In the

Supreme Court of the United States

Leonor Alberti DeCanas and Miguel Canas,

Petitioners,

v.

Anthony G. Bica and Juan Silva,

Respondents.

No. 74-882

Washington, D. C.
December 16, 1975

Pages 1 thru 37

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

LEONOR ALBERTI DeCANAS and MIGUEL CANAS, Petitioners,	:	
v.	:	No. 74-882
ANTHONY G. BICA and JUAN SILVA, Respondents.	:	

Washington, D. C.

Tuesday, December 16, 1975

The above-entitled matter came on for argument at 10:08 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT S. CATZ, Esq., 1910 K Street, N.W., Room 300, Washington, D. C. 20006; for the Petitioners.

WILLIAM S. MARRS, Esq., 2855 Telegraph Avenue, Berkeley, California 94705; for the Respondents.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Robert S. Catz, Esq., On Behalf of the Petitioners	3
William S. Marrs, Esq., On Behalf of the Respondents	24

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in DeCanas and Canas against Bica and Silva.

Mr. Catz, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT S. CATZ, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The petitioners are here on writ of certiorari to the California Court of Appeals, Second Appellate District. This case raises the question of whether a state statutory scheme which prohibits domestic employers from employing aliens not entitled to lawful residence is unconstitutional under the doctrine of federal preemption.

In 1971 the California legislature encated Labor Code section 2805. This statute was enacted in recognition by the California legislature that increasing numbers of illegal aliens coming into California were imposing severe hardships on the state's economy. The statute provides in part--and the statute is reproduced in our brief, petitoners' brief, at page 3--that no employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

In addition to the above provision, 2805 imposes misdemeanor penalties on employers who utilize illegal labor and in addition create a private cause of action against employers who--which allows employees to go into the local superior court to enjoin an employer's use of illegal labor.

The facts in this case are that petitioners, domestic farm workers from California, were employed by respondents, far labor contractors, for approximately three months during the summer harvest season of 1972.

In September of 1972, respondents laid petitioners off on the grounds that respondents had a surplus of labor and thus had no work available for them. As a direct consequence of being laid off and believing that respondents were employing illegal labor, petitioners commenced this action in the local superior court in Santa Barbara, California, pursuant to Section 2805, alleging that respondents were open and notorious employers of illegal labor.

In fact, at one point in our complaint petitioners allege that during a four-month period in 1972 the United States Border Patrol visited the worksite of respondents and apprehended over 40 illegal aliens.

Among other things, petitioners sought their own job reinstatement, damages, and a permanent injunction against respondents willful and continued employment of illegal

aliens. After a full evidentiary hearing on a motion for preliminary injunction in which petitioner sought to present evidence of respondents' use of illegal labor, respondents filed a demur challenging the validity of Section 2805 on the ground that the statute was preempted by federal immigration law.

The trial court granted respondents' demur and declared Section 2805 unconstitutional on several grounds but specifically on the ground that the statute was preempted by federal immigration law. The petitioners subsequently appealed this ruling to the California Court of Appeals which affirmed, and the California Supreme Court denied petitioners' request for discretionary review. A petition for cert was sought to this Court and granted.

At issue here today is the constitutionality of a state statutory scheme fashioned to protect citizens and lawful resident workers from the unfair competition by the influx of illegal aliens into California. That the problem of illegal aliens as one of great public importance of course is not in dispute today. This Court took the opportunity to outline the scope of the problem last term in its series of U.S. border patrol cases.

In California the problem of illegal aliens is particularly acute because of California's close proximity to the Mexican border. Illegal aliens go virtually unchecked

producing drastic effects, particularly on low-income and minority residents who suffer substantial job displacement.

In addition, illegal aliens create a substantial wage drain into Mexico, adversly affecting the local economies.

Q The only question we have is whether this field has been preempted by federal legislation.

MR. CATZ: That is correct, Your Honor.

Q Was it clear from the decision of the California Court of Appeal that your clients would have been entitled to relief under the California statute had the Court of Appeal not found it to be preempted?

MR. CATZ: I think that if you look at the appendix, Your Honor, the Superior Court's opinion, he expresses the view that he had no doubt that we could have established the facts of the case.

Q Your are talking about the Superior Court rather than the Court of Appeal?

MR. CATZ: That is correct.

