

No. 22-179

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HELAMAN HANSEN,

Respondent.

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

**BRIEF OF THE FIRST AMENDMENT COALITION,
FREEDOM OF THE PRESS FOUNDATION, NATIONAL
ASSOCIATION OF HISPANIC JOURNALISTS, NATIONAL
PRESS PHOTOGRAPHERS ASSOCIATION, AND NEWS
LEADERS ASSOCIATION AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENT**

PENNY VENETIS
Counsel of Record
INTERNATIONAL HUMAN
RIGHTS CLINIC
RUTGERS SCHOOL OF LAW
123 Washington Street
Newark, New Jersey 07102
(973) 353-3240
venetis@law.rutgers.edu
Counsel for Amici Curiae

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	8
I. 8 U.S.C. § 1324(a)(1)(A)(iv) is Unconstitutionally Overbroad, and Violates the First Amendment’s Guarantee of Freedom of the Press.....	8
A. The Overbreadth Doctrine Protects the Freedom of the Press	8
B. The U.S. Has Already Weaponized Subsection (iv) Against the Press and Can Do So Again	13
II. All Journalists Who Report on Immigration Matters Are Still in Danger of Being Prosecuted Under 8 U.S.C. §1324(a)(1)(A)(iv)	16
A. Members of The Catholic Press Are Particularly Vulnerable Under Subsection (iv).....	16
B. All Journalists and News Outlets That Report on Immigration Matters Can Fall Under Subsection (iv)’s Broad Ambit.....	21

	PAGE
C. Subsection (iv) Can Be Used as a Pretext to Harass, Silence and Prosecute Journalists	24
III. The Overbreadth Doctrine is Consistent With International Human Rights Laws That Protect the Freedom of the Press.....	27
A. The U.S. State Department Has Criticized Overbroad Statutes, That Can Be Used as Pretexts for Silencing and Arresting Reporters, as Conflicting With Human Rights	27
B. International Human Rights Law Mirrors First Amendment Overbreadth Law	31
CONCLUSION	34

TABLE OF AUTHORITIES

	PAGE(S)
U.S. CASES	
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975)	11, 12
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	25
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)	2
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972)	6
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	3, 4, 25
<i>Packingham v. North Carolina</i> , 137 S. Ct. 1730 (2017)	12
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011)	11
<i>United States v. Alvarez</i> , 567 U.S. 709 (2012)	16
<i>United States v. Goodwin</i> , 457 U.S. 368 (1982)	22, 26
<i>United States v. Hansen</i> , 25 F.4th 1103 (9th Cir. 2022)	5, 8, 9, 11
<i>United States v. Stevens</i> , 559 U.S. 460 (2010)	5, 11, 13
<i>Virginia v. Hicks</i> , 539 U.S. 113 (2003)	23

INTERNATIONAL CASES

<i>Herrera Ulloa v. Costa Rica</i> , Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. (ser. C) No. 107 (July 2, 2004)	33
<i>Jersild v. Denmark</i> , App. No. 15890/89 (Sept. 23, 1994)	7, 31, 32
<i>Kimel v. Argentina</i> , Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177 (May 2, 2008)	7, 33
<i>Palacio-Urrutia v. Ecuador</i> , Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) no. 446 (Nov. 24, 2021).....	32, 33
<i>Sabuncu v. Turkey</i> , App. No. 23199/17 (Oct. 11, 2020)	31

STATUTES

8 U.S.C. § 1324(a)(1)(A)(iv)	<i>passim</i>
------------------------------------	---------------

GOVERNMENT REPORTS

State Department, 2021 Country Reports on Human Rights Practice: China (2022)	28, 30
State Department, 2021 Country Reports on Human Rights Practice: Egypt (2022)	29
State Department, 2021 Country Reports on Human Rights Practice: Greece (2022)...	7, 29, 30

	PAGE(S)
State Department, 2021 Country Reports on Human Rights Practice: India (2022)	7, 30
State Department, 2021 Country Reports on Human Rights Practice: Italy (2022)	30
State Department, 2021 Country Reports on Human Rights Practice: Poland (2022)	30
State Department, 2021 Country Reports on Human Rights Practice: Singapore (2022)	30
State Department, 2021 Country Reports on Human Rights Practice: Spain (2022)	30
Letter from Randy J. Howe, Exec. Dir., Off. of Field Operations, U.S. Customs and Border Protection, to Mana Azarmi, Center for Democracy and Technology (May 9, 2019)	3, 4, 15
 LAW JOURNALS	
Harry Litman, Pretextual Prosecution, 92 Geo. L.J. 1133 (2004)	22, 26
 BOOKS	
<i>The Papers of James Madison 196-209</i> (William T. Hutchinson et al. eds. 1963) (1789)	8
 REPORTS	
Amnesty Int’l, ‘Saving Lives Is Not a Crime’: Politically Motivated Legal Harassment Against Migrant Human Rights Defenders by the USA, 14 (July 2, 2019)	4, 13, 15

	PAGE(S)
Anna Maria Mayda & Giovanni Peri, <i>The Political Impact of Immigration: Evidence from the United States</i> , Cato Institute (Sept. 12, 2018)	1, 10
Penelope Muse Abernathy, <i>Journalistic Mission: The Challenges and Opportunities for Ethnic Media, The Expanding News Desert</i>	22
NEWS ARTICLES	
<i>About Us</i> , Nat'l Cathl. Rep.	18
<i>Advertise with NCR</i> , Nat'l Cath. Rep.....	18
Alene Tchekmedyan, <i>Fearing Bad Publicity, LASD Covered up Case of Deputy Who Knelt on Inmate's Head</i> , L.A. Times (Mar. 25, 2022)	5, 25
Brandon Loran Maxwell, <i>Immigrants Make America Great</i> , Daily Chela (Mar. 26, 2021)	23
Carole Landry, <i>Russia-Ukraine War Briefing, Six Million Uprooted</i> , N. Y. Times (July 6, 2022)	9
<i>Catholic Social Teaching on Immigration</i> , U.S. Conf. of Cath. Bishops.....	17
Colleen Barry & Luigi Navarra, <i>Pope Decries Modern-Day Treatment of Migrants As He Declares 2 New Saints</i> , PBS NewsHour (Oct. 9, 2022)	18
David Masci & Gregory A. Smith, <i>7 Facts about American Catholics</i> , Pew Rsch. Center (Oct. 10, 2018)	19

	PAGE(S)
Deborah Netburn, <i>How a retired L.A. television executive became publisher of the National Catholic Reporter</i> , L.A. Times (Jan. 4, 2023)	18
E.H. & L.H., <i>The Case for Immigration</i> , Economist, (Apr. 16, 2018)	22
Editorial: <i>Republican agenda hardly reflective of Catholic values</i> , Nat'l Cath. Rep. (Jan. 23, 2023)	19
Editorial, <i>Immigration, Justice, and Reality</i> , Nat'l Cath. Reg. (Oct. 2, 2021)	20
Editorial, <i>The Immigration Blame Game</i> , Nat'l Cath. Reg. (Oct. 1, 2022)	19, 20
Edward Wong and Vivian Yee, N.Y. Times, <i>U.S. to Move Forward on Military Aid to Egypt Despite Lawmakers' Concerns</i> (Sep. 14, 2022)	29
Elahe Izadi, <i>Missouri governor accuses journalist who warned state about cybersecurity flaw of criminal 'hacking'</i> , Wash. Post (Oct. 15, 2021)	6
Eliot Spagat, <i>Migrants flee more countries, regardless of U.S. policy</i> , Associated Press News (Dec. 22, 2022)	9
Farhad Manjoo, Opinion, <i>There's Nothing Wrong with Open Borders</i> , N.Y. Times (Jan. 19, 2019)	21
Harriet Ryan & Brittny Mejia, <i>Villanueva Backs Off Investigation of Times Reporter who Revealed Cover-Up</i> , L.A. Times (Apr. 26, 2022)	6, 25

