

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1271

TITLE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., Petitioners
v. HERMAN DELGADO, ET AL.

PLACE Washington, D. C.

DATE January 11, 1984

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 IMMIGRATION AND NATURALIZATION :

4 SERVICE, ET AL., :

5 Petitioners : No. 82-1271

6 v. :

7 HERMAN DELGAGO, ET AL. :

8 - - - - -x

9 Washington, D.C.

10 Wednesday, January 11, 1984

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:51 a.m.

14

15 APPEARANCES:

16 ANDREW L. FREY, ESQ., Cffice of the Solicitor
17 General, Department of Justice, Washington, D. C.;
18 on behalf of the Petitioner.

19 HENRY R. FENTON, ESQ., Los Angeles, Cal.;;
20 on behalf of Respondent.

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on behalf of the Petitioner	
HENRY R. FENTON, ESQ.,	29
on behalf of Respondent	
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on behalf of the Petitioner - rebuttal	

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

2 CHIEF JUSTICE BURGER: Mr. Frey, I think you
3 may proceed when you're ready.

4 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,
5 ON BEHALF OF PETITIONER

6 MR. FREY: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 This case is a suit by four individuals -- two
9 citizens of the United States and two aliens lawfully
10 present in the United States -- for declaratory and
11 injunctive relief challenging the lawfulness of the
12 manner in which the Immigration and Naturalization
13 Service conducted factory surveys at two garment
14 factories in southern California in which the
15 Respondents were employed.

16 The importance of these factory surveys to the
17 INS' responsibility to attempt to apprehend and deport
18 aliens illegally present in the United States is
19 difficult to overstate. The record shows that in Los
20 Angeles in 1977 20,000 illegal aliens were apprehended
21 in the course of such surveys, and the Immigration
22 Service has told us that away from the border at the
23 time prior to the decision in this case approximately 60
24 percent of all apprehensions of illegal aliens occurred
25 in the course of factory surveys.

1 Now some years ago the factory surveys became
2 during the 1970s a more important tool to the INS for
3 several reasons. One was a matter of values.
4 Previously a lot of the enforcement efforts had been
5 concentrated in residential investigations of areas
6 where there were believed to be high concentrations of
7 illegal aliens living, and it was thought that it would
8 be far less intrusive, it would raise fewer Fourth
9 Amendment problems, it would be less intrusive in
10 privacy values for the agency to concentrate on the
11 workplace rather than in residential areas.

12 Secondly, it was believed -- and I think quite
13 plainly accurately -- that this was a more effective
14 utilization of the resources of the Service, because a
15 relatively small number of agents were able to make
16 relatively substantial numbers of apprehensions.

17 And, thirdly, it was deemed appropriate
18 because the prospect of employment is the principal
19 magnet that draws people to attempt to enter the country
20 illegally and work force surveys and enforcement efforts
21 concentrated on the work force seem correlative to the
22 factors that have drawn the people here.

23 QUESTION: Mr. Frey, may I ask you a
24 preliminary question?

25 MR. FREY: Certainly.

1 QUESTION: And that relates to whether the
2 Plaintiffs here in the case below had standing under the
3 Lyons decision of this Court last time.

4 MR. FREY: Yes, I believe that they do. We
5 don't challenge their standing.

6 QUESTION: I know you don't, but why not?

7 MR. FREY: Well, the reason I think they do is
8 that these work place surveys are recurrent and at
9 garment factories where these individuals were employed
10 it is likely that there will be, and in fact at Davis
11 Pleating Company there were two surveys during the year
12 in question.

13 QUESTION: And is that likely to be repeated
14 in the future, assuming the practice?

15 MR. FREY: It is likely to be repeated if the
16 Ninth Circuit's decision is reversed.

17 The consequences of the Ninth Circuit's
18 decision, while factory surveys are still being done,
19 they are very difficult to do at large facilities like
20 Davis Pleating because the restrictions would make it
21 too chaotic, and I'll get to that shortly.

22 Now I'd like to briefly describe these
23 surveys. First, the first point that I think is
24 significant is that they are not done randomly but they
25 are based on investigations which lead to the

1 acquisition of information that a substantial number of
2 illegal aliens are employed at the particular target
3 factory.

4 And indeed the results of the surveys that we
5 have before us in this case indicate this. The first
6 Davis survey --

7 QUESTION: Is there something in the record
8 about that -- about the fact that these aren't just
9 random? Is there some testimony or anything?

10 MR. FREY: Well, I think there is, yes. I
11 think there is an affidavit from one of the INS
12 directors, I believe, that suggest that.

13 Logic would dictate that it would make no
14 sense for them to go about randomly. They have very
15 limited resources in terms of personnel to do these
16 things, and they obviously want to utilize them in the
17 most effective way where they can arrest the largest
18 number of people with the smallest number of agents.

19 QUESTION: Mr. Frey, is an administrative
20 warrant possible?

21 MR. FREY: There were warrants in two of the
22 three searches in this case. They proceed either by
23 warrant or by consent. I'm told that in about 90
24 percent of the cases the factory owner or management
25 gives consent to the survey, and where consent is not

1 given a warrant is used.

2 In these cases, 78 illegal aliens were
3 arrested in the first Davis survey; 39 in the second;
4 and in the Mr. Pleat survey 45, which was 50 percent of
5 the work force. There were 90 workers; 45 were found to
6 be illegal aliens and apprehended. There may, of
7 course, have been some more.

8 QUESTION: What would be the situation if the
9 employees were working on a paving project or building a
10 bridge cut in the open -- no enclosure at all?

11 MR. FREY: Well, the Court of Appeals decision
12 relied for its holding, in part, on the fact that the
13 factories are enclosed and that the exits -- that agents
14 were stationed at the exits.

15 If you had an outdoor job site you would have
16 a different factual situation. I'm not sure that the
17 Court of Appeals would reach the same conclusions.
18 We're not dealing here with any issue of a search.

19 QUESTION: Could a warrant be obtained to
20 check out in open spaces?

21 MR. FREY: No. No, no. The warrant is
22 obtained to deal with the interests of the owner of the
23 factory and not having his premises searched. This case
24 involves no search issue; it involves only issues of
25 seizures -- whether there were seizures and, if so,

1 whether they were lawful.

2 QUESTION: Mr. Frey, may I ask? This may be a
3 far-out hypothetical.

4 Let's suppose you have a study of a given
5 neighborhood and the study was that the probabilities
6 are that -- it's a black neighborhood -- that 20 to 25
7 percent of the residents of that neighborhood have
8 committed crimes. That's all.

9 And then the police launch a program to stop
10 and interrogate on a random basis all of the blacks in
11 the neighborhood. Would that be all right, do you
12 think?

13 MR. FREY: I think that would pose some
14 interesting and difficult questions whether -- if you
15 had this abstract 20 or 25 percent probability that the
16 individual you stopped had committed a crime but no
17 specific information.

18 Martinez-Fuerte was a case somewhat like that,
19 and I think that that is not at all involved in this
20 case because there are no individual seizures of
21 particular workers based on -- not based on information
22 specifically relating to those workers.

23 QUESTION: No, but the interrogations were
24 random, were they not?

25 MR. FREY: Well, as I -- the interrogations

1 are not random but the interrogations --

2 QUESTION: Well, they are in the sentence, are
3 they not?

4 MR. FREY: But they are not. They don't
5 involve seizures of the individuals.

6 QUESTION: I know. We're talking only about
7 the interrogation that was made.

8 MR. FREY: Well, but the Fourth Amendment
9 doesn't apply on interrogations. It applies to
10 seizures. If you must seize and forceably detain a
11 person in order to question them, then the Fourth
12 Amendment is brought into play because you have seized
13 them and they have a protection against being
14 unreasonably seized.

15 QUESTION: Well, Mr. Frey, is there not a
16 seizure or detention when the agents question the
17 employee? Even if we were to agree with you that
18 there's no overall seizure of the premises, is there an
19 individual seizure if a person is detained for
20 questioning?

