No. _____

In the Supreme Court of the United States

DAVID ALLEN ANDERTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether to "encourage" or "induce" an alien to come to, enter, or reside in the United States in reckless disregard of the alien's "in violation of law" status, the serious felony offense created by 8 U.S.C. § 1324's residual clause [8 U.S.C. § 1324 (a)(1)(A)(iv)], is impermissibly vague because it leaves the choice of prohibited conduct and unbridled enforcement discretion to law enforcement, prosecutors, judges and juries, in contravention of the due process of law and the separation of powers, and because the statute's overbreadth runs afoul of the First Amendment's guarantee that no law shall abridge the freedom of speech.

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CASES

CONSTITUTION AND STATUTES

Petitioner David Allen Anderton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 901 F.3d 278 (Appendix A). The opinion of the district court denying a motion to dismiss is set forth in Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On August 16, 2018, the United States Court of Appeals for the Fifth Circuit issued its decision in this case affirming petitioner's convictions. On September 24, 2018, the timely petition for rehearing was denied. Appendix C. The petition is filed within 90 days after that date and is therefore timely.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Amendment I to the U.S. Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech . . .."

Amendment V to the U.S. Constitution provides, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law;"

8 U.S.C. § 1324(a)(1)(A)(iv) and (v) provide:

> (1)(A) Any person who –
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> * * *
>
> (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) engages in any conspiracy to commit any of the preceding acts [§§(a)(1)(A)(i), (ii), (iii), and (iv)].

8 U.S.C. § 1324(a)(1)(B)(i) provides:

> (B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs-
>
> (1) in the case of a violation of subparagraph (A)(1) 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[.]

STATEMENT

A. Course of Proceedings

Following a jury trial in the Eastern District of Texas, petitioner, the owner and operator of an irrigation and landscape business, was convicted of "conspiracy to encourage and induce an illegal alien to reside in the United States in violation of 8 U.S.C. § 1324 (a)(1)(v)(I) (Count 2); and encouraging an illegal alien to reside in the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) (Counts 3-6)." 901 F.3d at 280; App. A at 1-2. The indictment charged that "for the purpose of commercial advantage and private personal gain, [he] encouraged and induced [illegal aliens] to reside in the United States, knowing and in reckless disregard of the fact that such residence would be in violation of the law" and conspired to do so.[1]

Prior to trial, petitioner moved to dismiss the counts alleging violations of 8 U.S.C. § 1324(a)(1)(A)(iv) and (v) on the ground that the *scienter* standard of recklessness was an inappropriate standard for a serious criminal offense. The motion was denied. Appendix D.

Petitioner was sentenced to concurrent 5-year terms of probation, received a $60,000 fine ($10,000 on each count), and was ordered to pay restitution of $19,073.63. Appendix B. In addition, certain real

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[1] Petitioner was also convicted of false statement in an immigration document, a petition for visa workers, in violation of 18 U.S.C. § 1546(a). That conviction also was affirmed by the court of appeals. App. A at 1, 12-14. 901 F.3d at 280, 285-286.

property was ordered forfeited. 901 F.3d at 282; App. A at 4.

B. The Court of Appeals' Decision

Petitioner argued on appeal that 8 U.S.C. § 1324(a)(1)(A)(iv) is impermissibly vague and its *mens rea* standard, constitutionally deficient. As the court below characterized the issue: "He contends that the terms 'encourage' and 'induce' are so broad as to have no discernable parameters . . . [and that] a *mens rea* of reckless disregard of other persons' illegal presence exacerbates the vagueness . . .." 901 F.3d at 283; App. A at 6. Petitioner therefore urged that his conviction for violations of 8 U.S.C. § 1324(a)(1)(A)(iv) [inducing or encouraging aliens to reside in the U.S. "knowing or in reckless disregard of the fact" that such residency is or will be in violation of the law] and conspiracy to do so were fatally flawed and should be set aside.

