

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	DONALD B. VERRILLI, JR., ESQ.	
7	On behalf of the Respondent	33
8	REBUTTAL ARGUMENT OF	
9	PAUL D. CLEMENT, ESQ.	
10	On behalf of the Petitioners	74
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

P R O C E E D I N G S

(10:07 a.m.)

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

Mr. Clement.

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

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

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

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

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

1 backwards.

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

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

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

23 Indeed, if the DHS had --

24 JUSTICE SOTOMAYOR: Mr. Clement --

25 MR. CLEMENT: Yes.

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

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

15 Of course, one of the things that --

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

17 MR. CLEMENT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

11 So, there -- what --

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

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

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

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

1 dealt with or something like that.

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

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

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

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

1 individual at all.

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

5 MR. CLEMENT: Well, Justice Ginsburg, I
6 think there's two answers to that. One is, you're
7 right, sometimes it's a complex inquiry, sometimes it's
8 a straightforward inquiry. It could be murder, it could
9 be a drug crime. But I think the practical answer to
10 the question is by hypothesis, there's going to be
11 inquiry made to the Federal immigration authorities,
12 either the Law Enforcement Support Center or a 287(g)
13 officer.

14 And presumably, as a part of that inquiry,
15 they can figure out whether or not this is a removable
16 offense, or at least a substantially likely removable
17 offense.

18 JUSTICE KENNEDY: Suppose it takes 2 weeks
19 to make that determination, can the alien be held by the
20 State for that whole period of time --

21 MR. CLEMENT: Oh, I don't think --

22 JUSTICE KENNEDY: -- just under section 6?

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

1 limits, and I think so whatever --

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

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

16 JUSTICE BREYER: How do they have -- well,
17 the same question, but -- but I'm trying to think of
18 examples. Example one is the person is arrested. Now,
19 it says any person who is arrested shall have the
20 person's immigration status determined before the person
21 is released. So I wonder if they've arrested a citizen,
22 he's Hispanic-looking, he was jogging, he has a
23 backpack, he has water in it and Pedialyte, so they
24 think, oh, maybe this is an illegal person. It happens
25 he's a citizen of New Mexico, and so the driver's

1 license doesn't work.

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

8 Do you want to represent that or not?

9 MR. CLEMENT: I don't want to represent
10 that. What I do want to represent --

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

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

16 JUSTICE BREYER: What?

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

19 JUSTICE BREYER: Oh, fine.

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

21 JUSTICE BREYER: But the Fourth
22 Amendment -- for -- I mean, that's another question. I
23 don't know how long the Fourth Amendment allows. I
24 don't know on that. There probably is a range of
25 things. But we do know that a person ordinarily, for

1 this crime, X, would have been released after a day.
2 Oh, you know, the Fourth Amendment would have allowed
3 more. So now what I want to know is what in practice
4 will happen?

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

13 Is that a fair conclusion?

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

22 JUSTICE SCALIA: Anyway, if this is a
23 problem, is it an immigration law problem?

24 MR. CLEMENT: It --

25 JUSTICE SCALIA: Or is it a Fourth Amendment

1 problem?

2 MR. CLEMENT: Justice Scalia, it is
3 neither --

4 JUSTICE SCALIA: Is the Government's attack
5 on this that it violates the Fourth Amendment?

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

12 JUSTICE BREYER: That's a
13 different argument --

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

19 JUSTICE BREYER: All right. Can I make the
20 following statement in the opinion, and you will say
21 that's okay? Imagine -- this is imaginary. "We
22 interpret" -- imagine -- "we interpret section 2(B) as
23 not authorizing or requiring the detention of any
24 individual under 2(B), either at the stop or in prison,
25 for a significantly longer period of time than that

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

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

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

5 JUSTICE BREYER: Can I say that?

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

8 JUSTICE BREYER: No.

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

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

24 Now, here's the other reason why I don't
25 think factually, this is going to elongate things.

1 Because already in a significant number of booking
2 facilities in Arizona, you already have the process that
3 people are systematically run through immigration checks
4 when they are booked as part of the booking process.
5 That's reflected in the record here in the Maricopa
6 County system, that that's done by a 287(g) officer as a
7 matter of routine.

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

14 And so I don't think that this immigration
15 status check is likely to lead to a substantial
16 elongation of the stops or the detentions.

17 Now, obviously --

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

25 MR. CLEMENT: Exactly. Obviously, if this

1 is somebody who was going, you know, 60 miles an hour in
2 a 20-mile-an-hour school zone or something, they may
3 decide wholly apart from the immigration issue that this
4 is somebody they want to bring back to the station.

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

12 JUSTICE SOTOMAYOR: All right. Then tell
13 me --

14 JUSTICE SCALIA: So you'll -- you'll concede
15 that the -- that the State has to accept within its
16 borders all people who have no right to be there, that
17 the Federal Government has no interest in removing?

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

20 JUSTICE SCALIA: That's all the
21 statute -- and you call up the Federal Government, and
22 the Federal -- yes, he's an illegal immigrant, but
23 that's okay with us.

24 MR. CLEMENT: Well --

25 JUSTICE SCALIA: And the State has no power

1 to close its borders to people who have no right to be
2 there?

3 MR. CLEMENT: Well, here -- Justice Scalia,
4 here's my response, which is all of this discussion, at
5 least as I've understood it, has been about 2(B), and to
6 a lesser extent 6.

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

14 JUSTICE KENNEDY: I think --

15 MR. CLEMENT: -- but not with respect to
16 the Federal --

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

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

23 JUSTICE KENNEDY: And that is by reason of
24 his alien issues --

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

1 is no. I think the reason my answer is no has more to
2 do with our defense of section 3 and other provisions
3 than it does with respect to the inquiry and arrest
4 authority provisions, 2(B) and 6.

5 JUSTICE ALITO: Well, before you move on to
6 the registration requirement, could I take you back to
7 an example that's similar to the one that Justice Breyer
8 was referring to.

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

16 If you do the records check, you're not
17 going to get anything back, right, because the person is
18 a citizen. So what -- where would the officer take it
19 from there?

20 MR. CLEMENT: Well, if I can just kind of
21 work back for a second. I mean, obviously, it's a
22 pretty unusual circumstance where somebody produces an
23 out-of-state driver's license, and that doesn't dispel
24 reasonable suspicion for the officer. But, I'll take
25 the hypo that --

1 JUSTICE ALITO: Why would it dispel
2 reasonable suspicion if it's -- if the officer knows
3 it's a State that issues drivers' licenses to aliens who
4 are not lawfully --

5 MR. CLEMENT: And that might be a situation
6 where that's the case, and then -- then it wouldn't
7 dispel the reasonable suspicion. But, say, in the
8 average case, I think it would.

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

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

22 But I think the important thing is that, you
23 know, this statute doesn't authorize them to detain the
24 individual, certainly beyond the -- the Fourth Amendment
25 limits. And it really doesn't authorize them to do

1 anything that the official couldn't do on an ad hoc
2 basis without the statute.

3 Now, it does do --

4 JUSTICE ALITO: That may be the case, and I
5 would like to ask General Verrilli about that. But,
6 under the Fourth Amendment, presumably, if the officer
7 can arrest, the State officer can arrest a person simply
8 on the ground that the person is removable, which is
9 what the Office of Legal Counsel opined some years ago,
10 then presumably the officer could continue to detain
11 that individual that I mentioned until they reached a
12 point where the Terry stop becomes an arrest, at which
13 time, they would have to have probable cause.

14 But if they had probable cause to believe
15 the person was removable, then they could hold the
16 person, presumably, until the -- the person's status was
17 completely verified. Isn't that correct?

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

20 Now, as we read section 6, because there's a
21 pre-existing definition of "public offense" in Arizona
22 law, we don't think this is kind of the full Office of
23 Legal Counsel situation, where you have broad arrest
24 authority for removable individuals. This is a
25 relatively narrow slice of additional arrest authority

1 that happens to give arrest authority for people that
2 seem to fit the Federal government's priority, because
3 it really is going to apply to criminal aliens.

4 But I don't -- I don't take any issue with
5 what you're saying. I do think, though, it's important
6 to understand that 2(B) really doesn't give the officer
7 an authority he didn't otherwise have.

8 It does do one thing that's very important,
9 though, which it does have the effect of overriding
10 local policies that actually forbade some officers from
11 making those communications and -- because that's one of
12 the primary effects of 2(B). It just shows how
13 difficult the government's preemption argument is here,
14 because those kind of local policies are expressly
15 forbidden by Federal statute.

16 1373(a) and 8 U.S.C. 1644 basically say that
17 localities can't have those kind of sanctuary laws.

18 And so one effect that 2(B) has is on a
19 State level, it basically says, look, you can't have
20 local officers telling you not to make those inquiries,
21 you must have those inquiries.

22 JUSTICE SOTOMAYOR: Counsel, could -- does
23 section 6 permit an officer to arrest an individual who
24 has overstayed a visitor's visa by a day? They're
25 removable, correct?

1 MR. CLEMENT: They are removable. I don't
2 think they would have committed a public
3 offense -- absent a very unusual situation, I don't
4 think they would have committed a public offense under
5 Arizona law. So I don't think there actually would be
6 arrest authority in that circumstance, as
7 Justice Alito's question has -- has --

8 JUSTICE SOTOMAYOR: What is the definition
9 of public offense?

10 MR. CLEMENT: A public offense
11 definition -- it's actually -- it's a petition
12 appendix -- well, I'm sorry.

13 The definition is basically that it's
14 something that is a crime in another jurisdiction and
15 also a crime in Arizona. And so what makes this kind of
16 anomalous is normally, if something is a crime in
17 Arizona, there's arrest authority for that directly.

18 So what this really captures is people who
19 have committed a crime are no longer arrestable for the
20 crime because they have served their sentence or some
21 other peculiarity, but they're nonetheless removable
22 because of the crime.

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

1 Now, that does seem to expand beyond the
2 Federal Government's determination about the types of
3 sanctions that should govern the employment
4 relationship.

5 You talk about supply and demand. The
6 Federal Government, of course, prohibits the employment,
7 but it also imposes sanctions with respect to
8 application for work. And the State of Arizona, in this
9 case, is imposing some significantly greater sanctions.

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

16 But I take the premise that 5(C) does
17 something that there's no direct analog in Federal law.
18 But I -- but that's not enough to get you to preemption,
19 obviously.

20 And one of the things that makes 5(C), it
21 seems to us, a weak case for preemption is that it only
22 targets employment that is expressly forbidden by
23 Federal law. And so then we look at, you know,
24 essentially, the government is reduced to arguing that
25 because in 1986 when Congress passed IRCA, it only

1 focused on the employer's side of the equation and
2 didn't, generally speaking, impose restrictions on
3 employees, that somehow they're going to draw a
4 preemptive inference from that.

5 JUSTICE SOTOMAYOR: Counsel --

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

15 Is that an acceptable test from your
16 standpoint?

17 MR. CLEMENT: I think it's an acceptable
18 test. I mean, Justice Kennedy, you know, there
19 obviously have been subsequent cases, including DeCanas
20 and Whiting, that give additional shape and color to
21 that test, but I don't have any -- I don't have any real
22 quarrel with that test.

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

24 JUSTICE KENNEDY: But then the government on
25 this section is going to come and say, well, there may

1 be -- this must be -- this -- the enforcement of this
2 statute, as Arizona describes it, will be in
3 considerable tension with our -- with our basic
4 approach. Isn't that what I'm going to hear from the
5 government?

6 MR. CLEMENT: It may be what you're going to
7 hear, Justice Kennedy, but I don't think you just take
8 the Federal Government for its word on these things.

9 You know, it's interesting, in DeCanas
10 itself, the SG said that that California statute was
11 preempted. And in DeCanas, this Court didn't say, well,
12 you know, we've got this language from Hines, and we
13 have the SG tell us it's preempted, that's good enough
14 for us. They went beyond that, and they looked hard.

15 And what they did is they established that
16 this is an area where the presumption against preemption
17 applies. So that seems one strike in our favor.

18 We have here a situation where there is an
19 express preemption provision, and it -- it only
20 addresses the employer's side of the ledger. So the
21 express preemption provision clearly doesn't apply here.

22 So the only thing they have is this
23 inference --

24 JUSTICE SOTOMAYOR: Well, for those of us
25 for whom legislative history has some importance, there

1 seems to be quite a bit of legislative history that
2 the -- that the idea of punishing employees was raised,
3 discussed and explicitly rejected.

4 MR. CLEMENT: Sure.

5 JUSTICE SOTOMAYOR: The preemption language
6 would be geared to what was decided to be punished.
7 It seems odd to think that the Federal Government is
8 deciding on employment sanctions and has unconsciously
9 decided not to punish employees.

10 MR. CLEMENT: But, Justice Sotomayor,
11 there's a big difference between Congress deciding not
12 as a matter of Federal law to address employees with an
13 additional criminal prohibition, and saying that that
14 decision itself has preemptive effect. That's a rather
15 remarkable additional step.

16 And here's why I think, if you consider the
17 legislative history -- for those who do, it really
18 supports us -- because here's what Congress confronted.
19 I mean, they started thinking about this problem in
20 1971. They passed IRCA in 1986.

21 At that point, here's the state of the
22 world. It's already unlawful, as a matter of Federal
23 law, for the employee to get -- to have this unlawful
24 work. And if they seek this unlawful work, they are
25 subject to removal for doing it.

1 In addition, Congress was told that most of
2 the aliens who get this unlawful work are already
3 here -- they illegally entered, so they're already
4 subject to an independent criminal offense.

