No. 22-179

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

HELAMAN HANSEN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES


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## QUESTION PRESENTED

Whether the federal criminal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional on First Amendment overbreadth grounds.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 25 F.4th 1103. A memorandum opinion of the court of appeals (Pet. App. 15a-19a) is not published in the Federal Reporter but is available at 2022 WL 424827. The order of the en banc court denying rehearing and opinions respecting that order (Pet. App. 28a-80a) are reported at 40 F.4th 1049. The oral order of the district court (Pet. App. 27a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on February 10, 2022. A petition for rehearing was denied on July 25, 2022 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on August 25, 2022, and granted on December 9, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1324(a) of Title 8 of the United States Code provides in pertinent part:

> (1)(A) Any person who—
>
> (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;
>
> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> (iv) 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; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, or both.

* * * * *

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-13a.

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, respondent was convicted on two counts of encouraging or inducing unlawful immigration for private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i); twelve counts of mail fraud, in violation of 18 U.S.C. 1341; and three counts of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 21a, 81a. The district court sentenced respondent to concurrent terms of 120 months of imprisonment on the inducement counts and 240 months of imprisonment on the fraud counts, to be followed by two years of supervised release. *Id.* at 83a, 85a. The court of appeals vacated respondent's inducement convictions, affirmed in all other respects, and remanded for resentencing. *Id.* at 1a-19a.

### A. Statutory Background

For more than a century, federal law has prescribed criminal penalties for "encouraging" or "inducing" certain violations of the immigration laws. The current prohibition, codified in 8 U.S.C. 1324(a)(1)(A)(iv), traces its roots to the beginnings of modern immigration law.

1. In 1882, Congress enacted "the first general immigration statute." *Kleindienst* v. *Mandel*, 408 U.S. 753, 761 (1972). Shortly thereafter, Congress made "knowingly assisting, encouraging or soliciting the migration or importation of any alien" into the United States "to perform labor or service of any kind under contract or agreement" a crime punishable by a fine of up to $1000. Act of Feb. 26, 1885 (1885 Act), ch. 164, § 3, 23 Stat. 333. This Court upheld the constitutionality of those penal-

ties in *Lees* v. *United States*, 150 U.S. 476 (1893), explaining that, given Congress's "power to exclude aliens," "it has a right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition." *Id.* at 480.

The prohibition on encouraging or soliciting contract labor remained in force for decades. See Act of Feb. 20, 1907, ch. 1134, § 5, 34 Stat. 900; Act of Mar. 3, 1903, ch. 1012, § 5, 32 Stat. 1214-1215. In 1917, Congress revised the prohibition, making it a misdemeanor "to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer * * * into the United States." Act of Feb. 5, 1917 (1917 Act), ch. 29, § 5, 39 Stat. 879. Congress also separately prohibited "induc[ing], assist[ing], encourag[ing], or solicit[ing] or attempt[ing] to induce, assist, encourage, or solicit any alien to come into the United States by promise of employment through advertisements printed, published, or distributed in any foreign country." § 6, 39 Stat. 879.

2. In 1952, Congress enacted Section 1324(a)—the immediate predecessor to the provision at issue here—as part of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*). Congress included in Section 1324(a) an anti-inducement provision phrased in terms similar to the prior contract-laborer provision, while eliminating any reference to advertising. In particular, the INA made it a felony to "willfully or knowingly encourage[] or induce[], or attempt[] to encourage or induce, either directly or indirectly, the entry into the United States" of any noncitizen who had not been "duly admitted" or who was not "lawfully entitled to enter or reside within the United

States." § 274(a)(4), 66 Stat. 229; see 8 U.S.C. 1324(a)(4) (1952).[1] The INA also prohibited knowingly transporting into the United States, concealing, or harboring such a person. § 274(a)(1)-(3), 66 Stat. 228-229.

Congress revisited Section 1324(a) in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. During the legislative process, bills were proposed that would have eliminated the prohibition on knowingly encouraging or inducing illegal immigration. See H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 12 (1986) (*House Report*). The Commissioner of the U.S. Immigration and Naturalization Service told Members of Congress that the proposal was "[u]nfortunate[]" and "would seriously hamper enforcement" of the immigration laws. *Immigration Reform and Control Act of 1985: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 447 (1985). The Department of Justice urged legislators to retain the prohibition, explaining that it had been "a useful tool in combatting alien smuggling." *House Report* 112.

Congress ultimately retained the anti-inducement provision in modified form. IRCA § 112(a), 100 Stat. 3381-3382. As since renumbered, the statute now provides, in 8 U.S.C. 1324(a)(1)(A)(iv), that "[a]ny 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 * * * shall be punished as provided in subparagraph (B)." Section 1324(a)(1)(B), in turn, prescribes a range of penalties that

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

apply "for each alien in respect to whom such a violation occurs." 8 U.S.C. 1324(a)(1)(B). An offense in violation of the elements set forth in Section 1324(a)(1)(A)(iv) carries a sentence of up to five years of imprisonment. 8 U.S.C. 1324(a)(1)(B)(ii). Since 1996, Section 1324(a)(1)(B) has specified that a conviction for an offense containing those elements, plus proof that the conduct was undertaken for the "purpose of commercial advantage or private financial gain," is punishable by up to ten years of imprisonment. 8 U.S.C. 1324(a)(1)(B)(i); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 203(a), 110 Stat. 3009-565.

**B. Respondent's Offense Conduct**

From 2012 to 2016, respondent deceptively promised hundreds of noncitizens a path to citizenship, in response to which they unlawfully came to or remained in the United States while paying him substantial fees. Pet. App. 2a-3a. Specifically, respondent operated a program that "purported to help undocumented immigrants become U.S. citizens through adult adoption," which he persuaded at least 471 noncitizen victims to join, each paying between $550 and $10,000. *Ibid.* Respondent and his program collected more than $1.8 million through the adult-adoption scheme. *Id.* at 3a.

When a noncitizen child is adopted by U.S. citizen parents, the adoption can be a basis for naturalization and, in some circumstances, the child automatically becomes a U.S. citizen. See, *e.g.*, 8 U.S.C. 1101(b)(1), 1431, 1433. But respondent knew that the adult adoptions that he touted would not provide a basis for obtaining lawful status and, indeed, that "no one had achieved U.S. citizenship" through his program. Pet. App. 2a. Respondent nonetheless organized real adult adoptions

in state courts for his victims, frequently with unwitting relatives, friends, or ministers serving as the adoptive parents. J.A. 31-32, 38, 45-48. When the adult adoptions did not lead to U.S. citizenship for his victims, respondent would string them along, asking some to pay additional fees for "insurance" or "stock" to facilitate the phony process. J.A. 57-60.

Respondent's victims included not only noncitizens already in the United States but also noncitizens abroad, whom he induced to travel to the United States to participate in the scheme. *E.g.*, J.A. 56, 81-82. In at least two instances, respondent induced noncitizens who had lawfully entered the country on visas to remain in the United States unlawfully, beyond their periods of authorized stay, while continuing to pay him fees.

Those two victims—Epeli Vosa and Mana Nailati—were citizens of Fiji (and also, in Vosa's case, of the United Kingdom). J.A. 65, 81. Vosa entered the United States in 2014 on a six-month visitor's visa. J.A. 67. He had visited the United States several times before and complied with the applicable time limits. J.A. 76-77. But on this occasion, respondent induced Vosa to remain in the United States unlawfully, after his six-month authorized stay, by falsely promising him that he would become a U.S. citizen through the adult-adoption program. See J.A. 71 (Vosa's testimony that respondent told him to "stay, participate in the program, and [he'll] be good"). Vosa paid respondent $2500 to join the program. J.A. 69, 73-74. After Vosa remained in the United States unlawfully, respondent charged him an additional $1000 for "administration." J.A. 79-80. But for respondent's inducement, Vosa would have left the United States before the expiration of his authorized stay. J.A. 70-71, 75.

Nailati's experience was similar. He had lawfully entered the United States on a visa, and he had complied with the applicable time limits on previous visits to the United States. J.A. 82-86, 93-94. On this occasion, Nailati's family paid $4500 for him to participate in respondent's adult-adoption scheme. J.A. 86-90. When Nailati expressed concern to respondent about the imminent expiration of his authorized six-month stay, respondent falsely told him that he was "safe" and that "[i]mmigration cannot touch [him]" while participating in the program. J.A. 91; see J.A. 85-86. Those assurances, along with the adoption order and amended birth certificate that respondent secured for him listing his adoptive parent, led Nailati to remain in the United States unlawfully. J.A. 91-94. Respondent also employed Nailati, paying him a weekly stipend and, later, an hourly wage for performing various odd jobs in respondent's offices. J.A. 94-97.

**C. District Court Proceedings**

1. In 2017, a grand jury in the Eastern District of California charged respondent with two counts of encouraging and inducing illegal immigration for private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i); twelve counts of mail fraud, in violation of 18 U.S.C. 1341; and three counts of wire fraud, in violation of 18 U.S.C. 1343. J.A. 1-22; cf. Pet. App. 82a (noting government's dismissal of a thirteenth mail fraud count). The two inducement counts related to Vosa and Nailati, who were identified as "Victim 3" and "Victim 6" in the indictment. J.A. 20; see J.A. 103-104.