21 MR. FREY: I think that is absolutely clear.
22 It think it is absolutely clear after Florida against
23 Royer that what -- if you look at the record of this
24 case, what happens is a person is approached, asked if
25 he's a citizen. There is no physical contact except

1 that Miramontes, I think, or Lebonte was tapped on the
2 shoulder.

3 QUESTION: If he says it's none of your
4 business, you don't seize him?

5 MR. FREY: We don't. We don't do anything
6 unless in the course of saying it or something else that
7 he or she has done we acquire a particularized
8 suspicion of illegal alienage.

9 QUESTION: What happens if the person refuses
10 to answer the question?

11 MR. FREY: You move on to another person.
12 That in fact doesn't happen in these situations very
13 frequently, but that is what the agents are instructed
14 to do unless they have a particularized suspicion of
15 illegal alienage. They are not to engage in detentive
16 questioning.

17 And if you look at the record in this case and
18 read the Joint Appendix, which I urge you to do, and
19 read the testimony of the Respondents in this case, it
20 seems to me you would only -- I mean, I come away with
21 the conclusion that they were trying to give the agents
22 an award for their scrupulous sensitivity to Fourth
23 Amendment rights and not to --

24 QUESTION: Mr. Frey, what if there is a
25 particularized suspicion about a particular person and

1 the agent goes up to him and says "Are you a citizen?"
2 and he says, "Sorry, I won't answer; it's none of your
3 business." What does he do then?

4 MR. FREY: Well, that would be the --

5 QUESTION: He hasn't got probable cause.

6 MR. FREY: Well, there is nothing -- that is
7 the problem that's inherent in any Terry stop situation,
8 if the individual refuses --

9 QUESTION: Well, then he can walk away.

10 MR. FREY: If probable cause does not develop
11 during the course of the detention, then the detention
12 must be terminated.

13 QUESTION: Exactly.

14 QUESTION: Well, I take it that what this adds
15 up to is a statement on your part that the Fourth
16 Amendment does not prevent officials, police or others,
17 from asking questions.

18 MR. FREY: Well, that's what the Court said in
19 Florida against Royer -- even questions of people who
20 they suspect, as long as it is not accompanied by
21 conduct that would lead the person reasonably to believe
22 that they were not free to leave.

23 QUESTION: But if you have particularized
24 suspicion but not probable cause, you may momentarily
25 detain them to ask a question; is that right or not?

1 MR. FREY: Yes, you may detain them and you
2 may ask a question and if in the course of that brief
3 detention probable cause develops, you may then arrest
4 him.

5 QUESTION: But if he says "get your hand off
6 my arm; I'm just not interested in answering any of your
7 questions, I'm going to walk away", you've got to let
8 him walk away?

9 MR. FREY: You are out of luck except in
10 circumstances where there may be some other brief
11 investigative measure that you can take while you're
12 holding him that might clarify the situation and develop
13 probable cause.

14 QUESTION: But it's your position that the
15 reasonable suspicion that's required here is not
16 reasonable suspicion of illegal presence in the country,
17 but merely reasonable suspicion of Hispanic origin?

18 MR. FREY: Well, let me define somewhat the
19 issues in this case because I think it's very important
20 and I think the Ninth Circuit's opinion and the
21 Respondents' brief is quite confusing on this.

22 But there are two separate issues. One is the
23 question of whether the entire work force is seized by
24 the techniques that are employed in the factory survey
25 and, if so, whether that seizure violates the Fourth

1 Amendment.

2 Then there would be -- the next question would
3 be whether in the course of conducting the survey and
4 having contact with individual workers at the work place
5 what transpires is a seizure and, if so, is that seizure
6 lawful on an individual basis rather than a group basis.

7 QUESTION: Well, but you've already answered
8 me that you say the questioning does not involve a
9 seizure.

10 MR. FREY: That's correct.

11 QUESTION: But you said in response to Justice
12 White it might involve a momentary detention of the
13 Terry-type to ask questions.

14 MR. FREY: No, no, no, no. If I said that, I
15 did not intend that. I understood him to be postulating
16 if there were such a detention what consequences would
17 flow if there were no questions asked, or no answers
18 given.

19 Let me back up for a minute. If the Court of
20 Appeals is correct that there is an illegal seizure of
21 the entire work force, then this case presents no issue
22 of whether people can be questioned on the basis of a
23 suspicion of alienage alone, because there already is a
24 Fourth Amendment violation. They have all been
25 unlawfully seized. The relief that's been entered would

1 be entered.

2 If the Court of Appeals, as we submit, is
3 wrong in that, the record in this case presents not a
4 single instance in which any person was detained for
5 questioning on the basis solely of a suspicion of
6 alienage alone, and not of illegal alienage.

7 QUESTION: Well, it does present, does it not,
8 situations where individuals were questioned? In fact,
9 these named plaintiffs were questioned; is that true?

10 MR. FREY: Yes, but as I said earlier, the
11 Fourth Amendment does not regulate questioning; it
12 regulates seizures. Respondent --

13 QUESTION: You said there were no seizures in
14 this case.

15 MR. FREY: Hum?

16 QUESTION: And there were no individual
17 seizures?

18 MR. FREY: There were no -- I maintain as
19 stoutly as I am able to that there were no individual
20 seizures in this case, and if you look at the
21 interchanges Correa was not asked any questions during
22 the first survey and during the second survey; she was
23 asked if she was a citizen, said she was, and the agent
24 moved on.

25 QUESTION: What are they -- what do the agents

1 do if there is someone that they want to ask questions
2 and the person just leaves the premises? Will they be
3 followed or detained?

4 MR. FREY: Well, if they do not have a
5 reasonable suspicion that the person is an alien
6 unlawfully present in the country or has committed some
7 violation of the immigration laws, they let him leave.
8 There's no indication that anybody was detained in this
9 case, prevented from leaving or going about their
10 business on the basis of a mere suspicion of alienage or
11 anything else.

12 QUESTION: Mr. Frey, can I ask you a question
13 on this point?

14 MR. FREY: Yes.

15 QUESTION: One of my problems is that I think
16 that what one might normally expect in the way of
17 findings of fact are really quite sparse in this case.
18 Are the findings -- do the findings actually spell out
19 the facts as you portray them? Or do we have to look at
20 the testimony?

21 MR. FREY: No, I think you have to look at the
22 testimony. Everybody suggests that there is no dispute
23 about the facts. I would say there is no --

24 QUESTION: That's really what troubles me.

25 MR. FREY: I would say there is no dispute

1 about the material facts. That is, I would say if you
2 look at the testimony you will see nothing that raises
3 any factual issues.

4 QUESTION: But should we have to look at the
5 testimony in a case of this kind that comes in this way,
6 because I read the briefs and I get an entirely
7 different impression of the facts from both sides. I
8 look for findings, and I am kind of at a loss.

9 MR. FREY: Well, you can get a different
10 impression from the adjectives.

11 QUESTION: And in a summary judgment case that
12 normally isn't true. Normally the people are willing to
13 say these are the facts and you can decide the case on
14 this basis.

15 I don't know exactly what happens, for
16 example, if a worker during work hours gets up and walks
17 to the gate where an agent is posted. You say they can
18 just walk right out.

19 MR. FREY: Well, they did in this case.

20 QUESTION: Pardon me?

21 MR. FREY: The Respondents did. Two of them
22 in this case walked right out.

23 QUESTION: And we have to read the testimony
24 to so conclude, don't we?

25 MR. FREY: No. Well, I don't really --

1 QUESTION: What I'm really asking -- I won't
2 take your time up -- but is it not possibly a case which
3 requires some findings of fact to know exactly what
4 should be done with it?

5 MR. FREY: Well, I think it's a case in which
6 it would have been perhaps helpful to have some findings
7 of fact, but if the Court of Appeals is right in its
8 legal conclusions it makes no difference whether anybody
9 was stopped or would have been stopped, because the
10 Court of Appeals says that the fact that agents were
11 visible in the doorways was itself enough to constitute
12 a seizure and violate the Fourth Amendment, and on that
13 basis an injunction has been issued against --

14 QUESTION: I understand your position there.
15 Are you saying, though, that -- assume we disagreed with
16 the Court of Appeals and say they went too far. Is the
17 correct disposition to reenter the summary judgment of
18 the District Court or send it back and say we've got to
19 know more about it?

