No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EVELYN SINENENG-SMITH

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

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
ZACHARY D. TRIPP
Assistants to the Solicitor General
ANDREW W. LAING
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the federal criminal prohibition against encouraging or inducing illegal 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.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

United States v. *Sineneng-Smith*, No. 10-cr-414 (Dec. 17, 2015)

United States Court of Appeals (9th Cir.):

United States v. *Sineneng-Smith*, No. 15-10614 (Dec. 4, 2018)

TABLE OF CONTENTS

Table of Contents—Continued Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes: Page

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

EVELYN SINENENG-SMITH

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 910 F.3d 461. The opinion of the district court (App., *infra*, 40a-67a) is not published in the Federal Supplement but is available at 2013 WL 6776188.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2018. A petition for rehearing was denied on February 12, 2019 (App., *infra*, 77a). On April 30, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 12, 2019. On May 31, 2019, Justice Kagan further extended the time to and including July 12, 2019. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8 U.S.C. 1324(a)(1) provides in pertinent part:

> (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 * * * ;
>
> (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 * * * such alien within the United States * * * 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 * * * such alien * * * ;
>
> (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;
>
> (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)(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.
>
> * * * * *

Other pertinent constitutional and statutory provisions are reprinted in the appendix to this petition. App., *infra*, 111a-117a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, respondent was convicted on two counts of encouraging or inducing illegal immigration for financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), and two counts of mail fraud, in violation of 18 U.S.C. 1341. App., *infra*, 79a. The district court sentenced respondent to 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at 81a, 83a. The court of appeals reversed the Section 1324(a) convictions, vacated the sentence, and remanded for resentencing. *Id.* at 1a-39a.

1. From 2001 to 2008, respondent profited from tricking aliens who were unlawfully present in the United States into believing that they could obtain permanent-resident status if they paid her to file paperwork on their behalf. App., *infra*, 3a-4a. In particular,

her immigration-consulting business touted the supposed benefits of a discontinued Department of Labor certification program to aliens who, as she knew, had entered the United States too recently to be eligible for such certification. See Gov't C.A. Br. 4-7. She entered into retainer agreements with her clients for the ostensible purpose of assisting them to obtain permanent residence through the program; charged each client $5900 to file a futile application with the Department of Labor; and charged them an additional $900 to file a futile application with United States Citizenship and Immigration Services. App., *infra*, 42a. In doing so, she not only took the aliens' money under false pretenses, but also induced them to remain in the United States. *Id.* at 3a-4a; see *id.* at 4a (noting testimony from two of respondent's clients that they would have left the United States but for respondent's fraud).

A federal grand jury indicted respondent on charges that included three counts of encouraging or inducing illegal immigration for financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), as well as three counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). App., *infra*, 96a-101a. Section 1324(a)(1)(A)(iv) makes it unlawful to "encourage[] or induce[] 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). A violation of Section 1324(a)(1)(A)(iv) by itself carries a maximum term of imprisonment for five years. 8 U.S.C. 1324(a)(1)(B)(ii). Section 1324(a)(1)(B)(i) provides, however, that any person who "for the purpose of commercial advantage or private financial gain" violates Section

1324(a)(1)(A)(iv) shall be imprisoned for up to ten years. 8 U.S.C. 1324(a)(1)(B)(i).

Respondent pleaded guilty to the tax counts, and a jury found her guilty on the mail-fraud and Section 1324 counts. See Gov't C.A. Br. 4; App., *infra*, 4a. Respondent filed a motion for a judgment of acquittal arguing, among other things, that (1) the evidence was insufficient to support the verdicts; and (2) Section 1324 was unconstitutional as applied to her, under the Free Speech and Petition Clauses of the First Amendment. App., *infra*, 4a, 65a. Specifically, she argued that she had a constitutional right to file applications for immigration relief on behalf of her clients, for financial gain, notwithstanding that she knew the applications were frivolous. See D. Ct. Doc. 214, at 20-23 (Oct. 7, 2013).

The district court deemed the evidence insufficient on one of the Section 1324 counts and one of the mail-fraud counts, but otherwise denied the motion for an acquittal. App., *infra*, 4a-5a; 40a-67a. In denying further relief, the court found the evidence sufficient to prove that respondent had "held out her services" to two aliens "as a vehicle to obtain a legal work permit and green card," fraudulently "suggesting to them that the applications she would make on their behalf would allow them to eventually obtain legal permanent residency in the United States." *Id.* at 48a-49a. And, incorporating a prior order addressing a similar First Amendment claim, the court explained that respondent was "not being prosecuted for making applications" to government agencies, but instead for entering into retainer agreements with illegal aliens after fraudulently representing to them that her efforts could lead to legal permanent resident status. *Id.* at 75a; see *id.* at 65a.

2. Respondent appealed. Several months after oral argument, the court of appeals *sua sponte* directed the parties to submit additional briefing to address three issues, none of which respondent herself had raised, pertaining to the Section 1324 counts. C.A. Doc. 46, at 1-2 (Sept. 18, 2017). In particular, the court ordered the parties to address (1) whether "the statute of conviction is overbroad or likely overbroad under the First Amendment" and, if so, "whether any permissible limiting construction would cure the First Amendment problem"; (2) whether the statute of conviction "is void for vagueness or likely void for vagueness"; and (3) whether it "contains an implicit *mens rea* element which the Court should enunciate." *Ibid.*

Following the additional briefing, and further oral argument, the court of appeals relied on a First Amendment overbreadth theory to facially invalidate Section 1324(a)(1)(A)(iv) and set aside respondent's Section 1324 convictions. App., *infra*, 1a-39a. The court focused on Section 1324(a)(1)(A)(iv) alone, deeming the financial-gain element in Section 1324(a)(1)(B)(i) "irrelevant" to the validity of respondent's convictions. *Id.* at 10a n.5. The court took the view that Section 1324(a)(1)(A)(iv) defines "the predicate criminal act" without which respondent "could not have been convicted" and that "the chilling effect of the 'encourage or induce' statute extends to anyone who engages in behavior covered by it, whether for financial gain or not." *Ibid.*

On the merits, the court of appeals refused to interpret Section 1324(a)(1)(A)(iv) in accord with the Third Circuit, which had construed that provision to require "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." App., *infra*, 22a (quoting *DelRio-Mocci* v. *Connolly Props. Inc.*, 672 F.3d 241, 249 (3d Cir.), cert. denied, 568 U.S. 821 (2012)) (emphasis omitted). The court instead maintained that the statute must be read as "susceptible to regular application to constitutionally protected speech," such as a grandmother urging a grandson to overstay a visa, a political speech encouraging civil disobedience of the immigration laws, or an attorney's advice that a client remain in the country while contesting removal. *Id.* at 34a-38a.

3. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 77a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred in reaching out to facially invalidate an important federal criminal law. The prohibitions of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i) ensure appropriate punishment for defendants who seek enrichment by incentivizing or procuring violations of the immigration laws by aliens who illegally enter or remain in the United States. In concluding that nobody can be prosecuted under those provisions, the Ninth Circuit invented an argument on respondent's behalf; ignored an element of the crime for which respondent was convicted; and unnecessarily invited constitutional difficulties by giving unwarranted breadth to the remaining elements. Congress can constitutionally proscribe moneymaking schemes, like respondent's, that are premised on causing or increasing unlawful entry or residence by particular aliens. The provisions here are primarily directed at conduct, not speech. To the extent they even reach speech, they do so only incidentally by prohibiting communications that foster unlawful activ-

ity by particular individuals, which have long been understood to be outside the scope of the First Amendment. Accordingly, even where a profit motive is not required for conviction, the statute is not substantially overbroad in relation to its plainly legitimate sweep. Particularly in light of the circuit conflict that the decision below creates, this Court should grant certiorari and reverse.

A. The Ninth Circuit Wrongly Invalidated An Important Federal Statute On Its Face

The Ninth Circuit did not identify any First Amendment principle that would shield respondent's own conduct—duping illegally present aliens into remaining in the country indefinitely so that they could pay her to file frivolous visa applications—from criminal prosecution. It 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 the statutes of conviction, 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), substantially overbroad. But overbreadth can invalidate a criminal law only if "'a substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quoting *New York* v. *Ferber*, 458 U.S. 747, 769-771 (1982)). The Ninth Circuit's unwarranted invocation of that doctrine here not only failed to focus on the law as a whole, but invalidated it based on hypotheticals that it does not encompass.

1. Congress's ban on encouraging or inducing unlawful immigration activity for financial gain is facially constitutional

Respondent was convicted of violating provisions that criminalize encouraging or inducing immigration violations for profit. See 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i). Those provisions define a crime that is in the nature of a ban on solicitation or aiding and abetting illegal activity. The crime primarily prohibits conduct, not speech. And to the extent it reaches speech, it does so incidentally and only with respect to the type of illegality-enhancing communications that have long been recognized as unprotected. It does not criminalize pure advocacy, and it is not an overbroad restriction of speech.

a. The crime for which respondent was convicted is a prohibition on facilitating or soliciting an alien's unlawful entry or residence for financial gain

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." *United States* v. *Williams*, 553 U.S. 285, 293 (2008). The statute here is a ban on facilitating or soliciting certain unlawful immigration activities for financial gain. As such, its scope consists primarily, if not exclusively, of conduct or unprotected speech.

i. Respondent here was charged with the crime 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 commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i). See App., *infra*, 96a-97a (superseding indictment); C.A. S.E.R. 24-25

(jury instructions). To convict a defendant of that crime, the government must prove that she (1) knowingly (2) encouraged or induced (3) a particular alien (4) to enter or reside in the United States, (5) where such entry or residence is or will be unlawful, (6) knowing or in reckless disregard of that unlawfulness, (7) with a specific intent to profit. The crime is accordingly limited to certain acts of procuring or facilitating particular civil or criminal violations of the immigration laws for profit.

The wording of the actus reus—"induc[ing] or encourag[ing]" an alien's unlawful entry or remaining—mirrors the language of accomplice liability and solicitation. For example, the general federal ban on acting as an accomplice to a crime reaches, among others, a person who "induces" an offense against the United States. 18 U.S.C. 2 ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). It also reaches a person who "abets" a federal crime, *ibid.*, the standard definition of which includes "encourag[ing]" the crime's commission. See *Black's Law Dictionary* 4 (10th ed. 2014) (defining "abet" as "[t]o aid, *encourage*, or assist (someone), esp. in the commission of a crime") (emphasis added); *Webster's Third New International Dictionary* 3 (2002) (defining "abet" as to "incite, *encourage*, instigate, or countenance," as in "the commission of a crime") (emphasis added); *Webster's New International Dictionary* 4 (2d ed. 1958) (same).

The use of the terms "encourage" and "induce" in reference to contributory liability is not unique to federal law. Those words likewise appear in many state statutes defining solicitation, aiding-and-abetting, and other kinds of contributory liability. *E.g.*, Ark. Code

Ann. § 5-2-403(a)(1) and (b)(1) (2013) ("[s]olicits, advises, encourages, or coerces"); Ga. Code Ann. § 16-2-20(b)(4) (2011) ("advises, encourages, hires, counsels, or procures"); Nev. Rev. Stat. Ann. § 195.020 (LexisNexis 2012) ("directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony"); Tex. Penal Code Ann. § 7.02(a)(2) (West 2011) ("solicits, encourages, directs, aids, or attempts to aid"); Utah Code Ann. § 76-2-202 (LexisNexis 2017) ("solicits, requests, commands, encourages, or intentionally aids"); Wash. Rev. Code Ann. § 9A.08.020(3)(a)(i) (West 2015) ("[s]olicits, commands, encourages, or requests"); Wyo. Stat. Ann. § 6-1-201(a) (2017) ("counsels, encourages, hires, commands, or procures").

Although no mens rea language modifies the phrase "encourages or induces," 8 U.S.C. 1324(a)(1)(A)(iv), those words are not naturally read to encompass accidental conduct. Courts have held that proof of general criminal intent is required for the offenses in Section 1324(a)(1)(A). See *United States* v. *He*, 245 F.3d 954, 957-959 (7th Cir.) (affirming instruction that encouraging or inducing must be done "knowingly"), cert. denied, 534 U.S. 966 (2001); *United States* v. *Nguyen*, 73 F.3d 887, 890-893 (9th Cir. 1995) (requiring criminal intent for "bringing" an alien to the United States); *United States* v. *Zayas-Morales*, 685 F.2d 1272, 1276 (11th Cir. 1982) ("general criminal intent"); cf. *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015) ("Although there are exceptions," the Court "generally 'interpret[s] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.'") (citation omitted). A knowledge requirement, consistent with the standard mens rea requirement for accomplice liability, see *Rosemond* v. *United*

States, 572 U.S. 65, 76-77 (2014), accordingly applies to Section 1324(a)(1)(A)(iv).[*]

The crime has other mens rea elements as well. First, the alien's entry or residence must not only be unlawful, but the defendant must have knowledge or reckless disregard of that specific fact. 8 U.S.C. 1324(a)(1)(A)(iv). And the aggravated offense at issue here requires proof of a specific intent to profit. See 8 U.S.C. 1324(a)(1)(B)(i).

ii. Section 1324(a)(1)(A)(iv)'s "plainly legitimate sweep," *Washington State Grange*, 552 U.S. at 449 n.6 (citation omitted), encompasses a variety of non-speech activity that stimulates illegal immigration for financial gain. As the Ninth Circuit itself acknowledged, "[i]t is indisputable that one can encourage or induce with words, or deeds, or both." App., *infra*, 15a.

Section 1324(a)(1)(A)(iv) fills an important gap in the federal code, which otherwise contains no general criminal prohibition against facilitating an alien's continued unauthorized presence in the United States. Unlawful entry can be a crime, see 8 U.S.C. 1325(a), 1326(a), and aiding and abetting such conduct is therefore covered by the generalized prohibition against assisting in criminal "offense[s]," 18 U.S.C. 2. "As a general rule," however, "it is not a crime for a removable alien to remain

---

[*] The jury instructions on the offense elements in this particular case did not provide a specific mens rea modifying the phrase "encourage[d] or induce[d]." C.A. S.E.R. 24. 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 other defendants. See *Williams*, 553 U.S. at 293 (noting requirement of correct construction of statute challenged on overbreadth grounds); see also App., *infra*, 12a-14a (considering construction of mens rea element without regard to jury instructions).

present in the United States." *Arizona* v. *United States*, 567 U.S. 387, 407 (2012); see 8 U.S.C. 1182(a)(6)(A)(i), 1227(a)(1)(B). Aiding such continued presence is therefore not covered by the general aiding-and-abetting statute. More limited prohibitions on transportation or harboring, see 8 U.S.C. 1324(a)(1)(A)(i)-(iii), similarly do not encompass various forms of active assistance (like paying off smugglers) that a defendant might provide.

Section 1324(a)(1)(A)(iv)'s applications to conduct, rather than speech, present no First Amendment concerns. Even where applying Section 1324(a)(1)(A)(iv) to particular forms of conduct might incidentally implicate speech, "it has never been deemed an abridgment of freedom of speech or press 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).

iii. To the extent Section 1324(a)(1)(A)(iv) applies to speech, it primarily, if not exclusively, applies to speech that is "undeserving of First Amendment protection," *Williams*, 553 U.S. at 298, because it procures or facilitates unlawful activity that is itself unprotected, namely, an alien unlawfully entering or remaining in the United States. "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." *Ibid.* The constitutionality of such laws is well-established. See *ibid.*; *United States* v. *Stevens*, 559 U.S. 460, 468-469 (2010) (including "speech integral to criminal conduct" as a class of speech "'which ha[s] never been thought to raise any Constitutional problem'") (citation omitted);

International Bhd. of Elec. Workers v. *NLRB*, 341 U.S. 694, 705 (1951) (concluding that it "carries no unconstitutional abridgment of free speech" for Congress to prohibit "inducement or encouragement" of an unlawful secondary boycott); *Giboney,* 336 U.S. at 498 ("[T]he constitutional freedom for speech and press" does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.").

A prohibition of soliciting or abetting such illegal conduct, including through speech, is constitutional irrespective of whether the law violated by the solicited or abetted conduct is criminal or civil. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (finding "no difference in principle" between civil and criminal violations in the context of a prohibition against aiding unlawful employment discrimination). Laws against incentivizing or procuring civil immigration violations have a particularly long pedigree. This Court recognized more than a century ago, albeit without discussing the First Amendment, that Congress's power to define the immigration laws goes hand-in-hand with its ability to prohibit a person from encouraging another to violate those laws. In *Lees* v. *United States*, 150 U.S. 476 (1893), two men were convicted under a predecessor to Section 1324(a)(1)(A), which made it unlawful to "assist[], encourag[e] or solicit[] the migration or importation" of a contract laborer in violation of the civil immigration laws. Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333. This Court rejected the argument that Congress lacked the power to define such a crime, explaining that because Congress has "the power to exclude" the contract laborers at issue, 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." *Lees*, 150 U.S. at 480. That is what the modern Section 1324(a)(1)(A)(iv) does.

b. The crime at issue does not cover a substantial amount of unprotected speech

This Court has "insisted" that, "before applying the 'strong medicine' of overbreadth invalidation," a "law's application to protected speech be 'substantial,'" both in "an absolute sense" and "relative to the scope of the law's plainly legitimate applications." *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003) (citation omitted). The crime at issue here falls well short of that standard. The Ninth Circuit concluded that respondent was convicted of a crime with an overbroad definition based on a concern that the definition encompasses "abstract advocacy." App., *infra*, 36a. But any applications of the statute to abstract advocacy are insignificant as both an absolute and a relative matter.

The crime's financial-gain element alone eliminates most, if not all, of the Ninth Circuit's concerns. That element requires proof that the defendant committed the crime "for the purpose of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i), which is not a normal feature of "abstract advocacy." The element would exclude, for example, the Ninth Circuit's hypotheticals about "the simple words—spoken to a son, a wife, a parent, a friend, a neighbor, a coworker, a student, a client—'I encourage you to stay here,'" as well as a "speech addressed to a gathered crowd, or directed at undocumented individuals on social media, in which the speaker said something along the lines of 'I encourage all you folks out there without legal status to

stay in the U.S.!'" App., *infra*, 3a, 37a (footnotes omitted); see also *id.* at 35a (similar hypothetical of a grandmother telling her grandson whose visa has expired "I encourage you to stay"). None of the speech in those examples is for the purpose of private financial gain.