	PAGE(S)
John Cartwright, <i>Journalists are Essential to Democracy, We Must Respect and Protect Them</i> , Toronto Star (May 3, 2022)	2
Kate Linthicum, Cindy Carcamo & Alene Tchekmedyan, <i>No Easy Choices Amid Border Unrest</i> , L.A. Times (2019).	5, 26
<i>Mission and Values</i> , Nat'l Cath. Rep.	17
<i>National Catholic Register</i> , EWTN Advert.	18
Nick Baumann, <i>The GOP Candidate Who Wants Journos Jailed</i> , Mother Jones (Nov. 4, 2014).	24
<i>Pope Decries Modern-Day Treatment of Migrants As He Declares 2 New Saints</i> , PBS (Oct. 9, 2022)	17
Press Release: <i>National Catholic Register Selects Superdesk</i> , Superdesk Blog (Apr. 30, 2020).	18
Raja Abdulrahim, <i>Lives of Syrian Refugees in Turkey Shatter a Second, or Third, Time</i> , N. Y. Times (Feb. 12, 2023)	9
Ryan Bort & Asawin Suebsaeng, <i>Trump Keeps Musing About Journalists Being Raped in Prison — He's Not Joking</i> , Rolling Stone (Nov. 8, 2022).	24
Sandra Dibble, Cindy Carcamo & Alene Tchekmedyan, <i>Asylum Quest Converges at California's Doorstep: Caravan Heats up Immigration Debate</i> , L.A. Times	26

OTHER AUTHORITY

The Report of 1800, First Amendment
Encyclopedia, Nat'l Archives Founders Online . . 8

Tom Jones, Mari Payton & Bill Feather, *Source:*
Leaked Documents Show the U.S. Government
Tracking Journalists and Immigration
Advocates Through a Secret Database,
NBC7 San Diego (Jan. 10, 2020) 4, 14, 15

U.S. Bishop urges Biden Administration to
Reverse its Present Course on Immigration,
Cath. News Agency (Jan. 9th 2023) 17, 18

INTEREST OF *AMICI CURIAE*¹

Immigration is one of the most contentious and controversial issues of our time. Political leaders' positions on immigration and immigration reform "can be an important determinant of their electoral success or failure." Anna Maria Mayda & Giovanni Peri, *The Political Impact of Immigration: Evidence from the United States*, Cato Institute (Sept. 12, 2018).² That is why it is imperative for journalists to be able to report freely on immigration issues without fear of arrest, harassment, or intimidation by the government.

Amici Curiae, the First Amendment Coalition,³ Freedom of the Press Foundation,⁴ National Association of Hispanic Journalists,⁵ National Press

¹ No counsel for any party authored this brief, in whole or in part, nor did any person or entity, other than the Rutgers University Law School, make a monetary contribution to the preparation or submission of this brief.

² Available at <https://www.cato.org/publications/research-briefs-economic-policy/political-impact-immigration-evidence-united-states>.

³ Founded in 1988, The First Amendment Coalition ("FAC") is a nonprofit and nonpartisan organization based in California, dedicated to freedom of speech, and government transparency and accountability. FAC's members include news media outlets, journalists, community activists, and ordinary persons.

⁴ The Freedom of the Press Foundation (FPF) is a non-profit organization that protects, defends, and empowers public-interest journalism. It works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including documenting attacks on the press, and advocating for the public's right to know.

⁵ Established in 1984, The National Association of Hispanic Journalists (NAHJ) is the largest organization of Latino journalists in the U.S. NAHJ's mission is to increase the number

Photographers Association,⁶ and News Leaders Association,⁷ are non-profit public interest organizations dedicated to the protection of the First Amendment freedom of the press rights of journalists and the media. *Amici* submit this brief on behalf of all journalists. The language of 8 U.S.C. § 1324(a)(1)(A)(iv) (“Subsection (iv)”) is so broad, and has already been interpreted so broadly by the U.S. government, that any journalist who reports on immigration, in ways offensive to the government, risks prosecution under the statute. “[T]he threat of sanctions may deter [First Amendment expression] . . . almost as potently as the actual application of sanctions.” *Dombrowski v. Pfister*, 380 U.S. 479, 486, (1965), *quoting NAACP v. Button*, 371 U.S. 415, 433 (1963). “When reporters are harassed or threatened and feel afraid to file stories, both democracy and society are at risk.” John Cartwright, *Journalists are Essential to Democracy*,

of Latinos in the newsrooms and to work toward fair representation of Latinos in news media. NAHJ has more than 3,400 members, including working journalists and other media-related professionals.

⁶ Founded in 1946, National Press Photographers Association (NPPA) is a not-for-profit organization dedicated to the advancing visual journalism in its creation, editing, and distribution. NPPA’s members include video and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. NPPA vigorously promotes the constitutional and intellectual property rights of journalists as well as freedom of the press in all its forms.

⁷ The News Leaders Association (NLA) is a non-profit organization that works to empower journalists. NLA supports the First Amendment by keeping its membership informed of key legal and legislative developments; by joining *amicus* briefs to protect journalists’ rights and the public’s right to know; and by educating the public about the First Amendment.

We Must Respect and Protect Them, Toronto Star (May 3, 2022).⁸

Amici's concern about being silenced by federal officials who invoke the statute is not hypothetical. It has already happened. In 2018 and 2019, the U.S. government cited "possible violations under 8 U.S. Code §1324" as a justification to target journalists who were reporting on Latin American migrants traveling toward the U.S.-Mexico border in what was pejoratively labeled a "migrant caravan." Letter from Randy J. Howe, Exec. Dir., Off. of Field Operations, U.S. Customs and Border Protection, to Mana Azarmi, Center for Democracy and Technology (May 9, 2019).

Government officials can easily continue to use 8 U.S.C. §1324, particularly Subsection (iv)'s overbroad language, to "stifle, penalize, or curb the exercise" of journalists' reporting, in violation of the First Amendment. *See, e.g., Button*, 371 U.S. at 439. As such, *Amici* urge this Court to find that 8 U.S.C. § 1324(a)(1)(A)(iv) is unconstitutional.

SUMMARY OF ARGUMENT

8 U.S.C. § 1324 (a)(1)(A)(iv) is unconstitutionally overbroad and can easily be used to silence journalists in violation of the First Amendment's guarantee of freedom of the press. Contrary to its representations that the statute is only enforced against individuals seeking commercial gain, the federal government has admitted to invoking 8 U.S.C. § 1324 to gather information about journalists reporting on the "migrant caravan" that traveled to the U.S.-Mexico

⁸ Available at <https://www.thestar.com/opinion/contributors/2022/05/03/journalists-are-essential-to-democracy-we-must-respect-and-protect-them.html>

border in 2018 and 2019. Letter from Randy J. Howe, Exec. Dir., Off. of Field Operations, U.S. Customs and Border Protection, to Mana Azarmi, Center for Democracy and Technology (May 9, 2019).⁹ The government kept that information in a “secret database” and forced journalists to disclose their sources. *Id.*

U.S. officials impeded journalists’ free movement across the border, confiscated their equipment, and conducted “invasive” and “warrantless” searches of their devices, inhibiting them from reporting on the “migrant caravan.” *See, e.g.,* Tom Jones, Mari Payton & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC7 San Diego (Jan. 10, 2020).¹⁰

U.S. Customs and Border Protection falsely accused the journalists of participating in criminal violence at the border. Howe, *supra*. Yet, Border Patrol already knew that some of the journalists they had targeted were not even present where the alleged “illegal activities” occurred. Amnesty Int’l, ‘Saving Lives Is Not a Crime’: Politically Motivated Legal Harassment Against Migrant Human Rights Defenders by the USA, 14 (July 2, 2019).