20 MR. FREY: Well, there were cross motions for
21 summary judgment.

22 QUESTION: Well, I understand that, but is
23 that your position -- that we should reenter the
24 District Court's summary judgment?

25 MR. FREY: That would be our position, I

1 think, but we are into some areas of civil procedure
2 that I don't feel terribly comfortable with.

3 QUESTION: Aren't you just objecting to the
4 holding of the Court of Appeals as a matter of law, that
5 the whole factory is seized?

6 MR. FREY: Yes. We disagree with the Court of
7 Appeals on a number of points, but if the Court were to
8 conclude, as we think it must if it applies its prior
9 Fourth Amendment principles, that there was no seizure
10 of the entire work force --

11 QUESTION: Do we have to reach anything else?

12 MR. FREY: The entire Court of Appeals
13 decision, I think, falls because there is no
14 suggestion --

15 QUESTION: And then we remand for further
16 proceedings, if there are any.

17 MR. FREY: I would do that if I were in your
18 shoes, yes.

19 QUESTION: Mr. Frey, you identified two
20 separate questions. Do we have to answer both of them
21 in this case?

22 MR. FREY: No. In my opinion the linchpin of
23 the Ninth Circuit's decision is its holding of the
24 entire work force was seized by the procedures used in
25 the survey. If you disagree -- if you agree with that

1 holding, you would then have to move on to our
2 contention that if they were seized it was a reasonable
3 seizure under the principles of Martinez-Fuerte. That
4 would have to be decided.

5 I believe that there is no evidence or
6 suggestion in this case of any individual contact
7 between agent and Respondent that violated the Fourth
8 Amendment, so I don't believe there is any need to reach
9 those questions.

10 QUESTION: Well, what evidence is there that
11 individuals were declined the right to walk away from --

12 MR. FREY: Well, I wanted to talk a bit about
13 what evidence there is in this case, what allegations
14 there are in the complaint, and what evidence there is
15 in the deposition testimony of anything that might be
16 argued, and my opponents do argue, are in some instances
17 Fourth Amendment violations.

18 First of all, in the first amended complaint
19 there was an allegation that an individual who was then
20 a plaintiff in the case was asked whether he was a
21 citizen and said he was a citizen and was nevertheless
22 taken away and deported, although he was a citizen.

23 I would agree that this allegation would state
24 a very likely violation of the Fourth Amendment. It
25 turned out, however, that he had to be withdrawn as a

1 plaintiff from the case because he was an illegal
2 alien.

3 Now there is also the instance that Respondent
4 Delgado complains about. In the conversation with
5 Delgado the agent approached him and said are you a
6 citizen. He said yes. He said where were you born.
7 Mayaguez, Puerto Rico. He moved on.

8 Then, according to Delgado, he heard the
9 agent, one agent say to another agent -- this is at
10 Joint Appendix 94 -- "I heard him say, he said, 'when we
11 come back we're going to have to check them closer.
12 They speak too well of an English'." This was one of
13 the things that is complained of by our opponents in
14 this case. How this amounts to a Fourth Amendment
15 violation, I don't understand.

16 Respondent Miramontes complains that she was
17 frightened by the survey because when she was approached -
18 she was asked if she was an alien and she said she
19 was -- she's a lawful resident alien. She was asked for
20 her papers and she momentarily thought that she did not
21 have her papers on her person, as she is required by law
22 to do, and she was afraid that she might be arrested for
23 not having her papers, although in fact she did have her
24 papers. She produced them and they moved on to somebody
25 else.

1 Now this amounts to a mere fear that the
2 agents would act in conformity with the Fourth Amendment
3 if she gave them cause to do so by giving them probable
4 cause to arrest her.

5 Then there is an incident described in the
6 testimony of an INS agent at page 158 of the Joint
7 Appendix and relied on by our opponents in which he
8 describes a case in which someone went running out of
9 the factory to the parking lot to a car and he watched
10 this person because he did not want him to get in the
11 car and drive off, but the person then returned to the
12 factory and he didn't do anything.

13 There was no seizure of any individual. The
14 fact of the matter is that this individual was allowed
15 to go out of the factory unimpeded.

16 Finally -- and this is repeated many times in
17 Respondents' brief -- there is one incident which is not
18 in the Joint Appendix which is at page 27 of Respondent
19 Miramontes' testimony. She was asked: "Did you hear
20 anyone answering that they were American citizens?"
21 Answer: "I heard one in the shipping department."

22 "What happened?" "He said he was an American
23 citizen." "What did the Immigration officer do?" "He
24 was handcuffed. He let him go and then I don't know
25 what happened. I noticed he took the handcuffs off and

1 then he went back to the shipping department. I don't
2 know."

3 Now it is conceivable that somewhere in that
4 interaction between agent and employee there may have
5 been a Fourth Amendment violation, but, of course,
6 Miramontes doesn't know what caused the agent --

7 QUESTION: When you handcuffed somebody, you
8 sort of seize them, don't you?

9 MR. FREY: Well, but there may have been
10 probable cause to do so. She has no idea --

11 QUESTION: But you're arguing that he wasn't
12 seized.

13 MR. FREY: I'm not -- if her testimony is
14 accurate, I would say that he was seized, I would
15 agree. But what she does not know and what there is no
16 allegation of is that the seizure wasn't reasonable.

17 QUESTION: Whether there was an illegal
18 seizure.

19 MR. FREY: I would also like to direct the
20 Court's attention on this question of whether the entire
21 work force was seized to the factors that the Court of
22 Appeals relied on in holding that the entire work force
23 was seized. Now these are summarized in the permanent
24 injunction and declaratory judgment which I sent up to
25 the Court on Monday. It's just a convenient summary of

1 what the Court of Appeals relied on, and it's at page 2
2 of the judgment.

3 First, investigators placed in doorways, and
4 that is, among these factors, I think the only one that
5 is significant and, of course, our position with respect
6 to that factor is that any citizen or lawful alien would
7 have -- it's perfectly obvious what the investigators
8 are placed in the doorways for, and the evidence
9 suggests they don't actually block the doorways. They
10 are just visible in the doorways.

11 And that is that when the survey begins there
12 are often cries of "L'emigra", people running and
13 hiding. If the doorways were left unguarded, as now
14 happens under the injunction, people running out and
15 trying to get away -- quite understandably.

16 By placing agents visibly in the doorway that
17 discourages people from attempting to flee the factor,
18 illegal aliens --

19 QUESTION: Are these agents in uniform?

20 MR. FREY: They are not in uniform.

21 And I think from the standpoint of a citizen
22 or a lawfully resident alien there is nothing
23 frightening. There is no reason for those people to
24 suppose that they have been seized in any sense under
25 the Fourth Amendment. They are -- these individuals,

1 Respondents, were free to walk about the factory.

2 QUESTION: They were free to leave, too.

3 MR. FREY: They were free to leave. In fact,
4 the instructions that the agents have are when someone
5 seeks to leave the factory, if they have a reasonable
6 suspicion of illegal alienage they are to detain them
7 and ask them questions. They may otherwise ask them a
8 question, a non-detentive one.

9 All right. Now, second, the number of
10 investigators utilized. Well, when you have a factory
11 with two or three hundred employees, like Davis
12 Pleating, to use 15 or 20 investigators, some of whom
13 are stationed outside, seems to us quite reasonable.

14 Third, the surprise nature of the operation.
15 Well, this reminds me of the argument in Dalia against
16 the United States that you had to give notice to the
17 individual when you were placing a bug in his office.
18 Obviously these operations have to be by surprise.

19 The methodical questioning of workers. Well,
20 that's what they're there for.

21 The verbal announcement of INS authority and
22 the display of badges. I dare say that if they had come
23 in without badges and without announcing who they were
24 and what they were doing, I would certainly find that
25 more offensive and I suspect the Court of Appeals would,

1 too.

2 The carrying or use of handcuffs, something
3 that is obviously reasonable since they are going to be
4 arresting a large number of people, not all of whom will
5 be cooperative.

