

The Peter Jennings Project for Journalists and the Constitution
Moot Court
March 3, 2010

Unidentified Male Speaker

00:28 Oyez, oyez, oyez.. All persons having business before the honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the court is now sitting. God save the United States and this honorable court. All rise.

Judith Kaye

You may be seated.

Todd Brewster

Good afternoon. And thank you again for your patience for our technical problems. I am Todd Brewster, the Director of the Peter Jennings Project for Journalists and the Constitution, and I'd like to welcome you all to our 4th Annual Peter Jennings Project Moot Court. Since its inception in 2007, the Jennings Project's Moot Court has been honored by the participation of some of the most important men and women of the law, and this year is no exception. I'd like to begin by introducing our panel of judges who, with the exception of our chief judge in the middle, Judith Kaye, who occupies the middle seat, are arranged in chronological order.

To the left here is the Honorable Guido Calabresi, a judge in the Second Circuit Court of Appeals and a former dean of Yale Law School, who is on the board of the Peter Jennings Project and has been intimately involved with the Jennings Project since its inception. Guido knew Peter Jennings well, and I consider him a dear friend. He has always been a wise counsel on matters dealing with PJP, but this is his first year in which we can enjoy his company. Thank you and welcome, Guido.

Mike Fitts is the dean of the University of Pennsylvania Law School and a longtime friend of the Peter Jennings Project, having served as a judge in the Moot several times before. Welcome, Mike.

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02:52 The Honorable Brett Kavanaugh is a judge on the D.C. Circuit Court of Appeals. We have been trying to get Brett here for a couple of years, and we succeeded this time. So welcome, Brett.

Last year Judge Tim Lewis came strutting in here, riding on a wave of confidence. It had nothing to do with the law; his beloved Pittsburgh Steelers had just won the Super Bowl. If he seems a bit more humble this time around, just note—

Timothy Lewis

That it was a good year. It was a good year last year.

Todd Brewster

The Steelers went 9 and 7 but failed to qualify for the playoffs. Tim, who retired as a judge from the Third Circuit in 1999, is a partner with Schrader, Harrison, Segal & Lewis.

Skipping by our chief judge for the moment, we greet four-time veteran PJP judge Marjorie Rendell, who also happens to be the First Lady of the State of Pennsylvania but not for long, being she has promised us that once she no longer lives in the governor's mansion she will play an even more active role in PJP, and we look forward to that. Welcome, Midge.

Next to her is my close friend, Barry Schaller, who recently retired from the Connecticut Supreme Court and now is serving on senior status in the appellate division. Justice Schaller has a particular expertise in issues of bioethics and public health, which makes today's case well-suited to his many skills. Barry also has the distinction of holding faculty positions at three—count them, three—prestigious schools at the same time: Yale, Wesleyan, and Trinity.

Next to Barry is perhaps our feistiest of judges, Judge Dolores Sloviter. Take note, counselors. She is also a four-time PJP veteran and a judge on the Third Circuit Court of Appeals. Welcome, Dolores.

And at the far end is Jan Ting, a professor of law at Temple University here in Philadelphia, who in 2006 was the Republican candidate for the United States Senate in Delaware. Dr. Ting is the

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son of Chinese immigrants and among other subjects teaches immigration law at Temple, so he too is well-suited to today's topic.

04:49 Finally, I return to introduce our chief judge, Judith Kaye, another dear friend, as was her late husband Stephen. Stephen was a frequent luncheon companion of mine who loved a great argument almost as much as he loved the New York Yankees and the Metropolitan Opera. As a Mets fan and one who runs from and not towards the opera, that was hard for me to say. A great American who revered the Constitution, Steve is dearly missed, particularly at a moment like this because he would have so enjoyed being here today. Judith was Chief Judge of the State of New York from 1993 to 2008 and the first woman to hold the state's highest judicial office. She is now counsel to Skadden Arps, a New York City firm. Judith and Stephen both knew Peter well—they lived in the same building—and I know that her dedication to appearing here in what is also her fourth year as our chief judge has a lot to do with honoring her friendship with Peter. Judith, we are deeply grateful.

Judith Kaye

Thank you, Todd.

Todd Brewster

The list of those who have argued before PJP's Moot Court is an impressive one indeed. Kathleen Sullivan, Charles Ogletree, Miguel Estrada, David Rudovsky, and Erwin Chemerinsky have all competed for the attention of this panel. I am pleased to announce that today arguing the side of Morrison and the state of Arizona will be Nina Pillard, who is behind me here, a professor at Georgetown University Law Center who has appeared before the Supreme Court on 25 cases and served as Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice during the Clinton administration. Welcome, Nina.

Arguing the side of the immigrant, Isoke Obasanjo, on a return visit to the PJP court will be Ken Starr. Ken is finishing his term as dean of Pepperdine University Law School and will become the 17th President of Baylor University this June. Congratulations, Ken. Any of you who regularly complain about deadlines—those journalists among us here today—and sleep deprivation should take notice of Ken today. He argued a moot court in Santa Clara yesterday, took the redeye to Philadelphia last night, arrived about 7 a.m. this morning, and was teaching his workshop group at 9:00. When he arrived this morning, I watched him carefully to see if he

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was adding any strange substances to his coffee, and I can swear that he has not. Ken, thank you for your dedication to this project.

07:07 Today's case was prepared by Joe Pace, a Yale law student with a terrific future ahead of him. Joe is in attendance today. Joe, will you stand up and receive applause from this group. Joe worked under the guidance of Professor Akhil Amar, a PJP board member and a faculty member and another very close friend of mine. He really is the godfather to this project since its inception, I would say. I've asked Akhil to step forward to read the hypothetical for us, and then Judge Kaye, it'll be all yours to take forward.

Judith Kaye

Thank you, Todd.

Todd Brewster

Thank you.

Akhil Amar

The year is 2021, and the Supreme Court of the United States is about to hear Morrison vs. Obasanjo, a highly controversial case that grew out of a desperate health emergency. Here's the story: The previous summer, a massive global outbreak of an unusually deadly form of "Simian" flu struck the United States, causing panic among the general population. For a healthy adult, "Simian" flu's mortality rate is approximately 10%. It's far deadlier in children and pregnant women. A child infected with "Simian" flu has a 30% chance of death and a 40% chance of brain damage. A pregnant woman has an equal chance of death and an 85% chance of miscarriage.

Expecting a surge of cases later in the year, U.S. pharmaceutical companies rushed to produce vaccines to cope with the sudden need, but even at peak production, these companies could not meet the demand among American citizens for protection. To compound the problem, the population of Mexico had already been hit especially hard, and as the disease spread, the United States girded for what it expected would be an onslaught of Mexicans pushing over the border to get vaccines from the U.S. supply. In October 2020, with the country already in a state of alarm, Congress and the White House felt the pressure to take some sort of action. There was bipartisan

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support for a measure providing for emergency funding of the production and distribution of vaccines to be distributed by state agencies, but the plan faltered when addressing a priority schedule. Who should get the first vaccines, and who should wait? Everyone agreed that health workers, pregnant women, and children deserved priority, but activists, concerned that the issue would make an already burdensome immigration problem even worse, vigorously lobbied Congress to pass a law that required proof of citizenship for anyone before they could obtain a vaccine. Immigration rights groups insisted that vaccinations should be distributed without regard to immigration status.

10:06 Caught in weeks of gridlock—of course that never happens now, but this is in the future—and the death toll rising, Congress’s public approval rating plummeted. Violence began to break out in some southern cities, where the flow of illegal immigrants intensified the issue. Hoping to quell fears, members of Congress first tackled the District of Columbia, enacting a law that placed U.S. citizens at the top of the statutory hierarchy. But after two weeks of negotiation over the nationwide bill, the lawmakers were at a stalemate. Then, seized by the need to do something, the House and Senate finally agreed to a bill that gave priority to health workers, pregnant women, and children but conveniently punted on the key issue of immigration.

Now, here’s the statutory language, which you don’t have in your pamphlets, so listen carefully: One, the Center for Disease Control—CDC—shall, in coordination with each state’s Department of Health, determine the appropriate number of vaccines for distribution in every state. The following groups will be given priority in the CDC’s calculation of each state’s vaccine quota and in the distribution of those vaccines: (a) pregnant women, (b) persons between ages 6 months and 10 years of age, (c) people who are at a higher risk for “Simian” flu because of chronic health disorders of compromised immune systems, and (d) health care and emergency medical service personnel. Two, each state may adopt any additional criteria for distributing the vaccines it deems necessary to further the public health.

On the question as to where in the scheme of things noncitizens were to be considered differently, if at all, the language in a joint committee report seemed relevant. It said that while, quote “the bill does not address the degree of priority for providing vaccine to aliens, state authorities being at the forefront of distribution are expected to remain alert to the interplay of public health and immigration magnet risks as they develop policy,” unquote. Further clouding interpretation, both sides of this contentious argument read the bill as a victory for their partisans. Senate Majority Leader Joseph D. Pace—no relation—announced, quote “the states

have a better grasp than Congress of their public health needs and the place that immigration populations occupy within the priority for government services. The American people can rest assured that their state governments will distribute these vaccines appropriately,” unquote. House Minority Whip Charles Nad sounded a different note. Quote, “Congress has charted a humane course today,” he declared, “giving all human beings that reside within American borders an equal chance of a healthy life,” unquote. Arizona’s legislature chose to see things Senator Pace’s way. Interpreting Congress’s silence as an invitation to impose its own citizenship-based priority system, the legislature passed a law that gave noncitizens lowest priority in receiving vaccinations. The legislature further provided that no one with less than a year of lawful residence in the United States could receive a vaccine at all.

