No. 22-179

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

HELAMAN HANSEN,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit, voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. The NACDL was founded in 1958. It has a nationwide membership of direct and affiliate members. The NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The NACDL is dedicated to advancing the proper and efficient administration of justice and files numerous amicus briefs each year in federal and state courts addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

The members of the National Association of Federal Defenders (NAFD) provide representation pursuant to 18 U.S.C. § 3006A to persons accused of federal crimes who lack financial means to hire private counsel. The NAFD members advocate on behalf of the criminally accused, with the core mission of protecting the constitutional rights of their clients and safeguarding the integrity of the federal criminal justice system. Attorneys, investigators, and other NAFD personnel regularly work on behalf of individuals who are charged with immigration crimes or who are charged with non-immigration crimes and have immigration notifications lodged against them.

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[1] No counsel for any party authored this brief in whole or in part, and no other entity or person made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2 & 37.3, all parties received notice of *amici curiae's* intent to file this brief.

The NACDL and NAFD have a profound interest in assuring that 8 U.S.C. § 1324(a)(l)(A)(iv)—the criminal statute prohibiting activity that can be construed as "encourag[ing] or induc[ing]" a noncitizen to reside in the United States unlawfully—be declared unconstitutional so that ordinary advocacy and humane interactions with clients and their families and friends will not be not chilled or, if undertaken, criminalized. Amici are concerned that the statutory provision at issue in this case, 8 U.S.C. § 1324(a)(l)(A)(iv), offends core principles protected by the First Amendment and the Due Process Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

Acts of kindness, gestures of solidarity, and words of advice—particularly advice about paths toward legal status—all may be prosecuted under the overbroad and vague provision at issue in this case. By seeking to uphold the provision, the government opens the door for the force of the government to be leveled against all kinds of words or deeds that support people in need. The First Amendment and the Due Process Clause do not tolerate a criminal statute with meanings so uncertain and susceptible to overbroad and arbitrary enforcement.

Under 8 U.S.C. § 1324(a)(l)(A)(iv) (Subsection (iv)), any person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law" commits a felony punishable by up to five years in prison. Subsection (iv)'s terms have broad application, tying criminal culpability to any statement or act that "encourages or induces" undocumented noncitizens to enter the United States—or, even more problematic for

interactions of members of the NACDL and NAFD with their noncitizen clients, to remain in the country once they are already here. Not only is Subsection (iv)'s scope unduly broad, but also the precise contours of its broad reach are impossible to pin down. Accordingly, in addition to criminalizing activity protected by the First Amendment in violation of the overbreadth doctrine, Subsection (iv) also violates the Due Process Clause's void-for-vagueness doctrine.

This Court has already provided a template for holding that Subsection (iv) violates the prohibition on overbroad and vague criminal laws that chill speech. In *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), this Court affirmed the Ninth Circuit's invalidation of a child pornography statute as overbroad under the First Amendment. The statute in *Free Speech Coalition* suffered the same combination of overbreadth and vagueness as Subsection (iv).

In contrast, in *United States* v. *Williams*, this Court approved the child pornography statute—but only *after* Congress corrected its overbreadth, providing definitional sections and context that limited the meaning of statutory terms, rather than relying on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." 553 U.S. 285, 306 (2008). The contrast between the original statute in *Free Speech Coalition* and its successor in *Williams* shows why this Court should hold Subsection (iv) unconstitutional, leaving Congress to write any remedial definitions preventing the statute from chilling the exercise of rights protected by the First Amendment.

Even more so than the statute in *Free Speech Coalition*, Subsection (iv) suffers from overbreadth and vagueness. Justice Scalia's example in *Williams* of "abstract advocacy" protected under the First

Amendment—"I encourage you to obtain child pornography[,]" *Williams*, 553 U.S. at 300—is the same kind of "abstract advocacy" swept in under the language of Subsection (iv). "[E]ncourages or induces" covers such a broad range of speech that ordinary people have no way of knowing what the provision outlaws and what it permits, thereby chilling legitimate speech. The broad language is especially problematic in the context of legal representation because lawyers and legal staff routinely interact with clients and their families and friends who cannot be encouraged to remain in the United States under Subsection (iv)

Nor is the overbreadth problem solved by clever interpretation. Reading the statute to mean something other than its plain words would violate the separation of powers because rewriting the statute to narrow its scope would constitute a serious invasion of the legislative domain and sharply diminish Congress's incentive to fix the law, as it did after *Free Speech Coalition*. See *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) ("To read [the statute] as the Government desires requires rewriting, not just reinterpretation."). And judicial construction would not resolve the chilling effect of the statutory words on ordinary people.