6 And, finally, the apprehension of fleeing
7 co-workers in the sight of the work force. Well, if
8 they can't apprehend co-workers in the sight of the work
9 force, what they have to do is create a situation in
10 which they are induced to run out of the workplace and
11 be arrested outside. Now this is a prescription for
12 chaos, not for conformity with the Fourth Amendment.

13 I have one other thing. I urge you
14 particularly to look at page 130 of the Joint Appendix
15 and the testimony of Miramontes because she was
16 questioned there about what was really bothering her
17 about the surveys. And what bothered her about the
18 surveys was, first of all, the fact that these illegal
19 alien workers who were arrested had not committed any
20 crime, in her view, and it disturbed her that they were
21 being arrested and deported.

22 And I don't think it's a party for the
23 Immigration Service. It is a sad situation that these
24 people have to be deported. It is not a violation of
25 the Fourth Amendment; it is an enforcement of the law.

1 It also disturbed her that citizens are not
2 required to produce identification and lawful resident
3 aliens are required. Now again I can understand why
4 that might be annoying, but that is the law and it is
5 not a violation of the Fourth Amendment.

6 I'd like to reserve the balance of my time for
7 rebuttal.

8 QUESTION: Mr. Frey, may I ask you a question
9 on --

10 MR. FREY: Certainly.

11 QUESTION: -- on my time, if I have any.
12 Perhaps you were in the Court, I think it was in
13 December, when we had the case of Sure-tan against the
14 NLRB up here.

15 MR. FREY: I don't remember whether I heard
16 the argument.

17 QUESTION: Well, you are familiar with the
18 case, I am sure.

19 MR. FREY: Scmewhat.

20 QUESTION: It is the law of the United States
21 that an employer vioates no crime or no law when he
22 employs aliens, isn't it?

23 MR. FREY: That's correct.

24 QUESTION: And here the Solicitor General, on
25 behalf of the government in Sure-tan, was arguing that

1 it was a crime, a violation of the NLRB, for the
2 employer to report the presence of an illegal alien.
3 And here today you are arguing for precisely the
4 opposite result.

5 Do you see any inconsistency in the Government
6 of the United States --

7 MR. FREY: I see no inconsistency.

8 QUESTION: None whatever?

9 MR. FREY: None whatever.

10 QUESTION: None whatever?

11 MR. FREY: Not the slightest, not the
12 slightest. The National Labor Relations Act is not
13 involved in this case.

14 QUESTION: I understand that, but I'm
15 talking --

16 MR. FREY: The employer has no duty. This
17 case does not focus at all on the employer's rights or
18 duties. There was no suggestion in Sure-tan that the
19 Immigration Service should not enforce the law that
20 requires the apprehension and deportation of illegal
21 aliens.

22 QUESTION: I'm afraid you've misunderstood the
23 import of my question.

24 MR. FREY: I'm not sure I did.

25 QUESTION: I'm talking about the policy of the

1 United States. I know you don't form it and neither do
2 we, but it seems very curious that with --

3 MR. FREY: Well, if Congress wants --

4 QUESTION: -- nine million Americans
5 unemployed in the United States that the --

6 MR. FREY: Sure-tan turns on the problem of
7 the special policies which -- of the National Labor
8 Relations Act, which may or may not control the result
9 in that case. That is a policy that is made by Congress
10 and it is the Court's duty to determine how that policy
11 affects the decision in that case.

12 That policy is not in play here and,
13 therefore, there's no inconsistency in going
14 straightforwardly with our enforcement efforts in
15 conformity with Constitutional requirements.

16 QUESTION: I'd like for you to understand my
17 question. I said at the outset it was on my time and if -
18 I were a lawyer I would do what the law requires me to
19 do, and I hope to do it as a Justice.

20 But I was talking only about the policy of our
21 government which seems to be to be quite inconsistent.

22 MR. FREY: Well, perhaps so.

23 QUESTION: Am I correct that this is a
24 non-union shop we are dealing with here?

25 MR. FREY: No, this is a union shop.

1 QUESTION: It is a union shop.

2 MR. FREY: A union shop. In fact, originally
3 the Ladies Garment Workers Union was a plaintiff in this
4 case; they were dismissed.

5 QUESTION: Mr. Fenton.

6 ORAL ARGUMENT BY HENRY R. FENTON, ESQ.,

7 ON BEHALF OF RESPONDENTS

8 MR. FENTON: Mr. Chief Justice and may it
9 please the Court:

10 This case concerns the constitutionality under
11 the Fourth Amendment of INS workplace surveys or raids
12 which are carried on on a nationwide basis. The
13 government concedes that the three surveys that are at
14 issue in this case were carried out substantially in the
15 same way as they carry out surveys throughout the
16 country.

17 We submit that as part of that program of INS
18 surveys the Respondents -- two United States citizens
19 born in this country and two legal resident aliens, one
20 of whom has resided here since 1944 and was raised in
21 this country, the other of whom resided in this country
22 for some 15 years at the time of the surveys in 1977 --
23 were seized and were questioned along with their
24 co-workers in three surveys that occurred in 1977.

25 My argument is basically divided into three

1 parts. First, I will argue that the Respondents were
2 seized; secondly, that they were unreasonably seized;
3 and, finally, that the appropriate standard for seizure
4 in such a setting is reasonable suspicion of illegal
5 alienage.

6 Now I think that any common sense appraisal of
7 the record indicates that these people were actually
8 seized and that they are seized in the course of these
9 surveys. In excess of 20 and perhaps as many as 30 INS
10 officers took part in the surveys. In one of the
11 surveys they were accompanied by uniformed Los Angeles
12 Police Department agents.

13 Now they entered into the factory. They came
14 in suddenly. There was no notice to the employees. And
15 some of them immediately stationed themselves inside the
16 factory, in the doorways, so that the employees could
17 see that they were there. There was no question about
18 that. In fact, Respondents -- the record is clear that
19 Respondents said that they saw the agents position
20 themselves.

21 For example, Delgado said that, "I started
22 looking up" -- I'm quoting him; this is at the Appendix,
23 page 82 -- "I started looking up toward the front and
24 then I seen people with badges being stationed by the
25 doors. They wouldn't let nobody go out." And then

1 Delgado described that five people were stopped at the
2 doorway by INS agents and were prevented from going in.

3 Mrs. Miramontes, another Respondent, in
4 another survey -- again this is at the beginning of the
5 survey even before the questioning begins -- saw
6 somebody try and go out and the agent responded "don't
7 go out", and the person pushed his way past and ran out
8 the door and the INS retained a portion of the
9 tee-shirt.

10 QUESTION: Under the routine of the workplace,
11 were they allowed to go out whenever they wanted to?

12 MR. FENTON: They were allowed to go out
13 whenever they wanted to, certainly.

14 QUESTION: So they could go across the street
15 and get a cup of coffee, leave for the day?

16 MR. FENTON: That was their freedom as
17 American citizens, certainly.

18 QUESTION: Well, how about the rule -- did the
19 employer just let them take off whenever they felt like
20 it during working hours?

21 MR. FENTON: Well, no, the employer didn't,
22 but I think our point is that in a free society in that
23 setting if they had known in advance the kind of
24 intrusion they would have been subjected to, I would
25 submit that a reasonable worker under those

1 circumstances would have chosen not to remain at work,
2 Your Honor.

3 QUESTION: I didn't hear the last.

4 MR. FENTON: Would have chosen not to remain
5 at work. It was a very intrusive --

6 QUESTION: Because he would be arrested. But
7 my question was whether an employer at either of these
8 places permitted his employees to leave the shop during
9 the day, walk out the front door at any time.

10 MR. FENTON: Is Your Honor -- is the question
11 directed toward the time of the surveys or just
12 generally?

13 QUESTION: Day-to-day in his employment. The
14 answer is no, isn't it?

15 MR. FENTON: Well, there's nothing in the
16 record to that effect. Presumably the workers have to
17 remain at work, it's true, other than at breaks and at
18 lunch, if that's the purport of the question.