Q How about the Court of Appeal?

MR. CATZ: I do not think the Court of Appeals really addressed that because the case went up on a demur, and it was just considering the validity of the statute itself.

Thus, we submit that without a favorable

adjudication of the constitutionality of Section 2805, a continued employment of illegal aliens may render jobless thousands of lawful resident workers in California. In addition, domestic employers who, by long time business practice, intentionally seek out and rely on illegal labor will profit at the sake of the economy and will do so with total impunity.

It this time I think it might be helpful if petitioners outlined for the Court how the state statutory scheme operates and what obligations it imposes on domestic California employers.

In 1971 when the statute was enacted, it imposed the primary enforcement obligations of the statute on the California Labor Commissioner. Pursuant to Section 2805, the California Labor Commissioner promulgated a comprehensive set of regulations interpreting Section 2805. And the regulations are found at pages 1a through 3a of petitioners' reply brief.

First, the California Labor Commissioner defines an alien entitled to lawful residence as any non-United States citizen who possesses documentation issued by the Federal Government authorizing him or her to work. Thus when an applicant employee seeks employment, an employer has an express obligation to inquire whether the applicant be either a citizen or an alien. If the applicant employee

claims to be a citizen of the United States, he must sign a declaration to that effect under oath. If an applicant claims to be an alien, he must then display proper federal documents that are issued by the Department of Labor attesting to his employment certification. This must be done within three days of commencement of employment.

Employer liability then attaches when he fails to take the steps I have just described and later on an employee is found to be an unlawful resident alien.

Q Mr. Catz, the statute is conditional. It says, "No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." Has there been any administrative definition of that condition?

MR. CATZ: Yes, there has, Your Honor. The last regulation--it is in the reply brief at 3a--defines what is an adverse effect. That is at page 3a of petitioners' reply brief.

Q Of your reply brief, page 3a?

MR. CATZ: Yes. Section 2805 requires that the use of illegal labor must have an adverse effect on lawful resident workers, as you have pointed out, Your Honor. Adverse effect arises whenever illegal labor is employed in an occupation not deemed to be a shortage of labor in that field

by the Secretary of Labor and the United States Department of Labor. The Department of Labor promulgates and enlists those areas of employment in this country where there is a shortage of labor, and those regulations are found at 29 CFR, Section 60 et seq.

In addition, adverse effect is defined--arises whenever an employer pays an illgeal worker less than the prevailing minimum wage, either state or federal. Thus for purposes of a hypothetical, physicians is one occupation or profession in which the Secretary of Labor has seen that there is a shortage in this country. So that if an illegal alien came to California and was engaged as a brain surgeon and was employed by a California hospital, as long as the California hospital paid him in excess of the minimum wage, the hospital employer would not be subject to liability. In the case we have here today, there is a surplus of agricultural labor. In other words, liability attached against the respondents, because the Secretary of Labor of the United States did not list agriculture as a field in which there was a shortage of labor.

When federal and state laws have regulated in the same area, this Court has evolved two basic approached is determining the constitutional preemptivability of the state law in question. The first approach or test is often referred to as occupation, and that renders any state attempt

to regulate in the federal area invalid even though it may be agreed that the state scheme does not impair but enhances and aids in the achievement of a federal goal. The lower court in this case held--and this is the error that we complain of--that 2805 was an attempt by the State of California to legislate in the area of immigration, and the lower court concluded that Congress by the mere enactment of a comprehensive immigration nationality act, that of 1972, thus had expressed its intent by just the mere enactment to have occupied the field.

We believe that the lower court erred because any judicial preemption decision in this case, based on the occupation test, should not have been applied, and we say that because first there is no textual evidence in the Immigration and Nationality Act or its legislative history or even other federal laws that Congress specifically intended to preclude the states from enacting limited statutes such as 2805. We submit that Section 2805 is not an immigration law but a law that regulates the labor practices of domestic employers.

We will concede that the statute's long-range effect does have an incidental effect on immigration, but the statute does not regulate immigration policy. Instead, the statute prescribes a specific employment practice of domestic employers. Section 2805 and its implementing regulations

issued by the California Labor Commissioner used federal immigration and labor law definitions to effectuate a local labor law policy. The statute in no way alters federal determinations concerning entry into the United States and under what terms and conditions entry may be made. Section 2805 merely precludes the knowing employment by California employers of those individuals defined by federal law and administrative practice as not authorized to work in the United States by virtue--

Q Does that federal statute impose a penalty for knowingly employing an illegal alien? Did that ever pass?