In any event, even without the financial-gain element, Section 1324(a)(1)(A)(iv) would not apply to a substantial amount of protected speech. See *United States* v. *Tracy*, 456 Fed. Appx. 267, 272 (4th Cir. 2011) (per curiam) (upholding Section 1324(a)(1)(A)(iv) under the rule that speech that "constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment") (citation omitted), cert. denied, 566 U.S. 980 (2012). Solicitation and complicity laws like Section 1324(a)(1)(A)(iv) are ordinarily understood not to prohibit abstract advocacy of illegality, even when the language of those prohibitions might in other contexts encompass such advocacy. For example, in *Williams*, this Court interpreted a federal law that made it unlawful to "advertise[], promote[], present[], distribute[], or solicit[]" child pornography. 18 U.S.C. 2252A(a)(3)(B). Although the verbs "solicit[]" and "promote[]" can be understood capaciously, the Court concluded that they did not "prohibit advocacy of child pornography, but only offers to provide or requests to obtain it." *Williams*, 553 U.S. at 299. 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.

Section 1324(a)(1)(A)(iv) contains no indication that Congress intended to radically break from that mold and to prohibit mere advocacy, notwithstanding the constitutional problems that such a prohibition would invite. See *Skilling* v. *United States*, 561 U.S. 358, 403

(2010) ("[O]ur case law's current * * * requires us, if we can, to construe, not condemn, Congress's enactments."). The operative language—"encourages or induces"—uses the same verbs that this Court has itself used to describe prohibitions that are constitutional. See *Williams*, 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*, 341 U.S. at 705 ("The prohibition of *inducement or encouragement* of secondary pressure * * * carries no unconstitutional abridgment of free speech.") (emphasis added). And the statutory requirement that any inducement or encouragement be specific to "*an* alien," with penalties "for *each* alien in respect to whom * * * a violation occurs," 8 U.S.C. 1324(a)(1)(A)(iv) and (B) (emphases added), reinforces that an abstract statement of policy views will not suffice for conviction. See, *e.g.*, App., *infra*, 97a (indictment identifying specific individual aliens who respondent encouraged or induced to unlawfully remain in the United States).

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 grandmother thus does not violate Section 1324(a)(1)(A)(iv) merely by saying to her grandson whose visa has expired, "I encourage you to stay." App., *infra*, 35a. Similarly, just as a community organizer does not aid, abet, or solicit drug crimes merely by making a speech supporting changes in the drug laws and saying, "I encourage all you folks out there to smoke marijuana," a community organizer does not violate Section 1324(a)(1) merely by making

"[a] speech addressed to a gathered crowd" or posts on social media supporting changes in immigration law and saying, "'I encourage all you folks out there without legal status to stay in the U.S.,'" *id.* at 37a. And 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 similarly 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. Cf. 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 is typically excluded for the additional reason that it often would not involve "residence * * * in violation of law," 8 U.S.C. 1324(a)(1)(A)(iv), for an alien to remain in the United States while a lawyer or other professional is engaged in bona fide efforts to obtain relief. For example, if an alien has been put into removal proceedings but 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," App., *infra*, 38a, because the government has just allowed the client to live here in the meantime by releasing her on bond. 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).

2. The Ninth Circuit erred in viewing this case to involve a substantially overbroad restriction of protected speech

The Ninth Circuit's overbreadth analysis is mistaken in multiple ways. It misidentifies the law at issue, and it misinterprets the scope of the law it identifies. Each error alone would warrant reversal.

a. The Ninth Circuit did not suggest that the crime at issue here is overbroad if it requires proof of a financial motivation. It instead treated the financial-gain requirement as "irrelevant" to the overbreadth analysis. App., *infra*, 10a n.5. It had no license to do so.

Although Section 1324(a)(1)(A)(iv) itself defines a complete criminal offense, the statutory maximum term of imprisonment increases from five years to ten years if that conduct is committed with a purpose of financial gain. See 8 U.S.C. 1324(a)(1)(B)(i) and (ii). The grand jury was accordingly required to charge that fact in the indictment, and the petit jury was required to find that the government had proved it beyond a reasonable doubt. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). The Ninth Circuit's blinkered focus on Section 1324(a)(1)(A)(iv) as "the predicate criminal act" without which respondent "could not have been convicted," App., *infra*, 10a n.5, thus fails to fully account for the actual nature of the conviction.

The Ninth Circuit's approach represents an unwarranted expansion of the overbreadth doctrine. This Court has adopted a restrained approach to the overbreadth doctrine, in order to "vigorously enforce[]" the limits on the overbreadth doctrine's exception to third party standing and "maintain an appropriate balance" between "competing social costs." *Williams*, 553 U.S. at 292; see *Los Angeles Police Dep't*, 528 U.S. at 39-40.

Although striking down 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 effects" of "invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal." *Williams*, 553 U.S. at 292. The Ninth Circuit's judicial pruning of the jury's findings here improperly gives the former consideration controlling weight, and magnifies the social costs of the overbreadth doctrine, by invalidating a more specific offense whose applications are always or virtually always constitutional, solely because of constitutional concerns about a more generic offense that does not contain all of those same limitations.

Under the court of appeals' logic, those increased social costs would be incurred because of a happenstance of legislative drafting. The court below reasoned that the financial-gain requirement was irrelevant because it was an "enhancement" on a "base offense." App., *infra*, 10a n.5. But although Congress structured this particular statute as imposing heightened penalties upon a person who "violates subparagraph (A)" for "commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i), Congress just as easily could have defined the same two crimes by enacting two entirely distinct subparagraphs that each set forth complete and self-contained criminal offenses. For example, Congress could have enacted a provision making it (A) a crime punishable by up to five years of imprisonment to encourage or induce unlawful entry or residence; and (B) a crime punishable by up to ten years of imprisonment to encourage or induce unlawful entry or residence for

financial gain. That version of the statute would be substantively identical to the existing one, and would plainly foreclose the "enhancement" rationale that the court of appeals employed to expand the overbreadth doctrine. A court should not take the extraordinary step of facially invalidating a federal criminal statute solely because Congress decided to use a cross reference rather than repeat itself.

The Ninth Circuit identified no support in this Court's decisions for deeming a required component of the offense of conviction to be irrelevant to the overbreadth analysis. For example, in *United States* v. *Alvarez*, 567 U.S. 709 (2012), this Court reversed a conviction for lying about winning the Congressional Medal of Honor. See *id.* at 713-715 (plurality opinion). The relevant statute, the Stolen Valor Act of 2005, 18 U.S.C. 704 (2006), had a base offense covering false statements about winning a variety of federal medals, and aggravated penalties for lies about the Medal of Honor specifically. See 18 U.S.C. 704(b) and (c) (2006). But rather than ignoring the Medal-of-Honor element and looking solely at the more general base offense, the Court's analysis recognized that the relevant offense was lying about the Medal of Honor, and ultimately concluded that the statute was unconstitutional notwithstanding that "[t]he Government's interest in protecting the integrity of the Medal of Honor is beyond question." *Alvarez*, 567 U.S. at 725 (plurality opinion); see also *id.* at 737-739 (Breyer, J., concurring in the judgment) (discussing the Medal of Honor in First Amendment balancing).

The Ninth Circuit's erroneous approach to overbreadth here is also particularly significant because the financial-gain requirement itself minimizes any overbreadth relative to the statute's "plainly legitimate

sweep." *Washington State Grange*, 552 U.S. at 449 n.6 (citation omitted). As discussed, that requirement alone excludes a broad array of protected speech, including the court of appeals' hypotheticals involving speech at a political rally or a grandmother's loving pleas to her grandson. App., *infra*, 35a, 38a-40a. And it ensures that any application to false speech is limited to speech that qualifies as unprotected "fraud." *Stevens*, 559 U.S. at 468; see *Alvarez*, 567 U.S. at 723 (plurality opinion) (emphasizing that the Stolen Valor Act was not limited to lies "made for the purpose of material gain").

b. Even assuming that an overbreadth challenge to respondent's conviction could omit the financial-gain finding underlying that conviction, the Ninth Circuit erred in insisting that the statute must be read to cover abstract advocacy.

The Ninth Circuit's reasons for refusing to construe Section 1324(a)(1)(A)(iv) as a relatively narrow ban on soliciting or facilitating illegal activity are unsound. Its view that "encourage" in this context necessarily refers to protected speech, App., *infra*, 19a, cannot be squared with this Court's own use of that term to describe unprotected speech, *e.g.*, *Cox*, 379 U.S. at 563, the term's appearance in the standard definition of "abet," see *Black's Law Dictionary* 4, or the term's common usage in state complicity statutes, see p. 10, *supra* (collecting examples). Section 1324(a)(1)(A)(iv)'s use of *fewer* verbs than normally associated with a solicitation or aiding-and-abetting statute, see App., *infra*, 28a n.9, 31a-33a, should if anything mean that it is no broader than such provisions.

Contrary to the Ninth Circuit's supposition (App., *infra*, 17a-18a), construing Section 1324(a)(1)(A)(iv) in

accord with the normal contextual usage of "encouraging or inducing" would not render the provision superfluous. As discussed above, see p. 12, *supra*, Section 1324(a)(1)(A)(iv) is the only provision that criminalizes complicity in certain conduct that violates the civil immigration laws. Section 1324(a)(1)(A)'s other aiding-and-abetting provision, 8 U.S.C. 1324(a)(1)(A)(v)(II), covers only facilitation of violations of Section 1324(a)(1)(A) itself, not facilitation of an alien's primary conduct in violation of the immigration laws. Respondent's own conduct, for example, only violates Section 1324(a)(1)(A)(iv). That latter provision is also not superfluous for the further reason that federal law contains no general prohibition on soliciting illegal activity.

To the extent that Section 1324(a)(1)(A)(iv) might differ in certain respects from other facilitation or solicitation statutes, see App., *infra*, 32a-33a, any such differences do not compel the conclusion that it sweeps in substantial amounts of protected speech. This Court has never prescribed a one-size-fits-all test for determining when speech is "integral to criminal conduct," *Stevens*, 559 U.S. at 468, and thus unprotected. And a common thread of prohibitions "against conspiracy, incitement, and solicitation," whose constitutionality has never been doubted, is that they proscribe behavior "intended to induce or commence illegal activities." *Williams*, 553 U.S. at 298. A statute that *directly* prohibits inducement of an unlawful act, or encouragement that incentivizes (and thus increases the likelihood of) an unlawful act, is not facially overbroad. *E.g.*, *International Bhd. of Elec. Workers*, 341 U.S. at 705.

At a minimum, the Ninth Circuit's reading of Section 1324(a)(1)(A)(iv) violated the cardinal principle that an ambiguous statute should be construed to avoid serious

constitutional doubt. *E.g.*, *Skilling*, 561 U.S. at 403. This Court has recognized 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,' we are obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted); see, *e.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018); *United States ex rel. Attorney Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407-408 (1909). Caution is particularly warranted in overbreadth cases, which have the "tendency * * * to summon forth an endless stream of fanciful hypotheticals," *Williams*, 553 U.S. at 301, as the Ninth Circuit's opinion here illustrates.

B. The Question Presented Warrants This Court's Review

This Court's review is necessary because the Ninth Circuit has invalidated an Act of Congress on its face. This Court regularly grants certiorari, with or without a circuit conflict, when "a Federal Court of Appeals has held a federal statute unconstitutional." *United States* v. *Kebodeaux*, 570 U.S. 387, 391 (2013); see, *e.g.*, *Iancu* v. *Brunetti*, No. 18-302 (June 24, 2019), slip op. 3 ("As usual when a lower court has invalidated a federal statute, we granted certiorari."); *United States* v. *Davis*, No. 18-431 (June 24, 2019); *Matal* v. *Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015); *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015); *Alvarez*, *supra*; *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010); *United States* v. *Comstock*, 560 U.S. 126 (2010). That practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is "the gravest and most delicate duty that th[e] Court is called upon to perform." *Rostker* v.

Goldberg, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)).

Review is especially warranted here because, as the Ninth Circuit acknowledged, its interpretation of Section 1324(a)(1)(A)(iv) does in fact conflict with another circuit's. See App., *infra*, 22a-23a. The Third Circuit has interpreted Section 1324(a)(1)(A)(iv) to exclude "general advice" and instead to require "some affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise might have been." *DelRio-Mocci* v. *Connolly Props. Inc.*, 672 F.3d 241, 248, cert. denied, 568 U.S. 821 (2012); see *id.* at 249 (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"). The Ninth Circuit, however, determined that the statute "is [not] reasonably susceptible" to the Third Circuit's construction, "reject[ed]" the Third Circuit's determination that the statute only reaches "an act that provides substantial assistance," and "disagree[d] with the Third Circuit" about the need for a causal link to the alien's willingness to violate the law. App., *infra*, 23a.

The Ninth Circuit's decision is also important in practical terms. First, Section 1324(a)(1)(A)(iv)—and in particular the financial-gain offense with higher penalties—is an important tool for combating alien smuggling and other similar conduct that knowingly causes or significantly contributes to individual aliens violating the immigration laws. See p. 12, *supra*. Second, the court of appeals' decision potentially calls into question a broader array of governmental action. Congress has defined a

violation of Section 1324(a)(1)(A) by someone who is himself an alien to be an "aggravated felony" for purposes of removal, 8 U.S.C. 1101(a)(43)(N). It has also made an alien inadmissible or deportable if he "encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States" unlawfully, 8 U.S.C. 1182(a)(6)(E)(i), 1227(a)(1)(E)(i). The Ninth Circuit's ruling casts at least some doubt on applications of those provisions, as well as removal proceedings predicated upon them. Finally, the high proportion of immigration-related litigation, including criminal prosecutions, that occurs in the Ninth Circuit make it all the more imperative to review a decision of this magnitude from that court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
ZACHARY D. TRIPP
Assistants to the Solicitor General
ANDREW W. LAING
Attorney

JULY 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-10614
D.C. No. CR 10-414 RMW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EVELYN SINENENG-SMITH, DEFENDANT-APPELLANT

Argued and Submitted: Apr. 18, 2017
San Francisco, California
Reargued and Resubmitted: Feb. 15, 2018
Pasadena, California
Filed: Dec. 4, 2018

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, Senior District Judge, Presiding

OPINION

Before: A. WALLACE TASHIMA, MARSHA S. BERZON, and ANDREW D. HURWITZ,* Circuit Judges.

---

* Judge Reinhardt, who was originally a member of this panel, died after this case was reargued and resubmitted for decision. Judge Hurwitz was randomly drawn to replace him. Judge Hurwitz has read the briefs, reviewed the record, and watched video recordings of the oral arguments.

Opinion by Judge TASHIMA

TASHIMA, Circuit Judge:

INTRODUCTION

Defendant-Appellant Evelyn Sineneng-Smith was convicted on two counts of encouraging and inducing an alien to remain in the United States for the purposes of financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) & § 1324(a)(1)(B)(i).[1] Section 1324(a)(1)(A)(iv) ("Subsection (iv)") permits a 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." We must decide whether Subsection (iv) abridges constitutionally-
protected speech. To answer this question, we must decide what "encourages or induces" means.

The parties have widely divergent views about how to interpret the statute. Sineneng-Smith and several *amici* contend that encourage and induce carry their plain meaning and, therefore, restrict vast swaths of protected expression in violation of the First Amendment. The government counters that the statute, in context, only prohibits conduct and a narrow band of unprotected speech.

We do not think that any reasonable reading of the statute can exclude speech. To conclude otherwise, we

---

[1] Sineneng-Smith was also convicted of two counts of mail fraud in violation of 18 U.S.C. § 1341. We affirm those convictions in a separate, concurrently filed memorandum disposition.

would have to say that "encourage" does not mean encourage, and that a person cannot "induce" another with words. At the very least, it is clear that the statute potentially criminalizes the simple words—spoken to a son, a wife, a parent, a friend, a neighbor, a coworker, a student, a client—"I encourage you to stay here."

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.

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Facts

Sineneng-Smith operated an immigration consulting firm in San Jose, California. Her clients were mostly natives of the Philippines, 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. She signed retainer agreements with her clients that specified the purpose of the retention as "assisting [the client] to obtain permanent residence through Labor Certification." The problem was that the Labor Certification process expired on April 30, 2001; aliens who arrived in the United States after December 21, 2000, were not eligible to receive permanent residence through the program. *See Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 n.1 (9th Cir. 2010). Sineneng-Smith knew that the program had expired. She nonetheless continued to

sign retainer agreements with her clients and tell them that they could obtain green cards via Labor Certifications. And she also continued to sign new retainer agreements purportedly to assist additional clients in obtaining Labor Certification. At least two of Sineneng-Smith's clients testified that they would have left the country if Sineneng-Smith had told them that they were not eligible for permanent residence. Sineneng-Smith's words and acts which allegedly violated the statute were alleged to have occurred from 2001 to 2008.

B. Procedural History

On July 14, 2010, a grand jury returned a ten-count superseding indictment charging Sineneng-Smith with, as relevant to this appeal, three counts of violating 8 U.S.C. § 1324(a)(1)(A)(iv) & § 1324(a)(1)(B)(i)—encouraging or inducing an alien to reside in the country, knowing and in reckless disregard of the fact that such residence is in violation of the law.

Before trial, Sineneng-Smith moved to dismiss the immigration counts of the superseding indictment. Sineneng-Smith argued that: (1) her conduct was not within the scope of Subsection (iv); (2) Subsection (iv) is impermissibly vague under the Fifth Amendment; and (3) Subsection (iv) violates the First Amendment because it is a content-based restriction on her speech. The district court denied the motion to dismiss, but did not explicitly address the First Amendment argument.

After a twelve-day trial, the jury found Sineneng-Smith guilty on all three counts of violating Subsection (iv) and § 1324(a)(1)(B)(i), and all three counts of mail fraud. Sineneng-Smith then moved for a judgment of

acquittal pursuant to Federal Rule of Criminal Procedure 29(c), renewing the arguments from her motion to dismiss and contending that the evidence elicited at trial did not support the verdicts. The district court concluded that sufficient evidence supported the convictions for two of the three § 1324 counts and two of the three mail fraud counts.[2]

Sineneng-Smith timely appealed, again arguing that the charges against her should have been dismissed for the reasons asserted in her motion to dismiss, and that the evidence did not support the convictions. We first held oral argument on April 18, 2017, and submitted the case for decision. Subsequent to submission, however, we determined that our decision would be significantly aided by further briefing. On September 18, 2017, we filed an order inviting interested *amici* to file briefs on the following issues:

1. Whether the statute of conviction is overbroad or likely overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?

2. Whether the statute of conviction is void for vagueness or likely void for vagueness, either under the First Amendment or the Fifth Amendment, and if so, whether any permissible limiting

---

[2] The court sentenced Sineneng-Smith to 18 months on each of the remaining counts, to be served concurrently; three years of supervised release on the § 1324 and mail fraud counts, and one year of supervised release on the filing of false tax returns count, all to run concurrently. She was also ordered to pay $43,550 in restitution, a $15,000 fine, and a $600 special assessment.

construction would cure the constitutional vagueness problem?

3. Whether the statute of conviction contains an implicit mens rea element which the Court should enunciate. If so: (a) what should that mens rea element be; and (b) would such a mens rea element cure any serious constitutional problems the Court might determine existed?