Beyond “fanciful hypotheticals,” the “real-world conduct” of U.S. agents exemplifies the unconstitutional and dangerous overbreadth of 8 U.S.C. § 1324 (a)(1)(A)(iv). Appropriately, the Ninth

⁹ Available at <https://www.documentcloud.org/documents/6009352-CBP-Response-to-DHS-Coalition-Letter>.

¹⁰ Available at <https://www.nbcsandiego.com/news/local/source-leaked-documents-show-the-us-government-tracking-journalists-and-advocates-through-a-secret-database/3438/>.

Circuit rejected the government’s “narrow enforcement” argument regarding Subsection (iv), highlighting that “the First Amendment protects against the government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the government promised to use it responsibly.” *United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022), quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010).

As the Ninth Circuit pointed out, ordinary citizens can fall under the statute’s reach for uttering commonplace phrases like: “I encourage you to reside in the United States.” *Hansen*, 25 F.4th 1103. Along these same lines, under 8 U.S.C. § 1324 (a)(1)(A)(iv), all journalists and opinion writers—even from “papers of record” like the *New York Times*—could easily be caught up in Subsection (iv)’s dragnet for using “commonplace phrases” discussing the need for certain types of immigration reform.

Media coverage of immigration will continue to rise, given increasing global population displacement caused by natural disasters, violence and war. This means that more and more journalists are likely to either add immigration matters to their reporting portfolios, or increase their coverage of immigration issues. See, e.g., Alene Tchekmedyian, *Fearing Bad Publicity, LASD Covered up Case of Deputy Who Knelt on Inmate’s Head*, L.A. Times (Mar. 25, 2022);¹¹ Kate Linthicum, Cindy Carcamo & Alene Tchekmedyian, *No Easy Choices Amid Border Unrest*, L.A. Times

¹¹ Available at: <https://www.latimes.com/california/story/2022-03-25/sheriff-deputy-force-coverup>

(2019).¹² That is why it is critical for this Court to step in *now* to protect government officials from further weaponizing Subsection (iv) against journalists.

The mere threat of arrest or prosecution of journalists for reporting on a certain topic is, in and of itself, a First Amendment violation. Indeed, this Court has held that the overbreadth doctrine exists to protect individuals who would “refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” *Gooding v. Wilson*, 405 U.S. 518 (1972).

In carrying a five-year prison penalty, 8 U.S.C. § 1324 (a)(1)(A)(iv) is a ready-made pretext for governmental officials to silence any journalist whom the official perceives to be a threat. Too many high-ranking public officials already threaten to arrest journalists. *See, e.g.,* Elahe Izadi, *Missouri governor accuses journalist who warned state about cybersecurity flaw of criminal ‘hacking’*, Wash. Post, (Oct. 15, 2021).¹³ Those officials can manipulate 8 U.S.C. § 1324 (a)(1)(A)(iv) against anyone who has ever reported on immigration matters, and use it as a pretext to harass, silence, or prosecute them for reporting on other matters (such as public corruption). *See, e.g.,* Harriet Ryan & Brittney Mejia, *Villanueva Backs Off Investigation of Times Reporter who Revealed Cover-up*, L.A. Times (Apr. 26, 2022).¹⁴

¹² Available at: https://enewspaper.latimes.com/infinity/article_share.aspx?guid=fa35c1c8-71fc-4e4e-a4b7-9b24947c2b6d

¹³ Available at <https://www.washingtonpost.com/media/2021/10/14/mike-parson-st-louis-post-dispatch-hacker/>.

¹⁴ Available at: <https://www.latimes.com/california/story/2022-04-26/los-angeles-sheriff-villanueva-times-reporter-under-investigation-coverup>

Protecting journalists from overbroad laws is not only a fundamental legal principle here at home. The U.S. government has spoken out against overbroad statutes that threaten journalists, in the international arena, as well. Notably, the U.S. Department of State publishes annual human rights reports that call on nations to repeal laws that pose a threat to the freedom of the press. *See generally* Antony J. Blinken, Preface to 2021 U.S. Dept. of State Country Reports on Human Rights Practices (2022). Among the many laws that the State Department highlights as problematic are overbroad laws (including laws of U.S. allies) that can be used as pretexts for intimidating or arresting journalists who report on matters critical of the government. *See, e.g.*, State Dep’t, 2021 Country Reports on Human Rights Practice: Greece (2022); State Dep’t, 2021 Country Reports on Human Rights Practice: India (2022).

Similarly, cases overturning statutes for violating the freedom of the press exist not only in our federal courts, but world-wide. International human rights courts, including the European Court of Human Rights and the Inter-American Court of Human Rights, mirror this Court’s First Amendment overbreadth rulings. They have invalidated statutes that can be broadly interpreted to shut down journalistic scrutiny. *See, e.g.*, *Jersild v. Denmark*, App. No. 15890/89 (Sept. 23, 1994); *Kimel v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177 (May 2, 2008).

In sum, to protect journalists from being harassed, arrested, and silenced, this Court should affirm the Ninth Circuit’s holding that 8 U.S.C. § 1324 (a)(1)(A)(iv) is unconstitutionally overbroad. Subsection (iv), both on its face and as applied, threatens the “bulwark of liberty” that is the free

press. *See, e.g., Hansen*, 25 F.4th 1103; 12 *The Papers of James Madison 196-209* (William T. Hutchinson et al. eds. 1963) (1789).

ARGUMENT

I. 8 U.S.C. § 1324(a)(1)(A)(iv) is Unconstitutionally Overbroad, and Violates the First Amendment’s Guarantee of Freedom of the Press.

A. The Overbreadth Doctrine Protects the Freedom of the Press.

The “Father of the Constitution,” James Madison, wrote that freedom of the press “requires that it should be exempt not only from previous restraint by the executive . . . but from legislative restraint also.”¹⁵ *The Report of 1800*, Nat’l Archives Founders Online (last visited Feb. 16, 2023). 8 U.S.C. § 1324 (a)(1)(A)(iv) (“Subsection iv”) is the type of “legislative restraint” to which Madison would have objected. The statute carries a five year prison sentence for anyone who “encourage[s] or induce[s] 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.” The statute’s overbroad language gives too much power and too much discretion to federal officials to take harsh actions (with grave consequences) against journalists who report about immigration. On its face, it violates the First Amendment’s guarantee of freedom of the press. As such, this Court should find that it is unconstitutional.

¹⁵ Available at <https://founders.archives.gov/documents/Madison/01-17-02-0202>.