19 But I think the point is that the -- those
20 people were forced to remain and if they had chosen not
21 to remain they had to remain because of the force and
22 because of the show of authority that was going on
23 around them. They had no choice in the matter, and I
24 think in a free society even though we all have to work
25 and make a living we have a right to walk out the door.

1 QUESTION: But, Mr. Fenton, may I interrupt?
2 There are really three kinds of individuals. Some are
3 here unlawfully and some are citizens and some are
4 lawful residents. Is there any evidence in the record
5 that a person other than an unlawful alien attempted to
6 leave the factory and was restrained from doing so?

7 MR. FENTON: The only evidence was this one
8 instance that Mr. Frey referred to where someone was
9 handcuffed and then the handcuffs were taken off.

10 QUESTION: Do we know whether that person was
11 a citizen or not?

12 MR. FENTON: Well, I think the person
13 indicated that he or she was a citizen, was disbelieved,
14 evidently, was handcuffed, and subsequently the
15 handcuffs were removed.

16 QUESTION: Well, that person would have a
17 direct remedy, I would suppose.

18 MR. FENTON: I suppose so, but I submit that
19 the other workers were seized as well, under any test,
20 whether it's the test --

21 QUESTION: Well, supposing just for a moment,
22 to take a hypothetical, supposing we had some magical
23 way of identifying the different kind of persons and we
24 could tell as a matter of fact that all of the unlawful
25 aliens immediately tried to leave and were restrained

1 from doing so, and none of the others did.

2 Would you still say that the others were
3 seized?

4 MR. FENTON: I would, Your Honor, because I
5 think to the average worker you're talking about people
6 who are basically unskilled people and you have to look
7 at it from their vantage point -- the vantage point of
8 the average worker.

9 QUESTION: But part of the point that Justice
10 Blackmun makes, I think, is maybe they don't really have
11 any motive to leave, except the unlawful people.

12 MR. FENTON: Well, I think that -- I think
13 that when they see people being handcuffed at the outset
14 and they see law enforcement officers there, I think
15 they may very well have a motive to leave, and I think
16 the reason that they are forced to remain is simply
17 because they see that if they do leave they themselves
18 might be suspected of being illegal aliens, or they
19 themselves might be handcuffed.

20 They themselves may place themselves in a
21 position where they could possibly be deported.

22 QUESTION: Mr. Fenton, is this a class
23 action?

24 MR. FENTON: It was originally class -- it was
25 originally a class action.

1 QUESTION: I said is it now?

2 MR. FENTON: No, it's not. It was not
3 certified.

4 QUESTION: Well, what good is this argument?

5 MR. FENTON: Well, Your Honor, I think that
6 the Ninth -- the importance of it is that these surveys
7 are continuing and the fact of the matter is that it
8 wasn't just these individual Respondents who were seized
9 but it was everybody in the factory. The law suit was
10 brought on behalf of the union and the workers that it
11 represented, everyone in those factories.

12 The union really is technically a party,
13 although the Ninth Circuit didn't deal with the question
14 of the dismissal of the union. So we think that it is
15 important that in addition to the Respondents the other
16 people were seized as well. But we submit that these
17 Respondents were seized and that it was apparent to them
18 that they couldn't leave.

19 Now Mr. Frey suggests that two people walked
20 out the door. I think the record really doesn't suggest
21 that. What happened was in one instance Mrs. Correa,
22 after the questioning was over, mustered up the courage
23 to walk over and talk to an INS agent, but she never
24 left the custody of any of the INS agents. So there was
25 really never any attempt to leave and get away when INS

1 agents were present.

2 The other situation involved Mr. Delgado, and
3 the record simply reflects that he either directed
4 someone to go to the loading dock or he himself went to
5 the loading dock. But, once again, the crucial point is
6 that he never tried to leave, nor did he leave the
7 custody of the INS agents in the factory because he felt
8 compelled to remain not only because of the people who
9 were stationed there, but because there was a large
10 force of agents who were systematically questioning
11 people in a manner which would suggest that everyone was
12 under suspicion and everyone must remain.

13 QUESTION: Mr. Fenton, your brief states that
14 the exits were sealed. How were they sealed?

15 MR. FENTON: They were sealed by virtue of the
16 fact that agents were stationed there and actually
17 physically prevented people from leaving the factory.

18 QUESTION: That sentence states "the exits are
19 sealed and guards are stationed", but what you saying
20 now, as I understand it, that the sealing was the result
21 of the presence of the agents.

22 MR. FENTON: Yes, Your Honor.

23 QUESTION: Yes. These were ununiformed and
24 unarmed?

25 MR. FENTON: The agents were -- they were

1 armed, but the arms were concealed. They carried
2 handcuffs which were visibly displayed, which the
3 Respondents could see and the workers could see.

4 They were handcuffing people, which again
5 suggested to the workers that they had better
6 cooperate. It wasn't simply an encounter in an airport
7 with one or two ununiformed agents.

8 QUESTION: Is there evidence of more than one
9 person being handcuffed?

10 MR. FENTON: Yes, there's evidence of many
11 persons being --

12 QUESTION: Many persons?

13 MR. FENTON: Yes. In fact, I think --

14 QUESTION: Well, does the evidence indicate
15 whether the persons handcuffed were handcuffed after
16 probable cause had been found?

17 MR. FENTON: No, Your Honor, I don't think it
18 does. I think --

19 QUESTION: The evidence doesn't address that?

20 MR. FENTON: Well, I think the record
21 essentially suggests that the people who tried to flee
22 were handcuffed, but it doesn't -- it doesn't reflect
23 anything beyond that. The people who tried to run away
24 or tried to hide were handcuffed.

25 QUESTION: Your submission, though, generally

1 is that the entire work force, including aliens and
2 non-aliens, was seized?

3 MR. FENTON: Yes, Your Honor, that's our
4 position based upon all the circumstances, not just the
5 sealing of the exits.

6 QUESTION: Mr. Fenton, what does the record
7 show -- and perhaps some else has covered this, but I
8 think there seems to be some confusion -- about people
9 who sought to leave and were prevented from leaving in
10 the absence of any showing of reasonable suspicion?

11 MR. FENTON: Okay. Well, the only thing the
12 record shows is, as I said before -- and I can refer to
13 it -- is, for example, Delgado saw five people being
14 stopped at the back door.

15 QUESTION: Do you --

16 MR. FENTON: That's at page 82 of the Joint
17 Appendix.

18 QUESTION: Page 82. But we don't know whether
19 those five people there were reasonable suspicion to
20 stop them or not, I take it.

21 MR. FENTON: Well, we know that at this point
22 in time the agents had just come into the factory and
23 these were people who were simply trying to leave, but
24 they hadn't done anything suspicious other than be
25 present in the factory.

1 QUESTION: No, but I suppose an agent could
2 seek to question them on the way out, even though they
3 sought to get out as soon as the agents came in, and if
4 their answers revealed anything that gave reasonable
5 suspicion that would be reason for detainment.

6 MR. FENTON: I don't think that was the
7 situation here, Your Honor.

8 QUESTION: But do we know?

9 MR. FENTON: No, I think the record reflects
10 these people simply tried to get out before they were
11 questioned.

12 QUESTION: Where does it reflect it?

13 MR. FENTON: It's at the Appendix, page 82, I
14 believe.

15 QUESTION: What language on page 82 are you
16 relying on?

17 QUESTION: You say this language shows that
18 they were not only interrogated, might have been
19 interrogated, but they were prevented from leaving; is
20 that your point?

21 MR. FENTON: Yes, they were prevented from --
22 well, the language only says that --

23 QUESTION: They were stopped. Well, I didn't
24 know stopping was necessarily a seizure.

25 MR. FENTON: Well --

1 QUESTION: Do you think so under our cases or
2 not?

3 MR. FENTON: Well, I think that under these
4 circumstances if one tries to leave one's place of
5 employment and one is stopped at the door -- that's the
6 way I interpret this -- and prevented from leaving the
7 premises, then one is seized, and in my view one's
8 free --

9 QUESTION: Where is the language?

10 MR. FENTON: Well, it's this language. He saw
11 people. He says that he saw people running, about 10 to
12 20. "Where did they run to?" "Toward" -- that's in the
13 middle of the page -- "toward the back of the
14 building." "Did they run as a group?" "No." "Did you
15 see any of these people try to go out any door?"
16 "Yes."