MR. CATZ: No, Your Honor. That would be H.R. 8713 reported out of Mr. Eilberg's committee.

Q Where does it stand now?

MR. CATZ: The bill has been reported out of the House. It is supposed to go to the House Rules Committee, and that is scheduled for the spring.

Q So, it is still a live effort, is it?

MR. CATZ: It very much is, but there is--

Q If that were to pass, would that make a difference?

MR. CATZ: It might. It is my feeling that it certainly would deal with the problem, but how it would affect this case I hesitate to say. I might say that there

is no action foreseen on the Rodino bill in the Senate at all, and no hearings are scheduled. And my information is that none is expected.

Q Mr. Catz, I presume you feel your case is stronger by virtue of the fact that California's regulation is limited just to illegal aliens rather than if it had been addressed to all aliens, legally or illgally.

MR. CATZ: It goes a little bit beyond illegal aliens. In other words, it defines lawful resident aliens as anybody who really is not certified by the Department of Labor to work. Thus, for example, if a student from South Korea was attending the University of California at Berkeley and decided to get a job during the summer and did not have proper certification from the Department of Labor authorizing him to work, an employee who was adversely affected by him or her taking that position could get injunctive relief under Section 2805.

But the primary purpose of the statute of course was to deal with the problems of illegal aliens which Congress has refused to deal with, at least in the employment area.

Q If you deal with lawful aliens, you have problems with cases like Truax v. Raich.

MR. CATZ: That is correct, but when I use the term lawful residents, that is a definition that does not come from the federal scheme; that is the Labor Commissioner's

definition of dealing with who is allowed to work by federal standards. There may very well be people who are entitled to be in the United States but not entitled to work. And so the statute goes a little bit beyond illegal alien. Anybody that comes into California who is either a citizen or authorized to work by the Secretary of Labor will not be affected by Section 2805.

Q I gather that more than of your intermediate appellate courts has held as this one did. This is the second, is it not?

MR. CATZ: That is correct, Your Honor.

Q It has held 2805 unconstitutional.

MR. CATZ: That is correct. It actually preceded our case by a week. It was argued the same month. The appellants in that case were the State of California, and for some reason they declined to take the case to the California Supreme Court.

Q The California Supreme Court refused to review this one.

MR. CATZ: That is correct.

Q Mr. Catz, in your answer to my Brother Rehnquist a moment ago, I understood you to say that, as you told us earlier, the statute as administratively construed does not mean what it seems to say; it does not apply to aliens who are not entitled to lawful residence but rather

to aliens who are not entitled to work in the United States.

MR. CATZ: That is correct, Your Honor.

Q As determined by the federal authorities, by the Labor Department.

MR. CATZ: That is correct.

Q And to that extent, you say this precisely is congruent with the federal classification and no more than effectuates the federal policy.

MR. CATZ: That would be our position, Your Honor. I would be willing to concede that perhaps in the absence--I will not strongly concede it--but in the absence of the California Labor Commissioner's implementing regulation interpreting Section 2805, that the statute itself would be seriously in question in terms of its validity.

However, it is our position that the California Labor Commissioner's definitions and policies salvage 2805.

Q What is the sanction, if any, in the federal scheme? It is simply deportation of the alien, is it not?

MR. CATZ: That is correct. I think it is significant to note that first of all in the area of employment other than in the Farm Labor Contractor Registration Act, which I will be addressing in a few minutes, there is no federal law which deals with this area that California has entered into. But it is important to point out that illegal aliens do not even come in contact with the State of California in Section 2805. If,

for example, the California Labor Commissioner were to go out and visit an industrial factory and discover that there were 500 illegal aliens working there, the California Labor Commissioner would have no authority to apprehend the alien itself. The entire relationship is between the employer and the State of California, and of course California does not stand at the Mexican border and wave people off.

Q Mr. Catz, would you mind spelling out a little more your response to my Brother Stewart that this is congruent in its application with the pertinent federal statute?

MR. CATZ: I am just saying that Section 2805 merely adopts the standards that the United States Department of Labor utilizes in determining who can work.

