No. 19-67

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EVELYN SINENENG-SMITH,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether 8 U.S.C. § 1324(a)(1)(A)(iv), which criminalizes "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States" without lawful status, is facially unconstitutional.

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BRIEF IN OPPOSITION

INTRODUCTION

The government has many statutory tools to combat illegal immigration. Federal law criminalizes harboring, transporting, and concealing undocumented noncitizens, as well as aiding and abetting and conspiracy to commit such offenses. None of those conduct-based crimes was charged or challenged here.

This case involves a very different provision that broadly bans mere encouragement. It makes it a felony to "encourag[e] or induc[e]" a noncitizen without lawful status to "come to, enter, or reside in the United States." 8 U.S.C. § 1324(a)(1)(A)(iv) ("the encouragement provision"). The encouragement provision is not often charged, because the government does not need it to

prosecute actual wrongdoers. But it remains on the books, and so long as it does, the threat of prosecution chills a substantial amount of protected speech. Indeed, when it is charged, the government trumpets its broad sweep—as it did in this case, before the Ninth Circuit correctly held that the encouragement provision is not only broad, but unconstitutionally overbroad.

Now, in its effort to attract this Court's interest, the government asserts that the encouragement provision is a critical prosecutorial tool. The scant number of appellate decisions addressing it suggests otherwise. So does the government's inability to identify any unprotected conduct that can be prosecuted *only* under the encouragement provision, as opposed to under other, narrower provisions that do not cover significant protected speech. Indeed, Respondent was separately convicted of two counts of mail fraud—convictions that have been affirmed and are not before this Court. The Court should not review the constitutionality of a criminal provision that the government has not shown it actually needs.

Moreover, even if the encouragement provision's constitutionality might warrant review at some time, that time is not now. The Ninth Circuit's decision is the only published appellate decision addressing whether the encouragement provision violates the First Amendment. Further percolation in the courts of appeals is advisable and may lead to a consensus without any need for this Court's intervention.

This case also presents a poor vehicle for the question presented. The Ninth Circuit did not opine on additional reasons why the encouragement provision is "facially unconstitutional" (Pet. i), namely that it violates (1) the First Amendment's prohibition on content-

and viewpoint-based discrimination and (2) the Fifth Amendment's prohibition on vague crimes. Were this Court to grant the government's petition, it would have to confront those additional issues.

In any event, a grant of review would not change the outcome in this case because the judgment below is clearly correct. Not one Ninth Circuit judge even called for a response to the government's petition for rehearing en banc, much less suggested that the decision below was in any way doubtful. The plain language of the encouragement provision broadly penalizes encouraging undocumented noncitizens to come to or stay in the country—a reach that sweeps in a substantial amount of protected speech.

Moreover, despite the government's protestations, the financial-gain sentencing enhancement separately charged in this case cannot save the encouragement provision. The jury could not have imposed the sentencing enhancement without first finding that Respondent was guilty of violating the encouragement provision. The very reason that overbroad laws are subject to facial attack is to remedy the chilling effect resulting from keeping such laws on the books. The government cannot defend the encouragement provision against an overbreadth challenge by pointing out that this specific case also involved a separate sentencing enhancement. And even if the financial-gain enhancement were part of the underlying crime, the encouragement provision would still sweep in a significant amount of protected speech—ranging from lawyers giving advice to their clients to paid speakers advocating on behalf of immigration reform.

The petition for a writ of certiorari should be denied.

STATEMENT

A. Statutory Framework

The "encouragement provision," 8 U.S.C. § 1324(a)(1)(A)(iv), makes it a felony 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."

The encouragement provision does not stand alone; it is surrounded by other criminal offenses defined by 8 U.S.C. § 1324. Although the government's petition largely ignores the other offenses, they are highly relevant, as they provide necessary context for understanding and construing the encouragement provision.

Besides the encouragement provision, 8 U.S.C. § 1324(a)(1)(A) defines three other offenses authorizing punishment for broad categories of conduct:

> (i) bringing undocumented persons to the country at locations other than designated ports of entry, *see id.* § 1324(a)(1)(A)(i);
>
> (ii) transporting or moving undocumented persons within the country, *see id.* § 1324(a)(1)(A)(ii); and
>
> (iii) concealing, harboring, or shielding from detection undocumented persons, including in any building or by means of transportation, *see id.* § 1324(a)(1)(A)(iii).

Congress also criminalized conspiring to commit—and aiding and abetting the commission of—any of the offenses listed in § 1324(a)(1)(A), including the encouragement provision. *Id.* § 1324(a)(1)(A)(v)(I), (v)(II).