5 So at that point, Congress is facing a world
6 where the employee is already subject to multiple
7 prohibitions. The employer is completely scot-free as a
8 matter of Federal law. And so at that point, in 1986,
9 they address the employer's side of the equation, they
10 have an express preemption provision that says nothing
11 about any intent of preempting the employee's side of
12 the ledger. And in that, I don't think --

13 JUSTICE GINSBURG: But they did provide -- I
14 mean, your position was the Federal legislation
15 regulates the supply side. That leaves the demand side
16 open. But there is regulation, and the question is
17 whether anything beyond that is inconsistent with the
18 Federal -- it's not just that the person is removable,
19 but if they use false documents in seeking work, that's
20 a Federal crime.

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

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

1 The first is that if you look at what they
2 regulate on the employee's side, it's really things that
3 actually assist in regulating the employer's side.
4 Because what they're worried about is a fraudulent
5 document that then is used essentially to trick the
6 employer into employing somebody who shouldn't be
7 employed.

8 The second thing is, the more that you view
9 IRCA as actually regulating part of the employee's side,
10 then I think the more persuasive it is that the express
11 preemption provision doesn't reach the employee's side
12 of the equation.

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

16 MR. CLEMENT: Thank you, Mr. Chief Justice.
17 I appreciate the opportunity to do that.

18 I do think as to section 3, the question is
19 really -- it's a provision that is parallel to the
20 Federal requirements, and imposes the same punishments
21 as the Federal requirement.

22 So it's generally not a fertile ground for
23 preemption. But of course, there are cases that find
24 preemption even in those analogous circumstances.
25 They're the cases that the government is forced to rely

1 on. Cases like Buckman, cases like --

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

6 MR. CLEMENT: I think they could under
7 general double jeopardy principles and the dual
8 sovereignty doctrine. Obviously, if that was of
9 particular concern to you, that might be the basis for
10 an as-applied challenge if somebody was already
11 prosecuted under Federal law.

12 But, of course, this Court has confronted
13 exactly that argument in California v. Zook, where you
14 had the statute of California that prohibited somebody
15 operating as an interstate carrier without the ICC
16 license. It was raised -- well, you know, you have to
17 let just the Feds enforce that law. Otherwise, there's
18 the possibility of duplicative punishment, duplicative
19 prosecution.

20 And this Court rejected that argument there.

21 JUSTICE GINSBURG: Mr. Clement, it
22 seems that the -- I would think the largest hurdle for
23 you is Hines, which said the registration
24 scheme -- Congress enacted a complete registration
25 scheme which the States cannot complement or impose even

1 auxiliary regulations. So I don't see the alien
2 registration as a question of obstacle preemption, but
3 appeal preemption that alien -- we don't want competing
4 registration schemes. We want the registration scheme
5 to be wholly Federal.

6 MR. CLEMENT: Well, Justice Ginsburg, I
7 think that's part of the reason why I accepted Justice
8 Kennedy's characterization of the relevant language in
9 Hines, because although there's some general discussion
10 there of field preemption, when the Court actually
11 states what its holding is, it does state it in terms of
12 obstacle preemption.

13 And here's where I think there's a critical
14 difference between what the Court had before it in Hines
15 and what you have before you here.

16 In Hines, Pennsylvania passed its statute
17 before Congress passed the alien registration statute.
18 So not surprisingly, you know, they weren't -- they
19 weren't soothsayers in Pennsylvania. They couldn't
20 predict the future. So when it got up here, there was a
21 conflict between the provisions of the Pennsylvania
22 registration law and the Federal registration law. And
23 this Court struck it down on that preemption basis.

24 Here, it's quite different. Arizona had
25 before it the Federal statute. It looked at the precise

1 provisions in the Federal statute. It adopted those
2 standards as its own, and then it imposed parallel
3 penalties for the violation of the State equivalent.

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

9 JUSTICE SOTOMAYOR: Can I ask you something?

10 JUSTICE ALITO: Well, in that instance --

11 CHIEF JUSTICE ROBERTS: Justice Alito.

12 JUSTICE ALITO: In that regard, we are told
13 that there are some important categories of aliens who
14 can't obtain registration, cannot obtain Federal
15 registration, and yet they're people that nobody would
16 think should be removed. I think someone with a pending
17 asylum application would fall into that category.

18 How would section 3 apply there?

19 MR. CLEMENT: I think it probably wouldn't
20 apply. There's two provisions that might make it
21 inapplicable. The first question you'd ask is whether
22 that individual in that category would be subject to
23 prosecution under 1304 and 1306. And if I understand,
24 you know, the Government's position, there are certain
25 people where, you know, they can't really get a

1 registration document because of the narrow class that
2 they're in.

3 And as I understand it, it is not a
4 violation of either 1304 or 1306 to not get a
5 registration document when you're somebody who can't get
6 one. So you're not liable for the willful failure to
7 get a registration document, and when you don't have a
8 registration document to carry, you don't run afoul of
9 1306 on the carry --

10 JUSTICE ALITO: Well, of course, if you've
11 entered the country illegally, you can't get a
12 registration.

13 MR. CLEMENT: Well, sure.

14 JUSTICE ALITO: But --

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

17 JUSTICE ALITO: No, I understand that. I
18 didn't understand the distinction you were drawing, that
19 you can't be prosecuted for lack of a registration if
20 you couldn't have gotten a registration.

21 MR. CLEMENT: Well, if you're in -- no, if
22 you're in the country lawfully, I mean, you can try to
23 register. And so somebody who enters illegally -- I
24 mean, they're already guilty of one Federal misdemeanor
25 by the illegal entry.

1 JUSTICE ALITO: Right.

2 MR. CLEMENT: But at the point that they
3 stay 30 days and don't try to register, then that's an
4 independent violation.

5 So maybe I need to fix what I said and say,
6 look, if you're somebody who -- if you did go to
7 register, would be told: You're fine, but we can't give
8 you a registration document, then that individual's not
9 subject to prosecution under the Federal statute,
10 therefore wouldn't be subject to prosecution under the
11 State statute.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Clement.

14 General Verrilli.

15 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

16 ON BEHALF OF THE RESPONDENT

17 GENERAL VERRILLI: Mr. Chief Justice, and
18 may it please the Court:

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

24 GENERAL VERRILLI: That's correct.

25 CHIEF JUSTICE ROBERTS: Okay. So this is

1 not a case about ethnic profiling.

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

4 Mr. Clement is working hard this morning to
5 portray S.B. 1070 as an aid to Federal immigration
6 enforcement. But the very first provision of the
7 statute declares that Arizona is pursuing its own policy
8 of attrition through enforcement, and that the
9 provisions of this law are designed to work together to
10 drive unlawfully present aliens out of the State.

11 That is something Arizona cannot do, because
12 the Constitution vests exclusive --

13 JUSTICE SOTOMAYOR: General, could you
14 answer Justice Scalia's earlier question to your
15 adversary? He asked whether it would be the
16 Government's position that Arizona doesn't have the
17 power to exclude or remove -- to exclude from its
18 borders a person who's here illegally.

19 GENERAL VERRILLI: That is our position,
20 Your Honor. It is our position because the Constitution
21 vests exclusive authority over immigration matters with
22 the national government.

23 JUSTICE SCALIA: Well, all that means, it
24 gives authority over naturalization, which we've
25 expanded to immigration. But all that means is that the

1 Government can set forth the rules concerning who
2 belongs in this country. But if, in fact, somebody who
3 does not belong in this country is in Arizona, Arizona
4 has -- has no power?

5 What -- what does sovereignty mean if it
6 does not include the ability to defend your borders?

7 GENERAL VERRILLI: Your Honor, the Framers
8 vested in the national government the authority over
9 immigration because they understood that the way this
10 nation treats citizens of other countries is a vital
11 aspect of our foreign relations. The national
12 government, and not an individual State --

13 JUSTICE SCALIA: But it's still up to the
14 national government. Arizona is not trying to kick out
15 anybody that the Federal government has not already said
16 do not belong here.

17 And -- look, the Constitution
18 provides -- even -- even with respect to the Commerce
19 Clause -- "No State shall without the consent of
20 Congress lay any imposts or duties on imports or exports
21 except," it says, "what may be absolutely necessary for
22 executing its inspection laws."

23 The Constitution recognizes that there is
24 such a thing as State borders, and the States can police
25 their borders, even to the point of inspecting incoming

1 shipments to exclude diseased material.

2 GENERAL VERRILLI: But they cannot do what
3 Arizona is seeking to do here, Your Honor, which is to
4 elevate one consideration above all others. Arizona is
5 pursuing a policy that maximizes the apprehension of
6 unlawfully present aliens so they can be jailed as
7 criminals in Arizona unless the Federal Government
8 agrees to direct its enforcement resources to remove the
9 people that Arizona has identified.

10 CHIEF JUSTICE ROBERTS: Well, if that State
11 does -- well, that's a question of enforcement
12 priorities.

13 Well, let's say that the government had a
14 different set of enforcement priorities, and their
15 objective was to protect to the maximum extent possible
16 the borders. And so anyone who is here illegally, they
17 want to know about and they want to do something about.
18 In other words, different than the current policy.

19 Does that mean in that situation, the
20 Arizona law would not be preemptive?

21 GENERAL VERRILLI: I think the mandatory
22 character of the Arizona law and the mandatory character
23 of the obligations it imposes, especially as backed by
24 this extraordinary provision in section 2(H), which
25 imposes civil penalties of up to \$5000 a day on any

1 official in the State of Arizona who is not following
2 section 2 or, as we read it, the rest of S.B. 1070, to
3 the maximum extent possible, does create a conflict.

4 But I do think the most fundamental point
5 about section 2 is to understand its relationship to the
6 other provisions in the statute. Section 2 is in the
7 statute to identify the class of people who Arizona is
8 then committed to prosecute under section 3, and if they
9 are employed, also under section 5.

10 JUSTICE ALITO: Well, I have the same
11 question as the Chief Justice. Suppose that the Federal
12 Government changed its priorities tomorrow, and it
13 said -- they threw out the ones they have now, and they
14 said the new policy is maximum enforcement. We want to
15 know about every person who's stopped or arrested, we
16 want to -- we want their immigration status verified.

17 Would the Arizona law then be un-preemptive?

18 GENERAL VERRILLI: No, I think it's still a
19 problem, Your Honor. These decisions have to be made at
20 the national level because it's the national government
21 and not -- it's the whole country and not an individual
22 State that pays the price --

23 JUSTICE SCALIA: Do you have any example
24 where -- where enforcement discretion has the effect of
25 preempting State action?

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

4 JUSTICE SCALIA: I'll point out another case
5 of ours where we've said that essentially the preemption
6 of State law can occur, not by virtue of the Congress
7 preempting, but because the Executive doesn't want this
8 law enforced so -- so rigorously, and that preempts the
9 State from enforcing it vigorously.

10 Do we have any cases --

11 GENERAL VERRILLI: I think the preemption
12 here -- focusing for a moment on section 3 -- the
13 preemption here flows from judgments of Congress, from
14 the registration system that Congress set up in sections
15 1301 through 1306, from the decision of Congress in
16 section 1103 in the law to vest the Secretary of DHS and
17 the Attorney General with the authority to make the
18 judgments about how this law is going to be enforced --

19 JUSTICE SCALIA: Well, they do that with
20 all -- all Federal criminal statutes. And you
21 acknowledge that as a general matter, States can enforce
22 Federal criminal law, which is always entrusted to the
23 Attorney General.

24 GENERAL VERRILLI: They can make -- they can
25 engage in detention in support of the enforcement of

1 Federal law. That's what the OLC opinion from 2002
2 says. It does not say that they can prosecute under
3 Federal law and make their own decisions. That's a far
4 different matter.

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

7 CHIEF JUSTICE ROBERTS: Well, but you say
8 that the Federal Government has to have control over who
9 to prosecute, but I don't see how section 2(B) says
10 anything about that at all. All it does is notify the
11 Federal Government, here's someone who is here
12 illegally, here's someone who is removable. The
13 discretion to prosecute for Federal immigration offenses
14 rests entirely with the Attorney General.

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

19 Section 1 of this statute says that
20 sections 2 and 3 and 5 are supposed to work together to
21 achieve this policy of attrition through enforcement.
22 And so what section 2 does is identify a population that
23 the State of Arizona is going to prosecute under
24 section 3 and section 5.

25 CHIEF JUSTICE ROBERTS: Right. So apart

1 from section 3 and section 5, take those off the table,
2 you have no objection to section 2.

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

8 Arizona has got this population, and
9 they've -- and they're by law committed to maximum
10 enforcement. And so the Federal Government's got to
11 decide, are we going to take our resources, which we
12 deploy for removal, and are we going to use them to deal
13 with this population, even if it is to the detriment of
14 our priorities --

15 CHIEF JUSTICE ROBERTS: Exactly. And the
16 Federal Government has to decide where it's going to use
17 its resources.

18 And what the State is saying, here are
19 people who are here in violation of Federal law, you
20 make the decision. And if your decision is you don't
21 want to prosecute those people, fine, that's entirely up
22 to you.

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

25 GENERAL VERRILLI: Here's the other

1 half -- here's the other half of the equation, Mr. Chief
2 Justice, which is that they say if you're not going to
3 remove them, we are going to prosecute them. And that
4 means that the -- and I think this does get at the heart
5 of why this needs to be an exclusive national power --

6 CHIEF JUSTICE ROBERTS: Only under section 3
7 and section 5.

8 GENERAL VERRILLI: Yes, but those are -- but
9 what you're talking about is taking somebody whose only
10 offense is being unlawfully present in the country and
11 putting them in jail for up to 6 months, or somebody
12 who --

13 CHIEF JUSTICE ROBERTS: Well, let's
14 say you're worried about --

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

17 CHIEF JUSTICE ROBERTS: There you go.
18 Right. For the notification, what could possibly be
19 wrong if Arizona arrests someone, let's say for drunk
20 driving, and their policy is you're going to stay in
21 jail overnight no matter what, okay? What's wrong
22 during that period by having the Arizona arresting
23 officer say, I'm going to call the Federal agency and
24 find out if this person is here illegally, because the
25 Federal law says the Federal agency has to answer my

1 question?