Q You mean that is the Schedule A, is it, in 29 CFR?

MR. CATZ: That is correct. And Schedule B as well. Schedule B in 29 CFR lists those occupations in which there is no shortage, and labor certification would not be allowed.

Q Specifically then it is congruent with the Labor Department regulations.

MR. CATZ: That is correct.

Q Not with any particular federal statute.

MR. CATZ: That code of regulations, of course, is promulgated pursuant to the references in the Immigration and

Nationality Act inviting the Department of Labor to determine those occupations in which there is a shortage or surplus of labor.

Q There is a federal provision with respect to the employment of illegal aliens?

MR. CATZ: No, Your Honor. There is not in the Immigration Nationality Act. There is in the Farm Labor Contractor Registration Act, but that is limited to the farm labor context and not to industrial employers.

Q Let us suppose you were talking in the area of farm labor and the same issue came up. What if California law were just limited to farm laborers?

MR. CATZ: I would draw to the Court's attention for purposes of preemption discussion Section 15 of the Farm Labor Contractor Registration Act amendments of 1974 provide that--

Q Are they in any of these?

MR. CATZ: Yes, I am sorry, Your Honor. That is at page 2 of petitioners' opening brief.

Q What color?

MR. CATZ: White, Your Honor.

Q You would argue that if the California law were limited to the farm labor situation, there would be no preemption because the federal law dealing with the same subject matter expressly saves state law.

MR. CATZ: That is correct, Your Honor.

Q And you would say that would be effective despite the immigration law?

MR. CATZ: That is correct.

Q And do you not think that is somewhat persuasive with respect to the validity of the California law in its entirety with respect to the intention of Congress?

MR. CATZ: I think it is, Your Honor. I think that Congress has last spoken on the area of illegal aliens with the Farm Labor Contractor Registration Act, and it attempts to get to the root of the problem.

I think a final word perhaps needs to be mentioned about the anti-harboring provisions of the Immigration and Nationality Act, and there at page 7 of our reply brief. This is the only specific federal statute which respondents argue poses a potential conflict with Section 2805, and that is Section 274(a)(3) of the act. This section provides that any person who "willfully or knowingly conceals, harbors, or shields from detection any alien not duly admitted or not lawfully entitled to enter or reside within the United States shall be guilty of a felony."

To prevent the interpretation that employment per se would constitute a crime under this section--and I emphasize the word "this section"--Congress added the

following proviso: "Provided, however, that for purposes of this section employment, including the usual and normal practices incident to employment, shall not be deemed to constitute harboring."

This statute, while exempting employment per se from the crime of harboring, does not purport to grant an absolute exemption from criminal or civil sanctions for employers of illegal aliens. There may well be a given set of facts in which the knowing employment of illegal aliens, particularly where an element of concealment or procurement is involved, may subject an employer to criminal sanctions under the act.

There has been no specific judicial interpretation of 274(a)(3), I believe, by this Court. An examination of the legislative history reveals that the congressional intent was to protect the innocent and unknowing employer from prosecution under this section. So, we would argue that 274(a)(3) indicates no more than congressional silence regarding a prohibition against the intentional and knowing employment of illegal aliens. This section does not express an intent to protect the knowing employment of illegal aliens, either in its text or in its legislative history, and neither does this section express an intent by Congress to preempt the state--

Q I gather that you are relying, if I read your

brief correctly, rather heavily on what was done in the Farm Labor Contractor Registration Act even though that is limited only to farm labor since it expressly says that it is intended to supplement state action. That in itself is explicit on the part of Congress that is this whole field state regulation was permissible.

MR. CATZ: I agree, Your Honor, we are relying heavily on the Farm Labor Contractor Registration Act amendments.

Q On that very point, Mr. Catz, we do not have the Solicitor General here to inquire further, but at the conclusion of his memorandum filed in opposition to your cert, he says--

MR. CATZ: What page, Your Honor?

Q At page 6, second to the last paragraph. "In considering legislation making the employment of aliens a crime, the Congress has indicated that the problem is a national one which requires a more delicate balancing of interests than that achieved by California law."

Do I get an undertone there that there is a delicate diplomatic problem that enforcement of the California type of statute would irritate Mexican and Central American countries?