The case proceeded to trial. At the conclusion of the evidence, the district court gave the then-current Ninth Circuit model instruction on the elements of a violation of Section 1324(a), as the government had proposed. See

J.A. 103-104 (instruction as given); J.A. 105-106 (government's proposal). Respondent had asked that the jury be instructed that he could not be found guilty on the Section 1324(a)(1)(A)(iv) counts unless the government proved both that he "substantially" encouraged or induced the relevant noncitizens to reside in the United States in violation of law and that he "intended" that their residence be in violation of law. J.A. 99-100; see J.A. 107-108. The government opposed those modifications to the model instruction, and the district court declined to adopt them. J.A. 101.

The jury convicted on all counts. J.A. 109-116. The jury's verdict included a special finding that respondent committed his violations of Section 1324(a)(1)(A)(iv) "for the purpose of private financial gain." J.A. 116.

2. Respondent's prosecution in district court was contemporaneous with appellate proceedings in a separate but analogous case, *United States* v. *Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018). Like respondent here, the defendant in *Sineneng-Smith* had been convicted of violating Section 1324(a)(1)(A)(iv) and (B)(i) for inducing noncitizens to remain in the United States unlawfully based on false promises of services that would lead to citizenship. See *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1577 (2020). She had appealed those convictions, raising (*inter alia*) a limited set of constitutional claims. See *id.* at 1580.

While respondent here was awaiting sentencing, the court of appeals issued an order in *Sineneng-Smith* inviting selected amici to brief and argue various constitutional challenges to Section 1324(a)(1)(A)(iv) that the defendant in that case had not raised, including an argument that the statute is facially invalid under the First Amendment overbreadth doctrine. See *Sineneng-*

*Smith*, 140 S. Ct. at 1580-1581. The court's *sua sponte* amicus invitation in *Sineneng-Smith* prompted respondent to file a post-trial motion in this case seeking to dismiss his own Section 1324(a) convictions on various constitutional theories, including that "Subsection (iv) is unconstitutionally overbroad." D. Ct. Doc. 165, at 3 (Nov. 9, 2017) (capitalization altered; emphasis omitted); see *id.* at 2.

3. The district court denied respondent's motion to dismiss. Pet. App. 27a. The court sentenced respondent to concurrent terms of 120 months of imprisonment on the inducement counts and 240 months of imprisonment on the fraud counts, to be followed by two years of supervised release. *Id.* at 83a, 85a.

**D. Appellate Proceedings**

1. In his opening brief on appeal, respondent reasserted the overbreadth challenge to Section 1324(a)(1)(A)(iv) that he had first raised after the court of appeals' solicitation of briefing on that issue in *Sineneng-Smith*. Resp. C.A. Br. 44-46. On the government's motion, the court stayed respondent's appeal pending the resolution of *Sineneng-Smith*. 11/20/18 C.A. Order 1; see 6/12/19 C.A. Order 1; Gov't C.A. Stay Mot. 1-2.

The court of appeals subsequently issued a published opinion in *Sineneng-Smith* in which it adopted the overbreadth argument that it had solicited amici to present, holding that Section 1324(a)(1)(A)(iv) is "unconstitutionally overbroad in violation of the First Amendment." 910 F.3d at 467-468. This Court then granted the government's petition for a writ of certiorari to review whether the statute is "unconstitutionally overbroad." *Sineneng-Smith*, 140 S. Ct. at 1578. The Court did not, however, ultimately reach that issue in

*Sineneng-Smith*. See *ibid.* The Court instead vacated and remanded on the alternative ground that, in reaching out to invalidate a federal statute based on constitutional arguments that the defendant had not herself initially pursued, the *Sineneng-Smith* "appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion." *Ibid.*

The Court emphasized in *Sineneng-Smith* that "invalidation for First Amendment overbreadth is 'strong medicine' that is not to be 'casually employed.'" 140 S. Ct. at 1581 (brackets and citation omitted). And the Court remanded for the appeal to be reconsidered "shorn of the overbreadth inquiry interjected by the appellate panel." *Id.* at 1582. The court of appeals affirmed on remand. See *United States* v. *Sineneng-Smith*, 982 F.3d 766, 770 (9th Cir. 2020), cert. denied, 142 S. Ct. 117 (2021).

2. After its decision on remand in *Sineneng-Smith*, the court of appeals lifted the stay in this case and later issued a published opinion, in which it again held that Section 1324(a)(1)(A)(iv) is facially "overbroad and unconstitutional." Pet. App. 13a-14a. Thus, although it affirmed in all other respects, the court vacated respondent's Section 1324(a) convictions and remanded for resentencing. *Id.* at 1a-14a, 15a-19a.

In once again invalidating Section 1324(a)(1)(A)(iv), the court of appeals acknowledged that this Court had vacated the first *Sineneng-Smith* opinion, but it nonetheless "conclude[d] that much of [the *Sineneng-Smith* opinion's] thorough analysis" remained "persuasive on the overbreadth issue." Pet. App. 5a. The panel here therefore largely adopted the reasoning of the vacated *Sineneng-Smith* opinion, while "add[ing] [its] thoughts" endorsing the same "conclusion of overbreadth." *Ibid.*

The court of appeals refused to interpret Section 1324(a)(1)(A)(iv) as a prohibition on the facilitation or solicitation of unlawful conduct that implicates only speech categorically unprotected by the First Amendment. Pet. App. 9a-10a. The court deemed that interpretation to be "not supported by the statutory text," *id.* at 9a, and instead construed Section 1324(a)(1)(A)(iv) to criminalize a broad swath of "protected speech," citing many of the hypothetical scenarios on which the vacated *Sineneng-Smith* decision had relied, *id.* at 11a.

The court of appeals acknowledged that Section 1324(a)(1)(A)(iv) has been applied in prior prosecutions to conduct that Congress may proscribe—such as "procuring and providing fraudulent documents and identification information to unlawfully present aliens, assisting in unlawful entry, [and] misleadingly luring aliens into the country for unlawful work." Pet. App. 10a. But based largely on the view that the provision also criminalizes activities such as "telling an undocumented immigrant 'I encourage you to reside in the United States,'" or "encouraging an undocumented immigrant to take shelter during a natural disaster," the court deemed Section 1324(a)(1)(A)(iv)'s "plainly legitimate sweep" to be "narrow" and to "pale[] in comparison to the amount of protected expression" that it purportedly encompasses. *Id.* at 11a-12a. The court did not, however, suggest that respondent's own case had resulted in a conviction based on protected speech, nor did it identify any example of an actual prosecution that had.

The court of appeals rejected any application of the canon of constitutional avoidance, asserting that "the plain meaning of subsection (iv) does not permit [its] application." Pet. App. 12a. In addition, although the jury had found that respondent acted "for the purpose of

* * * private financial gain," 8 U.S.C. 1324(a)(1)(B)(i), the panel did not discuss either that finding or any of the other mental-state requirements of the offense.

3. The court of appeals denied the government's petition for rehearing en banc. Pet. App. 28a-29a. Judge Gould concurred in the order denying rehearing en banc, defending the reasoning of the panel opinion that he had authored. *Id.* at 29a-44a.

Judge Bumatay, joined in whole or part by seven other judges, dissented from the denial of rehearing en banc. Pet. App. 44a-78a. Judge Bumatay found Section 1324(a)(1)(A)(iv) "perfectly consistent with the First Amendment" because its "text, history, and structure" illustrate that it "prohibits only criminal solicitation and aiding and abetting" of unlawful immigration activity. *Id.* at 44a, 46a. Judge Bumatay explained that the statute, properly understood as targeting the solicitation and facilitation of unlawful immigration, does not criminalize "any—let alone a substantial amount of—protected speech." *Id.* at 77a.

Judge Collins also dissented from the denial of rehearing en banc for "reasons similar to those recounted in Judge Bumatay's dissent." Pet. App. 78a; see *id.* at 78a-80a. Judge Collins emphasized that facial invalidation is particularly inappropriate here because respondent "was convicted of [the] *aggravated* version of the § 1324(a)(1)(A)(iv) offense," which requires an additional mens rea element that "substantially narrows the reach" of the crime's definition. *Id.* at 79a-80a.

## SUMMARY OF ARGUMENT

The Ninth Circuit erred in striking down an important and longstanding federal criminal law on First Amendment overbreadth grounds. The prohibitions of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i) ensure appropriate

punishment for defendants who seek enrichment through knowingly facilitating or soliciting violations of the immigration laws by noncitizens who illegally enter or remain in the United States. Those provisions are valid on their face and as applied here.

A. The Ninth Circuit identified no First Amendment principle that would preclude applying the statute to respondent's own for-profit scheme to induce illegal immigration. The court of appeals instead relied on the overbreadth doctrine, under which a statute that is concededly valid as applied to the defendant may nonetheless be struck down on its face if it would violate the First Amendment in a substantial number of other cases. That doctrine represents a departure both from the traditional rule favoring as-applied constitutional challenges and from the traditional rule against invoking the rights of third parties. Accordingly, this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 553 U.S. 285, 292 (2008).

B. The text, context, and history of the statute demonstrate that it is a conventional prohibition on facilitating or soliciting illegal conduct, not a novel and sweepingly broad ban on speech. Respondent was charged with "encourag[ing] or induc[ing] an alien to * * * reside in the United States, knowing or in reckless disregard of the fact that such * * * residence is or will be in violation of law," 8 U.S.C. 1324(a)(1)(A)(iv), "for the purpose of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i). In the criminal-law context, the statutory terms "encourage" and "induce" have an established meaning. Those terms have long

been closely associated with the concept of criminal complicity. To "encourage" or "induce" a violation of the law, the defendant must facilitate or solicit it. The terms had that established meaning when Congress first incorporated them into the statutory scheme more than a century ago, and they retain that meaning today. The other elements of the crime of conviction, including its multiple mens rea requirements, confirm that it is a commonplace criminal law that targets complicity, not a broad ban on speech.