2 It seems an odd argument to say the Federal
3 agency has to answer the State's question, but the State
4 can't ask it.

5 GENERAL VERRILLI: Well, we're not saying
6 the State can't ask it in any individual case. We
7 recognize that section --

8 CHIEF JUSTICE ROBERTS: You think there are
9 individual cases in which the State can call the Federal
10 Government and say: Is this person here illegally?

11 GENERAL VERRILLI: Yes, certainly. But that
12 doesn't make --

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

15 GENERAL VERRILLI: No. I don't think so,
16 Mr. Chief Justice, because the -- I think the problem
17 here is in that -- is in every circumstance as a result
18 of section 2(B) of the law, backed by the penalties of
19 section 2(H), the State official must pursue the
20 priorities that the State has set, irrespective of
21 whether they are helpful to or in conflict with the
22 Federal priorities.

23 And so --

24 JUSTICE ALITO: Well, suppose that
25 every -- suppose every law enforcement officer in

1 Arizona saw things exactly the same way as the Arizona
2 legislature. And so, without any direction from the
3 legislature, they all took it upon themselves to make
4 these inquiries every time they stopped somebody or
5 arrested somebody.

6 Would that be a violation of Federal law?

7 GENERAL VERRILLI: No, it wouldn't be,
8 Your Honor, because in that situation, they would be
9 free to be responsive to Federal priorities, if the
10 Federal officials came back to them and said, look, we
11 need to focus on gangs, we need to focus on this drug
12 problem at the border --

13 JUSTICE ALITO: But what if they said, well,
14 we don't care what your priorities are; we have our
15 priorities, and our priority is maximum enforcement, and
16 we're going to call you in every case? It was all done
17 on an individual basis, all the officers were
18 individually doing it --

19 GENERAL VERRILLI: Yes, well --

20 JUSTICE ALITO: -- that would be okay?

21 GENERAL VERRILLI: Well, if there's a -- if
22 there's a State policy locked into law by statute,
23 locked into law by regulation, then we have a problem.
24 If it's not --

25 JUSTICE SOTOMAYOR: General --

1 GENERAL VERRILLI: -- I mean, the line is
2 mandatory versus discretionary --

3 JUSTICE ALITO: That's what I can't
4 understand because your argument -- you seem to be
5 saying that what's wrong with the Arizona law is that
6 the Arizona legislature is trying to control what its
7 employees are doing, and they have to be free to
8 disregard the desires of the Arizona legislature, for
9 whom they work, and follow the priorities of the Federal
10 Government, for whom they don't work.

11 GENERAL VERRILLI: But they -- but with
12 respect to immigration enforcement, and to the extent
13 all they're doing is bringing people to the Federal
14 Government's attention, they are cooperating in the
15 enforcement of Federal law --

16 JUSTICE KENNEDY: But the hypothetical is
17 that that's all the legislature is doing.

18 GENERAL VERRILLI: Well, except I think,
19 Justice Kennedy, the problem is that it's not
20 cooperation if in every instance, the officers in the
21 State must respond to the priorities set by the State
22 government and are not free to respond to the priorities
23 of the Federal officials who are trying to enforce the
24 law in the most effective manner possible.

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

1 confused. General, I'm terribly confused by your
2 answer. Okay? And -- and I don't know that you're
3 focusing in on what I believe my colleagues are trying
4 to get to.

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

11 He tells me that unless there's another
12 reason to arrest the person -- and that's 3 and 6, or
13 any of the other provisions -- but putting those aside,
14 we're going to stay just in 2(B), if the government
15 says, we don't want to detain the person, they have to
16 be released for being simply an illegal alien, what's
17 wrong with that?

18 GENERAL VERRILLI: Well --

19 JUSTICE SOTOMAYOR: Taking out the other
20 provisions, taking out any independent State-created
21 basis of liability for being an illegal alien.

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

24 Now, we are not making an allegation of
25 racial profiling. Nevertheless, there are already tens

1 of thousands of stops that result in inquiries in
2 Arizona, even in the absence of S.B. 1070. It stands to
3 reason that the legislature thought that that wasn't
4 sufficient and there needed to be more.

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

8 JUSTICE SCALIA: Sounds like racial
9 profiling to me.

10 GENERAL VERRILLI: And they're -- and given
11 that what we are talking about is the status of being
12 unlawfully present --

13 JUSTICE SOTOMAYOR: Do you have the
14 statistics as to how many arrests there are and how
15 many -- and what the -- percentage of calls before the
16 statute?

17 GENERAL VERRILLI: There is some evidence in
18 the record, Your Honor. It's the -- the Palmatier
19 declaration, which is in the Joint Appendix, was
20 the -- he was the fellow who used the run the
21 Law Enforcement Support Center, which answers the
22 inquiries. That -- that declaration indicates that in
23 fiscal year 2009, there were 80,000 inquiries and --

24 JUSTICE SCALIA: What does this have to do
25 with Federal immigration law? I mean, it may have to do

1 with racial harassment, but I thought you weren't
2 relying on that.

3 GENERAL VERRILLI: The --

4 JUSTICE SCALIA: Are you objecting to
5 harassing the -- the people who have no business being
6 here? Is that -- surely you're not concerned about
7 harassing them. They've been stopped anyway, and all
8 you're doing is calling up to see if they're illegal
9 immigrants or not.

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

13 GENERAL VERRILLI: And other -- and other
14 people lawfully present in the country, certainly, but
15 this is --

16 JUSTICE SCALIA: But that has nothing to do
17 with the immigration law --

18 GENERAL VERRILLI: Hines is --

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

21 GENERAL VERRILLI: Hines identified this
22 problem as harassment as -- as a central feature of
23 preemption under the immigration laws because of the
24 concern that the way this nation treats citizens of
25 other countries is fundamental to our foreign relations.

1 And this is a --

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

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

8 Now, I can think -- I'm not saying they're
9 right, but if that means you're going to hold an
10 individual longer than you would have otherwise, I can
11 think of some arguments that it is preempted, and some
12 replies. So keep that out of it.

13 Suppose that we were to say, that sentence,
14 as we understand it, does not raise a constitutional
15 problem as long as it is interpreted to mean that the
16 policeman, irrespective of what answer he gets from ICE,
17 cannot detain the person for longer than he would have
18 done in the absence of this provision.

19 Now, in your view, is there any preemption
20 exemption -- argument against -- any preemption argument
21 against that sentence as I have just interpreted it? I
22 don't know what your answer is, and that's why I'm
23 asking.

24 GENERAL VERRILLI: Yes. We would think it
25 would ameliorate --

1 JUSTICE BREYER: And if so, what?

2 GENERAL VERRILLI: -- it would ameliorate
3 the practical problem; but, there's still a structural
4 problem here in that this is an effort to enforce
5 Federal law. And the -- under the Constitution, it's
6 the President and the Executive Branch that are
7 responsible for the enforcement of Federal law --

8 CHIEF JUSTICE ROBERTS: It is --

9 GENERAL VERRILLI: -- and --

10 CHIEF JUSTICE ROBERTS: It is not an effort
11 to enforce Federal law. It is an effort to let you know
12 about violations of Federal law. Whether or not to
13 enforce them is still entirely up to you.

14 If you don't want to do this, you just tell
15 the person at LESC -- if that's the right -- is that the
16 right acronym?

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

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

24 I mean, why -- it is still your decision.
25 And if you don't want to know who is in this country

1 illegally, you don't have to.

2 GENERAL VERRILLI: That's correct. But the
3 process of -- the process of cooperating to enforce the
4 Federal immigration law starts earlier, and it starts
5 with the process of making the decisions about who
6 to -- who to stop, who to apprehend, who to check on.

7 And the problem -- the structural problem we
8 have is that those decisions -- in the making of those
9 decisions, Arizona officials are not free --

10 CHIEF JUSTICE ROBERTS: Under 2(B), the
11 person is already stopped for some other reason. He's
12 stopped for going 60 in a 20. He's stopped for drunk
13 driving. So that decision to stop the individual has
14 nothing to do with immigration law at all. All that has
15 to do with immigration law is the -- whether or not they
16 can ask the Federal Government to find out if this
17 person is illegal or not, and then leave it up to you.

18 It seems to me that the Federal Government
19 just doesn't want to know who's here illegally or not.

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

23 And one thing that's instructive in that
24 regard, Mr. Chief Justice, are the declarations put into
25 the record by the police chiefs from Phoenix and Tucson,

1 both of whom I think explain effectively why S.B. -- the
2 section 2(B) obligation gets in the way of the mutual
3 effort to -- to focus on the priorities of identifying
4 serious criminals so that they can be removed from the
5 country.

6 JUSTICE SCALIA: Anyway, what -- what's
7 wrong about the States enforcing Federal law? There's a
8 Federal law against robbing Federal banks. Can it be
9 made a State crime to rob those banks? I think it is.

10 GENERAL VERRILLI: I think it could, but I
11 think that's quite --

12 JUSTICE SCALIA: But does the Attorney
13 General come in and say, you know, we might really only
14 want to go after the professional bank robbers? If it's
15 just an amateur bank robber, you know, we're -- we're
16 going to let it go. And the State's interfering with
17 our -- with our whole scheme here because it's
18 prosecuting all these bank robbers.

19 GENERAL VERRILLI: Well, of course, no one
20 would --

21 JUSTICE SCALIA: Now, would anybody listen
22 to that argument?

23 GENERAL VERRILLI: Of course not.

24 JUSTICE SCALIA: Of course not.

25 GENERAL VERRILLI: But this argument is

1 quite different, Justice Scalia, because here what we
2 are talking about is that Federal registration
3 requirement in an area of dominant Federal concern,
4 exclusive Federal concern with respect to immigration:
5 Who can be in the country, under what circumstances, and
6 what obligations they have --

7 JUSTICE KENNEDY: Now, are you talking about
8 3 now or --

9 GENERAL VERRILLI: Yes.

10 JUSTICE KENNEDY: -- or does this argument
11 relate to 2 as well?

12 GENERAL VERRILLI: This is an argument about
13 section 3.

14 JUSTICE ALITO: Well, could I ask you this
15 about 2, before you move on to that? How is a -- this
16 is just a matter of information. How can a State
17 officer who stops somebody or who arrests somebody for a
18 nonimmigration offense tell whether that person falls
19 within the Federal removal priorities without making an
20 inquiry to the Federal Government?

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

1 GENERAL VERRILLI: Well, in any individual
2 case, that's correct. You -- you would need to make the
3 inquiry in the first place. It won't always be correct,
4 if you're arresting somebody based on probable cause
5 that they've committed a serious crime, and they -- and
6 they -- the inquiry into whether -- into their status
7 will be enough to identify that person for priority --

8 JUSTICE ALITO: Well, what if they just,
9 they stop somebody for a traffic violation, but they
10 want to know whether this is a person who previously was
11 removed and has come back, or somebody who's
12 just -- just within the last few hours possibly
13 come -- well, let's just -- somebody who's previously
14 been removed? How can you know that without making an
15 inquiry?

16 GENERAL VERRILLI: Well, I think -- I think
17 it's correct that you can't, but there's a -- there's a
18 difference, Justice Alito, I think, between the question
19 of any individual circumstance and a mandatory policy
20 backed by this civil fine, that you've got to make the
21 inquiry in every case.

22 I mean, I think it's as though -- if I can
23 use an analogy, if you ask one of your law clerks to
24 bring you the most important preemption cases from the
25 last 10 years, and they rolled in the last -- the last

1 hundred volumes of the U.S. Reports and said, well,
2 they're in there. That -- that doesn't make it --

3 CHIEF JUSTICE ROBERTS: What if they just
4 rolled in Whiting?

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: That's a pretty good
7 one.

8 JUSTICE BREYER: Look, in the Federal
9 statute, it says in 1373 that nobody can prohibit or
10 restrict any government entity from making this inquiry
11 of the Federal Government. And then it says that the
12 Federal Government has -- any agency -- and then it says
13 the Federal Government has an obligation to respond.

14 Now, assuming the statute were limited as I
15 say, so nothing happened to this individual, nothing
16 happened to the person who's stopped that wouldn't have
17 happened anyway, all that happens is the person -- the
18 policeman makes a phone call.

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

20 If that were the situation, and we said it
21 had to be the situation, then what in the Federal
22 statute would that conflict with, where we have two
23 provisions that say any policeman can call?

24 GENERAL VERRILLI: So --

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

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

2 GENERAL VERRILLI: Yes.

3 JUSTICE BREYER: Because in my mind, I'm not
4 clear what your answer is to that.

5 GENERAL VERRILLI: I understand the
6 question. And I think the answer is this: 1373 was
7 enacted in 1996, along with 1357. And 1357 is the
8 provision that sets forth the powers and authorities of
9 Federal immigration officials.

10 It contains 1357(g), which effectively says
11 that Federal -- that the Federal Government, the
12 Attorney General, can deputize State officials, so long
13 as they're -- they obtain adequate training and they're
14 subject to the direction and control of the Attorney
15 General in carrying out immigration functions.

16 Then the last provision, (g)(10), says that
17 nothing that we've said so far should be read to
18 preclude informal cooperation, communication or other
19 informal cooperation in the apprehension, detention and
20 removal of unlawfully present persons.

21 But it's the focus on cooperation.

22 And I think you have to -- so I don't think
23 you can read into 1373 the -- the conclusion that what
24 Congress was intending to do was to shift from the
25 Federal Government to the States the authority to set

1 enforcement priorities, because I think the cooperation
2 in this context is cooperation in the service of the
3 Federal enforcement.

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

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

11 Because I, frankly -- as the Chief has said
12 to you, it's not that it's forcing you to change your
13 enforcement priorities. You don't have to take the
14 person into custody. So what's left of your argument?