13:32 On February 5, 2021, Isoke Obasanjo, an immigrant from Nigeria who had lawfully resided in the United States for two years and whose asylum application had recently been granted, went to a local clinic in Tucson to get vaccinated for “Simian” flu. Despite being two months pregnant, she was turned away. The clinic director told her that it had not yet vaccinated its quota of U.S. citizens and that by Arizona law she must wait until the state declared that the next population within the priority scheme could enter the queue. In response, Obasanjo launched a suit in federal court against Arizona’s attorney general, Jennifer Morrison, challenging Arizona’s law on the ground that it violated the equal protection clause of the 14th Amendment to the United States Constitution and interfered with Congress’s exclusive powers over immigration matters.

After careful consideration of the case, the district court upheld the law, finding that Congress had implicitly authorized the states to adopt their own priority schemes for noncitizens. It also found that where states are acting under a valid delegation of immigration authority from Congress, the courts should only subject the state policies to the same level of review as they would congressional policy—that is, rational basis. Since the court was convinced that there was indeed a rational motive behind the law, namely prioritizing health of U.S. citizens and deterring aliens from entering the United States to obtain scarce vaccinations, it determined that the law should stand. That’s the district court.

On appeal, a three-judge panel of the United States Court of Appeals for the Ninth Circuit reversed. There, a two-judge majority found Congress to be constitutionally incapable of delegating its powers over immigration to the states. In a concurrence, the third judge agreed with the lower court that the law was enacted under a valid delegation and that rational basis

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applied but that the law failed even this permissive test based on epidemiological studies showing a disproportionate risk of outbreak in immigrant communities.

15:40 The state of Arizona successfully petitioned the United States Supreme Court for a writ of certiorari, and today, in an unusual session, the Supreme Court moved its chambers from Washington to these chambers here in Philadelphia so it could be heard before the Fellows of the Peter Jennings Project for Journalists and the Constitution. So today you are about to hear oral argument in Morrison vs. Obasanjo.

Judith Kaye

Thank you so much, Professor Amar. Joe Pace, we thank you for a fascinating, intriguing time ahead. And probably no one here is more grateful than Ms. Pillard, upon whom we now call.

Nina Pillard

Thank you, Madame Chief Justice, and may it please the court. There's no more basic role of government under our Constitution than to safeguard the lives of the members of our national political community.

Judith Kaye

Are you reserving any time for rebuttal, or will you just—

Nina Pillard

Yes, I'm sorry, Madame Chief Justice. I'd like to reserve four minutes for rebuttal, if I may.

Aliens are rushing to the borders to obtain the scarce, life-sustaining vaccine against the deadly "Simian" flu. Under these challenging circumstances, government has a compelling interest in prioritizing the distribution of the vaccine to our own citizens.

Judith Kaye

Ms. Pillard, you really look to the statute then, don't you? That is the basis for your argument.

Nina Pillard

That is.

Judith Kaye

17:04 And where do we find a prioritizing of citizens against noncitizens in the statute?

Nina Pillard

The federal statute, which is within Congress's naturalization power to enact, authorizes the states to balance the competing considerations, the public health, and also to respond to the immigration magnet concerns that were so much debated in Congress.

Marjorie Rendell

That's not really stated in the statute. The statute says that the state may adopt criteria for distributing as it deems necessary to further the public health. There's a public health focus in Congress's enactment; there's no reference at all to immigration. Shouldn't Congress, if they intended immigration to be something that the state should concern themselves with—and what is highly unusual—shouldn't they have had to have made that specific?

Nina Pillard

It's true, Justice Rendell, that the statute doesn't explicitly in the language of the statute refer to the immigration magnet concern but broadly gives a delegation to the states.

Dolores Sloviter

We're looking at the statute. Stick to the statute itself since you're talking about that, which talks about furthering public health. How does citizenship and the durational requirement relate to the public health concerns?

Nina Pillard

Thank you, Justice Sloviter. The citizenship requirement relates to the public health in the sense that there is a scarce supply of the vaccine, and there has been a very high incidence of “Simian” flu in Mexico and in other countries. And what we’re concerned for is that the vaccine be deployed in a way that is effective.

Unidentified Male Speaker

18:50 But isn’t the focus of public health on the population? That’s the major focus. It’s the population; it’s not particular aspects of the population. But the second focus is on priority groups of persons, and there’s no designation in the statute about the population or the persons being limited to citizenship. In fact, there’s no need for Congress to draft a statute excluding factors. Congress has set forth the priority public health factors. So how do you get from there to citizens?

Nina Pillard

Congress has set forth the priority public health factors, but it’s also clear in the joint committee report, the most authoritative piece of legislative history that we have, expressly points to the need for the states to take up this balancing of the immigration magnet concerns and the public health. And let me just speak to—

Dolores Sloviter

We have to look at the words of the statute, not the legislative history. Don’t we start with the actual language of the statute? And doesn’t the actual language of the federal statute say that pregnant women are the highest priority? So on what basis can the state have looked at Ms. O’s citizenship?

Nina Pillard

The federal statute expressly grants to the states authority to add additional criteria.

Dolores Sloviter

Well, that’s additional criteria. But the statute—

Guido Calabresi

20:16 I have a question, if I may, counsel, and that is this is being denied a woman who is an alien, and it is also being denied that unborn child that she is bearing. And that unborn child is going to be an American citizen—is an American citizen. She has a right to be here under asylum. So how is this statute properly applied in this case? And I'm not altogether sure I know then what we do. Should we find out whether the Arizona statute means to apply here by certifying to Arizona what that statute means? Or should we simply dismiss on the grounds that service has been granted because this statute doesn't really apply to this case?

Nina Pillard

Justice Calabresi, it is the position of the state of Arizona that the pregnancy does not render the statute applicable to an American citizen. An unborn child is not an American citizen, and it is unclear whether this child in fact will be born within the United States.

Guido Calabresi

The question is whether Arizona, in choosing to exclude noncitizens because of the things you said—the danger of immigrants coming in—also meant to deprive those who are citizens-to-be. That is not an alien at that point, the unborn.

Nina Pillard

The state of Arizona does not think that there is any precedent that would require the certification of that issue to the Arizona Supreme Court. However, we would—

Guido Calabresi

My question is I don't know what the Arizona law means.

Nina Pillard

The Arizona law, consistent with existing constitutional and state law on when someone becomes a person, is that the unborn child that Ms. Obasanjo is carrying is not a citizen that falls within the higher priority tier under the statute.

Dolores Sloviter

22:30 You haven't answered my question, which was—and I can understand why—under the specific provision language of the federal statute, pregnant women get first priority. Now, you talked about the second part of the statute, but the first priority is pregnant women. How did we even get here in light of the fact that this woman was pregnant?

Nina Pillard

She was pregnant, but as Arizona reads the statute, she is not within the four priority tiers because those are limited to citizens, and it is our understanding—

Dolores Sloviter

It doesn't say that in the federal statute.

Nina Pillard

It doesn't. We do have to rest on an implication. We do. We have to rest, frankly, on an implication from the history, the legislating background, the debates in Congress, the situation that—

Judith Kaye

The history is not unanimous. It's not a unanimous history.

Nina Pillard

That's true, although the authoritative joint committee report does directly support—

Timothy Lewis

Counsel, does the statute directly address the question that Judge Sloviter has asked you, which is where along the lines of priority a pregnant woman who is not an American citizen ranks? Does it or doesn't it?

Nina Pillard

23:54 The federal statute addresses it in this way, Justice Lewis: It permits the states to make state level determinations how to deal with the citizen in question. And that makes a lot of sense.

Guido Calabresi

That may permit the state perhaps—reading it your way, assuming that that allows distinctions on citizenship—that may permit within the level of pregnant women first to benefit citizen pregnant women and then noncitizen pregnant women. But does it lead pregnant women who are not citizens to be allowed to be put at the bottom?

Timothy Lewis

Or is that left to the discretion of the state?

Guido Calabresi

Yeah, and Congress said pregnant women first, then the others. Now, why should we read this last clause as not just giving additional power, which is what you're arguing and it's dubious, but as trumping the structure that the federal government set up?

Nina Pillard

Perhaps I can clarify. The state of Arizona reads the statute as putting noncitizens at the bottom of each of the four tiers, and we are administering the statute such that citizen pregnant women have priority before noncitizen pregnant women. Citizen emergency health workers have priority before noncitizen health workers.

Marjorie Rendell

But that's not an additional criteria; that is an inconsistent criteria if you are saying, "Oh, pregnant women are first, but half of the pregnant women—those who are not citizens—don't come first." That's an inconsistent criteria, not an additional criteria.

Nina Pillard

25:33 Justice Rendell, it is not an inconsistent criterion because the statute doesn't say, "and aliens are treated the same." And as you know, the plenary power doctrine gives Congress broad authority and authority—

Judith Kaye

And are you distinguishing between a pregnant woman two months pregnant and a pregnant woman nine months pregnant that's a noncitizen?

Nina Pillard

We're not. We're not. This is an as applied challenge.

Judith Kaye

So that person also would be denied.

Nina Pillard

That could be a harder case, Justice Kaye.

Judith Kaye

Well, but we have to anticipate that as well.

Nina Pillard

Absolutely. All we're asking—

Judith Kaye

So what is your answer?