This Court's Due Process Clause jurisprudence has established that vagueness issues are especially acute in the First Amendment context. *Vill. of Hoffman Ests.* v. *Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) ("If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."). Although vagueness was not included in the question presented, aspects of this Court's vagueness jurisprudence provide context supporting overbreadth under the First Amendment. First, this Court has held unconstitutional statutes that, like Subsection (iv), depend on third persons'

reactions to what the defendant does. See *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971) (invalidating a statute that criminalized "annoying" conduct because "[c]onduct that annoys some people does not annoy others"). Second, the inherent malleability of Subsection (iv)'s broad terms affords prosecutors and law enforcement officers unrestrained discretion and therefore invites arbitrary and selective enforcement. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–09 (1972). Third, Subsection (iv)'s vagueness fails "to ensure that ambiguity does not chill protected speech." *F.C.C.* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012).

Lastly, the government in its petition claims that invalidation of Subsection (iv) "will continue to be a substantial impediment to the nationwide administration of the immigration laws." Pet. 23. But the statute is not often prosecuted. When it is, it almost always accompanies other charges that more clearly and specifically cover the prohibited conduct—as in the present case. Holding Subsection (iv) unconstitutional does not impede enforcement of immigration laws.

For these reasons, the Court should find that Subsection (iv)'s overbreadth and vagueness render the statute facially unconstitutional. By doing so, the Court can avoid criminalizing a vast pool of potential speech that creates special risks of chilling protected conduct of criminal defense lawyers, investigators, and staff whose obligation is to zealously represent persons who are noncitizens.

ARGUMENT

I. THIS COURT'S CONTRASTING DECISIONS IN *FREE SPEECH COALITION* AND *WILLIAMS* PROVIDE A TEMPLATE FOR AFFIRMING THE NINTH CIRCUIT.

This Court's decisions in *Free Speech Coalition* and *Williams* provide before-and-after pictures that illustrate why Subsection (iv) is unconstitutionally overbroad. Like the statute in *Free Speech Coalition*, Subsection (iv)'s plain text covers conduct and speech protected by the First Amendment. Unlike the amended statute in *Williams*, Subsection (iv) lacks the definitional sections and "narrowing context" that would clarify the otherwise uncertain meaning of broad statutory language. This Court should follow the template those cases provide, striking down Subsection (iv)'s criminalization of language that "encourages or induces" noncitizens as overbroad and leaving the task of any rewriting of the statutory language to Congress.

A. In *Free Speech Coalition*, the Court Affirmed the Ninth Circuit's Holding That an Overbroad Child Pornography Statute Infringed on First Amendment Rights.

In the Child Pornography Prevention Act of 1996, Congress criminalized "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct." H.R. 4123, 104th Cong. § 3 (1996). The Ninth Circuit held that the statute, by criminalizing images that "appear to be" of a minor, violated the First Amendment for its overbreadth and the Due Process Clause for its vagueness. *Free Speech Coalition* v. *Reno*, 198 F.3d 1083, 1094 (9th Cir. 1999), *aff'd sub nom. Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234

(2002). This Court affirmed based on First Amendment overbreadth, holding that a statute is invalid if it criminalizes "lawful speech as the means to suppress unlawful speech." 535 U.S. at 255.

This Court recognized an exception to First Amendment rights for child pornography in *New York* v. *Ferber*, 458 U.S. 747 (1982), but required consideration not only of how much protected speech is criminalized, but also whether the statute chills the free exercise of speech and activities protected by the First Amendment. *Free Speech Coalition*, 535 U.S. at 255 ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."). The statute was not saved by an affirmative defense imposing a burden on the defendant to prove the material was lawful. *Id*. at 255–56. Because the First Amendment required "a more precise restriction" than provided in the statute, it was unconstitutionally overbroad, so the Court had no need to address the statute's vagueness. *Id*. at 258.

B. In *Williams*, The Court Upheld Congress's Rewrite of the Child Pornography Statute Because its Definitional Specificity Protected Against Overbreadth.

The Court spoke in *Free Speech Coalition*, and Congress heard the message, rewriting the statute to address the areas of vagueness and overbreadth. When the new statute was challenged, this Court upheld it, finding that, after "Congress went back to the drawing board," the amended statute's clarifications and definitional provisions rendered it constitutionally valid. *Williams*, 553 U.S. at 289, 307. Five new express provisions saved the statute: 1) an actual knowledge requirement that applied to each element of the statute; 2) a narrow meaning, derived from context, of the

terms "promotes" and "presents;" 3) a shift in focus onto the subjective belief of the defendant rather than the subjective belief of others; 4) a mens rea that applies regardless of whether a reasonable person would have that state of mind; and 5) a narrow and explicit description of the required actus reus. *Id*. at 293–98.

In finding the amended statute neither overbroad nor vague, this Court credited the steps Congress took to define its scope after its predecessor version was declared unconstitutional. Between *Free Speech Coalition* and *Williams*, Congress "responded with a carefully crafted attempt to eliminate" the constitutional problems the Court had identified in the earlier statue. *Id.* at 307. This Court explained the legislative narrowing that saved the successor statute from both an overbreadth and a vagueness challenge, especially the sections defining "sexually explicit conduct" and "the commonsense canon of *noscitur a sociis*" used to limit the otherwise broad meaning of "promotes" and "presents." *Id*. at 293–94; see also *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 20–21 (2010) (noting that "Congress also took care to add narrowing definitions to the material-support statute over time," which "increased the clarity of the statute's terms").

