Center for Immigration Studies

Memorandum

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S.B. 1070 Goes Before the Supreme Court

A Summary of the Oral Argument

By Jon Feere

Four provisions of Arizona's S.B. 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act", went before the Supreme Court in *Arizona v. United States,* nearly two years after the Obama administration filed a lawsuit to stop the law from being enforced. Eight justices heard the case, Justice Elena Kagan having recused herself. While it is difficult to predict how the Supreme Court will decide the case, the proceedings suggest that the Court will uphold at least some of the contested provisions.

At issue are four provisions of S.B. 1070. They are:

Section 2(B): Requires Arizona law enforcement to make a reasonable attempt, when practicable, to determine a person's immigration status during a "lawful stop, detention, or arrest" if there is a reasonable suspicion "that the person is an alien and is unlawfully present in the United States."

Section 3: Makes "willful failure to complete or carry an alien registration document" a state crime.

Section 5(C): Makes it a misdemeanor for "a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place, or perform work as an employee or independent contractor in [Arizona]."

Section 6: Authorizes state and local officers to make arrests without warrant where there is probable cause to believe "the person to be arrested has committed any public offense that makes the person removable from the United States."

Arguing for Arizona was Paul Clement, a Georgetown University law professor who once served as the U.S. Solicitor General under President George W. Bush. Arguing for the Obama administration was current U.S. Solicitor General Donald Verrilli, Jr. A transcript and audio recording of the oral argument are available online at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf and http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=11-182.

At the outset, Mr. Clement argued that the Ninth Circuit was wrong to rule against Arizona and that it got to its decision "by inverting fundamental principles of federalism". Mr. Clement argued:

> "The Ninth Circuit, essentially, demanded that Arizona point to specific authorization in Federal statute for its approach. But that gets matters backwards. A State does not need to point to Federal authorization for its enforcement efforts. Rather, the burden is on the parties seeking to preempt a duly enacted State law to point to some provision in statutory law that does the preempting. Now, the United States can't really do that here, and the reason is obvious. There are multiple provisions of the Federal immigration law

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> that go out of their way to try to facilitate State and local efforts to communicate with Federal immigration officials, in order to ascertain the immigration status of individuals."

This strikes to the main debate over S.B. 1070. Under the Supremacy Clause, where state and federal law are in conflict it is the federal law that reigns supreme. Has Arizona passed a law that conflicts with federal law or does S.B. 1070 complement federal law? Arizona argues that the provisions at issue mirror federal law, should help federal immigration officials in carrying out their responsibilities, and therefore are not preempted. The Obama administration argues that its own priorities as to how it wants to enforce (or not enforce) immigration laws should preempt a state's effort to pass parallel legislation, even if the legislation appears consistent with federal law. Put another way, the Obama administration is arguing that in a preemption argument, the Supreme Court should focus on the political priorities of the White House rather than on the intent of Congress. The administration seems to be asking the Court to depart from standard preemption analysis and get involved in the ever-changing political considerations of the executive branch.

The Racial Angle. Much to the chagrin of the open-border crowd, the Justice Department did not include in its briefs an argument against S.B. 1070 based on racial profiling. It seems even the Obama administration knew it would be a losing argument. Interestingly, before General Verrilli could say anything other than, "Mr. Chief Justice, and may it please the Court", he was immediately asked a question by Chief Justice John Roberts:

> CHIEF JUSTICE ROBERTS: "Before you get into what the case is about, I'd like to clear up at the outset what it's not about. No part of your argument has to do with racial or ethnic profiling, does it? I saw none of that in your brief."
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> GENERAL VERRILLI: "That's correct, Mr. Chief Justice."
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> CHIEF JUSTICE ROBERTS: "Okay. So this is not a case about ethnic profiling."
>
> GENERAL VERRILLI: "We're not making any allegation about racial or ethnic profiling in the case."

At two different points Justice Scalia and Justice Sotomayor also were quick to steer the Solicitor General away from arguments that focused on racial profiling and harassment.

The Four Provisions

The four provisions at issue are arranged below in order of the amount of time they were discussed during the proceeding, from most to least. Significant portions of the transcript are quoted directly while summaries are provided where appropriate.

Section 2(B)

The Supreme Court spent a large amount of time on Section 2(B), which requires Arizona law enforcement to make a reasonable attempt, when practicable, to determine a person's immigration status during a "lawful stop, detention, or arrest" if there is a reasonable suspicion "that the person is an alien and is unlawfully present in the United States." During oral argument, the discussion often moved to the larger issues of state sovereignty and federal inaction, and the justices seemed to recognize that Arizona has a legitimate concern about lax federal enforcement and illegal immigration, generally. It is likely that Section 2(B) will be upheld, but that the Court will couch its opinion in a Fourth Amendment analysis, holding that the length of stops conducted under Arizona's law must conform to existing constitutional standards.