The punishments authorized for the above violations are found at 8 U.S.C. § 1324(a)(1)(B). The base-

line maximum prison sentences—for which no additional elements need be proven—are ten years' imprisonment for subparts (i) and (v)(I) (bringing undocumented persons into the country and conspiracy), and five years for the other four offenses, including the encouragement provision. *Id.* § 1324(a)(I)(B)(i)-(ii). Congress authorized a higher maximum sentence of ten years' imprisonment for violations of subparts (ii), (iii), and (iv) (the encouragement provision), if the government additionally proves the violation occurred "for the purpose of commercial advantage or private financial gain." *Id.* § 1324(a)(I)(B)(i).

In addition to the above provisions, Congress made it a felony for anyone to "bring[] or attempt[] to bring to the United States in any manner whatsoever" undocumented persons, or to hire more than ten undocumented persons in a year. 8 U.S.C. § 1324(a)(C)(2), (a)(3)(A). Enhancement for these violations is available also. *E.g.*, *id.* § 1324(a)(2)(B)(ii)-(iii).

B. District Court Proceedings

Respondent Evelyn Sineneng-Smith, a U.S. citizen, worked as an immigration consultant in San Jose, California for nearly two decades. In that capacity she worked to help noncitizens navigate our country's complex immigration system.

In 2010, the government charged Ms. Sineneng-Smith in connection with work she did for three undocumented workers and their employers, namely assisting with applications in connection with pursuing lawful permanent residence on employment-based grounds. *See* 8 C.F.R. § 245.10. The workers were not at the time eligible to adjust status through that process, but this approach had the effect of securing a favorable pri-

ority date for their applications in the event the law changed—a point the government's expert conceded below. Appellant's C.A. Opening Br. 12-18.

The government asserted that Ms. Sineneng-Smith committed mail fraud under 18 U.S.C. § 1341 by using the U.S. mail to lead the three workers to believe "they could achieve legal permanent residency via [her] services." Pet. App. 57a. She was subsequently convicted on that ground. The Ninth Circuit affirmed the fraud convictions, and they are not at issue in this Court.[1]

But the government went further. It also charged Ms. Sineneng-Smith with three felony counts under the encouragement provision. To support this charge, the government focused on what it described as Ms. Sineneng-Smith's "dangerous words" and "words and … deeds" in convincing the three undocumented workers to stay in the country. Gov. Closing Argument, Dist. Ct. Dkt. 210, at 60. It contended that Ms. Sineneng-Smith had communicated to the undocumented noncitizens: if you "stay [in the country], your patience is going to be rewarded." *Id.* at 12; *see also id.* ("What is she telling her clients through these leniency letters? She's telling them to stay.").

On top of each encouragement offense, the government also invoked the financial-gain sentencing enhancement found at § 1324(a)(1)(B)(i). As the government explained to the jury, the financial-gain enhancement is a "separate standard" from the encouragement provision's prohibition on encouraging or inducing un-

[1] The government also charged two counts related to monetary transactions with money derived from unlawful activity (18 U.S.C. § 1957), which were dismissed, and two counts of subscribing false tax returns (26 U.S.C. § 7206(1)), to which Ms. Sineneng-Smith pleaded guilty. Those counts are likewise not at issue here.

documented individuals to reside in the United States. Gov. Closing Argument, Dist. Ct. Dkt. 210, at 14-15. The district court instructed the jurors that, if they found Ms. Sineneng-Smith "*guilty* of encouraging or inducing illegal immigration as alleged in Counts One through Three," they must "*then*" determine whether the government proved that she "committed *the offense*" for financial gain. Jury Instructions, Dkt. 193, at 16; Jury Instruction Tr., Dist. Ct. Dkt. 210, at 81-82 (emphases added). The verdict form similarly asked whether the jury found her "Guilty" of violating the encouragement provision alone. Only if the jury checked "Guilty" was the jury then to answer whether the government proved that she "committed the offense in Count One[, Two, or Three] for private financial gain." Verdict Form, Dist. Ct. Dkt. 195, at 1-2. It was accordingly possible for the jury to find Ms. Sineneng-Smith guilty of the encouragement crime without also finding the financial-gain enhancement applicable.

Ms. Sineneng-Smith moved to dismiss the encouragement counts, arguing *inter alia* that the encouragement provision is void for vagueness under the Fifth Amendment and violates the First Amendment. The district court denied the motion despite recognizing that the portion of the indictment relating to the encouragement provision was predicated on Ms. Sineneng-Smith's words to the undocumented workers. Pet. App. 74a ("The *promise* of a path to legal permanent residency that Sineneng-Smith held out … was plainly powerful encouragement to those aliens to set up a life in the United States." (emphasis added)). The district court also ruled that the encouragement provision did not require the government to prove that Ms. Sineneng-Smith actually ***aided*** the noncitizens in their attempts to remain in the United States. As the court explained,

"[t]he 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." *Id.*

Following a 12-day trial, a jury returned guilty verdicts on all three encouragement counts. The district court granted Ms. Sineneng-Smith's motion for judgment of acquittal as to one encouragement count but denied the motion as to the other two. The district court again rejected Ms. Sineneng-Smith's constitutional arguments, Pet. App. 53a, 65a, even though it again acknowledged that the government's proof of encouragement was based on Ms. Sineneng-Smith's words—i.e., she "encouraged [one worker] to remain in the United States … by *promising* to help her obtain legal status." Pet. App. 50a (emphasis added); *see also id.* 49a ("[T]he 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." (emphasis added)).