The Ninth Circuit erred in refusing to give the terms "encourage" and "induce" their established criminal-law meanings. The court wrongly cherry-picked the broadest conceivable dictionary definitions while failing to take account of the settled understanding of the terms in criminal law. Indeed, those terms are commonplace in state laws defining facilitation and criminal complicity. The court also erred in construing the statute to prohibit abstract advocacy of unlawful immigration. Like other state and federal laws that use the terms "encourage" and "induce" to invoke the traditional criminal-law concepts of facilitation and solicitation, Section 1324(a)(1)(A)(iv) does not prohibit mere advocacy of lawbreaking. At a minimum, the terms "encourage" and "induce" are fairly susceptible of being given their traditional criminal-law meanings in this criminal statute, and the canon of constitutional avoidance would therefore compel adopting that reading over one that renders the statute facially overbroad.

C. Properly construed, respondent's statute of conviction is not substantially overbroad relative to its plainly legitimate sweep. Section 1324(a)(1)(A)(iv) proscribes a substantial amount of non-speech conduct, such as selling fake passport stamps or leading nonciti-

zens to the border. To the extent that the statute reaches speech, it prohibits only speech that aids or is "intended to induce * * * illegal activities," *Williams*, 553 U.S. at 298, which this Court has long recognized may be proscribed without offending the First Amendment. On the other side of the ledger, the Ninth Circuit did not identify any realistic danger of chilling protected speech, or even any actual prosecutions of such speech, but instead struck down the statute based on hypothetical scenarios that the statute would not encompass. Relying on those hypotheticals was particularly inappropriate here because none of the hypotheticals would satisfy the financial-gain requirement—a part of respondent's crime of conviction that the court wrongly ignored. To the extent that the statute could be, or ever is, applied to protected speech, any concerns could be addressed through the normal constitutional mechanism of an as-applied challenge.

## ARGUMENT

### RESPONDENT'S CONVICTIONS UNDER 8 U.S.C. 1324(a)(1)(A)(iv) AND (B)(i) ARE CONSTITUTIONALLY VALID

The Ninth Circuit identified no First Amendment principle that would shield respondent's conduct—causing noncitizens to reside in the country unlawfully and pay him money based on false promises of a path to citizenship—from criminal prosecution. The court instead invoked an exception to the normal rules favoring as-applied challenges and case-specific standing, see, *e.g.*, *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999), to declare 8 U.S.C. 1324(a)(1)(A)(iv) substantially overbroad. But the text, context, and history of Section 1324(a)(1)(A)(iv) illustrate that the longstanding prohibition on "encourag[ing]" or

"induc[ing]" unlawful immigration activity, *ibid.*, is a proscription of soliciting or facilitating illegality of the sort that has never raised First Amendment concerns. In addition, respondent's conviction depended on proof that he instigated unlawful activity for financial gain. The statute does not proscribe the conduct described in the Ninth Circuit's parade of horribles, see Pet. App. 11a, and the court erred in granting First Amendment protection for defendants like respondent, who seek to profit by causing unlawful immigration.

### A. Respondent's Convictions Are Invalid Only If The Statute Of Conviction Is Substantially Overbroad In Its Potential Application In Other Cases

In the First Amendment context, as in others, "[f]acial challenges are disfavored." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008). Among other things, such challenges "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process." *Id.* at 450-451.

A facial overbreadth challenge—in which a defendant asserts that a statute, constitutionally applied to him, is nevertheless invalid because it would be unconstitutional in a "substantial number" of *other* cases, *Washington State Grange*, 552 U.S. at 449 n.6 (citation omitted)—is even more exceptional. "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U.S. 747, 767 (1982); see *United States* v. *Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothet-

ical cases."). That normal third-party standing rule, to which overbreadth claims are a "limited" exception, reflects "two cardinal principles of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudication." *Los Angeles Police Dep't*, 528 U.S. at 39-40 (citations and internal quotation marks omitted).

Accordingly, the Court has taken care to ensure that the overbreadth exception does not "swallow" the traditional rule preferring as-applied challenges to facial ones. *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment," *Los Angeles Police Dep't*, 528 U.S. at 39 (citation omitted), this Court "has repeatedly warned that invalidation for First Amendment overbreadth is strong medicine that is not to be casually employed," *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020) (brackets, citation, and internal quotation marks omitted); cf. *Hicks*, 539 U.S. at 119 (noting the "substantial social costs created by the overbreadth doctrine when it blocks application of a law to * * * constitutionally unprotected conduct") (emphasis omitted).

The Court has therefore "vigorously enforced the requirement that a statute's overbreadth be *substantial* * * * relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 553 U.S. 285, 292 (2008). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, "there must be a realistic danger that the statute itself will significantly compro-

mise recognized First Amendment protections of parties not before the Court." *Id.* at 801. And laws that are "not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)" are far less likely to present such a danger. *Hicks*, 539 U.S. at 124; see *ibid.* (observing that "an overbreadth challenge" to such a law will "[r]arely, if ever, * * * succeed").

### B. The Text, Context, And History Of Section 1324(a)(1)(A)(iv) Illustrate That It Is A Conventional Prohibition On Soliciting Or Facilitating Illegality

Because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers," the "first step in overbreadth analysis is to construe the challenged statute." *Williams*, 553 U.S. at 293. As relevant here, respondent was charged with two counts of "encourag[ing] or induc[ing] 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," 8 U.S.C. 1324(a)(1)(A)(iv), for the purpose of "private financial gain," 8 U.S.C. 1324(a)(1)(B)(i). See J.A. 20. The statutory text, context, and history demonstrate that the terms "encourage" and "induce" refer to facilitating or soliciting another person's illegal activity. The court of appeals erred in reading the statute to prohibit constitutionally protected speech—a reading at odds with the established criminal-law meaning of the terms "encourage" and "induce." At a minimum, the statute can fairly be construed to avoid constitutional concerns.

### *1. The terms "encourage" and "induce" in a criminal law refer to facilitation and solicitation*

The terms "encourage" and "induce" in Section 1324(a)(1)(A)(iv) are familiar criminal-law terms of art. "For hundreds of years, both terms were historically bound up with liability for criminal complicity," and Congress incorporated those settled understandings into Section 1324(a)(1)(A)(iv). Pet. App. 53a (Bumatay, J., dissenting from the denial of rehearing en banc). A person "encourages or induces" a noncitizen to violate the immigration laws only if the person (a) facilitates or (b) solicits the violation. 8 U.S.C. 1324(a)(1)(A)(iv).

a. In criminal law, the term "encourage" means "[t]o instigate; to incite to action; to embolden; [or] to help." *Black's Law Dictionary* 667 (11th ed. 2019) (*2019 Black's*) (emphasis omitted). Dictionaries and treatises often use it to define well-established forms of criminal facilitation, such as "aid" and "abet." See *ibid.* (cross-referencing the definition of "aid and abet") (capitalization omitted); *id.* at 5 (defining "abet" as "[t]o aid, *encourage*, or assist (someone), esp. in the commission of a crime") (emphasis altered); *Webster's Third New International Dictionary of the English Language* 3 (1986) (*Webster's Third*) (defining "abet" as to "incite, *encourage*, instigate, or countenance," as in "[abet] the commission of a crime") (emphasis added); *Webster's New International Dictionary of the English Language* 4 (2d ed. 1958) (same); 1 Jens David Ohlin, *Wharton's Criminal Law* § 10:1, at 298 (16th ed. 2021) (explaining that, at common law, the legal meaning of "'abet'" was "to *encourage*, advise, or instigate the commission of a crime") (emphasis added); see also *Reves* v. *Ernst & Young*, 507 U.S. 170, 178 (1993) (noting that aiding and abetting "comprehends all assistance ren-

dered by words, acts, *encouragement*, support, or presence") (quoting *Black's Law Dictionary* 68 (6th ed. 1990)) (emphasis added).

The term "induce" carries a similar connotation in criminal law. To induce a crime is to "entic[e] or persuad[e] another person" to commit it. *2019 Black's* 926; see *Webster's Third* 1154 (defining "induce" as "to move and lead (as by persuasion or influence)"). Thus, "induce" appears alongside "aid" and "abet" in the federal accomplice-liability statute. See 18 U.S.C. 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, *induces* or procures its commission, is punishable as a principal.") (emphasis added).