We received nine *amicus* briefs,[3] as well as supplemental briefs from both Sineneng-Smith and the government. On February 15, 2018, we again held oral argument and resubmitted the case for decision.

STANDARD OF REVIEW

The government urges us to review Sineneng-Smith's First Amendment overbreadth claim for plain error, arguing that she waived the issue by not raising it until we requested supplemental briefing.

Although Sineneng-Smith never specifically argued overbreadth before our request for supplemental briefing, she has consistently maintained that a conviction under the statute would violate the First Amendment. Sineneng-Smith's motion to dismiss argued that "[t]he crime alleged here is rooted in speech *content*—performing immigration consultancy work on behalf of aliens and their employers by petitioning the government on their behalf—not in conduct lacking any First Amendment protection." Likewise, her opening brief on appeal reasserted a First Amendment challenge: "Such communication is 'pure' speech entitled to the highest level of protection."

---

[3] We thank all *amici* for their helpful briefs and oral advocacy.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Because Sineneng-Smith has asserted a First Amendment claim throughout the litigation, her overbreadth challenge "is—at most—a new argument to support what has been a consistent claim." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (internal quotation marks omitted). We thus conclude that she preserved her overbreadth argument, and review it de novo.

ANALYSIS

The First Amendment dictates that "Congress shall make no law . . . abridging the freedom of speech." "[A] law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

Of course, like most constitutional principles, the right to free speech "is not absolute." *Ashcroft* v. *Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002). For example, laws or policies that target conduct but only incidentally burden speech may be valid. *See, e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 122-23 (2003). Further, traditional narrow carve-outs to the First Amendment, "long familiar to the bar," allow Congress to restrict certain types of speech "including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks and citations omitted).

Sineneng-Smith and several *amici* argue that the statute explicitly criminalizes speech through its use of the term "encourages or induces," and that the speech

restriction is content-based and viewpoint-discriminatory, because it criminalizes only speech *in support* of aliens coming to or remaining in the country. Alternatively, Sineneng-Smith asserts that even if the statute targets some conduct, it sweeps in too much protected speech and is therefore unconstitutionally overbroad. The government counters that Subsection (iv) should be read as referring only to conduct and, to the extent it affects speech, restricts only unprotected speech.

We address those competing constructions below, beginning with the topic of overbreadth.[4]

I. First Amendment Overbreadth

Because of the "sensitive nature of protected expression," *New York v. Ferber*, 458 U.S. 747, 768 (1982), "[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere," *Free Speech Coal.*, 535 U.S. at 244. To implement this protection, the general rules governing facial attacks on statutes are relaxed under the First Amendment. Typically, to succeed on a facial attack, a challenger would need "to establish that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." *Stevens*, 559 U.S. at 472 (internal quotation marks and citations omitted).

---

[4] We follow the Supreme Court's lead in assessing the statute's overbreadth before engaging in the strict scrutiny analysis that would follow if we concluded that Subsection (iv) was a content-based restriction on speech. *See Stevens*, 559 U.S. at 474 (recognizing that the statute at issue explicitly regulated expression based on content, but analyzing the statute for overbreadth rather than for whether it survived strict scrutiny).

However, "[i]n the First Amendment context . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n. 6 (2008)). This exception to the typical rule is based on the idea that speakers may be chilled from expressing themselves if overbroad criminal laws are on the books. *See Farber*, 458 U.S. at 768-69 (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980)). To combat that chilling effect, even a person whose activity is clearly not protected may challenge a law as overbroad under the First Amendment. *See id.*

To determine whether Subsection (iv) is overbroad, we must first construe the statute. Next, we must ask whether Subsection (iv), as construed, restricts speech and, if so, whether that speech is protected. Finally, we must weigh the amount of protected speech that the statute restricts against the statute's legitimate sweep.

Recognizing that striking down a statute as overbroad is "strong medicine," and the justification for facially striking down a statute "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct," we conclude that the chilling effect of Subsection (iv) is both real and substantial. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). The only reasonable construction of Subsection (iv) restricts a substantial amount of protected speech in relation to the narrow band of conduct and unprotected expression that the statute legitimately prohibits. Therefore, we hold that Subsection (iv) is facially invalid.

A. Construing the Statute

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). Subsection (iv) reads: "Any person who . . . encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law . . . shall be punished as provided in subparagraph (B)."[5] Construing the statute also requires us to look beyond the plain text of Subsection (iv). *See Stevens*, 559 U.S. at 474. Thus, to interpret Subsection (iv), we analyze: the *mens rea* required for conviction; what "encourages or induces" means; whether "an alien" limits the scope of the statute; and whether "in violation of law" refers to both criminal and civil laws.

---

[5] The government argues that the "statute of conviction is not 8 U.S.C. § 1324(a)(1)(A)(iv), standing alone. Rather, the indictment charged and the jury found that Sineneng-Smith acted 'for the purpose of commercial advantage or private financial gain' under 8 U.S.C. § 1324(a)(1)(B)(i). . . . Accordingly, the 'statute[s] of conviction' are 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i)." Subsection (B)(i) is a commercial enhancement of Subsection (A)(iv). For the purposes of our overbreadth analysis, the commercial enhancement is irrelevant. Subsection (A)(iv) is the predicate criminal act; without the encouraging or inducing, Sineneng-Smith could not have been convicted. And, as the meaning of § 1324(a)(1)(A)(iv) does not vary depending upon whether the financial gain enhancement also applies, the chilling effect of the "encourage or induce" statute extends to anyone who engages in behavior covered by it, whether for financial gain or not.

The government contends that a defendant runs afoul of Subsection (iv) only when she (1) knowingly undertakes, (2) a non-*de-minimis*, (3) act that, (4) could assist, (5) a specific alien (6) in violating, (7) civil or criminal immigration laws.

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." *Stevens*, 559 U.S. at 481 (internal quotation marks and citations omitted). "We will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain, and sharply diminish Congress' incentive to draft a narrowly tailored law in the first place." *Id.* (internal quotation marks and citations omitted).

The government's interpretation of Subsection (iv) rewrites the statute. For the following reasons, we hold that to violate Subsection (iv), a defendant must knowingly encourage or induce a particular alien—or group of aliens—to come to, enter, or reside in the country in reckless disregard of whether doing so would constitute a violation of the criminal or civil immigration laws on the part of the alien. As properly construed, "encourage or induce" can mean speech, or conduct, or both, and there is no substantiality or causation requirement.

1. Mens Rea

We first address what *mens rea* is required to sustain a conviction under Subsection (iv). As an initial matter, the most natural reading of Subsection (iv) requires us to break it into two prongs for the purposes of determining the requisite *mens rea*: first, the "encourage or induce" prong; and, second, the violation of law prong.

Subsection (iv) is silent about the *mens rea* required for the encourage prong, but explicitly provides that a defendant must "know[] or reckless[ly] disregard" the fact that an alien's "coming to, entry, or residence is or will be in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv).

a. Mens Rea *for "encourage or induce" Prong*

In *United States v. Yoshida*, the defendant was indicted for "knowingly encouraging and inducing" three aliens to enter the United States. 303 F.3d 1145, 1149 (9th Cir. 2002). On appeal, Yoshida argued that "there [was] insufficient evidence that she . . . knowingly encouraged or induced in some way [the aliens'] presence in the United States." *Id.* at 1149-50. In affirming the conviction, we concluded that "[a] number of events revealed at trial creates a series of inescapable inferences leading to the rational conclusion that Yoshida knowingly 'encouraged and induced' [the aliens] to enter the United States." *Id.* at 1150. We repeatedly emphasized the knowledge requirement. *See id.* ("The government also offered circumstantial evidence that Yoshida knowingly encouraged [the aliens] to enter the United States"); *id.* at 1151 ("a reasonable jury could easily conclude that Yoshida knowingly led the aliens to the flight"). Therefore, we think it clear that Subsection (iv) has a knowledge *mens rea* for the encourage prong.

b. Mens Rea *for the Violation of Law Prong*

Despite the fact that Subsection (iv) explicitly states that a defendant must "know[] or reckless[ly] disregard" the fact that an alien's "coming to, entry, or residence is or will be in violation of law," the government argues that we have increased that *mens rea* requirement to an "intent" to violate the immigration laws.

We disagree, but recognize that our prior cases provide some support for the government's position.

The government's argument is based on *United States v. Nguyen*, 73 F.3d 887 (9th Cir. 1995), in which we reviewed a conviction under subsection (i) of § 1324(a)(1)(A). Subsection (i) criminalizes "bring[ing]" an alien "to the United States . . . at a place other than a designated port of entry" when the defendant "know[s] that [such] person is an alien." 8 U.S.C. § 1324(a)(1)(A)(i). "Read literally, then, the statute criminalizes bringing, purposefully or otherwise, any alien, illegal or otherwise, into the country other than at a designated port of entry." *Nguyen*, 73 F.3d at 890. In the absence of an explicit *mens rea* standard, we considered the legislative history of the statute and concluded that Congress did not intend to "dispense with a *mens rea* requirement for the felony offense." *Id.* at 893. "Accordingly, we [held] that to convict a person of violating [§] 1324(a)(1)(A), the government must show that the defendant acted with criminal intent."[6] *Id.*

Subsequent cases adding a *mens rea* element to the other subsections of § 1324(a)(1)(A) adopted *Nguyen*'s criminal intent language. *See United States v. Barajas-Montiel*, 185 F.3d 947, 951-53 (9th Cir. 1999). Central to the government's argument, in *Yoshida* we stated, "[w]e

---

[6] "Criminal intent" is an amorphous term that can signify different levels of culpability. For example, Black's Law Dictionary defines the term as "mens rea," or "[a]n intent to commit an actus reus without any justification, excuse, or other defense." *Intent*, *Black's Law Dictionary*, 930-31 (10th ed. 2014). However, Black's also recognizes that sometimes "criminal intent" means "an intent to violate the law,—implying a knowledge of the law violated." *Id.* (citations omitted).

have held that 'to convict a person of violating section 1324(a)(1)(A), the government must show that the defendant acted with criminal intent, i.e., the intent to violate United States immigration laws.'" *Yoshida*, 303 F.3d at 1149 (quoting *Barajas-Montiel*, 185 F.3d at 951).

However, the passing reference to "criminal intent" in *Yoshida* did not increase the *mens rea* of the violation of law prong to intent. We affirmed Yoshida's conviction because "the jury had ample evidence before it to conclude, beyond a reasonable doubt, that Yoshida encouraged the aliens to enter the United States, with *knowledge or in reckless disregard of the fact that the aliens' entry was in violation of law*." *Id.* at 1151 (emphasis added). Not only does *Yoshida* foreclose the government's argument that we have increased the *mens rea* level of Subsection (iv), it confirms that we have not read out of the statute the "reckless disregard" standard that appears explicitly in it.

2. "Encourages or Induces"

a. Our Construction of "encourage or induce"

Next, we turn to the meaning of "encourage or induce." As always, we begin with the language of the statute to determine whether it has "a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). A critical dispute in this case is whether, and to what extent, the words "encourage and induce" criminalize protected speech.

We have previously recognized that "encourage" means "to inspire with courage, spirit, or hope . . . to spur on . . . to give help or patronage to." *United*

States v. Thum, 749 F.3d 1143, 1147 (9th Cir. 2014) (alterations in original) (quoting *United States v. He*, 245 F.3d 954, 960 (7th Cir. 2001) (quoting Merriam Webster's Collegiate Dictionary 381 (10th ed. 1996))). This definition is well-accepted. *See, e.g.*, *Encourage*, *Oxford English Dictionary Online* (3d ed. 2018) ("to inspire with courage, animate, inspirit . . . . [t]o incite, induce, instigate"). Similarly, induce means "[t]o lead (a person), by persuasion or some influence or motive that acts upon the will . . . to lead on, move, influence, prevail upon (any one) to do something." *Induce*, *Oxford English Dictionary Online* (3d ed. 2018).

In isolation, "encourage or induce" can encompass both speech and conduct. It is indisputable that one can encourage or induce with words, or deeds, or both. The dictionary definitions do not, however, necessarily resolve the dispute in this case. We must also examine the context in which the words are used to determine whether we can avoid First Amendment concerns. *See Williams*, 553 U.S. at 294-95. We look to the principle of *noscitur a sociis* to determine whether the language surrounding "encourage or induce" provides those words with a more precise definition. *Id.* at 294.

In *Williams*, the Supreme Court analyzed whether 18 U.S.C. § 2252A(a)(3)(B)'s prohibition on "advertis-[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" purported child pornography was overbroad. *Id.* at 293-94. In construing the statute, the Court narrowed the meanings of "promotes" and "presents" in light of their neighboring verbs. *Id.* at 294. The Court reasoned that "advertises," "distributes," and "solicits" all had an obvious transactional connotation: "Advertising, distributing, and soliciting are steps taken in the course

of an actual or proposed transfer of a product." *Id.* "Promotes" and "presents," on the other hand, are not obviously transactional. In context, however, the Supreme Court read them as having a transactional meaning as well. *Id.* at 294-95. Thus, the Court interpreted "promotes" to mean "recommending purported child pornography to another person for his acquisition," and "presents" to "mean[] showing or offering the child pornography to another person with a view to his acquisition." *Id.* at 295.

By contrast, Subsection (iv) does not have a string of five verbs—it is limited to only two: "encourages or induces." Here, the proximity of encourage and induce to one another does not aid our analysis. As discussed above, both encourage and induce can be applied to speech, conduct, or both. Therefore, unlike the string of verbs in *Williams*, neither of these verbs has clear non-speech meanings that would inform and limit the other's meaning. In other words, when read together, they do not provide a more precise definition or one that excludes speech. Nor are the words necessarily transactional like those in *Williams*. Thus, the application of *noscitur a sociis* to the two operative verbs here, does not narrow our search; our conclusion that Subsection (iv) could cover speech, as well as conduct, remains.

Beyond their immediate neighbors in Subsection (iv), encourage and induce also "keep company" with the verbs in the other subsections of § 1324(a)(1)(A). The neighboring subsections prohibit: (i) "bring[ing]" an alien to the United States "at a place other than a designated port of entry;" (ii) "transport[ing] or mov[ing]" an alien in furtherance of a violation of the immigration laws; and

(iii) "conceal[ing], harbor[ing], or shield[ing] from detection" an alien in the country in violation of the immigration laws. 8 U.S.C. § 1324(a)(1)(A)(i), (ii), & (iii). Bringing, transporting, moving, concealing, harboring, and shielding all clearly refer to some type of 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." (Citation omitted.) Conversely, *Amicus* American Civil Liberties Union contends that subsections (i)-(iii) criminalize so much conduct that the only thing left to criminalize in Subsection (iv) is pure speech.

The government's proposed interpretation of "encourage or induce" in the context of § 1324(a)(1)(A) is strained. While we agree that the statute is intended to restrict the facilitation of illegal immigration and that subsections (i)-(iii) prohibit specific actions, it does not follow that Subsection (iv) covers only actions. Instead, the structure of the section lends itself to the more obvious conclusion that the verbs in the subsections must mean different things because they form the basis of separate charges. *See Thum*, 749 F.3d at 1146-47.

In § 1324, "Congress created several discrete immigration offenses including," among others, the crimes outlined in subsections (a)(1)(A)(i)-(iv). *United States v. Lopez*, 484 F.3d 1186, 1190-91, 1193-94 (9th Cir. 2007) (en banc); *see Thum*, 749 F.3d at 1146. We have held that construing § 1324(a)(1)(A) "so that effect is given to

all its provisions, so that no part will be inoperative or superfluous, void or insignificant," requires Subsection (iv) to be read as excluding the conduct criminalized in the remaining subsections. *Thum*, 749 F.3d at 1147 (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). If encouraging or inducing cannot mean bringing, transporting, moving, concealing, harboring, or shielding, what is left?

The government offers a few limited examples of other actions that could potentially be covered under Subsection (iv), but not reached by subsections (i)-(iii). These examples include: (1) providing aliens with false documents; (2) selling a border-crossing kit to aliens, including a map of "safe crossing" points and backpacks filled with equipment designed to evade border patrol; (3) duping foreign tourists into purchasing a fake "visa extension;" or (4) providing a "package deal" to foreign pregnant women who wish to give birth in the United States that includes a year of room and board, a six-month tourist visa, and instructions on how to overstay the visa without detection. But we doubt Congress intended to limit Subsection (iv) to actions such as these, as the provision does not appear necessary to prosecute any of these actions. Subsection (i), (iii), and (v)(II), which, respectively, restrict bringing, shielding from detection, and aiding and abetting the commission of any of these acts, cover the examples raised by the government. Additionally, 8 U.S.C. § 1324c and 18 U.S.C. § 1546 provide broad criminal prohibitions against document fraud in violation of the immigration laws. These few, unpersuasive examples therefore do not convince us that "encourage" and "induce" can be read so as not to encompass speech, even though their plain meaning dictates otherwise.

In sum, the structure of the statute, and the other verbs in the separate subsections, do not convince us to stray from the plain meaning of encourage and induce—that they can mean speech, or conduct, or both. Although the "encourage or induce" prong in Subsection (iv) may capture some conduct, there is no way to get around the fact that the terms also plainly refer to First Amendment-protected expression. In fact, in *Williams*, one of the seminal overbreadth cases, Justice Scalia used the statement, "I encourage you to obtain child pornography" as an example of protected speech. 553 U.S. at 300. We see no reason why "I encourage you to overstay your visa" would be any different. And interpreting "encourage or induce" to exclude such a statement would require us to conclude that "encourage" does not mean encourage. The subsection is not susceptible to that construction. Subsection (iv), therefore, criminalizes encouraging statements like Justice Scalia's example and other similar expression.

b. Other Courts' Construction of "encourage or induce"

Only one other Circuit has considered a First Amendment overbreadth challenge to Subsection (iv), and that was in an unpublished disposition. In *United States v. Tracy*, the defendant "pled guilty to one count of conspiring to encourage non-citizens to enter the United States illegally . . . but reserved the right to appeal the district court's denial of his motion to dismiss that charge." 456 F. App'x 267, 268 (4th Cir. 2011) (per curiam). The Fourth Circuit rejected the defendant's argument "that speech that encourages illegal aliens to come to the United States is protected by the First

Amendment in certain instances." *Id.* at 272. Instead, the court stated "that speech that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment," and concluded that the statute did not prohibit a substantial amount of protected speech. *Id.* (alteration and citations omitted). We will address the extent to which Subsection (iv) can be read to prohibit only aiding and abetting in more detail below, but it is clear that *Tracy* recognized that the subsection reaches some speech. *Id.* ("[T]here may be some instances in which we might find that the statute chills protected speech.").

Although not addressing Subsection (iv) from a First Amendment perspective, other courts have interpreted what "encourage or induce" means in the subsection. Somewhat recently, we touched upon the issue in *Thum*. *Amici* put quite a bit of stock in our use of a "broad" definition of "encourage" in *Thum*, but we agree with the government that *Thum* is inconclusive about whether "encourage" (or "induce") includes speech.