Nina Pillard

26:06 Let me give you two parts to my answer. All we're asking is that here in the pre-viability phase of a very early pregnancy that there's no authority for taking into account the potential citizenship of the pregnancy in how we apply this statute. A nine month would present, I admit, a much harder case.

Guido Calabresi

Just for my information, is the Arizona statute a unitary statute, or can it be divided? That is, if it is unconstitutional in some parts, is there anything in the statute—I didn't see it in the account of the statute that was given to me—which says that the other parts are saved, because that raises some problems. For example, if a one-year absolute exclusion is unconstitutional, and if a statute is a unitary statute, then the whole thing falls. I'd kind of like to know whether we are supposed to try to save what parts of a statute we can or not because I don't see it in the record.

Nina Pillard

And Justice Calabresi, I think your question really underscores why this is an area that's subject to the plenary power of the political branches. We are in a public health crisis, nationally and—

Unidentified Male Speaker

But we asked you something about what Arizona is doing specifically that isn't part of the statute. It's applying some kind of a quota which prohibits people from lower classes moving up, presumably even within the priority classes. I don't see anything in the Arizona statute about that, so how can you justify the scheme that Arizona is actually applying outside its own statute, apart from the problems that the federal legislation says nothing about any purpose but furthering the public health?

Nina Pillard

That's right. We're furthering the public health, and we have a rationing scheme.

Unidentified Male Speaker

What about the quota that has worked its way in without authorization?

Nina Pillard

28:01 We believe it is directly authorized by the federal statute. The quota is the implementation of a rationing scheme, and without some kind of limitation on the timing and when we start to open up the next priority category, we cannot effectively reserve the vaccine as Congress has directed us to for the priority—

Brett Kavanaugh

All of the questions so far have illustrated that the interpretation of the statute is really a close call, and your position is going to raise serious constitutional questions under our equal protection precedents. Given that, why shouldn't we make Congress that wants to enact law along the lines you say speak more clearly and we avoid the constitutional question as we usually do?

Nina Pillard

Justice Kavanaugh, this is the precise inverse of that, actually, is the compelling argument that we are in a national emergency. This is a situation in which we don't have time to go back and redraft and have debate between the courts and Congress.

Unidentified Male Speaker

That's a question for Congress. National emergencies are questions for Congress, and Congress here did not speak clearly to the question of whether immigrants or noncitizens should have lower priority. And until Congress speaks clearly on that, why should we assume that that's what they intended and trigger this constitutionally?

Marjorie Rendell

And isn't it more dangerous for us to put a seal of approval on what even you seem to acknowledge is a sloppy statute?

Nina Pillard

No. This statute is a statute that's giving the kind of flexibility required to the political branches.

Dolores Sloviter

Isn't the statute—

Guido Calabresi

29:38 —the fact that this was a national emergency.

Judith Kaye

Proximity has its virtues.

Guido Calabresi

Sorry.

Dolores Sloviter

Isn't the statute inconsistent with our decision in *Graham v. Richardson*? Let's talk some law.

Nina Pillard

Let's talk some law. It's distinguishable from *Graham v. Richardson*. Here we're talking about the lives of United States citizens, and here Congress's determination, supported by its distinctive expertise on matters of public health but most importantly on matters of immigration, has determined that we don't want to have people flooding over the borders and taking up the vaccine, many people coming over the borders who may already be infected, and bringing—

Dolores Sloviter

What standard should we use? Strict scrutiny or rational basis?

Nina Pillard

Rational basis is the appropriate standard here.

Dolores Sloviter

30:31 Except in *Graham v. Richardson*, the Supreme Court said you use strict scrutiny and said that aliens are entitled to the same equal protection as citizens. And Arizona isn't doing that.

Nina Pillard

Aliens are entitled to equal protection, but equal treatment does not mean treating people who are differently situated the same way.

Judith Kaye

I'm exercising a Chief Judge prerogative and calling on Justice Fitts, who has been very patient. Justice Fitts, then Justice Lewis.

Michael Fitts

What we are trying to determine is the extent to which Congress had spoken clearly on this issue, and therefore, the extent to which the state can be accorded deference in the decision making here. So there are two parts to my question. The first is your position in the interpretation of the statute strikes me on one level as extraordinary, which is to say by interpreting the term *additional criteria*, it would seem that the state of Arizona could adopt almost anything as their criteria. Are there any limits to what they could adopt under your standard?

Nina Pillard

The limits are provided by the requirements of rationality.

Michael Fitts

But literally, the first part of the federal statute in effect serves as no restriction on the criteria—that is, pregnant women, other standards.

Nina Pillard

32:03 I disagree, Justice Fitts. The statute clearly prioritizes pregnant women and emergency health workers, and if the state of Arizona said, “No, we’re going to flip those; we’re going to put those at the bottom,” that would be in contravention of the—

Michael Fitts

But haven’t they done that in a sense?

Nina Pillard

They have not done that.

Michael Fitts

Haven’t they said that somebody who is in the bottom category or in the top category who is an alien suddenly goes to the bottom category?

Nina Pillard

No.

Michael Fitts

Isn’t that flipping the criteria?

Nina Pillard

Indeed, I think it would be consistent with the statute to say that someone who is already ill or who is planning to spend the next year out of the country who is a pregnant woman shouldn’t get the vaccine. I think there are additional criteria consistent with that, which would be carving out special cases. And I just want to say that it makes a lot of sense— I’m sorry. I see my time is expired.

Judith Kaye

No. Could you finish your sentence, please?

Nina Pillard

32:49 Thank you. Thank you, Madame Chief Justice.

Judith Kaye

And then let Justice Ting ask his question.

Nina Pillard

My sentence was I was just going to say that it makes a lot of sense for Congress to—

Judith Kaye

It's hard to be the Chief Justice.

Jan Ting

I have a yes or no question for you, counsel, and that is, would your position be the same if Ms. Obasanjo was a longtime resident of the United States with legal permanent resident status? Presumably your answer is yes. Is that right?

Nina Pillard

The position would be the same.

Jan Ting

It would be the same. And then doesn't that raise *Graham v. Richardson* concerns of equal protection, which also involved legal permanent residents of the United States? Your position would require us to overturn *Graham v. Richardson*.

Nina Pillard

We think the factual circumstances are clearly distinguishable, but to the extent that you think that it's inconsistent with Graham, yes, we would urge that you limit Graham.

Judith Kaye

33:35 Thank you. Mr. Starr?

Kenneth Starr

Chief Justice Kaye, and may it please the court. In light of the court's questions thus far, I would like to turn to this court's language in *Graham v. Richardson* because it sets forth the constitutional standard. And then we turn to the statute that Congress saw fit to pass and then the statute that Arizona passed. And taking those three elements together, I think the court will rightly conclude that the statute that Arizona passed is manifestly unconstitutional under settled principles that are almost as old as the Republic but certainly are as old as the soaring language of the equal protection clause.

Timothy Lewis

Mr. Starr, if we decide that Congress did in fact have the authority to delegate this issue to the states as it appears to have done in Section Two, then don't we have to defer to that delegation? Under *Fialo vs. Bell* as far back as 1977 we said that the power to exclude aliens is a fundamental sovereign attribute that's properly exercised by governments and political departments and immune from judicial control. So what are we doing looking at this if that's really the scheme? And it does appear from the record that they punted on the issue of what states ought to do.

Kenneth Starr

And punting is not good enough because we would submit, Your Honor—and this court has not held to the contrary—that this issue with respect to the control of immigration and naturalization embedded in the original document itself of America's Constitution in Article One, Section A, Clause 4, must be uniform. What has been launched—

Guido Calabresi

35:33 But counsel, if Congress in its sovereign authority here were to decide that there are some things with respect to immigration which are best decided in the states, are you saying to us that the Constitution forbids Congress from expressly giving the states authority to make those decisions in the same way that we have in bankruptcy, which is also uniform? The question of whether they've done so may be a different one, but are you telling us that if Congress decides that on this issue Connecticut can know better about immigration in Connecticut and Arizona, that Congress doesn't have the power to do that?

Kenneth Starr

Your Honor, I am suggesting that because of the need for uniformity, such would raise a most serious question, and thus it behooves Congress to speak with crystalline clarity, which a number of the questions of this court suggest. And this statute, Section One and certainly Section Two, which is the delegating provision, doesn't speak with clarity at all with respect to immigration.

Marjorie Rendell

Okay, but just to stop there, Mr. Starr, Congress can delegate to the states. There is that common ground. You do agree with that? Congress can delegate in the immigration area to the states?

Kenneth Starr

I am suggesting, Your Honor, that it could raise a serious constitutional question—

Marjorie Rendell

Is this a yes answer?

Kenneth Starr

It is a conditional yes.

Michael Fitts

But can Congress delegate implicitly?

Kenneth Starr

37:08 I think this court should hold that it cannot; that if it is going to effect a delegation, assuming arguendo that it can delegate with respect to the immigration function and thereby create a crazy quilt network that the founding generation never contemplated. But let's assume arguendo that this court is anti-federalist and says, "Let's—"

Guido Calabresi

I have one problem with that. In dealing with the District of Columbia, Congress specifically put immigrants in a lower category. If we read this statute as not doing that, then Congress has created a lack of uniformity between what it did with the District of Columbia and what is happening in the states. So that's a problem if the idea is uniformity because they will have done it. Uniformity, it seems to me, could be argued by saying, "We who are like the state governments with respect to the district have established that immigrants rate lower, not in the same way that Arizona does but in our way, and we have now told the states that they may do the same with respect to theirs."