MR. CATZ: Of course, respondents have vigorously argued that point and gone one step further and suggested,

for example, that Section 2805 will drive illegal aliens out of California into neighboring states. And I would just like to say that perhaps the potential is there for that but in fact there is no mechanism for enforcing this statute. I would be less than candid if I would say to the Court that Section 2805 will be a panacea for solving the immense problems California is having. But I would say that if the statute has any value, it at least provides a vehicle until Congress deals with a limited number of employers in California that knowingly hire illegal aliens and rely on illegal labor in running their business. California does not have the resources to strike out against employers. But at least it will be in a position to deal with those few employers that will be abusive. So, I do not think there is an actual problem that will transcend beyond the California borders. The problem is national.

Q Mr. Catz, on page 4 of the Solicitor General's memorandum, you will notice that footnote four is addressed to your argument based on the Farm Labor Contractor Registration Act. It says, "While that act contemplates some limited room for state law, the state law must be 'appropriate.'" And "2805 is not in accord with federal policy, and thus is not appropriate." I gather that is an attempted answer to your proposition that since Congress already said states may operate in the field of farm labor, then that must also be an

expression of congressional intent that states may operate generally in the field of all alien labor; is that right?

MR. CATZ: I would think so, but I am at a loss to understand the Solicitor's conclusion that it is not appropriate. Of course I do not recall anything--

Q What is that 2051 "appropriate"?

MR. CATZ: The word "appropriate" comes from the language of the Farm Labor Contractor Registration Act on Section 15, and I do not know what the makers of the bill meant by appropriate.

Q It seems to me that that at least goes some direction towards conceding that there is no overall preemption just from the existence of an unexercised federal power.

MR. CATZ: I think that is correct, and that would be one of our arguments. I think that this case, if I may suggest to the Court, can be adequately disposed of on a very narrow ground, and that is that the Court of Appeals rendered 2805 unconstitutional on the basis that by Congress's mere enactment of the comprehensive Immigration and Nationality Act, that Congress intended to occupy the field without there being anything more. We would suggest that the Court dispose of this case in the same manner in which it disposed of the Deblino case, which was a recent preemption decision of this Court where New York had

implemented the state WIN program, and there was a federal WIN program. And the lower courts declared that the state WIN program was preempted by the federal ADC program. In rendering a decision in this case, this Court did not reach the conflicts question and we are merely suggesting that this Court need not reach the conflicts question either, that it can render its decision based on the occupation test alone.

Q I am not sure I understand that. It is asserted in this case that the state law, even if there is no overall preemption from the federal power, that there is a conflict between state law and federal law, an actual conflict. Why must not we reach that?

MR. CATZ: I was suggesting merely that since the lower court rendered its decision based on the occupation test alone, that that perhaps might be the only question that was before the Court.

Q By occupation you mean federal occupation of the field?

MR. CATZ: That is correct.

Q And you would say that then we would have to remand for the lower court to reach the conflict in order for a state court to reach it.

MR. CATZ: That is merely one suggestion that I offer, and I do that simply because of the way this case disposed of the Deblino matter.

Q Was the thought perhaps that the California court would have a sharper idea than we would of the application of 2805?

MR. CATZ: In all candor--and I say so respectfully--I do not think the California court knew why it rendered the case unconstitutional. There are overlapping doctrines in its opinion, and it is hard for the reader to conclude whether they reached the preemption decision on either occupation or conflict. And I invite the Court to look at that opinion.

In closing, we respectfully urge this Court to reverse the lower court's declaration that Section 2805 is unconstitutional on the grounds of federal preemption. We do so because we believe that Section 2805 is but a labor statute that touches on the field of immigration law in an incidental but in a very limited area that Congress has not expressly indicated its intent to occupy the field.

And, finally, the statute, far from conflicting with federal law, furthers the accomplishment of federal law policies and therefore is not preempted.

Q Mr. Catz, is the record in any shape for us if we were to agree with you that there has not been an occupancy, that there is room for state regulation? Is the record sufficient so that we can decide whether in fact the state law is in conflict?

MR. CATZ: I think there is room in the record, and there is a substantial transcript as well.

Q But how about if the state court did not really reach the question, which you suggest they did not; is that right?

MR. CATZ: I think the opinion is rather nebulous, and I--

Q Then we would not know precisely what the state law reaches or what it means.