Ms. Sineneng-Smith was sentenced concurrently on all counts to 18 months' imprisonment and three years' supervised release, fined $15,000, and ordered to pay $43,550 in restitution and a $600 special assessment.

C. Court Of Appeals Proceedings

In defending the encouragement convictions on appeal, the government advocated that the provision be construed "broadly" as reaching "*statements or* actions [that] encouraged or induced the alien to remain in the United States." Gov. C.A. Opening Br. 30 (emphasis added). The government relatedly argued that the encouragement element was satisfied by mere words, citing Ninth Circuit precedent holding that "encourage"

means to "help" or "to inspire with courage, spirit, or hope." *Id.* at 32.

The Ninth Circuit reversed Ms. Sineneng-Smith's encouragement convictions, finding the statute unconstitutionally overbroad. The court did not reach Ms. Sineneng-Smith's alternative arguments that the encouragement provision (1) impermissibly discriminates based on content and viewpoint and (2) is void for vagueness. Pet. App. 8a & n.4, 39a n.15.

The panel first construed the encouragement provision based on its plain language and the context of the statutory section in which it appears. The panel rejected the government's argument that the encouragement provision applies only to conduct, explaining that the ordinary meaning of "encourage[]" and "induce[]" encompasses "speech, conduct or both," and that nothing in the text or structure of the statute provides a reason to "stray from the [terms'] plain meaning." Pet. App. 16a, 19a. The panel recognized that adopting the government's preferred interpretation would require "rewrit[ing] the statute." Pet. App. 27a. The court likewise rejected as "irrelevant" the sentencing enhancement of 8 U.S.C. § 1324(a)(1)(B), because the encouragement provision's meaning "does not vary depending on whether the financial gain enhancement also applies," and "the chilling effect" of the encouragement provision "extends to anyone who engages in behavior covered by it, whether for financial gain or not." Pet. App. 10a n.5.

The panel accordingly interpreted the encouragement provision to require the government to prove only that a defendant "knowingly encourage[d] or induce[d] 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." Pet. App. 11a.

Next, the panel concluded that the encouragement provision—so construed—criminalizes protected speech, because it prohibits speech that extends beyond any of the First Amendment's few, narrow carveouts. Pet. App. 28a-33a. For example, the Ninth Circuit explained that the statute did not fall within the exception for speech integral to criminal conduct because "continuing to reside in the U.S. is not a criminal offense" and because the government identified no case law applying that exception to speech simply encouraging disobedience of a *civil* provision. Pet. App. 28a, 32a-33a.

Finally, the panel concluded that the encouragement provision "is susceptible to regular application to constitutionally protected speech and … there is a realistic (and actual) danger that the statute will infringe upon First Amendment protections." Pet. App. 34a. The encouragement provision makes it a felony for "a loving grandmother [to] urge[] her grandson to overstay his visa, by telling him 'I encourage you to stay.'" Pet. App. 35a. Similarly, the encouragement provision could capture "marches, speeches, publications, and public debate expressing support for immigrants." Pet. App. 36a-37a. And it could also criminalize the speech of "professionals who work with immigrants," like attorneys, as the government had advocated in a prior case. Pet. App. 38a (discussing *United States* v. *Henderson*, 857 F. Supp. 2d 191, 203 (D. Mass. 2012)). The panel then juxtaposed this illegal reach of the encouragement provision against any *legitimate* application. Because the court concluded that the provision's "legitimate sweep"—which encompasses only "conduct not

criminalized in other subsections of § 1324(a)(1)(A)"—is "narrow," it held that the encouragement provision was unconstitutionally overbroad. Pet. App. 39a.

The government petitioned for rehearing en banc, advancing *inter alia* the same argument it advances here, namely that the financial-gain enhancement saves the encouragement provision from constitutional challenge. The Ninth Circuit denied rehearing without calling for a response.

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED DOES NOT MERIT REVIEW

A. The Encouragement Provision Is Rarely Used And Unnecessary

This case does not present an important question of federal law because the encouragement provision is only rarely invoked. Although the government repeatedly insists on the importance of the provision (Pet. 7, 8, 12, 23, 25), it does not support this claim. The government does not reveal how often the encouragement provision is charged. And more importantly, the government does not identify a single instance in which (1) the provision was actually charged and (2) the defendant could not have been charged under *another* statutory provision unaffected by the ruling below.