17 And then he says -- then he says: "What
18 happened when these people tried to get out the door?"
19 "Well, every door was covered." "How many of these
20 people did you see try to get out a door?" "I saw five
21 trying to get out the back emergency exit, but they were
22 stopped."

23 That was the testimony I was referring to.

24 QUESTION: Of course, you left out whether
25 they were running and trying to hide. They were trying

1 to hide, according to the testimony.

2 MR. FENTON: Well, these people, I think, we
3 trying to get out. Some were trying to hide.

4 QUESTION: Well, that's what he describes them
5 all as doing. Would that be justification, do you
6 think, for asking a couple of questions?

7 MR. FENTON: I think if -- in an instance like
8 that basically I think that workers are terrified and
9 while under ordinary circumstances --

10 QUESTION: Which ones are particularly
11 terrified?

12 MR. FENTON: I beg your pardon?

13 QUESTION: Which ones are particularly
14 terrified?

15 MR. FENTON: Particularly perhaps the illegal
16 aliens.

17 QUESTION: I mean, isn't that a reasonable
18 inference that they're the ones who ought to be
19 questioned and stopped for a moment? Wouldn't that
20 itself provide the articulable suspicion?

21 MR. FENTON: Well, I think that -- not
22 necessarily, because in this --

23 QUESTION: Is there any evidence that anyone
24 other than those got up and ran? Is there any evidence
25 that a citizen got up and ran when somebody walked in

1 the door?

2 MR. FENTON: No, there's no evidence one way
3 or the other.

4 QUESTION: It's really highly unlikely, isn't
5 it?

6 MR. FENTON: I beg your pardon?

7 QUESTION: Isn't it highly unlikely that a
8 citizen would get up and run?

9 MR. FENTON: Well, I think the point is that a
10 U.S. -- the U.S. citizens, the Respondents at least,
11 didn't try to leave, whether it was by running or
12 walking. I think it probably is unlikely that a citizen
13 would run, but I think it's conceivable that in that
14 setting that a citizen would be frightened sufficiently
15 by the survey, would be frightened of being mistaken for
16 an illegal alien, that he or she might run.

17 QUESTION: Why?

18 MR. FENTON: Because the basis for
19 handcuffing, the apparent basis for handcuffing, I would
20 submit, was that the person tried to leave and Hispanic
21 appearance of the people.

22 QUESTION: Mr. Fenton, one question. It's
23 true that they had two days at these plants, right?

24 MR. FENTON: There were -- well, there were
25 two separate plants. There were two surveys.

1 QUESTION: There were two separate days?
2 MR. FENTON: There was a nine-month --
3 QUESTION: Well, weren't there two days that
4 they did the same thing?
5 MR. FENTON: Yes, at one of the plants; that's
6 correct.
7 QUESTION: Well, if they were -- the people
8 you are talking about -- were so scared to death, why
9 did they come back the second day?
10 MR. FENTON: The second survey wasn't on the
11 second day. It was some nine months later, Your Honor.
12 In other words --
13 QUESTION: It was later.
14 MR. FENTON: It was several months later. It
15 wasn't the following day.
16 QUESTION: Well, if they were so scared, they
17 did come back in the place to work.
18 MR. FENTON: Well, they had to make a living,
19 but, you know, I submit that they were afraid.
20 QUESTION: They could have gone back to Mexico
21 and made it.
22 MR. FENTON: And the record reflects, Your
23 Honor, that -- well, I'm talking about U.S. citizens and
24 legal residents, and the record reflects that these
25 people, not the illegal aliens -- I'm not talking about

1 those people.

2 QUESTION: Well, again, I thought Justice
3 Stevens asked you to name one point in the record that
4 said a citizen was involved.

5 MR. FENTON: Well, citizens remained within
6 the factory. The Respondents were citizens and resident
7 aliens and Mrs. Correa, one of the Respondents,
8 testified that when the agents left she spent some 45
9 minutes calming down citizens and legal residents who
10 were crying because they were so upset about what was
11 going on and were so frightened that they might have
12 been apprehended and so forth.

13 QUESTION: What would their --

14 QUESTION: Well, how can you apprehend a
15 citizen?

16 MR. FENTON: For fear that they themselves
17 might have been mistaken as an illegal alien. For
18 example, if one were to identify oneself as an illegal
19 alien, a Hispanic, and were disbelieved, presumably one
20 could be handcuffed, from the vantage point of the
21 workers.

22 QUESTION: There's no evidence that that took
23 place, is there?

24 MR. FENTON: There was one instance of this
25 one worker who was handcuffed and then later the

1 handcuffs were taken off.

2 QUESTION: Yes, but what do we know about the
3 probable cause or suspicion that the agents had with
4 respect to that one worker?

5 MR. FENTON: Well, we don't, but --

6 One further point with respect to the seizure
7 that I'd like to make, Your Honor. I think that there
8 is an admission in the record that in fact the people
9 were stationed in the doorways to keep everyone inside.
10 Assistant Director Smith stated that the agents were
11 placed there "in order to guarantee that individuals
12 will not escape", and this is at page 48 of the Joint
13 Appendix.

14 QUESTION: Do I understand you to contend that
15 if the person responds and says "no, I am not a citizen
16 and I do not have a work permit" that there's something
17 wrong with taking them into custody, including
18 handcuffing them?

19 MR. FENTON: I'm saying that if there's
20 reasonable cause, if there were reasonable cause to
21 believe --

22 QUESTION: Well, that's very reasonable cause,
23 isn't it?

24 MR. FENTON: Well, our point is, first of all,
25 that those people are seized before any questioning even

1 begins, so that there's a seizure before there's any
2 particularized or objective basis of suspicion.

3 Contrary to what Mr. Frey says, the record
4 reflects that there is -- that in 90 percent of the
5 cases, as he says, these surveys are carried out with
6 the permission of the employer, but there's no pattern
7 to it. Sometimes there'll be an anonymous tip and
8 they'll go to a particular place of employment based on
9 an anonymous tip.

10 In the Davis Pleating surveys where there was
11 a warrant -- and perhaps in ten percent of the cases
12 there's a warrant to permit entry into the factory --
13 the only basis for the raid was that three illegal
14 aliens were apprehended outside the factory.

15 One of them said that she believed there were
16 five illegal aliens in the factory, based on her
17 conversations with people in the factory. Another one
18 said that she thought there were many. The third said
19 she thought there were 18. None of them would identify
20 anyone in the factory or name any illegal aliens in the
21 factory.

22 The other basis for the raid, which captured a
23 population of 300 people, was that the INS agent
24 involved stated that he saw 20 persons of a -- and these
25 were his words -- "of apparent Latin appearance" walk

1 into the factory. So there really is no basis before
2 the agents go in there, no objective or particularized
3 basis for --

4 QUESTION: Mr. Fenton, your position, I think,
5 on behalf of your clients is the same even if there's
6 all the basis in the world to go in. You're not arguing
7 on behalf of the employer that you have no right to come
8 in the factory and usually, as I understand it, the
9 employer consents.

10 MR. FENTON: Well, we're arguing -- that's
11 true, but we're arguing that the people are seized, that
12 my clients were seized without any --

13 QUESTION: But you make the same argument even
14 if 50 percent of the people in the factory were well
15 known to be unlawful aliens and the other 50 would still
16 make the same --

17 MR. FENTON: But if 50 percent of the -- I
18 would make that if there were no specific -- if there
19 were no particularized and objective basis beforehand to
20 go in and seize those people, and after the fact they
21 were determined that 50 percent were illegal aliens.
22 Yes, that would be my point.

23 However, if the government, if the INS had a
24 particularized and objective belief that 50 percent of
25 the people in there were illegal aliens, certainly they

1 would have a right to go in and detain those individuals
2 and question them, but that's never the case in these
3 surveys.

4 QUESTION: Could they follow precisely -- they
5 don't know which 50 percent it is. Could they follow
6 precisely the procedure they followed here if they had a
7 100 percent certainty that 50 percent of the work force
8 was illegal aliens? Could they follow this procedure
9 then?