Many States likewise use the terms "encourage" or "induce" to describe criminal facilitation. Colorado, for example, defines criminal complicity as "aid[ing], abet[ting], advis[ing], or *encourag*[*ing*]" the commission of a crime, Colo. Rev. Stat. § 18-1-603 (2022) (emphasis added), while Indiana provides for liability as a principal when someone "knowingly or intentionally aids, *induces*, or causes another person" to commit a crime, Ind. Code § 35-41-2-4 (2022) (emphasis added). See Ala. Code § 13A-2-23(1) (2022) ("induces"); Ark. Code § 5-2-403(a)(1) and (b)(1) (2022) ("encourages"); Ga. Code Ann. § 16-2-20(b)(4) (2022) ("encourages"); Idaho Code Ann. § 18-204 (2022) ("encouraged"); Nev. Rev. Stat. Ann. § 195.020 (2022) ("encourages * * * [or] induces"); Tex. Penal Code § 7.02(a)(2) (2022) ("encourages"); Utah Code Ann. § 76-2-202 (2022) ("encourages"); Wash. Rev. Code § 9A.08.020(3)(a)(i) (2022) ("encourages"); Wyo. Stat. Ann. § 6-1-201(a) (2022) ("encourages"); see also 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(a), at 457 (3d ed. 2018) (LaFave) ("Several terms have been employed by courts and legislatures in de-

scribing the kinds of acts which will suffice for accomplice liability. The most common are 'aid,' 'abet,' 'advise,' 'assist,' 'cause,' 'command,' 'counsel,' 'encourage,' 'hire,' 'induce,' and 'procure.'").

b. The terms "encourage" and "induce" are also commonly used to describe the crime of soliciting illegal activity. Under the Model Penal Code, for example, a person commits the offense of solicitation if, with the requisite mental state, the person "commands, *encourages* or requests another person to engage in specific conduct" that would violate the law. Model Penal Code § 5.02(1) (1985) (emphasis added). The accompanying commentary explains that some analogous formulations use the term "induce" in place of "encourage." *Id.* § 5.02 cmt. 3, at 372 n.25 (listing examples).

Federal law follows a similar pattern. Although Congress has not enacted a general federal solicitation statute, the federal prohibition on soliciting the commission of a crime of violence punishes "[w]hoever," with the requisite intent, "solicits, commands, *induces*, or otherwise endeavors to persuade" another person "to engage in [the covered] conduct." 18 U.S.C. 373(a) (emphasis added). And the Mann Act, 18 U.S.C. 2421 *et seq.*, punishes one who "knowingly persuades, *induces*, entices, or coerces" someone to engage in prostitution or criminal sexual activity in certain circumstances. 18 U.S.C. 2422(a) and (b) (emphasis added). Cf. Nat'l Comm'n on Reform of Fed. Crim. Laws, *Final Report* § 1003(1), at 69 (1971) (proposing a general federal solicitation offense under which "[a] person is guilty * * * if he commands, induces, entreats, or otherwise attempts to persuade another person to commit a particular felony").

State solicitation laws are in accord. It is commonplace for States to equate either "inducing" or "encour-

aging" a crime with criminal solicitation. See Ariz. Rev. Stat. § 13-1002(A) (2022) ("encourages"); Colo. Rev. Stat. § 18-2-301(1) (2022) ("induces"); Fla. Stat. § 777.04(2) (2022) ("encourages"); Haw. Rev. Stat. § 705-510(1) (2022) ("encourages"); Idaho Code Ann. § 18-2001 (2022) ("encourages"); 720 Ill. Comp. Stat. 5/8-1(a) (2022) ("encourages"); Kan. Stat. Ann. § 21-5303(a) (2021) ("encouraging"); Ky. Rev. Stat. § 506.030(1) (2022) ("encourages"); Me. Rev. Stat. tit. 17-A, § 153(1) (2022) ("attempts to induce"); Mont. Code Ann. § 45-4-101(1) (2021) ("encourages"); N.M. Stat. Ann. § 30-28-3(A) (2023) ("induces"); N.D. Cent. Code § 12.1-06-03(1) (2022) ("induces"); 18 Pa. Cons. Stat. § 902(a) (2022) ("encourages"); Tex. Penal Code § 15.03(a) (2022) ("attempts to induce"); W. Va. Code Ann. § 61-11-8a(b)(1) (2022) ("inducement"); Wyo. Stat. Ann. § 6-1-302(a) (2022) ("encourages").

#### *2. Statutory history and context confirm that Section 1324(a)(1)(A)(iv) targets facilitation and solicitation*

Both the historical and current context of Section 1324(a)(1)(A)(iv) show that Congress did not use "encourage" and "induce" in a broad, speech-restrictive manner. The statute began as, and remains, a prohibition on facilitation and solicitation.

a. Congress first prohibited "encouraging" certain immigration violations in 1885. See pp. 4-5, *supra*. At the time, that term was already linked to aiding-and-abetting liability. See *Black's Law Dictionary* 419 (1st ed. 1891) (*1891 Black's*) (defining "encourage" to mean "[t]o instigate; to incite to action," and cross-referencing the definition of "aid") (capitalization and emphasis omitted); Pet. App. 55a-57a (Bumatay, J., dissenting from the denial of rehearing en banc) (additional examples).

Similarly, the word "induce" appeared in the forerunners to the current provision as early as 1917. See p. 5, *supra*. Already by then, it had long been associated with conduct that "leads or tempts" individuals to commit crimes. *1891 Black's* 617 (defining "inducement," "[i]n criminal evidence," as "[m]otive; that which leads or tempts to the commission of crime") (capitalization and emphasis omitted); see J. Kendrick Kinney, *A Law Dictionary and Glossary* 385 (1893) ("[i]nducement" includes "that which leads to the commission of crime") (emphasis omitted); Pet. App. 56a-57a (Bumatay, J., dissenting from the denial of rehearing en banc) (additional examples). Congress itself had recently used the term "induce[]" to proscribe the facilitation of a crime. See Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 ("Whoever * * * aids, abets, counsels, commands, *induces*, or procures [the commission of an offense], is a principal.") (emphasis added).

The other words that accompanied forms of "encourage" or "induce" in the early statutes reinforced those terms' ordinary criminal-law meaning. See Antonin Scalia & Bryan A. Garner, *Reading Law* 195 (2012) (Scalia & Garner) (explaining that, under the associated-words canon, "words grouped in a list should be given related meanings") (citation omitted); see also *Williams*, 553 U.S. at 294 (invoking that canon). The 1885 statute at issue in *Lees* v. *United States*, 150 U.S. 476 (1893), for example, made it unlawful to "assist[], encourag[e] or solicit[] the migration or importation" of contract laborers in specified circumstances. 1885 Act § 3, 23 Stat. 333. In upholding that prohibition against a constitutional challenge, this Court emphasized Congress's power to punish those who "assist" in the violation, *Lees*, 150 U.S. at 480, without suggesting that the term

"encouraging" was different in kind from the surrounding statutory terms. The 1917 iteration of the contract-laborer statute similarly made it unlawful "to induce, assist, encourage, or solicit" a violation. 1917 Act § 5, 39 Stat. 879.

When Congress enacted the INA in 1952, Section 1324(a) forbade "encourag[ing] or induc[ing]" entries into the United States in violation of the INA. § 274(a)(4), 66 Stat. 229. Congress's removal of two additional terms ("assist" and "solicit") did not redefine the remaining terms from a prohibition of facilitation and solicitation into a novel and expansive prohibition of speech. Indeed, the more compact formulation of the crime echoed this Court's then-recent description of the substance of the 1917 statute. See *United States* v. *Hoy*, 330 U.S. 724, 727 (1947) (describing "contract laborers" covered by the statute "as persons *induced* or *encouraged* to come to this country by offers or promises of employment") (emphases added). And, just as Congress pared down the verbs, it eliminated the separate prohibition on "induc[ing], assist[ing], encourag[ing], or solicit[ing]" unlawful migration "through advertisements printed, published, or distributed in any foreign country." 8 U.S.C. 142 (1946).

b. The other elements of the current statute confirm that it is a standard proscription of criminal facilitation and solicitation rather than a sweeping prohibition of innocuous speech. To start, Section 1324(a)(1)(A)(iv) prohibits only acts of encouragement or inducement directed at a specific noncitizen or noncitizens, not the general public. The object of the encouragement or inducement must be "an alien," and the statutory penalties apply with respect to "each alien." 8 U.S.C. 1324(a)(1)(A)(iv) and (B); see *Grant Bros. Constr. Co.* v.

*United States*, 232 U.S. 647, 664 (1914) (explaining that, under a predecessor statute, "a separate penalty shall be assessed in respect of each alien whose migration or importation is knowingly assisted, encouraged or solicited"). The statute's focus on the defendant's interactions with an individual noncitizen is consistent with a ban on facilitation or solicitation—not with a ban on "abstract advocacy of illegality," *Williams*, 553 U.S. at 298-299.

The actus reus of the offense is also paired with multiple scienter requirements. See *Williams*, 553 U.S. at 294 (focusing on scienter requirement in determining that statute was not overbroad). For example, the statute requires proof that the defendant knew that the particular noncitizen's entry or residence in the United States would be unlawful, or acted "in reckless disregard of [that] fact." 8 U.S.C. 1324(a)(1)(A)(iv). That element demands more than mere negligence; evidence that the defendant "should have known" is insufficient. *United States* v. *Kalu*, 791 F.3d 1194, 1208 (10th Cir. 2015). The aggravated offense of which respondent was convicted further requires proof that the defendant acted with the specific intent to obtain "commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(B)(i). Those requirements reinforce that the type of conduct Congress proscribed was direct facilitation or solicitation of an identifiable noncitizen's unlawful conduct.