The court below rejected petitioner's constitutional challenge to 8 U.S.C. § 1324(a)(1)(A)(iv), stating:

> As to vagueness, Justice Scalia summed up, "[o]ur cases establish that the Government violates the guarantee [of the Due Process clause] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement" [citation omitted]. **This court is concerned that the instant statutes of conviction, Sections 1324 (a)(1)(A)(iv) and (v), are extremely broad and the consequences of felony conviction**

> **are harsh.** Whether these terms are unconstitutionally vague is another matter. Courts must indulge a presumption of constitutionality and carefully examine a statute before finding it unconstitutional. *Skilling v. United States,* 561 U.S. 358, 405-06 . . . (2010).

901 F.3d at 283 (emphasis added); App. A at 7.

Applying a "presumption of constitutionality and carefully examin[ing the] statute[,]" the court found it "sufficiently clear to provide fair notice to the public and guide law enforcement." 901 F.3d at 283; App. A at 7, 8. With respect to "the requirement that a defendant exhibit 'reckless disregard' that an alien's residence in the U.S. will be illegal," the court of appeals said it was "bound to 'follow Congress' intent as to the required level of mental culpability for any particular offense.'" 901 F.3d at 284; App. A at 9.

THE BASIS OF FEDERAL JURISDICTION IN THE COURT OF APPEALS

The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The court of appeals upheld § 1324(a)(1)(A)(iv), despite acknowledged misgivings regarding the breadth of the statute. However, the statute is not salvageable. Like residual clauses this Court has considered previously, this "catch all" subsection reposes in other branches of government a level of discretion at odds with the Constitution's guarantee of due process and its requirement of separation of powers. Moreover, this statute's overbreadth abridges the freedom of speech, as the Ninth Circuit held in *United States v. Sinening-Smith.* No. 15-10614 (decided December 4, 2018).

I. The Court's Decision Conflicts with the Decision of the Court of Appeals for the Ninth Circuit in *United States v. Sinening-Smith.*

In *Sinening-Smith,* the Ninth Circuit reversed convictions for encouraging and inducing an alien to remain in the United States for purpose of financial gain, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iv) and 1324(a)(1)(B)(i) and concluded that Subsection (iv) was unconstitutional.[2] The Ninth Circuit concluded that § 1324(a)(1)(A)(iv)'s breadth could not be reconciled with the Constitution's prohibition against laws

[2] Sineneng-Smith also was convicted of mail fraud, in violation of 18 U.S.C. § 1341. Those convictions were affirmed in a separate unpublished memorandum opinion.

abridging the freedom of speech.[3] The court of appeals' decision in this case conflicts with that result.

"Sinening-Smith operated an immigration consulting firm…[and her clients were foreign workers] unlawfully employed in the home health care industry in the United States, who sought authorization to work and adjustment of status to obtain legal permanent residence (green cards). Sineneng-Smith assisted clients with applying for a 'Labor Certification,' and then for a green card[,]" representing that the certification would achieve permanent resident status when the program had actually expired (slip op. at 6-7). Regarding subsection (iv)'s "felony prosecution of any person who 'encourages or induces an alien to come to, enter, or reside in the United States' if the encourager knew, or recklessly disregarded 'the fact that such coming to, entry, or residence is or will be in violation of law,'" the court of appeals addressed the potential reach of *encouraging* and *inducing*, and concluded:

> The statute thus criminalizes a substantial amount of constitutionally-protected expression. The burden on First Amendment rights is intolerable when compared to the statute's legitimate sweep. Therefore, we hold that Subsection (iv) is unconstitutionally overbroad in violation of the First Amendment.

(slip op. at 6). Acknowledging that "encourage or induce" can encompass both speech and conduct, the

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[3] The court ordered briefing on the due process challenge to the statute on vagueness grounds but did not reach that issue in view of its disposition on First Amendment grounds. *Sineneng-Smith,* slip op. at 42, n.15.

court observed that "neither of these verbs has clear non-speech meanings that would inform and limit the other's meaning." *Id.* at 18-19.