The overbreadth doctrine guards against statutes that chill free speech, including freedom of the press. In *United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022), the Ninth Circuit invalidated Subsection (iv) as overbroad, stating: “[i]t is clear that subsection (iv) covers a substantial amount of protected speech.” *Id.* The court found that many commonplace statements “could be construed . . . as encouraging” undocumented people to enter or live in the United States. *Id.* For example, the plain language of Subsection (iv) covers an individual knowingly saying: “I encourage you to reside in the United States,” or encouraging an immigrant to seek shelter during a natural disaster. *Id.*

By extension, Subsection (iv) threatens journalists and media outlets with criminal liability for using “commonplace phrases” to discuss certain types of immigration reform. Today, these threats reach almost all media. Global displacement has increased greatly as people attempt to escape wars, violence, and natural disasters. See *e.g.*, Carole Landry, *Russia-Ukraine War Briefing, Six Million Uprooted*, N. Y. Times (July 6, 2022) (migration from Ukraine following Russian attacks);¹⁶ Eliot Spagat, *Migrants flee more countries, regardless of U.S. policy*, Associated Press News (Dec. 22, 2022)(migration from Guatemala, Honduras and Mexico because of violence);¹⁷ Raja Abdulrahim, *Lives of Syrian Refugees in Turkey Shatter a Second, or Third, Time*,

¹⁶ Available at <https://www.nytimes.com/2022/07/06/briefing/russia-ukraine-war-displaced-yandex.html#:~:text=About%20one%2Dthird%20of%20Ukraine's,the%20International%20Organization%20for%20Migration>.

¹⁷ Available at <https://apnews.com/article/mexico-violence-caribbean-earthquakes-central-america-c13d40798242dc08986dd4ed296898d9>.

N. Y. Times (Feb. 12, 2023) (displacement of millions of people caused by earthquake in Syria and Turkey).¹⁸ Journalists, by trade, cover all of these events and their geopolitical implications. The First Amendment protects them in doing so. That protection must be free from governmental interference.

The U.S. public is incredibly concerned about the impact of global migration on their lives. Immigration and immigration reform are among the most contentious political issues of our time. As such, political leaders' positions on immigration and immigration reform "can be an important determinant of their electoral success or failure." Anna Maria Mayda & Giovanni Peri, *The Political Impact of Immigration: Evidence from the United States*, Cato Institute (Sept. 12, 2018).¹⁹ That is precisely why journalists' unfettered coverage of immigration is so important. Covering immigration is critical in creating an informed public and electorate.

[S]peech on matters of public concern . . . is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues

¹⁸ See study on displacement based because of natural disaster from the Internal Displacement Monitoring Center <https://www.internal-displacement.org/global-report/grid2022/#:~:text=Conflict%2C%20violence%20and%20disasters%20triggered,breaking%20year%20for%20disaster%20displacement>.

¹⁹ Available at <https://www.cato.org/publications/research-briefs-economic-policy/political-impact-immigration-evidence-united-states>.

occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection. (Internal citations omitted.)

Snyder v. Phelps, 562 U.S. 443, 451-52 (2011)

The government’s contention that it does not enforce Subsection (iv) against protected speech is constitutionally irrelevant. *Hansen*, 25 F.4th at 1111. In overturning Subsection (iv), the Ninth Circuit quoted this Court in finding that “the First Amendment protects against the government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the government promised to use it responsibly.” *Id.*, quoting *United States v. Stevens*, 559 U.S. 460 (2010).

United States v. Stevens is relevant here. In *Stevens*, this Court invalidated 18 U.S.C. § 48 as unconstitutional and substantially overbroad. Violations of § 48 carried a penalty of up to five years in prison for anyone who “creates, sells, or possesses a depiction of animal cruelty,” if done “for commercial gain” in interstate or foreign commerce. *Id.* at 464. This Court found that news sources, almost all of which operate for profit, were vulnerable to the statute’s overbroad reach. This Court held that it was unconstitutional for Congress “to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty” (i.e., speech), while not criminalizing the underlying cruel acts themselves. *Id.*

This Court also applied the overbreadth doctrine to protect the media in *Bigelow v. Virginia*, 421 U.S. 809 (1975), where it found that a Virginia law violated the First Amendment. The law “made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion.” *Id.* A newspaper publisher was convicted under the law

for publishing an advertisement informing women on how to obtain safe abortions in New York City. *Id.* This Court found that the Virginia Supreme Court erred in finding the publisher lacked standing to challenge the law as overbroad. *Id.* at 817.

Even though the Court's ultimate holding in *Bigelow* was not based on the overbreadth doctrine, this Court still discussed the overbreadth doctrine at length, as well as the Virginia Supreme Court's misunderstanding of it. In discussing overbreadth, this Court found that the "statute's potential for sweeping and improper application was strong." *Id.* Notably, the Court said that the advertisement was an expression of "pure speech" that was of public interest. *Id.*; *Cf. Packingham v. North Carolina* 137 S. Ct. 1730 (2017) (invalidating as "extraordinarily overbroad" a North Carolina criminal law preventing sex offenders, who had been convicted of having sex with children, from accessing much of the Internet, in part, because the statute's broad wording would bar access to valuable information on websites such as washingtonpost.com).

In both *Stevens* and *Bigelow*, this Court found that criminal statutes were overbroad when media outlets and journalists could be unwittingly threatened with prosecution for their reporting, editorial content, and even their advertising choices. That is certainly the case here. Subsection (iv) gives far too much authority to federal officials to determine what words, publications, or actions violate the law. It violates the First Amendment for federal authorities to have the power to determine what types of speech "encourage" an undocumented person "to come to, enter, or reside" in the U.S. To paraphrase the Ninth Circuit, Subsection (iv) captures too much journalistic parlance to pass constitutional muster. It is too risky

then, from a First Amendment perspective to let Subsection (iv) stand.

**B. The U.S. Has Already Weaponized
Subsection (iv) Against the Press and Can
Do So Again.**

The possibility that federal officials will read Subsection (iv) as broadly as possible to stifle highly-protected journalistic speech is very real, not hypothetical. Subsection (iv) has already been used to harass journalists to prevent them from reporting on immigration matters. This, in and of itself, evinces its unconstitutional overbreadth.

In November 2018, journalists began documenting the experiences of thousands of people from across Latin America, traveling in a “migrant caravan” towards the U.S.-Mexico border. These journalists were detained by U.S. border officials and subjected to intensive screenings, which appeared to be politically motivated. Amnesty Int’l, ‘Saving Lives Is Not a Crime’: Politically Motivated Legal Harassment Against Migrant Human Rights Defenders by the USA 14 (2019).²⁰ These actions, carried out by Customs and Border Protection (“U.S. Border Patrol”) and Immigration and Customs Enforcement (“ICE”), were part of the November 2018 “Operation Secure Line,” a Trump Administration program designed to monitor all aspects of the “migrant caravan.” *Id.* at 9.

In March 2019, NBC7 San Diego published an investigative report exposing a Department of Homeland Security “secret database of [59] activists, journalists, and social media influencers tied to the

²⁰ Available at https://www.amnestyusa.org/wp-content/uploads/2019/06/Amnesty-Report_SLINAC_FINAL005.pdf.

migrant caravan.” The secret database tracked the individuals’ personal information, and also placed an “alert” on them, to signal whether they had been subjected to interrogation at the border. Tom Jones, Mari Payton & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC7 San Diego (Jan. 10, 2020)(“*Leaked Documents*, Jan. 2020”).²¹

Of the ten journalists and photojournalists listed in the database, at least five were detained and interrogated by the U.S. Border Patrol. *Id.* The government compelled each journalist to disclose confidential information about their observations as journalists and about their sources, including the identities of people with whom they may have interacted while working in Mexico. *Id.*

In response to inquiries about this improper monitoring, U.S Border Patrol admitted to “collect[ing] evidence that might be needed for future legal actions.” In their attempt to justify the dossiers they compiled on journalists, U.S. Border Patrol falsely claimed that journalists were tracked and targeted because of alleged involvement in violence at the border. *Leaked Documents* Jan. 2020.