Justice Sotomayor raised an interesting question about how aliens should be treated if Arizona attempts to refer an illegal alien over to federal officials, and those officials refuse to take him in. She asked of Mr. Clement:

> JUSTICE SOTOMAYOR: "What happens if — this is the following call — the call to the — to the federal government: 'Yes, he's an illegal alien. No, we don't want to detain him.' What does the law say, the Arizona law say, with respect to releasing that individual?"

Anyone who has followed the politics of immigration knows the answer to this inquiry. Even where 287(g) and Secure Communities programs are set up, ICE may decide against picking up an illegal alien detained by local law enforcement. The local authorities have no choice but to release the alien back out onto the streets with the hope that he does not go on to commit a serious crime. It seems from his response that Mr. Clement is aware of this phenomenon:

> MR. CLEMENT: "Well, I don't know that [S.B. 1070] speaks to it in specific terms, but here's what I believe would happen, which is to say, at that point, then, the officer would ask themselves whether there's any reason to continue to detain the person for state law purposes. I mean, it could be that the original offense that the person was pulled over needs to be dealt with or something like that. … But if what we're talking about is simply what happens then, for purposes of the federal immigration consequences, the answer is nothing. The individual, at that point, is released."

In some jurisdictions, local law enforcement will not bother to contact ICE in some instances because they know ICE will not pick up the illegal alien. It is a serious problem. But with S.B. 1070, officers may attempt to turn a larger number of aliens over to ICE, which will put the Obama administration on record as having refused to pick up a significant number of people. If any of the individuals they refuse to pick up go on to commit serious crimes, the political fallout could be significant. It seems the White House wants to avoid this altogether.

The issue did go to the larger picture of whether states have a right to secure borders and what steps they can take to secure them. Early in the argument, Justice Scalia raised the issue with Mr. Clement:

> JUSTICE SCALIA: "You'll concede that the — that the state has to accept within its borders all people who have no right to be there, that the federal government has no interest in removing?"
>
> MR. CLEMENT: "No, I don't accept that, Justice Scalia, but —"
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> JUSTICE SCALIA: "That's all the statute — and you call up the federal government, and the federal — yes, he's an illegal immigrant, but that's okay with us."
>
> MR. CLEMENT: "Well —"
>
> JUSTICE SCALIA: "And the state has no power to close its borders to people who have no right to be there?"

Mr. Clement did not address this issue directly, likely because it was not a central issue before the Court, but attempted to link it to Section 3 of S.B. 1070, discussed below, which allows Arizona to arrest an alien not carrying registration documents. But Justice Kennedy was interested in Justice Scalia's question and raised it again:

> JUSTICE KENNEDY: "I think Justice Scalia's question was the — was the broader one, just as a theoretical matter. Can we say — or can — do you take the position that a state must accept, within its borders, a person who is illegally present under federal law?"

Mr. Clement answered, "No", but again attempted to focus on the more narrow issue of Section 3. It is clear that the issue of state sovereignty is on the minds of at least some justices, and of particular interest is the fact that Justice Kennedy, often the swing vote in difficult cases, seemed concerned that states find themselves unable to cope with mass illegal immigration. This bodes well for Arizona, and it suggests that the Court's decision may include language

that criticizes the Obama administration (and previous administrations) for failing to adequately secure borders and placing states in such a difficult position.

Later, Justice Sotomayor asked Solicitor General Verrilli the same question:

> JUSTICE SOTOMAYOR: "General, could you answer Justice Scalia's earlier question to your adversary? He asked whether it would be the government's position that Arizona doesn't have the power to exclude or remove — to exclude from its borders a person who's here illegally."
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> GENERAL VERRILLI: "That is our position, Your Honor. It is our position because the Constitution vests exclusive authority over immigration matters with the national government."

Justice Scalia pushed the Solicitor General on this point:

> JUSTICE SCALIA: "Well, all that means — it gives authority over naturalization, which we've expanded to immigration. But all that means is that the government can set forth the rules concerning who belongs in this country. But if, in fact, somebody who does not belong in this country is in Arizona, Arizona has — has no power? What — what does sovereignty mean if it does not include the ability to defend your borders?"

General Verrilli couched his response in a constitutional argument about foreign relations, an issue he turned to on a number of occasions throughout his argument, while Justice Scalia pushed the issue further:

> GENERAL VERRILLI: "Your Honor, the Framers vested in the national government the authority over immigration because they understood that the way this nation treats citizens of other countries is a vital aspect of our foreign relations. The national government, and not an individual state —"
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> JUSTICE SCALIA: "But it's still up to the national government. Arizona is not trying to kick out anybody that the federal government has not already said do not belong here. And — the Constitution provides — even — even with respect to the Commerce Clause — 'No state shall without the consent of Congress lay any imposts or duties on imports or exports except,' it says, 'what may be absolutely necessary for executing its inspection laws.' The Constitution recognizes that there is such a thing as state borders, and the states can police their borders, even to the point of inspecting incoming shipments to exclude diseased material."
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> GENERAL VERRILLI: "But they cannot do what Arizona is seeking to do here, Your Honor, which is to elevate one consideration above all others. Arizona is pursuing a policy that maximizes the apprehension of unlawfully present aliens so they can be jailed as criminals in Arizona, unless the federal government agrees to direct its enforcement resources to remove the people that Arizona has identified."