The court described the government's contention that subsection (iv) should be interpreted to require specific action:

> The government contends, in light of these other verbs in the other subsections, that "encourage or induce" "should likewise be interpreted to require specific actions that facilitate an alien's coming to, entering, or residing in the United States illegally. So understood, §1324(a)(1)(A)[(iv)] serves as a **'catch all' provision** that covers actions other than 'bringing,' 'transporting,' etc., that might facilitate illegal immigration."

Id. at 20 (emphasis added). The Court reasoned that although "subsections (i)-(iii) prohibit specific actions, it does not follow that Subsection (iv) covers only actions." *Id.* at 21. The Court concluded that the "Government's interpretation of subsection (iv) rewrites the statute." *Id* at 14. "While we endeavor to 'construe[] [a statute] to avoid serious Constitutional doubts,' we can only do so if the Statute is 'readily susceptible to such a construction.'" "We will not rewrite a law to conform it to Constitutional requirements, for doing so would constitute a serious invasion of the legislative domain . . .." *Id.* at 14, citing *United States v. Stevens*, 559 U.S. 460, 481 (2010).

Like the Fifth Circuit (901 F.3d at 283-84; App. A at 6, 8-9, 10), the Ninth addressed the Third Circuit's decision in *DelRio-Mocci v. Conolly Props. Inc.,* 672

F.3d 241, 249 (3d Cir. 2012). The court of appeals observed that "*DelRio-Mocci* added an act requirement, a substantiality requirement, and a causation requirement to the text of Subsection (iv)[,]" and stated: "we do not think the statute is reasonably susceptible to this interpretation in the absence of statutory text to that effect" (*Sinening*, slip op. at 26). The statute "does not contain an act or assistance requirement." *Id.* at 39. The court noted the statute's silence "about the *mens rea* required for the encourage prong" and the knowing or reckless disregard regarding the alien's "in violation of law" status. *Id.* at 15.[4] The court concluded that "implying a *mens rea* requirement into the statute, … did not cure the statute's impermissible scope." *Id.* at 39.

II. The Fifth Circuit Erred in Upholding the Constitutionality 8 U.S.C. § 1324(a)(1)(A)(iv), a Residual Clause which Leaves the Determination of Offense Conduct to the Executive and Judicial Branches in Derogation of the Separation of Powers and the Due Process of Law.

The Fifth Circuit reached a different conclusion regarding Subsection 1324(a)(1)(A)(iv)'s constitutionality. Despite its concerns about this "extremely broad statute" and its harsh consequences, the court was "strongly inclined to conclude that 'encourage' and 'induce' are sufficiently clear to provide fair notice to the public and guide law enforcement." The court noted: "The district

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[4] The court in *Sineneng-Smith* repeatedly emphasized that residence in the United States is not a crime even if the person's presence is unauthorized. *Id.* at 29, 31, 36, 41.

court instructed that '[e]ncourage means to knowingly instigate, help or advise. Induce means to knowingly bring about, to effect or cause or to influence an act or course of conduct.'" 901 F.3d at 283; App. A at 8. The court erred in ruling that encourage and induce are sufficiently precise to shield the statute from a fatal vagueness challenge. "Help" and "advice" describe human discourse and interaction without meaningful limitation or context, other than a relationship to unauthorized aliens. Induce - to "influence" a "course of conduct" - is without parameters and also specifies no conduct. These open-ended terms invite free-wheeling prosecutorial and law enforcement decision making. Unlike the other provisions of § 1324(a)(1)(A), the statute is not constrained by an *actus reus.* Like the residual clauses condemned as impermissibly broad in *Johnson v. United States,* 576 U.S.___, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 584 U.S.___(2018), § 1324(a)(1)(A)(iv)'s **catch all terminology** suffers the same fatal infirmities.