Kenneth Starr

Your Honor, two points: The first, that statute passed by Congress has not been tested as to its unconstitutionality or not. Secondly, it brings me back as I continually urge the court to come back to *Graham v. Richardson*. My sister has urged the court, if necessary, to overrule *Graham v. Richardson*. A unanimous decision of this court that has been settled law, namely alienage is a suspect class.

Dolores Sloviter

Counsel, if you go back to *Mathews v. Diaz*, five years after *Graham*, we said that you can allow benefits to some aliens and not all, that there's a narrow standard of review and it's reasonable for Congress to make an alien's eligibility depend on the character and duration of his residence. Now, we did have a footnote on what the states can do, but I think we have since passed that. So you can't really go back to *Graham* as much as some of us might like you to do.

Kenneth Starr

39:32 And accepting that, Justice Sloviter, if we come back to what Congress has done in these various and sundry areas, we see that in Mathews it spoke with crystalline clarity, and this court embraced a posture of deferentialism. I think some justices on this court would now disagree with this. Why? Because it is so accepted in the canon of constitutional law that aliens deserve protection. They're lawfully here, and especially this particular individual is a refugee. She has also satisfied Arizona's requirement. Her case especially cries out for the participation on an equal basis.

Michael Fitts

Do I take it from your position that you would say we need to find that the D.C. statute is unconstitutional, because that would follow from that proposition, would it not?

Kenneth Starr

Not at all. I am suggesting my theory of the case, our theory of the case, is that any legislature, including even the Congress of the United States, acts perilously, not manifestly unconstitutionally, when it draws a line that sends individuals outside the city gates—to use that metaphor—on grounds of alienage because of the equal protection component of the due process clause. It is settled in American constitutional law that aliens in particular are a vulnerable class who need the succor of the law. Now, Congress—

Judith Kaye

But do we take into account, Mr. Starr, the nature that this is an unusually deadly outbreak that threatens the entire population of the United States?

Kenneth Starr

A powerful policy reason that would suggest that Congress should speak with clarity. I draw the court back to the statute. The statute that Congress passed is not clear in the slightest. In fact, return to the language of Section Two: additional criteria. In fact, look at the words *any additional criteria for distributing the vaccines it deems necessary—to do what?—to further the public health*. Just as—

Marjorie Rendell

41:39 What kind of criteria would a state want to enact if not a criteria suited specifically to its own geographic location, the fact pattern? This is a true border state that is risking a horrible experience with public health if there is an invasion of people from Mexico. What kind of criteria was anticipated in Section Two if not a criteria that's linked to geographic distinction, which Arizona has?

Kenneth Starr

And that's precisely the case: there are geographic distinctions. There may be certain neighborhoods that in fact are especially vulnerable. And in fact the very limited record in this case suggests that immigrant neighborhoods are in fact uniquely vulnerable. And what we do know is that the most vulnerable class are those of pregnant women.

Michael Fitts

Let me give you a somewhat different situation. Suppose Congress was prepared to pass a statute that in put aliens, in a sense, in the lowest category but then, due to lobbyists arguing that that was unfair, they decided instead to only apply that to the District of Columbia but to allow states to treat the balance differently given the fact that perhaps they would have the ability to look at local public health concerns and be more open to perhaps immigration. In those circumstances where Congress in effect was trying to provide greater allowance of immigration and protection of aliens under that statute, would it be your position that that would be unconstitutional?

Kenneth Starr

No. Again, I think if it drawing a line based on alienage, then it must and perhaps it can pass strict scrutiny. Perhaps there are compelling reasons. This court—

Dolores Sloviter

Haven't we consistently upheld statutes like that in *Nyquist* and *Foley* in which we've upheld in New York State—mostly New York State, as a matter of fact—discrimination against aliens in terms of state troopers, public school teachers, etc.?

Kenneth Starr

43:57 And there is no question, as I suggested a few minutes ago, that Congress does enjoy, under this court's jurisprudence, greater flexibility to draw lines that the states do not, and there are very powerful reasons for that. We're talking here about the line that the state of Arizona has drawn. And going back to Madison's Federalist 10, this court is well-advised to be very wary when it is the state that is drawing a discriminatory line.

Dolores Sloviter

Could Congress pass the Arizona statute—

Unidentified Male Speaker

But Mr. Starr, we are in a national emergency, which is the reason why the statute—

Kenneth Starr

I am delighted to answer simultaneous— Presumably, yes.

Unidentified Male Speaker

Judge Sloviter and I have done this for years. Don't worry about it.

Kenneth Starr

My answer was presumably, yes. That is, presumably, Congress can do virtually anything that it wants to do, but it can tug up against in terms of naturalization. I keep coming back to naturalization.

Guido Calabresi

The problem with when Congress can do virtually anything that it wants, which is what you've just said, is that that runs headlong into your rhetoric with respect to the protection of aliens. That is, if the protection of aliens because they are so defenseless, because they don't have the vote, all the reasons that Professor Ely in his time said—courts need to protect certain groups—

certainly apply to them, but it all disappears like that under the congressional sovereignty notion so that in a way, this court has been talking out of both sides of its mouth. And it's time that we decided either to go along with the sovereignty thing, in which case aliens are really at the bottom as we've long known, or to say that those cases—the complete sovereignty cases—are a 19th century abomination which we've built on, and it's time to get rid of them. But to try to make an argument from the poor state of aliens into saying that Congress can't be implied to do something seems to me—

Kenneth Starr

46:02 And that is emphatically not my argument. It's a most interesting academic part of the discussion here, and this court may want to clean up its jurisprudence.

Judith Kaye

Well then, I'm calling on Justice Lewis and then Justice Ting.

Kenneth Starr

Might I finish ever so briefly? I may not.

Judith Kaye

I'll think about it.

Kenneth Starr

I understood the look, Madame Chief Justice.

Timothy Lewis

Mr. Starr, we talked earlier about Congress punting on the issue of how states were to deal with this. Why wasn't that actually a very wise thing to do at this moment of national emergency when we know that border states have a different kind of problem than, for example, my state of Pennsylvania or Kansas? Aren't the states really in the best position to know exactly how the order ought to unfold and how the treatment ought to unfold accordingly and to weigh the

question of whether or not there's a likelihood that there will be an influx over the borders because of that and so forth?

Kenneth Starr

46:59 But Your Honor, Congress, under those circumstances, even conceding Congress has that power—I'm willing *arguendo* to accept Congress's ability to do that—it should do so in language that we all understand. The language in Subsection Two doesn't come close. Couldn't it have said, "Including but not limited to the problem of aliens in certain border states?"

Timothy Lewis

I agree with you that the language is unclear, and just one final point: What about the committee report, which is really all that we have other than two congressmen who are clearly representing opposing views? And I don't count that for anything. What about the committee report? Doesn't that help us discern—

Kenneth Starr

I don't think so because the report suggests that—and I'm going to quote from it, and this is not going to provide much illumination to the interpretive exercise—"are expected to remain alert to the interplay of public health and immigration magnet risks as they develop policy." Be on alert. Paint it orange. Give it some color. This is not saying engage in a regime of discrimination against—

Jan Ting

We have the committee reports in front of us, counselor, but can't we take into cognizance the actual statutes that Congress has in fact enacted authorizing the states to discriminate against aliens? For example, the '86 Immigration Reform Act which authorized the states in their own discretion to deny benefits to noncitizens and the Welfare Reform Act of 1996 which authorized the states to withhold benefits to noncitizens? Isn't that something that we should take judicial cognizance of?

Kenneth Starr

48:41 Absolutely. However, the constitutionality of a number of those statutes has either not been tested or has actually been tested, and those statutes have been found wanting. This court hasn't spoken authoritatively to this, but what this court has made absolutely clear throughout its jurisprudence is aliens are vulnerable, and if Congress wants to—

Timothy Lewis

Is there any way in which we can interpret the words *public and persons to exclude unlawfully here aliens*? If not, it seems to me that the language used simply encompasses them.

Kenneth Starr

Yes, at least with respect to those lawfully— You said unlawfully and of course Ms. Obasanjo is very much lawfully here. She has a moral claim on this country that few do. She has been granted asylum. If you send her home, she faces persecution. Under the 1980 Refugee Act, we have treaty obligations that protect her. She is in this country lawfully and has been in Arizona for two years and yet, under those circumstances, she has been denied this—

Timothy Lewis

That's a sign of the carelessness with which the Arizona statute was drawn to include someone not only in a high priority group but someone who was really an invited guest of the country.

Kenneth Starr

And it shows the ill wisdom of being unduly deferential to the states and to infer a vast delegation of authority with respect to matters that affect immigration and naturalization.

Judith Kaye

Mr. Starr, just looking at the joint committee report to which you've been directed, I see the words *immigration magnet* are in single quotes. Is that taken from something else?

Kenneth Starr

I think it is a term of art.

Judith Kaye

50:25 We know what that means, don't we? We know Arizona and Mexico, that that's an immigration magnet risk, isn't it?

Kenneth Starr

Yes. The opportunity for economic costs, health care—there is no question, Your Honor. We're not—

Judith Kaye

So we know exactly what was meant in that joint committee report.

Kenneth Starr

Certainly in this joint committee report it is flagging a clear social problem. But number one, it's not law—to state the obvious—but then secondly, what is the mandate? The mandate is to remain alert to the interplay. That is a sufficiently high level of generality that should get—

Judith Kaye

But isn't that exactly what Arizona has done?

