No. 19-67

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

REPLY BRIEF FOR THE PETITIONER

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The Ninth Circuit struck down as "unconstitutionally overbroad" the longstanding prohibition in 8 U.S.C. 1324(a)(1)(A)(iv) on "encourag[ing] or induc[ing]" certain violations of the immigration laws. Pet. App. 3a. In order to do so, it constructed constitutional arguments that respondent herself had not advanced; read the statute unnecessarily broadly; and disregarded a key component of the crime for which respondent was indicted, tried, and convicted—namely, that the inducement of illegal activity be "for the purpose of * * * private financial gain," 8 U.S.C. 1324(a)(1)(B)(i). See Pet. 7-8. Respondent identifies no sound basis for denying review of that flawed decision. Respondent's principal contention is that review is unwarranted because "the government does not need" the statute. Br. in Opp. 13; see *id.* at 11-14. That contention is unfounded and, in any event, is not a judgment for respondent or the court of appeals to make. Congress enacted Section 1324(a)(1)(A)(iv)

and (B)(i) to prohibit the for-profit facilitation or solicitation of particular violations of the immigration laws, including respondent's own scheme to induce aliens into residing in the country illegally while paying her to file futile applications for immigration benefits. The Ninth Circuit's decision facially invalidating that Act of Congress warrants this Court's review.

A. The Decision Below Is Incorrect

The Ninth Circuit erred in concluding that Section 1324(a)(1)(A)(iv) is a facially overbroad restriction of speech. Pet. App. 34a-39a. Properly construed, the statute proscribes primarily conduct, not speech. See Pet. 9-15. To the extent that the statute implicates speech, it focuses on unprotected speech that facilitates or solicits illegal activity. The statute therefore does not prohibit a "substantial amount of protected speech" relative to its "plainly legitimate sweep," *United States* v. *Williams*, 553 U.S. 285, 292 (2008).

1. Like the Ninth Circuit, respondent errs in asserting that the terms "'encourage' and 'induce'" necessarily encompass "a wide array of protected speech." Br. in Opp. 18 (capitalization altered; emphasis omitted). As the petition explains (Pet. 10-11), those terms correspond to wording that is commonly used to define offenses involving accomplice liability and solicitation. For example, the general federal statute on accomplice liability provides that whoever "induces" the commission of a federal crime "is punishable as a principal." 18 U.S.C. 2(a); see also, *e.g.*, *Black's Law Dictionary* 644 (10th ed. 2014) (defining "encourage" in the criminal-law sense to mean "[t]o instigate; to incite to action; to embolden; to help. See *aid and abet*.") (capitalization altered; emphasis added). Thus, although Section 1324(a)(1)(A)(iv) does not use the precise words "aid,"

"abet," or "solicit," see Br. in Opp. 19, the examples collected in the petition demonstrate that the terms that the statute does use ("encourages or induces") refer to the facilitation or solicitation of illegal activity, not mere abstract advocacy.

Respondent errs in contending (Br. in Opp. 19-20) that construing the statute as a relatively narrow ban on soliciting or facilitating illegal activity would violate the canon against surplusage. While *some* of its applications may overlap with other federal prohibitions, "[r]edundancies across statutes are not unusual events in drafting," and the canon against superfluity applies only when an interpretation would render a provision "wholly superfluous," *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992); see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012) (explaining that the canon applies when an interpretation would render "some words altogether redundant"). That is not the case here. Although Section 1324 contains a separate aiding-and-abetting provision, that provision only covers aiding and abetting a violation of Section 1324(a)(1)(A) *itself*. See 8 U.S.C. 1324(a)(1)(A)(v)(II) (applying only to "aid[ing] or abet[ting] the commission of any of *the preceding acts*") (emphasis added). Irrespective of that provision, Section 1324(a)(1)(A)(iv) remains necessary to cover the knowing facilitation of certain illegal activity—such as an alien's illegal residence in the United States—that is *not* prohibited by Section 1324(a)(1)(A). Pet. 22-23. Section 1324(a)(1)(A)(iv) is also the only prohibition on the solicitation of various types of illegal activity. Pet. 23. The canon against superfluity thus gave the Ninth Circuit no license to adopt the broad reading that it viewed as constitutionally problematic.