Ariana Drehsler, a freelance photojournalist whose work has appeared in *The New Yorker*, *The Wall Street*

²¹ Available at <https://www.nbcsandiego.com/news/local/source-leaked-documents-show-the-us-government-tracking-journalists-and-advocates-through-a-secret-database/3438/>.

Journal and *The New York Times*,²² was in the U.S. Border Patrol's database with an "X" over her photograph. *Leaked Documents* Jan. 2020. Drehsler was questioned by U.S. Border Patrol officers about a November 25, 2018 incident, "during which U.S. Border Patrol fired teargas into a crowd of asylum seekers on Mexican territory." *Id.* She was questioned a second time about a similar January 2019 incident. Amnesty Int'l, *supra*, at 16. Drehsler, however, was not even present for either incident. *Id.* Nonetheless, she was pulled into "secondary interrogation" every time she crossed the the U.S.-Mexico border. *Id.* at 16.

U.S. Border Patrol later wrote a letter to the Center for Democracy and Technology, in May 2019, admitting that it compiled the watch list to investigate "possible violations under 8 U.S. Code §1324." Letter from Randy J. Howe, Exec. Dir., Off. of Field Operations, U.S. Customs and Border Protection, to Mana Azarmi, Center for Democracy and Technology (May 9, 2019).²³ This admission is especially troubling because the agency intensified restrictions against journalists *just weeks* after Subsection (iv) was found to be unconstitutionally overbroad in *United States v. Sineneng-Smith*, the precursor to *Hansen*. Amnesty Int'l, *supra*, at p. 17.

So, contrary to its assertions to this Court, the U.S. has already misused 8 U.S.C. § 1324 to stop highly protected journalistic speech regarding matters of great public concern. If Subsection (iv) remains in place, it can easily be used again to intimidate and

²² Ariana Drehsler, *About & Contact*, Ariana Drehsler Photojournalist (last visited Feb. 22, 2023). Available at: <https://www.arianadrehler.com/about-contact>

²³ Available at <https://www.documentcloud.org/documents/6009352-CBP-Response-to-DHS-Coalition-Letter>.

silence any journalist who covers immigration matters. The statute's language is so broad, and immigration enforcement is so extensive, that it would be next to impossible to monitor governmental misapplication of Subsection (iv). "The mere potential for the exercise of [an overly broad statute's] power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *United States v. Alvarez*, 567 U.S. 709, 723 (2012). As such, this Court should find that Subsection (iv) is unconstitutional.

II. All Journalists Who Report on Immigration Matters Are Still in Danger of Being Prosecuted Under 8 U.S.C. §1324(a)(1)(A)(iv).

The existence of the watch list, and the U.S. government's weaponization of Subsection (iv) against journalists who were not even present at the U.S.-Mexico border, demonstrate that journalists still risk punishment under Subsection (iv) for merely reporting about immigrants. This chills journalists' ability to report on one of the most controversial and topical issues in the U.S., with which the public and elected officials grapple every day. *See Alvarez*, 567 U.S. at 723.

A. Members of The Catholic Press Are Particularly Vulnerable Under Subsection (iv).

Journalists who write for the Catholic press are at particular risk for being arrested and prosecuted under 8 U.S.C. § 1324(a)(1)(A)(iv) because their writing encourages millions of Catholic readers to help undocumented immigrants. Approximately 23% of the U.S. population identifies as Catholic, making

Catholicism the most popular Christian denomination in this country. *Mission and Values*, Nat'l Cath. Rep. (last visited Feb. 17, 2023).²⁴ The U.S. Catholic Church is “an immigrant Church with a long history of embracing diverse newcomers and providing assistance and pastoral care to immigrants, migrants, refugees, and people on the move.” *Catholic Social Teaching on Immigration*, U.S. Conf. of Cath. Bishops (last visited Feb. 9, 2023).²⁵

In a speech to a 40,000-person crowd, Pope Francis encouraged Catholics to be “a neighbor to all those who are mistreated and abandoned on the streets of our world, soothing their wounds and bringing them to the nearest shelter, where their needs can be met.” *Id.* Pope Francis, as well as U.S. Catholic Bishops, have decried modern-day treatment of migrants as “disgusting, sinful, and criminal.” *Pope Decries Modern-Day Treatment of Migrants As He Declares 2 New Saints*, PBS (Oct. 9, 2022).²⁶ Recently, U.S. Bishops criticized the Biden Administration’s crackdown on illegal immigration. *U.S. Bishop urges Biden Administration to Reverse its Present Course on Immigration*, Cath. News Agency (Jan. 9th 2023).²⁷ Texas Bishop Mark Seitz, chairman of the U.S. Conference of Catholic Bishops’ Committee on Migration, urged the Administration to “reverse its

²⁴ Available at <https://www.ncronline.org/mission-and-values>.

²⁵ Available at <https://www.usccb.org/committees/migration/immigration>.

²⁶ Available at <https://www.pbs.org/newshour/world/pope-decries-modern-day-treatment-of-migrants-as-he-declares-2-new-saints>.

²⁷ Available at <https://www.catholicnewsagency.com/news/253290/us-bishops-urge-biden-administration-to-reverse-its-present-course-on-immigration>.

present course in favor of humane solutions that recognize the God-given dignity of migrants and provide equitable access to immigration and humanitarian pathways.” *Id.* He stated that undocumented immigrants at the border “fleeing violence have a right to seek safety in the U.S.” *Id.*

This pro-immigration position is reflected in the Catholic press. The *National Catholic Reporter* “averages about 1 million unique visitors to its website per month and is still publishing a print newspaper that is sent out once every two weeks.” Deborah Netburn, *How a retired L.A. television executive became publisher of the National Catholic Reporter*, L.A. Times (Jan. 4, 2023).²⁸ The “award-winning biweekly newspaper enjoys a readership of 100,000.” *Advertise with NCR*, Nat’l Cath. Rep. (last visited Feb. 17, 2023).²⁹

Similarly influential, the *National Catholic Register* “is read by tens of thousands of active lay Catholics along with over 800 priests, 160 bishops, 40 archbishops and 30 Vatican officials.” *About Us*, Nat’l Cathl. Rep. (last visited Feb. 17, 2023).³⁰ Its current print circulation of 44,000 subscribers has increased 94% over the past 10 years, and is still growing.” *National Catholic Register*, EWTN Advert. (last visited Feb. 17, 2023).³¹ “Every month, NCRregister.com clocks approximately 2.4 million page views and nearly one million users.” Press Release: *National Catholic Register Selects Superdesk*,

²⁸ Available at <https://www.latimes.com/california/story/2023-01-04/why-a-former-television-executive-decided-to-become-publisher-of-the-national-catholic-reporter>.

²⁹ Available at <https://www.ncronline.org/advertise>

³⁰ Available at <https://www.ncregister.com/info/about-us>

³¹ Available at <https://www.ewtnadvertising.com/print>

Superdesk Blog (Apr. 30, 2020). Journalists writing for these publications have great influence over the roughly 51 million Catholic adults in the United States. David Masci & Gregory A. Smith, *7 Facts about American Catholics*, Pew Rsch. Center (Oct. 10, 2018).³² Their writing on open borders and helping immigrants can most certainly be construed as violating Subsection (iv).