Chief Justice Roberts then brought up the issue of federal enforcement priorities in the context of a preemption argument. He seemed to suggest that preempting a state law based on executive branch priorities is unworkable:

> CHIEF JUSTICE ROBERTS: "Well, let's say that the government had a different set of enforcement priorities, and their objective was to protect, to the maximum extent possible, the borders. And so anyone who is here illegally, they want to know about, and they want to do something about, in other words, different than the current policy. Does that mean, in that situation, the Arizona law would not be preemptive?"

This is a significant point, and it is why the Court generally bases its preemption analysis on the intent of Congress. Priorities may shift from one administration to the next, and may even shift from month to month in any given administration. If the Supreme Court were to rule that state laws are preempted based on existing political priorities of a president's administration, then a new ruling might be justified every time the president issues a new set of priorities.

The Solicitor General gave an unresponsive answer, prompting Justice Alito to rephrase the question:

> JUSTICE ALITO: "Well, I have the same question as the Chief Justice. Suppose that the federal government changed its priorities tomorrow, and it said — they threw out the ones they have now. And they said the new policy is maximum enforcement, we want to know about every person who's stopped or arrested, we want to — we want their immigration status verified. Would the Arizona law then be un-preempted?"
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> GENERAL VERRILLI: "No, I think it's still a problem, Your Honor. These decisions have to be made at the national level because it's the national government and not — it's the whole country and not an individual state that pays the price —"
>
> JUSTICE SCALIA: "Do you have any example where — where enforcement discretion has the effect of preempting state action?"

General Verrilli was unable to come up with a case, and his response did not appear to allay the Court's concerns. Justice Scalia immediately asked again, getting to the crux of both the legal and political issue in this case:

> JUSTICE SCALIA: "I'm talking another case of ours where we've said that, essentially, the preemption of state law can occur, not by virtue of the Congress preempting, but because the executive doesn't want this law enforced so — so rigorously, and that preempts the state from enforcing it vigorously. Do we have any cases?"

General Verrilli again could not come up with a case and instead argued that Congress vested the Attorney General with the authority to make judgments about how the federal law is enforced. Justice Scalia was not persuaded, responding, "Well, they do that with all federal criminal statutes."

Chief Justice Roberts then suggested that Section 2(B) did not impact the federal government's priorities:

> CHIEF JUSTICE ROBERTS: "Well, but you say that the federal government has to have control over who to prosecute, but I don't see how section 2(B) says anything about that at all. All it does is notify the federal government, here's someone who is here illegally, here's someone who is removable. The discretion to prosecute for federal immigration offenses rests entirely with the Attorney General."

General Verrilli then effectively argued that the Court could not look at the individual provisions of S.B. 1070 because they "work together to achieve this policy of attrition through enforcement." He noted that Sections 3 and 5 allow for an alien to be prosecuted. Chief Justice Roberts asked whether the government had no objection to Section 2. General Verrilli affirmed that the government was still opposed to Section 2 and then argued that S.B. 1070 puts the federal government in a "dilemma". He argued:

> GENERAL VERRILLI: "Arizona has got this population, and they've — and they're, by law, committed to maximum enforcement. And so the federal government's got to decide, are we going to take our resources, which we deploy for removal, and are we going to use them to deal with this population, even if it is to the detriment of our priorities —"

Chief Justice Roberts responded:

> CHIEF JUSTICE ROBERTS: "Exactly. You — the federal government has to decide where it's going to use its resources. And what the state is saying, here are people who are here in violation of federal law, you make the decision. And if your decision is you don't want to prosecute those people, fine, that's entirely up to you. That's why I don't see the problem with section 2(B)."

A lengthy back and forth followed in which General Verrilli seemed to admit that Section 2 was not in conflict with federal law, after being asked whether a state can call the federal government and inquire about the legal status of an arrested individual. General Verrilli stated, "Well, we're not saying the state can't ask it in any individual case." Chief Justice Roberts asked, "So doesn't that defeat the facial challenge to the act?" General Verrilli instinctively responded in the negative, but did not back it up with a response significant enough to stop Justices Alito and Kennedy from pushing forward with more inquiries. Justice Alito told General Verrilli that he couldn't understand his argument and Justice Kennedy had to reiterate the hypothetical in an effort to get General Verrilli to focus on the issue of Section 2 and whether states have a right to require their law enforcement to inquire about immigration status. Eventually, Justice Sotomayor stepped in and attempted to get the Solicitor General back on track:

> JUSTICE SOTOMAYOR: "I'm sorry. I'm a little confused. General, I'm terribly confused by your answer. Okay? And — and I don't know that you're focusing in on what I believe my colleagues are trying to get to."