Kenneth Starr

Arizona has taken that and has gone with an absolute vengeance and has stepped across the *Graham v. Richardson* line.

Judith Kaye

So the answer is yes, that is what Arizona has done.

Kenneth Starr

51:09 But it has done so in a way that offends the Constitution. There is nothing here that says that to remain alert to this interplay means that you can—Arizona or any state—violate the constitutional norms articulated by this court time and again.

Dolores Sloviter

Could Congress exclude aliens from the insurance reform bills that it is currently considering? Could it say that aliens can't buy insurance or can't get insurance under the bills now under consideration?

Kenneth Starr

Two points: This court would be quite deferential, I believe, to judgments that Congress makes. My second point is Congress well knows that it is perilously close to the ground of unconstitutionality in light of the vulnerability of aliens and the suspect classification that they are embracing. Therefore, it puts the onus on Congress to have a very compelling interest in justifying this kind of line drawing for those who are lawfully in this country. Our submission goes to those who are lawfully in the United States.

Marjorie Rendell

Is the report authoritative?

Kenneth Starr

It is certainly not law. The court—

Marjorie Rendell

Do we need to find an ambiguity in the statute in order to consider it? Or should we consider the statute with that in mind?

Kenneth Starr

52:36 I don't think the statute actually is ambiguous. To the contrary, I think it is necessary for the statute, in light of these constitutional norms at stake, to speak with great clarity. The clear and unambiguous rules should apply here.

Jan Ting

Your position is that Arizona could not discriminate against a tourist who was in the country legally to visit Disneyland who wanted to cut in front of a United States citizen in order to get the vaccine because they fit within a preferred category aside from citizenship. A tourist could come in and not be discriminated against. Is that your position?

Kenneth Starr

No. It depends upon—

Jan Ting

They're in the country legally. That's somebody who is in the country legally.

Kenneth Starr

But going back to the category—

Dolores Sloviter

Disneyland is not in Arizona.

Kenneth Starr

And I accept that as a friendly amendment. But when we return to the statute, what is it that Congress had in mind, because I understand we want to honor Congress's considered judgment as to who does in fact deserve protection. There are four categories. Beyond that I think there is a lot of room for the states to roam except to discriminate.

Jan Ting

53:44 So the tourist gets the vaccine.

Kenneth Starr

It of course depends on the administration, not as a matter of law.

Judith Kaye

I'm going to give Justice Calabresi—

Guido Calabresi

You're asserting a rather interesting power in this court, and that is to force Congress not to duck issues. And that is a very interesting thing because if we buy what you say, we have the right to tell Congress that it must take very difficult political positions that it does not want to take, and we as a court can tell them that they must do it. Now, is that something that we have a right to do? Or does Congress have a right to say, "We're politicians. We're elected to duck issues, to pass them on to the states, and who is this court coming here to tell us that we must do otherwise?"

Kenneth Starr

Your Honor, time and time again this court has embraced an interpretive rule of Congress. If you're going to legislate in a way that entrenches upon very important values, especially federalism—11th Amendment values and other related values—then in fact you must speak with crystalline clarity. I thank the court.

Judith Kaye

Thank you, Mr. Starr. Ms. Pillard?

Nina Pillard

Thank you, Madame Chief Justice. Congress need not speak with crystalline clarity, as Mr. Starr would require. The appropriate precedent—

Judith Kaye

55:11 How about just plain old clarity?

Nina Pillard

Even clarity is not required under the plenary power doctrine. We're talking about the lowest standard of judicial review, and that's for good reason. The standard is even lower than rational basis review.

Timothy Lewis

This is in an area where it is delegating its traditional responsibility and authority to oversee immigration law? In other words, when it's telling a state to do what is normally its function, you don't think it should speak with crystalline clarity or just plain clarity?

Nina Pillard

All Congress needs to do is authorize it, and in this case there's good reason for the delegation to the states—

Guido Calabresi

...cases which goes back to Charles Evans Hughes during the New Deal saying that when they go to the edge of commerce, they may not delegate unless they speak absolutely clearly. At every level this court has said that when Congress tries to do something that is close to the constitutional line, it must make clear to us that it really, really means it.

Judith Kaye

Ms. Pillard, you surely are not arguing with that proposition; that when Congress comes close to the line on a subject such as alienage and immigration—subjects that are close to us as Americans—that it should speak with clarity? Are you arguing against that?

Nina Pillard

56:40 We are. We're arguing against any heightened clear statement rule—

Judith Kaye

Ms. Pillard, do you want to rethink that for a moment?

Nina Pillard

—ordinary legislative clarity because here we're talking about a political crisis that's particularly—

Judith Kaye

What is ordinary legislative clarity?

Nina Pillard

Ordinary rules of statutory construction. Where there's an ambiguity, you can look to the authoritative joint committee report, and there we think it's clear. And there's good reason for delegation to the states here. What Nebraska or Wyoming might do with respect to aliens might be different from what Arizona or Texas or California should be doing.

Michael Fitts

Don't we know as a matter of fact that while there may be good reasons for delegation, that's not why Congress passed the statute that it passed in this case? It did it for the precise reasons that my colleague pointed out, namely to avoid the issue. Not because they made an affirmative judgment that the states were deserving of the deference that Congress would be deserving but because Congress didn't want to decide. Isn't that a—

Nina Pillard

With respect, Justice Fitts, I disagree. Part of the reason for political gridlock is precisely that the circumstances vary geographically, and what's good for one state, what's efficient for one state in this kind of matter, might not be efficient for another.

Michael Fitts

But they need to decide. There's no record here that Congress made an affirmative judgment about that. To the contrary, there was an affirmative judgment not to make a judgment.

Nina Pillard

Section Two of the statute is precisely the affirmative judgment: We're going to give this to the states, and they're going to make the policy determinations on this. We would urge that the appropriate precedent is not Graham but this court's more recent pronouncement in Mathews, which says that with respect to aliens, Congress regularly makes rules that would be unacceptable when applied to citizens. Here Mr. Starr is arguing that a scarce resource—a scarce resource—not everybody can get it—should be given to invited guests over full members of the political community.

Marjorie Rendell

Is it your position that the statute is ambiguous?

Nina Pillard

The statute, in our view, is clear in delegating the authority.

Marjorie Rendell

If it's not ambiguous, why can we consider the report?

Nina Pillard

You need not consider the report given the clear delegation in Section Two—

Marjorie Rendell

We should not consider the report if the statute is clear, should we?

Nina Pillard

58:52 You need not. Absolutely. So if it clearly delegates the authority to the extent that you believe that there is an ambiguity, I would point you to the joint committee report to clarify that indeed that authority is intended to be given to the states. Thank you.

Judith Kaye

Thank you. That concludes our argument. Never have I been more sympathetic with Chief Justice Roberts than I was today. Oh, my goodness. To have eight fantastic colleagues, that is quite an exercise.

Dolores Sloviter

I was thinking of that, but then of course we know that one justice doesn't say anything, so he has minus one for this purpose.

Timothy Lewis

At one point, I was thinking of picking up the phone and saying, "I would like to ask a question. Is there anyone out there that can—"

Judith Kaye

What a great idea. Really, thank you, counsel—Ms. Pillard and Mr. Starr. You were just wonderful.

59:54 [applause]

It would be really interesting to take a vote of the audience and ask you how you think we would decide this case. I thought it was pretty clear. But I think we'll go one by one and listen to our colleagues and start with Justice Calabrese who is seated all the way to the right, in only one sense.

[laughter]

Justice Calabresi

As is well known I tend to follow my learned senior colleague and mentor, Justice Cavanagh, in most views on the law and I'm inclined to do so from his question today; that is, it seems to me that there are 2 issues of serious Constitutional doubt. One, whether Congress has the power to delegate with respect to immigration at all, and that's a very difficult Constitutional question especially if the question is can they by delegating hide what they are doing and force courts to take positions on what is Constitutional or not. And, second, if they did delegate here, did what they delegated amount to something that is Constitutional or not about which there were many, many questions.

Under those circumstances I think we have more than a right. I think we have a duty to avoid the Constitutional question and to say that Congress has not done those things. Congress can only make us take stands on difficult Constitutional issues if it is clear that they must be answered. We should avoid them if it is at all possible because otherwise we are deciding things on which the Legislature may not have told us to go to the Constitutional boundary. And the fact that this is an emergency, which was the argument made by petitioner, doesn't change this because it is precisely in emergencies that Congress is apt to duck issues, act fast, get us into Constitutional difficulties, and we should strike it down under the Second Look Doctrines. The Schechter Case, the chicken case, the NRA case, is a classic case of emergency action by Congress in which the Court said undue delegation, or not clear delegation. If Congress really means it, it should do it again.

(1:02:57) So for those reasons I would affirm the Court below reading the statute not to delegate anything which would raise Constitutional issues. If the Court wants to go further and reach Constitutional issues, I must say I do think that there is a dramatic tension between all the language which says aliens are particularly vulnerable, must be protected, all the John Ely type of, they are people who are not there. And the long line of cases which says there is absolute sovereignty in Congress in the Executive. If I were forced to choose between those two, I would reject the sovereignty line of cases. I think that they are 19th Century cases—they come from 19th Century cases when racial and ethnic discrimination was standard rather than something that is objectionable. I think it would be a good time to look them over but I doubt that the Court or I myself would be inclined to—

Judith Kaye

But where would you draw the line if you went down that—

Justice Calabresi

I'm sorry?