The government remains free to charge three other broad classes of immigration-related offenses defined in 8 U.S.C. § 1324(a): (1) bringing an alien into the United States anywhere other than a designated port of entry, (2) transporting an alien within the United States, and (3) "conceal[ing], harbor[ing], or shield[ing]" an alien from detection within the United States. 8 U.S.C.

§ 1324(a)(1)(A)(i)-(iii); *see also supra* pp. 4-5. The same subsection sweeps in any conduct that is even remotely related to the bringing, transporting, and harboring provisions by making it a crime to aid and abet the commission of, or to conspire to commit, any of those three offenses. *Id.* § 1324(a)(1)(A)(v). Furthermore, § 1324(a)(2) also broadly criminalizes "bring[ing]" or "attempt[ing] to bring in any manner whatsoever" an undocumented noncitizen "to the United States."

In light of these multiple options for prosecuting criminal conduct, it is perhaps unsurprising that the government cannot elaborate on why the encouragement provision is supposedly important. The government presents it as the only "general criminal prohibition against facilitating an alien's continued unauthorized presence in the United States." Pet. 12. But actual "facilitation" is covered by, for example, provisions criminalizing the transportation or harboring of undocumented individuals, by the prohibitions on aiding/abetting or conspiracy to commit those offenses, or by statutes that specifically prohibit the creation and dissemination of fraudulent immigration documents or hiring, recruiting, or profitably referring unauthorized workers for employment, *e.g.*, 8 U.S.C. §§ 1324a, 1324c; 18 U.S.C. § 1546. Respondent herself was prosecuted and convicted for mail fraud, convictions that the Ninth Circuit affirmed and that are no longer at issue.

The government identifies just one concrete example of conduct it believes is not covered by other laws: "paying off smugglers." Pet. 13. But smugglers are routinely prosecuted under the bringing, transporting, and harboring provisions of § 1324(a)(1)(A)(i)-(iii) or

under § 1324(a)(2).[2] The government does not explain why "paying off" smugglers would not be chargeable at least as aiding and abetting—or conspiracy to commit—the smugglers' own crimes. And sure enough, the government has prosecuted "paying off smugglers" without resorting to the encouragement provision. *E.g.*, *United States* v. *Dominguez*, 661 F.3d 1051, 1065-1066 (11th Cir. 2011) (affirming convictions for conspiracy and aiding and abetting attempted smuggling pursuant to § 1324(a)(2) where defendant paid smugglers). Additionally, depending on the government's theory, it can make use of non-immigration-specific statutes, like the mail fraud offenses it charged in this very case. *See supra* p. 6; Pet. 3-5, 8 (describing Respondent's conduct as "fraud" involving "false pretenses" and "duping").[3]

There is no need for this Court to review the constitutionality of a statute the government does not need

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[2] *See, e.g.*, *United States* v. *Colon*, 220 F.3d 48, 50 (2d Cir. 2000) (defendant pleaded guilty to conspiracy to commit smuggling under 18 U.S.C. § 371 and 8 U.S.C. § 1324(a)(1)(A)(i)-(iii)); *United States* v. *Alvarez-Marquez*, 542 F. App'x 543, 544-545 (9th Cir. 2013) (defendant charged under, *inter alia*, 8 U.S.C. § 1324(a)(1)(A)(iii)); *United States* v. *Barajas-Montiel*, 185 F.3d 947, 950 (9th Cir. 1999) (defendant convicted under, *inter alia*, 8 U.S.C. § 1324(a)(1)(A)(ii)); *United States* v. *Valenzuela-Ramirez*, 296 F. App'x 683, 685 (10th Cir. 2008) (defendant had previously pleaded guilty under § 1324(a)(1)(A)(ii)). The government has also used § 1324(a)(2) to prosecute smugglers. *E.g.*, *United States* v. *Johnson*, 30 F. App'x 685 (9th Cir. 2002); *United States* v. *Merker*, 334 F. App'x 953, 955-956 (11th Cir. 2009) (per curiam).

[3] The government's speculation that the decision below "potentially" undermines—or "casts some doubt"—on "a broader array of governmental action" (Pet. 25-26) shows how far it must stretch to make its question presented seem important. The government does not suggest that the differently-phrased statutes it cites have even been challenged under the First Amendment, let alone held unconstitutional.

and rarely uses. If anything, the government's attempt to salvage such a provision only underscores that its real interest in the statute is not prosecutorial, but rather in chilling expression the government does not like.