Justice Sotomayor reframed the issue and asked General Verrilli again to explain what is wrong with state law enforcement calling a federal agency and inquiring about the legal status of someone the police have already legally stopped. General Verrilli argued that there are three problems, and turned to the first on his list, the "problem of harassment". (He would raise the two other arguments later after being reminded to do so by Justice Sotomayor, but the Court did not appear interested.) He continued:

> GENERAL VERRILLI: "Now, we are not making an allegation of racial profiling; nevertheless, there are already tens of thousands of stops that result in inquiries in Arizona, even in the absence of S.B. 1070. It stands to reason that the legislature thought that that wasn't sufficient and there needed to be more. And given that you have a population in Arizona of two million Latinos, of whom only 400,000 at most are there unlawfully —"

Justice Scalia interrupted, clearly disturbed that the Solicitor General was turning to an argument the Court thought it had cast aside from the outset:

> JUSTICE SCALIA: "Sounds like racial profiling to me."

Justice Sotomayor inquired about statistics and Justice Scalia pressed again on the relevance of the discussion:

> JUSTICE SCALIA: "What does this have to do with federal immigration law? I mean, it may have to do with racial harassment, but I thought you weren't relying on that. … Are you objecting to harassing the — the people who have no business being here? Is that — surely you're not concerned about harassing them. They've been stopped anyway, and all you're doing is calling up to see if they are illegal immigrants or not. So you must be talking about other people who have nothing to do with — with our immigration laws. Okay? Citizens and — and other people, right?"

General Verrilli responded, "And other — and other people lawfully present in the country, certainly, but this is —"

Justice Scalia jumped in again to question the relevance of such a discussion: "But that has nothing to do with the immigration law … which is what you're asserting preempts all of this activity."

General Verrilli then asserted that the 1941 case *Hines v. Davidowitz* (discussed below) identified harassment as a "central feature of preemption" because the way in which "this nation treats citizens of foreign countries is fundamental to our foreign relations." His point, it seems, is that a state's effort on immigration could upset relations between the federal government and foreign countries. Of course, this does not answer the question about why it would be unconstitutional for a state to inquire about the legal status of a person state officials have arrested.

Justice Breyer stepped in and tried to return General Verrilli to the text of Section 2(B) once again. Justice Breyer asked whether Section 2(B) would be acceptable if it were enforced within the confines of the Constitution where a police officer does not "detain the person for longer than he would have done in the absence of [Section 2(B)]." Justice Breyer seemed to be supporting the notion that a police officer inquiring about legal status would not be a problem on its own, and would only become a problem if the person were detained beyond constitutional limits of the Fourth Amendment, an issue posed to Mr. Clement, and explored in greater detail below.

General Verrilli responded that it would "ameliorate the practical problem", but then argued that it did not matter because Section 2(B) was still "an effort to enforce federal law".

Chief Justice Roberts did not seem to like General Verrilli's response. The exchange that followed seems to back up the interpretation that the White House does not want to be bothered with inquires from states, regardless of the constitutionality of such inquires:

> CHIEF JUSTICE ROBERTS: "It is not an effort to enforce federal law. It is an effort to let you know about violations of federal law. Whether or not to enforce them is still entirely up to you. If you don't want to do this, you just tell the person at LESC … 'Look, when somebody from Arizona calls, answer their question, and don't even bother to write it down. Okay? I stopped somebody else, is he legal or illegal, let me check — it's, oh, he's illegal. Okay. Thanks. Good-bye.' I mean, why — it is still your decision. And, if you don't want to know who is in this country illegally, you don't have to."
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> GENERAL VERRILLI: "That's correct. But the process of — the process of cooperating to enforce the federal immigration law starts earlier. And it starts with the process of making the decisions about who to — who to stop, who to apprehend, who to check on. And the problem — the structural problem we have is that those decisions — in the making of those decisions, Arizona officials are not free —"
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> CHIEF JUSTICE ROBERTS: "Under 2(B), the person is already stopped for some other reason. He's stopped for going 60 in a 20. He's stopped for drunk driving. So that decision to stop the individual has nothing to do with immigration law at all. All that has to do with immigration law is the — whether or not they can ask the federal government to find out if this person is illegal or not and then leave it up to you. It seems to me that the federal government just doesn't want to know who is here illegally or not."

General Verrilli responded, "I don't think that's right" and raised the Obama administration's priorities, namely a focus on "serious criminals". He seemed to suggest that local officers should abide by the administration's priorities and not report the average illegal alien engaged in so-called non-serious crimes.

Justice Alito asked the question again, but this time in the context of aliens who had been previously removed, noting that such aliens are priorities of the Obama administration. Justice Alito asked how Arizona would be able to tell that an alien stopped for a non-immigration offense was one of these priority aliens without making an inquiry to the federal government. General Verrilli did not provide an answer and instead argued that a mandatory policy requiring an inquiry in all cases is different from an individual case. He used an analogy in his answer, to which Chief Justice Roberts had a humorous retort:

> GENERAL VERRILLI: "I mean, I think it's as though, if I can use an analogy, if you ask one of your law clerks to bring you the most important preemption cases from the last 10 years, and they rolled in the last, the last hundred volumes of the U.S. Reports and said, well, they are in there. That — that doesn't make it —"
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> CHIEF JUSTICE ROBERTS: "What if they just rolled in *Whiting*?"
>
> (Laughter.)