The Editorial Staff at the *National Catholic Reporter* could be prosecuted for their article “Republican Agenda Hardly Reflective of Catholic Values.” The article states that “our country needs real immigration reform, with a pathway to citizenship for those who were brought to the U.S. illegally as children and for others.” Editorial, *Editorial: Republican Agenda Hardly Reflective of Catholic Values*, Nat’l Cath. Rep. (Jan. 23, 2023).³³ The Editorial Staff highlights that these beliefs are “supported by Catholic social teaching, Pope Francis and many church leaders,” thus encouraging Catholics to help immigrants. *Id.*

Similarly, in 2022, the Editors of the *National Catholic Register* wrote an editorial titled “The Immigration Blame Game.” The Editors acknowledge that “while Catholic Americans obviously lack the power to break this political impasse on [their] own, as faithful followers of Christ, [they] do have an obligation to offer a superior example of how to address this fraught issue.” Editorial, *The Immigration Blame*

³² Available at <https://www.pewresearch.org/fact-tank/2018/10/10/7-facts-about-american-catholics/>.

³³ Available at <https://www.ncronline.org/opinion/editorial/editorial-republican-agenda-hardly-reflective-catholic-values>.

Game, Nat'l Cath. Reg. (Oct. 1, 2022).³⁴ They remind readers that, as Catholics, they “must remember that helping a person in need is a Christian imperative, not a political statement,” adding that it is “never justifiable to withhold assistance from immigrants when they desperately need it.” *Id.*

The prior year, the editors of the *National Catholic Register* wrote another piece titled “Immigration, Justice and Reality,” unabashedly pronouncing that “the United States’ immigration system is broken.” Editorial, *Immigration, Justice, and Reality*, Nat'l Cath. Reg. (Oct. 2, 2021).³⁵ They explain that “our decades-long failure to both secure our borders and pursue just reforms in how we receive migrants has rendered our laws ineffectual and our policies inadequate.” *Id.* The Editors then urge readers to “take seriously our duty to help those from other parts of the world live free of violence and poverty.” *Id.* They encourage readers to “resist the temptation to political abstraction and find ways to respond to the very real call to serve immigrants in need who are in our country today.” *Id.* They suggest that, as Catholics, “[o]ur first question shouldn’t be ‘Where are you from?’ but ‘How can I help?’ as we follow the example of the Good Samaritan — and ultimately of Jesus Christ — in embracing all we encounter as our neighbors, worthy of love and dignity.” *Id.*

As these examples demonstrate, journalists writing for the Catholic press do more than just discuss immigration. They tell their readers that it is their duty, as Catholics, to assist undocumented immigrants,

³⁴ Available at <https://www.ncregister.com/commentaries/the-immigration-blame-game>.

³⁵ Available at <https://www.ncregister.com/commentaries/immigration-justice-and-reality>

regardless of what U.S. law says. Under any analysis, their writing falls squarely within Subsection (iv)'s wide ambit. This places Catholic journalists and media outlets in danger of being arrested and prosecuted for their highly-protected journalistic speech.

B. All Journalists and News Outlets That Report on Immigration Matters Can Fall Under Subsection (iv)'s Broad Ambit.

Under the government's broad reading of the statute, many journalists and media outlets that have discussed creative solutions to the immigration crisis could be in danger of being prosecuted under 8 U.S.C. §1324(a)(1)(A)(iv). *New York Times* columnist Farhad Manjoo, who called for open borders in 2019, would be a prime target. Manjoo encourages Democratic leaders to approach the immigration crisis with "creativity and verve," and to adopt the slogan "let them in." Farhad Manjoo, Opinion, *There's Nothing Wrong with Open Borders*, N.Y. Times (Jan. 19, 2019).³⁶ Manjoo urges:

opposing the nation's cruel and expensive immigration and border-security apparatus in its entirety. Imagine radically shifting our stance towards outsiders from one of suspicion to one of warm embrace. Imagine that if you passed a minimal background check, you'd be free to live, work, pay taxes and die in the United States. Imagine moving from Nigeria to Nebraska as freely as one might move from Massachusetts to Maine.

Id.

³⁶ Available at <https://www.nytimes.com/2019/01/16/opinion/open-borders-immigration.html>.

E.H. and L.H. also encouraged open immigration in their article in *The Economist*. E.H. & L.H., *The Case for Immigration*, *Economist* (Apr. 16, 2018).³⁷ They say that a world without borders would be “fairer, freer, with more opportunities for a larger number of people . . .” *Id.* E.H. and L.H. say that the United States, “must do more to help those beset by war, persecution or economic duress. *Id.* Overzealous federal agents can construe E.H. and L.H.’s words as “encourag[ing]” illegal immigration to the U.S., because war and economic duress do not make a migrant eligible to come to, or remain, in the U.S. The decision to arrest is left to the “unfettered discretion” of federal prosecutors, and that decision need not be motivated by the purpose or function of 8 U.S.C. § 1324. *See*, Harry Litman, *Pretextual Prosecution*, 92 *Geo. L.J.* 1133, 1138 (2004). *See also United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

News outlets that serve immigrant and underrepresented communities are at particular risk of being targeted for writing about immigration matters. “As the makeup of the country’s population changes, ethnic news outlets are playing a key role in providing essential news to groups of people who often get scant attention in the mainstream press.” Penelope Muse Abernathy, *Journalistic Mission: The Challenges and Opportunities for Ethnic Media*, *The Expanding News Desert* (last visited Feb. 20, 2023).³⁸

The Daily Chela, a Hispanic and Chicano news source, published an opinion piece by Brandon Loran

³⁷ Available at www.economist.com/openfuture/2018/04/16.

³⁸ Available at: <https://www.usnewsdeserts.com/reports/news-deserts-and-ghost-newspapers-will-local-news-survive/the-news-landscape-of-the-future-transformed-and-renewed/journalistic-mission-the-challenges-and-opportunities-for-ethnic-media/>

Maxwell, which asserts that the “true danger to Americans is not the foreign born or prospective citizen but the current [U.S.] citizenship process . . .” Brandon Loran Maxwell, *Immigrants Make America Great*, *Daily Chela* (Mar. 26, 2021).³⁹ The “average immigrant,” he continues, “both documented and undocumented, comes to the United States for freedom and opportunity: a chance to flee economic or political hardship and take part in the American dream. *Id.* Americans and lawmakers should welcome them, not disparage them.” *Id.*

Journals such as *The Daily Chela*, are prime targets for investigation under Subsection (iv) both because they advocate for open borders, but also because of the demographics of the populations they serve. If these smaller periodicals are investigated under Subsection (iv), they are likely to shutter. Unlike *The New York Times* or the *The Economist* (that can hire elite lawyers to fight over-reaching governmental investigations), smaller news outlets do not have the resources to respond to governmental inquiries or investigations. “Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole . . .” *Virginia v. Hicks* 539 U.S. 113 (2003), quoting *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). As such, Subsection (iv) can have a particularly strong chilling effect on smaller news publications that serve under-represented communities.

³⁹ Available at <https://www.dailychela.com/immigrants-make-america-great-2/>

C. Subsection (iv) Can Be Used as a Pretext to Harass, Silence and Prosecute Journalists.

As the U.S. Border Patrol's watch list demonstrates, harassing and arresting reporters under Subsection (iv) is all too easy. This broad-reaching statute can easily serve as pretext to intimidate, prosecute, or jail any journalist who public officials do not like, as long as that journalist has reported at least once about immigration.