The five key provisions that saved the rewrite in *Williams* are not present here. Rather, "encourages" and "induces" appear by themselves and without definition, retaining their broad, nebulous meaning. As the Court noted in *Williams*, the First Amendment invalidates statutes whose terms' meanings depend on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306.

C. In *Packingham*, the Court Followed *Free Speech Coalition*, Emphasizing the Importance of Free Speech on the Internet.

This Court's protection of speech in *Free Speech Coalition* is in the mainstream of this Court's First Amendment jurisprudence. This Court recently addressed overbreadth concerns, citing to *Free Speech Coalition*, where a statute implicated free speech on the Internet. *Packingham* v. *North Carolina,* 137 S. Ct. 1730, 1735–37 (2017). In doing so, the Court recognized that First Amendment rights in "a street or a park" extend to the "vast democratic forums of the Internet in general, and social media in particular." *Id.* at 1735 (citing *Reno* v. *ACLU*, 521 U.S. 844, 868 (1997)). Broadly worded statutes reach protected speech, both traditional and as enhanced by social media. The "plainly legitimate sweep" of a statute like Subsection (iv) remains narrow, while an ever more "substantial number of its applications are unconstitutional." *Stevens*, 559 U.S. at 473 (citation omitted).

In *Packingham*, the Court concluded that a statute prohibiting sex offenders from accessing social networking websites was unconstitutionally overbroad because the statute was not narrowly tailored to avoid burdening substantially more speech than necessary to further the government's legitimate interests. 137 S. Ct. at 1736. The Court applied *Free Speech Coalition* to emphasize that the seriousness of the matter addressed by the statute did not diminish the need to limit the statute's scope. *Id.* As in *Williams*, the Court emphasized that a narrower statute could legitimately criminalize speech—"the First Amendment permits a State to enact specific, narrowly tailored laws"—but the law in question generally barred access to the Internet. *Id.* at 1737.

The Court in *Packingham* also referenced the "vast democratic forums of the Internet" as one of the most important places for the exchange of views in the modern era. *Id*. at 1735 (quoting, *ACLU*, 521 U.S. at 868). "In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Id*. (quoting *ACLU*, 521 U.S. at 852). Subsection (iv)'s overbreadth implicates the expanded town hall of social media. Does "friending" or "liking" on Facebook encourage or induce residence when the person friended or liked may be undocumented? Does blogging or commenting against enforcement of immigration laws constitute a felony by encouraging individual aliens to remain in the country without documents? What about signing an online petition in support of lawful status for certain individuals or categories of undocumented persons? *Packingham* reinforces the need for narrow definitions to avoid infringing on First Amendment rights.

II. SUBSECTION (iv)'s PLAIN MEANING COVERS BROAD EXPANSES OF PROTECTED SPEECH.

"[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *Wisconsin Central Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). The ordinary meaning of "encourages or induces" implicates broad ranges of conduct and speech, especially in the context of legal representation.

A. The Natural Meaning of the Text Covers Numerous Everyday Situations.

Taking the statutory terms at face value, a vast range of protected speech and conduct could amount to encouragement or inducement, especially when tied to "residing in" the United States. Would soup kitchen managers or low-income shelters or church groups that serve a hot meal on a winter's day, knowing that undocumented noncitizens are among their clientele, be liable for encouragement? [2] Would a volunteer who provides a group of undocumented immigrants with English language tutoring "encourage" them to remain in the country? Would a good Samaritan who refers a person to a soup kitchen or provides clothing or shelter potentially commit a crime? These acts broadcast a message of care and compassion that may inspire undocumented immigrants to stay in the country. Such activities by schools, health clinics, and religious organizations, and virtually any other actual assistance to or expressions of support for undocumented immigrants, could constitute felonies.

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[2] During previous oral argument, the government conceded in response to Justice Kavanaugh's soup kitchen hypothetical that such charitable efforts "might violate the statute." *United States* v. *Sineneng-Smith*, No. 19-67, 2020 WL 907832, *8–9 (U.S. Oral. Arg. 2020). The government claimed that the Court need not worry because 8 U.S.C. § 1621 exempted humanitarian efforts, but that statute is limited to state and local governments. Further, *Free Speech Coalition* found that potential defenses were inadequate to protect First Amendment rights. 535 U.S. at 255–56; *see also United States* v. *Delgado-Ovalle*, No. 13-20033-07-KHV, 2013 WL 6858499, at *7 (D. Kan. Dec. 30, 2013) (The courts equating "encourage" with "help" "could potentially result in the prosecution of soup kitchen managers, low-income shelters, and immigration attorneys giving advice to undocumented residents about their options to remain in the United States and pursue citizenship.").