15 GENERAL VERRILLI: So let me just summarize
16 what I think the three are, and then maybe I can move on
17 to sections 3 and 5.

18 With respect to -- with respect to 2, we
19 think the harassment argument -- we think this is a more
20 significant harassment problem than was present in
21 Hines --

22 JUSTICE SOTOMAYOR: Please move more --

23 GENERAL VERRILLI: With respect to -- in
24 addition, we do think that there is a structural
25 accountability problem in that they are enforcing

1 Federal law but not answerable to the Federal officials.

2 And third, we do think there are practical
3 impediments, in that the -- the result of this is to
4 deliver to the Federal system a -- a volume of inquiries
5 that makes it harder and not easier to identify who the
6 priority persons are for removal.

7 So those are the three reasons.

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

11 GENERAL VERRILLI: Thank you, Mr. Chief
12 Justice.

13 The -- I do think the key thing about
14 section 3 is that we -- is that section 3 is purporting
15 to enforce a Federal registration requirement. That's a
16 relationship between the alien and the United States
17 government that's exclusively a Federal relationship.
18 It's governed by the terms of 1301 through 1306.

19 And the way in which those terms are
20 enforced does have very significant Federal interest at
21 its heart, and there is no State police power interest
22 in that Federal registration relationship.

23 And I do think -- I think it's a very
24 important -- Justice Alito raised the question of these
25 categories of people. I think it's -- it is quite

1 important to get clarity on that.

2 The -- if you are -- if you have come into
3 the country unlawfully, but you have a pending
4 application for asylum, a pending application for
5 temporary protective status because you would have to be
6 removed to a country to which you can't be removed
7 because of the conditions in the country, if you have a
8 valid claim for relief under the Violence Against Women
9 Act based on your treatment, if you have a valid claim
10 for relief because you are a victim of human
11 trafficking, if you have a valid claim for relief
12 because you are the victim of a crime or a witness to a
13 crime, all of those persons are in technical violation
14 of 1306(a).

15 And -- and it seems to me they -- they are
16 in violation of 1306(a), so my friend, Mr. Clement, just
17 is not correct in saying that those are people who
18 aren't in violation of 1306(a) and, therefore, aren't in
19 violation of -- of section 3. They are in violation.

20 JUSTICE SCALIA: Well, maybe 1306(a) ought
21 to be amended, then. I mean, we have statutes out
22 there, that there a lot of people in violation of it
23 and -- well, the Attorney General will take care of it.

24 Is that how we write our criminal laws?

25 GENERAL VERRILLI: But it's a situation in

1 which no reasonable person would think that
2 the individual ought to be prosecuted, and yet, very
3 often, the States aren't even going to know. In fact,
4 about asylum status, they can't know because there are
5 regulations that require that to be kept private to
6 avoid retaliation against the person making the
7 application.

8 And so, this is -- so this is -- this is, I
9 think, a very strong illustration of why the enforcement
10 discretion over section 3 needs to be vested exclusively
11 in the Federal Government.

12 JUSTICE SCALIA: Again, I ask you, do you
13 have any other case in which the basis for preemption
14 has been you are interfering with -- with the Attorney
15 General's enforcement discretion?

16 GENERAL VERRILLI: Well, this is --

17 JUSTICE SCALIA: I think that's an
18 extraordinary basis for saying that the State is
19 preempted.

20 GENERAL VERRILLI: I think what's
21 extraordinary about this, actually, Justice Scalia, is
22 the State's decision to enact a statute purporting to
23 criminalize the violation of a Federal registration
24 obligation. And I think that's the problem here. And
25 they're doing it for a reason --

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

3 GENERAL VERRILLI: But -- but what --

4 JUSTICE SCALIA: It's the bank. It's the
5 Federal bank example --

6 GENERAL VERRILLI: Well, no.

7 JUSTICE SCALIA: -- a State law which
8 criminalizes the same thing that the Federal law does.

9 GENERAL VERRILLI: I think it's quite
10 different.

11 What they're doing here is using 1306(a) to
12 get at the status of unlawful presence. The only people
13 who can be prosecuted under section 3 are people who are
14 unlawfully present in the country. That's what the
15 statute says. And they're using it to get at that
16 category of people, to essentially use their State
17 criminal law to perform an immigration function.

18 And the immigration function is to try
19 to -- to prosecute these people. And, by the way, you
20 can prosecute somebody, they can be put in jail for 30
21 days here, but under Federal law, a violation of 1306(a)
22 is a continuing offense. So the day they get out of
23 jail for that 30 days, they can be arrested again, and
24 this can happen over and over again.

25 And the point of this provision is to drive

1 unlawfully present people out of the State of Arizona.

2 JUSTICE KENNEDY: Suppose --

3 suppose -- well, assume these are two

4 hypothetical -- two hypothetical instances.

5 First, the Federal Government has said we

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

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

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

9 That's the first -- just hypothetical.

10 JUSTICE SCALIA: You said that in your

11 brief, didn't you?

12 JUSTICE KENNEDY: Also hypothetical is that

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

14 with social disruption, economic disruption, residents

15 leaving the State because of flood of immigrants.

16 Let's just assume those two things.

17 Does that give the State of Arizona any

18 powers or authority or legitimate concerns that any

19 other State wouldn't have?

20 GENERAL VERRILLI: Of course, they have

21 legitimate concerns in that situation. And, Justice

22 Kennedy --

23 JUSTICE KENNEDY: And can they go to their

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

25 the legislature to enact laws to correct this problem?

1 GENERAL VERRILLI: They -- they certainly
2 can enact laws of general application. They can enforce
3 the laws of general application that are on the books.
4 They already -- as a result of 8 U.S.C. 1621, it's clear
5 that they are under no obligation to provide any State
6 benefits to the population.

7 But I think, most importantly, they
8 can -- and -- not most importantly, but as importantly,
9 they can engage in cooperative efforts with the Federal
10 Government --

11 Excuse me. I see my --

12 CHIEF JUSTICE ROBERTS: No, keep going.

13 GENERAL VERRILLI: They can -- they can
14 engage in cooperative efforts with the Federal
15 Government, of which there are many going on in Arizona
16 and around the country, in order to address these
17 problems.

18 JUSTICE SCALIA: General, didn't you say in
19 your brief -- I forget where it was -- I thought you
20 said that the -- the Justice Department doesn't get
21 nearly enough money to enforce our immigration laws?

22 Didn't you say that?

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

25 JUSTICE SCALIA: Exactly. Okay.

1 So the State says, well, that may be your
2 priorities, but most of these people that you're not
3 going after, or an inordinate percentage of them, are
4 here in our State, and we don't like it. They're
5 causing all sorts of problems. So we're going to help
6 you enforce Federal law. We're not going to do anything
7 else. We're just enforcing Federal law.

8 GENERAL VERRILLI: Well, what I think
9 they're going to do in Arizona is something quite
10 extraordinary, that has significant real and practical
11 foreign relations effects. And that's the problem, and
12 it's the reason why this power needs to be vested
13 exclusively in the Federal Government.

14 What they're going to do is engage,
15 effectively, in mass incarceration, because the
16 obligation under section 2(H), of course, is not merely
17 to enforce section 2 to the fullest possible extent at
18 the -- at the risk of civil fine, but to enforce Federal
19 immigration law, which is what they claim they are doing
20 in section 3 and in section 5.

21 And so -- so you're going to have a
22 situation of mass incarceration of people who are
23 unlawfully present. That is going to raise -- poses a
24 very serious risk of raising significant foreign
25 relations problems.

1 And these problems are real. That is the
2 problem of reciprocal treatment of
3 United States citizens in other countries.

4 JUSTICE KENNEDY: So you're saying the
5 government has a legitimate interest in not enforcing
6 its laws?

7 GENERAL VERRILLI: No. We have a legitimate
8 interest in enforcing the law, of course, but it needs
9 to be -- but these -- this Court has said over and over
10 again, has recognized that the -- the balance of
11 interest that has to be achieved in enforcing the -- the
12 immigration laws is exceedingly delicate and complex,
13 and it involves consideration of foreign relations. It
14 involves humanitarian concerns, and it also involves
15 public order and public safety.

16 JUSTICE SOTOMAYOR: General, when --
17 when -- I know in your brief, you had -- you said that
18 there are some illegal aliens who have a right to remain
19 here. And I'm just realizing that I don't really know
20 what happens when the Arizona police call the Federal
21 agency.

22 They give the Federal agency a name,
23 correct?

24 GENERAL VERRILLI: I assume so, yes.

25 JUSTICE SOTOMAYOR: You don't really have

1 knowledge of what --

2 GENERAL VERRILLI: Well, they -- I mean, it
3 can come in lots of different ways, but generally,
4 they'll get a name and some other identifying
5 information.

6 JUSTICE SOTOMAYOR: All right. And what
7 does the computer have? What information does your
8 system have?

9 GENERAL VERRILLI: Yes. So the way this
10 works is there's a system for -- for incoming inquiries.
11 And then there's a person at a computer terminal. And
12 that person searches a number of different databases.
13 There are eight or ten different databases. And that
14 person will check the name against this one, check the
15 name against that one, check the name against the other
16 one, to see if there are any hits.

17 JUSTICE SOTOMAYOR: Well, how does that
18 database tell you that someone is illegal as opposed to
19 a citizen?

20 Today, if you use the name Sonia Sotomayor,
21 they'd probably figure out I was a citizen. But let's
22 assume it's John Doe, who lives in Grand Rapids. So
23 they're legal. Is there a citizen database?

24 GENERAL VERRILLI: The citizen problem is
25 actually a significant problem. There isn't a citizen

1 database. If you --

2 JUSTICE SOTOMAYOR: I'm sorry, there is or
3 there isn't?

4 GENERAL VERRILLI: There is not. If you
5 have a passport, there's a database if you look
6 "passports." So you could be discovered that way. But
7 otherwise, there is no reliable way in the database to
8 verify that you are a citizen unless you're in the
9 passport database. So you have lots of circumstances in
10 which people who are citizens are going to come up no
11 match. There's no -- there's nothing suggesting in the
12 databases that they have an immigration problem of any
13 kind, but there's nothing to --

14 JUSTICE SOTOMAYOR: So if you run out of
15 your house without your driver's license or
16 identification and you walk into a park that's closed
17 and you're arrested, you -- they make the call to this
18 agency. You could sit there forever while they --

19 GENERAL VERRILLI: Yes, and I --

20 JUSTICE SOTOMAYOR: -- figure out if
21 you're --

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

24 Mr. Clement suggested that it takes 10
25 minutes to process these calls. That's true, but you're

1 in a queue for 60 minutes before it takes the 10 minutes
2 to process the call. So the average time is 70 minutes,
3 not 10 minutes.

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

7 Is the reason that the government is not
8 focused on people who are here illegally as opposed to
9 the other categories you were talking about because of
10 prioritization or because of lack of resources?

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

18 GENERAL VERRILLI: Well, it's a little more
19 complicated than that. I think the point is this, that
20 with respect to persons who are unlawfully present,
21 there are some who are going to fall in our priority
22 categories, there are those who have committed serious
23 offenses, there are those who have been removed and have
24 come back, and there are other priority categories.

25 Because we have resource constraints and

1 there are only so many beds in the detention centers and
2 only so many immigration judges, we want to focus on
3 those priority categories. Find them, remove them.

4 There's a second category, and that is
5 individuals who are here in violation, technically of
6 1306(a), but who have a valid asylum application or
7 application for temporary protected status or
8 other -- and with respect to those persons that we think
9 would -- it's affirmatively harmful to think that they
10 ought to be prosecuted.

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

18 JUSTICE SCALIA: Well, can't you avoid that
19 particular foreign relations problem by simply deporting
20 these people? Look, free them from the jails --

21 GENERAL VERRILLI: I really think --

22 JUSTICE SCALIA: And send them back to the
23 countries that are -- that are objecting.

24 GENERAL VERRILLI: This is a --

25 JUSTICE SCALIA: What's the problem with

1 that?

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

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

20 In addition, we have very significant issues
21 on the border with Mexico. And in fact, they're the
22 very issues that Arizona's complaining about in that --

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

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

3 JUSTICE SCALIA: It sounded like what you
4 were saying.

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

11 CHIEF JUSTICE ROBERTS: And your concern is
12 the problems that would arise in bilateral relations if
13 you remove all of these people, or a significant
14 percentage or a greater percentage than you are now.
15 Nothing in the law requires you to do that. All it does
16 is lets you know where -- that an illegal alien has been
17 arrested, and you can decide, we are not going to
18 initiate removal proceedings against that individual.

19 It doesn't require you to remove one more
20 person than you would like to remove under your
21 priorities.

22 GENERAL VERRILLI: Right, but the problem
23 I'm focused on -- we're focused on, Mr. Chief Justice,
24 is not our removal decisions, but Arizona's decision to
25 incarcerate, and the foreign relations problem that that

1 raises. That's why this power has got to be exercised
2 at the national level.

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

5 GENERAL VERRILLI: Correct.

6 CHIEF JUSTICE ROBERTS: But not 2.

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

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

13 CHIEF JUSTICE ROBERTS: Section 5.

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

21 Now, what my friend, Mr. Clement, says, is
22 that it may be a comprehensive regime for employers;
23 it's not a comprehensive regime for employees. And
24 therefore, it's -- there ought not be any inference here
25 that the States are precluded from criminalizing efforts

1 to seek or obtain employment in Arizona.

2 But I really think that's not right.

3 The -- employment is one problem. And Congress tackled
4 the problem of employment and made a decision, a
5 comprehensive decision, about the sanctions it thought
6 were appropriate to govern. And Congress did, as
7 Justice Ginsburg suggested, make judgments with respect
8 to the circumstances under which employees could be held
9 criminally liable, as well as the circumstances under
10 which employers could be held liable.