> CHIEF JUSTICE ROBERTS: "That's a pretty good one."

It is unclear whether General Verrilli laughed at Chief Justice Roberts's reference to last year's Supreme Court case in which the Court upheld Arizona's E-Verify law.

Justice Breyer shifted the focus to federal statute 8 U.S.C. § 1373 which (1) prohibits restrictions on the ability of state and local governments to inquire to the federal government about the legal status of individuals, and (2) requires the federal government to respond to such inquires. On its face, the statute would appear to require the Court to uphold Arizona's Section 2(B).

General Verrilli argued, however, that § 1373 should be read along with § 1357, which created what is known as the 287(g) program, which allows state and local officers to assist federal authorities in carrying out immigration responsibilities after training. Though it is unclear, General Verrilli seems to have been trying to make the argument that the provisions in § 1373 ought to apply only to state and local officers trained under 287(g). This is an argument that those opposing state involvement have made in the past. The Court did not discuss this further as Justice Sotomayor pushed General Verrilli to move on to his other points. Justice Sotomayor's analysis of the Solicitor General's argument resulted in a small amount of laughter in the Court:

> JUSTICE SOTOMAYOR: "Can I get to a different question? I think even I or someone else cut you off when you said there were three reasons why 2(B) — Putting aside your argument that this — that a systematic cooperation is wrong — you can see it's not selling very well. Why don't you try to come up with something else? Because I, frankly — as the Chief has said to you, it's not that it's forcing you to change your enforcement priorities. You don't have to take the person into custody. So what's left of your argument?"

General Verrilli eventually responded:

> GENERAL VERRILLI: "With respect to — in addition, we do think that there is a structural accountability problem, in that they are enforcing federal law, but not answerable to the federal officials. And third, we do think there are practical impediments, in that the — the result of this is to deliver to the federal system a volume of inquiries that makes it harder and not easier to identify who the priority persons are for removal. So those are the three reasons."

None of the justices responded. Chief Justice Roberts then asked the Solicitor General to move on to his concerns about Section 3.

Length of Stops. Some justices seemed concerned about Fourth Amendment issues, namely whether Section 2(B) would result in people being stopped for a lengthy period of time that would result in a constitutional violation. Mr. Clement was asked to address this aspect of 2(B) more than any other. Justice Sotomayor asked of Mr. Clement:

> JUSTICE SOTOMAYOR: "What I see as critical is the issue of how long, and under — and when is the officer going to exercise discretion to release the person?"

The concern raised by Justice Sotomayor, and by the Department of Justice, is that although stops are permitted under the Constitution on an ad hoc basis, S.B. 1070 might result in longer and unconstitutional inquiries since the inquires would become systematic. Mr. Clement responded:

> MR. CLEMENT: "... I don't think Section 2(B) says that the systematic inquiry has to take any longer than the ad hoc inquiry. And, indeed, Section 2 — in one of its provisions — specifically says that it has to be implemented in a way that's consistent with federal, both immigration law and civil rights law."

Justice Kennedy inquired about how long it would take for Arizona law enforcement to receive a response from DHS regarding a person's legal status, his concern being that if it took "two weeks" it might violate Fourth Amendment

protections. Mr. Clement reiterated that basic constitutional protections would still apply and that a reasonableness inquiry would apply. Mr. Clement also pointed out that an immigration status inquiry "takes 10 or 11 minutes".

In using a hypothetical, Justice Breyer asked Mr. Clement whether Section 2(B) would result in an individual arrested for a small offense staying in jail for a longer period of time than he or she otherwise would have as a result of law enforcement having to wait for a response on the individual's legal status. Mr. Clement argued, once again, that the individual is "not going to be detained any longer than the Fourth Amendment allows." Justice Breyer responded that the length of detention protected under the Fourth Amendment varies, but what he really wanted to know is whether Section 2(B) would, in practice, result in "a significant number of people" being detained "for a significantly longer period of time than in the absence of 2(B)." Mr. Clement began to argue that Section 2(B) should not result in a significant change, but was interrupted by Justice Scalia who questioned whether the Court should be bothering with a Fourth Amendment analysis:

> JUSTICE SCALIA: "Anyway, if this is a problem, is it an immigration law problem?"
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> MR. CLEMENT: "It —"
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> JUSTICE SCALIA: "Or is it a Fourth Amendment problem?"
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> MR. CLEMENT: "Justice Scalia, it is neither —"
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> JUSTICE SCALIA: "Is the government's attack on this that it violates the Fourth Amendment?"
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> MR. CLEMENT: "No, of course, the federal government, that also has a lot of immigration arrests that are subject to the Fourth Amendment, is not making a Fourth Amendment claim here. And it's neither an immigration law concern or something that should be the basis for striking down a statute on its face."