The commonly understood and dictionary meanings of "encourages" and "induces" chill the activities of normal people who could be prosecuted under the text's plain meaning. Subsection (iv)—by its plain terms and scope—criminalizes protected speech. This Court in *Williams* cited the statement "I encourage you to obtain child pornography" as an example of speech that the government could not constitutionally regulate. *Williams*, 553 U.S. at 300; see *Free Speech Coalition*, 235 U.S. at 253–54 ("Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may *encourage* pedophiles to engage in illegal conduct.") (emphasis added). Worse yet, the very threat of prosecution under Subsection (iv) deters people from exercising their free speech rights. The only sure way to avoid prosecution under the statute is self-censorship. Clergy, teachers, doctors, friends, and family members who might otherwise speak or write about immigration-related issues will "'steer far wide[] of the unlawful zone." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)). As a result, "the free dissemination of ideas may be the loser." *Id.* at 379 (citation omitted).

The ordinary meaning of Subsection (iv) also burdens associational rights under the First Amendment. Given the indefiniteness of "encourages or induces," Subsection (iv) interferes with the freedom to engage in association of beliefs and ideas in support of undocumented immigrants. See *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (noting "the close nexus between the freedoms of speech and assembly."). The provision can be read to criminalize working with organizations and interest groups dedicated to promoting the goals and rights of noncitizens. The First Amendment does not allow the freedoms of speech and

association to be so inhibited, especially when it comes to matters of public debate and discourse such as immigration. The overbreadth and vagueness doctrines protect people who might otherwise forfeit speech and association in response to a criminal statute with such a nebulous standard for guilt.

As this Court recognizes, difficulty in "determin[ing] whether the incriminating fact . . . has been proved" is not what invalidates a statute; instead, the question is whether it is impossible to determine "precisely what that [incriminating] fact is." *Williams*, 553 U.S. at 306. The endless array of cases that are prosecutable under Subsection (iv) illustrates its indeterminacy about what kind of facts are incriminating. From the outset, Subsection (iv) was obviously unclear. In 1952, testimony by then-Attorney General James P. McGranery expressed concerns that Section 274—the 1952 encouragement provision—was vague, needed to be "clarified," and was "seriously inadequate." H. Comm. on the Judiciary, 82d Cong., Hearings Before the President's Comm'n on Immigr. and Naturalization 1350–51 (Comm. Print 1952) (statement of the Hon. James P. McGranery, Att'y Gen. of the United States).

Government assurances of narrow enforcement do not insulate the statute from its unconstitutionality. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480. Promises of fair enforcement "do not neutralize the vice of a vague law." *Baggett*, 377 U.S. 373. "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). Allowing prosecutors to "shap[e] a vague statute's contours through

their enforcement decisions" would transfer to them a job that belongs to Congress. *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring).

B. Subsection (iv)'s Overbreadth Directly Affects Legitimate Activities of Law Firms and Public Defenders Representing Noncitizens.

Another peril of Subsection (iv)'s overbroad and vague language is its stifling effect on constitutionally-protected legal advice and representation. This hits home for the NACDL and NAFD. Criminal defense lawyers, investigators, and other legal professionals whose practice intersects with immigration issues can avoid prosecution "only by restricting their conduct to that which is unquestionably safe." *Baggett*, 377 U.S. at 372.[3] On one side, a rock: attorneys must be able to advise clients unencumbered by fear of recrimination, consistent with the professional and ethical duty to their clients to provide zealous advocacy. On the other side, a hard place: Subsection (iv) criminalizes any behavior that could be construed as encouraging an undocumented client to come to, enter, or reside in the United States unlawfully.

Defense attorneys are constantly working in the mixed field of immigration and criminal law. Lawyers represent defendants, witnesses, and victims who, along with their families, are typically already residing in this country and need legal advice to navigate an exceptionally complex area of the law. See *Arizona*

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[3] The Court has recognized the interconnected nature of criminal defense and immigration matters. *See Dimaya,* 138 S. Ct. at 1213 ("[W]e have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more intimately related to the criminal process.") (internal quotation marks and citation omitted).

v. *United States*, 567 U.S. 387, 395 (2012) ("Federal governance of immigration and alien status is extensive and complex."). And the stakes for these clients are exceptionally high. See *Dimaya*, 138 S. Ct. at 1213 (noting, in the void-for-vagueness context, the "grave nature of deportation," a "'drastic measure' often amounting to lifelong 'banishment or exile'"); *Lee* v. *United States*, 137 S. Ct. 1958, 1968 (2017) ("preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence").

Basic to such advice are the immigration rules pertaining to rights lost by failing to establish continuous presence in the United States, the risks of inadmissibility by leaving the country, and the chances for adjustment of status while present. See, *e.g.*, 8 U.S.C. §§ 1229b(b), 1182(a)(9)(A)(ii) & 1182(a)(9)(B)(i). Specifically, in the course or representing an undocumented client, a lawyer may inform a client that relief from removal may be available if he or she can establish continuous presence; advise clients about the risks involved with leaving the United States, including the possibility of triggering grounds of inadmissibility; and share a professional opinion with a client about the strength of the case. A lawyer providing advice on these subjects could have concerns, or even decline to present advice to clients, for fear of facing criminal prosecution for encouraging clients to stay in the country in violation of civil immigration laws.