11 And I think it is useful in thinking about
12 the judgments Congress actually made --

13 JUSTICE SCALIA: You think field preemption;
14 is that your argument with respect to --

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

19 On the employer's side -- and, after all,
20 this is a situation in which the concern here is that
21 the employer is in a position of being the exploiter and
22 the alien of being the exploited -- on the employer's
23 side, Congress said that States may not impose criminal
24 sanctions, and even -- and the Federal Government will
25 not impose criminal sanctions for the hiring of

1 employees unless there's a pattern or practice.

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

9 So I think that's a significant problem.

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

17 So that I think there are strong indicators
18 in the text that Congress did make a judgment, and the
19 judgment was this far and no farther. And it's
20 reasonable that Congress would have done so, for the
21 same kinds of foreign relations concerns that I was
22 discussing with respect to section 3. It would be an
23 extraordinary thing to put someone in jail merely for
24 seeking work. And yet that's what Arizona proposes to
25 do under section 5 of its law.

1 Now, of course, there is an express
2 preemption provision, but the express preemption
3 provision, as this Court has said many times, does not
4 operate to the exclusion of implied preemption, field or
5 conflict.

6 So we do think those principles apply here.

7 We think there's a reason why the express
8 preemption provision was limited to the employer's side,
9 which is that after DeCanas laws had been enacted on the
10 employer's side, and with -- Congress was making clear
11 that those were preemptive, there were no laws on the
12 employee's side at the time.

13 And therefore, no reason for preemption.

14 CHIEF JUSTICE ROBERTS: Thank you, General.

15 GENERAL VERRILLI: Thank you, Mr. Chief
16 Justice.

17 CHIEF JUSTICE ROBERTS: Mr. Clement,
18 5 minutes.

19 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

20 ON BEHALF OF THE PETITIONERS

21 MR. CLEMENT: Thank you, Mr. Chief Justice,
22 and may it please the Court:

23 I'd like to start briefly with the
24 enforcement issues and then talk about the other
25 provisions.

1 The last thing I'll say about the
2 enforcement provision, since I do think that the
3 Government's rather unusual theory that something that's
4 okay when done ad hoc becomes preempted when it's
5 systematic, I think that theory largely refutes itself.

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

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

23 Now, the individual it turns out was wanted
24 for attempted murder in El Salvador and was also guilty
25 of illegal reentry into the United States. He was

1 stopped on three previous occasions, and his status was
2 not verified. Now, if it had been, he certainly would
3 have been apprehended. In at least two of the stops,
4 his immigration status wasn't checked because of a city
5 policy, City of Phoenix.

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

13 As to section 3, two points about that.

14 One is, I respectfully disagree with the
15 Solicitor General as to whether the various things that
16 he led off -- read off -- the litany of situations where
17 somebody is -- technically doesn't have registration
18 would be a violation of 1306(a).

19 And the reason I take that position is that
20 provision says "a willful failure to register." Now,
21 maybe the prosecutors take the view that there's
22 willfulness in those circumstances, but I don't think
23 many judges would. I think they would say that if
24 you've been told by the Federal Government that you're
25 perfectly fine here and you don't need to register, that

1 that would be good enough to defeat a finding of
2 willfulness.

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

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

15 MR. CLEMENT: Well --

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

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

24 JUSTICE SOTOMAYOR: No -- no
25 Confrontation -- no Confrontation Clause problem with

1 that? With relying on a call to a Federal agency and
2 the police officer says, you're arrested, you're
3 charged, it's not an illegal alien -- or it is an
4 illegal alien.

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

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

12 MR. CLEMENT: And they bring a prosecution
13 under section 3 --

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

17 MR. CLEMENT: I --

18 JUSTICE SOTOMAYOR: Who do they get it from?

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

24 What I would like to say is two things.
25 One, if there's some sloppiness in the way the Federal

1 Government keeps its records so that there's lots of
2 people that really should be registered but aren't, I
3 can't imagine that sloppiness has a preemptive effect.

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

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

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

21 CHIEF JUSTICE ROBERTS: Finish your
22 sentence.

23 MR. CLEMENT: -- before 1986, the Government
24 was not agnostic about unlawful employment by aliens.
25 The employees were already covered, and they were

1 subject to deportation. So the government said, we're
2 going to cover the employers for the first time. I
3 can't imagine why that would have preemptive effect.

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Clement, General Verrilli.

7 Well argued on both sides.

8 Thank you.

9 The case is submitted.

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

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A	<p>adopted 31:1</p> <p>adversary 34:15</p> <p>affirmatively 68:9</p> <p>afoul 32:8</p> <p>agency 4:18 15:20,20 41:23 41:25 42:3 45:9 54:12 64:21,22 66:18 77:8 78:1</p> <p>aggressive 69:4</p> <p>agnostic 79:24</p> <p>ago 20:9</p> <p>agree 24:6</p> <p>agreed 3:21</p> <p>agrees 36:8</p> <p>aid 34:5</p> <p>AL 1:3</p> <p>alien 7:14 9:19 10:3 15:21,21 17:24 18:15 23:14 29:3 30:1,3,17 45:6 45:10,16,21 57:16 67:12 70:16 72:22 78:3,4,11,16</p> <p>aliens 19:3 21:3 27:2 31:13 34:10 36:6 64:18 71:17 79:24</p> <p>Alito 18:5 19:1 20:4 31:10,11 31:12 32:10,14 32:17 33:1 37:10 42:24 43:13,20 44:3 52:14 53:8,18 57:24</p> <p>Alito's 22:7</p> <p>allegation 34:3 45:24</p> <p>allowed 12:2</p> <p>allows 11:18,23</p> <p>amateur 51:15</p>	<p>ameliorate 48:25 49:2</p> <p>amended 58:21</p> <p>Amendment 9:25 10:6 11:18,22,23 12:2,25 13:5,8 13:9 19:24 20:6 78:23</p> <p>analog 23:17</p> <p>analogous 28:24</p> <p>analogy 53:23 79:6</p> <p>analysis 31:4,5</p> <p>anomalous 22:16</p> <p>answer 8:6,22 9:9 17:25 18:1 34:14 41:25 42:3 45:2 48:16,22 49:19 55:4,6 67:5 77:18</p> <p>answerable 57:1</p> <p>answers 9:6 46:21</p> <p>anticipate 14:12</p> <p>antifraud 73:13</p> <p>anybody 35:15 51:21</p> <p>anyway 12:22 47:7 51:6 54:17</p> <p>apart 16:3 39:25</p> <p>appeal 30:3</p> <p>APPEARAN... 1:14</p> <p>appendix 22:12 46:19 75:20</p> <p>application 23:8 31:17 58:4,4 59:7 62:2,3 68:6,7 77:10</p> <p>applies 25:17</p> <p>apply 21:3 25:21 31:18,20 74:6</p> <p>appreciate 28:17</p>	<p>apprehend 50:6</p> <p>apprehended 76:3</p> <p>apprehension 36:5 55:19</p> <p>approach 3:25 25:4</p> <p>appropriate 72:6</p> <p>approval 79:9 79:11,14</p> <p>April 1:9</p> <p>area 25:16 52:3</p> <p>argued 80:7</p> <p>arguing 5:5,25 23:24</p> <p>argument 1:12 2:2,5,8 3:3,7 5:21 6:19 13:13 21:13 29:13,20 33:15 33:21 42:2 44:4 48:20,20 51:22,25 52:10 52:12 56:7,14 56:19 72:14,16 74:19 76:11</p> <p>arguments 48:11</p> <p>arises 71:3</p> <p>Arizona 1:3 3:4 3:11,13,24 7:16 8:12 15:2 20:21 22:5,15 22:17 23:8 25:2 30:24 34:7,11,16 35:3,3,14 36:3 36:4,7,9,20,22 37:1,7,17 39:23 40:8 41:19,22 43:1 43:1 44:5,6,8 46:2,6 49:19 50:9 61:1,13 61:17 62:15</p>	<p>63:9 64:20 68:16 69:5 72:1 73:24</p> <p>Arizona's 15:23 24:12 69:22 70:24</p> <p>arrest 5:9 8:10 8:15 12:17 14:14,17,18,22 14:23 18:3 20:7,7,12,23 20:25 21:1,23 22:6,17 45:12 52:23</p> <p>arrestable 22:19</p> <p>arrested 6:2 8:13 10:18,19 10:21 12:7 37:15 43:5 45:7 60:23 66:17 70:17 77:8 78:2</p> <p>arresting 41:22 53:4</p> <p>arrests 13:7,17 41:19 46:14 52:17</p> <p>ascertain 4:12 4:21 14:20</p> <p>aside 45:13 56:7</p> <p>asked 34:15 48:5</p> <p>asking 48:4,23</p> <p>aspect 35:11</p> <p>asserting 47:20</p> <p>assist 28:3</p> <p>assume 61:3,16 64:24 65:22 69:3</p> <p>assuming 6:22 54:14</p> <p>asylum 31:17 58:4 59:4 68:6 77:10</p> <p>as-applied 29:10</p> <p>attack 13:4</p> <p>attempted 3:14</p>
----------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

75:24 attention 44:14 attorney 10:3 38:17,23 39:14 51:12 55:12,14 58:23 59:14 attrition 34:8 39:21 authorities 9:11 12:16 55:8 76:10 78:20 authority 8:10 8:15 17:8,11 18:4 20:24,25 21:1,7 22:6,17 34:21,24 35:8 38:17 55:25 61:18 authorization 3:24 4:3 authorize 19:23 19:25 authorized 78:16 authorizing 13:23 auxiliary 30:1 average 10:15 19:8 67:2 avoid 59:6 68:18 a.m 1:13 3:2 80:10	51:18 60:4,5 banks 51:8,9 based 53:4 58:9 basic 25:3 basically 21:16 21:19 22:13 29:4 basis 6:16,17 8:24 13:11 20:2 29:9 30:23 43:17 45:21 59:13,18 69:9 bear 75:10 bearing 69:11 bears 3:11 beds 68:1 behalf 1:15,18 2:4,7,10 3:8 33:16 74:20 believe 7:20 20:14 45:3 belong 35:3,16 belongs 35:2 benefits 62:6 beyond 19:24 23:1 25:14 27:17 69:10 big 26:11 bilateral 70:12 bit 23:12 26:1 book 14:23 booked 15:4,11 booking 15:1,4 books 62:3 border 18:11 43:12 69:21 borders 16:16 17:1,20 34:18 35:6,24,25 36:16 borrowed 3:14 bother 49:20 Branch 49:6 Brett 75:20 Breyer 10:16 11:11,16,19,21	12:15 13:12,19 14:5,8 18:7 48:2 49:1 54:8 54:25 55:3 brief 33:23 61:11 62:19 64:17 briefly 74:23 bring 16:4 53:24 75:9 78:6,12 bringing 44:13 broad 20:23 broader 17:18 Buckman 29:1 79:6 burden 4:4 business 47:5	cases 14:13,22 14:22 24:19 28:23,25 29:1 29:1 31:6 38:10 42:9 53:24 69:16 categories 31:13 57:25 67:9,22 67:24 68:3 category 31:17 31:22 60:16 68:4,11,12 cause 5:9 20:13 20:14 53:4 67:13 causing 63:5 Center 9:12 10:15 46:21 centers 68:1 central 47:22 69:12 71:18 certain 31:24 certainly 12:16 19:24 23:10 42:11 47:14 62:1 76:2 challenge 14:11 29:10 42:14 78:21,22 change 8:9 56:12 changed 37:12 71:16 character 36:22 36:22 characterizati... 30:8 charged 78:3 check 6:3 15:15 18:16 19:19 49:22 50:6 65:14,14,15 checked 15:13 76:4 checks 15:3 Chief 3:3,9 22:23 28:13,16	31:11 33:12,17 33:19,25 36:10 37:11 39:7,25 40:15 41:1,6 41:13,17 42:8 42:13,16 49:8 49:10,17,18 50:10,24 54:3 54:6 56:11 57:8,11 62:12 67:4 70:11,23 71:3,6,13 74:14,15,17,21 79:21 80:5 chiefs 50:25 Circuit 3:20,23 circumstance 5:21 8:18 18:22 22:6 42:17 53:19 circumstances 10:10 24:11 28:24 52:5 66:9 72:8,9 76:22 citizen 10:21,25 18:10,18 19:12 65:19,21,23,24 65:25 66:8 citizens 12:8 35:10 47:12,24 64:3 66:10 city 76:4,5 civil 7:10 36:25 53:20 63:18 claim 13:9 58:8 58:9,11 63:19 79:6 clarity 58:1 class 32:1,16 37:7 Clause 35:19 77:25 clauses 15:24 clear 8:19 15:11 15:19 33:20 55:4 62:4
<hr/> B <hr/> B 1:17 2:6 33:15 back 16:4 18:6 18:17,21 43:10 48:3 53:11 67:24 68:22 69:5 backed 36:23 42:18 53:20 backing 9:25 backpack 10:23 backwards 4:1 balance 64:10 bank 51:14,15	<hr/> C <hr/> C 2:1 3:1 California 25:10 29:13,14 call 5:23,24 6:24 7:13,13 15:19 16:21 27:21 41:23 42:9 43:16 45:9,9 54:18,23 64:20 66:17 67:2 77:18 78:1,6 calling 47:8 calls 46:15 49:19 66:25 captures 22:18 care 43:14 58:23 carrier 29:15 carry 32:8,9 77:13 carrying 55:15 case 3:4 16:10 19:6,8 20:4 23:9,21 24:12 33:20 34:1,3 38:4 42:6 43:16 53:2,21 59:13 77:3 78:21 80:9,10			