In addition, the terms "encourage[]" and "induce[]" do not encompass accidental or even undirected conduct. 8 U.S.C. 1324(a)(1)(A)(iv). Courts have therefore approved instructions requiring that the defendant *knowingly* encouraged or induced the noncitizen, consistent with this Court's general practice of interpreting

a criminal statute "to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *Elonis* v. *United States*, 575 U.S. 723, 734 (2015) (citation omitted); see, *e.g.*, *United States* v. *He*, 245 F.3d 954, 957-959 (7th Cir.), cert. denied, 534 U.S. 966 (2001); cf. *United States* v. *Zayas-Morales*, 685 F.2d 1272, 1276-1277 (11th Cir. 1982) (similar interpretation of pre-1986 version of Section 1324(a)(1)). Application of a knowledge requirement accords with the standard mens rea requirement for accomplice liability. See *Rosemond* v. *United States*, 572 U.S. 65, 76-77 (2014).[2]

***3. The court of appeals' contrary reading of the statute is unsound***

In both of its decisions deeming the statute facially overbroad, the Ninth Circuit's core error has been its refusal to give the terms "encourage" and "induce" their settled criminal-law meanings, instead insisting on reading them to encompass large swaths of constitutionally protected speech. See Pet. App. 6a-7a, 11a; *United States* v. *Sineneng-Smith*, 910 F.3d 461, 473-475, 479 (9th Cir. 2018), vacated and remanded, 140 S. Ct. 1575 (2020). The Ninth Circuit's overly expansive

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[2] In this particular case, the jury instructions did not provide a specific mens rea modifying the phrase "encouraged or induced." J.A. 104. But it would be inappropriate to rely on that case-specific fact as controlling the interpretation of the statute for purposes of a facial overbreadth challenge that rests on the hypothetical application of the statute to others, particularly since, as applied to the facts of this case, the statute raised no colorable First Amendment issue at all. See *Williams*, 553 U.S. at 293 (observing that "[t]he first step in overbreadth analysis is to construe the challenged statute"); see also Pet. App. 6a-9a (construing the statute without regard to the jury instructions).

reading is unsound on its own terms and, at a minimum, is incompatible with the canon of constitutional avoidance. This Court has previously declined to adopt the broadest conceivable meaning of terms in a federal criminal statute that has been challenged under the First Amendment, see *Williams*, 553 U.S. at 293-295, and it should follow the same course here.

*a. The court of appeals disregarded the established meanings of "encourage" and "induce"*

The court of appeals derived its "overly broad interpretation of the law" by cherry-picking the broadest conceivable definitions of "encourage" and "induce" from dictionaries quoted in prior circuit decisions. Pet. App. 47a (Bumatay, J., dissenting from the denial of rehearing en banc); see *id.* at 6a-7a (panel opinion). As this Court has recognized, however, the proper analysis focuses on how Congress itself used those terms in context. See, *e.g.*, *Williams*, 553 U.S. at 293-297; *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). The Ninth Circuit failed to conduct that analysis here and in its vacated decision in *Sineneng-Smith*. Indeed, the court did not even acknowledge the established criminal-law meanings of the terms "encourage" and "induce," let alone provide any rationale for concluding that Congress deviated from those established meanings in Section 1324(a)(1)(A)(iv).

That approach is inconsistent with this Court's decision in *United States* v. *Williams*, *supra*, which upheld the constitutionality of a federal law that made it unlawful to "advertise[], promote[], present[], distribute[], or solicit[]" child pornography. 18 U.S.C. 2252A(a)(3)(B) (2006). As Justice Scalia noted in his opinion for the Court, the verbs "'present[]'" and "'promote[]'" could "in isolation" be understood capaciously, to include

mere "advocacy of child pornography." *Williams*, 553 U.S. at 294, 299. But the Court rejected that construction based on the surrounding verbs (including "solicit[]") and other textual clues, such as the statute's scienter requirement and the history of similar child pornography laws upheld by the Court. See *id.* at 294-297. The Court thus determined that the statute did not reach statements like "I believe that child pornography should be legal" or "I encourage you to obtain child pornography." *Id.* at 300. Here, too, the terms "encourage" and "induce," as used in Section 1324(a)(1)(A)(iv), must be read in their statutory and historical contexts, with a view to their established usage in criminal law.

Under the Ninth Circuit's blinkered approach, the ubiquity of the terms "encourage" and "induce" in criminal laws defining facilitation and solicitation would subject any number of those laws to constitutional attack. Twenty-two States cited that very concern in supporting the government's petition in this case. See Arizona et al. Cert. Amici Br. 3-9; see also *id.* App. 1-49 (additional examples). Respondent's suggestion (Br. in Opp. 19-20) that many of those laws would pass constitutional muster merely confirms that the terms "encourage" and "induce" do not of themselves require reading Section 1324(a)(1)(A)(iv) so broadly as to render the statute facially overbroad.

The court of appeals also drew unwarranted inferences from the surrounding statutory context. See Pet. App. 8a-9a. The court reasoned that adjacent provisions forbidding, for example, knowingly bringing a noncitizen into the United States, see 8 U.S.C. 1324(a)(1)(A)(i), encompass "such a wide range of conduct" that they leave "little room" for Section 1324(a)(1)(A)(iv) "to cover additional actions" and that

Section 1324(a)(1)(A)(iv) must therefore be construed as if it targets protected speech. Pet. App. 8a. That inference is unsound. As discussed below, Section 1324(a)(1)(A)(iv) covers conduct that neither the neighboring provisions, nor even the rest of federal law, would otherwise criminally prohibit. See pp. 38-39, *infra*. In any event, to the extent that some—or even a great deal of—conduct falls within multiple provisions, such "overlap * * * is not uncommon in criminal statutes," *Loughrin* v. *United States*, 573 U.S. 351, 358 n.4 (2014), and provides no justification for giving abnormal meanings to statutory terms.

The court of appeals was likewise mistaken to rely on the separate aiding-and-abetting provision in 8 U.S.C. 1324(a)(1)(A)(v)(II) as a reason not to give the terms "encourage" and "induce" their established criminal-law meanings. See Pet. App. 8a-9a. The separate provision covers only facilitation of violations of Section 1324(a)(1)(A) *itself*, not facilitation of a noncitizen's primary conduct in violating the immigration laws. See 8 U.S.C. 1324(a)(1)(A)(v)(II) (prohibition on "aid[ing] or abet[ting] the commission of any of the preceding acts"). The separate provision also does not cover solicitation, as Section 1324(a)(1)(A)(iv) does, and both are independently necessary in order to criminalize the act of aiding and abetting someone who is soliciting a noncitizen's unlawful entry into the United States. Moreover, the separate aiding-and-abetting provision was added to the statute in 1996, nearly 50 years after Congress enacted what is now Section 1324(a)(1)(A)(iv). See IIRIRA § 203(b)(1), 110 Stat. 3009-565.

*b. The court of appeals wrongly construed the statute to prohibit abstract advocacy*

The Ninth Circuit erred in its belief that Section 1324(a)(1)(A)(iv) "covers a substantial amount of protected speech," such as a family member "telling an undocumented immigrant, 'I encourage you to reside in the United States,'" an activist encouraging civil disobedience of the immigration laws, or an attorney advising a noncitizen client to remain in the country while contesting removal. Pet. App. 11a; see *Sineneng-Smith*, 910 F.3d at 483-484. Section 1324(a)(1)(A)(iv), like other solicitation and complicity laws, does not criminalize abstract advocacy.

Solicitation and complicity laws are ordinarily understood not to prohibit abstract or generalized advocacy of illegality, even when the literal language of those prohibitions might in other contexts encompass such advocacy. See, *e.g.*, *Ford* v. *State*, 262 P.3d 1123, 1130-1131 (Nev. 2011) (construing prohibition on soliciting prostitution not to reach "abstract advocacy"); *State* v. *Ferguson*, 264 P.3d 575, 578 (Wash. Ct. App. 2011) (construing aiding-and-abetting statute not to "forbid the mere advocacy of law violation," and rejecting overbreadth challenge); cf. *Williams*, 553 U.S. at 298-299. Here, Section 1324(a)(1)(A)(iv) contains no indication that Congress intended to break from that mold and prohibit mere advocacy, notwithstanding the constitutional questions that doing so would invite.

To the contrary, Section 1324(a)(1)(A)(iv) uses the same operative language—"encourage" or "induce"—that this Court itself used in *Williams* and other decisions to describe prohibitions that are constitutional. See 553 U.S. at 298 (describing restriction on speech "intended to *induce* or commence illegal activities" as

constitutional) (emphasis added); *Cox* v. *Louisiana*, 379 U.S. 559, 563 (1965) ("A man may be punished for *encouraging* the commission of a crime.") (emphasis added); *International Bhd. of Elec. Workers* v. *NLRB*, 341 U.S. 694, 705 (1951) (*IBEW*) (upholding "prohibition of *inducement or encouragement* of secondary pressure") (emphasis added). And the statutory requirement that any inducement or encouragement be directed to a particular identifiable noncitizen or noncitizens, see pp. 26-27, *supra*, reinforces that the statute cannot sensibly be read to reach general advocacy in the public sphere about immigration law.

Just as a teenager does not aid, abet, or solicit marijuana possession merely by saying to a friend, "I encourage you to try smoking pot," a person does not violate Section 1324(a)(1)(A)(iv) merely by saying to a noncitizen, "I encourage you to reside in the United States." See Pet. App. 11a. The criminal-law concepts of facilitation and solicitation have traditionally required more than such abstract or de minimis encouragements. See, *e.g.*, 2 LaFave § 11.1(c), at 275 ("[T]he crime of solicitation should not be extended to persons who merely express general approval of criminal acts[.]"); *id.* § 13.2(a), at 464 n.55 (noting additional safeguards imposed by courts in accomplice-liability "cases involving, at best, encouragement of the crime"); cf. *DelRio-Mocci* v. *Connolly Props. Inc.*, 672 F.3d 241, 249 (3d Cir.) (construing Section 1324(a)(1)(A)(iv) to prohibit "an affirmative act that substantially encourages or induces an alien lacking lawful immigration status to come to, enter, or reside in the United States where the undocumented person otherwise might not have done so"), cert. denied, 568 U.S. 821 (2012).