10 MR. FENTON: I think not. I think it would
11 violate the rights of the remaining 50 percent, but
12 that --

13 QUESTION: But it seems to me that the rights
14 of the remainder are unaffected by the number of people
15 they suspect.

16 MR. FENTON: Well --

17 QUESTION: I mean, you might think there's one
18 armed robber in the factory and follow a similar
19 procedure.

20 MR. FENTON: Well, again in the one armed
21 robber situation you'd have some -- you'd be looking for
22 that one armed robber. You'd have a description or
23 something of that sort.

24 The evil of these raids --

25 QUESTION: But you might go through and ask

1 everybody to show your driver's license, look for -- I
2 mean, anybody that's at least reasonably close in size
3 and dimensions and so on.

4 MR. FENTON: But you wouldn't permit the
5 police to, for example, to seal off an apartment store
6 to look for a shoplifter and have police officers march
7 up and down the aisles of the department store and keep
8 people there for two hours to look for shoplifters. I
9 think that would violate the Fourth Amendment rights of
10 those people.

11 QUESTION: Well, they might ask each one who
12 seeks to leave at the time he leaves, "Can I see your
13 driver's license?" They wouldn't have to stay there two
14 hours unless it gets awfully crowded in front.

15 MR. FENTON: Your Honor, I would submit that
16 our situation is totally different. It's simply not
17 that kind of situation.

18 Now the surveys, we submit, violate the Fourth
19 Amendment first of all because they closely resemble the
20 general searches and the bills of attainder that were
21 carried out by the British as part of our
22 pre-Revolutionary history.

23 Again, in those cases, although here we're
24 talking about places of employment, we're talking about
25 indiscriminate seizures of people so that you can

1 question them and find some guilty people. There the
2 British would go into an area without suspecting anyone
3 in particular of customs violations and they would,
4 based upon generalized warrants, seize people. We
5 submit that the surveys per se violate the Fourth
6 Amendment because they resemble those bills of attainder
7 and generalized searches.

8 Moreover, there's no particularized suspicion
9 nor adherence to any objective standard and we submit --

10 QUESTION: I gather, Mr. Fenton, you don't
11 find any support for your position in Davis v.
12 Mississippi.

13 MR. FENTON: Your Honor, I think that Davis
14 versus Mississippi does support our position, and there,
15 again, there was --

16 QUESTION: You haven't cited it or relied on
17 it. I wondered.

18 MR. FENTON: Well, it is one of the amicus
19 briefs, Your Honor, but we do believe that it does
20 support our position and that in that case again the
21 Court held that simply because people were -- simply
22 because one was black and a group of blacks were
23 arrested that that was not a particularized basis to
24 suspect that someone was guilty of a crime. So we do
25 feel that that case supports our position.

1 We feel that U.S. versus Cortez is even more
2 on point and this Court held that it's necessary under
3 the Fourth Amendment that particular persons seized be
4 guilty of wrongdoing and that that was the essential
5 teaching of the Fourth Amendment.

6 QUESTION: Let me ask you this hypothetical
7 question: Suppose they weren't looking for aliens but
8 the police simply stationed a car at the exit of the
9 parking lot at a factory. The first question: All the
10 persons coming to take a car off were asked to exhibit
11 their driver's license. Do you think that would be all
12 right, or would they be seized?

13 MR. FENTON: I think that if you had one or
14 two officers who were, say, outside the factory and
15 simply asked people to look at, that might be a
16 different case because you just don't -- you don't have
17 the tremendous coercive impact that you do of this
18 entire apparatus that appeared in the course of the
19 survey.

20 QUESTION: I'm limiting my hypothetical to
21 people who are approaching a parking lot ostensibly,
22 apparently, to take a car, and they are asked at that
23 time to exhibit their driver's license. That's all
24 right, in your view?

25 MR. FENTON: No, I think not. I think in that

1 particular case --

2 QUESTION: How about, then, when they're
3 driving out and they stop them as they are driving out
4 and say now you're driving your car, let me see your
5 license.

6 MR. FENTON: Well, I think under Delaware
7 versus Krause if they're going to stop a car they must
8 have -- the police must have a particularized and
9 objective basis of suspicion, so I think that would not
10 be all right.

11 Now the government contends that the
12 government interest that's involved justifies these
13 wholesale violations of rights and we submit that this
14 Court has already considered the national interest that
15 they purport is served here in the Brignoni-Ponce and
16 Cortez cases, and determined that a very minimum
17 particularized basis of suspicion and a suspicion of
18 illegal alienage is required.

19 So that question has already been considered
20 by this Court.

21 QUESTION: How about in Martinez-Fuerte?

22 MR. FENTON: Your Honor, I think the
23 Martinez-Fuerte is an entirely situation -- it's sui
24 generis and doesn't really apply to any other
25 situation. There, the Court --

1 QUESTION: Well, it's the closest case.

2 MR. FENTON: Yes, it is. If I may discuss it,
3 the situation there involved a permanent checkpoint
4 which had been in place for some 24 years. The Court
5 held that there was a very minimal subjective intrusion
6 because all motorists using that highway know it's
7 there. I personally use that road all the time,
8 practically every week, and all you do is slow down, and
9 you know that that is all that's going to happen.

10 The Court contrasted that very minimal
11 subjective intrusion to the very substantial intrusion
12 involved in roving stops by border patrols. This
13 particular situation is much more analogous to a roving
14 stop. It's a surprise entry by these officers; it's
15 totally unanticipated.

16 And, in fact, it's far more intrusive, far
17 more --

18 QUESTION: Well, I guess to have standing you
19 have to say it is anticipated; otherwise you'd be in the
20 Lyons situation and your clients wouldn't have
21 standing. So you have to take the position that yes, we
22 know this is going to happen and it's going to recur;
23 therefore, we have standing.

24 So where's the surprise?

25 MR. FENTON: Well, Your Honor, I think that

1 while these particular individuals may know that at some
2 point in time it may recur, they certainly don't know
3 that it's going to recur at any particular point in
4 time. They don't know necessarily that it's going to
5 recur.

6 I think that our standing lies in the fact
7 that the government has admitted that they're going to
8 continue engaging in these surveys.

9 QUESTION: Would Martinez-Fuerte be different
10 if the government didn't maintain its checkpoint at the
11 same place every day of the year?

12 MR. FENTON: I think the decision would have
13 been different. I think it was crucial to the decision,
14 and this Court said that you had a very minimal
15 subjective intrusion. Very little fear, very little
16 anxiety was engendered by the checkpoint, since it was
17 permanently there and everyone knew that it was there.

18 This Court also held that one has a much lower
19 expectation of privacy in an automobile and everyone
20 expects to be stopped once in a while for vehicle -- for
21 traffic tickets and so forth by law enforcement agents.

22 And another factor, another crucial
23 distinguishing factor, I think, in Martinez-Fuerte is
24 that really it was an extension of the border. It was
25 at the junction of two highways leading away from the

1 border and I think that's a totally different
2 situation.

3 As the Court said in Almeida-Sanchez, to
4 protect our borders you have really different kinds of
5 Fourth Amendment considerations that are involved. This
6 is -- these surveys occurred within our central cities.

7 QUESTION: Well, but wasn't Martinez-Fuerte on
8 the highway between San Diego and Los Angeles?

9 MR. FENTON: That's correct.

10 QUESTION: So that it's hard to say it was the
11 border because people headed north from San Diego had to
12 pass through that stop.

13 MR. FENTON: Well, it's not technically the
14 border, but I think it's an adjunct to the border.

15 QUESTION: Well, I don't think the Court would
16 have needed the reasoning it used in Martinez-Fuerte to
17 justify the stop if it had been a traditional border
18 stop where you can stop anybody, regardless of any sort
19 of probable cause.

20 MR. FENTON: I recognize that, Your Honor.
21 I'm just saying that that was a factor.

22 QUESTION: And searched them.

23 MR. FENTON: I think the crucial point was
24 that it was a very minimal subjective intrusion. Here
25 we have a very substantial subjective intrusion. I

1 think the record bears this out in that respect.