B. The Circuits Are Not Divided As To The Encouragement Provision's Unconstitutionality

Review of this issue is premature for the independent reason that—contrary to the government's suggestion—there is no circuit split regarding the provision's constitutionality. To Respondent's knowledge, this case represents the first published appellate decision addressing the encouragement provision's overbreadth.[4]

The government's attempt to conjure a limited circuit split (Pet. 25) does not implicate the question presented. *DelRio-Mocci* v. *Connolly Props. Inc.*, 672 F.3d 241 (3d Cir. 2012), has nothing to do with overbreadth or even the First Amendment. Rather, *DelRio* considered whether the plaintiffs there had pled factual allegations related to the encouragement provision that were adequate to sustain a claim under RICO.

While the decision below and *DelRio* diverge on the precise *scope* of the encouragement provision, *see* Pet. App. 23a, that disagreement does not warrant this

[4] The Fourth Circuit held in an unpublished *per curiam* disposition that the encouragement provision is not overbroad. *United States* v. *Tracy*, 456 F. App'x 267 (4th Cir. 2011). But *Tracy* provides no reasoning supporting its suggestion that the provision targets "speech … that constitutes criminal aiding and abetting" or its holding that the provision does not "'prohibit[] a substantial amount of [protected] speech.'" *Id.* at 272. Both conclusions are incorrect for the reasons explained in Part II. Unsurprisingly, the government does not assert that *Tracy* creates a circuit split warranting this Court's review.

Court's review. The government identifies no reason why a disagreement over the precise coverage of a rarely invoked statute presents an important federal question. Indeed, the government carefully avoids arguing that the Third Circuit's interpretation is even ***correct*** or that it would render the encouragement provision constitutional. Nor did it advance any such position at trial. Contrary to the *DelRio* standard, the jury was not required to find that Ms. Sineneng-Smith actually *caused* the undocumented noncitizens to stay in the country or that she "substantially" encouraged or induced anyone to reside here. Rather, the jury was asked to find only whether Ms. Sineneng-Smith encouraged or induced three individuals to reside in the United States without lawful status. Jury Instructions, Dist. Ct. Dkt. 193, at 18; Verdict Form, Dist. Ct. Dkt. 195, at 1-2; *see supra* pp. 7-11 (government and district court explaining the encouragement provision's expansive scope).

The government echoed its expansive view of the encouragement provision's scope on appeal, where it asserted that other courts have "broadly" construed the encouragement provision as reaching "*statements or* actions [that] encourage or induced the alien to remain in the United States." Gov. C.A. Opening Br. 30 (emphasis added). The government similarly indicated that the encouragement or inducement requirement was satisfied by mere words, citing Ninth Circuit precedent holding that "encourage" means to "help" or "to inspire with courage, spirit, or hope." *Id.* at 32. The government's initial appellate briefing did not even mention *DelRio*, much less urge the Ninth Circuit to adopt the *DelRio* court's interpretation of the encouragement provision. Having declined to prosecute Respondent under the Third Circuit's construction, the

government cannot credibly argue its correctness now—and indeed, it does not.

C. This Case Is A Poor Vehicle For The Question Presented

A further reason to deny the government's petition is that the Ninth Circuit has not reached the encouragement provision's full set of constitutional flaws, nor has any other court of appeals. Because the government asks this Court to decide whether the encouragement provision is "facially unconstitutional" (Pet. i), deciding the question presented would require the Court to consider not just overbreadth but also (A) whether the provision impermissibly discriminates against speech on the basis of content and viewpoint and (B) whether it is unconstitutionally vague. *See supra* p. 9. These additional issues present strong alternative grounds for affirmance, but this Court would need to address them without the benefit of any fully developed lower court reasoning.

The encouragement provision is textbook viewpoint discrimination. "The most basic" of First Amendment principles is that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 790-791 (2011) (citing *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002)). But by its plain terms, the encouragement provision advances an anti-immigration perspective by subjecting to punishment large swaths of speech *favoring* immigration, while permitting speech *disfavoring* it. An advocate holding a sign or speaking aloud in support of undocumented noncitizens may be prosecuted for "encouraging" their continued residence here,

while a counter-protester who recites the opposite message faces no punishment.[5]

The encouragement provision is also unconstitutionally vague, in that it both "fails to give ordinary people fair notice of the conduct it punishes" and is "so standardless that it invites arbitrary enforcement." *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015). The outer limits of the word "encourage" are impossible to pin down. Courts have interpreted it to encompass everything from simply giving "hope" to actively giving "patronage." *See United States* v. *Thum*, 749 F.3d 1143, 1147 (9th Cir. 2014) (encourage means "to inspire with courage, spirit, or hope … to spur on … to give help or patronage to"); *accord United States* v. *He*, 245 F.3d 954, 960 (7th Cir. 2001) (adopting the same definition); *see also United States* v. *Lopez*, 590 F.3d 1238, 1249 (11th Cir. 2009) (term means "[t]o instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident; to help; to forward; to advise"). In light of these varying definitions, the encouragement provision inescapably means different things to different people. After all, speech that one listener brushes off as speculation, fantasy, or simply off-point may embolden or inspire another, leaving speakers to guess at which words (or expressive actions) cross the line. Just as "[c]onduct that annoys some people does not annoy others," *Coates* v. *City of*

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[5] The government's insistence that the financial-gain enhancement provision somehow cures the statute's overbreadth does not apply to a viewpoint-discrimination argument. The government identifies no case law—nor is Respondent aware of any—supporting the argument that a *viewpoint* may be targeted merely because it was expressed for profit. Even unprotected speech cannot be restricted on the basis of viewpoint. *See, e.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 391 (1992).