Criminal defense lawyers are also directly at risk because of three non-immigrant benefits that often apply to persons unlawfully present in the United States and enmeshed in the criminal justice system: the S-visa for potential witnesses with information valuable to the government; the T-visa for victims of severe forms of human trafficking; and the U-visa for nonimmigrant

victims of crimes. 8 U.S.C. § 1101(a)(15)(S), (T), and (U). The infinite permutations of needed advice to witnesses, victims, defendants, and their family members implicate what could easily be considered encouraging or inducing a person known to be unlawfully in the country to stay by providing truthful and warranted advice.

In *Gentile* v. *State Bar of Nevada*, this Court highlighted the effects of a state attorney discipline rule barring extrajudicial statements that leaves "the lawyer [with] no principle for determining when his remarks pass from the safe harbor . . . to the forbidden[.]" 501 U.S. 1030, 1049 (1991). Given the breadth and imprecision of Subsection (iv), an ethical attorney who seeks to practice within the bounds of professional responsibility by honestly discussing the legal consequences of any proposed course of conduct with a client may still be held liable—or nevertheless be chilled—for conduct that approximates encouragement.

Criminal defense lawyers are but one group whose work is undermined and harmed by the operation of Subsection (iv). Other professionals will experience similar difficulties in discerning where impermissible encouragement begins and ends. A priest might encourage a new noncitizen parishioner to return on future Sundays. A doctor might ask an undocumented patient to schedule a follow-up appointment. Teachers and other state employees who interact with migrant children and their families might encourage attendance in school, enrolling in college, and other improvements in living conditions. These professionals face ethical dilemmas when their words risk running afoul of Subsection (iv).

Nor should this Court accept the government's assertion that a "financial gain" enhancement defeats Mr. Hansen's overbreadth argument. After all, an

enhancement does nothing to change the underlying elements of the offense. The differing penalties for enhanced and unenhanced violations are irrelevant to overbreadth and vagueness, instead illustrating the statute's extensive breadth in normally covering activity involving no remuneration. The predicate offense is the same either way, and the penalty enhancement merely represents an aggravated version of the basic Subsection (iv) crime. The government is correct that "a specific penalty is a prerequisite to enforcement." Br. 48 (citing *United States* v. *Evans*, 333 U.S. 483, 495 (1948)). But *Evans* is inapposite. In that case, the statute proscribed two types of conduct and provided a penalty for only one. Here, the situation is flipped: the statute proscribes one type of conduct and provides two penalty ranges, depending upon the presence of an aggravating fact—financial gain. And that very case warned against the kind of grasping interpretation the government urges, saying as we say: "It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make." *Evans*, 333 U.S. at 495.

Despite the government's protestations, *United States* v. *Alvarez*, 567 U.S. 709 (2012), fully supports the Ninth Circuit's decision in the present case. Br. 47–48. In *Alvarez*, the defendant lied about his military service, which constituted a misdemeanor, and received an enhanced sentence under the Stolen Valor Act of 2005 for lying about earning the Congressional Medal of Honor. *Alvarez*, 567 U.S. at 713–14. This Court reversed the conviction, not because of the enhancement but because criminalizing a certain kind of lie impinged on free speech rights. *Id*. at 717–23. The Court had no reason to reach the relevance of penalty enhancements—the charged version of the statute was unconstitutional. Indeed, the Court abrogated the

Tenth Circuit case that upheld the statute in a prosecution that did not involve the Congressional Medal of Honor enhancement. *Id.* at 714; see *United States* v. *Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010), *reversed*, 667 F.3d 1146 (10th Cir. 2012), *vacating reversal and reinstating district court dismissal of information*, 684 F.3d 962 (10th Cir. 2012).

As in *Alvarez* and the present case, it is the unenhanced offense that infringes on the First Amendment, requiring that both the base and its enhanced version be invalidated. *Alvarez*, like the *Free Speech Coalition* and *Williams* pairing, provides a before-and-after illustration: the Stolen Valor Act of 2005 violated the First Amendment, so Congress—not the Judicial Branch—rewrote the statute as the Stolen Valor Act of 2013, addressing directly the First Amendment concerns by eliminating the "falsely represents himself" language and substituting conventional fraud language in 18 U.S.C. § 704(b). As in *Alvarez*, the Court should invalidate the statute for infringing on First Amendment rights, leaving to Congress any rewrite of the statute in light of its constitutional infirmity.

III. JUDICIAL CONSTRUCTION CANNOT SAVE THE OVERBROAD STATUTE.

The government attempts to narrow the meaning of "encourages or induces" by invoking aiding-and-abetting or criminal solicitation provisions. However, this proposal defies basic principles of statutory interpretation. Subsection (iv) lacks a definitional provision limiting the meaning of "encourages or induces." Likewise, the provision does not provide context for application of the canon of *noscitur a sociis*. In *Williams*, this Court applied the canon when considering whether "promotes" and "presents" were impermissibly vague. *Williams*, 553 U.S. at 294 (assigning a narrower meaning to "presents" and "promotes,"

otherwise susceptible to "wide-ranging meanings," where the law listed them with "distributes," "advertises," and "solicits"). But here, unlike the statutory provision in *Williams*, "encourages" and "induces" appear by themselves and without definition—retaining their broad, nebulous meaning.