73:10 74:10 78:8 clearly 25:21 Clement 1:15 2:3,9 3:6,7,9 4:24,25 5:10 5:17 6:10,20 7:3,18 8:4 9:5 9:21,23 10:8 11:9,14,17,20 12:14,24 13:2 13:6,14 14:4,6 14:9 15:25 16:18,24 17:3 17:15,22,25 18:20 19:5 20:18 22:1,10 23:10 24:17 25:6 26:4,10 27:24 28:16 29:6,21 30:6 31:19 32:13,15 32:21 33:2,13 34:4 45:8 48:5 58:16 66:24 71:21 74:17,19 74:21 77:15,20 78:5,12,17,19 79:23 80:6 clerks 53:23 close 17:1 closed 66:16 colleagues 45:3 collect 19:18 color 24:20 come 12:20 24:25 51:13 53:11,13 56:10 58:2 65:3 66:10 67:24 Commerce 35:18 commits 68:16 committed 8:11 22:2,4,19 37:8 40:9 53:5 67:22	communicate 4:11,20 communicated 77:21 communicating 75:16 communication 55:18 76:10 communicatio... 21:11 Communities 15:10,10 Community 76:9 competing 30:3 complaining 69:22 complement 29:25 complete 29:24 completely 20:17 27:7 complex 9:4,7 64:12 complicated 67:19 components 45:5 comprehensive 71:19,22,23 72:5 computer 65:7 65:11 concede 16:14 concern 13:10 29:9 47:24 52:3,4 70:11 71:18 72:20 concerned 47:6 61:24 concerning 35:1 concerns 61:18 61:21 64:14 73:21 conclusion 12:13 55:23 conditions 58:7	conduct 70:8 conflict 30:21 37:3 42:21 54:22 72:16 74:5 77:5 79:18 Confrontation 77:25,25 confronted 26:18 29:12 confused 45:1,1 Congress 23:25 24:14 26:11,18 27:1,5 29:24 30:17 35:20 38:6,13,14,15 55:24 71:16,16 72:3,6,12,18 72:23 73:3,10 73:13,18,20 74:10 consent 35:19 consequences 8:6 consider 26:16 considerable 25:3 consideration 36:4 64:13 consistent 7:9 Constitution 34:12,20 35:17 35:23 49:5 constitutional 48:14 constraints 67:25 contact 16:6 contains 55:10 context 56:2 continue 7:22 8:25 19:19 20:10 continuing 60:22 control 39:8 44:6 55:14	controls 24:9 cooperate 50:21 cooperating 44:14 50:3 cooperation 44:20 55:18,19 55:21 56:1,2,8 69:15,17 cooperative 62:9,14 correct 20:17,18 21:25 33:24 39:15 50:2 53:2,3,17 58:17 61:25 64:23 66:23 71:5 costs 3:12,13 Counsel 20:9,23 21:22 22:23 24:5 countries 35:10 47:25 64:3 68:23 69:6 country 32:11 32:22 35:2,3 37:21 41:10 47:14 49:25 51:5 52:5 58:3 58:6,7 60:14 62:16 69:11,17 70:8 County 15:6 couple 69:2 course 5:15 13:6 19:17 23:6 28:23 29:12 32:10 51:19,23 51:24 61:20 62:23 63:16 64:8 74:1 court 1:1,12 3:10 12:20 25:11 29:12,20 30:10,14,23 31:5 33:18 64:9 69:16	71:19 74:3,22 75:11 Court's 71:11 cover 80:2 covered 79:25 covers 77:3 create 37:3 crime 5:9 8:12 9:9 12:1 22:14 22:15,16,19,20 22:22 27:20 45:7 51:9 53:5 58:12,13 crimes 6:2 criminal 16:9 21:3 26:13 27:4 38:20,22 58:24 60:2,17 72:23,25 73:5 73:14 criminalize 59:23 criminalizes 60:8 criminalizing 60:1 71:25 criminally 72:9 criminals 36:7 51:4 critical 6:25 30:13 current 36:18 custody 8:21,22 56:14 cut 56:5 <hr/> D <hr/> D 1:15 2:3,9 3:1 3:7 74:19 database 65:18 65:23 66:1,5,7 66:9 databases 65:12 65:13 66:12 Davidowitz 24:9 day 12:1 21:24 36:25 60:22
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>days 12:8 33:3 41:15 60:21,23 deal 40:12 dealt 8:1 DeCanas 24:19 25:9,11 74:9 decide 16:3 40:11,16 70:17 decided 26:6,9 deciding 26:8,11 decision 26:14 31:6 38:15 40:20,20 49:24 50:13 59:22 70:8,24 71:17 72:4,5 75:11 decisions 37:19 39:3 50:5,8,9 70:24 declaration 46:19,22 75:19 declarations 50:24 declares 34:7 defeat 42:14 77:1 defend 35:6 defense 18:2 definition 20:21 22:8,11,13 delicate 64:12 deliver 57:4 deluge 79:13 demand 23:5 27:15 demanded 3:23 Department 1:18 62:20 deploy 40:12 deportable 8:17 deportation 80:1 deporting 68:19 deputize 55:12 described 71:19 describes 25:2 designed 34:9</p>	<p>desires 44:8 detain 5:25 6:13 7:15,22 8:25 15:21 19:23 20:10 45:15 48:17 detained 6:24 11:18 12:10 14:1 detainer 6:7 detention 11:5 13:23 14:14 38:25 55:19 68:1 detentions 15:16 determination 9:19 23:2 determine 24:11 52:24 determined 10:20 detriment 40:13 device 79:9,11 DHS 4:23 38:16 difference 23:12 26:11 30:14 53:18 different 6:8,9 6:10 13:13 23:11 30:24 36:14,18 39:4 52:1 56:4 60:10 65:3,12 65:13 difficult 21:13 dilemma 40:7 direct 23:17 36:8 direction 43:2 55:14 directly 22:17 31:7 disagree 76:14 discovered 66:6 discretion 5:22 7:2 37:24 39:13 59:10,15</p>	<p>discretionary 44:2 discussed 26:3 discussing 73:22 discussion 17:4 30:9 diseased 36:1 dispel 18:23 19:1,7 disproportion... 3:12 disregard 44:8 disruption 61:14,14 distinction 32:18 distinguishes 14:21 divides 6:12 doctrine 29:8 document 28:5 32:1,5,7,8 33:8 documents 27:19 Doe 65:22 doing 6:22,23 26:25 43:18 44:7,13,17 47:8 59:25 60:11 63:19 73:6 dominant 52:3 DONALD 1:17 2:6 33:15 double 29:2,7 draw 24:3 drawing 32:18 drive 34:10 60:25 drivers 19:3 driver's 10:25 18:11,23 19:20 66:15 drives 18:11 driving 41:20 50:13 drug 9:9 43:11</p>	<p>drunk 41:19 50:12 dual 29:7 duly 4:4 duplicative 29:18,18 duties 35:20 D.C 1:8,15,18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 34:14 50:4 75:11 easier 57:5 echo 75:7 economic 61:14 effect 3:20 14:12 21:9,18 26:14 37:24 79:3 80:3 effective 44:24 effectively 51:1 55:10 63:15 effects 21:12 63:11 70:8 effort 49:4,10,11 51:3 efforts 4:3,11 62:9,14 71:25 eight 65:13 either 9:12 13:24 32:4 67:12 EI 75:24 elevate 36:4 elongate 14:13 14:25 elongation 13:17 15:16 emergency 61:13 employed 28:7 37:9 employee 26:23 27:6 employees 24:3 26:2,9,12 44:7</p>	<p>71:23 72:8 73:1,5,14 79:25 employee's 27:11 28:2,9 28:11 74:12 employer 27:7 28:6 72:21 employers 71:22 72:10 80:2 employer's 24:1 25:20 27:9 28:3 72:19,22 73:4 74:8,10 employing 28:6 employment 23:3,6,22 26:8 41:16 71:17 72:1,3,4 79:19 79:24 enact 59:22 61:25 62:2 enacted 4:5 29:24 55:7 74:9 enforce 29:17 38:21 44:23 49:4,11,13 50:3 57:15 61:6 62:2,21 63:6,17,18 69:24 enforced 38:8 38:18 57:20 enforcement 3:15 4:3 9:12 10:15 25:1 34:6,8 36:8,11 36:14 37:14,24 38:25 39:21 40:10 42:25 43:15 44:12,15 46:21 49:7 56:1,3,13 59:9 59:15 69:4 74:24 75:2,7,9 76:11</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

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

<p>fraud 79:6 fraudulent 28:4 free 43:9 44:7 44:22 50:9 68:20 73:5,14 friend 58:16 71:21 full 20:22 24:13 fullest 63:17 function 24:10 60:17,18 functions 55:15 fundamental 3:22 37:4 39:17 47:25 71:15 fundamentally 71:16 further 4:18 19:9 future 30:20</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>g 3:1 55:16 gangs 43:11 geared 26:6 general 1:17 20:5 24:8 29:7 30:9 33:14,17 33:24 34:2,13 34:19 35:7 36:2,21 37:18 38:1,11,17,21 38:23,24 39:14 39:15 40:3,25 41:8,15 42:5 42:11,15 43:7 43:19,21,25 44:1,11,18 45:1,18,22 46:10,17 47:3 47:13,18,21 48:24 49:2,9 49:17 50:2,20 51:10,13,19,23 51:25 52:9,12 53:1,16 54:24</p>	<p>55:2,5,12,15 56:15,23 57:8 57:11 58:23,25 59:16,20 60:3 60:6,9 61:20 62:1,2,3,13,18 62:23 63:8 64:7,16,24 65:2,9,24 66:4 66:19,22 67:18 68:21,24 69:2 70:1,5,22 71:5 71:7,14 72:15 74:14,15 76:15 80:6 generally 10:11 12:18 14:19 24:2 28:22 65:3 General's 59:15 getting 79:11 Ginsburg 9:2,5 27:13,25 29:21 30:6 72:7 give 21:1,6 24:20 28:13 33:7 61:17 64:22 given 8:16 46:5 46:10 gives 34:24 giving 75:8 Glidewell 75:20 go 4:10 19:9 33:6 41:17 48:3 51:14,16 61:23 goes 4:17 39:5 going 7:1 9:10 10:4 11:17 13:16,17 14:20 14:25 16:1 18:17 21:3 24:3,9,25 25:4 25:6 38:18 39:23 40:11,12 40:16 41:2,3</p>	<p>41:20,23 43:16 45:14 48:9 50:12 51:16 59:3 62:12,15 63:3,5,6,9,14 63:21,23 66:10 67:21 69:5,7 70:17 71:8 77:6,9,17,20 78:22 80:2 good 22:24 25:13 54:6 76:9 77:1 good-bye 49:23 gotten 32:20 govern 23:3 72:6 governed 57:18 government 5:3 5:24 6:5,14 7:14 13:7 15:8 16:17,21 23:6 23:24 24:24 25:5,8 26:7 28:25 34:22 35:1,8,12,14 35:15 36:7,13 37:12,20 39:8 39:11 40:7,16 42:10 44:10,22 45:14 50:16,18 52:20 54:10,11 54:12,13 55:11 55:25 57:17 59:11 61:5 62:10,15 63:13 64:5 67:7 72:24 75:8,17 75:17 76:24 77:14 79:1,23 80:1 governments 67:13 government's 13:4 21:2,13 23:2 31:24 34:16 40:10</p>	<p>44:14 75:3 79:16 Grand 65:22 greater 23:9 70:14 ground 20:8 28:22 guilty 32:24 75:24</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 41:1,1 happen 5:14 7:20 8:19 12:4 19:13 60:24 77:6 happened 54:15 54:16,17 75:15 happens 7:12 8:5 10:24 14:16 21:1 54:17 64:20 harassing 47:5,7 harassment 45:23 47:1,22 56:19,20 hard 23:12 25:14 34:4 harder 57:5 harmful 68:9 hear 3:3 25:4,7 28:14 hearing 12:20 14:21 heart 39:5,18 41:4 57:21 held 6:2 9:19 72:8,10 help 38:3 63:5 helpful 42:21 Hines 24:8 25:12 29:23 30:9,14,16 45:23 47:18,21 56:21 hiring 72:25 Hispanic-look...</p>	<p>10:22 history 25:25 26:1,17 hits 65:16 hoc 6:16 7:6 20:1 75:4 hold 8:16,21 10:4,6 20:15 48:9 holding 30:11 Honor 9:23 20:19 34:20 35:7 36:3 37:19 38:2 40:3 43:8 46:18 70:1,2 80:4 hour 16:1 18:12 hours 12:8 53:12 house 66:15 human 58:10 humanitarian 64:14 hundred 54:1 hurdle 29:22 hypo 18:25 hypothesis 9:10 24:7 hypothetical 44:16 61:4,4,9 61:12 hypotheticals 17:12</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ICC 29:15 ICE 48:16 idea 26:2 68:13 identification 66:16 identified 36:9 47:21 identifies 71:7 identify 5:14 37:7 39:22 53:7 57:5</p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