Speaking for four members of the Court in *Dimaya*, Justice Kagan reiterated that the "void-for-vagueness doctrine" "guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges" (*Dimaya,* slip op. at 4-5). Justice Gorsuch's concurrence echoes this concern: "'A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis'" (*Dimaya* concurrence, slip op. at 9; citation omitted).

The "void for vagueness" doctrine is "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not" (*Dimaya*, slip op. at 5). The concurrence also acknowledged the "doctrine's equal debt to the separation of powers" (*Dimaya* concurrence, slip op. at 8, and 2):

> "[L]egislators may not * * * leav[e] to judges the power to decide '**the various crimes includable in [a] vague phrase**,' *Jordan v. DeGeorge,* 341 U.S. 223, 242 (1951) (Jackson, J., dissenting)." *Id.* at 8 (emphasis added).
>
> "Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of **shaping a vague statute's contours through their enforcement decisions**." *Id.* at 8 (emphasis added).
>
> "Allowing the legislature to hand off" the "hard business" of "law making" "risks substituting" for the Constitution's design "one where legislation is made easy," leaving unelected officials free to pursue their own predilections. *Id.* at 9.

Nor is the statute constrained by an inherently unlawful context – as, for example, is the case with fraud. The universe of possible applications of the terms "induce" and "encourage" is limited only by the enforcement predilections of the agent, prosecutor, judge, or juror.

By its terms, the statute embraces any conduct which would "induce or encourage" an undocumented alien to reside in the United States. The universe of

possible conduct which would "induce" or "encourage" an undocumented foreigner to reside in the U.S. is seemingly unlimited. Consider a few of the ordinary incentives which a community affords, in addition to opportunities for work and for shelter: education, participation in religious activities, charitable opportunities, recreation, medical and dental care, emergency care, entertainment, access to legal assistance, and so forth. The court of appeals' opinion necessarily approves filling-in-the-blanks with the proscribed "induced or encouraged" ***conduct***, but this runs afoul of the constitutional prohibition against vague criminal statutes and abridges the separation of powers which assigns legislative power to the Congress.

Section 1324(a)(1)(A)(iv) does not describe, even loosely, **the conduct** proscribed. It describes no conduct. "A vague law impermissibly delegates basic policy matters to policemen, judges, ***and juries*** for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972) (emphasis added). "An unconstitutionally vague law invites arbitrary enforcement in this sense if it 'leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Beckles v. United States,* 137 S. Ct. 886, 894 (2017), citing *Giaccio v. Pennsylvania,* 382 U.S. 399, 402-403 (1966).

"[T]he Due Process Clause prohibits the Government []from 'taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of ***the conduct*** it

punishes, or so standardless that it invites arbitrary enforcement[,]'" *Beckles*, 137 S. Ct. at 892 (emphasis added), citing *Johnson*, 135 S. Ct. at 2556, citing *Kolender v. Lawson,* 461 U.S. 352, 357-58 (1983).

The court of appeals also erred in treating the due process claim of impermissible vagueness as an "as applied" claim. 901 F.3d at 282-83; App. A at 6. The constitutionality of the statute cannot be sustained by the "as applied" analysis in these circumstances. As this Court observed in *City of Chicago v. Morales,* 527 U.S. 41, 52 (1999): "[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson,* 461 U.S. 352, 358…(1983)."

Justice Alito's dissent from the holding in *Johnson*, 135 S. Ct. at 2580 (which found a sentencing enhancement to be impermissibly vague) stated one view of the law governing vagueness challenges:

> Thus, in a due process vagueness case, **we will hold that a law is facially invalid 'only if the enactment is impermissibly vague in *all* of its applications.'** *Hoffman Estates* [*v. Flipside, Hoffman Estates*], 455 U.S. [489,] at 494-495…[(1982)] (emphasis added); see also *Chapman* [*v. United States*], 500 U.S. [453,] at 467… [(1991)]. (emphasis added)

However, the majority in *Johnson* rejected the view that an "as applied" analysis was controlling [135 S. Ct. at 2561]:

> Resisting the force of these decisions, the dissent insists that 'a statute is void for vagueness only if it is vague in all its applications.'…It claims that the prohibition of unjust or unreasonable rates in [*United States v.*] *L. Cohen Grocery* [*Co.*, 255 U.S. 81 (1921)] was 'vague in all applications,' even though one can easily envision rates so high that they are unreasonable by any measure.…It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all, but a tautology. If we hold a statute to be vague, it is vague in all its applications (and never mind the reality). If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery,* why should the existence of some clearly risky crimes save the residual clause?