Justices Breyer and Alito inquired about the Fourth Amendment again, and Mr. Clement reiterated that 2(B) "doesn't give the officer an authority he didn't otherwise have." He noted that the one thing the provision does provide is a means for the state to overcome local sanctuary policies, which prevent officers from inquiring about legal status and communicating with federal officials.

Section 5(C)

This section garnered a significant amount of discussion involving earlier rulings, legislative history, and the 1986 Immigration Reform and Control Act (IRCA) which, among other things, extended an amnesty to illegal aliens and made it a crime for an employer to knowingly hire illegal aliens. It is likely that of all provisions at issue before the court, Section 5(C) may be the most unpredictable. If Arizona does win, the margin will likely be slim as the justices appear somewhat fractured on the issue.

A seemingly skeptical Chief Justice Roberts opened up a discussion over Section 5(C) — which makes it a misdemeanor for "a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place, or perform work as an employee or independent contractor in [Arizona]" — saying that it "does seem to expand beyond the federal government's determination about the types of sanctions that should govern the employment relationship." Chief Justice Roberts noted that federal law prohibits employment of illegal aliens, but that Arizona is "imposing some significantly greater sanctions."

Mr. Clement noted that Section 5(C) does not have a parallel in federal law, but argued that such a situation is "not enough to get you to preemption, obviously." He argued that simply because Congress only focused on the employers' side of the equation in IRCA, and did not necessarily focus on the employee, it is not enough for the

Court to "draw a preemptive inference".

Justice Kennedy brought up the Supreme Court case, *Hines v. Davidowitz* (1941) which held that "where the federal government, in the exercise of its superior authority in [the field of immigration], has enacted a complete scheme of regulation and has therein provided a standard … states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." That same Court also held that the Supreme Court's "primary function is to determine whether, under the circumstances of [a particular case, a state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Justice Kennedy asked Mr. Clement whether it would be acceptable for the Supreme Court to use this same test in analyzing Arizona's S.B. 1070.

Mr. Clement said that while *Hines* provided an "acceptable test", the ruling has been since shaped by the Supreme Court decisions *De Canas v. Bica* (1976) and *Chamber of Commerce v. Whiting* (2011). He also argued that the Court should not simply take the government on its word that a state statute is preempted, and that the Court should act with a presumption against preemption:

> MR. CLEMENT: "You know, it's interesting, in *De Canas* itself, the [Solicitor General] said that that California statute was preempted. And, in *De Canas*, this Court didn't say, well, you know, we've got this language from *Hines*, and we have the [Solicitor General] tell us it's preempted, that's good enough for us. They went beyond that, and they looked hard. And what they did is they established that this is an area where the presumption against preemption applies. So, that seems one strike in our favor. We have here a situation where there is an express preemption provision, and it — it only addresses the employer's side of the ledger. So the express preemption provision clearly doesn't apply here. So the only thing they have is this inference …"

In *De Canas*, the Court held that "[O]nly a demonstration that complete ouster of state power — including state power to promulgate laws not in conflict with federal laws — was the clear and manifest purpose of Congress would justify" a state law being preempted. The Court also refused to block "harmonious state regulation touching on aliens" where the law is harmonious with federal law. The *De Canas* Court also held that while the "power to regulate immigration is unquestionably exclusively a federal power", it noted that the Court has never held that "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted." That Court also held that a state regulation should not be preempted in the absence of "persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

In *Whiting*, the Court held that "[i]mplied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" The Court held that its own precedents establish that a "high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal act."

These two rulings make it difficult for the Obama administration to be successful in its attack on S.B. 1070, and these rulings will be applicable to all provisions at issue. The government is unable to show express preemption and therefore relies on implied preemption. Yet the Court requires a high threshold be met and just last term (in *Whiting*) noted an unwillingness to engage in a freewheeling judicial inquiry.

After these decisions were noted, Justice Sotomayor told Mr. Clement that she felt legislative history has some importance, pointing out that Congress did raise the issue of punishing employees (rather than just employers) and that the idea was rejected. Mr. Clement cautioned Justice Sotomayor against using Congress's decision to not punish employees as justification for preempting Arizona from punishing employees. He noted that for the Court to apply preemption in such a manner would be "a rather remarkable additional step". His point seems to be that simply because Congress decided against prohibiting something, it does not necessarily follow that Congress therefore

opposed states from prohibiting that same thing.

Mr. Clement also argued that the legislative history actually supports Arizona. He explained that when Congress came up with the prohibitions against employers hiring illegal aliens in IRCA, Congress had already been thinking about the problem since 1971. He argued that Congress was told that most of the aliens working illegally were already subject to a penalty for illegal entry and that therefore some focus on the employer was also warranted. He argued that the more one looks at IRCA the more it becomes clear that the express preemption provisions apply to the employer and should not operate to prohibit state laws on the employee.