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

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

<p>18:21 23:11 24:18 26:19 27:14 32:22,24 35:5 36:19 44:1 46:25 48:15 49:24 53:22 58:21 65:2 77:13 78:21 meaning 6:1 means 8:12 34:23,25 41:4 45:8 48:9 mentioned 20:11 merely 63:16 73:6,23 Mexicans 69:15 Mexico 10:25 18:10,10 19:20 69:12,14,21,24 migration 69:5 69:7 miles 16:1 18:12 18:13 million 46:6 mind 55:3 69:11 minute 71:12 minutes 10:12 10:14 12:7 66:25 67:1,1,2 67:3 74:18 misdemeanor 32:24 modest 23:14 moment 5:19 38:12 money 61:6,8 62:21 month 75:12 months 41:11,16 morning 3:4 34:4 move 18:5 19:19 52:15 56:16,22 multiple 4:9 27:6</p>	<p>murder 9:8 75:24 mutual 51:2</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 nail 12:19 name 19:17 64:22 65:4,14 65:15,15,20 narrow 20:25 32:1,15 narrower 5:5 nation 35:10 47:24 national 34:22 35:8,11,14 37:20,20 41:5 69:9 70:7,10 71:2,18 naturalization 34:24 nearly 62:21 necessary 35:21 79:11 need 4:2 33:5 43:11,11 53:2 76:25 needed 46:4 79:9 needs 7:25 41:5 59:10 63:12 64:8 69:9 70:9 neither 13:3,9 never 14:11 Nevertheless 45:25 new 8:15 10:25 18:10,10 19:20 37:14 Ninth 3:20,23 nonimmigrati... 52:18 normally 22:16 notification 41:18 notify 39:10</p>	<p>Notwithstandi... 3:17 number 12:6,9 14:13 15:1 65:12</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objecting 47:4 68:23 objection 40:2 objective 36:15 objectives 24:14 obligation 51:2 54:13 59:24 62:5 63:16 obligations 36:23 52:6 obstacle 24:12 30:2,12 obtain 31:14,14 55:13 72:1 obvious 4:8 obviously 15:17 15:25 18:21 23:13,19 24:19 29:8 occasions 76:1 occur 38:6 odd 26:7 42:2 offenders 75:14 offense 7:25 8:11,13,15,17 9:16,17 10:5 20:21 22:3,4,9 22:10 27:4 41:10 52:18 60:22 offenses 14:17 39:13 67:23 Office 20:9,22 officer 4:19 5:22 7:1,21 8:16,25 9:3,13 10:14 15:6 18:14,18 18:24 19:2,14 20:6,7,10 21:6</p>	<p>21:23 41:23 42:25 45:8 52:17 75:19 78:2 officers 4:20,21 21:10,20 43:17 44:20 75:15 official 20:1 37:1 42:19 officials 4:12,15 4:16 8:20 16:6 16:7 19:10 43:10 44:23 50:9 55:9,12 57:1 77:21 oh 9:21 10:24 11:19 12:2 49:22 okay 6:20 12:9 13:21 16:23 33:25 41:21 42:13 43:20 45:2 47:12 49:20,22 62:25 75:4 OLC 39:1 once 16:5 ones 37:13 open 27:16 operate 74:4 operates 5:11 operating 29:15 operation 31:8 opined 20:9 opinion 13:20 14:2 39:1 opportunity 28:17 opposed 65:18 67:8,17 oral 1:11 2:2,5 3:7 33:15 order 4:12 62:16 64:15 ordinarily 11:25 origin 69:6 original 7:24</p>	<p>ought 58:20 59:2 68:10 71:24 outcome 69:6 outset 33:21 outside 8:3 out-of-state 18:23 overnight 41:21 override 76:7 overriding 21:9 overstayed 21:24</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 PAGE 2:2 Palmatier 46:18 parallel 28:19 31:2 park 66:16 part 9:14 15:4 28:9 30:7 33:21 69:8 participating 15:12 particular 22:25 24:12 29:9 68:19 79:5 parties 4:4 6:12 passed 23:25 26:20 30:16,17 passport 66:5,9 passports 66:6 patience 71:11 pattern 73:1 PAUL 1:15 2:3 2:9 3:7 74:19 pays 37:22 peculiarity 22:21 Pedialyte 10:23 penalize 17:8 penalties 23:15 31:3 36:25 42:18 pending 31:16</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>58:3,4 Pennsylvania 30:16,19,21 people 12:6,9 15:3 16:16 17:1 21:1 22:18 31:15,25 36:9 37:7 40:19,21 44:13 47:5,10,12,14 52:22 57:25 58:17,22 60:12 60:13,16,19 61:1 63:2,22 66:10 67:8,16 68:12,20 69:13 69:18 70:13 73:7 79:2,10 79:14,15 percent 69:13 percentage 46:15 63:3 70:14,14 perfectly 76:25 77:22 perform 60:17 period 9:20 11:5 12:11 13:25 41:22 permissible 19:14 permit 21:23 person 7:2,22,25 8:13,16,21,21 9:3 10:18,19 10:20,24 11:25 14:1 16:8,9 17:21 18:14,17 20:7,8,15,16 27:18 34:18 37:15 41:24 42:10 45:6,12 45:15 48:17 49:15 50:11,17 52:18 53:7,10 54:16,17 56:14 59:1,6 65:11</p>	<p>65:12,14 70:20 77:8,19 78:15 persons 55:20 57:6 58:13 67:20 68:8 person's 10:20 20:16 persuasive 28:10 petition 22:11 Petitioners 1:4 1:16 2:4,10 3:8 74:20 Phoenix 50:25 75:16 76:5 phone 45:9 54:18 pick 45:9 place 52:25 53:3 79:17 please 3:10 33:18 40:5 56:22 69:24 74:22 plenty 28:14 point 3:24 4:2,5 5:13 7:20 8:7 13:15 19:13 20:12 26:21 27:5,8 33:2 35:25 37:4 38:3,4 40:5 60:25 66:23 67:19 71:15 75:11 points 70:6 76:13 police 5:22 35:24 50:25 57:21 64:20 78:2 policeman 48:16 54:18,23 policies 21:10,14 76:8 policing 76:9 policy 34:7 36:5</p>	<p>36:18 37:14 39:21 41:20 43:22 53:19 71:18 76:5,11 population 39:22 40:8,13 46:5 62:6 68:15 71:8 portray 34:5 poses 63:23 position 5:6 6:15 6:22 17:20 27:14 31:24 34:16,19,20 72:21 76:19 possibility 29:18 possible 36:15 37:3 44:24 63:17 possibly 41:18 53:12 potential 78:23 power 16:25 34:17 35:4 41:5 57:21 63:12 70:6,7,9 71:1 powers 55:8 61:18 practical 9:9 49:3 57:2 63:10 practice 12:3 73:1 precise 30:25 preclude 55:18 75:15 precluded 71:25 predict 30:20 preempt 4:4 preempted 3:19 6:17 25:11,13 48:11 59:19 75:4 79:12 preempting 4:6 27:11 37:25 38:7</p>	<p>preemption 21:13 23:18,21 25:16,19,21 26:5 27:10 28:11,23,24 30:2,3,10,12 30:23 38:5,11 38:13 47:23 48:19,20 53:24 59:13 72:13,16 74:2,2,4,8,13 79:18 preemptive 24:4 26:14 36:20 74:11 79:3 80:3 preempts 38:8 47:20 preliminary 3:18 premise 13:16 23:16 presence 60:12 present 17:21 34:10 36:6 41:10 46:12 47:14 55:20 56:20 60:14 61:1 63:23 67:20 69:18 President 49:6 presumably 5:20 8:14 9:14 20:6,10,16 presumption 25:16 pretty 18:22 23:13 54:6 previous 76:1 previously 52:22 53:10,13 pre-existing 20:21 price 37:22 primary 21:12 24:10 principal 24:10</p>	<p>principle 24:8 principles 3:22 29:7 74:6 priorities 36:12 36:14 37:12 40:14 42:20,22 43:9,14,15 44:9,21,22 50:22 51:3 52:19,22 56:1 56:13 62:24 63:2 68:13 70:21 75:8,10 76:11 prioritization 67:10 priority 21:2 43:15 53:7 57:6 67:21,24 68:3 prison 12:10 13:24 private 59:5 probable 5:8 20:13,14 53:4 probably 11:24 14:10 31:19 65:21 problem 12:23 12:23 13:1 26:19 37:19 39:18 40:23 42:16 43:12,23 44:19 45:23 47:22 48:15 49:3,4 50:7,7 56:20,25 59:24 61:25 63:11 64:2 65:24,25 66:12 68:17,19 68:25 69:8,9 70:22,25 72:3 72:4 73:9 77:25 problems 62:17 63:5,25 64:1 70:12</p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

proceedings 70:18	protective 58:5	41:11 45:13	14:21 19:25	76:25 77:23
process 6:8 15:2 15:4 50:3,3,5 66:25 67:2 68:14	proud 15:9	56:7	21:3,6 22:18	79:16
produces 18:22	provide 17:7 27:13 62:5	Q	26:17 28:2,19	registered 77:19 79:2
professional 51:14	provides 35:18	quarrel 24:22	31:4,25 39:5	registration 17:9 18:6
profiling 33:22 34:1,3 45:25 46:9	provision 4:5,18 17:10 25:19,21 27:10 28:11,19 34:6 36:24 48:18 55:8,16 60:25 74:2,3,8 75:2 76:20 79:19	question 6:19 9:10 10:17 11:22 17:18 22:7 27:16 28:18 30:2 31:21 34:14 36:11 37:11 42:1,3 48:4,5 49:19 53:18 55:6 56:5 57:24	51:13 64:19,25 68:21 72:2 75:10 79:2,7	29:23,24 30:2 30:4,4,17,22 30:22 31:14,15 32:1,5,7,8,12 32:19,20 33:8 38:14 52:2 57:15,22 59:23 76:17
program 15:10 15:11	provisions 3:21 4:9 7:8 9:25 16:10 18:2,4 30:21 31:1,20 34:9 37:6 45:13,20 54:23 74:25	queue 67:1	reason 4:7 7:22 14:15,24 17:23 18:1,14 30:7 45:12 46:3 50:11 59:25 63:12 67:7 69:8 74:7,13 76:19 77:12	57:15,22 59:23 76:17
prohibit 4:19 54:9	public 8:11 20:21 22:2,4,9 22:10 64:15,15	quick 27:24	reasonable 5:13 10:7,9 18:24 19:2,7 59:1 73:20	regulate 27:22 28:2
prohibited 29:14	pull 75:12	quite 26:1 30:24 51:11 52:1 57:25 60:9 63:9 73:2	reasons 56:6 57:7	regulated 27:22
prohibition 26:13	pulled 7:25 75:20	R	rebuttal 2:8 27:25 28:14 74:19	regulates 27:15
prohibitions 27:7	punish 26:9	R 3:1	reciprocal 64:2	regulating 28:3 28:9
prohibits 23:6	punished 26:6	racial 33:22 34:3 45:25 46:8 47:1	recognize 42:7 79:20	regulation 27:16 43:23
proposes 5:3 73:24	punishing 26:2	raise 48:14 63:23	recognized 64:10	regulations 30:1 59:5
prosecute 29:5 37:8 39:2,9,13 39:23 40:21 41:3 60:19,20 67:16	punishment 29:18	raised 26:2 29:16 57:24	recognizes 35:23	rejected 26:3 29:20
prosecuted 29:3 29:11 32:19 59:2 60:13 67:12 68:10 71:8	punishments 28:20	raises 68:17 71:1	record 10:10 15:5 46:18 50:25	relate 52:11
prosecuting 16:9 51:18	purporting 57:14 59:22	raising 63:24	records 18:16 78:15 79:1	relations 35:11 47:25 63:11,25 64:13 68:17,19 70:12,25 73:21
prosecution 29:19 31:23 33:9,10 77:14 78:7,12	purpose 73:12	range 11:24	reduced 23:24	relationship 23:4 37:5 57:16,17,22
prosecutors 76:21	purposes 7:23 8:5 16:5 24:13	rapidly 12:18	reentry 75:25	relatively 12:17 20:25 23:14
protect 36:15	pursue 42:19	Rapids 65:22	referring 18:8	release 7:2 12:17,18 14:18 14:19,22 19:14
protected 68:7	pursuing 34:7 36:5	reach 28:11	reflected 15:5	released 8:7,23 10:21 12:1 15:21 45:16
	push 55:1	reached 20:11	refutes 75:5	releasing 7:17
	put 6:6 11:2 50:24 60:20 73:23	read 5:4,5 20:20 37:2 55:17,23 76:16	regard 31:12 50:24	relevant 30:8
	puts 40:7	real 24:21 63:10 64:1	regime 71:20,22 71:23	reliable 66:7
	putting 8:2	realistic 69:3	register 32:23 33:3,7 76:20	relief 58:8,10,11
		realizing 64:19		rely 28:25
		really 4:7 7:4		