Similarly, just as a lawyer does not aid, abet, or solicit a crime if she tells a client in good faith that a particular type of illegal conduct is rarely prosecuted, a lawyer does not violate Section 1324(a)(1)(A)(iv) if she tells a client who is present unlawfully that she is unlikely to be removed. See Model Rules of Prof'l Conduct 1.2(d) (2018) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client."). Good-faith legal or other professional advice also does not violate the statute when it does not involve "residence * * * in violation of law," 8 U.S.C. 1324(a)(1)(A)(iv), as will often be the case when a noncitizen remains in the United States while a lawyer or other professional is engaged in bona fide efforts to obtain relief. For example, when a noncitizen has been put into removal proceedings but has been released on bond under 8 U.S.C. 1226(a), it would be lawful for an attorney to advise the client that she should remain in the country while contesting removal, because the government has just allowed the client to remain in the United States during the removal proceedings. That interim presence, countenanced by the government, is not fairly understood to be residence "in violation of law" within the meaning of Section 1324(a)(1)(A)(iv). Cf. *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 246 & n.5 (2010) (adopting a narrow reading of bankruptcy provision requiring lawyers and other professionals "to avoid instructing or encouraging assisted persons to take on more debt," where a broader reading inhibiting "frank discussion serves no conceivable purpose within the statutory scheme" and "would seriously undermine the attorney-client relationship").

*c. The court of appeals flouted the canon of constitutional avoidance*

At a minimum, the court of appeals' reading of Section 1324(a)(1)(A)(iv) cannot be reconciled with the cardinal rule that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [a court is] obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted). The Ninth Circuit flouted that canon, seemingly applying what Judge Bumatay called a "'constitutional collision canon' —*stretching* the law to ensure that it violates the Constitution." Pet. App. 48a (opinion dissenting from the denial of rehearing en banc).

This Court should reject that inversion of statutory construction. For the reasons set forth above, Section 1324(a)(1)(A)(iv) is best read as a conventional criminal prohibition on facilitating or soliciting illegal activity, not a far-reaching prohibition on innocent advocacy. At the very least, interpreting the terms "encourage" and "induce" to carry their traditional criminal-law meanings is "fairly possible" in this criminal-law context. *St. Cyr*, 533 U.S. at 300 (citation omitted). And the canon of constitutional avoidance "militates against" any more expansive reading that would "raise serious questions of constitutionality." Scalia & Garner 247-248; see Pet. App. 78a-79a (Collins, J., dissenting from the denial of rehearing en banc) (invoking constitutional avoidance).

**C. Respondent's Crime Of Conviction Is Not Substantially Overbroad**

Properly construed, the crime for which respondent was convicted is a conventional solicitation and complicity crime of the sort that has never raised First Amend-

ment concerns. To the extent that such a law reaches speech, it reaches only the type of speech integral to illegal activity that has long been recognized as unprotected by the First Amendment. At a minimum, respondent has failed to demonstrate the kind of *substantial* overbreadth that would be required to invalidate the statute on its face, given its "plainly legitimate sweep," *Washington State Grange*, 552 U.S. at 449 n.6 (citation omitted). Indeed, neither respondent nor the court of appeals identified a single real-world example of any prosecution based on protected speech. And if legitimate First Amendment concerns arise in a future case, those concerns could be addressed in an as-applied challenge, without invalidating the statute on its face.

***1. Section 1324(a)(1)(A)(iv) covers substantial amounts of non-speech conduct and plays an important role in the statutory scheme***

a. Cases prosecuted under Section 1324(a)(1)(A)(iv) and its predecessors illustrate the wide range of non-speech conduct that the provision legitimately covers, such as acts of procuring and providing fraudulent documents and identification information to unlawfully present noncitizens. In *United States* v. *Oloyede*, 982 F.2d 133 (4th Cir. 1993) (per curiam), for example, the defendants sold false citizenship papers to noncitizens. See *id.* at 135-137. And in *United States* v. *Ndiaye*, 434 F.3d 1270 (11th Cir.), cert. denied, 549 U.S. 855 (2006), the defendant paid a government employee to issue Social Security numbers to noncitizens who were not legally entitled to have them. See *id.* at 1277-1278, 1297-1298; see also, *e.g.*, *United States* v. *Martinez*, 900 F.3d 721, 725-726, 730-731 (5th Cir. 2018) (defendants arranged for noncitizens' fraudulent use of the identification information of former employees).

The statute also forbids schemes to provide assistance for unlawful entry and to misleadingly lure noncitizens into the country for unlawful work. In *United States* v. *Tracy*, 456 Fed. Appx. 267 (4th Cir. 2011) (per curiam), cert. denied, 566 U.S. 980 (2012), for example, the defendant sold noncitizens fraudulent papers to travel from Kenya to Cuba and provided instructions for unlawfully entering the United States from Cuba. See *id.* at 269. In *United States* v. *Castillo-Felix*, 539 F.2d 9 (9th Cir. 1976), the defendant sold a noncitizen counterfeit papers to work in the United States and led the noncitizen to a hole in the border fence to enter unlawfully from Mexico. See *id.* at 11. And in *United States* v. *Kalu*, *supra*, the defendant solicited foreign workers to come to the United States under false pretenses and then employed them unlawfully. See 791 F.3d at 1198-1199.

Smuggling activities also fall within the plainly legitimate sweep of the statute. In *United States* v. *Yoshida*, 303 F.3d 1145 (9th Cir. 2002), for example, the defendant led noncitizens through an airport to their flight to the United States, "timed their arrival at the boarding gate so that they could enter the aircraft without having to wait or be questioned extensively by airline employees," and sat behind them on the plane. *Id.* at 1150; see, *e.g.*, *United States* v. *Fujii*, 301 F.3d 535, 540 (7th Cir. 2002) (similar); *He*, 245 F.3d at 955-956 (similar). And in *United States* v. *Okatan*, 728 F.3d 111 (2d Cir. 2013), the defendant picked a noncitizen up at a Canadian airport, drove the noncitizen to the vicinity of the U.S. border, and arranged to meet the noncitizen on the U.S. side of the border after the noncitizen crossed on foot. See *id.* at 113-114.

b. In proscribing those and other activities, Section 1324(a)(1)(A)(iv) fills important gaps in federal law. Congress has not enacted a general ban on solicitation of unlawful activity. And without Section 1324(a)(1)(A)(iv), there would be no general criminal prohibition on facilitating a noncitizen's continued unlawful presence in the United States. Unlawful entry or reentry into the United States is a crime, see 8 U.S.C. 1325(a), 1326(a), and aiding and abetting such conduct can therefore be a violation of the general prohibition on assisting in a criminal "offense," 18 U.S.C. 2(a). "As a general rule," however, "it is not a crime for a removable alien to remain present in the United States," at least absent a final order of removal. *Arizona* v. *United States*, 567 U.S. 387, 407 (2012); see 8 U.S.C. 1253(a). Section 1324(a)(1)(A)(iv) is thus necessary to extend criminal penalties to those who solicit or facilitate such unlawful presence.

Respondent's own criminal conduct involved precisely such solicitation. Respondent was convicted of inducing two noncitizens to remain in the country unlawfully, not to enter it. Each one advised respondent of the imminent expiration of the noncitizen's authorized six-month period of stay in the United States, and respondent persuaded each one to remain here unlawfully beyond that period, while continuing to pay him fees in the adult-adoption scheme. J.A. 70-71, 75, 91-94. Respondent induced them to violate federal law by falsely holding out the prospect of a pathway to citizenship through adult adoption; by deceiving them into believing that they would be "safe" from immigration authorities while participating in the program, J.A. 91; by arranging real state-court adoptions to give the scheme a false veneer

of legitimacy; and, in Nailati's case, by providing employment opportunities. See pp. 7-9, *supra*.

c. Many prosecutions under Section 1324(a)(1)(A)(iv), such as the prosecutions for smuggling-related activities, involve only nonexpressive conduct. Those sorts of prosecutions form the core of Section 1324(a)(1)(A)(iv)'s plainly legitimate sweep, and they all comport with the First Amendment. The court of appeals accordingly acknowledged that "[i]t is clear from previous convictions under the statute cited by the government, and likely from [respondent's] conduct here, that [Section 1324(a)(1)(A)(iv)] has at least some 'plainly legitimate sweep.'" Pet. App. 4a (footnote omitted); see *id.* at 10a (observing that the "government is surely correct" that the statute encompasses some "criminal conduct" that Congress may proscribe). But the court stated that "many of these crimes seem also to be encompassed by the other subsections of 1324(a)(1)(A), leaving subsection (iv)'s plainly legitimate sweep little independent work to do." *Id.* at 10a. That reasoning is unsound on multiple levels.