In cases outside the context of Subsection (iv), this Court and others have given the statutory terms "encourages" or "induces" a much broader meaning than what the government proposes here. See, *e.g.*, *Int'l Bhd. of Elec. Workers* v. *NLRB*, 341 U.S. 694, 701–02 (1951) ("The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion."); *State* v. *Melchert-Dinkel*, 844 N.W.2d 13, 23–24 (Minn. 2014) (holding that the words "encourages" and "advises" must be severed from state statute that prohibits encouraging, advising, or assisting another person's suicide because "the common definitions of 'advise' and 'encourage' broadly include speech that provides support or rallies courage"). "To read [Subsection (iv)] as the Government desires requires rewriting, not just reinterpretation." *Stevens*, 559 U.S. at 481.[4]

The government asserts that the legislative history indicates that Subsection (iv)'s broad terms actually refer to criminal solicitation and facilitation. That assertion lacks merit. With direct aiding-and-abetting language in the adjacent subsection

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[4] Subsection (iv) lacks another important feature of criminal aiding-and-abetting and solicitation statutes: the conduct assisted in those statutes must be a criminal offense, not just a civil infraction. Inchoate crimes require commission of a crime by another, but Subsection (iv) applies to both criminal and civil violations of the immigration laws. "As a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona*, 567 U.S. at 407.

(§ 1324(a)(1)(A)(v)), the government provides no reason why, if such language were intended, Congress would not have used such language in Subsection (iv). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). "*Expressio unius est exclusio alterius*." *Leatherman* v. *Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993).

The history that the government presents here is inapt, citing earlier immigration laws as the direct precursors of Subsection (iv). Br. 4–7. However, the government's version of the statutory history glosses over Subsection (iv)'s non-linear development, as its scope became broader and much less defined over time. In particular, the provision that Congress enacted in 1952 as part of the Immigration and Nationality Act (INA) deviated from earlier immigration laws in 1885 and 1917, which targeted only the use of contract labor to draw immigrants into the country. See Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333 (prohibiting "knowingly assisting, encouraging or soliciting the migration or importation of any alien . . . to perform labor or service of any kind under contract or agreement"); Act of Feb. 5, 1917, ch. 29, § 5, 39 Stat. 879 (prohibiting "induc[ing], assist[ing], encourag[ing], or solicit[ing] the importation of migration of any contract laborer . . . into the United States"). The 1952 provision, on the other hand, became untethered from a focus on labor contractors. See Pub. L. No. 82-414, § 274, 66 Stat. 163, 228–29 (1952).

The 1952 amendments also removed the words "assist" and "solicit" that might have narrowed the meaning of the otherwise vague standard of encouragement. The current version of Subsection (iv), as amended in 1986, applies not only to encouraging unlawful entry by undocumented noncitizens without reference to contract labor; it further criminalizes encouraging those who are already in the country to continue to "reside" unlawfully. Subsection (iv), broader in scope and cut loose from its specific contract-labor application, bears little resemblance to the 1885 and 1917 statutes on which the government relies.

The government invokes the constitutional-avoidance canon in urging this Court to adopt a narrower construction of Subsection (iv). The problem, though, is that the government's reading of the provision as a conventional criminal prohibition on facilitating or soliciting illegal activity simply inserts different words into the statute. That reading also has no basis in Subsection (iv)'s statutory history. The government's proposed reading thus replaces "encourages or induces" with two verbs that Subsection (iv) plainly lacks: "solicits" and "facilitates."

Rewriting the text of Subsection (iv) in this manner violates separation of powers principles. *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) ("If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."); see *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 596 (1951) ("After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."). If Congress wanted "encourage" and "induce" to carry

a similar meaning to facilitate and solicit, it could use those terms or, at least, define "encourage" and "induce" accordingly, rather than leaving prosecutors, police, jurors, and judges to guess. "It is for the people, through their elected representatives, to choose the rules that will govern their future conduct." *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring). Therefore, this Court should find Subsection (iv) invalid rather than strain to write alternative text.

IV. THE COURT'S DUE PROCESS VAGUENESS DOCTRINE SUPPORTS THE NINTH CIRCUIT'S FINDING OF FIRST AMENDMENT OVERBREADTH.

This Court's vagueness doctrine should inform its assessment of First Amendment overbreadth. A criminal statute runs afoul of the Due Process Clause for its vagueness when it (1) fails to provide sufficient notice that would enable ordinary people to understand what conduct it prohibits; or (2) encourages arbitrary and discriminatory enforcement. *Grayned*, 408 U.S. at (1972). Subsection (iv)'s terms implicate both interests. Where "a statute's literal scope [reaches] expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); *accord Vill. of Hoffman Ests.*, 455 U.S. at 498–99.