2. The Ninth Circuit also had no license to deem the financial-gain requirement "irrelevant" to the overbreadth analysis. Pet. App. 10a n.5. Section 1324(a)(1)(A) defines multiple offenses, with proof that the crime "was done for the purpose of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i), providing a necessary component of an aggravated offense. Respondent was convicted of that aggravated offense, and the constitutional question is therefore whether that offense—not a lesser-included offense—is substantially overbroad. See Pet. 19-22.

Respondent defends (Br. in Opp. 22-23) the Ninth Circuit's disregard of the financial-gain requirement on the theory that it is only a "sentencing enhancement." But this Court has held that "merely using the label 'sentence enhancement' to describe" a defendant's motivation for committing a crime does "not provide a principled basis" for relieving the prosecution of its burden to treat it as an offense element for purposes of indictment and proof beyond a reasonable doubt to a jury. *United States* v. *Booker*, 543 U.S. 220, 231 (2005) (citing *Apprendi* v. *New Jersey*, 530 U.S. 466, 476 (2000)); see Pet. 19. Such constitutional treatment should likewise apply in the context of an overbreadth challenge, which already represents "an exception to the traditional rule that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (quoting *New York* v. *Ferber*, 458 U.S. 747, 767 (1982)). The exception should not be expanded even further to allow a defendant to invoke the putative

rights of someone convicted of a constitutionally *different* crime.

Respondent alternatively asserts (Br. in Opp. 24-25) that the financial-gain requirement would not change the constitutional calculus because the First Amendment protects speech "delivered for money." Notably, even the Ninth Circuit did not embrace that argument. See Pet. App. 10a n.5, 39a (addressing only the constitutionality of Section 1324(a)(1)(A)(iv), not (B)(i)). That is presumably because even assuming that Section 1324(a)(1)(A)(iv) might otherwise allow the fanciful prosecutions that the decision below hypothesized—*e.g.*, of a grandmother exhorting her grandson to stay in the country unlawfully—the financial-gain element would plainly foreclose them. And even if a defendant might receive some ancillary financial benefit from his actions (*e.g.*, a gratuity for his services), that does not mean that the defendant has acted "*for the purpose* of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i).[*]

3. At a minimum, the narrower construction of the statute is "fairly possible," and the canon of constitutional avoidance thus requires its adoption. Pet. 24 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001)). Under that construction, the offense defined by Section

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[*] Contrary to respondent's assertion (Br. in Opp. 25), Section 1324(a)(1)(A)(iv) does not permit the prosecution of attorneys who advise their clients to remain in the country unlawfully. See Pet. 18. And a prosecutor's colloquy with the district court in *United States* v. *Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012)—in which the defendant was not an attorney providing advice to a client, but instead an official at the Department of Homeland Security who induced her housekeeper to reside in the country illegally, see *id.* at 195-197—does not show otherwise.

1324(a)(1)(A)(iv) and (B)(i) is not facially overbroad because it does not "prohibit[] a substantial amount of protected speech" relative to its legitimate sweep, *Williams*, 553 U.S. at 292. The offense targets primarily the conduct of facilitating or soliciting illegal activity for private financial gain, not abstract advocacy. Although some acts of facilitation or solicitation may be committed through speech, such speech "enjoy[s] no First Amendment protection." *Williams*, 553 U.S. at 298; see *ibid.* (endorsing the constitutionality of "long established criminal proscriptions" on "speech * * * that is intended to induce or commence illegal activities"); Pet. 13-14.