As a matter of statutory construction, Section 1324(a)(1)(A)(iv) covers activities that the neighboring prohibitions on transportation and harboring, 8 U.S.C. 1324(a)(1)(A)(i)-(iii), do not. For example, acts that facilitate a noncitizen's entry but do not involve physically accompanying the noncitizen to the border—*e.g.*, selling a fake passport stamp—may not fall within Section 1324(a)(1)(A)(i)'s bar on "bringing" the noncitizen into the country. *United States* v. *Garcia-Paulin*, 627 F.3d 127, 133-134 (5th Cir. 2010). And to the extent that the neighboring provisions do overlap, "[i]t is not unusual for a particular act to violate more than one criminal statute," including multiple statutes in the same general

subject area. *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part). "[I]n such situations the Government may proceed under any statute that applies." *Ibid.*; see p. 31, *supra*.

Furthermore, any such overlap would not support the Ninth Circuit's apparent conclusion that the plainly legitimate sweep of Section 1324(a)(1)(A)(iv) should be measured, for overbreadth purposes, by identifying the criminal conduct legitimately proscribed *only* by Section 1324(a)(1)(A)(iv). This Court's precedents do not permit a court to subtract from a statute's plainly legitimate sweep all conduct that some other law may also prohibit before assessing whether the statute is overbroad. See *Hicks*, 539 U.S. at 123 (including "drug dealers" when explaining that rules against trespassing in a public housing complex applied not only to First Amendment speakers but also to "drug dealers" and others not engaged in constitutionally protected conduct).

***2. Section 1324(a)(1)(A)(iv)'s application to speech involved in facilitating or soliciting unlawful activity presents no First Amendment concerns***

To the extent that Section 1324(a)(1)(A)(iv) prohibits facilitation and solicitation accomplished partially or entirely through speech, it covers only speech that the Court has recognized to be "undeserving of First Amendment protection," *Williams*, 553 U.S. at 298. This Court has long recognized that speech that constitutes a "solicitation to commit a crime," or that is "intended to induce * * * illegal activities," may be proscribed. *Ibid.*; cf. *Fox* v. *Washington*, 236 U.S. 273, 277-278 (1915) (Holmes, J.) (describing as "not unfamiliar" a law that makes someone who utters "encouragements" an accomplice to "the crime encouraged").

Before the Founding, Anglo-American criminal law treated someone who successfully counseled, abetted, encouraged, or otherwise incited a criminal offense as an accessory to that offense. See Kent Greenawalt, *Speech and Crime*, 1980 Am. B. Found. Res. J. 645, 655-656, 689-690 (citing passages from Coke, Hale, and Blackstone). And it appears that "no one in England or the colonies seriously disputed the appropriateness of punishment for that behavior." *Id.* at 690. There is accordingly no tenable argument that the original understanding of the First Amendment limited "statutes that penalize encouragements to specific crimes." *Ibid.*

It therefore "has never been an abridgment of freedom of speech * * * to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). As this Court has explained, "the constitutional freedom for speech" does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* at 498. "Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities." *Williams*, 553 U.S. at 298. Such "'prevention and punishment'" of "speech integral to criminal conduct" has "'never been thought to raise any Constitutional problem.'" *United States* v. *Stevens*, 559 U.S. 460, 468-469 (2010) (citation omitted); see, *e.g.*, *Frohwerk* v. *United States*, 249 U.S. 204, 206 (1919) (Holmes, J.) (observing "that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of

a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech").

As the Court's decisions reflect, when speech is "intended to induce or commence illegal activities," it has "no social value" and "enjoy[s] no First Amendment protection." *Williams*, 553 U.S. at 298. That principle applies irrespective of whether the proscription of the underlying activity is criminal or civil. In *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), for example, this Court upheld the application of a civil ban on aiding unlawful employment practices to a newspaper's sex-discriminatory placement of help-wanted advertisements. *Id.* at 378, 388-389. The Court analogized the case to one involving a "want ad proposing a sale of narcotics or soliciting prostitutes," expressed "no doubt that a newspaper constitutionally could be forbidden to publish" such ads, and saw "no difference in principle" between the case before it and one involving advertisements proposing criminal transactions. *Id.* at 388. Respondent thus errs in suggesting (Br. in Opp. 19) that the constitutional analysis turns on whether the speech at issue is integral to "criminal conduct" or merely to "civil * * * violations." Cf. *Sineneng-Smith*, 910 F.3d at 482 (Ninth Circuit's similar suggestion).

Nor is *Pittsburgh Press* alone in recognizing that the First Amendment does not protect speech soliciting or facilitating civilly proscribed activity. In *IBEW*, this Court found that a federal "prohibition of inducement or encouragement" of labor-union activity that was only civilly proscribed "carrie[d] no unconstitutional abridgment of free speech," even as applied to paradigmatic speech activity like "picketing" and a "telephone call." 341 U.S. at 705; see 29 U.S.C. 158(b)(4) (Supp. II 1948);

see also *International Bhd. of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 293 (1957) (observing that a State may "constitutionally enjoin peaceful picketing aimed at preventing effectuation" of the State's policy, "whether of its criminal *or its civil* law") (emphasis added).

The similar "prohibition of inducement or encouragement" in Section 1324(a)(1)(A)(iv) likewise "carries no unconstitutional abridgement of free speech," *IBEW*, 341 U.S. at 705. Its criminal prohibition on soliciting or facilitating certain civil immigration offenses reflects more than a century of congressional recognition that criminal penalties may be appropriate for someone who induces unlawful activity by a noncitizen, even when criminal penalties are not imposed on the noncitizen who is induced. See *Lees*, 150 U.S. at 480 (explaining that "the [criminal] penalty" in Section 1324(a)'s predecessor was "visited not upon the alien laborer," who was merely subject to deportation, "but upon the party assisting in the importation"). Congress's differentiation between the two types of activities is analogous to policy choices that legislatures make in other contexts. Some States, for example, make a minor's possession of alcohol a civil infraction, but an adult's "aid[ing] or assist[ing]" in furnishing alcohol to the minor a crime. Me. Rev. Stat. tit. 28-A § 2081(1)(A) (2022); see *id.* § 2051(1)(A); see also, *e.g.*, Mich. Comp. Laws §§ 436.1701, 436.1703(1)(a) and (2) (2022).

As this Court's decisions reflect, a distinction between the facilitation or solicitation of a criminal violation and a civil one would be unsound. "Much public policy does not readily lend itself to accompanying criminal sanctions," and "[i]t is not the presence of criminal sanctions which makes a state policy 'important.'" *Building Serv. Emps. Int'l Union* v. *Gazzam*, 339 U.S.

532, 540 (1950). A legislature's choice to, say, make prostitution a civil rather than criminal offense should not come at the price of constitutionally invalidating criminal sanctions against facilitating or soliciting prostitution. And a constitutional line between civil and criminal illegality in this context would introduce unwarranted complexities into First Amendment law by requiring determinations of whether a potential "civil" penalty might in fact be "criminal" in nature, see, *e.g.*, *Hudson* v. *United States*, 522 U.S. 93, 99-100 (1997), or whether a third party's conduct satisfied all of the elements (including the mens rea element) of a crime, see, *e.g.*, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938) (noting that a legislature "may impose both a criminal and a civil sanction in respect to the same act"); see also, *e.g.*, 15 U.S.C. 78ff(a) (criminal penalty for willful securities-law violation otherwise punishable civilly); 26 U.S.C. 7201 (criminal penalty for willful tax-law violation).

Nothing in this Court's First Amendment jurisprudence foreclosed Congress from criminalizing respondent's conduct here, in which he induced his victims to violate the civil immigration laws. And nothing in this Court's First Amendment jurisprudence suggests that Congress is facially barred from prohibiting the facilitation or solicitation of such violations. Respondent's convictions, and the statute under which he was convicted, are constitutionally valid.

***3. The Ninth Circuit's overbreadth analysis was flawed***

In both its initial decision in *Sineneng-Smith* and its decision here, the Ninth Circuit's approach to Section 1324(a)(1)(A)(iv) has illustrated one of the dangers of the overbreadth doctrine that this Court identified in *Williams*: the doctrine's "tendency * * * to summon forth an endless stream of fanciful hypotheticals." 553

U.S. at 301. Indeed, the Ninth Circuit's holdings have rested on little else. Neither decision identifies a single real-world example in the decades-long history of Section 1324(a)(1)(A)(iv) in which the statute has been applied to protected speech. The Ninth Circuit has instead simply asserted that the "plain text" of the statute necessarily "covers a substantial amount of protected speech" based on hypotheticals devised by respondent, amici curiae, or the court itself. Pet. App. 11a; cf. *Sineneng-Smith*, 910 F.3d at 483-484. This Court's precedents make clear that exercising the judicial power to facially invalidate an Act of Congress requires more than such speculation. See *Sineneng-Smith*, 140 S. Ct. at 1585-1586 (Thomas, J., concurring).

First, the Ninth Circuit's hypotheticals fail to establish that the statute poses "a realistic danger" of chilling the speech of third parties, *Taxpayers for Vincent*, 466 U.S. at 801, as invalidation for overbreadth would require. In *Williams*, for example, the defendant argued that the word "presenting" in a statute prohibiting the pandering of child pornography could be understood to criminalize even the act of turning suspected images of child pornography over to the police. 553 U.S. at 302 (brackets and citation omitted). This Court pointed out, however, that a state ban on child pornography upheld in a prior decision had included the same word and that other state laws did as well. *Ibid.* Notwithstanding such laws, the Court was "aware of no prosecution for giving child pornography to the police." *Ibid.* The Court could "hardly say, therefore, that there is a 'realistic danger' that" the statute at issue would "deter such activity." *Ibid.* (citation omitted). Here, too, no "realistic danger" exists.