Judith Kaye

Where would you draw the line if you went down the second road instead of the first?

Justice Calabresi

I suppose if I were going on that, that I would at least limit those cases to situations where there was a direct link to diplomacy, to international relations, to the kinds of things which in a non-alien context we have—those things where in a non-alien context we have said that the Executive and the Legislature has to—

Judith Kaye

And what about a national health emergency? Oh, this is wonderful.

[laughter]

(1:04:48) What about a National health emergency?

Justice Calabresi

What about a National—

Judith Kaye

Health emergency?

Justice Calabresi

No. I don't think that has anything really to do with International relations.

Judith Kaye

Okay. I'm just tallying your vote and you would be to affirm you would overturn the Statute?

Justice Calabresi

I would affirm. I would be happy to affirm on narrower grounds. If a Court were so inclined to affirm on broader grounds I would go along with that.

Judith Kaye

Good. Well, Justice Ting, I'll call on you next.

Jan Ting

I want to compliment the authors of the problem. I thought it was a terrific problem and really put the judges in a hard place. The answer is not obvious. As my questions to the Council suggested I think it's relevant what the immigration status of the petitioner is. I think if the petitioner had been a long time permanent resident, green card holder, a non-citizen, then I think clearly *Graham v. Richardson* would apply and I think it would be an easy case. Conversely I think if a petitioner had been a tourist going to Disneyland or, even worse, an illegal alien, then I think the State of Arizona would be in a much stronger position. I also think it's relevant what happens to the vaccine that Mrs. Obesanga was denied? Was there in fact an American citizen standing right behind her who was going to get the vaccine if she was denied it? So you look at the immigration status and you look at what happens to that vaccine. Is there an American citizen who needs that vaccine right behind her and is Arizona free to say, "We want that American citizen; that citizen of Arizona, to get the vaccine," as opposed to this non-citizen who is in a particular immigration status. I think the problem was brilliant because it had her in this unusual immigration status which is neither permanent resident nor a temporary visitor. Asylum status lets somebody stay in the country for a year but if they haven't done anything bad they get to adjust their status and become a permanent resident after a year. So the problem was written to put us right in the middle ground. In a sense we have to deal with it, I think, on those particular facts, some of which we don't know. But I think based on the facts that we do have I would have to agree with the lower Court, although I would, I think, write a concurring opinion to make these particular points known.

Judith Kaye

The Lower Court being the Circuit Court, not the District Court.

Justice Ting

The Circuit Court, right.

Unidentified Female Speaker

So you would also affirm and overturn the Statute and you would try to concur and I would try to talk you out of that.

[laughter]

Justice Ting

Right.

Judith Kaye

(1:07:55) Justice Fitts?

Michael A. Fitts

Let me address this in two ways, on a narrower level and a more general level. As a Constitutional matter, I would affirm the Court of Appeals. I would do it for precisely the same reasons that Judge Calabresi has said, which is to say this is a deeply problematic case with discrimination against the discreteness of a minority. It may be that Congressional action can sanitize that action but if they are going to do it, they need to do it with some clarity. They certainly can't do it in the circumstances where they refuse to even express a judgment that is the punted elsewhere. In that circumstance I would say they had not delegated the authority and we should invalidate below. But I would raise the more general question here, which is discrimination against aliens. On the one hand it is the classic discrimination in the minority. It is a group who are subject to stereotypes and to prejudice and without legal political recourse given that they are aliens. It invokes all that we think of about groups that need to be protected by the

judiciary. On the other hand, the definition of who are part of the United States, who we are as a people, you think of as within the realm of Congress. That's their judgment about who the people are and who we define ourselves as sovereignty. Justice Calabresi suggests that their plenary powers is limited by foreign policy considerations, issues of terrorism, perhaps, or issues of foreign affairs. But it does seem to me that Congress may have broader powers in defining who we are, who comes into the rubric of American citizens. I think that the way the doctrines are stated at this point the Constitution, or at least the Supreme Court precedent, gives Congress that power on the theory that they may be less subject to the same biases that you will find elsewhere in the states or local jurisdictions; and therefore defers to a political branch in making those decisions. Justice Calabresi sounds like he would even question their judgments along this line. I have more doubts about whether in the end we should defer to the sovereignty doctrine but we don't have to reach that issue.

Judith Kaye

So you, too, would affirm. And you would join in the Court's opinion?

Justice Fitts

I would not [inaudible]

[laughter]

Judith Kaye

Thank you. Justice Sloviter?

Justice Dolores K. Sloviter

(1:10:59) This is a very interesting problem. I've been on the Court of Appeals for more than 30 years and I've never had an issue like this so I spent some time in the last week reading the cases. The cases go both ways but there's been a shift in the Supreme Court's jurisprudence. When you start with *Graham v.*, which I had mentioned, Justice Blackman was very firm on the idea that aliens were entitled to equal protection under the law. But little by little the cases have gone in the other direction. Mostly they've talked in terms of preemption, Congress's power to preempt, and it's very hard in this case to see a connection between public health, the need for

public health, and the duration of somebody's residence in the United States. But the Supreme Court has upheld that kind of restriction in recent years. I have no idea what that—well, I do have some idea as to what they would do in this case. But I found, from my own standpoint, what the panel asked and commented on, very useful in terms of if you're getting close to a Constitutional issue and the Statute isn't clear. I'm not dealing with an alien case and I don't want to talk about the case. But you have to make Congress say what it wants to say. If you're going to take away from the people a right that the people think that they have, such as a privacy right, for example, then Congress had better be clear about it and accept the public reaction in the electorate. If they don't do that then I'm not sure that the Courts are obliged to think about, or to fill in the interstices that Congress has left out. And then Congress can complain that the Courts aren't doing that which they think the Courts should be doing or what they thought the Legislature did. So I think we can be—I would affirm. Depending on how the majority opinion were written, I would write a concurrence or not.

Judith Kaye

And would you be for Justice Calabresi's avoidance rationale or for his—that would be the narrowest grounds?

Justice Sloviter

Yes. I think that we should avoid a Constitutional issue if we can. Our jurisprudence says that we should do that and I don't see any reason not to.

Judith Kaye

Thank you. Justice Kavanaugh?

Justice Kavanaugh

(1:14:24) Thank you. I want to begin by complimenting the Council. You got a great example today of what it's like to witness an experienced spectacular Supreme Court Council who really did a tremendous job, both Nina Pillard and Ken Starr. My first job out of a Clerkship was working in the Solicitor General's office in 1992 for Solicitor General Starr and my impression then is the same as my impression now, that he's a spectacular advocate and particularly after a red-eye flight I think that was—

Judith Kaye

But he's younger now.

Justice Kavanaugh

Yes. [laughs]

[laughter]

Justice Kavanaugh

So thanks to the advocates. Also to the problem, Professor Amar and Mr. Pace, a great problem, as others have pointed out and really explored some fascinating issues about the Constitution and the structure of our government, the Separation of Powers issues, the Federalism issues, the individual rights issues—a perfect problem, I would say. I agree with what Justice Ting said. The precise immigration status probably is an important issue in many cases. Perhaps on this Statute it wouldn't be, but I think as a general matter, the fact that the person in the problem was in the country lawfully is certainly a factor that weighs in her balance in the picture and in the analysis of the problem. I would ultimately go as Justice Calabresi pointed out on the Constitutional Avoidance Doctrine. The Statute, as you heard, didn't specifically say anything, the Federal Statute didn't specifically anything about authorizing the states to make distinctions based on citizenship status. It just said any additional criteria; it didn't say any additional criteria including citizenship status, for example. So given the language of the Statute, I would think, and given the difficult Constitutional questions that would be presented on multiple levels as, I almost said Dean Calabresi because when I first knew him he was my Dean, but Justice Calabresi said, I think I would interpret the Statute narrowly so as to avoid the Constitutional question. And as Justice Rendell said, the Legislative history would not be relevant in my analysis. This is a classic example where you have competing statements from different members of Congress that point in different directions. It's one of the reasons Justice Scalia has so often said that Legislative history is a problem and one of the reasons the Courts today pay much more attention, as I think you saw a good example of today, in the precise words of the text of the Statute than in statements made by members. So, overall, affirm narrowly and no concurrence.

Judith Kaye

(1:17:13) I have to tell you as the Chief Justice, that was the fifth vote. I'm feeling awful good.

[laughter]

Justice Schaller?

Justice Schaller

Thank you.

Judith Kaye

Tell us about the Connecticut Supreme Court.

Justice Schaller

Well, we don't get—

Unidentified Female Speaker

She's got her majority. She doesn't care.

Judith Kaye

I'm feeling great. I'm feeling great.

Justice Schaller

(1:17:41) I would view this and was happy to see from the beginning that we were involved with a public health issue because I'd always seen it as an issue that takes second place. The public health of the nation and the funding of it is always in second place. I think there are some unique features about public health that are involved here. So from the start and at the end, I would view this truly in a public health context where we consider populations of people that—and we need to consider the whole population. It doesn't do any good in public health matters to consider a part of the population when you're preparing a vaccine because if you leave too many holes in it

you've undermined the whole public health. And, second, there are priority classes. It struck me as amusing the thought of people flooding over the border in these special priority classes. The thought of pregnant women and children, chronically ill people, and health care workers making a run for the border struck me as being a very odd way for Arizona to get alarmed, actually. There's a maxim in public health, early public health law, that's—and I will do it in English, not Latin—the welfare of the people is the supreme law. So we start from the beginning, I think, with this being a peculiar and a unique public health issue.