Respondent contends (Br. in Opp. 25-27) that even though inducement of a criminal violation of the immigration laws is unprotected speech, inducement of a "civil" violation is not. But in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), this Court found "no difference in principle" between an advertisement soliciting civilly proscribed conduct and an advertisement soliciting criminally proscribed conduct. *Id.* at 388-389; see Pet. 14. Respondent's suggestion (Br. in Opp. 27) that *Pittsburgh Press* should be limited to the commercial-speech context, or disregarded entirely, is unfounded. "Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (*commercial or not*) that is intended to induce or commence illegal activities." *Williams*, 553 U.S. at 298 (emphasis added). And respondent cites no decision of this Court indicating that the constitutionality of the proscription turns on whether the sanction for the activity is civil or criminal. See, *e.g.*, *International Bhd.*

of Teamsters v. *Vogt, Inc.*, 354 U.S. 284, 293 (1957) (observing that a State may "constitutionally enjoin peaceful picketing aimed at preventing effectuation" of the State's policy, "whether of its criminal *or its civil* law") (emphasis added); *International Bhd. of Elec. Workers* v. *NLRB*, 341 U.S. 694, 701, 705 (1951) (concluding that Congress may forbid a union and its agents from picketing to "'induce or encourage'" a civilly unlawful secondary boycott, without abridging "the freedom of speech guaranteed by the First Amendment"). Nor does she identify any first-principles reason for introducing such a distinction into First Amendment law.

B. The Question Presented Warrants Review

As the petition explains (Pet. 24-25), this Court regularly reviews decisions of lower courts that strike down federal statutes, with or without a circuit conflict. Respondent's request for an exception in this case—which rests primarily on her view (Br. in Opp. 13) that "the government does not need" Section 1324(a)(1)(A)(iv)—is unfounded.

1. As an initial matter, respondent's contention that Section 1324(a)(1)(A)(iv) is "rarely invoked," Br. in Opp. 11, is incorrect; the government has regularly brought prosecutions under that provision. See, *e.g.*, *United States* v. *Smith*, 928 F.3d 1215, 1221 (11th Cir. 2019); *United States* v. *Martinez*, 900 F.3d 721, 730-732 (5th Cir. 2018); *United States* v. *Kalu*, 791 F.3d 1194, 1197 (10th Cir. 2015); *United States* v. *Okatan*, 728 F.3d 111, 114-116 (2d Cir. 2013). In any event, even if Section 1324(a)(1)(A)(iv) prosecutions were rare, this Court has not required the government to show some minimum number of prosecutions as a prerequisite to review of the constitutional validity of a federal statute. See, *e.g.*,

United States v. *Stevens*, 559 U.S. 460 (2010) (addressing constitutionality of infrequently used federal statute prohibiting certain depictions of animal cruelty); *Williams*, 553 U.S. 285 (addressing constitutionality of federal statute criminalizing child pornography using virtual images, even though little evidence existed of prior trafficking in virtual child pornography); see also, *e.g.*, *United States* v. *Alvarez*, 567 U.S. 709 (2012) (addressing the constitutionality of the Stolen Valor Act of 2005, Pub. L. No. 109-147, 120 Stat. 326, notwithstanding the respondent's contention that it was infrequently used); see Cert. Reply Br. at 4-5, *Alvarez*, 567 U.S. 709 (No. 11-210). Respect for the coordinate branches of government counsels strongly in favor of reviewing the court of appeals' decision here, which invalidates a statute that Congress has had in place, in some form, for the past century, see Pet. 14, and under which the government continues to bring prosecutions.

Respondent errs in suggesting (Br. in Opp. 12-13) that Section 1324(a)(1)(A)(iv) is unnecessary because other statutes prohibit similar conduct. Respondent fails to address—let alone rebut—the government's explanation of how Section 1324(a)(1)(A)(iv) "fills an important gap" in federal law. Pet. 12. A defendant, such as respondent, who knowingly induces an alien to break the law by remaining in the country will frequently not be chargeable under the general federal aiding-and-abetting statute, 18 U.S.C. 2, because remaining in the country unlawfully (for example, by overstaying a visa) is typically not itself a criminally punishable offense. Only Section 1324(a)(1)(A)(iv) reaches that sort of inducement of illegal activity. Section 1324(a)(1)(A)(iv) is also an important tool for prosecuting defendants who

knowingly facilitate an alien's illegal entry into, or residence in, the United States but whose conduct may not qualify as "bring[ing]," "transport[ing]," or "harbor-[ing]" the alien, or aiding or abetting those acts. 8 U.S.C. 1324(a)(1)(A)(i)-(iii) and (v)(II). Particularly in circuits that limit the applicability of those provisions, see, *e.g.*, *United States* v. *Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012) (concluding that "providing a place to stay" for an unlawfully present alien does not necessarily violate the prohibition on harboring), Section 1324(a)(1)(A)(iv) may be the only means of enforcing the law.