MR. CATZ: Perhaps, Your Honor. That of course is for the Court to determine. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Marrs.

ORAL ARGUMENT OF WILLIAM S. MARRS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

It is respondents' position that 2805 of the Labor Code is unconstitutional on three grounds. The first is that it deals with foreign affairs and immigrations, which is a subject of such dominant federal concern that states are precluded from legislating in that area.

Clearly 2805 will discriminate against the nationals of a foreign sovereign. This may be a subject which Congress may want to do, but it is our contention that it is not up to the State of California to take that in their hands.

Q That has apparently been the case with farm labor. Congress has said that the State of California may do so.

MR. MARRS: Yes, in the case of farm labor. 2805 applies to all employers.

Q I suppose there might be an issue as to whether the state law were severable. If it were invalid in part, it might be valid in part.

MR. MARRS: I am not sure I understand the question. It is severable as to farm labor only?

Q The California law at issue here covers farm as well as industrial labor, does it not?

MR. MARRS: Yes.

Q Let us assume that if it were just a farm labor law it would be valid.

MR. MARRS: I would disagree with that.

Q Let us assume that it was. Could this law be upheld in so far as it applies to farm labor?

MR. MARRS: If 2805 applied only to farm labor, I would say that it could not be upheld because the Farm Labor Contractor Registration Act took into account the state scheme, but that was as far as the safety and health standards. There are some 12, I believe, states who already have large regulating farm labor contractors as far as the health and the safety of the employees, and I believe that

is what that was after and not that they had passed laws regulating the employment of illegal aliens, and they were just inviting them to do that.

2805 also controls immigration rather than just being a labor law. First of all, the so-called illegal aliens will be unable to secure employment in the State of California, and those that are working will be terminated. There is also a group of aliens that are not entitled to lawful residence but who are able to work under the federal scheme who would not be entitled to under 2805.

Petitioners put much reliance on the regulations which tried to save 2805. Those regulations were adopted three days after a superior court judge in Los Angeles declared 2805 unconstitutional in the Dolores Canning case, which was the other appellate case.

Q When you say other aliens, do you mean the green card people who would come across on a daily basis?

MR. MARRS: I will get to those. It is going to regulate those also.

Q Are you intimating that the regulations were prepared in that three-day interval?

MR. MARRS: I am sure they were. And I also think that if this Court upholds 2805, the Labor Commissioner could rescind those regulations, and we are right back with the statute again with no regulations. So then we have what is an

adverse effect. Who is entitled to lawful residence? The regulations are not embodied in stone.

Also in California particularly there is a problem with illegal aliens who have come across into California, particularly in southern California, who have got jobs, have families, married and have families, and they are protected from deportation by the Immigration and Nationality Act. But they are not given a document by the Immigration Authority that they can work or anything. And if this law is enforce, those people, while they are trying to get their status adjusted from illegal alien to lawful resident alien, would be unable to work, and that would frustrate California--

Q Are they not disqualified from working as a matter of federal law?

MR. MARRS: No, they are not. In fact, those people are encouraged by the Immigration to keep working to support their families until they can get their status adjusted.

Q Then as I understood it, and perhaps I misunderstood it, I understood your brother's submission to be that under these regulations, the California regulations, anybody permitted to work as a matter of federal law is permitted to work under this statute. Did I misunderstand that?

MR. MARRS: No. The regulation says anyone in

possession of the green card or any document issued by the Immigration that authorizes them to work, but they do not issue these documents to these aliens who are subject to having their status adjusted. They know where they are, and it takes a period of time. They have to investigate their background and they do not issue them a letter or anything that says they can continue to work because it is not a problem in the federal statute.

Q When you say subject to having their status adjusted, that means they are illegally here?

MR. MARRS: Yes.

Q And they are not authorized by the Federal Government to work?

MR. MARRS: Yes, they are authorized to work.

Q Expressly authorized?

MR. MARRS: They did not come in under a visa, but the policy of the government is to continue them to work while they are having their status adjusted.

Q But that is a matter of discretion. They can make an application for status adjustment and it may have been turned down by the commissioner, may it not?

MR. MARRS: Yes. But under this--I do not know how many but I am sure it would be in the thousands--would have to make an application to get their status adjusted or lose their job.