<p>relying 47:2 78:1 remain 64:18 remarkable 26:15 removability 23:13 removable 9:3 9:15,16 10:5 20:8,15,24 21:25 22:1,21 27:18 39:12 removal 26:25 40:12 52:19 55:20 57:6 69:19 70:18,24 remove 6:6 34:17 36:8 41:3 52:24 68:3 69:13,14 70:13,19,20 removed 31:16 51:4 52:22 53:11,14 58:6 58:6 67:12,23 removing 16:8 16:17 69:18 replies 48:12 Reports 54:1 represent 11:3,4 11:8,9,10,12 11:15 representation 12:5 15:19 require 59:5 70:19 requirement 17:10 18:6 28:21 52:3 57:15 requirements 28:20 73:13 requires 4:15 70:15 requiring 13:23 resident 18:10 residents 61:14</p>	<p>resource 67:25 resources 3:15 36:8 40:11,17 61:6,8 67:10 67:15 77:9 respect 3:21 6:11 7:3,17 17:12,15 18:3 23:7 35:18 39:16 44:12 52:4 56:18,18 56:23 67:20 68:8 72:7,14 73:22 respectfully 76:14 respond 4:16 44:21,22 54:13 Respondent 1:19 2:7 33:16 response 17:4 78:10 responses 27:24 responsible 49:7 responsive 13:15 43:9 rest 37:2 restrict 4:19 54:10 restrictions 24:2 73:4 rests 39:14 result 42:17 46:1 57:3 62:4 retaliation 59:6 right 5:10 9:7 11:11 13:19 14:3 16:12,16 17:1 18:17 31:4 33:1 39:25 41:18 47:12 48:7,9 49:15,16 50:21 64:18 65:6 70:22 72:2 rights 7:10 rigorously 38:8</p>	<p>rises 5:8 risk 63:18,24 rob 51:9 robber 51:15 robbers 51:14 51:18 robbing 51:8 ROBERTS 3:3 22:23 28:13 31:11 33:12,19 33:25 36:10 39:7,25 40:15 41:6,13,17 42:8,13 49:8 49:10,18 50:10 54:3,6 57:8 62:12 67:4 70:11 71:3,6 71:13 74:14,17 79:21 80:5 role 69:12 rolled 53:25 54:4 roughly 10:14 routine 15:7 75:21 rules 35:1 run 15:3 32:8 46:20 66:14</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 safety 64:15 Salvador 75:24 sanction 23:14 sanctions 23:3,7 23:9,11 26:8 72:5,24,25 73:14 sanctuary 21:17 save 27:25 saw 33:23 43:1 saying 21:5 26:13 40:18 42:5 44:5 48:8 58:17 59:18 64:4 69:25</p>	<p>70:2,4,5 says 4:18 7:5,8 10:19 15:20 21:19 27:10 31:6 35:21 39:2,9,19 41:25 45:8,15 54:9,11,12 55:10,16 60:15 63:1 71:21 76:20 78:2 79:7 Scalia 12:22,25 13:2,4 16:14 16:19,20,25 17:3 34:23 35:13 37:23 38:4,19 46:8 46:24 47:4,16 47:19 51:6,12 51:21,24 52:1 58:20 59:12,17 59:21 60:1,4,7 61:10 62:18,25 68:18,22,25 69:23 70:3 72:13,17 Scalia's 17:17 34:14 scheme 29:24,25 30:4 31:7,8 51:17 schemes 30:4 school 16:2 scot-free 27:7 searches 65:12 second 18:21 28:8 68:4,12 79:4 Secretary 38:16 section 7:4,5,7 8:9 9:22 11:7 13:22 14:12 17:7 18:2 20:20 21:23 22:25 23:15 24:25 28:15,18</p>	<p>31:18 36:24 37:2,5,6,8,9 38:2,12,16 39:6,9,17,19 39:22,24,24 40:1,1,2,24 41:6,7 42:7,18 42:19 51:2 52:13 57:9,14 57:14 58:19 59:10 60:13 63:16,17,20,20 68:16,16 71:10 71:12,13,15 73:22,25 76:13 78:13 79:5 sections 22:24 38:14 39:20 56:17 69:4 Secure 15:9,10 see 6:25 30:1 39:9 40:23 45:6 47:8 56:9 62:11 65:16 seek 26:24 72:1 79:8 seeking 3:18 4:4 27:19 36:3 73:6,15,24 selling 56:9 send 68:22 sentence 8:14 22:20 48:6,13 48:21 79:22 serious 51:4 53:5 63:24 67:22 75:14 served 8:14 22:20 serves 79:12 service 56:2 set 35:1 36:14 38:14 42:20 44:21 55:25 62:23 sets 55:8 SG 25:10,13</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

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

<p>42:24,25 48:13 61:2,3 supposed 39:20 79:17 supposition 78:5 Supreme 1:1,12 sure 5:17 11:14 11:14 15:18 26:4 32:13 67:5 surely 47:6 surprised 11:12 surprisingly 30:18 suspected 45:6 suspicion 5:13 18:24 19:2,7 system 15:6 38:14 57:4 65:8,10 systematic 6:17 7:5 56:8 75:5 systematically 15:3 S.B 34:5 37:2 46:2 51:1</p> <hr/> <p style="text-align: center;">T</p> <p>T 2:1,1 table 40:1,4 tackled 72:3 take 7:6 8:22 12:8,8 17:12 17:19 18:6,18 18:24 21:4 23:16 25:7 40:1,4,11 56:13 58:23 76:19,21 takes 6:14 9:18 10:12 12:7 66:24 67:1 talk 22:24 23:5 74:24 talking 8:5 10:13 32:16 41:9 46:11</p>	<p>47:10 52:2,7 67:9 77:6 targets 23:22 tax 71:11 technical 58:13 technically 68:5 76:17 tell 5:2 16:12 25:13 49:14 52:18 65:18 telling 15:22 21:20 tells 45:11 temporary 58:5 68:7 ten 65:13 tens 45:25 tension 25:3 tensions 67:13 terminal 65:11 terms 7:19 29:4 30:11 57:18,19 terribly 45:1 Terry 19:14 20:12 test 24:15,18,21 24:22 text 73:18 Thank 28:16 33:12 57:11 74:14,15,21 80:4,5,8 thanks 49:22 theoretical 17:19 theory 75:3,5 they'd 65:21 thing 19:22 21:8 25:22 28:8 35:24 50:23 57:13 60:8 73:23 75:1,6 79:4 things 5:15 11:25 14:25 23:20 25:8 28:2 43:1</p>	<p>61:16 69:2 76:15 78:24 think 5:4,21 6:12,14 7:4,5 8:8,18 9:6,9,21 9:23,24 10:1,9 10:17,24 12:5 12:14 13:15 14:4,6,9,10,14 14:25 15:14 17:14,17,22,25 18:1 19:8,22 20:18,22 21:5 22:2,4,5 24:17 24:23 25:7 26:7,16 27:12 28:10,18 29:6 29:22 30:7,13 31:4,16,16,19 36:21 37:4,18 38:1,2,2,11 39:5,17 40:6,6 41:4 42:8,15 42:16 44:18 45:22 48:3,4,6 48:8,11,24 50:20,21 51:1 51:9,10,11 53:16,16,18,22 55:6,22,22 56:1,5,16,19 56:19,24 57:2 57:13,23,23,25 59:1,9,17,20 59:24 60:9 62:7 63:8 66:23 67:19 68:8,9,13,15 68:21 69:3,10 69:16 71:14 72:2,11,13,15 72:17 73:2,6,9 73:17 74:6,7 75:2,5 76:11 76:22,23 77:3 78:19,20 79:5 79:19</p>	<p>thinking 26:19 72:11 79:5 thinks 18:14 79:12 third 57:2 thought 5:20 46:3 47:1 62:19 72:5 thousands 46:1 three 45:22 56:6 56:16 57:7 76:1 threw 37:13 time 5:7 9:20 10:7 11:6 12:11 13:25 20:13 22:24 27:25 28:14 43:4 67:2 71:9 74:12 80:2 times 74:3 Today 65:20 told 27:1 31:12 33:7 76:24 77:22 tomorrow 37:12 tort 79:7,8,10 traffic 53:9 75:21 trafficking 58:11 training 55:13 transfer 8:21 treatment 58:9 64:2 treats 35:10 47:24 trick 28:5 true 13:18 39:17 66:25 try 4:10 5:13 19:19 32:22 33:3 56:9 60:18 78:22 trying 10:17 35:14 44:6,23 45:3 48:3</p>	<p>54:19 55:1 57:9 77:9 Tucson 50:25 turn 75:14 turning 5:2 turns 75:23 two 9:6 27:24 31:20 45:5 54:22 61:3,4 61:16 76:3,13 78:24 types 23:2</p> <hr/> <p style="text-align: center;">U</p> <p>Ultimately 10:8 unconsciously 26:8 understand 5:6 6:1,18 21:6 31:23 32:3,17 32:18 37:5 40:6 44:4 48:14 52:21 55:5 67:14 understood 17:5 35:9 uniform 3:16 United 1:1,6,12 3:4,17 4:6 57:16 64:3 75:25 unlawful 26:22 26:23,24 27:2 60:12 79:24 unlawfully 34:10 36:6 41:10 46:7,12 55:20 58:3 60:14 61:1 63:23 67:20 69:18 unnecessarily 8:10 unusual 6:15 18:22 22:3 75:3 un-preemptive</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>37:17 use 27:19 40:12 40:16 53:23 60:16 65:20 78:6 useful 72:11 U.S 54:1 U.S.C 21:16 62:4</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5 3:4 24:8 29:13 valiantly 57:9 valid 58:8,9,11 68:6 various 76:15 verified 20:17 37:16 76:2 verify 66:8 Verrilli 1:17 2:6 20:5 33:14,15 33:17,24 34:2 34:19 35:7 36:2,21 37:18 38:1,11,24 39:15 40:3,25 41:8,15 42:5 42:11,15 43:7 43:19,21 44:1 44:11,18 45:18 45:22 46:10,17 47:3,13,18,21 48:24 49:2,9 49:17 50:2,20 51:10,19,23,25 52:9,12 53:1 53:16 54:24 55:2,5 56:15 56:23 57:11 58:25 59:16,20 60:3,6,9 61:20 62:1,13,23 63:8 64:7,24 65:2,9,24 66:4 66:19,22 67:18 68:21,24 69:2</p>	<p>70:1,5,22 71:5 71:7,14 72:15 74:15 80:6 versus 44:2 vest 38:16 vested 35:8 59:10 63:12 vests 34:12,21 victim 58:10,12 view 5:3 28:8 48:19 76:21 vigorously 38:9 violated 17:9 violates 13:5 violating 29:4 violation 31:3 32:4 33:4 40:19 43:6 53:9 58:13,16 58:18,19,19,22 59:23 60:21 68:5 73:12 76:18 79:8 violations 49:12 Violence 58:8 virtue 38:6 visa 21:24 visitor's 21:24 vital 35:10 69:18 volume 57:4 volumes 54:1</p> <hr/> <p style="text-align: center;">W</p> <p>walk 66:16 want 6:21 7:15 8:9,20 11:8,9 11:10,13 12:3 13:14,15 14:19 15:18,20 16:4 27:22 30:3,4 36:17,17 37:14 37:16,16 38:7 40:21 45:15 49:14,25 50:19 50:21 51:14 52:23 53:10 67:15 68:2</p>	<p>71:11 75:18 76:8,9 78:8 79:17 wanted 73:13 75:23 wants 6:5 warrant 6:6 Washington 1:8 1:15,18 wasn't 46:3 67:5 76:4 77:19 water 10:23 way 4:10,19 5:4 5:5 7:9 35:9 43:1 47:24 48:4 51:2 57:19 60:19 61:7 65:9 66:6 66:7 78:25 79:15 ways 65:3 weak 23:21 Wednesday 1:9 weeks 9:18 10:4 weigh 23:12 went 25:14 weren't 30:18 30:19 47:1 We'll 3:3 28:13 we're 8:4 10:13 24:9 34:2 42:5 43:16 45:14 51:15,15 61:24 63:5,6,7 70:23 72:15 77:9,16 77:17,20 80:1 we've 25:12 34:24 38:5 55:17 Whiting 24:20 31:5 54:4 wholly 16:3 30:5 willful 32:6 76:20 willfulness 76:22 77:2 wish 61:7,7</p>	<p>witness 58:12 Women 58:8 wonder 10:21 word 25:8 words 36:18 work 11:1 18:15 18:21 23:8 26:24,24 27:2 27:19 34:9 39:20 44:9,10 69:19 73:6,15 73:24 76:12 working 24:7 34:4 works 65:10 world 26:22 27:5 worried 28:4 41:14 worst 75:18,18 worth 69:11 72:17 wouldn't 19:6 31:19 33:10 43:7 54:16 61:19 73:15 78:7 write 49:20 58:24 wrong 6:23 39:6 41:19,21 44:5 45:17 51:7 56:8</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:2,7 12:1</p> <hr/> <p style="text-align: center;">Y</p> <p>year 46:23 69:14 years 20:9 53:25</p> <hr/> <p style="text-align: center;">Z</p> <p>zone 16:2 18:12 Zook 29:13</p> <hr/> <p style="text-align: center;">\$</p> <p>\$5000 36:25</p>	<hr/> <p style="text-align: center;">1</p> <hr/> <p>1 39:19 10 10:12,14 18:13 53:25 55:16 66:24 67:1,3 10:07 1:13 3:2 1070 34:5 37:2 46:2 11 10:12,14 12:7 11-182 1:4 3:4 11:27 80:10 1103 38:16 1301 38:15 57:18 1304 31:23 32:4 1306 31:23 32:4 32:9 38:15 57:18 1306(a) 58:14,16 58:18,20 60:11 60:21 68:6 76:18 77:3 1357 55:7,7 1357(g) 55:10 1373 54:9 55:6 55:23 1373(a) 4:17 21:16 1373(c) 4:14 1621 62:4 1644 21:16 183 75:20 186 75:20 1971 26:20 1986 23:25 26:20 27:8 71:15,17,19 72:18 79:23 1996 55:7</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 7:7 9:18 10:4 12:8,8 37:2,5,6 39:17,20,22 40:2 46:6 52:11,15 56:18</p>
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<p>2(B) 5:2 7:4,5 11:7 12:12 13:16,22,24 14:1,12 17:5 18:4 21:6,12 21:18 39:9 40:24 42:18 45:5,14 48:6 50:10 51:2 56:6 2(H) 36:24 42:19 63:16 68:16 20 50:12 20-mile 18:12 20-mile-an-ho... 16:2 2002 39:1 2009 46:23 2012 1:9 25 1:9 287(g) 9:12 10:14 15:6</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 15:23 17:7 18:2 28:15,18 29:4 31:18 37:8 38:2,12 39:6,20,24 40:1,4,5 41:6 45:12 52:8,13 56:17 57:9,14 57:14 58:19 59:10 60:13 63:20 68:17 69:4 71:4,8 73:22 76:13 78:13 79:5 30 33:3 41:15 60:20,23 33 2:7</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>400,000 46:6</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 37:9 39:20,24</p>	<p>40:1,4,5 41:7 56:17 63:20 69:4 71:4,8,10 71:12,13,15 73:25 74:18 5(C) 22:25 23:15 23:16,20</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 8:9 9:22 15:22 15:23 17:6 18:4 20:20 21:23 41:11,16 45:12 60 16:1 18:12 50:12 67:1 69:13</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>70 67:2 69:13 74 2:10</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 21:16 62:4 80,000 46:23</p>			
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