Cincinnati, 402 U.S. 611, 614 (1971), speech that may leave one listener unimpressed may encourage another.

These independent constitutional flaws strongly caution against granting the government's petition. Given the broad sweep of the question presented, certiorari would require this Court to address other constitutional infirmities without the benefit of any lower court analysis, contrary to the Court's role as "'a court of review, not of first view.'" *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1170 (2017).

II. The Decision Below Is Correct

The case additionally does not warrant review because the decision below is correct. The government advances three basic counterarguments: (1) the Ninth Circuit construed the encouragement provision too broadly, (2) the sentencing enhancement charged in this particular case somehow saves the overbroad encouragement provision, and (3) the encouragement provision prohibits only speech integral to criminal conduct. None of these assertions is persuasive.

A. The Ninth Circuit Correctly Interpreted The Encouragement Provision To Cover A Wide Array Of Protected Speech

The government's assertion that the Ninth Circuit should have "construe[d]" the encouragement provision as a "relatively narrow ban on soliciting or facilitating illegal activity" (Pet. 22-24; *see also id.* at 9-12) is nothing less than statutory redrafting. Congress's chosen terms, "encourage" and "induce," have expansive meanings that naturally encompass protected speech. *See supra* pp. 9-10; 15; *see also International Bhd. of Elec. Workers* v. *NLRB*, 341 U.S. 694, 702 n.7 (1951) (defining "[i]nduce" to mean "'[t]o lead on; to influence;

to prevail on; to move by persuasion or influence,'" and "[e]ncourage" to mean, *inter alia*, "'[t]o give courage to; to inspire with courage, spirit, or hope; to raise the confidence of; to animate; hearten'").[6]

The government treats the encouragement provision as though Congress used other locutions, including "incentivizing," "procuring," (Pet. 7), "facilitating," "soliciting," "aiding and abetting," (Pet. 9), and "active assistance" (Pet. 13). The actual statute contains none of these words. The government's attempt to turn the encouragement provision into an aiding and abetting statute (Pet. 9-10) is particularly strained. As the Ninth Circuit explained, the encouragement provision "looks nothing like an aiding and abetting statute." Pet. App. 33a. It does not use the word "aid" or "abet" (or, for that matter, "solicit"). It does not require any actual assistance, as the district court expressly held. Pet. App. 74a. It is not confined to criminal offenses, unlike every other aiding and abetting statute the government relies upon. *See* Pet. 10-11; *see also supra* p. 10. And as the Ninth Circuit noted, the government was—and still is—unable to identify a single case "where a defendant was convicted of aiding and abetting a ***civil*** offense." Pet. App. 32a (emphasis added).

Moreover, § 1324 *already* includes an aiding-and-abetting provision, which makes it a crime to aid or abet § 1324(a)'s bringing, transporting, and harboring

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[6] *See also, e.g.*, *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754, 760 (2011) ("The term 'induce' means '[t]o lead on; to influence; to prevail on; to move by persuasion or influence.'" (quoting *Webster's New International Dictionary* 1269 (2d ed. 1945)); *Black's Law Dictionary* 697 (5th ed. 1979) (to "induce" means "[t]o bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on").

offenses. *See* 8 U.S.C. § 1324(a)(1)(A)(v)(II) ("Any person who … aids or abets the commission of any of the preceding acts [in § 1324(a)(1)(A)(i-iv)] shall be punished[.]"). Adopting the government's proposed interpretation of the encouragement provision would thus "[be] at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted). The government's only real response is that the aiding-and-abetting language of subsection (v)(II) supposedly does not cover "facilitation of an alien's primary conduct in violation of the immigration laws." Pet. 23. But as discussed above, multiple other provisions criminalize the government's sole example of such "facilitation" (namely, paying off smugglers), and the government has not explained otherwise. *See supra* pp. 12-13; *Dominguez*, 661 F.3d at 1065-1066.[7]

The government also adds that the encouragement provision alone covers "solicitation," Pet. 23, but it points to nothing in the statute, in this Court's case law, or even in a dictionary that would support reading "encourages or induces" in that way. As the Ninth Circuit observed, Congress "clearly knows how to write a solicitation statute" and "could have done so here" if it had wanted to. Pet. App. 28a n.9 (citing 18 U.S.C. § 373(a) as an example of a solicitation statute).