In response, General Verrilli argued that it was Congress's intent to craft IRCA in such a way so as to focus on the employer, rather than the employee when it comes to criminal liability. He noted that Congress prohibited states from imposing criminal sanctions against employers and that even the federal government will not impose criminal sanctions against employers for hiring illegal aliens unless there is "a pattern or practice". General Verrilli argued that these facts make it "quite incongruent to think that Congress" would have left the states free to impose criminal liability on employees.

General Verrilli also argued that Congress prohibited the use of I-9 forms for any other purpose than "prosecutions for violations of the federal antifraud requirements". He argued: "[I]f Congress wanted to leave states free to impose criminal sanctions on employees for seeking work, they wouldn't have done that, it seems to me."

In his rebuttal, Mr. Clement argued that before IRCA, the federal government "was not agnostic" about illegal aliens seeking work in that they were already subject to deportation. Mr. Clement noted that IRCA was an effort to "cover employers for the first time" and argued that he could not imagine why that would have a preemptive effect.

Section 3

S.B. 1070's Section 3 makes "willful failure to complete or carry an alien registration document" a state crime. Mr. Clement argued that the provision "is parallel to the federal requirements, and imposes the same punishments as the federal requirement" and that it is "generally not a fertile ground for preemption". Whether or not the Court will uphold this provision is difficult to predict, but it should be noted that Justice Kennedy — often a swing vote — seemed to recognize that states are facing serious problems as a result of lax federal enforcement of immigration laws.

Justice Kennedy also raised a concern about double prosecutions and asked whether an alien could be prosecuted by the state and by the federal government for not carrying his documents. Mr. Clement argued that the alien could rightfully be prosecuted by both governments and noted that the Supreme Court rejected an argument opposing similar double prosecution in *California v. Zook* (1949).

Justice Ginsburg again raised the analysis in *Hines*, discussed above, and said it was Arizona's "largest hurdle" in that the Court held there that, as paraphrased by Justice Ginsburg, the states "cannot complement or impose even auxiliary regulations". Justice Ginsburg seems to read the holding as preventing any state regulations, even those that are complementary. She did not read the entire quote, which arguably applies only where states are operating "inconsistently with the purpose of Congress".

Mr. Clement responded by noting a "critical difference" between what the Court had before it in *Hines* and what is currently before the Court. He noted that in *Hines* the state regulation (where Pennsylvania required aliens to register with the state) was passed before the federal requirement that aliens register and carry their documents at all times. When the federal requirement became law, the Court struck down the state requirement because of a conflict. In the case with Arizona, Mr. Clement argued that the state had the federal statute before it and therefore "adopted those standards as its own" and then "imposed parallel penalties for the violation of the state equivalent." Mr. Clement argued that the "right analysis" is what the Court laid out in *Whiting* and that the Court should look

for whether the state scheme "directly interferes with the operation of the federal scheme."

Justice Alito raised a concern about how Section 3 would apply to certain aliens who cannot obtain federal registration, but are generally not removable, and gave the example of aliens seeking asylum. Mr. Clement explained that Section 3 "probably wouldn't apply" because S.B. 1070 requires that Arizona only enforce Section 3 if the alien is in violation of federal statutes requiring registration and carrying of registration documents, 8 U.S.C. §§ 1306(a) and 1304(e).

When it was the Solicitor General's turn to argue against Section 3 the focus was largely on the ability of a state to determine whether a person has violated the law, and the impact Section 3 would have on foreign relations.

General Verrilli started by arguing that the requirement that aliens carry their documents at all times is "exclusively a federal relationship" between "the alien and the United States". He argued that there is "no state police power interest in that federal registration relationship."

General Verrilli reiterated Justice Alito's concerns about illegal aliens who have pending asylum cases who would not be capable of carrying documents since none were ever issued. He also raised the examples of aliens with pending TPS applications, aliens with a valid claim for relief as a victim of human trafficking, and aliens with a valid claim for relief as a victim or witness to a crime. General Verrilli pointed out that in each instance the alien would be in violation of the federal requirement, and therefore would be violating Arizona's Section 3. He seems to have been suggesting that this would be the case even if the federal government opted against prosecuting the alien for the violation based on the alien's pending application. Justice Scalia responded that perhaps the statute should be amended. General Verrilli responded that currently state law enforcement would have no way of knowing that the alien had a pending application because it is often kept private. Of course, General Verrilli did not mention the fact that pending applications are not necessarily going to be approved.

Justice Scalia asked whether General Verrilli could point to a case where a state statute was preempted because of interference with the Attorney General's enforcement discretion, calling it an "extraordinary basis" for preemption. General Verrilli did not come up with one. Justice Scalia then suggested that this statute was, again, just a matter of a state criminalizing the same thing that the federal government criminalizes. General Verrilli disagreed and argued that Arizona would use Section 3 to "perform an immigration function". He pointed out that under federal law, the document requirement is a continuing offense. He argued that Arizona could jail an alien for 30 days for violating the state version, and then — because the federal offense is ongoing — the state could jail the alien for another 30 days "over and over again". This is an interesting point and may raise some red flags for certain members of the Court.