The first issue is whether Congress can delegate and I would avoid that issue. We're supposed to—the rule really is that judges should avoid Constitutional issues if they can—decide it on some other basis. It really protects the stability of the existing law in many ways.

Judith Kaye

It's not a ducking thing.

Justice Schaller

No.

Judith Kaye

I think there was some laughter when we talked about that, but it's not like we're ducking it. That's a principle.

Justice Schaller

The judges would love to jump right in with the big Constitutional issues, but we're not supposed to do that.

(1:19:47) On the issue of whether Congress did delegate, I think that's rather clear and simple. The statutory language is plain. It sets out the priorities. It talks about the public and persons and even in the additional criteria it says to further the public health and that has a very special meaning in our law and ethics. Just as a sideline, the law and ethics of public health really runs counter to our system of jurisprudence because there we focus less on individual rights than on the rights of the whole population. That's a real footnote.

Judith Kaye

How are you coming out?

[laughter]

Justice Schaller

Oh, good, I was hoping I would leave you with doubt. [laughs] I would clearly affirm. However, I might, depending on how willing the panel was to get into the unique public health context, I might want to say something about public health and talk about the “what if.” If Congress could, if Congress did, and if rational basis review applied, I would say this Statute is irrational. It is counterintuitive in some respects. It does not further the public health. I think there is a lot of practical ways in which even judges can look at this.

Judith Kaye

Which Statutes? The Federal or the—

Justice Schaller

Arizona Statute. The Arizona Statute is really counterintuitive if one analyzes it. We already have a major epidemic waging in Mexico. There are probably people coming here for safety purposes. And the end result could be that people are going to come any way and they’re just not going to get protected which undermines the whole porous system. Really, 2 problems underlie the whole issue here and that is the inadequacy of our public health system in producing enough vaccine, as we saw recently until too late in the game; and second, our porous immigration policy. So as a way of combating them, Arizona has found a way of basically undermining what is really a public health statute by encumbering it with immigration policy unique to its own jurisdiction. I might want to say something about that but I would not run counter to the majority rationale.

Judith Kaye

Justice Lewis?

Justice Lewis

(1:22:11) I actually would like to begin by complimenting Council also. Ken, it's always a pleasure to work with you in any capacity and especially under the grueling circumstances that have been described. You did a wonderful job. And, Nina, likewise; it was just a terrific job. That's really where the heavy lifting comes in and we got to read the hypothetical and read a couple of cases and prepare, but you guys obviously did a great deal more. Thank you very much for that effort. It was really a wonderful exercise. Likewise, to Akhil and the Yale Law School folks who put together a terrific hypothetical.

I will be brief because 8 other people have already said what I would otherwise say, which is that I would affirm the Court of Appeals in this case. I would like very much; it's funny, we just had this exchange—I would like very much to find that it violates equal protection clause and is unconstitutional. When I was on this Court, there were many occasions when a panel or just me, I, wanted to reach the Constitutional question because it was just so inviting and we do like to get out—but it's not really appropriate to do that if there are narrower grounds. For that reason, I would adopt Judge Calabresi's approach and affirm on those narrower grounds. Thanks.

Judith Kaye

Justice Rendell?

Justice Rendell

(1:23:48) I come out the same way and I think I do adopt Justice Calabresi's reasoning. I think one thing that needs to be stressed here is that there are 2 Constitutional pieces to this. The first is the uniformity of immigration laws. It would have been one thing here if Congress had enacted the provision that Arizona enacted. Then you would have a clear, equal protection issue right in front of you. But it's one step removed from that because what happened here is a state adopted a law that impacts immigration. That right away sends off red flags because immigration is routinely, constitutionally, a matter for the Federal government. So you have to stop and think, okay, then if the Federal government is going to say the states can do something that is Federal, they need to be really clear about that. Clearly, you can tell from our questioning, we do not think it's that clear. I'll just quote one thing from *Graham vs. Richards* on this threshold issue of—it's about immigration and that's about the National government, not the states. "A

Congressional enactment construed so as to permit State Legislatures to adopt avergent laws on the subject of citizenship requirements (there it was for Federally-supported welfare programs) would appear to contravene this explicit Constitutional requirement of uniformity.” And that’s the whole essence of the whole immigration piece. We don’t want New York to decide its own immigration, and Arizona to decide its own immigration, so the minute a state does something regarding immigration or alienage, it sends off red flags. You don’t get to the equal protection argument that you would if it were the National government or if they had specifically delegated. But even if they specifically delegate it to the states, clearly, I think you would still have an issue of whether that’s unconstitutional even if it’s delegated. It doesn’t have standards. There’s a lot of case law on that. So I would go with affirm on that basis.

Judith Kaye

And I will make it unanimous, also in the brevity of my comments on the holding. I do want to add special thanks to everyone. Professor Ahmar and everyone here.

There are just 2 additional things I want to say. I think my colleagues have very well reflected the grounds for the affirmance that I would vote for. The first thing I want to add is that I’m kind of proud to say that we decided this question in the State of New York. I don’t know, perhaps the decision could be distinguished, I don’t think so. But we did—the Court of Appeals of the State of New York in the year 2001 held unconstitutional a State Statute which under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, we did find the State Statute denying Medicaid benefits for aliens unconstitutional. We held on both grounds, both the ground that the State Statute is directly in the teeth of Graham insofar as it allows the states to adopt avergent laws on the subject of citizenship requirements for Federally-supported welfare programs. That was one ground. And the other, that the Statute must be evaluated as any other State Statute that classifies based on alienage. We hold that Section 122 violates the equal protection clauses of the United States and the New York State Constitutions. Do you all applaud that decision?

[applause]

Judith Kaye

(1:27:44) Professor Ahmar, I want to add that to your storehouse of background. So I say we decided it both as a matter of Federal law and as a matter of State law. You should just know we

have a dual constitutional system in this nation. Every state has a State Constitution. The highest Court of the State is the last word under the State Constitution. The highest State Court sits also to review Federal Constitutional questions when those are brought to us, but those can be reviewed by the United States Supreme Court and maybe we went wrong. I don't know. What do you think? Nina? Ken? But we did resolve the issue consistently with what the Court has held today.

Unidentified Male Speaker

That case, I believe, involved legal permanent residents?

Judith Kaye

Yes.

Unidentified Male Speaker

Which is a slight variation from what we're dealing with here.

Judith Kaye

Yes. No, I'm confident it's not four-square in any way but I think it's kind of directional.

(1:28:49) The second thing I wanted to add is what a special personal privilege it is for me to be here and I thank you all so much. The Peter Jennings Project, and Todd, and Casey Jennings right there in the front row. And if you don't mind, I just want to add a little passage in the words of Peter, who was a dear, dear friend. These words are in the book that he and Todd co-authored called *In Search of America*. I visited Peter this morning. I opened the book and leafed through it and I thought this so encapsulated how I was feeling about the problem.

“Americans are unique in their vision of a dynamic, idea-driven identity, a fact that is demonstrated in our method of national self criticism. In what other nation has a Constitution, a document laying out the machinery of government, taken on the quality of a sacred test. Where else but in America does the claim that is unconstitutional ring with the quality of an accusation as if it were calling attention to the immoral or unnatural or even the impossible. Indeed, where

else can the un-prefix be applied to a people the way we say something is Un-American. The French cannot be considered Un-French or the German, Un-German.”

That was the feeling I had about the problem today. It’s not American. It’s Un-American. And that’s all I have to say. Thank you.

[applause]

Judith Kaye

I guess we could take some questions if you like.

Unidentified Male Speaker

May I whether Counsel would like to say what they really think of that?

[laughter]

Judith Kaye

Oh, yes. What a nice idea. Do you want to chime in? Nina, I think you had the tough call today.

Nina Pillard

(1:31:00) I at least agree with the decision of the Court. The thing that I found frustrating as an Advocate was something that some of you alluded to which was the layers of other issues that are there. We can’t even get to the equal protection question. Or can we get to the question of whether there is actually power on the part of Congress to do this if it clearly so chose. Because it didn’t really clearly so choose. There were these—maybe it’s the academic in me—that there were these other issues lurking out there that we didn’t really get to sink into. But I also—just grappling with this area, again, which I have a little bit, glancingly, in the past—I do see the kind of deep tension in the Doctrine. The plenary power doctrine, which is the enormously deferential, let the political branches work it out. Court, keep out. Which applies to matters, not just the core can you come in, you have to stay out, but matters touching on immigration.

Judith Kaye

Have you seen the evolution that Justice Calabresi referred to?

Nina Pillard

Yes—different strands going different ways—it’s a complex picture. So you do have this very strong plenary power doctrine and then you also have this concern for the politically marginal, and disenfranchised aliens. I really like Justice Schaller’s point about public health which, in a sense, puts the whole individual rights rubric on the back burner. I tried to think about that as I was preparing and the best I could do, I was not even satisfied with enough to mention it, which is—well, you know, the immigrants, or the people who are excluded from priority, do benefit from a well-administered system of vaccination because vaccinated people are a firewall against disease as it travels through. So if you trust that the government has a good system of doing it—no, not everyone is going to get it—

Judith Kaye

I’m glad you didn’t press that.