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[7] The government also does not confront the fact that the encouragement provision of § 1324(a)(1)(A)(iv) is *itself* subject to the aiding-and-abetting provision of § 1324(a)(1)(A)(v)(II). The government's rewriting of the encouragement provision would mean that someone could be charged with aiding and abetting solicitation—or aiding and abetting aiding and abetting—which is at the very least counterintuitive, if not absurd.

The government contends that the Ninth Circuit should have read the statute narrowly to avoid constitutional problems. Pet. 16-17. But courts may not actually "'***rewrite*** a … law to conform it to constitutional requirements.'" *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (emphasis added). Doing so "would constitute a serious invasion of the legislative domain, and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place." *Id.* (internal quotation marks and citations omitted); Pet. App. 11a, 27a. Besides, the statute's history shows that Congress has previously chosen to expand the scope of the encouragement provision, not to narrow it. *E.g.*, Pub. L. No. 82-414, § 274(a)(4), 66 Stat. 163, 229 (1952) (previous version of encouragement provision containing additional mens rea requirement).

The government's cited cases are far afield. For two of them, the government relies on shorthand phrases in the opinions, rather than actual statutory terms. The statutes at issue did not use the words "encourage" or "induce," but were more narrowly tailored. *See United States* v. *Williams*, 553 U.S. 285, 294 (2008) (statute included a "string of operative verbs—'advertises, promotes, presents, distributes, or solicits'"—that narrowed the meaning of more expansive terms); *Cox* v. *Louisiana*, 379 U.S. 559, 560 (1965) (penalizing picketing with the intent of "interfering with, obstructing, or impeding the administration of justice" or "'influencing any judge, juror, witness, or court officer'"). These opinions show at most that context matters. Indeed, *Williams* expressly distinguished the statute at issue there from a problematic criminalization of the statement "*I encourage you* to obtain child pornography." 553 U.S. at 300 (emphasis added). And the remaining case actually supports Respondent. Alt-

hough it did not involve an overbreadth challenge, it recognized that "[t]he words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *International Bhd.*, 341 U.S. at 701-702 & n.7, 705.

B. The Financial-Gain Enhancement Does Not Remedy The Chilling Effect Of The Overbroad Encouragement Provision

Unable to salvage the constitutionality of the encouragement provision itself, the government argues that its decision to charge Ms. Sineneng-Smith with the statute's separate financial-gain enhancement somehow changes the calculus. Pet. 15, 20-21. It does not.

The government does not explain why an overbroad criminalization of protected speech can remain on the books simply because the government sometimes charges it together with a sentencing enhancement. Facial attacks on overbroad laws criminalizing free speech exist precisely because the "'continued existence of [such a] statute in unnarrowed form would tend to suppress constitutionally protected rights.'" *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972); *see also Williams*, 553 U.S. at 292 (the very "*threat* of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas" (emphasis added)). Thus, even persons whose conduct "is clearly unprotected" may "attack overly broad statutes." *New York* v. *Ferber*, 458 U.S. 747, 769 (1982); *see also Broadrick* v. *Oklahoma*, 413 U.S. 604, 612 (1973) ("[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory

effects of overly broad statutes."). That pernicious chilling effect exists by virtue of the encouragement provision alone, which—as the government admits—"defines a complete criminal offense." Pet. 19.

The financial-gain enhancement simply increases "the statutory maximum term of imprisonment" for violating the encouragement provision "from five to ten years." Pet. 19. But the jury could not impose the financial-gain enhancement without first finding Ms. Sineneng-Smith guilty of the encouragement offense. The jury form was crystal clear on this point, as it first asked the jury to determine whether Ms. Sineneng-Smith was "Guilty" of violating the encouragement provision alone and then—as a secondary question—to determine whether "the government had proven beyond a reasonable doubt that [she] committed *the offense* … for private financial gain." Verdict Form, Dist. Ct. Dkt. 195, at 1-2 (emphasis added); *see also supra* pp. 6-7; *United States* v. *Williams*, 449 F.3d 635, 646 (5th Cir. 2006) (transporting an undocumented noncitizen in violation of § 1324(a)(1)(A)(ii) is a "lesser included offense" of doing so for financial gain).