Respondent additionally argues (Br. in Opp. 14-16) that the Ninth Circuit's decision should be allowed to stand in the absence of a demonstrated division of authority within the courts of appeals on the constitutionality of Section 1324(a)(1)(A)(iv). But she cannot dispute that this Court typically grants review of lower-court decisions holding a statute unconstitutional, even in the absence of a circuit conflict. See Pet. 24 (collecting recent examples); see also, *e.g.*, *Stevens*, 559 U.S. 460; *Williams*, 553 U.S. 285; *United States* v. *Morrison*, 529 U.S. 598 (2000). Moreover, the Ninth Circuit has recognized that its reading of Section 1324(a)(1)(A)(iv) departs from the narrower construction adopted by the Third Circuit in *DelRio-Mocci* v. *Connolly Properties, Inc.*, 672 F.3d 241, cert. denied, 568 U.S. 821 (2012). See Pet. App. 22a-23a. Whether or not the Third Circuit's construction is itself correct in all respects, at a minimum it demonstrates that reasonable jurists can construe the statute more narrowly than the Ninth Circuit did in deeming it overbroad. See *Williams*, 553 U.S. at 293 ("The first step in overbreadth analysis is to construe the challenged statute.").

2. The overbreadth question decided by the Ninth Circuit is squarely presented in this case. A panel of that court held that Section 1324(a)(1)(A)(iv) is "unconstitutionally overbroad" and reversed respondent's Section 1324(a)(1) convictions for that reason alone. Pet. App. 39a.

Respondent nevertheless asserts that the case is a "poor vehicle for the question presented" because the Ninth Circuit did not also address whether the statute is invalid on viewpoint-discrimination or vagueness grounds. Br. in Opp. 16 (capitalization altered; emphasis omitted). But a decision striking down a federal statute should not go unreviewed simply because a defendant points to alternative constitutional theories that no court has addressed, let alone endorsed. Indeed, respondent did not even raise a viewpoint-discrimination argument below, see Resp. C.A. Br. 35-41, and the Ninth Circuit's overbreadth ruling obviated any perceived need to address vagueness, see Pet. App. 39a n.15. Cf. *Timbs* v. *Indiana*, 139 S. Ct. 682, 690 (2019) (declining to address an argument that was "neither pressed nor passed upon below").

The additional arguments are meritless in any event. The newly minted viewpoint-discrimination argument simply repackages the Ninth Circuit's overbreadth argument in even worse clothing. *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 & n.6 (2008) (explaining that non-overbreadth facial challenge requires showing that a "law is unconstitutional in all of its applications"). If this Court agrees with the government that the statute is not overbroad because it is directed at conduct and unprotected speech, then no basis exists to strike it down facially on

viewpoint-discrimination grounds. A statute prohibiting, say, solicitation is not unconstitutional simply because it distinguishes between speech that induces a crime and speech that discourages it. See *Williams*, 553 U.S. at 298. And respondent's vagueness challenge—in addition to suggesting that many standard state accomplice-liability and solicitation laws are themselves unconstitutionally vague, see, *e.g.*, Pet. 11-12—provides no basis for invalidating her convictions here. She raises no doubt that her own conduct was clearly prohibited by the statute, and she cannot rely on hypothetical applications of the statute to third parties as the basis for a vagueness challenge. See *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) ("We consider whether a statute is vague as applied to the particular facts at issue, for 'a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'") (quoting *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)) (brackets omitted).

Even assuming the alternative arguments had some foundation, this Court would not need to address them in the first instance in order to correct the Ninth Circuit's manifest error on the only constitutional issue that it considered. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 n.7 (2005) ("[W]e are a court of review, not of first view."). This Court should grant certiorari and reverse the judgment below.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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