In *Thum*, we considered whether the defendant encouraged or induced an alien to reside in the United States when the defendant escorted an alien from a fast food restaurant near the San Ysidro Port of Entry—on the U.S. side of the border—to a nearby vehicle headed north. 749 F.3d at 1144-45. In interpreting "encourage," we relied on the general dictionary definition. *Id.* at 1147. We also recognized that we "ha[d] previously equated 'encouraged' with 'helped.'" *Id.* (citing *Yoshida*, 303 F.3d at 1150). But the main question in that case was whether the defendant had done enough to encourage the alien to reside in the U.S. *Thum*, 749 F.3d at 1147. On that point, we agreed with the defendant that

escorting an alien to a van bound for Northern California was at most "aid[ing] in the attempted *transportation* of the alien, which would be covered under 8 U.S.C. § 1324(a)(1)(A)(ii)," and did not "convince the illegal alien to stay in this country . . . or . . . facilitate the alien's ability to live in this country indefinitely." *Id.* at 1148 (internal quotation marks and citations omitted). *Thum* thus stands for the proposition that "[e]ncouraging an illegal alien to reside in the United States must mean something more than merely transporting such an alien within this country." *Id.* at 1149.[7] We did not address whether the statute reached speech.

Many other courts have concluded that encourage can mean "to help." *See United States v. Lopez*, 590 F.3d 1238, 1249-52 (11th Cir. 2009) (upholding a supplemental jury instruction which, in part, defined "encourage" as "to help"); *United States v. Fujii*, 301 F.3d 535, 540 (7th Cir. 2002); *He*, 245 F.3d at 957-58; *United States v. Oloyede*, 982 F.2d 133, 135-37 (4th Cir. 1993) (per curiam). However, as mentioned above, none of these cases considered a First Amendment challenge to Subsection (iv), nor do they foreclose the conclusion that "encourage or induce" can mean speech. To "help" is not a helpful limitation in terms of excluding expression, because speech can *help* someone decide to enter or to reside in the United States.

Additionally, the government cites out-of-circuit cases for the argument that encouraging or inducing "requires

---

[7] Likewise, *Yoshida* does not aid our analysis. *Yoshida*, examining whether there was sufficient evidence to sustain the defendant's conviction under Subsection (iv), held only that escorting aliens through an airport to a United States-bound flight constituted encouragement. *Yoshida*, 303 F.3d at 1150-51.

substantial assistance (or offers of assistance) that the defendant expects to make an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise would have been." For example, in *DelRio-Mocci v. Connolly Props. Inc.*, the Third Circuit

> read subsection (iv) as prohibiting a person from engaging in 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. Thus, subsection (iv) has the distinct character of foreclosing the type of substantial assistance that will spur a person to commit a violation of immigration law where they otherwise might not have.

672 F.3d 241, 249 (3d Cir. 2012) (emphasis added). The court reasoned that if it interpreted "encourage or induce" too broadly it would "render subsections (i)-(iii)] redundant or superfluous." *Id.* The court thus read the following elements into what constituted encouragement under Subsection (iv): it must be (1) an affirmative act that (2) substantially encourages (3) an alien lacking lawful immigration status to (4) come to, enter, or reside in the United States where (5) the undocumented person otherwise might not have done so. *Id.* At least one other court has adopted the Third Circuit's interpretation. *See United States v. Henderson*, 857 F. Supp. 2d 191, 204-08 (D. Mass. 2012).

There is a lot to unpack in this interpretation of the statute, but at bottom, *DelRio-Mocci* added an act requirement, a substantiality requirement, and a causation requirement to the text of Subsection (iv). The

Third Circuit adopted the substantiality requirement from its "harboring" decisions under § 1324(a)(1)(A)(iii), which hold that a defendant can only be convicted where his "conduct tend[s] to substantially facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting the alien's unlawful presence." *Id.* at 246-48 (quoting *United States v. Ozcelik*, 527 F.3d 88, 97 (3d Cir. 2008) (internal quotation marks omitted)). The Ninth Circuit, however, does not have such a precedent and we do not think the statute is reasonably susceptible to this interpretation in the absence of statutory text to that effect. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1017 n.9 (9th Cir. 2013) (recognizing that the Ninth Circuit broadly defines harboring "to mean 'afford shelter to'") (quoting *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976)). We therefore reject the government's proposed interpretation that "encourage or induce" must mean an act that provides substantial assistance (or non-*de-minimis* help) to an alien for entering or remaining in the country.

We also disagree with the Third Circuit that a causation requirement can be read into the statute. On its face "the plain language of the statute makes clear that the relevant inquiry is the conduct of the defendant," and not the alien. *See United States v. Dhingra*, 371 F.3d 557, 561 (9th Cir. 2004) (rejecting vagueness and overbreadth challenges to 18 U.S.C. § 2422(b), which prohibits "knowingly persuad[ing], induc[ing], entic[ing], or coerc[ing] any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense").

One district court's struggle to interpret Subsection (iv) illustrates our concerns. In *Henderson*, defendant was convicted pursuant to Subsection (iv) because she had "employed a person she came to learn was an illegal alien to clean her home from time to time and, when asked, advised the cleaning lady generally about immigration law practices and consequences." 857 F. Supp. 2d at 193. Considering a post-verdict motion for judgment of acquittal, the district court reviewed the "Developing Appellate Case Law" to determine the scope of Subsection (iv), and adopted the Third Circuit's test from *DelRio-Mocci*. *Id.* at 204, 208.

In arguing against the motion, the government took "the position that giving illegal aliens advice to remain in the United States while their status is disputed constitutes felonious conduct under § 1324(a)(1)(A)(iv) because it constitutes encouragement or inducement under the statute."[8] Doubling down, "the government contended that an immigration lawyer would be prosecutable for the federal felony created by § 1324(a)(1)(A)(iv) if he advised an illegal alien client to remain in the country because, if the alien were to leave, the alien could not return to seek adjustment of status." *Id.* at 203.

The district court expressed discomfort with the government's position and incredulity that the government would continue to pursue the felony prosecution. *See id.* at 193-94, 211-14. However, applying the *DelRio-Mocci* test, the district court concluded that "a jury could find that [defendant's] employment together with her [immigration] advice could have caused [the alien],

---

[8] The defendant in *Henderson* does not appear to have made an explicit First Amendment argument.

or a person in her position, to reside here when she otherwise might not have." *Id.* at 208. The court denied the motion for acquittal, but granted defendant's motion for a new trial in order to give new jury instructions. *Id.* at 210, 214.

Despite *Henderson*, the government now argues that "[n]o reported decision applies Subsection (iv) to efforts to persuade, expressions of moral support, or abstract advocacy regarding immigration." Even if this were correct, it misses the point. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S at 480. Thus, the absence of convictions based purely on protectable expression is not evidence that the statute does not criminalize speech. Just because the government has not (yet) sought many prosecutions based on speech, it does not follow that the government cannot or will not use an overbroad law to obtain such convictions. Further, the lack of convictions says nothing about whether Subsection (iv) chills speech. Indeed, *Henderson* exemplifies why we cannot take the government's word for how it will enforce a broadly written statute, and suggests that any would-be speaker who has thought twice about expressing her views on immigration was not being paranoid.

3. "An alien"

The government contends that Subsection (iv) is limited to encouraging "a particular alien or aliens," rather than "the general public." For the purposes of this appeal, and to avoid serious constitutional concerns, we

think the government's proposed interpretation is reasonable, but not ultimately dispositive to our overbreadth analysis. And while it is easy to foresee arguments about what constitutes a group of particular aliens versus the "general public," we accept that Subsection (iv) requires a defendant to direct his or her encouragement or inducement toward some known audience of undocumented individuals.

4. "In Violation of Law"

Recognizing the breadth of the statute, the government admits that "in violation of law" refers not only to criminal law, but also to civil violations of the immigration laws. We agree. *Amicus* Professor Eugene Volokh argues that we could narrow the scope of the statute by reading "violation of law" to mean only violations of the criminal law. But, because simple residence in the United States without legal status is not a crime, and the statute reaches inducing or encouraging an alien to "reside" in the United States, the subsection is not susceptible to this limiting construction. *See Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States."). The proposed limiting construction would render "reside" superfluous.

5. Construction of the Statute

To recap, we interpret Subsection (iv) as follows: to violate the subsection, a defendant must knowingly encourage or induce a particular alien—or group of aliens —to come to, enter, or reside in the country, knowing or in reckless disregard of whether doing so would constitute a violation of the criminal or civil immigration laws. As construed, "encourage or induce" can mean speech,

or conduct, or both, and there is no substantiality or causation requirement.

Ultimately, the government asks us to rewrite the statute. Under no reasonable reading are the words "encourage" and "induce" limited to conduct. We think the statute is only susceptible to a construction that affects speech. As an illustration—under the government's reading of the statute, it would argue that a mother telling an undocumented adult child "If you leave the United States, I will be very lonely. I encourage you to stay and reside in the country" would not subject the mother to prosecution. But, in this example, the mother is merely repeating the words of the statute in an attempt to get her child to stay. We think any reasonable person reading the subsection would assume that the mother's statement makes her vulnerable to prosecution, that the words of the statute have their plain meaning, and that a person can encourage or induce another by verbally, explicitly encouraging or inducing her.

B. Subsection (iv) Restricts Protected Speech

The conclusion that Subsection (iv) reaches speech does not end our inquiry. We must now examine: (1) whether the statute reaches protected speech and, if so, (2) whether the statute restricts a substantial amount of such speech in relation to the statute's legitimate sweep. *See, e.g.*, *Hicks*, 539 U.S. at 118-19.

Not all speech is protected under the First Amendment. Congress is allowed to restrict certain types of speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See Stevens*, 559 U.S. at 468. The most relevant exception to

the First Amendment for this case is speech integral to criminal conduct, but incitement also deserves mention.

The government asserts that even if we interpret Subsection (iv) to reach speech, it does not constrain protected speech because the speech is integral to assisting others in violating the immigration laws. In the government's reading, Subsection (iv) is analogous to an aiding and abetting statute. But, to repeat, continuing to reside in the U.S. is not a criminal offense; therefore, assisting one to continue to reside here cannot be aiding and abetting a crime. One *amicus*, supporting the constitutionality of the statute, reads it as a solicitation restriction.[9]

1. Incitement

Under the incitement exception to the First Amendment, the government may not "proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent

---

[9] *Amicus* Professor Eugene Volokh proposes construing the statute to restrict a defendant from "directly, specifically, and purposefully encouraging" criminal violations of the immigration laws. We do not think that the statute is reasonably susceptible to this interpretation. First, we decline to read a specificity or directness requirement into the statute because the plain meanings of encourage and induce do not include such principles. Second, Congress clearly knows how to write a solicitation statute as evidenced by 18 U.S.C. § 373(a): "Whoever . . . solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in" a violent felony is subject to prosecution. If Congress wanted Subsection (iv) to restrict only solicitation, it could have done so. Finally, as discussed above, we cannot limit "in violation of law" to criminal laws and, like Professor Volokh, we are not aware of any precedent for treating speech soliciting merely civil violations as a crime.

lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). "Abstract advocacy," even of a crime, on the other hand, is protected speech. *See Williams*, 553 U.S. at 298-99. As we have construed Subsection (iv), it does not require that an alien imminently violate the immigration law. Nor does Subsection (iv) require that any encouragement or inducement make it "likely" that an alien will violate the immigration law. Plainly, the incitement doctrine is a poor fit for this particular statute, especially considering that other incitement cases typically involve incitements to violence, riot, or breach of the peace. *See, e.g.*, *Brandenburg*, 395 U.S. at 447-48; *see also Hess v. Indiana*, 414 U.S. 105, 109 (1973); *United States v. Poocha*, 259 F.3d 1077, 1080-81 (9th Cir. 2001); *id.* at 1084-85 (Tashima, J., concurring in part and dissenting in part) (agreeing that speech must be likely to incite violence to be proscribed). If Subsection (iv) reaches any speech that is exempted from the First Amendment as incitement, it is an extremely narrow band of speech and does not significantly reduce the scope of the statute.

2. Speech Integral to Criminal Conduct

The government's primary argument is that any covered speech is "integral" to a violation of the immigration law. "[S]peech or writing used as an integral part of conduct in violation of a valid criminal statute" does not enjoy First Amendment protection. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *id.* at 498-502 (picketing for "the sole immediate purpose" of compelling a company to stop selling to nonunion peddlers was not protected speech because it was part of "a single and integrated course of conduct" in violation of

criminal restraint of trade laws). For this reason, speech that aids and abets criminal activity does not necessarily benefit from First Amendment protection. *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

In *Freeman*, we reviewed "convict[ions] on fourteen counts of aiding and abetting and counseling violations of the tax laws, an offense under 26 U.S.C. § 7206(2)." *Id.* at 551. We held that the defendant was entitled to a jury instruction on a First Amendment defense as to twelve of the counts because, at least arguably, the defendant made statements about the "unfairness of the tax laws generally." *Id.* at 551-52. Conversely, the defendant was not entitled to the First Amendment instruction on the remaining two counts because the defendant actually assisted in the preparation of false tax returns. *Id.* at 552. We reasoned that "[e]ven if the convictions on these [two] counts rested on spoken words alone, the false filing was so proximately tied to the speech that no First Amendment defense was established." *Id.* As *Freeman* illustrates, although some speech that aids or abets a crime is so integral to the crime itself that it is not constitutionally protected, other speech related to criminal activity is not so integral as to be unprotected.

Based on *Freeman*, the government contends that any speech that Subsection (iv) reaches is integral to a violation of the immigration laws.[10] However, there

---

[10] The government cites *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), but the holding in that case relies on the since-weakened distinction between commercial and non-commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980). More fundamentally, the defendant in *Pittsburgh Press* violated an

are relevant differences between an aiding and abetting statute and Subsection (iv). For one, as explained above, the statute is not limited only to speech that substantially assists an alien in violating the immigration laws. *Freeman* exposes the relevant distinction. The statute in *Freeman* prohibited "[w]illfully aid[ing] or assist[ing] in, or procur[ing], counsel[ing], or advis[ing] the preparation or presentation" of false tax returns. 26 U.S.C. § 7206(2). On the twelve counts for which the court reversed Freeman's convictions, the court focused on the fact that Freeman may have generally advocated the filing of false returns. *Id.* at 551-52. On the other hand, for the two convictions that the court affirmed, it emphasized that Freeman "not only counseled but also *assisted* in the filing of false returns." *Id.* at 552 (emphasis added). The assistance on the two affirmed counts, even if only words, was more directly related to the completed crime. *Id.* Thus, *Freeman*'s conclusion is that only some speech that the statute restricted was so related to the predicate crime that it was considered "integral." [11] Likewise, here, the statute criminalizes speech beyond that which is integral to violations of the immigration laws.

---

ordinance that made it unlawful "to aid" in employment discrimination. 413 U.S. at 389. "Encourage" and "induce" are broader than "aid," and sweep in protected speech.

[11] *Freeman* was an as-applied First Amendment challenge to the false tax returns statute. We note that the string of verbs in the statute involved in *Freeman* is more similar to the one at issue in *Williams* than the operative verbs in Subsection (iv). *See* pp. 19-21, *supra*.

Second, as the government recognizes, aiding and abetting convictions require the government to prove certain elements that are not present in Subsection (iv):

> In this circuit, the elements necessary for an aiding and abetting conviction are: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense.

Thum, 749 F.3d at 1148-49 (quoting *United States v. Shorty*, 741 F.3d 961, 969-70 (9th Cir. 2013)). The first obvious difference is that aiding and abetting requires the commission of a crime by another, but Subsection (iv) applies to both criminal and civil violations of the immigration laws. The government asserts that the civil/criminal distinction should not matter in the First Amendment context, but points to no case where a defendant was convicted for aiding and abetting a civil offense. We are not aware of any case that upholds a statute restricting such speech. Therefore, even if certain speech would constitute aiding and abetting when directed toward the commission of a crime, it would be constitutionally protected when aimed at inducing a civil violation of law. And because unauthorized presence in the country is a civil violation rather than a crime, Subsection (iv) reaches beyond speech integral to a crime.

Next, aiding and abetting requires that the accused "assisted or participated" in the commission of the offense. For the reasons described above, we cannot construe Subsection (iv) as applying only to assistance

for or participation in a violation of the immigration law; it is enough to encourage.

Further, aiding and abetting requires that a principal actually commit the underlying offense. *See id.* at 1149. There is no such requirement in Subsection (iv). The government argues that this should not matter for the First Amendment analysis because, citing the Model Penal Code § 2.06(3)(a)(ii), Subsection (iv) resembles an attempted aiding and abetting statute. The government's argument fails, however, because "[t]here is no general federal 'attempt' statute. [A] defendant . . . can only be found guilty of an attempt to commit a federal offense if the statute defining the offense also expressly proscribes an attempt." *United States v. Hopkins*, 703 F.2d 1102, 1104 (9th Cir. 1983). Subsection (iv) does not restrict attempt, unlike the other subsections of the statute.

Most fundamentally, Subsection (iv) looks nothing like an aiding and abetting statute. Just two lines below Subsection (iv)'s text, Congress required that anyone who "aids or abets the commission of any of the preceding acts" shall be punished as a principal. 8 U.S.C. § 1324(a)(1)(A)(v)(II). Further, Congress authored a general aiding and abetting statute, 18 U.S.C. § 2, which states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Clearly, if Congress wanted Subsection (iv) to be an aiding and abetting statute, it would have included the words aiding and abetting. The statute instead manifests Congress' intent to restrict a broader range of activity, and that activity stretches beyond unprotected speech.

C. Subsection (iv) Restricts A Substantial Amount of Protected Speech in Relation to its Legitimate Sweep

Because we conclude that Subsection (iv) reaches protected speech, we must now analyze whether the amount of protected speech the statute restricts is substantial in relation to its legitimate sweep. In plain terms, are the statute's improper applications too numerous to allow the statute to stand? "The concept of 'substantial overbreadth' is not readily reduced to an exact definition." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). But, "[c]riminal statutes must be scrutinized with particular care" and "those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). Although "substantial" does not have a precise meaning in this context, the Supreme Court has explained that a statute may be struck down if it is "susceptible of regular application to protected expression." *Id.* at 467. In other words, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Taxpayers for Vincent*, 466 U.S. at 801.