The government's primary response is to urge this Court to ignore the plain language of the statute designating the financial-gain provision as an enhancement because Congress *could have* made encouraging or inducing for financial gain a standalone crime. Pet. 22-23. Dismissing the text and structure of a statute as a mere "happenstance of legislative drafting," Pet. 20, is a remarkable position for the government to take. The statutory text is always "[t]he starting point in discerning congressional intent," and when the "'language is plain'"—as it is here—'"the sole function of the courts'" is to interpret it as written. *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004). Here, that means treating the fi-

nancial-gain provision as an enhancement, as Congress provided.[8]

In any event, the financial-gain enhancement does not save this law. Speech is not left unprotected "merely because it is uttered by 'professionals.'" *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371-2372 (2018). Nor does speech lose its protection when it is delivered for money. A speaker who receives a fee for delivering a message of welcome and reassurance to a group of undocumented people "encourages" them to remain here. And an attorney who (correctly) advises a paying undocumented client that she has greater constitutional protections in the United States, or that she will be ineligible for certain forms of immigration relief if she leaves and tries to return, *see* 8 U.S.C. § 1229(b), is "encouraging" the client to remain here. This Court has rejected the notion that the First Amendment provides less protection for paid legal advice. *See Florida Bar* v. *Went for It, Inc.*, 515 U.S. 618, 634-635 (1995) ("There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer."); *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1054 (1991) (opinion of Kennedy, J.) ("[N]one of the justifications put forward by

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[8] The government also relies on *United States* v. *Alvarez*, 567 U.S. 709 (2012), a curious choice given that this Court *struck down* a provision criminalizing false speech about military decorations. Although the plurality opinion's analysis focused on lies about the Congressional Medal of Honor, which were the subject of an enhanced penalty, it did not decide that a constitutional analysis—much less an overbreadth analysis—should always be limited to such an enhancement. Rather, it simply took the government's regulatory interests at their strongest (protecting the integrity of the Medal of Honor), and still found them insufficient to justify a content-based prohibition. *See id.* at 724-730 (plurality opinion).

respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.").

Paid speech encouraging undocumented noncitizens to stay in the country is hardly "'fanciful.'" Pet. 24. In fact, the government is on record arguing that "'an immigration lawyer would be prosecutable [under the encouragement provision] 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.'" Pet. App. 24a (quoting *United States* v. *Henderson*, 857 F. Supp. 2d 191, 203 (D. Mass. 2012)). The petition tellingly does not even mention *Henderson*, which the Ninth Circuit discussed at length. The government's grudging allowance that an attorney could safely advise a client "in removal proceedings but released on bond" to remain in the country (Pet. 18) is cold comfort to attorneys who must advise undocumented clients and their families in other scenarios, including before removal proceedings begin. And in any event, an "unconstitutional statute" will not be upheld "merely because the Government promise[s] to use it responsibly." *Stevens*, 559 U.S. at 480.

C. The Encouragement Provision Does Not Fall Under The Narrow First Amendment Exception For Speech Integral To A Crime

As a fallback position, the government contends that the encouragement provision merely criminalizes speech integral to criminal conduct. Pet. 13-14. Not so. Exceptions to the First Amendment exist "in a few limited areas" that are "well-defined and narrowly limited." *Stevens*, 559 U.S. at 468-469 (internal quotation marks omitted). The narrow exception the government invokes is for speech *integral* to *criminal* conduct alone—that is,

speech that is necessary to the commission of a crime (e.g., detailed advice on how to defraud the government of taxes). As this Court has explained, "[m]any long established *criminal* proscriptions—such as laws against conspiracy, incitement, and solicitation … [permissibly] criminalize speech." *Williams*, 553 U.S. at 298 (emphasis added); *see also United States* v. *Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (listing First Amendment exceptions); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (rejecting the contention that the First Amendment applies to "speech or writing used as an integral part of conduct in violation of a valid *criminal* statute" (emphasis added)).

This case does not fall under the "integral to criminal conduct" exception because the statute broadly proscribes *encouragement* (not speech essential to a crime), and because it forbids the encouragement of *civil* (not just criminal) immigration infractions. Pet. App. 26a (noting that the government "admits" that the encouragement provision extends to "civil violations of the immigration laws"); *see supra* p. 10. The Ninth Circuit explained that it was not "aware of any case that upholds a statute restricting such speech," and the government still does not offer a single example. Pet. App. 32a.

The government relies solely on *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). But there this Court merely stated in passing that a newspaper may be forbidden from publishing certain kinds of advertisements—whether under a civil ordinance (that prohibited discrimination on the basis of sex) or under a criminal statute (that prohibited ads for prostitution or narcotics). *Id.* at 387. The Court did *not*, as the government suggests, expand the First Amendment exception for speech integral to

criminal conduct—indeed, that exception was never mentioned. Moreover, as the Ninth Circuit explained, *Pittsburgh Press* relied at least in part on the now-outdated principle that commercial speech is not entitled to any First Amendment protection. Pet. App. 30a n.10; *see also Pittsburgh Press*, 413 U.S. at 384 ("[C]ommercial speech [is] unprotected by the First Amendment."). Nothing in *Pittsburgh Press* suggests that Congress may criminalize speech that does not even advocate a criminal act, much less constitute an "integral" part of one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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