The discussion then turned to the larger issue of whether Arizona has a legitimate and legally supported interest in reducing the illegal alien population. Justice Kennedy pushed two "hypothetical instances", which suggest that he may sympathize with Arizona. Justice Kennedy asked whether Arizona would have the authority to change its laws to address "a massive emergency with social disruption, economic disruption, residents leaving the state because of flood of immigrants" where the federal government does not have "the money or the resources to enforce our immigration laws" to the extent that federal officials may wish. General Verrilli responded that Arizona would have "legitimate concerns in that situation", but argued that the state could only "engage in cooperative efforts with the federal government" and gave the example of 8 U.S.C. § 1621, which allows states to deny certain benefits to illegal aliens in some circumstances.

Justice Scalia pointed out that General Verrilli admitted in his brief that the federal government does not have the resources necessary to enforce immigration laws. Justice Scalia again pushed General Verrilli on why a state should not help the federal government with enforcing federal law. General Verrilli then turned back to the issue of foreign

relations, arguing that Arizona is attempting to engage in "mass incarceration" that would pose a "very serious risk of raising significant foreign relation problems" and raise the issue of "reciprocal treatment of the United States citizens in other countries". This prompted Justice Kennedy to ask, "So you're saying the government has a legitimate interest in not enforcing its laws?" General Verrilli responded that the federal government does have a legitimate interest in enforcing the law, but that it needed to be balanced against a number of factors such as foreign relations and humanitarian concerns.

The foreign relations argument did not seem to persuade Justice Scalia, who asked:

> JUSTICE SCALIA: "Well, can't you avoid that particular foreign relations problem by simply deporting these people? Look, free them from the jails and send them back to the countries that are objecting."

General Verrilli responded that S.B. 1070 is not going to result in "mass migration back to countries of origin" but more likely migration to other states. He also argued that, "Mexico is in a central role in this situation." This resulted in a back-and-forth between him and Justice Scalia:

> GENERAL VERRILLI: "Between 60 and 70 percent of the people that we remove every year, we remove to Mexico. And, in addition, we have to have the cooperation of the Mexicans. And I think, as the Court knows from other cases, the cooperation of the country to whom we are — to which we are removing people who are unlawfully present is vital to be able to make removal work. In addition, we have very significant issues on the border with Mexico. And, in fact, they are the very issues that Arizona is complaining about, in that —"
>
> JUSTICE SCALIA: "So we — we have to — we have to enforce our laws in a manner that will please Mexico? Is that what you're saying?"
>
> GENERAL VERRILLI: "No, Your Honor, but what it does — no, Your Honor, I'm not saying that."
>
> JUSTICE SCALIA: "It sounded like what you were saying."
>
> GENERAL VERRILLI: "No, but what I am saying is that this points up why the Framers made this power an exclusive national power. It's because the entire country feels the effects of a decision — conduct by an individual state. And that's why the — the power needs to be exercised at the national level and not the state level."

Chief Justice Roberts reiterated that Section 2(B) would not require the Obama administration to increase removals. General Verrilli responded that it was Arizona's decision to incarcerate under Section 3 that might raise foreign relations problems. Chief Justice Roberts responded, "But not 2." General Verrilli seemed to concede that Section 2 did not upset foreign relations.

Justice Sotomayor led General Verrilli to a different topic, asking him how the federal databases operate to determine an individual's legal status. She asked whether there is a "citizen database" and General Verrilli explained that there is not, with the exception of the passport database. Justice Sotomayor then raised a hypothetical of a citizen running out of his house without a driver's license and walking into a park that is closed and getting arrested. She said because of the databases, a person "could sit there forever" while the federal agency determines legal status. General Verrilli argued that Mr. Clement was incorrect when he claimed it takes 10 minutes to process an inquiry. General Verrilli argued that there is an hour-long queue, concluding "So the average time is 70 minutes, not 10 minutes."

Section 6

Section 6 authorizes arrests without warrant where an officer has probable cause to believe "the person to be arrested has committed any public offense that makes the person removable from the United States". The Court spent very little time on this provision, likely because many of the concerns the justices may have had about this provision were answered during the argument over 2(B). Many of the same legal issues arise, and it is likely that if Section 2(B) is upheld by the Court, Section 6 will also be upheld, though perhaps by a smaller margin.

During oral arguments, Mr. Clement argued that Section 6 is necessary because, while under ordinary circumstances police have arrest authority where an individual violates state law, additional arrest authority is needed in the case of an illegal alien who has served his sentence for the underlying crime but who is "nonetheless removable because of the crime."

Justice Sotomayor asked Mr. Clement whether Section 6 permits a local law enforcement officer "to arrest an individual who has overstayed a visitor's visa by a day." Mr. Clement responded in the affirmative.

Conclusion

The Supreme Court is expected to release its decision late June. If any provisions result in a four-four split among the eight justices, the lower court's decision will be upheld and the injunction for the given provision will stand. Regardless of the outcome of *Arizona v. United States*, Congress could (and should) clarify its position on state authority over immigration matters and provide additional guidance to state legislatures currently drafting immigration-related legislation.