Q And deportation is then suspended pending outcome of the change in status hearing.

MR. MARRS: Yes.

Q Are you talking about the same type of aliens in the government they make such an effort to keep from crossing the border?

MR. MARRS: Initially.

Q If so, why are they not arrested and deported if they may be arrested as they cross the border?

MR. MARRS: Usually these are people that have been here for four or five or even ten or twenty years who have families and are part of the community, and they are either a parent, a child or a spouse of a citizen or a lawful resident alien. And the government's policy is to keep them in the country until they can get their status adjusted. Otherwise they are going to break up the family units.

Q So, the longer they can get away with it, the better is their status.

MR. MARRS: I would think that is probably true.

Q I did not hear you.

MR. MARRS: Yes, that is true. Congressman Sisk I believe has a bill in right now to recapture those or everyone that has been in the country I think it is three years will be granted an amnesty type thing so they can have

their status adjusted.

Q How does the government justify not giving green cards to them?

MR. MARRS: Well, the green card is--

Q None of this is in the record, is it, that you are talking about?

MR. MARRS: On the green card?

Q Yes.

MR. MARRS: No.

Q And the fact that some are here without green cards but the Federal Government allows them to work, is that in the record?

MR. MARRS: No, it is the practice of the--

Q Is it in the record?

MR. MARRS: No, it is not.

Q How can we consider it?

MR. MARRS: I was just bringing it up in relation to the petitioners' reply brief as far as the I-151 cards and the documents.

Q Suppose we disagreed with you and with the lower court with respect to the general preemption or occupation. Are you urging us here to sustain the judgment on the ground that there is an actual conflict?

MR. MARRS: Yes, I think there is an actual conflict with 1324(a).

Q But the lower court did not decide that?

MR. MARRS: The lower court went on the occupation ground, that the Immigration and Nationality Act was so comprehensive that the states were precluded from acting even though the federal scheme--there was a void there.

I think 2805 in the regulations brings us right into the situation of Truax, and that is if 2805 is valid, then prudent employers in the State of California will refuse to hire all aliens whether they are illegal, green card, or whatever status, so that the burden is not on them to determine the legal status. These people are not protected by Title VII as far as alienage is concerned, and they would either lose their jobs or would have to take lower paying jobs with employers who needed to recruit other people from the work force.

Q Why on earth would an employer hesitate under this California statute to hire an alien who had a green card? Because in order to violate the state statute he has to knowingly employ an alien who is not permitted to work in the United States.

MR. MARRS: Then he is put in the position of judging whether the green card is valid to start with. He becomes the arbitrator as to is he in here legally or is he not in here legally. It would be much safer for him just to hire all citizens. And I think in California, especially

in southern California, that is a real possibility.

Q He does not violate it unless he knows that the man is here illegally. He knows when he hires him, but he also must know that he is violating the statute. If he has a green card, how could he possibly be knowingly hiring somebody who si not entitled to work?

MR. MARRS: Maybe the green card is a forgery. I mean, he cannot tell.

Q Maybe visas and passports are all forgeries.

MR. MARRS: That is conceivable.

Q But you could not convict a man for that. If he looks at what appears to be a legitimate green card, how could he be charged with not doing that?

MR. MARRS: Then I think you get down to what is a legitimate green card or someone else that is an alien that is entitled to work but does not have a green card.

Q Is not the green card valid on its face? Would it not constitute an abundant defense to a criminal action in California courts?

MR. MARRS: I do not know. This law has never gone into effect. The date it was to take effect it was enjoined by a superior court. So, we do not have any case law on it at all.

If an alien with a 151 card loses his 151 card or has it stolen, then he also has a burden on him. Until he gets

a new card, the employer would not hire him. And it takes from six months to two or three years to get a new I-151 card.

It is also our position that 2805 is unconstitutional because the Immigration and Nationality Act of 1952 is so comprehensive that they have left no room for the states to legislate, and I think there is a specific intent by Congress to occupy the field here. The nature of the subject matter, foreign affairs and immigration, the pervasiveness of the legislation is very comprehensive. The legislative history indicates that Congress thought they were passing a comprehensive bill. The only earlier state legislation on this was struck down as violating the foreign commerce clause. And in 1917 when the Immigration and Nationality Act was passed, that continued until 1952. There had never been a valid state intrusion into these affairs. 2805 falls within the parameters of the Hines decision, we contend, because there is such a comprehensive scheme of regulation that the states cannot help it, they cannot hurt it, they cannot do anything to it. They have to stay away from it.