Clarification of the appropriate use of "as applied" constitutional analysis also is squarely presented here.

As in *Dimaya,* one vague element is compounded by another. Petitioner asserted below "that making such conduct a felony offense under a ***mens rea*** **of reckless disregard of other persons' illegal presence exacerbates the vagueness**, particularly because various statutes and regulations strictly limit an employer's ability to question the immigration status of new or existing hires." 901 F.3d at 283: App. at 6 (emphasis added).

The statute's infirmities are indeed compounded by insufficient *mens rea* standards. **No scienter** is required with respect to the gravamen of the offense, to "induce" and to "encourage"; and a standard of

recklessness applies to the alleged offender's knowledge of the alien's status. The court of appeals dismissed the scienter argument, on the ground that recklessness is a standard often used in criminal statutes. 901 F.3d at 284; App. A at 9. However, the courts reject *de minimus mens rea* standards for statutes imposing heavy penalties. To apply a scienter standard of recklessness in such circumstances offends the " 'general rule' [] that a guilty mind is 'a necessary element in the indictment and proof of every crime.'" *Elonis v. United States,* 575 U.S.__, 135 S. Ct. 2001, 2009 (2015), citing *United States v. Balint,* 258 U.S. 250, 251 (1922). See, also, *Posters 'N' Things, Ltd. v. United States,* 511 U.S. 513 (1994) (even with respect to items objectively discernable as drug paraphernalia, a culpable state of mind is required). And see *Ratzlaf v. United States,* 510 U.S. 135 (1994).

The constitutional requirement of a clear and culpable state of mind is particularly compelling in the case of purported violations arising in the context of ordinary and legal human endeavors – here, the hiring of people to work at a business engaged in lawful commerce. Recklessness in that context, particularly given the conflicting obligations an employer faces both to not hire an unauthorized worker and to at the same time not discriminate in that hiring (901 F.3d at 283: App. A at 6), is not a tenable scienter requirement for a violation of §1324(a)(i)(A)(iv).

An inadequate *mens rea* requirement renders the statute's reach indeterminate and thereby violates due process. *E.g., Johnson,* 135 S. Ct. at 2556-57. As in *Dimaya,* the statute here layers uncertain or speculative terms – "encourage or induce" • "in

reckless disregard" • "residence is or will be in violation of law" - thus compounding vagueness. *Dimaya*, slip op. at 8; concurrence, at 8, 16-17.

III. This Conflict Between the Circuits Creates a Disparity Between Federal Jurisdictions in Application of the Law, an Issue Which Arises in the Context of Immigration Law Enforcement, a Matter of National Importance.

These conflicting rulings on the constitutionality of §1324(a)(1)(A)(iv), one on due process grounds and the other to secure the liberty of freedom of speech, create an untenable situation. The resulting conflict means that this law may be applied and enforced in certain federal jurisdictions in the United States, but not in others.

The conflict arises in the context of "a hotly-debated issue in our society" [*Sinening,* slip op. at 40], a context in which the transfer of Congressional power to prosecutors and juries is particularly dangerous. As the *Sineneng* court observed - in particular reference to statutory overbreadth in the First Amendment context but also applicable to enforcement decisions which compromise due process: "We think that they are part of every-day discussions in this country where citizens live side-by-side with non-citizens." *Id.* at 38. This is an area of law for which uncertainty regarding a statute's application and insufficiently constrained discretion regarding enforcement decisions present serious dangers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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