The purpose of the fair notice element of the void-for-vagueness doctrine "is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999); see also *Lanzetta*, 306 U.S. at 453 ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."). A criminal law provides inadequate notice where the meaning of its terms depends on "wholly subjective judgments without statutory

definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306. "[T]he [vagueness] doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212. Subsection (iv)'s expansive terms establish few parameters, creating intolerable doubt about what the law intends to criminalize.

An important element of Subsection (iv)'s imprecision is its subjectivity. The statute's dependence on the subjective reactions of a judge or jury to a defendant's conduct—was an individual encouraged or induced?—results in unconstitutional vagueness. In *United States* v. *L. Cohen Grocery Co.*, for example, the Court held that a prohibition on "unjust or unreasonable rate[s] or charge[s]" was unconstitutionally vague because assessment of whether charges were "unjust or unreasonable" was left entirely to the "estimation of the court and jury." 255 U.S. 81, 89 (1921). The Court likewise struck down an ordinance that criminalized behaving in a manner "annoying to persons passing by" because "[c]onduct that annoys some people does not annoy others," as conduct or words that "encourages or induces" some people does not others, leaving the law without specifying any standard of conduct at all. *Coates*, 402 U.S. at 612–14. And in *Morales*, the Court invalidated a statute that prohibited loitering "with no apparent purpose," because it improperly left "'it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" 527 U.S. at 60–61 (quoting *United States* v. *Reese*, 92 U.S. 214, 221 (1876)).

Subsection (iv)'s failure to specify an explicit *mens rea* standard for "encourages or induces" exacerbates the notice problem. A statute's constitutionality under

the vagueness doctrine is "closely related" to whether it contains a mental requirement. See *Colautti* v. *Franklin*, 439 U.S. 379, 395 (1979), *abrogated on other grounds by Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) ("Because of the absence of a scienter requirement in the provision . . . the statute is little more than 'a trap for those who act in good faith.'") (quoting *United States* v. *Ragen*, 314 U.S. 513, 524 (1942)). Further, Subsection (iv) only imposes a knowing or reckless disregard standard to whether an unauthorized immigrant's entry or residence "will be in violation of law." Subsection (iv)'s lack of an explicit, heightened scienter requirement contributes to the law's failings in meeting the demand of fair notice. "The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains." *Baggett*, 377 U.S. at 373.

The inherent subjectivity and imprecise terms of Subsection (iv) are doubly problematic because they create risk that charging decisions will be based on the whims of law enforcement officials. The vagueness doctrine requires that criminal laws "establish minimal guidelines to govern law enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (citation omitted). The concern is that "[v]ague laws invite arbitrary power." *Dimaya*, 138 S. Ct. at 1223 (Gorsuch, J., concurring); see also *Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis."). The indeterminate nature of what behavior might rise to the level of "encourages or induces" grants police and prosecutors unrestrained discretion, creating risk of unguided enforcement under the statute. This risk amounts to "a denial of due process." *Goguen*, 415 U.S. at 576 (finding a state law void for vagueness where its prohibition

on treating an American flag "contemptuously" permitted selective enforcement). Vagueness concerns are especially pronounced here, where:

- The statute threatens criminal punishment. *Vill. of Hoffman Ests.*, 455 U.S. at 498–99 ("The Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").
- Criminal defense lawyers and staff are potential targets under the statute. *Gentile*, 501 U.S. at 1051 ("The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the state.").
- The statute not only creates the potential for arbitrary treatment of individuals but also provides a potential tool for discriminatory enforcement against disfavored classes. *Kolender*, 461 U.S. at 360 (vague statute provided potential tool for "harsh and discriminatory enforcement").

In *Gentile*, this Court emphasized the special interest in avoiding vagueness when a law potentially affects criminal defense lawyers because of their vital role in serving as a check on law enforcement, both through their speech and through their actions defending clients. 501 U.S. at 1051 (noting that the sanctioned attorney "succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government"). Subsection (iv) similarly affects criminal defense lawyers and immigration attorneys who often defend against state action and possible instances of governmental overreach. A law as

imprecise as Subsection (iv) invites selective treatment of these individuals. Subsection (iv) can be wielded against "particular groups deemed to merit [prosecuting officials'] displeasure." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972) (quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98 (1940)).

The concern about arbitrary enforcement should apply with special force in the context of immigration, which raises the stakes of discriminatory treatment. With such unfettered discretion, executive branch enforcement officials could in theory wield that power to target individuals who are allied with or who support specific groups of undocumented noncitizens based on race, religion, or national origin, all under the guise of controlling illegal immigration. Members of the criminal defense bar, who frequently advocate on behalf of minority communities and help them secure access to the courts to vindicate their rights, could end up bearing the brunt of enforcement under Subsection (iv). See *NAACP* v. *Button*, 371 U.S. 415, 434 (1963) (declaring a state law unconstitutional where it risked "smothering" efforts to pursue litigation on behalf of minorities).