The third ground upon which we believe 2805 is unconstitutional is that it is in direct conflict with 1324(a). 2805 makes it a crime to knowingly employ an alien not entitled to lawful residence. 1324(a) grants an

exemption for such employment.

Q Is 1324(a) the California statute?

MR. MARRS: No, no, that is the Immigration and Nationality Act.

Q Where is it cited or set out in the brief?

MR. MARRS: In my brief it is at page 7 of the appendix. It is 8 USC 1324(a), 7 and 8. And the proviso is on page 8. However, also Congress's action with these bills, H.R. 982 and 8713, both of those bills--

Q I believe you said there was a conflict in the criminal law, and I am not sure there is. What about the civil remedy under the California statute? There is one, is there not?

MR. MARRS: Yes, there is.

Q I do not see any preclusion of a civil remedy here, do you?

MR. MARRS: As regards 1324(a) there is not.

H.R. 982 and now 8713 specifically repeal that proviso and attach liability to the employer. It is interesting to note that the way they do it, though, is in a three-step process, and that is, one, they give a citation; two, there is an administrative fine; and then, three, there is a criminal penalty. And Congress did this I think trying to balance some interest because there are various groups that feel this will cause discrimination against minorities.

Q This is in Roman nine and Roman ten of your brief?

MR. MARRS: That will cause discrimination by employers against minorities in this field.

Q This was amended, you say, the proviso on page Roman eight of your appendix to your brief; it has been amended?

MR. MARRS: It has been deleted in the proposed legislation.

Q Proposed. It is only a bill, is it not?

MR. MARRS: Yes.

Q That proviso is still in effect?

MR. MARRS: Yes, it is.

Q And there is a bill pending that would delete it and would substitute a three-step process.

MR. MARRS: Yes.

Q The first a warning, I think.

MR. MARRS: A citation and then a fine and then a criminal penalty.

Q And that is so far just pending legislation?

MR. MARRS: That is correct.

I think that shows a little evidence that Congress is well aware of this problem, and they are trying to find a way to solve it, and California's way is not their way. They specifically rejected the original bill that came in with I

believe it was a thousand dollar fine the first time out, similar to California; it is only a lesser amount. And they rejected that because they thought it was too severe, it would cause problems on employers, and it would cause employers to discriminate against certain minorities.

Q Of course, Congress has been aware of the problem presumably a long time and has not done much about it, has it?

MR. MARRS: Yes. In fact, they were aware of it in 1952 when they passed the act and in the legislative history.

Q Is there any doubt but that Congress, if it elects to occupy the entire field, could nullify all the state statutes in this area ultimately?

MR. MARRS: I believe they already have, but there is no doubt that they can.

Q If they have not, they certainly can.

MR. MARRS: Yes, that is inherent in the sovereign power of the nation.

When the act was passed, there was reference by the petitioner to the Congressional Record. Senator Douglas in 1952 offered an amendment to Senate bill 185?, which became this exemption, 1324(a), and his bill would have removed that exemption and made it a crime to knowingly employ an employer. And that amendment was turned down.

So, in concluding, it is our position that this

subject is of such dominant federal concern and Congress has weighed the burdens and the rights of all aliens in this country and that the federal branch conducts foreign policy and foreign affairs and that California is intruding into this area and they are prohibited from so doing.

Q Mr. Marrs, on a very unimportant point, is there some California reason for this God-awful color of these briefs--[laughter]--which you cannot read? Is there some rule out there? This is the third time we have had it in two weeks.

MR. MARRS: Are they all California cases?

Q Yes.

Q Pernau-Walsh Printing Company.

MR. MARRS: I believe it is the printer's choice.

Q It is dark blue and you cannot see the black printing on it.

Q Would you persuade the printer in the future to sort of help poor eyes out.

MR. MARRS: I will send him a note on that.

MR. CHIEF JUSTICE BURGER: Counsel, I have anticipated that and instructed the clerk to reject any such briefs hereafter.

MR. MARRS: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:59 o'clock a.m. the case was submitted.]