It is apparent that Subsection (iv) is susceptible to regular application to constitutionally protected speech and that there is a realistic (and actual) danger that the statute will infringe upon recognized First Amendment protections. Some of the situations raised in the supplemental briefing and at oral argument demonstrate the improper scope of this statute. While we are aware

that the Supreme Court is skeptical of "fanciful hypotheticals" in overbreadth cases, we do not think that the scenarios raised here are fanciful. *See Williams*, 553 U.S. at 301. We think that they are part of everyday discussions in this country where citizens live side-by-side with non-citizens. Buttressing our assessment that the following hypotheticals are not overly speculative, the government has already shown a willingness to apply Subsection (iv) to potentially protected speech. *See Henderson*, 857 F. Supp. 2d at 193-94, 203-04.[12]

We begin with an obvious example from one of the *amicus* briefs: "a loving grandmother who urges her grandson to overstay his visa," by telling him "I encourage you to stay." Nothing in Subsection (iv) would prevent the grandmother from facing felony charges for her statement. Again, in *Williams*, the Supreme Court

---

[12] Additionally, the City and County of San Francisco in its *amicus* brief represents that the government has repeatedly threatened its officials with violations of 8 U.S.C. § 1324. For example, "ICE Director Thomas Homan announced that he had asked Attorney General Sessions to determine whether sanctuary cities like San Francisco are 'committing a statutory crime' under section 1324." Further, San Francisco relates that "Director Homan renewed his threat in even starker terms. According to Director Homan, 'when a sanctuary city intentionally or knowingly shields an illegal alien from federal law enforcement, that is a violation of 8 U.S.C. 1324.' Director Homan announced that he was 'putting together a response plan' with 'the highest levels of the Department of Justice,' and ominously declared, 'This is not over.'" True, San Francisco reports that "[t]o the extent these threats have been tied to any specific prong of section 1324, they have been tied to the 'harboring' or 'transporting' prongs of that statute." *Id.* But not all of the threats were tied to a specific subsection, and the government might well turn to Subsection (iv).

used almost identical language—"I encourage you to obtain child pornography"—to describe abstract advocacy immune from government prohibition. 553 U.S. at 300. The government has not responded persuasively to this point; it simply argues that the grandmother would not be subject to criminal charges because her statement was "not accompanied by assistance or other inducements." However, as we have detailed above, Subsection (iv) does not contain an act or assistance requirement.

Further, implying a *mens rea* requirement into the statute, and applying it only to speech to a particular person does not cure the statute's impermissible scope. Just because the grandmother wanted her words to encourage her grandson and said them directly to him does not render those words less protected under the First Amendment. We think that situations like this one, where a family member encourages another to stay in the country, or come to the country, are surely the most common form of encouragement or inducement within Subsection (iv)'s ambit.

The government similarly dismisses "marches, speeches, publications, and public debate expressing support for immigrants," as being subject to Subsection (iv)'s restrictions. Again, however, the government relies on its faulty construction of the statute to argue that such speech does not "assist" or "incentivize" an immigrant to come to, enter, or reside in the United States in violation of law. The statute, however, does not criminalize assistance or incentivizing; it makes it a felony to

"encourage" or "induce." A speech addressed to a gathered crowd,[13] or directed at undocumented individuals on social media,[14] in which the speaker said something along the lines of "I encourage all you folks out there without legal status to stay in the U.S.! We are in the process of trying to change the immigration laws, and the more we can show the potential hardship on people who have been in the country a long time, the better we can convince American citizens to fight for us and grant us a path to legalization," could constitute inducement or encouragement under the statute. But, this general advocacy could not be considered incitement because there is no imminent breach of the peace. It would not be aiding and abetting or solicitation because it is general and is not advocating a crime. Instead, it is pure advocacy on a hotly-debated issue in our society. Such "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). Criminalizing expression like this threatens almost anyone willing to weigh in on the debate. *Cf. Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996) ("Cities, counties, and states have a long tradition of issuing pronouncements, proclamations, and statements of principle on a wide range of

---

[13] Speaking directly to a particular group of aliens, as opposed to the public at large, is within the scope of Subsection (iv) as we have construed it.

[14] The Supreme Court has made clear that "cyberspace . . . . and social media in particular" is "the most important place[] . . . for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

matters of public interest, including . . . immigration.").

Additionally, *amici* present several examples of professionals who work with immigrants whose speech might be chilled on account of Subsection (iv)'s breadth. The most common example cited is an attorney who tells her client that she should remain in the country while contesting removal—because, for example, non-citizens within the United States have greater due process rights than non-citizens outside the United States, or because, as a practical matter, the government may not physically remove her until removal proceedings are completed. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Under the statute's clear scope, the attorney's accurate advice could subject her to a felony charge. The government's arguments to the contrary are unavailing. First, undoubtedly, the attorney would *know* that telling an immigrant she would have greater rights if she remained here or that she may not be removed while in removal proceedings would encourage the immigrant to stay. And, we do not think construing Subsection (iv) to reach advice from attorneys endangers statutes like 18 U.S.C. § 2(a), the general aiding and abetting statute. An attorney can knowingly encourage a course of action without aiding or abetting it. Moreover, as we have explained, remaining in the country while undocumented, without more, is not a crime. More fundamentally, though, the government has already shown its intent to prosecute those citizens (attorneys or sympathetic lay persons) who give even general immigration advice. *See Henderson*, 857 F. Supp. 2d at 193.

The foregoing examples are not some parade of fanciful horribles. Instead, they represent real and constitutionally protected conversations and advice that happen daily. They demonstrate that Subsection (iv)'s impermissible applications are real and substantial. Because Subsection (iv)'s legitimate sweep—which only reaches conduct not criminalized in the other subsections of § 1324(a)(1)(A), and unprotected speech—is narrow, we hold that Subsection (iv) is overbroad under the First Amendment.[15]

CONCLUSION

Subsection (iv) criminalizes a substantial amount of protected expression in relation to the statute's narrow legitimate sweep; thus, we hold that it is unconstitutionally overbroad in violation of the First Amendment. The judgment of the district court is **REVERSED** with respect to the "encourage or induce" counts, Counts 2 and 3 of the First Superseding Indictment. In accordance with the Memorandum disposition filed concurrently herewith, with respect to the mail fraud counts, Counts 5 and 6, the judgment of the district court is **AFFIRMED**.

Because two of the five counts of conviction are reversed, the sentence must be vacated and the case remanded for resentencing. *See United States v. Carter*, 2018 WL 5726694, at *8 (9th Cir. Nov. 2, 2018); *United States v. Davis*, 854 F.3d 601, 606 (9th Cir. 2017).

REVERSED in part, AFFIRMED in part, sentence VACATED and REMANDED for resentencing.

---

[15] Because we strike down Subsection (iv) as overbroad, we need not reach the separate issue of whether the statute is void for vagueness.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. CR-10-00414-RMW

UNITED STATES OF AMERICA, PLAINTIFF

v.

EVELYN SINENENG-SMITH, DEFENDANT

[Filed: Dec. 23, 2013]

ORDER GRANTING-IN-PART AND DENYING-IN-PART DEFENDANT EVELYN SINENENG-SMITH'S MOTION FOR ACQUITTAL AND DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

[Re: Docket Nos. 213, 214]

Defendant Evelyn Sineneng-Smith moves for a judgment of acquittal and a new trial with respect to three counts of violating § 1324(a)(1)(A)(iv) and (b)(i), and three counts of mail fraud. Dkt. Nos. 213, 214. For the reasons explained below, the court grants the motion for judgment of acquittal as to Counts One and Four, and denies the motion for judgment of acquittal as to Counts Two, Three, Five, and Six. The court conditionally grants the motion for a new trial as to Counts One and Four, and denies the motion for a new trial as to Counts Two, Three, Five, and Six.

I. BACKGROUND

From approximately 1990 to April 2008, defendant Evelyn Sineneng-Smith owned and operated an immigration consultation business located in San Jose, California, with additional offices in Beverly Hills, California, La Jolla, California, Las Vegas, Nevada, and New York, New York. Sineneng-Smith counseled foreign nationals on applying for and obtaining employment based visas in order to enable them to work in the residential health care industry. An alien can obtain an employment-based visa under United States immigration law from the Department of State by filing form I-485, Application to Register Permanent Residence or Adjust Status. Certain aliens are ineligible for adjustment of status. However, in 1994, Congress enacted Section 245(i) of the Immigration and Naturalization Act, known as the Legal Immigration Family Equity Act ("LIFE Act"), which permitted certain aliens who were otherwise ineligible for adjustment of status to pay a penalty in order to adjust their status without leaving the United States if the alien was the beneficiary of a qualifying immigrant visa petition or application for labor certification and met statutory and regulatory requirements before April 30, 2001. The relevant labor certification application, known as Form ETA-750, is filed with the United States Department of Labor ("USDOL") by the employer seeking to hire the alien. If the USDOL approves the form, an employer can apply on the alien's behalf to obtain a visa number and file an application with the United States Citizenship and Immigration Services ("USCIS") called the I-140, Petition for Alien Worker.

Counts one through three each allege that for the purpose of private financial gain, Sineneng-Smith encouraged or induced an alien to reside in the United States, knowing or in reckless disregard of the fact that such residence was in violation of the law. The indictment lists the initials of each alien, the date he or she entered into a retainer agreement with the defendant, and the admission number listed in Form I-94, the record of the alien's arrival into the United States. These aliens have since been revealed to be Oliver Galupo (Counts One and Four), Amelia Guillermo (Counts Two and Five), and Hermansita Esteban (Counts Three and Six).

The defendant is also charged with three counts of mail fraud. In support of those allegations, the superseding indictment alleges that Sineneng-Smith entered into retainer agreements with foreign nationals, most of whom entered the United States on visitor's visas from the Philippines, and their employers. The superseding indictment alleges that Sineneng-Smith fraudulently promoted USDOL's labor certification program as a way for foreign nationals to obtain a permanent resident employment-based visa, while knowing that foreign nationals who did not file petitions with USDOL or USCIS prior to April 30, 2001 would not be eligible to obtain employment-based visas. She charged $5,900 for the filing of an application for a foreign labor certification with USDOL and $900 for the filing of the I-140 Form with USCIS—filings that she allegedly knew were futile. Sineneng-Smith also allegedly knew that her clients had overstayed the amount of time they were allowed to be in the United States and worked illegally at various health care facilities.

On July 30, 2013, after a twelve-day trial, a jury convicted Sineneng-Smith on all six counts. Dkt. No. 195. Sineneng-Smith now moves the court for a judgment of acquittal and, in the alternative, for a new trial on all six counts.

II. ANALYSIS

Federal Rule of Criminal Procedure 29(c) permits a court to "set aside the verdict and enter an acquittal" if the jury has returned a guilty verdict or "[i]f the jury has failed to return a verdict." Fed. R. Crim. P. 29(c)(2). "In ruling on a Rule 29 motion, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Alarcon-Simi*, 300 F.3d 1172, 1176 (9th Cir. 2002) (internal quotation marks omitted). The court "must bear in mind that it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts." *United States v. Rojas*, 554 F.2d 938, 943 (9th Cir. 1977) (internal quotation marks omitted); *see also Alarcon-Simi*, 300 F.3d at 1176.

As for the new trial motion, Federal Rule of Criminal Procedure 33 permits the court, on defendant's motion, to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The court's power to grant a new trial is broader than its power to grant a motion for judgment of acquittal because the court "is not obliged to view the evidence in the light most favorable to the verdict, and it is free to weigh the evidence and evaluate for itself the credibility of the witnesses." *United States v. Kellington*, 217 F.3d

1084, 1097 (9th Cir. 2000). However, the court's discretion is not unconstrained. The court may only grant a new trial if it finds that "the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." *Id.* (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)).

A. Sufficiency of the Evidence on the Immigration Charges

To prove that Sineneng-Smith was guilty under § 1324(a)(1)(A)(iv) and (b)(i), the government had to show beyond a reasonable doubt that (1) the person identified in the count was an alien; (2) Sineneng-Smith encouraged or induced the alien to reside in the United States in violation of the law; (3) Sineneng-Smith knew that the alien's residence in the United States was or would be in violation of the law; and (4) Sineneng-Smith did so for private financial gain. The parties agree that a violation of § 1324(a)(1)(A)(iv) is not a continuing offense. Therefore, the government must prove that the offense was completed on the charged date. However, as the court ruled in considering the defendant's motions in limine, "[e]vidence of defendant's continued encouragement or inducement of the specific clients charged in the counts is relevant if it tends to prove acts consistent with the alleged inducement or encouragement such as showing that the inducement or encouragement was carried out." Dkt. No. 131, at 5.

The defendant did not dispute that Guillermo, Esteban, and Galupo are aliens. The government introduced evidence proving this element as to all three alleged victims. RT: 686:16-17; 688:5-6; Gov't Exh. 13B; Gov't Exh. 14 (as to Guillermo); RT: Vol. 6, 4:19-20; 6:5-8;

Gov't Exh. 17B (as to Esteban); Gov't Exh. 10 (as to Galupo).

It is also undisputed that Sineneng-Smith knew that Guillermo's, Esteban's, and Galupo's residences in the United States were in violation of the law. Sineneng-Smith knew of her clients' immigration status because she routinely examined her clients' passports and visas and made copies for her files. RT: 1019:2-6. The defendant also admitted to ICE Special Agent Anthony Villacorta that she knew that "most of [her clients] were here illegally." *Id.* at 1018:24-1019:1. Therefore, the government presented sufficient evidence from which a reasonable jury could have found the first and third elements of the immigration charges proven beyond a reasonable doubt.

Finally, there is no dispute that Sineneng-Smith committed the immigration offenses for private financial gain. The government introduced checks to the defendant written on behalf of Galupo, Gov't Exh. 11, Esteban, Gov't Exh. 19, and Guillermo, Gov't Exh. 15. Esteban and Guillermo both testified that they paid Sineneng-Smith for their retainer agreements. RT: Vol. 6, 19:18-23; 30:9-10 (Esteban); RT: 701:12-24; 715:19-24 (Guillermo).

1. Count Two: "Encouragement" as to Guillermo

The defendant argues that the government presented insufficient evidence for a reasonable jury to find beyond a reasonable doubt that Sineneng-Smith encouraged or induced Guillermo to reside in the United States in violation of the law. The government in response directs the court to several excerpts of Guillermo's testimony at trial. In particular, Guillermo testified that

she met with the defendant, the defendant's staff member, and Guillermo's employer, Marilyn Santiago, on April 10, 2002. RT: 693:11-24. At that meeting, Guillermo signed a retainer agreement for Sineneng-Smith to guide her through the labor certification process, paying Sineneng-Smith $200 per month plus a $500 down payment for a total of $5,900. *Id.* at 701:3-5; 12-15; 23-24. Guillermo testified that she then asked the defendant's staff member—apparently while Sineneng-Smith was present—whether she could work, and the staff member replied "that's why you are here." *Id.* at 704:9-12. Shortly after Guillermo's meeting with the defendant, she began working for Santiago. *Id.* at 705:14-18.

Guillermo testified that five years later, Santiago informed her that her labor certification was approved. RT: 713:22-24. Sineneng-Smith mailed her a retainer for a Petition for Alien Worker (I-140), which Guillermo signed on May 5, 2007, the charged date. *Id.* at 714:14-23; 715:25-716:3. This retainer agreement cost Guillermo $1,000, and she paid $300 down. *Id.* at 715:12-24. Santiago signed the agreement on June 20, 2007, and Guillermo mailed the retainer back to Sineneng-Smith. *Id.* at 716:12-16; 720:16-20. The government introduced several of Guillermo's retainer agreements with Sineneng-Smith into evidence. Gov't Exh. 13A at 346-47; Gov't Exh. 13D; Gov't Exh. 13F. Along with the retainer agreement for the Petition for Alien Worker, the government introduced a document from Sineneng-Smith advising Guillermo on a premium processing service for the Petition for Alien Worker. Gov't Exh. 13F at 182-83. This document mentions the possibility of Guillermo receiving a work permit and green card, and the accompanying chart states that the "Next Step if result is Approval" is to "Apply for Work Permit/Green Card." *Id.*

From this evidence, a reasonable jury could have found beyond a reasonable doubt that Sineneng-Smith encouraged Guillermo to reside illegally in the United States on May 5, 2007. This court previously held in denying the defendant's motion to dismiss that Sineneng-Smith could "encourage" within the meaning of § 1324(a)(1)(A)(iv) "[b]y suggesting to the aliens that the applications she would make on their behalf, in exchange for their payments, would allow them to eventually obtain legal permanent residency in the United States." Dkt. No. 51, at 4-5. The jury could have concluded that Sineneng-Smith suggested to Guillermo that, by proceeding with the retainer agreements and various applications, Guillermo would eventually be able to obtain legal status. While the defendant was present, her employee told Guillermo that the purpose of the meeting was to allow Guillermo to work in the United States. The defendant had Guillermo sign and pay for retainer agreements that would purportedly help Guillermo achieve legal status, when in fact legal status was impossible.

The evidence at trial was sufficient for a reasonable jury to find that through advertisements in Filipino newspapers and flyers at residential healthcare facilities, Sineneng-Smith attracted individuals she knew were working illegally in the United States, promising them that a successful labor certification and I-140 petition would allow them to obtain legal permanent residency, all the while knowing that without a change in the law, many of her clients were not allowed to work even after the labor certification and I-140 were approved. RT: 1018:9-11; 16-18; 1019:19-21; 1020:1-5; 13-18; 1022:9-17. This evidence could have provided the jury with context for Sineneng-Smith's specific meeting

with Guillermo, lending credibility to Guillermo's testimony on her perception of the meeting's purpose. This evidence also could have provided context for Sineneng-Smith's employee's "that's why you are here" statement, allowing a reasonable jury to find beyond a reasonable doubt that Sineneng-Smith "encouraged" Guillermo to reside illegally within the United States on the day Guillermo signed the Petition for Alien Worker, as prohibited by § 1324(a)(1)(A)(iv).

Sineneng-Smith argues that she never met with Guillermo or talked to her about the Petition for Alien Worker. The defendant contends that she merely filed paperwork for Guillermo. But the jury could have reasonably concluded otherwise. Sineneng-Smith did meet with Guillermo with respect to the labor certification, and the documents surrounding the Petition for Alien Worker indicate that Sineneng-Smith held out her services as a vehicle to obtain a legal work permit and green card. The evidence shows an ongoing relationship between Guillermo and the defendant, and Guillermo testified repeatedly that she "trusted Evelyn Sineneng-Smith," even though Sineneng-Smith was not providing Guillermo with legal advice. RT: 720:1-9. A reasonable jury could have found beyond a reasonable doubt that the retainer agreements, meetings, and other documents exchanged by Sineneng-Smith and Guillermo rose to the level of the defendant "encouraging" Guillermo to reside illegally in the United States.