The Ninth Circuit did not rely on any "actual" prosecutions for the kind of abstract advocacy or other protected speech that it misread the statute to cover, *Hicks*, 539 U.S. at 122 (citation omitted). The only case that the court identified—*United States* v. *Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012) (cited at Pet. App. 12a)—was a prosecution of an official at the Department of Homeland Security who induced her housekeeper to reside in the country illegally. *Id.* at 193, 203-204. Although a colloquy with the district court in that case included a suggestion by the prosecutor that an immigration lawyer's advice to a client could violate Section 1324(a)(1)(A)(iv), *Henderson* itself was not such a case, and the Ninth Circuit did not suggest that the facts of the actual case would support an as-applied constitutional challenge. The colloquy in *Henderson* does not even begin to satisfy respondent's burden of showing a realistic danger that the threat of prosecutions under Section 1324(a)(1)(A)(iv) substantially chills protected speech.

Second, the hypotheticals fail to account for a critical requirement of the specific crime for which respondent was convicted. The crime of conviction here required not only proof beyond a reasonable doubt that respondent encouraged or induced illegal conduct, but also that he did so for his own "commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(B)(i). The financial-gain requirement was charged in the indictment, found by the jury at trial, and necessary to the maximum sentence (ten years of imprisonment) that respondent faced. J.A. 20, 116; see 8 U.S.C. 1324(a)(1)(B)(i) and (ii); *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000).

The financial-gain requirement alone excludes many of the Ninth Circuit's fanciful scenarios. For example,

even under that court's erroneously broad reading of "encourage," a defendant could not be convicted of for-profit encouragement based merely on "advising an undocumented immigrant about available social services," or "telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa." Pet. App. 11a. Even if providing such advice or information has the effect of encouraging a noncitizen to remain in the country unlawfully, the speaker in the court's hypotheticals is not acting "for the purpose of commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(B)(i). That remains true even if—as respondent has posited (Br. in Opp. 28)—the speaker happens to receive some ancillary financial benefit, as long as that was not the speaker's purpose in the specific encouraging or inducing conduct.

Respondent contends that the financial-gain requirement is irrelevant because Section 1324(a)(1)(A)(iv) sets forth a complete offense, with the financial-gain requirement serving merely as a "penalty enhancement." Br. in Opp. 8; see *id.* at 7-8, 27; cf. *Sineneng-Smith*, 910 F.3d at 471 n.5 (similar). But respondent identifies no prior case in which a defendant was permitted to raise an overbreadth challenge to a lesser-included offense, with fewer elements than the offense of conviction. Indeed, this Court's decision in *United States* v. *Alvarez*, 567 U.S. 709 (2012), cuts the other way. In *Alvarez*, the Court considered an overbreadth challenge to a statute that criminalized false statements about having been awarded military decorations or medals, with enhanced penalties for the particular false statements that the defendant had made about winning the Congressional Medal of Honor. See *id.* at 713-715 (plurality opinion); see also 18 U.S.C. 704(b) and (c) (2006). But rather than

ignoring the enhancement and looking solely at the more general offense, the plurality treated the relevant offense as lying about receiving the Medal of Honor. See *Alvarez*, 567 U.S. at 724-726.

Disregarding one of the requirements for the actual crime of conviction was an unwarranted extension of overbreadth doctrine—invalidating the otherwise unproblematic application of a statute by speculating about whether the application of a *different* statute to different defendants would pose any constitutional problem. Although facially invalidating a law on overbreadth grounds is sometimes necessary to eliminate a chilling effect on third parties who are deterred "from engaging in constitutionally protected speech," reliance on the overbreadth doctrine has the "obvious harmful effect[]" of "invalidating a law that in some of its applications is perfectly constitutional." *Williams*, 553 U.S. at 292. Those harmful effects would be greatly magnified if courts had license to ignore limits that Congress included when defining the actual crime at issue.

Respondent's effort to focus the overbreadth inquiry on Section 1324(a)(1)(A)(iv), while ignoring the financial-gain requirement in Section 1324(a)(1)(B)(i), also misunderstands the structure of the statute. Although Section 1324(a)(1)(A)(iv) defines a complete criminal offense in the sense that no additional elements are necessary for conviction, a specific penalty is a prerequisite to enforcement. See *United States* v. *Evans*, 333 U.S. 483, 495 (1948). And the separate penalty provision here, 8 U.S.C. 1324(a)(1)(B), differentiates between a crime consisting only of the elements specified in Section 1324(a)(1)(A)(iv) (which is punishable by a maximum of five years of imprisonment), and one that includes the further requirement of a "purpose of commercial advantage or private finan-

cial gain" (which is punishable by ten years of imprisonment). Compare 8 U.S.C. 1324(a)(1)(B)(ii), with 8 U.S.C. 1324(a)(1)(B)(i).

#### *4. As-applied challenges, not facial overbreadth claims, are the appropriate way to address any constitutional concerns with the prohibition*

Even if Section 1324(a)(1)(A)(iv) and (B)(i) could be read to cover some protected speech, that would not justify invalidating the statute on its face. Because any prosecution for such speech "could of course be the subject of an as-applied challenge," *Williams*, 553 U.S. at 302, invalidation on overbreadth grounds would be justified only if respondent could show that the normal course of constitutional adjudication is insufficient to address concerns about chilling effects. Respondent has failed to make that showing.

And prosecuting respondent's own conduct—his profiting from deceiving noncitizens into believing that they could become U.S. citizens through adult adoption—raises no First Amendment concerns. Not only speech integral to illegal conduct, but also speech constituting "fraud," falls outside the scope of the First Amendment. *Stevens*, 559 U.S. at 468. Section 1324(a)(1)(A)(iv) and (B)(i) cover many such deceptive schemes—*e.g.*, those that defraud noncitizens by selling them false entry papers. No sound reason exists to permit a defendant who has engaged in such a scheme to escape prosecution under the statute by hypothesizing that it might be unconstitutional as applied to others.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

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1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition to Government for a redress of grievances.

2. 8 U.S.C. 1324 provides:

**Bringing in and harboring certain aliens**

**(a) Criminal penalties**

(1)(A) Any person who—

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor,

or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) 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; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any

person, be punished by death or imprisoned for any term of years or for life, fined under title 18, or both.

(C) It is not a violation of clauses[1] (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs—

(A) be fined in accordance with title 18 or imprisoned not more than one year, or both; or

(B) in the case of—

(i) an offense committed with the intent or with reason to believe that the alien unlawfully

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[1] So in original. Probably should be "clause".

brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who—

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if—

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

**(b) Seizure and forfeiture**

**(1) In general**

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

**(2) Applicable procedures**

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

**(3) Prima facie evidence in determinations of violations**

In determining whether a violation of subsection (a) has occurred, any of the following shall be prima

facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

**(c) Authority to arrest**

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

**(d) Admissibility of videotaped witness testimony**

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

**(e) Outreach program**

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

3. 18 U.S.C. 2 provides:

**Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

4. 18 U.S.C. 373 provides:

**Solicitation to commit a crime of violence**

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent

or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

5. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332, provided in pertinent part:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

* * * * *

SEC. 3. That for every violation of any of the provisions of section one of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging or soliciting the migration or importation of any alien or aliens, foreigner or foreigners, into the United States, its Territories, or the District of Columbia, to perform labor or service of any kind under contract or agreement, express or implied, parol or special, with such alien or aliens, foreigner or foreigners, previous to becoming residents or citizens of the United States, shall forfeit and pay for every such offence the sum of one thousand dollars, which may be

sued for and recovered by the United States or by any person who shall first bring his action therefor including any such alien or foreigner who may be a party to any such contract or agreement, as debts of like amount are now recovered in the circuit courts of the United States; the proceeds to be paid into the Treasury of the United States; and separate suits may be brought for each alien or foreigner being a party to such contract or agreement aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit at the expense of the United States.

* * * * *

6. Act of Feb. 5, 1917, ch. 29, §§ 5-6, 39 Stat. 879, provided:

SEC. 5. That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the fifth proviso of section three of this Act, or have been imported with the permission of the Secretary of Labor in accordance with the fourth proviso of said section, and for every violation of any of the provisions of this section the person, partnership, company, or corporation violating the same shall forfeit and pay for every such offense the sum of $1,000, which may be sued for and recovered by the United States, as debts of like amount are now recov-

ered in the courts of the United States. For every violation of the provisions hereof the person violating the same may be prosecuted in a criminal action for a misdemeanor, and on conviction thereof shall be punished by a fine of $1,000, or by imprisonment for a term of not less than six months nor more than two years; and under either the civil or the criminal procedure mentioned separate suits or prosecutions may be brought for each alien thus offered or promised employment as aforesaid. The Department of Justice, with the approval of the Department of Labor, may from any fines or penalties received pay rewards to persons other than Government employees who may furnish information leading to the recovery of any such penalties, or to the arrest and punishment of any person, as in this section provided.

SEC. 6. That it shall be unlawful and be deemed a violation of section five of this Act to induce, assist, encourage, or solicit or attempt to induce, assist, encourage, or solicit any alien to come into the United States by promise of employment through advertisements printed, published, or distributed in any foreign country, whether such promise is true or false, and either the civil or criminal penalty or both imposed by said section shall be applicable to such a case.

7. Immigration and Nationality Act, ch. 477, § 274, 66 Stat. 228, provided:

SEC. 274. (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts,

by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(b) No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.