2 QUESTION: What -- tell me, what standing do
3 your clients have to seek an injunction? Is it because
4 it may happen to them again?

5 MR. FENTON: It may happen to them again.

6 QUESTION: What are the odds on that?

7 MR. FENTON: Well, I think the government has
8 indicated they intend to engage in further surveys in
9 these particular factories.

10 QUESTION: Oh, I know, but at this plant?

11 MR. FENTON: Yes, that's what they said. And
12 I don't think there's any question about it. Moreover,
13 the law suit was -- the Ninth Circuit took the position
14 they didn't even have to reach the standing of the union
15 and the union suit for -- on behalf of workers they
16 represented.

17 QUESTION: Well, the union isn't in the case
18 any more.

19 MR. FENTON: Well, Your Honor, we would submit
20 that they really are in the case even though the Ninth
21 Circuit didn't deal with the standing question.

22 But I think the crucial point is that these
23 surveys are continuing and we submit that hundreds of
24 thousands of people each year are -- have their rights
25 violated by virtue of these surveys, so that it's

1 crucial that -- so that you really do have a question
2 here beyond the situation of these four Respondents.

3 QUESTION: Does the number of people affected
4 really matter if we don't have a class action and there
5 are four individuals?

6 MR. FENTON: Well, I think in terms of
7 balancing, if one balances the national interest, I
8 think it is appropriate to consider the effect that this
9 has on people in this country.

10 QUESTION: It sure does if you're the Congress
11 of the United States, but don't we have to decide the
12 specific controversy between the four individuals and
13 the government?

14 MR. FENTON: Yes, Your Honor, that's correct.

15 But I think also in terms of the notion of
16 whether or not these surveys are reasonable, the
17 government raises national considerations, national
18 policy considerations, and it's appropriate for this
19 Court also to consider the impact on the individuals,
20 the interests of the individuals who are subjected to
21 these surveys.

22 QUESTION: May I ask this: I take it one of
23 the interests at least of some of the individuals,
24 according to the testimony, was concern about their
25 friends because they obviously had some sympathy with

1 the people who were being arrested.

2 MR. FENTON: Well, we're not -- I think that's
3 extraneous.

4 QUESTION: May I just say, do you rely on that
5 at all?

6 MR. FENTON: No.

7 QUESTION: Okay. So it's only concern about
8 their own wellbeing that would be relevant?

9 MR. FENTON: Absolutely. I don't think that
10 has a thing to do with the case. Our point is that --

11 QUESTION: Are all four of the parties still
12 in the country?

13 MR. FENTON: Yes, Your Honor. Well, they are
14 citizens and as far as I know they are, yes.

15 Now again in considering the reasonableness of
16 the seizure, it's appropriate to examine whether or not
17 there are alternative means of enforcement available to
18 the INS to solve the problems that they assert exist,
19 and we submit that there certainly are.

20 First of all, INS workplace surveys have never
21 been seriously proposed as any portion of the solution
22 to our immigration problems. In fact, the Select
23 Commission suggested a number of alternatives to solve
24 our problems and surveys were not among them.

25 The Select Commission even said that any

1 massive program of deportation would violate civil
2 rights, and the U.S. Civil Rights Commission found these
3 surveys to be violative of civil rights.

4 Beyond that, Your Honor --

5 QUESTION: What did they find? Violated what
6 right?

7 MR. FENTON: Well, the U.S. Civil Rights
8 Commission.

9 QUESTION: Well, I know. What right?

10 MR. FENTON: Fourth Amendment rights.

11 QUESTION: Did they say Fourth Amendment
12 rights?

13 MR. FENTON: I believe so, Your Honor.

14 QUESTION: Were they addressing this
15 particular --

16 MR. FENTON: No, they were not. They were not
17 addressing these particular surveys, but they were
18 addressing surveys just like the ones that are at issue
19 in this case.

20 Now the other point is that there is no reason
21 why the INS can't engage in the normal kinds of law
22 enforcement functions that other law enforcement
23 officers engage in. The record reflects that --

24 QUESTION: Your time has expired, Counsel.

25 MR. FENTON: Yes. Thank you.

1 QUESTION: Did you have anything further, Mr.
2 Frey?

3 ORAL ARGUMENT BY ANDREW L. FREY

4 ON BEHALF OF PETITIONERS - REBUTTAL

5 MR. FREY: A couple of points, Mr. Chief
6 Justice.

7 First of all, I think my colleague
8 underestimates the intelligence of his clients when he
9 suggests that they are so frightened for their own
10 welfare. In fact, Respondent Correa, in explaining what
11 bothered her, at page 116 of the Joint Appendix, was
12 talking about she was upset that production was
13 interrupted and they had to compete with non-union
14 shops.

15 And then she says, "Immigration goes by in the
16 car." She says, "These people are legal. They don't
17 have anything to fear. It's just the idea, I guess,
18 they're going to come through."

19 "Well, do you fear when you see an Immigration
20 officer?" "Not when I see them. I don't fear for me.
21 It's what I see."

22 I think these individuals are quite clear
23 about what is going on and what kind of threat the
24 survey represents to them.

25 QUESTION: Mr. Frey, what standing do these

1 four people have to seek an injunction?

2 MR. FREY: Well, I think they have standing to
3 seek an injunction on the ground that the Ninth Circuit
4 -- if the Ninth Circuit is right, they are being
5 illegally seized and they are exposed to a threat, and
6 given the number of illegal aliens --

7 QUESTION: I know. That may be true that they
8 were exposed to a threat if the Ninth Circuit's right,
9 but how about an injunction? Doesn't that -- don't they
10 have to really, if they're going to have --

11 MR. FREY: Probably a declaratory judgment
12 would suffice. I thought you were raising a question of
13 their standing to obtain an adjudication of their
14 rights.

15 QUESTION: No, no. I'm talking about why have
16 then even got standing to get a declaratory judgment?
17 That speaks to the future.

18 MR. FREY: Well, they are exposed to a
19 future --

20 QUESTION: Does the government represent they
21 are going to sweep this particular factory again?

22 MR. FREY: We won't tell you when.

23 QUESTION: No, of course, not, but you are
24 going to -- the likelihood is --

25 MR. FREY: Given the results that we've had at

1 these places, they are likely targets.

2 Let me just -- Justice Brennan raised the
3 question of Davis against Mississippi and I do think
4 that that is a very different case, because you have to
5 distinguish between this hypothetical group seizure
6 that's gone on here and the question of the seizure and
7 arrest in Davis against Mississippi of an individual.

8 And I agree that you would need probable
9 cause, under Dunaway against New York, a well settled
10 law, -- to arrest an individual you would need
11 reasonable suspicion, as in Cortez, to make a seizure of
12 a particular individual suspected of an offense,
13 suspected of being subject to a seizure. But this
14 theoretical seizure of the entire work force is a
15 totally different animal.

16 And the point that Justice Stevens was getting
17 at with my colleague, suppose that they had identified
18 39 people on the second day of a survey by name who were
19 present and they had gotten a warrant naming those 39
20 people. They would still have employed precisely the
21 same procedures to prevent those people from running out
22 and hiding and to try to identify who they were.

23 And under the reasoning of the Ninth Circuit,
24 even if they had a warrant based on probable cause they
25 would still be violating the Fourth Amendment rights of

1 all the other people in the workplace.

2 So there simply is -- well, my time is up.

3 CHIEF JUSTICE BURGER: Thank you, gentlemen.

4 The case is submitted. We will resume at

5 1:00.

6 (Whereupon, at 11:57 a.m., the case in the
7 above-entitled matter was submitted.)

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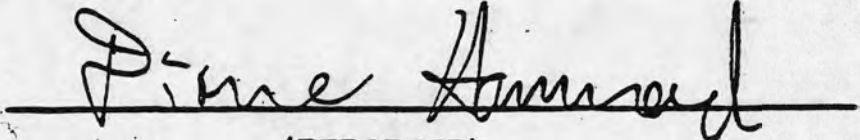
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HERMAN DELGADO, ET AL.

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