Sineneng-Smith also argues, with respect to Counts Two and Three, that the retainer agreements were not signed until after the charged date, meaning that they were not in legal effect on the charged date. But this fact is irrelevant. The government's allegations are

not based on the legal relationship between the defendant and her clients. In fact, as the defendant repeatedly asserts, the legal relationship was relatively circumscribed. Instead, the government alleges that Sineneng-Smith encouraged her clients to reside illegally in the United States by suggesting to them that the applications she would make on their behalf would allow them to eventually obtain legal permanent residency in the United States. In other words, the government's proof of encouragement is based on the impression Sineneng-Smith fostered in her clients that they would be able to obtain a green card through her services. Having her clients sign a retainer agreement was the mechanism of the defendant's encouragement, but the retainer agreement having immediate legal effect was unnecessary for encouragement to have occurred.

2. Count Three: "Encouragement" as to Esteban

Esteban's testimony at trial tells a similar story to Guillermo's. Esteban testified that she met with Sineneng-Smith on May 13, 2002. RT: Vol. 6 at 8:17-22. At that meeting, Esteban signed a retainer agreement, which the government admitted into evidence. Gov't Exh. 17A at 245-46. Like Guillermo, Esteban paid the defendant a $5,900 retainer fee. RT: Vol. 6 at 19:23. Esteban testified that during the May 13, 2002 meeting, Sineneng-Smith told her that she "was able to work once the [labor certification] was filed." *Id.* at 11:10-13. Esteban also testified that, with respect to Esteban's ability to remain in the United States, Sineneng-Smith advised her that "[she] was here in the U.S. and that [she] could stay here in the U.S." *Id.* at 11:14-24. It was Esteban's understanding that at the end of the process, she "would receive a green card." *Id.* at 11:25-12:2.

Esteban testified that after the May 13, 2002 meeting, she began to work at Soquel Leisure Villa. RT: Vol. 6 at 23:4-5. Esteban did not attempt to extend her visa, which expired on October 12, 2002, because she "thought that [she] had a petition that had been filed and that that was [her] way of being legalized." *Id.* at 23:7-13. Later, Esteban testified that she received a letter notifying her that her labor certification application had been approved. *Id.* at 29:3-5. Sineneng-Smith then sent Esteban a retainer agreement for immigrant petition, which Esteban signed. *Id.* at 29:11-30:1. As with Guillermo, Esteban paid $1,000 for this retainer agreement. RT: Vol. 6 at 29:17-23. Esteban testified that she gave the second retainer agreement, dated June 18, 2007—the charged date—to her employer to mail to Sineneng-Smith. The government introduced this retainer agreement, along with several related documents, into evidence. Gov't Exh. 17E.

The evidence as to Esteban is stronger than the evidence as to Guillermo. The jury could reasonably believe Esteban's testimony that the defendant personally represented to her that she could stay in the United States and work while her labor certification was pending. It is uncontested that Sineneng-Smith knew that Esteban's continued residence in the United States was illegal. Thus, based on Esteban's testimony, a reasonable jury could find beyond a reasonable doubt that Sineneng-Smith encouraged Esteban to remain in the United States on the charged date by promising to help her obtain legal status.

3. Count One: "Encouragement" as to Galupo

The court finds the evidence presented at trial insufficient as to Galupo. Unlike Esteban or Guillermo, Galupo did not testify at trial, nor did his employer. The only evidence presented by the government at trial connecting Galupo and Sineneng-Smith was the retainer agreement for the defendant's services signed by Galupo. The government argues that the "jury could infer from reviewing Galupo's June 2, 2005 retainer agreement that the defendant also encouraged him to reside in the United States." Gov. Opp. at 6-7. In doing so, the government wishes to criminalize the signing of a retainer agreement with an illegal resident in the United States for the filing of a labor certification on the alien's behalf. This simple act, as the defendant argues, is certainly not a violation of § 1324(a)(1)(A)(iv). Rather, as the court ruled in denying Sineneng-Smith's motion to dismiss, encouragement under the statute requires "suggesting to the aliens that the applications [Sineneng-Smith] would make on their behalf, in exchange for their payments, would allow them to eventually obtain legal permanent residency in the United States." Dkt. No. 51, at 4-5. Therefore, to present sufficient evidence of encouragement, the government must demonstrate that Sineneng-Smith suggested to Galupo that the applications she would make on his behalf would potentially lead to legal permanent residency in the United States.

However, the government has introduced no evidence that Sineneng-Smith made any representations to Galupo that her services could allow him to obtain legal permanent residency in the United States. The government presented no testimony concerning statements

made by Sineneng-Smith to Galupo, nor did it introduce any documentary evidence to that effect. Moreover, the retainer agreement between Galupo and Sineneng-Smith by itself is insufficient—on its face, it merely states that Sineneng-Smith will assist Galupo in attaining a labor certification. The retainer agreement does not promise that the labor certification can lead to legal permanent residency for Galupo.

Although the circumstances surrounding the signing of Galupo's retainer agreement appear similar to those of Guillermo and Esteban, the court—and a reasonable jury—must examine the evidence as to each count separately. If the court were to allow the jury to infer solely from the retainer agreement that Galupo had an experience with Sineneng-Smith similar to Guillermo's and Esteban's, it would allow the jury to convict Sineneng-Smith on Count One based solely on other crimes she committed. From the government's presentation of a few otherwise neutral documents from Galupo's file that are similar to documents found in Guillermo's and Esteban's files, the government wished the jury to infer that the representations the defendant made to Guillermo and Esteban also were made to Galupo. This sort of inference is prohibited by Fed. R. Ev. 404(b)(1). And without any evidence that Sineneng-Smith made any representations at all regarding Galupo's ability to obtain legal permanent residency, no reasonable jury could find beyond a reasonable doubt that Sineneng-Smith encouraged Galupo to reside illegally in the United States.

The government contends that the jury could have found that once Galupo signed the retainer agreement with Sineneng-Smith, he had to remain in the United

States so he could work to pay her. This argument suggests that any person who lends an alien money could be guilty of violating § 1324(a)(1)(A)(iv). Another court has held, and the Third Circuit has affirmed, that an employer does not encourage an alien within the meaning of § 1324(a)(1)(A)(iv) by hiring an undocumented worker. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 308 (D.N.J. 2005) *aff'd sub nom. Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527 (3d Cir. 2012). If actually hiring an alien to work does not constitute "encouragement," it is certainly not "encouragement" to make an agreement with an alien that, under the circumstances, requires him to work to pay money owed under the agreement. Even further, nothing about simply owing the defendant money required Galupo to live and work in the United States. Galupo could have sent Sineneng-Smith the money from the Philippines. He could have obtained the money from a generous relative. The government's argument here fails.

4. Summary: Immigration Charges

In sum, the evidence presented at trial was sufficient as to Counts Two (Guillermo) and Three (Esteban), and insufficient as to the encouragement element of Count One (Galupo). Sineneng-Smith argues, as she did in her motion to dismiss earlier in this case, Dkt. No. 46, that her conduct cannot fall within the scope of § 1324(a)(1)(A)(iv), and that interpreting § 1324(a)(1)(A)(iv) to prohibit the conduct of which defendant is accused would cause it to be unconstitutionally vague. But for the reasons stated above and in the court's denial of her motion to dismiss, Dkt. No. 51 at 4-6, the court finds that the conduct proven as to Counts Two and Three constitutes "encour-

agement" under § 1324(a)(1)(A)(iv),[1] and that this interpretation of § 1324(a)(1)(A)(iv) does not render it unconstitutionally vague or deny Sineneng-Smith fair notice. Therefore, the court grants the defendant's motion for judgment of acquittal as to Count One, and denies it as to Counts Two and Three. Upon a similar review of the evidence, but without construing the evidence in the light most favorable to the government, the court finds that failing to grant a new trial on Counts Two and Three would not result in "a serious miscarriage of justice," *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000), so the court accordingly denies Sineneng-Smith's motion for a new trial as to Counts

[1] Sineneng-Smith makes the same arguments as before. However, the court will address one argument in particular, as the government further refuted it with evidence presented at trial. Sineneng-Smith contends that she must be acquitted because there can be legitimate reasons for someone to file a labor certification or petition for alien worker. The defendant relies on USCIS Associate Center Director Kurt Gooselaw's grand jury testimony that individuals have a right to file foreign labor certifications and I-140s, and that thousands of foreign labor certifications and I-140s for aliens unlawfully present in the United States have been approved. But the government sufficiently responded to this argument with Mr. Gooselaw's trial testimony. Mr. Gooselaw testified that an alien with an approved labor certification and I-140, who is ineligible for § 245(i) and residing in the United States, is creating an "unlawful presence." RT: 244:4-11. "That means if they accrue more than 180 days in less than a year they could be barred from the United States if they depart. And more than one year unlawful presence, they depart the United States, they could be barred for ten years." *Id.* at 244:13-16. Therefore, Sineneng-Smith did not file for labor certifications and I-140s for legitimate reasons, but rather that the defendant harmed her clients by worsening their immigration status.

Two and Three. As to Count One, the court conditionally grants Sineneng-Smith's motion for a new trial.

B. Sufficiency of the Evidence on the Mail Fraud Charges

To prove that Sineneng-Smith committed mail fraud, the government had to show beyond a reasonable doubt that: (1) Sineneng-Smith knowingly devised and intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money by means of false or fraudulent pretenses, representations, or promises; (2) the statements made or facts omitted as part of the scheme were material; (3) Sineneng-Smith acted with the intent to defraud; and (4) Sineneng-Smith used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme. Sineneng-Smith in her motions for judgment of acquittal and new trial only contests the first two elements.

The defendant does not dispute that if a scheme to defraud is found, the mails were used to carry out an essential part of the scheme. As to Count Four, ICE Special Agent Wendell Wright testified that he discovered a letter dated December 2, 2005 from the defendant transmitting a Department of Labor Application for Permanent Employment Certification for Galupo that was mailed from San Jose, CA to Chicago, IL. RT: 1162:11-1163:3; *see* Gov't Exh. 9E. Special Agent Wright found a U.S. Postal certified mail receipt with the document. *Id.* at 1163:4-7. As to Count Five, Special Agent Wright testified that he found a letter, dated July 12, 2007, signed by Sineneng-Smith, and accompanying the I-140 Form for Guillermo, that was mailed from San Jose, CA to Lincoln, NE. *Id.* at 1167:16-1168:14; *see* Gov't Exh.

13H. Special Agent Wright found a U.S. Postal certified mail receipt with these documents as well. *Id.* at 1168:15-18. As to Count Six, Esteban testified that she received a leniency letter dated October 22, 2007 in the mail from Sineneng-Smith. RT: Vol. 6 27:17-28:6.

Sineneng-Smith also does not appear to dispute that if a scheme to defraud is found, a reasonable jury could have concluded beyond a reasonable doubt that she acted with intent to defraud. The government presented sufficient evidence as to this element. ICE Special Agent Anthony Villacorta testified that Sineneng-Smith admitted to him that she knew that her clients could not obtain legal permanent residency through labor certification, that she knew how the § 245(i) legislation operated, and that her clients could not work even after the labor certification and petition for immigrant worker were approved. RT: 1020:1-18; 1022:9-14. According to Special Agent Villacorta's testimony, Sineneng-Smith explained to him the proper procedure for her clients to be able to legally adjust their immigration status, which required them to wait in their home country until they were approved for a work visa to enter the United States. *Id.* at 1022:17-1023:8. Sineneng-Smith knew that she was not following the proper procedure with her clients. *Id.* at 1023:5-8. The government also presented evidence that Sineneng-Smith, through advertisements in Filipino newspapers and flyers at residential healthcare facilities, attracted clients she knew were working illegally in the United States. *Id.* at 1018:9-11; 16-18; 1019:19-21. From all of this evidence, the jury could have reasonably concluded beyond a reasonable doubt that Sineneng-Smith acted with intent to defraud.

1. A Scheme or Plan to Defraud

"Proof of an affirmative, material misrepresentation supports a conviction of mail fraud" without any additional proof of a fiduciary duty to the victim. *United States v. Benny*, 786 F.2d 1410, 1418 (9th Cir. 1986). However, "[a] defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved." *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981) (citing *United States v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980); *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967); *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960)). In addition, "deceitful statements of half truths or the concealment of material facts is actual fraud violative of the mail fraud statute. . . . [T]he deception need not be premised upon verbalized words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance." *United States v. Woods*, 335 F.3d 993, 998 (9th Cir. 2003) (citing *Lustiger*, 386 F.2d at 138). Note also that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Neder v. United States,* 527 U.S. 1, 25 (1999).

The government alleges that Sineneng-Smith misled Guillermo, Esteban, and Galupo into believing that they could achieve legal permanent residency via the defendant's services. The relevant inquiry, then, is whether, as to each alleged victim, the government presented sufficient evidence from which a reasonable jury could conclude beyond a reasonable doubt that Sineneng-Smith engaged in a scheme to defraud by creating the false impression that her client could achieve legal permanent residency. The government must also have introduced

sufficient evidence from which a jury could conclude that the falsehood was material. The court finds that the government upheld its burden with respect to Count Five (Guillermo) and Count Six (Esteban), but not as to Count Four (Galupo). Sineneng-Smith's motion for judgment of acquittal is therefore denied as to Counts Five and Six and granted as to Count Four.

2. Count Five: Scheme to Defraud as to Guillermo

The relevant facts for the mail fraud charge are similar to the facts for the immigration charge. Guillermo testified that she met Sineneng-Smith on April 10, 2002. RT: 693:11-24. There, Guillermo sat at a table with Santiago (her employer), the defendant, and the defendant's staff member. *Id.* At the meeting, Guillermo signed a retainer agreement for Sineneng-Smith to assist her in "obtain[ing] permanent residence through Labor Certification." Gov't Exh. 13A at 346-47. Guillermo testified that she asked the defendant's staff member whether she could work, and the staff member replied "that's why you are here." RT: 704:9-12.

Guillermo testified that she began working for Santiago about a month after the meeting, on May 5, 2002. RT: 705:14-18. Guillermo also testified that she received a number of leniency letters from Sineneng-Smith. *Id.* at 706:16-25. The letters indicated that Guillermo was "taking steps to legalize his/her immigration status in the United States," and they were addressed to various state and federal agencies. Gov't Exh. 13C. Eventually, Santiago told Guillermo that her labor certification had been approved. RT: 713:22-24. Shortly thereafter, Sineneng-Smith sent Guillermo a retainer for an I-140, which Guillermo signed. *Id.* at 714:14-23; 715:25-716:3. Guillermo testified that she

also paid a $300 down payment on the retainer agreement's $1,000 total cost. *Id.* at 715:12-24. As described in the section on Count Two, Guillermo testified that she signed a document on "premium processing." Gov't Exh. 13F at 182-83. This document mentions the possibility of Guillermo receiving a work permit and green card, and the accompanying chart states that the "Next Step if result is Approval" is to "Apply for Work Permit/Green Card." *Id.*

Sineneng-Smith, contending that the evidence only reveals material omissions, argues that "a non-disclosure can only serve as a basis for a fraudulent scheme when there exists an independent duty that has been breached by the person so charged." *United States v. Dowling*, 739 F.2d 1445, 1449 (9th Cir. 1984), *rev'd on other grounds*, 473 U.S. 207 (1985). But the evidence introduced at trial establishes that the defendant's statements to Guillermo are better characterized as half-truths, or even as being affirmatively misleading. Various different documents suggested that Guillermo could obtain a green card, and the defendant's staff member indicated to Guillermo that following Sineneng-Smith's advice would allow Guillermo to legally work in the United States. A jury could have reasonably concluded from the evidence that Sineneng-Smith intentionally led Guillermo to believe that Guillermo could obtain legal permanent residency.

Finally, the government presented unequivocal evidence of materiality. Guillermo testified that if the defendant told her that she could not obtain a green card, she would have gone home. RT: 796:17-19. Guillermo reasonably relied on Sineneng-Smith's representations

that Guillermo could obtain a green card. The evidence introduced at trial was sufficient as to Count Five.

3. Count Six: Scheme to Defraud as to Esteban

As Esteban's testimony was detailed in the section on Count Three, and the testimony was largely similar to Guillermo's, the court will only highlight a few key facts. Esteban testified that when she met with Sineneng-Smith, the defendant told her "to trust her because she studied law, and that her office was trustworthy, and that there were many people whose petitions had been approved." RT: Vol. 6, 10:11-16. Esteban believed that at the end of the process, she "would receive a green card." *Id*. at 11:25-12:2. Esteban signed a retainer agreement with similar language to the one Guillermo signed. The agreement stated that "Evelyn Sineneng-Smith, has been retained by me Hermansita Esteban (alien) for the purposes of assisting me (alien), to obtain permanent residence through Labor Certification." Gov't Exh. 17A at 245-46. Esteban testified that after the meeting, she was under the impression that her petition "was [her] way of being legalized." RT: Vol. 6, 23:7-13. As a result, Esteban did not extend her visa. *Id*.

Esteban testified that, like Guillermo, she received leniency letters "almost every month." RT: Vol 6, 25:19-20; Gov't Exh. 17C. The leniency letters stated that "[t]his alien is taking steps to legalize his/her immigration status in the United States," again indicating to Esteban that she was going through the process to achieve legal permanent residency. Gov't Exh. 17C. The government also admitted status letters sent by Sineneng-Smith to Esteban. These letters told Esteban to "[p]lease be patient and cooperate with us so that we will be successful in obtaining your permanent residency in the United

States." Gov't Exh. 17C. Esteban later signed a retainer agreement for Sineneng-Smith to assist her in filing a Petition for Alien Worker. Gov't Exh. 17E at 42-43.

The record is replete with explicit misrepresentations made to Esteban. A reasonable jury could have found beyond a reasonable doubt that Sineneng-Smith's repeated allusions to Esteban attaining legal status or permanent residency fraudulently misled Esteban into believing that she could obtain a green card, when in fact it was impossible. Esteban's testimony demonstrates that Esteban assumed she was taking the proper steps to achieve legal permanent residency, and that Sineneng-Smith's actions were instrumental in forming this belief. Unlike the defendant contends, this count is not based purely on an omission. Rather, Sineneng-Smith's affirmative statements to Esteban in person and through retainer agreements and letters misled Esteban.

As to materiality, although the government does not point to an express statement from Esteban that she would not have reasonably retained Sineneng-Smith had Esteban known that she was ineligible for a green card, the jury could reasonably infer materiality beyond a reasonable doubt based on all of Esteban's testimony detailing her belief that she could work and reside in the United States while proceeding to obtain a green card. The court therefore denies the defendant's motions with respect to Count Six.

4. Count Four: Scheme to Defraud as to Galupo

As mentioned in the section on Count One, Galupo did not testify at trial. The government directs the court to two documents introduced at trial to support the jury's verdict: Galupo's retainer agreement, Gov't Exh. 9 at

189-91, and a chart entitled "The Road to Obtaining Permanent Residence is a Rocky and Frustrating Road," Gov't Exh. 9 at 195. Because the government cannot demonstrate that Sineneng-Smith engaged in a scheme to defraud Galupo, the court grants the defendant's motion for judgment of acquittal as to Count Four.