This is particularly true in the current political climate when public officials are openly hostile to the press, and openly threaten journalists. For example, former President Donald Trump, who is currently seeking the 2024 Republican nomination for the Presidency, has been soliciting advice from attorneys on how to imprison journalists, should he return to the White House. Ryan Bort & Asawin Suebsaeng, *Trump Keeps Musing About Journalists Being Raped in Prison — He's Not Joking*, Rolling Stone (Nov. 8, 2022). If Trump wins in 2024, which is possible, he can easily follow through on his threats to arrest journalists.

Similarly, Senator Tom Cotton has advocated for jailing journalists. Nick Baumann, *The GOP Candidate Who Wants Journos Jailed*, Mother Jones (Nov. 4, 2014). In 2006, Cotton wrote an open letter to *The New York Times*, accusing the newspaper of facilitating future terrorist attacks and advocating for the paper's prosecution under the Espionage Acts. *Id.* Cotton wanted the Times in its "rightful place: not at the Pulitzer announcements, but behind bars." *Id.*

Officials who are openly hostile to the press can latch on to Subsection (iv) and use it as a pretext to

arrest journalists who criticize them. Particularly vulnerable under Subsection (iv), are journalists who cover both immigration issues and other politically-charged topics. “[I]n appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.” *Button*, 371 U.S. at 432.

For example, the *LA Times* published an article by Alene Tchekmedyan in 2022 that exposed a cover-up by Los Angeles County Sheriff Alex Villanueva and his office, after using excessive force on a handcuffed inmate. Alene Tchekmedyan, *Fearing Bad Publicity, LASD Covered Up Case of Deputy Who Knelt on Inmate's Head*, L.A. Times (Mar. 25, 2022).⁴⁰ Less than a month later, Sheriff Villanueva held a press conference announcing a criminal investigation into Tchekmedyan and two of her alleged sources. Harriet Ryan & Brittny Mejia, *Villanueva Backs Off Investigation of Times Reporter who Revealed Cover-up*, L.A. Times, (Apr. 26, 2022).⁴¹ The Sheriff stated that Tchekmedyan was a subject of his office's investigation into multiple felonies, including conspiracy and burglary. *Id.* Only after a “barrage of criticism from politicians, and the newspaper and press freedom groups, [did Villanueva] back[] off his announcement and den[y] that he considered the reporter a suspect.” *Id.*

Tchekmedyan has written multiple articles about the struggles faced by documented and undocumented

⁴⁰ Available at: <https://www.latimes.com/california/story/2022-03-25/sheriff-deputy-force-coverup>

⁴¹ Available at: <https://www.latimes.com/california/story/2022-04-26/los-angeles-sheriff-villanueva-times-reporter-under-investigation-coverup>

immigrants in, and traveling to, the U.S. She even wrote two articles specifically about the “migrant caravan.” Sandra Dibble, Cindy Carcamo & Alene Tchekmedyian, *Asylum Quest Converges at California’s Doorstep: Caravan Heats up Immigration Debate*, L.A. Times (last visited Feb. 22, 2023)⁴²; Kate Linthicum, Cindy Carcamo & Alene Tchekmedyian, *No Easy Choices Amid Border Unrest*, L.A. Times (2019).⁴³

Tchekmedyian has already been targeted and criminally investigated by a public official, without justification, for exposing his corruption and abuses. Subsection (iv) is so overbroad that the same public official, or others like him, who may want to silence Tchekmedyian in the future, could easily misrepresent her reporting, and convince a federal prosecutor to investigate her. *See*, Harry Litman, *Pretextual Prosecution*, 92 Geo. L.J. 1133, 1138 (2004); *See also*, *Goodwin*, 457 U.S. at 380 n.11.

Because Subsection (iv) can be so easily misused to chill journalistic speech, this Court should find that it is overbroad and violates the First Amendment.

⁴² Available at: <https://enewspaper.latimes.com/infinity/article/share.aspx?guid=dd396a6c-472e-4f78-aa93-a108aaa23877>

⁴³ Available at: <https://enewspaper.latimes.com/infinity/article/share.aspx?guid=fa35c1c8-71fc-4e4e-a4b7-9b24947c2b6d>

III. The Overbreadth Doctrine is Consistent With International Human Rights Laws That Protect the Freedom of the Press.

A. The U.S. State Department Has Criticized Overbroad Statutes, That Can Be Used as Pretexts for Silencing and Arresting Reporters, as Conflicting With Human Rights.

For nearly 50 years, the U.S. Department of State has compiled and published annual “Country Reports on Human Rights Practices” (hereinafter “Reports”) for all United Nation member states, as well as for countries receiving aid from the U.S. Among the stated purposes of these Reports is for nations to “come closer to building a world where respect for human rights is universal.” Antony J. Blinken, Preface to U.S. Dept. of State 2021 Country Reports on Human Rights Practices (2022). The Biden Administration “has put human rights at the center of U.S. domestic and foreign policy.” *Id.* Countries whose Reports reflect poor human rights records risk being denied the opportunity to participate in future programs such as the Summit for Democracy. *Id.*

The Human Rights Reports document the human rights abuses of nearly 200 countries across the world. *Id.* The types of abuses frequently covered in the Reports include: unjust jailing, torture and killing of journalists; detaining, jailing and deporting people for their political beliefs; and unjust and irregular detention and deportation of immigrants. *Id.*

The U.S. Government, in compiling the Reports, annually reiterates its commitment to human rights globally. *Id.* One of the U.S.’s core areas of concern is the freedom of journalistic expression. *Id.* Indeed, in

the Preface to the 2021 Human Rights Reports, Secretary of State Blinken claims that “the stability, security, and health of any country depends on the ability of its people to freely exercise their human rights—to feel safe . . . using their voices and reporting from independent media to hold governments accountable.” *Id.* Unsurprisingly, he Reports criticize many countries for restricting the freedom of the press.

The vein that runs through most of these “freedom of the press” critiques is that laws throughout the world are impermissibly overbroad. Thus, they can be readily manipulated by government officials to silence journalists. The laws’ overbroad language allows governments to threaten and arrest journalists for engaging in activities that have nothing to do with the overbroad statutes’ stated purposes.

For example, the Reports criticize China for its “serious restrictions on free expression and media, including physical attacks on and criminal prosecution of journalists.” State Dep’t, 2021 Country Reports on Human Rights Practice: China (2022). The Reports state that the Chinese government targeted journalists and quarantined them, under overbroad Pandemic response laws, to prevent them from reporting about China’s unconscionably poor response to Covid-19. *Id.* Several of these journalists were convicted under the overly broad law of “picking quarrels and provoking trouble” simply for meeting with foreign officials and reporting on COVID-19 outbreaks. *Id.*

In addition to pointing out how dictatorships such as Russia and China violate human rights through their overbroad and pretextual laws, the Reports also discuss the ways that democracies and and close U.S.

allies do the same. For example, Egypt is a military dictatorship, but nonetheless a close U.S. ally, and receives approximately \$1.3 billion in annual aid from the U.S. Edward Wong and Vivian Yee, *U.S. to Move Forward on Military Aid to Egypt Despite Lawmakers' Concerns*, N.Y. Times (Sept. 14, 2022).⁴⁴ The U.S. criticized the Egyptian government for laws “prohibiting fake news” and “joining a terror group,” and for using those laws to stifle press deemed hostile to the government. State Dep’t, 2021 Country Reports on Human Rights Practice: Egypt (2022). Egyptian authorities arrested, as “terrorists” who spread “fake news,” journalists covering important topics in the public interest, including workers’ protests at chemical plants, and a lack of oxygen in COVID-19 hospital wards. *Id.* These journalists were held in pretrial detention for almost a year. *Id.* The authorities also apprehended the owner of *Business News*, an Egyptian newspaper, on those same charges, for publishing an article discussing the effects of COVID-19 on the economy. *Id.* The Reports state that Egypt used its overbroad anti-terrorist and “fake news” statutes as pretexts to limit freedom of the press, and prevent journalists from covering topics of great public concern.