The facial vagueness of Subsection (iv) supports its invalidation for overbreadth under the First Amendment. As with this Court's grant of the facial vagueness challenge to the residual clause of 18 U.S.C. § 16's definition of "crime of violence," as incorporated into the Immigration and Nationality Act, Subsection (iv) should be stricken, whether or not some underlying conduct would fall within the scope of a constitutional statute. See *Dimaya*, 138 S. Ct. at 1211; *Johnson* v. *United States*, 576 U.S. 591, 602 (2015) (finding the residual clause of the Armed Career Criminal Act unconstitutionally vague without considering its application to the petitioner, and noting that the Court's "holdings

squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp"). "The question is not whether discriminatory enforcement occurred [in the case] . . . but whether [the law] is so imprecise that discriminatory enforcement is a real possibility." *Gentile*, 501 U.S. at 1051.

Vague statutes that implicate substantial First Amendment interests are facially invalid. See *Kolender*, 461 U.S. at 358 n.8 (affirming the validity of facial vagueness challenges if the law "reaches a substantial amount of constitutionally protected conduct") (cleaned up); *Morales*, 527 U.S. at 55 (same); see also *Young* v. *Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (noting that a facial vagueness challenge may proceed where the statute has a substantial "deterrent effect" on protected expression). And as demonstrated above, Subsection (iv)'s standardless language and its potential for arbitrary enforcement impose a chilling effect on First Amendment liberties.

V. THE GOVERNMENT'S CLAIM THAT SUBSECTION (iv) IS ESSENTIAL TO IMMIGRATION ENFORCEMENT IS BELIED BY ITS REDUNDANCY AND RELATIVELY INFREQUENT USE.

The government's claim that Subsection (iv) is a necessary component of immigration enforcement rests on mistaken assumptions. The narrow area of actual crime included in Subsection (iv)'s overbroad language is covered by other statutes, the statute is not often utilized, and the provision makes little to no difference in sentencing.

Subsection (iv) involves relatively infrequent prosecutions that can easily be charged under other statutes. For the five years between fiscal years 2017 and

2021, according to United States Sentencing Commission data, only 197 cases could be identified as having at least one count of conviction specifically under Subsection (iv). [5] Of those, over half came from the Southern District of Florida. At the same time, there were zero such convictions reported from the District of Arizona and the District of New Mexico, with very few from the other border districts of the Southern District of California, the Western District of Texas, and the Southern District of Texas.

In a separate analysis of the subset of cases from the Southern District of Florida using the Public Access to Court Electronic Records (PACER), the Subsection (iv) charge appears to be usually used in the context of maritime smuggling (from the territorial waters or the high seas), which could be prosecuted under either the smuggling or transportation subsections, sometimes with specific aiding-and-abetting counts under Subsection (v). From searching PACER in other districts with convictions under Subsection (iv), the pattern is the same: underlying conduct usually fits a more specific statute or aiding-and-abetting the specific offense.

In contrast to the relatively few cases identified under Subsection (iv), the Sentencing Commission data

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[5] The data used for this analysis were extracted from the U.S. Sentencing Commission's "Individual Offender Datafiles" spanning fiscal years 2017 to 2021. The Commission's "Individual Offender Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, Commission Datafiles, https://www.ussc.gov/research/datafiles/commission-datafiles. While Commission data might undercount the number of Subsection (iv) cases, because many entries lack a recorded subsection, this number stands in stark contrast to the 10,633 cases identified as having at least one count of conviction under Subsection (ii), and the over 1,140 cases identified as having at least one count of conviction under Subsection (iii) during the same time period.

reflect that the true immigration crimes covered by the subsections of § 1324 that address smuggling, harboring, and transportation (all of which include accomplice liability) were prosecuted in 16,674 cases nationally during the same five years. The Subsection (iv) cases appear to almost always involve conduct that can be prosecuted under other subsections of § 1324. To the extent that fraud and profit are involved, as in the present case, the broad mail and wire fraud statutes, as well as the specific statutes governing immigration fraud, cover the potential conduct. Striking Subsection (iv), rather than impairing immigration enforcement, would simply remove a redundant provision that, as a practical matter, does nothing to secure our borders.

Further, the seldom-used and redundant statute, when prosecuted, does not alter outcomes under the Sentencing Guidelines. Under U.S.S.G. § 2L1.1, the Sentencing Commission sets out the base offense level and specific offense characteristics related to smuggling, transporting, and harboring aliens. Although Appendix A to the Guidelines Manual generally references § 1324(a), the guideline does not appear to address Subsection (iv). In any event, under the grouping rules, accompanying counts would run any punishment concurrently with other immigration offenses. U.S.S.G. § 3D1.2(d). And if the accompanying counts included fraud under U.S.S.G. § 2B1.1 or other higher guidelines, the effect would be negligible under U.S.S.G. § 3D1.4. Aside from redundancy, Subsection (iv) has little to no practical effect at sentencing.

The Court should strike the statute as overbroad, in violation of the First Amendment, with no concern that such action would impair our Nation's enforcement of immigration laws.

CONCLUSION

Subsection (iv)'s First Amendment overbreadth affords too little notice to individuals about what it criminalizes and grants too much discretion to law enforcement, thereby chilling and punishing protected words and conduct. The court of appeals' judgment should be affirmed.

Respectfully submitted,

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