The government highlights the first line of Galupo's retainer agreement, which reads "This will acknowledge that Evelyn Sineneng-Smith has been retained by me Oliver Galupo (alien worker) for purposes of assisting me to obtain my Labor Certification thru PERM." Nothing about this statement is misleading. It does not suggest that Galupo will receive legal status or a green card. Not only is it apparently true that Galupo retained Sineneng-Smith, but the government does not contend that Galupo could not have obtained a labor certification.

The government also points to an addendum to the retainer agreement: "As of today, 245i was not renewed, but Congress may reintroduce 245i during their next session." The government argues that a "jury could find that the statement is misleading because it does not provide an explanation of what 245(i) [sic] and speculates that Congress may take action." Dkt. No. 218 at 15-16. If anything, this addendum is more consistent with full disclosure than with misrepresentation. In adding this language, Sineneng-Smith made only truthful statements. These truthful statements disclosed the current state of the law to Galupo. Because there is no evidence as to what either Sineneng-Smith or Galupo said at the time the retainer agreement was signed, there is insufficient evidence from which a reasonable jury could find that the defendant should have explained what § 245(i) is or that she should have told Galupo that

he was ineligible for a green card. In fact, because there is a lack of evidence, it is reasonable to conclude that Sineneng-Smith may have told Galupo that, without a change in the law, he could not obtain a green card. No reasonable jury could conclude beyond a reasonable doubt from the retainer agreement that Sineneng-Smith misled Galupo.

The analysis as to the "Rocky and Frustrating Road" chart is similar. This chart indicates that attaining a work permit and green card may be possible, but that it is a difficult and "frustrating" process. Gov't Exh. 9 at 195. Under the portion of the chart mentioning a work permit and green card, a note reads "If applicable, 245i effective here." Again, because the government presented no evidence of the discussion surrounding this chart, there was no evidence from which a jury could conclude that Sineneng-Smith did or did not represent to Galupo that he could obtain a green card. The only evidence that the government showed the jury was the chart itself, without any context. No reasonable jury could find beyond a reasonable doubt based on this ambiguous chart that Sineneng-Smith engaged in a scheme to defraud Galupo.

Taken together, the retainer agreement and chart fare no better. As both documents specially mention § 245(i), Sineneng-Smith may have highlighted the issue rather than concealed it. The government introduced no testimony concerning the meeting, nor did the jury have any context for how the defendant presented these two documents to Galupo.

Furthermore, even if a reasonable jury could accept beyond a reasonable doubt that the retainer agreement and the "Rocky and Frustrating Road" chart proved a

scheme to defraud, the government could not prove that the falsehood was material. Without any testimony as to Galupo's motives for retaining Sineneng-Smith, the government presented no evidence that Galupo even intended to pursue a green card. Any conclusion that Galupo would not have reasonably retained Sineneng-Smith had he known that he was ineligible for legal permanent residency would have been based on pure speculation, much less evidence beyond a reasonable doubt. The evidence as to Galupo is clearly insufficient.

5. Summary: Mail Fraud Charges

In sum, the evidence presented at trial was sufficient as to Counts Five (Guillermo) and Six (Esteban), and insufficient as to the scheme to defraud and materiality elements of Count Four (Galupo). Therefore, the court grants the defendant's motion for judgment of acquittal as to Count Four, and denies it as to Counts Five and Six. Upon a similar review of the evidence, but without construing the evidence in the light most favorable to the government, the court finds that failing to grant a new trial on Counts Five and Six would not result in "a serious miscarriage of justice," *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000), so the court accordingly denies Sineneng-Smith's Motion for a new trial as to Counts Five and Six. As to Count Four, the court conditionally grants Sineneng-Smith's motion for a new trial.

C. Entrapment by Estoppel

Sineneng-Smith argues that the government is estopped from prosecuting her for the act of being hired to do immigration consultant work. But, as the court

stated in addressing this same assertion in the defendant's motion to dismiss, Sineneng-Smith is not being prosecuted for the act of being hired to do immigration consultant work. "She is being prosecuted for allegedly entering into allegedly retainer agreements with illegal aliens, accepting payment from aliens and representing to aliens that her efforts would enable them to become legal permanent residents when she knew that they could not. That conduct, if proven, would be illegal under § 1324(a)(1)(A)(iv)." Dkt. No. 51 at 6.

D. First Amendment Arguments

Sineneng-Smith contends that her conviction on the immigration charges violates her rights under the Petition Clause and Free Speech Clause of the First Amendment. The defendant makes the same arguments here —almost verbatim—as she made in her motion to dismiss. *See* Dkt. No. 46 at 20-25. For the same reasons as the court expressed in its order denying Sineneng-Smith's motion to dismiss, it rejects the defendant's contentions here. Dkt. No. 51 at 6.

E. Objections to Evidence and Jury Instructions

1. Scheme Evidence and Relevant Time Period

The court previously considered and rejected the defendant's arguments to exclude evidence of mail fraud based on a scheme mail fraud theory in its Rulings on Defendant's Motions *In Limine* I-IV. Dkt. No. 131. The court denied the defendant's motion in limine to exclude evidence based on a scheme mail fraud theory because Sineneng-Smith's arguments all rested on the erroneous premise that the scheme is not relevant to establish liability for the three specific counts charged.

Id. at 1-3. The summary witnesses' testimony was relevant to the existence and scope of the charged offenses, and the witnesses properly laid foundation for each of the summary charts introduced under Federal Rule of Evidence 1006. For the reasons stated here and those given in the order on the defendant's motions in limine, Sineneng-Smith is not entitled to a new trial based on the court's allowance of this evidence.

2. La Jolla Recording and Ramelb Testimony

The court also previously considered and rejected Sineneng-Smith's arguments as to the La Jolla recording and ICE Special Agent Ramelb testimony in its Rulings on Defendant's Motions *In Limine* I-IV. Dkt. No. 131. As Special Agent Ramelb sufficiently authenticated the recording in his testimony at trial, RT: 1097:5-6; 1098:17-24; 1099:1-4; 1100:23-25; 1101:19-21; 1102:11-20; 1103:1-11, and the defendant concedes that her arguments here are the same as in the motion in limine, the court concludes that Sineneng-Smith is not entitled to a new trial based on the court's allowance of this evidence.

3. Vicarious Liability Instruction

The court has previously denied the defendant's request for a vicarious liability instruction. The government did not rely upon a vicarious liability theory, and the evidence the government offered from Sineneng-Smith's employees was limited to conduct within the scope of the employees' agency as proscribed by Sineneng-Smith.

III. ORDER

For the above stated reasons, the court grants defendant Evelyn Sineneng-Smith's motion for judgment of acquittal as to Counts One and Four. The motion for judgment of acquittal is denied as to Counts Two, Three, Five, and Six. The motion for a new trial is conditionally granted as to Counts One and Four, and denied as to Counts Two, Three, Five, and Six.

Dated: Dec. 23, 2013

/s/ RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

No. CR-10-00414 RMW

UNITED STATES OF AMERICA, PLAINTIFF

v.

EVELYN SINENENG-SMITH, DEFENDANT

Filed: Oct. 12, 2011

ORDER DENYING MOTION TO DISMISS COUNTS ONE THROUGH THREE, NINE, TEN, AND THE FORFEITURE ALLEGATIONS OF THE SUPERSEDING INDICTMENT
[Re Docket No. 46]

Defendant Evelyn Sineneng-Smith moves to dismiss counts one through three, counts nine and ten, and the forfeiture allegations of the superseding indictment filed against her. The counts in question allege violations of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(I), which impose criminal liability and penalties on any person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of the law. . . . " For the reasons set forth below, the court denies the motion to dismiss.

I. BACKGROUND[1]

From approximately 1990 to April 2008, defendant Evelyn Sineneng-Smith owned and operated an immigration consultation business located in San Jose, California, with additional offices in Beverly Hills, California, La Jolla, California, Las Vegas, Nevada, and New York, New York. Sineneng-Smith counseled foreign nationals on applying for and obtaining employment-based visas in order to enable them to work in the residential health care industry.

An alien can obtain an employment-based visa under United States immigration law from the Department of State by filing form I-485, Application to Register Permanent Residence or Adjust Status. Certain aliens are ineligible for adjustment of status. However, in 1994, Congress enacted Section 245(i) of the Immigration and Naturalization Act, known as the Legal Immigration Family Equity Act ("LIFE Act"), which permitted certain aliens who were otherwise ineligible for adjustment of status to pay a penalty in order to adjust their status without leaving the United States if the alien was the beneficiary of a qualifying immigrant visa petition or application for labor certification and met statutory and regulatory requirements before April 30, 2001. The relevant labor certification application, known as Form ETA-750, is filed with the United States Department of Labor ("USDOL") by the employer seeking to hire the alien. If the USDOL approves the form, an employer can apply on the alien's behalf to obtain a visa number

---

[1] Unless otherwise noted, background facts are taken from the superseding indictment.

and file an application with the United States Citizenship and Immigration Services ("USCIS") called the I-140, Petition for Alien Worker.

Counts one through three each allege that for the purpose of private financial gain, Sineneng-Smith encouraged or induced an alien to reside in the United States, knowing or in reckless disregard of the fact that such residence was in violation of the law. The indictment lists the initials of each alien, the date he or she entered into a retainer agreement with the defendant, and the admission number listed in Form I-94, the record of the alien's arrival into the United States.

The defendant is also charged with three counts of mail fraud. In support of those allegations, the superseding indictment alleges that Sineneng-Smith entered into retainer agreements with foreign nationals, most of whom entered the United States on visitor's visas from the Philippines, and their employers. The superseding indictment alleges that Sineneng-Smith fraudulently promoted USDOL's labor certification program as a way for foreign nationals to obtain a permanent resident employment-based visa, while knowing that foreign nationals who did not file petitions with USDOL or USCIS prior to April 30, 2001 would not be eligible to obtain employment-based visas. She charged $5,900 for the filing of an application for a foreign labor certification with USDOL and $900 for the filing of the I-140 Form with USCIS–filings that she allegedly knew were futile. Sineneng-Smith also allegedly knew that her clients had overstayed the amount of time they were allowed to be in the United States and worked illegally at various health care facilities.

II. ANALYSIS

A. Motion to Dismiss

Under Rule 12(b) of the Federal Rules of Criminal Procedure, a party may file a motion to dismiss based on "any defense, objection, or request that the court can determine without a trial of the general issue." Fed. R. Crim. P. 12(b); *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986). In considering a motion to dismiss, the court is limited to the face of the indictment and must accept the facts alleged in the indictment as true. *Winslow v. United States*, 216 F.2d 912, 913 (9th Cir. 1955).

B. The Scope of the Charged Statute

Section 1324(a)(1)(A) provides:

> Bringing in and harboring certain aliens
>
> (a) Criminal penalties.
>
> (1) (A) Any person who—
>
> . . . .
>
> (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 the law.

Section 1324(a)(1)(B)(I) sets the penalty when such conduct was done for commercial purposes or private financial gain.

The primary issue raised in the motion is whether defendant "encourage[d]" illegal aliens to continue to re-

side in the United States within the meaning of the statute by encouraging or inducing illegal aliens and their employers to pay her to pursue what she knew were hopeless applications for permanent residency. Defendant submitted no false information to USDOL or USCIS. A number of courts have considered the meaning of "encourages" under § 1324(a)(1)(A)(iv).

In *United States v. Oloyede*, 982 F.2d 133 (4th Cir. 1992), defendants had been convicted of a scheme to defraud the INS by falsifying documents for citizenship applications for illegal aliens already residing in the United States. Analyzing the meaning of "encourage" in a predecessor statute to § 1324(a)(1)(A)(iv), the court compared the language of that statute's predecessor statute, which had only proscribed conduct that encouraged "entry into the United States." It explained:

> IRCA [Immigration Reform and Control Act] worked a substantial expansion in the types of activities held criminal under this statute. IRCA's plain language distinguishes between these distinct categories of behavior and indicates that "encouraging" is not limited to bringing in, transporting or concealing illegal aliens. Rather, "encouraging" relates to actions taken to convince the illegal alien to come to this country or *to stay in this country*. Appellants' actions reassured their clients that they could continue to work in the United States, that they would not be subject to the threat of imminent detection and deportation, and that they could travel back to their homeland without risk of being prevented from returning, thus providing all the benefits of citizenship. The selling

> of fraudulent documents and immigration papers under these circumstances constitutes "encourages" as that word is used in the statute.

Id. at 137 (emphasis added).

In *United States v. Ndiaye*, 434 F.3d 1270, 1296 (11th Cir. 2006), the Eleventh Circuit held that the defendant had encouraged and induced an illegal alien to reside in the United States by helping him fraudulently obtain a Social Security number. The court explained that the defendant "may not have encouraged or induced an alien to come to or enter the United States, but a jury could have found that he encouraged or induced an alien . . . to reside in the United States, knowing it was in violation of the law. This violates the plain language of the statute."

Sineneng-Smith argues that her case is unlike *Oloyede*, *Ndiaye*, or other cases upholding convictions under the subject statute because she is not accused of helping aliens to obtain a benefits to which the aliens were not entitled. But the plain language of the statute imposes no requirement that the "encouragement" be accomplished through conduct that involves fraud against the United States. Here, the victims of defendant's alleged scheme were the aliens themselves. By suggesting to the aliens that the applications she would make on their behalf, in exchange for their payments, would allow them to eventually obtain legal permanent residency in the United States, Sineneng-Smith encouraged the aliens to remain in the country within the meaning of § 1324(a)(1)(A)(iv). Indeed, the fact that she is accused of defrauding the aliens themselves, as opposed to the federal government, more strongly supports the conclusion the Sineneng-Smith encouraged or induced the aliens to remain in the

United States than if she had merely assisted the aliens in obtaining fraudulent documents. The promise of a path to legal permanent residency that Sineneng-Smith held out to the alleged victims of her scheme was plainly powerful encouragement to those aliens to set up a life in the United States.

Sineneng-Smith cites the unreported district court decision in *Hagar v. ABX Air, Inc.*, 2008 WL 819293 (S.D. Ohio Mar. 25, 2008) for the proposition that merely employing an illegal alien does not constitute "encourag-[ing]" or "induc[ing]" an alien to reside in the United States in violation of § 1324(a)(1)(A)(iv). That court held that "at a minimum the defendant must take some affirmative act to assist an alien to enter or remain in the United States" and that allegations that the defendants knowingly hired unauthorized aliens did not allege affirmative conduct that constituted encouraging or inducing. *Id.* *Hagar* appears questionable to the extent that it implies that the statute requires that a person actually *assist* the alien as opposed to merely encouraging the alien. The fact that Sineneng-Smith may not have assisted her clients to remain in the United States does not mean that she did not wrongfully encourage or induce them to continue to reside in the United States. The facts alleged demonstrate that she did.

In addition, interpreting § 1324(a)(1)(A)(iv) to prohibit the conduct of which Sineneng-Smith is accused does not cause the statute to be impermissibly vague. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with such definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. United*

States, 130 S. Ct. 2896, 2927-27 (2010) (*quoting Koleder v. Lawson*, 461 U.S. 352, 357 (1983)). Sineneng-Smith argues that she is being prosecuted "for the simple act of being hired to provide immigration consultancy services to an unlawful alien." (Mot. at 14.) In fact, she is being prosecuted for allegedly fraudulently entering into retainer agreements by which she represented to illegal aliens that she would pursue a viable path to legal permanent residency on their behalf, when she knew that the aliens she represented could not become legal permanent residents. As explained above, that conduct falls within the plain meaning of the statute, and an ordinary person would have understood that such conduct is prohibited. Defendant cites a number of cases involving the infamous honest services statute, 18 U.S.C. § 1346, but does not explain how 1324(a)(1)(A)(iv) resembles that statute in vagueness or novelty of application. The mere fact that there have been no prior cases directly on point does not mean that Sineneng-Smith did not have notice that her conduct was prohibited.

Similarly, Sineneng-Smith does not accurately describe the charges against her in her argument that she lacked notice because she relied on numerous USDOL and USCIS approvals of applications or that her First Amendment rights have been violated. She is not being prosecuted for making applications to the USDOL or USCIS. She is being prosecuted for allegedly entering into allegedly retainer agreements with illegal aliens, accepting payment from aliens and representing to aliens that her efforts would enable them to become legal permanent residents when she knew that they could not. That conduct, if proven, would be illegal under § 1324(a)(1)(A)(iv).

The parties agreed that the ruling on counts one through three dictate the outcome on counts nine and ten and the forfeiture allegations.

III. ORDER

For the foregoing reasons, the court denies defendant's motion.

DATED: 10/11/2011

/s/ RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-10614
DC No. 5:10 CR-0414 RMW
ND Cal., San Jose

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EVELYN SINENENG-SMITH, DEFENDANT-APPELLANT

[Filed: Feb. 12, 2019]

ORDER

Before: TASHIMA, BERZON, and HURWITZ, Circuit Judges.

Plaintiff-Appellee has filed a petition for rehearing en banc. [Dkt. 119] Defendant-Appellant has filed a petition for panel rehearing and for rehearing en banc. [Dkt. 120] The panel has voted to deny the petition for panel rehearing. Judges Berzon and Hurwitz vote to deny both petitions for rehearing en banc, and Judge Tashima so recommends. The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for panel rehearing and the petitions for rehearing en banc are **DENIED**.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

USDC Case Number: CR-10-10-00414-001 RMW
BOP Case Number: DCAN510CR00414-001
USM Number: 13393-111

UNITED STATES OF AMERICA

v.

EVELYN SINENENG-SMITH

[Filed: Dec. 17, 2015]

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

pleaded guilty to counts: 7&8

☐ pleaded nolo contendere to count(s): _____ which was accepted by the court.

☐ was found guilty on count(s): _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1324	Encourage and Inducing Illegal Immigration for Private Financial Gain	June 18, 2007	2-3
18 U.S.C. § 1341	Mail Fraud	October 22, 2007	5-6
18 U.S.C. § 7206(1)[1]	Willfully Subscribing to a False Tax Return	October 15, 2004	7-8

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not[2] guilty on counts: 2, 3, 5 & 6

☐ Count(s) _____ is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until

---

[1] So in the original.

[2] So in the original.

all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/14/2015
Date of Imposition of Judgment

/s/ RONALD M. WHYTE
Signature of Judge
The Honorable RONALD M. WHYTE
Senior United States District Judge
Name & Title of Judge

[12/14/2015]
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

18 months on each of Counts Two, Three, Five, Six, Seven and Eight, all Counts to run concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

The defendant be housed in minimal level custody. BOP recognize that the defendant is from the San Francisco Bay Area.

☐ The defendant is remanded to the custody of the United States Marshal. The appearance is hereby exonerated.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ am/pm on _____ (no later than 2:00 pm).

☐ as notified by the United States Marshal.

The appearance bond shall be deemed exonerated upon the surrender of the defendant.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

at 2:00 pm on 3/16/2016 (no later than 2:00 pm).