The Reports also enumerate how European democracies and close allies violate international law when they pass laws that could be used to silence a free press. The 2021 Reports document human rights violations committed by Greece, a long-standing U.S. ally, including “credible reports of . . . serious restrictions on free expression and media, including criminal libel and slander laws.” State Dep’t, 2021

⁴⁴ Available at <https://www.nytimes.com/2022/09/14/us/politics/egypt-military-aid-biden.html>.

Country Reports on Human Rights Practice: Greece (2022). The Reports criticized a statute that allows prosecution for “spreading fake news,” specifically regarding “national defense, the economy, and health.” *Id.* The Reports note that Greek non-governmental organizations were very concerned that the law would be used to punish journalists who report on the Greek government’s harsh policies for turning away migrants and asylum seekers. *Id.*

The Reports also discuss how India, another close U.S. ally and the world’s largest democracy, restricts freedom of the press. The Reports state that “significant human rights issues included . . . restrictions on free expression and media, including violence, threats of violence, or unjustified arrests or prosecutions of journalists.” State Dep’t, 2021 Country Reports on Human Rights Practice: India (2022). The Reports highlight a law, passed in the Jammu and Kashmir Union Territory in 2020, criminalizing journalists’ reporting of “fake and anti-national news.” *Id.* The overbroad law was used to imprison journalists reporting on a wide variety of issues, including seemingly innocuous ones, like criticizing the Kashmiri government’s film-promotion policy. *Id.* Police also used similarly overbroad laws to arrest journalists covering violent protests, ongoing police counterterrorism operations, and the beating of an elderly Muslim man. *Id.*

Beyond these specific instances, the Reports criticize many U.S. allies, simply for having criminal libel laws. *See generally* State Dep’t, 2021 Country Reports on Human Rights Practice: Spain; Italy; Poland; and Singapore.

B. International Human Rights Law Mirrors First Amendment Overbreadth Law.

First Amendment cases invalidating overbroad statutes are consistent with cases decided by multiple international tribunals. Statutes that are broadly worded, and that can be used as pretexts to arrest journalists have been invalidated by human rights courts in Europe and the Americas.

For example, in 2020, the European Court of Human Rights (“European Court”) found that Turkey violated Articles 5 § 1 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) in *Sabuncu v. Turkey*, App. No. 23199/17, ¶ 10, 51 (Oct. 11, 2020).⁴⁵ Journalists and editors, who had reported on government separatists, were convicted for violating a law stating that “anyone who disseminates propaganda in favor of [an illegal] organization [formed with the intent of committing offences] by legitimizing . . . methods such as force, violence or threats shall be liable to a term of imprisonment of 1 to 3 years.” *Id.* at ¶ 97. The European Court held that the overbroad law was used as a pretext to punish the government’s political opponents, and that “the judicial authorities characterized criticism levelled legitimately at the authorities in the context of public debate. . . as assisting terrorist organizations.” *Id.* at ¶ 178.

The European Court similarly found that Denmark violated Article 10 of the Convention in *Jersild v. Denmark*, App. No. 15890/89, ¶ 10, 14 (Sept. 23, 1994).⁴⁶ The Danish government prosecuted journalists, who reported on right-wing youth groups, under a criminal

⁴⁵ Available at <https://hudoc.echr.coe.int/eng?i=001-206212>.

⁴⁶ Available at <https://hudoc.echr.coe.int/eng?i=001-57891>.

law that punishes “any person who, publicly or with the intention of disseminating it to a wide circle, makes a statement. . . threatening, insulting or degrading a group of persons on account of their race.” *Id.* at ¶ 19. The European Court found that the law was overbroad as written and applied. It found that it is “incumbent on [the press] to impart information and ideas of public interest.” *Id.* at ¶ 31. The law infringed on the media’s ability to work in the public interest to “expose, analyze, and explain” the growing number of young racists in Denmark. *Id.* at ¶ 33.

Human rights cases decided in the Americas are similar to the European Court’s overbreadth cases. In *Palacio-Urrutia v. Ecuador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) no. 446 (Nov. 24, 2021) the Inter-American Court of Human Rights found that Ecuador violated its obligations to protect journalists. The Court held that criminal proceedings brought by then-President Rafael Correa against a journalist who published an article titled *NO a las mentiras* (‘no more lies’) were a clear violation of Article 13 of the Inter-American Charter on Human Rights, which guarantees the right to freedom of expression. *Id.* at ¶ 56. The journalist was prosecuted under a law punishing “serious slanderous insult against authority.” *Id.* The article criticized Correa for ordering the murder of five protesters who clashed with his security detail. The Court found that Palacio’s article was a matter of public interest that deserved “special protection.” *Id.* at ¶ 115. The Court stated that freedom of expression is a cornerstone of democratic societies, and a “right that protects dissemination not only of favorable or harmless ideas, but of those that are (“*ingratas*”) disrespectful of the State . . .” *Id.* at ¶ 87. The Court held that the overbroad statute could

have a “chilling effect, inhibiting the dissemination of ideas, opinions, and information.” *Id.* at ¶ 124.

Similarly, in *Kimel v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177 (May 2, 2008), Kimel, a well-known Argentinian journalist, was convicted for writing a book about officials who prosecuted people for murdering five clergymen. The judge who presided over the murder trial alleged that Kimel was guilty of “false imputation of a publicly actionable crime” (“*calumnia*”), punishable by up to three years in prison. *Id.* at ¶ 65. The Inter-American Court found that the statute under which Kimel was convicted was overbroad, because it too easily allowed the government to infringe on the freedom of expression guaranteed by Article 13 of the Inter-American Charter. *Id.* at ¶ 95.

Additionally, in *Herrera Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. (ser. C) No. 107 (July 2, 2004), the Inter-American Court found that Costa Rica violated Article 13 of the American Convention on Human Rights for convicting a journalist for republishing articles from a Belgian newspaper that were critical of Costa Rican diplomats. *Id.* The Court held that the criminal statute of publishing “offenses against honor” was overbroad, and violated “freedom of expression,” because it did not distinguish between matters of public and private interest. *Id.*

These cases demonstrate that overbroad statutes, that infringe the freedom of the press, have been invalidated by international human rights courts, using much of the same reasoning as this Court has used in its own First Amendment cases. Subsection (iv), whose broad language has already been

weaponized against journalists, would very likely be invalidated by international human rights courts.

CONCLUSION

To protect the freedom of the press, and to allow journalists to report freely on one of the most important and contentious political issues of our time, *Amici Curiae* urge this Court to find that 8 U.S.C. § 1324(a)(1)(A)(iv) violates the First Amendment.

Dated: March 8, 2023

Respectfully submitted,

PENNY VENETIS
Counsel of Record
INTERNATIONAL HUMAN
RIGHTS CLINIC
RUTGERS SCHOOL OF LAW
123 Washington Street
Newark, New Jersey 07102
(973) 353-3240
venetis@law.rutgers.edu
Counsel for Amici Curiae