[laughter]

Nina Pillard

Right. But it just doesn’t make sense and I think it is almost irrational to say the student who is coming in for an authorized, legally sanctioned semester in the U.S. is not going to get the vaccine. This woman, who is an asylee from fleeing persecution and lawfully invited to be here, isn’t going to get it.

Unidentified Male Speaker

To what extent, if one wrote an opinion on the narrow ground, which I think is the opinion that this Court would write, is it appropriate to discuss in saying why it is a difficult Constitutional issue which we wish to avoid the kinds of problems that all of us, I think Justice Fitts said first, about what is said to be on one side or another so that we really, as a Court, open the discussion dialogue with Congress and the people about these very difficult underlying questions, just because we’re saying that we shouldn’t decide them unless there is much more discussion on it. I

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would think that a good opinion in a case like this would use dicta?? (1:34:25) to raise questions about the issue without the side egos that we're seeing.

Judith Kaye

(1:34:32) I'm going to assign the opinion to you.

[laughter]

Kenneth Starr

Not to worry. May it please the Court? First of all, thank you for an extraordinarily active bench. [laughter] It's wonderful for an audience that may not see Appellate Courts in action. But it is great when the Chief Justice starts calling on justices.

Judith Kaye

It's known as control.

Kenneth Starr

(1:35:13) My general point is the backdrop of the problem and that as so elegantly put together by Mr. Pace and Akhil. Caught in weeks of gridlock and with the death toll rising, Congress's public approval rating plummeted. As I read this problem I thought across the way from here Mr. Madison and others vision Congress as being this deliberative body and then in New York in 1789 that the one thing that was inadmissible would be for State Legislatures to be able to instruct their representatives on how to vote because we were to come together, We the People in Congress assembled. So this problem, quite apart from the public health sad, tragic dimensions, was a reminder to all of us that Congress needs to do its job.

Judith Kaye

Thank you, Ken.

[applause]

Judith Kaye

I think we would be willing to take a few minutes of questions. Anyone care to put a question to us? Yes, sir.

Gamal

My name is Gamal. For rationing health care, I think today's Court took rationing health care a little bit of a vengeance. Usually the way we see rationing health care we have 2 views of rationing health care. Let's say one of them, if a human being needs 10 pounds of health care so rationing is to give the poor 2 pounds of health care, the rich get 10 pounds and the middle class gets 5 pounds. Another way of seeing what rationing health care is, is to see the needs of the poor people and we give them a customized health care, and see the rich people who have different needs and give them specialized care for them. I think today's case, you guys took rationing health care out of what it really means.

Judith Kaye

Well, thank you. Were you on the journalist's side or the—

Gamal

No, I'm on the people's side.

[laughter]

Judith Kaye

So are we—so are we. Any other questions? Yes. Are you a journalist person?

Dan Fisher

(1:37:57) I am a journalist. I plead guilty to that. I'm just curious. As the case unfolded, if I could throw a hypothetical that we juice this up a little and we have thousands of immigrants, as implausible as Justice Schaller suggested, have crossed the border of unknown virulence. We have a limited supply and so we really have an emergency of trying to control the spread as we

don't know where it's coming from. We don't know the danger of this collection of non-citizens. First of all, what would Congress's power be to pass a discriminatory law regarding citizens? And, second, if you could clarify more at what point does Congress, I know you've discussed it, gets into the danger zone where they delegate this sort of decision to the state. Can you explain it a little better?

Judith Kaye

Justice Rendell?

Justice Rendell

If you get into the equal protection aspect and the different treatment, you look at the category and its aliens. And you look at whether it's rational basis or strict scrutiny. For the sake of our, let's say it's strict scrutiny when it is a protected class, and we've said alienage is a protected class. It said that in *Graham*. So when it's a protected class then you don't look at the rationality of the government's basis for acting. Government has to have a compelling state interest in order to differentiate and discriminate; the hypothetical that you pause and it might go the other way. It might be that Congress can do something and say, we need to disincentivize this people from coming across the borders. We've tried everything. We can't stop them. So you might be able to find a compelling state interest for the different treatment. Equal protection is not an absolute. It is a balance, as so many of the things we do are a balance. In that situation you might find that there is a compelling state interest. If anybody wants to add to that.

Judith Kaye

(1:40:00) I think you've said it very well.

Unidentified Male Speaker

Think about the situation where you've got the 2 pregnant women in line and there's only 1 vaccine. Ultimately it comes down to that. One woman arrived first and happens to be the alien and one step behind her is the American pregnant woman who says, "I want that vaccine." And there's only 1 dose left. Does the equal protection doctrine prevent Arizona from saying in that tiebreaker we want to use the citizenship of the second woman to get her that vaccine.? I am reluctant to read equal protection that broadly. I'm all for avoiding the doctrine if possible but I

think if Congress wrote a specific Statute that said, as a tiebreaker in that situation where you've only got 1 vaccine, the State can decide to prefer the American citizen over the non-citizen, I'm sympathetic.

Judith Kaye

The one thing I can say with certainty is we would have a divided court.

Justice Sloviter

Can I address this question?

Judith Kaye

Yes.

Justice Sloviter

I would be interested in Ken's view. It seems to me that the Supreme Court has more and more given Congress plenary authority over matters like this. My guess is that the Supreme Court would uphold legislation that disadvantaged aliens. I don't know of any other way to say it.

Unidentified Male Speaker

(1:41:45) May I be heard? There is a body of law with respect to scarce resources and this may at least be analogous to that. There are only so many resources to go around and so there is a preferential treatment for residents of the state where there's just only so much to go around. This might fit into that category.

Justice Sloviter

They haven't always stuck to that, though, in the Notary case and some other cases.

Justice Rendell

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There would have to be a reason. There has to be a rationale as to why we would say with scarce resources we prefer the citizens. And, interestingly, Arizona didn't say citizens of Arizona. They said the citizens of the United States. Well, what rationale makes them want citizens of the United States to have this versus aliens? In the one case where they were talking about education, the Supreme Court said we don't want to deny aliens the right to education because we want aliens to be educated. We don't want to have this minority and this group that is not educated and cannot move up in the economic food chain. That's counterproductive. So here it would seem to me the Supreme Court would say we want everybody to be healthy. We want all these pregnant women to be saved and their children to be saved. We don't want to scourge on our system of having people who have brain-damaged children, or whatever, because of this flu. That's not a good thing so we want all the pregnant women to get it and they should be the ones who get it before the health care workers and to make priorities in that way that make sense. I just can't come up with a rational reason to say aliens in a public health issue should fare worse than normal citizens. But they may come up with that.

Justice Calabresi

This is a very, very tough issue and let me just begin by saying that I am not the most balanced person about it. I'm a refugee. I'm an immigrant. I was sworn in as a judge on the 55th anniversary of the day I landed because I wanted to say all that American gave to me and all that it didn't give to others. I'm a patriot in a very deep sense. If America had not taken me in there's a very substantial chance that I would have been killed. The attitude at any given time in a Democracy and in the representatives of the people is, this is a zero-sum game we really can't open it up to others. The scarcity is there and we must protect it. If you look at it from a 300 year point of view instead it is becoming of immigrants, it is the treating of immigrants and aliens in the way you treat people here, that has generation after generation brought forth leaders in this country. How do you deal with this conflict? How do you deal with it? Can courts really step in and say what the people want at any given time can't be done, even while they tell you that there's a shortage; that there's an emergency? That's the thing that he was saying. On the other hand, simply to sit back and let the reactions of, Oh my God, there's an emergency. We've got to do something, is also not going to do it. It's exactly in this kind of area that courts can exercise their second look doctrines, their teaching doctrines, their dialogue doctrines, talking to the representatives of the people and saying, "Is it really necessary? Do you really mean it?" Ultimately it may be up to you and is up to you, but think about what you are doing when you do this rationing. In an odd way, that's what we were all talking about today.

Judith Kaye

(1:46:17) That is an excellent example of the wisdom of our independent judiciary and our separate branches of government, isn't it? Yes?

Unidentified Male Speaker

To my question that Judge Calabresi asked that I'm not sure got a lot of hearing was the status of the pregnancy, the fetus, in terms of the different categories of alien ship. Is there a citizenship in potential or some other issue that may address—is it a permanent resident? Does that make a difference? And if this woman was 8 months pregnant, would that make a difference in terms of how you would address this issue?

Justice Calabresi

I would like to say I raised that because I was particularly angry at a decision of 2 of the judges of my court whom I admire most and am closest to, Jon Newman and Amalya Kearse, who in a case that involved medical rights and so on where the argument was that the child that was about to be born, 8 month, would be a citizen, were so determined because they were so strongly in favor of abortion rights, that they ruled that there was no right at all, which seemed to me to completely to misunderstand whatever might be said in favor or against but it had nothing. If it had something to do with women's choice it really didn't say what Justice Blackman unfortunately said, that a fetus is not a person at all which seemed to me to be a mistake. Focusing on the fact that there is something that has some rights, whatever they may be, is awfully important.

Unidentified Male Speaker

(1:48:20) Why don't we have a discussion of Roe vs. Wade?

[laughter]

Judith Kaye

What I will add maybe by way of concluding thoughts are, as you can see, this has been a tremendous amount of fun for all of us up here. We really enjoyed ourselves. I think the ultimate

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pronouncement, Casey, and you would agree, wouldn't you, that Peter Jennings would have been very pleased with this session. That is an extremely high standard.

[laughter]

Judith Kaye

Thank you all so much.

[applause]

(end of audio)

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