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

The appearance bond shall be deemed exonerated upon the surrender of the defendant.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Three years. This term consists of three years on each of Counts Two, Three, Five and Six, and one year on Counts Seven and Eight, all Counts to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex

offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall pay any restitution, fine and special assessment that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.

2. The defendant shall participate in the Location Monitoring Program as directed by the probation officer for a period of six months, and be monitored by location monitoring technology at the discretion of the probation officer. Location monitoring shall be utilized to verify her compliance with home detention while on the program. The defendant is restricted to her residence at all times except for employment, education, religious services, medical appointments, substance abuse or mental health treatment, attorney visits, court appearances, court-ordered obligations or other activities pre-approved by the probation officer. The defendant shall pay all or part of the costs of the program based upon her ability to pay as determined by the probation officer.

3. The defendant shall comply and cooperate with the IRS in a good-faith effort to pay any outstanding tax liability, to include any assessed penalty and interest.

4. The defendant shall timely and accurately file all future income tax returns required by law during the term of supervision, unless an extension of time is granted by the IRS.

5. The defendant shall provide the probation officer with access to any financial information, including

tax returns, and shall authorize the probation officer to conduct credit checks and obtain copies of income tax returns.

6. The defendant shall not open any new lines of credit and/or incur new debt without the prior permission of the probation officer.

7. The defendant shall submit her person, residence, office, vehicle, or any property under her control to a search. Such a search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to searches.

8. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

9. The defendant shall not own or possess any firearms, ammunition, destructive devices, or other dangerous weapons.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	Assessment	Fine	Restitution
TOTALS	$600	$15,000	$43,550

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Evelyn Das West	$6,995	$6,995	
Caridad Escarez	$6,995	$6,995	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Herman-sita Esteban	$6,995	$6,995	
Fred Esteban	$7,995	$7,995	
Amelia Guillermo	$7,145	$7,145	
Erlinda Sandalo	$7,425	$7,425	
TOTALS	$43,550.00	$43,550.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the fine/restitution.

☐ the interest requirement is waived for the fine/restitution is modified as follows: _____

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows*:

A Lump sum payment of $44,150 due immediately, balance due

☐ not later than _____, or

in accordance with ☐ C, ☐ D, or ☐ E, and/or F below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g. months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court

---

* Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

When incarcerated, payment of criminal monetary penalties are due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102 in monthly payments of not less than $250 or at least 10 percent of earnings, whichever is greater, to commence no later than 60 days from placement on supervision. Any established payment plan does not preclude enforcement efforts by the US Attorney's Office if the defendant has the ability to pay more than the minimum due.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s): _____

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

No. CR 10-00414 RMW

UNITED STATES OF AMERICA, PLAINTIFF

v.

EVELYN SINENENG-SMITH, DEFENDANT

[Filed: July 14, 2010]

SUPERSEDING INDICTMENT

VIOLATIONS: 8 U.S.C. §§ 1324(a)(1)(A)(iv) & (B)(i)—Encouraging and Inducing Illegal Immigration for Private Financial Gain; 18 U.S.C. § 1341—Mail Fraud; 26 U.S.C. § 7206(1)—Willfully Subscribing to a False Tax Return; 18 U.S.C. § 1957—Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity; 18 U.S.C. § 982(a)(6)(A)(ii)(II)—Criminal Forfeiture of Facilitating Property; 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c)—Criminal Forfeiture of Mail Fraud Proceeds; 18 U.S.C. § 982(a)(1)—Criminal Forfeiture of Money Laundering Proceeds

SAN JOSE VENUE

The Grand Jury charges:

At all times relevant to this indictment:

1. From approximately 1990 until April 2008, Evelyn Sineneng-Smith ("Sineneng-Smith) owned and operated an immigration consultation business located at 1022 West Taylor Street in San Jose, California. She also had "store front" offices in Beverly Hills, California, La Jolla, California, Las Vegas, Nevada, and New York, New York.

2. As an immigration consultant, Sineneng-Smith counseled foreign nationals on applying for and obtaining employment-based visas in order for them to work in the residential health care industry.

3. The United States Citizenship and Immigration Services ("USCIS") is a government agency within the United States Department of Homeland Security that oversees lawful immigration to the United States.

4. An "alien" is any person who is not a citizen or national of the United States.

5. A "non-immigrant visa" provides an alien with a temporary stay in the United States, and an "immigrant visa" is issued for permanent residence in the United States.

6. Under United States immigration law, an alien can obtain an employment-based visa. An employer must first file an application, known as a Form ETA-750, with the United States Department of Labor ("USDOL") seeking to hire the alien. After USDOL approves the form, the employer can apply on the alien's behalf to obtain a visa number and file an application with USCIS called the I-140, Petition for Alien Worker. The petition is signed under penalty of perjury. The Department of State issues a limited number of visas an-

nually, and if a visa for the employment-based visa category is available, an alien can file form I-485, Application to Register Permanent Residence or Adjust Status, to became a lawful permanent resident of the United States. This form is also signed under penalty of perjury.

7. In 1994, Congress enacted Section 245(i) of the Immigration and Naturalization Act, known as the Legal Immigration Family Equity Act ("LIFE Act"), which permitted certain aliens who were otherwise ineligible for adjustment of status to pay a penalty in order to adjust their status without leaving the United States. The LIFE Act temporarily extended the ability of certain aliens to adjust their status until April 30, 2001. Therefore, in order for an alien to adjust his status under Section 245(i), he must be the beneficiary of a qualifying immigrant visa petition or application for labor certification that was filed on or before April 30, 2001 and meet statutory and regulatory requirements. The LIFE Act was previously limited to eligible aliens who filed applications on or before January 14, 1998.

COUNTS ONE THROUGH THREE:

(8 U.S.C. § 1324(a)(1)(A)(iv) & (B)(i)—Encouraging and Inducing Illegal Immigration for Private Financial Gain)

8. The factual allegations contained in Paragraphs One through Seven are realleged and incorporated herein by reference as if set forth in full.

9. On or about on the dates set forth below, in the Northern District of California, the defendant,

EVELYN SINENENG-SMITH,

identified in the counts below, for the purpose of private financial gain, did encourage and induce an alien to reside in the United States, knowing and in reckless disregard of the fact that such residence in the United States was in violation of the law:

COUNT	RETAINER AGREEMENT	ALIEN'S INITIALS	ALIEN'S ADMISSION NUMBER (I-94)
ONE	June 5, 2005	O.G.	XXXXXX0310
TWO	May 5, 2007	A.G.	XXXXXX6809
THREE	June 18, 2007	H.E.	XXXXXX9809

All in violation of Title 8, United States Code, Section 1324(a)(1)(A)(iv) and (B)(i).

COUNTS FOUR THROUGH SIX:

(18 U.S.C. § 1341—Mail Fraud)

10. The factual allegations contained in Paragraphs One through Nine are realleged and incorporated herein by reference as if set forth in full.

11. It was part of the scheme and artifice to defraud that Sineneng-Smith counseled foreign nationals, most of whom entered the United States on visitor's visas from the Philippines, to apply for a Department of Labor Foreign Labor Certification in order to work in residential health care facilities.

12. It was part of the scheme and artifice to defraud that Sineneng-Smith entered into contracts known as "Retainer Agreement for Professional Services" with foreign nationals and their employers to file, among

other documents, applications for a Foreign Labor Certification with the DOL, and an I-40, Petition for Alien Worker, with CIS. Sineneng-Smith charged approximately $5,900.00 for the filing of an application for a Foreign Labor Certification with the DOL and $900.00 for the filing of the I-140 form with CIS.

13. It was part of the scheme and artifice to defraud that Sineneng-Smith promoted DOL's labor certification program as a way for foreign nationals to obtain a permanent resident employment-based visa, all the while knowing full well that foreign nationals who did not file petitions with DOL or CIS before April 30, 2001 and met certain regulatory and statutory criteria, were not eligible to obtain an employment-based visas. Sineneng-Smith knew that her clients overstayed the amount of time that they were allowed to be in the United States and worked illegally at various health care facilities.

14. It was further part of the scheme and artifice to defraud that Sineneng-Smith gave her clients a document, entitled "Prayer for Your Mercy & Leniency" addressed to state and federal government agencies. The document, which contained Sineneng-Smith's signature, stated that the alien who possessed it was applying for a Department of Labor Foreign Labor Certification, and requested the government official exercise his discretion to allow the alien to remain in the United States during the processing of application. The bottom of the letter listed an expiration date.

15. On or about on the dates listed in the counts below, in the Northern District of California and elsewhere, the defendant,

EVELYN SINENENG-SMITH,

having devised and intending to devise a scheme and artifice to defraud and obtain money by means of materially false and fraudulent pretenses, representations, and promise, as described above, and for the purposes of executing said scheme and artifice and attempting so to do, knowingly deposited and caused to be deposited to be sent and delivered by the United States Postal Service the following documents:

COUNT	DATE	DOCUMENT	MAILED FROM	MAILED TO
FOUR	December 2, 2005	Letter from Sineneng-Smith transmitting Department of Labor Application for Permanent Employment Certification for client O.G.	San Jose, CA	Chicago, IL
FIVE	July 12, 2007	Letter signed by Sineneng-Smith accompanying Form	San Jose, CA	Lincoln, NE

		I-140, Immigrant Petition for Alien Worker, on behalf of client A.G.		
SIX	October 22, 2007	Letter to client H.E. from Sineneng-Smith entitled "Prayer for Your Mercy & Leniency on behalf of H.E."	San Jose, CA	Soquel, CA

All in violation of Title 18, United States Code, Section 1341.

COUNT SEVEN:

(26 U.S.C. § 7206(1)—Willfully Subscribing to a False Tax Return)

16. On or about June 25, 2003, in the Northern District of California, the defendant,

EVELYN SINENENG-SMITH,

then a resident of San Jose, California, did willfully make and subscribe a U.S. Individual Income Tax Return, Form 1040 (married filing separately) for the tax year 2002, which was verified by a written declaration that it was made under penalties of perjury, and was

filed with the Internal Revenue Service, which said U.S. Individual Income Tax Return she did not believe to be true and correct as to every material matter in that the said U.S. Individual Income Tax Return reported gross receipts on Line 1 of Schedule C of the return to be $749,020.00, whereas as she then and there well knew and believed, the gross receipts for her immigration services for the 2002 tax year were greater than the amount reported.

All in violation of Title 26, United States Code, Section 7206(1).

COUNT EIGHT:

(26 U.S.C. § 7206(1)—Willfully Subscribing to a False Tax Return)

17. On or about October 15, 2004, in the Northern District of California, the defendant,

EVELYN SINENENG-SMITH,

then a resident of San Jose, California, did willfully make and subscribe a U.S. Individual Income Tax Return, Form 1040 (married filing separately) for the tax year 2003, which was verified by a written declaration that it was made under penalties of perjury, and was filed with the Internal Revenue Service, which said U.S. Individual Income Tax Return she did not believe to be true and correct as to every material matter in that she said U.S. Individual Income Tax Return reported gross receipts on Line 1 of Schedule C of the return to be $883,758.00, whereas as she then and there well knew and believed, the gross receipts for her immigration services for the 2003 tax year were greater than the amount reported.

All in violation of Title 26, United States Code, Section 7206(1).

COUNTS NINE THROUGH TEN:

(18 U.S.C. § 1957—Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity)

18. The factual allegations contained in Paragraphs One through Seven and Counts one through Three are realleged and incorporated herein by reference as if set forth in full.

19. On or about on the dates listed in the counts below, in the Northern District of California, the defendant,

EVELYN SINENENG-SMITH,

identified in the counts below, did knowingly engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, such property having been derived from a specified unlawful activity, that is, encouraging and inducing illegal immigration for purposes of private financial gain, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iv) and (B)(i);

COUNT	DATE	FINANCIAL TRANSACTION
NINE	7/15/2005	Bank of America Check No. 5966, in the amount of $37,500.00, made payable to First American Title Company
TEN	7/11/2006	Bank of America Check No. 7149, in the amount of $57,500.00 made payable to First American Title Company

All in violation of Title 18, United States Code, Section 1957.

CRIMINAL FORFEITURE ALLEGATION ONE:

(18 U.S.C. § 982(a)(6)(A)(ii)(II)—Criminal Forfeiture of Facilitating Property)

20. The allegations contained in Paragraphs One through Seven and Counts One through Three are hereby realleged for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 982(a)(6)(A)(ii)(II).

21. Pursuant to Title 18, United States Code, Section 982(a)(6)(A)(ii)(II), upon conviction of an offense in violation of Title 18, United States Code, Sections 1324(a)(1)(A)(iv) and (B)(i), the defendant, Evelyn Sineneng-Smith, shall forfeit to the United States of America any conveyance, including any vessel, vehicle, or aircraft, used in the commission of the offense of which the defendant is convicted, any property, real or personal, that constitutes or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the defendant is convicted, and any property, real or personal, used to facilitate or intended to be used to facilitate the commission of the offense of which the defendant is convicted. The property to be forfeited includes, but is not limited to, the following: 1022 Taylor Street, San Jose, California 95126.

22. If any of the property described above, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1).

CRIMINAL FORFEITURE ALLEGATION TWO:

(18 U.S.C. 981(a)(1)(C) and 28 U.S.C. § 2461(c)—Criminal Forfeiture of Mail Fraud Proceeds)

23. The allegations contained in Paragraphs One through Seven and Counts Four through Six of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c).

24. Upon conviction of the offenses in violation of Title 18, United States Code, Section 1341, set forth in Counts Four through Six of this Indictment, the defendant, Evelyn Sineneng-Smith, shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offenses, including:

a. a sum of money equal to the total amount of proceeds the defendant obtained or derived from, directly or indirectly, from the violation.

25. If any property, real or personal, involved in the offense, and any property traceable to such property involved the offense, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p).

CRIMINAL FORFEITURE ALLEGATION THREE:

(18 U.S.C. § 982(a)(1)—Criminal Forfeiture of Money Laundering Proceeds)

26. The allegations contained in Paragraphs One through Seven and Counts Nine and Ten of this indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 982(a)(1).

27. Pursuant to Title 18, United States Code, Section 982(a)(1), upon conviction of an offense in violation

of Title 18, United States Code, Section 1957, the defendant, Evelyn Sineneng-Smith, shall forfeit to the United States of America any property, real or personal, involved in such offense, and any property traceable to such property.

28. If any property, real or personal, involved in the offense, and any property traceable to such property involved the offense, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1).

DATED: 7/14/10

A TRUE BILL.

/s/ [ILLEGIBLE]
FOREPERSON

JOSEPH P. RUSSONIELLO
United States Attorney

/s/ MATTHEW A. PARRELLA
MATTHEW A. PARRELLA
Chief, CHIP Unit

(Approved as to form: /s/ SUSAN KNIGHT
AUSA KNIGHT

AO 257 (Rev. 6/78)

DEFENDANT INFORMATION RELATIVE TO A CRIMINAL ACTION - IN U.S. DISTRICT COURT

BY: ☐ COMPLAINT ☐ INFORMATION ☒ INDICTMENT
☒ SUPERSEDING

FILED
2010 JUL 12 P 2:38
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
N.D. OF CALIFORNIA
SAN JOSE

Name of District Court, and/or Judge/Magistrate Location
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

OFFENSE CHARGED

SEE ATTACHMENT

☐ Petty
☐ Minor
☐ Misdemeanor
☒ Felony

PENALTY: SEE ATTACHMENT

DEFENDANT - U.S

EVELYN SINENENG-SMITH

DISTRICT COURT NUMBER
CR 10 00414 RMW

PVT

PROCEEDING

Name of Complaintant Agency, or Person (& Title, if any)
ICE

☐ person is awaiting trial in another Federal or State Court, give name of court

☐ this person/proceeding is transferred from another district per (circle one) FRCrp 20, 21, or 40. Show District

☐ this is a reprosecution of charges previously dismissed which were dismissed on motion of: ☐ U.S. ATTORNEY ☐ DEFENSE — SHOW DOCKET NO.

☐ this prosecution relates to a pending case involving this same defendant — MAGISTRATE CASE NO.

☐ prior proceedings or appearance(s) before U.S. Magistrate regarding this defendant were recorded under — CR 10 00414

DEFENDANT

IS *NOT* IN CUSTODY
Has not been arrested, pending outcome this proceeding.
1) ☐ If not detained give date any prior summons was served on above charges
2) ☐ Is a Fugitive
3) ☐ Is on Bail or Release from (show District)

IS IN CUSTODY
4) ☐ On this charge
5) ☐ On another conviction ☐ Federal ☐ State
6) ☐ Awaiting trial on other charges
If answer to (6) is "Yes", show name of institution

Has detainer been filed? ☐ Yes ☐ No — If "Yes" give date filed

DATE OF ARREST Month/Day/Year

Or... if Arresting Agency & Warrant were not

DATE TRANSFERRED TO U.S. CUSTODY Month/Day/Year

Name and Office of Person Furnishing Information on this form: JOSPEH P. RUSSONIELLO
☒ U.S. Attorney ☐ Other U.S. Agency

Name of Assistant U.S. Attorney (if assigned): SUSAN F. KNIGHT

☐ This report amends AO 257 previously submitted

ADDITIONAL INFORMATION OR COMMENTS

PROCESS:
☐ SUMMONS ☒ NO PROCESS* ☐ WARRANT Bail Amount:
If Summons, complete following:
☐ Arraignment ☐ Initial Appearance
Defendant Address:

** Where defendant previously apprehended on complaint, no new summons or warrant needed, since Magistrate has scheduled arraignment*

Date/Time: Before Judge:

Comments:

ATTACHMENT TO PENALTY SHEET
CR 10-00414-RMW
U.S.
v.
EVELYN SINENENG-SMITH

COUNTS ONE THROUGH THREE: Title 8, United States Code, Section 1324(a)(1)(A)(iv) & (B)(i)—Encouraging and Inducing Illegal Immigration for Private Financial Gain.

Penalties: 10 years imprisonment;
$250,000 fine;
3 years supervised release;
$100 special assessment.

COUNTS TWO THROUGH SIX: Title 18, United States Code, Section 1341—Mail Fraud

Penalties: 20 years imprisonment;
$250,000 fine;
3 years supervised release;
$100 special assessment.

COUNTS SEVEN AND EIGHT: Title 26, United States Code, Section 7206(1)—Willfully Subscribing to a False Tax Return.

Penalties: 3 years imprisonment;
$100,000 fine;
1 year supervised release;
$100 special assessment and cost of prosecution.

COUNTS NINE AND TEN: Title 18, United States Code, Section 1957—Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity.

Penalties: 10 years imprisonment
and/or fine of twice the criminally derived proceeds
3 years supervised release
$100 special assessment

APPENDIX G

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 the 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

---

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

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 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) of this section, 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) of this section 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) of this section 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.