for the same kinds of foreign relations concerns that I

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

21   would be an extraordinary thing to put someone in jail

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

23   proposes to do under Section 5 of its law.

24   Now, of course, there is an express

25   preemption provision, but the express preemption

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

2   operate to the exclusion of implied preemption, field or

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

4   We think there's a reason why the express

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

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

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

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

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

10   reason for preemption.

11   CHIEF JUSTICE ROBERTS: Thank you, General.

12   GENERAL VERRILLI: Thank you, Mr. Chief

13   Justice.

14   CHIEF JUSTICE ROBERTS: Mr. Clement,

15   5 minutes.

16   REBUTTAL ARGUMENT OF PAUL D. CLEMENT

17   ON BEHALF OF THE PETITIONERS

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

19   and may it please the Court:

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

21   enforcement issues and then talk about the other

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

23   enforcement provision, since I do think that the

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

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

1 systematic. I think that theory largely refutes itself.

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

3 echo that there is no interference with enforcement

4 priorities by simply giving the Federal government

5 information on which to bring their enforcement

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

7 point this Court made in its Florence decision earlier

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

9 over for the most innocuous of infractions, and they

10 turn out to be the most serious of offenders.

11   And so if you preclude officers, as happened

12 in Phoenix, from communicating with the Federal

13 government, the Federal government will not be able to

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

15 example of this, look at the declaration of Officer

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

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

18 the individual.

19   Now, the individual, it turns out, was

20 wanted for attempted murder in El Salvador and was also

21 guilty of illegal reentry into the United States. He

22 was stopped on three previous occasions and his status

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

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

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

1   the city policy, city of Phoenix.

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

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

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

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

6   maximize communication with the Federal authorities. So

7   I think the enforcement policy and priorities argument

8   simply doesn't work.

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

10   is, I respectfully disagree with the Solicitor General

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

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

13   technically doesn't have registration would be a

14   violation of 1306(a).

15   And the reason I take that position is that

16   provision says a willful failure to register. Now,

17   maybe the prosecutors take the view that there is

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

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

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

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

22   that would be good enough to defeat a finding of

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

24   JUSTICE SOTOMAYOR: But you're inviting --

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

1   talking about because what's going to happen, now, is

2   that, if there is no statement by the Federal agency of

3   legality, the person is arrested, and, now, we're going

4   to have Federal resources spent on trying to figure out

5   whether they have an asylum application, whether they

6   have this, whether they have that, whether they are

7   exempted under this reason, whether the failure to carry

8   was accidental or not -- I mean, you are involving the

9   Federal government in your prosecution.

10   MR. CLEMENT: Well --

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

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

13   got a Federal call -- we got a Federal answer that the

14   person wasn't registered?

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

16   communicated with the Federal immigration officials, and

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

18   doesn't have to register. The --

19   JUSTICE SOTOMAYOR: No -- no

20   Confrontation -- no Confrontation Clause problem with

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

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

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

24   illegal alien.

25   MR. CLEMENT: My supposition, Justice

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

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

3   I do want to be clear about --

4   JUSTICE SOTOMAYOR: No, no, no. How

5   about -- what -- how about they get a response, yes,

6   it's an illegal alien?

7   MR. CLEMENT: And they bring a prosecution

8   under Section 3 and then --

9   JUSTICE SOTOMAYOR: So how -- where do they

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

11   alien that's not authorized to be here?

12   MR. CLEMENT: I --

13   JUSTICE SOTOMAYOR: Who do they get it from?

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

15   the Federal authorities. I think it would be admitted.

16   There might be a challenge in that case. I mean -- you

17   know, this is a facial challenge. I'm not going to try

18   to address that potential Sixth Amendment issue.

19   What I would like to say is two things.

20   One, if there is some sloppiness in the way the Federal

21   government keeps its records, so that there's lots of

22   people that really should be registered, but aren't, I

23   can't imagine that sloppiness has a preemptive effect.

24   The second thing I would say is that I do

25   think, in thinking about Section 3 in particular, the

1   analogy is not the fraud on the FDA claim in Buckman.

2   It's really the state tort law that says that it's a

3   violation of state tort law to not even seek the

4   approval that's needed under the FDA for a device.

5   Now, states impose tort law for people that

6   market a device without getting the necessary approval.

7   And nobody thinks that's preempted because it serves the

8   Federal interest. It doesn't have a deluge of

9   information. It forces people to get FDA approval.

10   And in the same way, this state law will

11   force people to register, which is what the Federal

12   government is supposed to want in the first place, so

13   there is no preemption there. There is no conflict.

14   As to the employment provision, I do think

15   it's important to recognize that --

16   CHIEF JUSTICE ROBERTS: Finish your

17   sentence.

18   MR. CLEMENT: -- before 1986, the -- the

19   government was not agnostic about unlawful employment by

20   aliens. The employees were already covered, and they

21   were subject to deportation. So the government said,

22   we're going to cover the employers for the first time.

23   I can't imagine why that would have preemptive effect.

24   Thank you, Your Honor.

25   CHIEF JUSTICE ROBERTS: Thank you,

1   Mr. Clement, General Verrilli. Well argued on both

2   sides.   Thank you.

3   The case is submitted.

4   (Whereupon, at 11:27 a.m., the case in the

5   above-entitled matter was submitted.)

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