No. 19-67

In the Supreme Court of the United States

United States of America,

Petitioner,

v.

Evelyn Sineneng-Smith,

Respondent.

On Writ of Certiorari
to the U.S. Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of
Professor Eugene Volokh in
Support of Neither Party

Eugene Volokh
Counsel of Record
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amicus Curiae

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Interest of the *Amicus Curiae*[1]

Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law. He has taught First Amendment law for more than twenty years, and has written a textbook and over forty law review articles on the First Amendment, including one that discusses in detail the criminal solicitation exception. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 989-97 (2016).

Summary of Argument

In *United States* v. *Williams*, 553 U.S. 285, 297 (2008), this Court recognized a solicitation exception to the First Amendment—or perhaps recognized that solicitation is a special case of the "speech integral to criminal conduct" exception. *See Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 43-44 (2010) (Breyer, J., dissenting); *United States* v. *White*, 610 F.3d 956, 960 (7th Cir. 2010). Either way, this Court did not define when speech becomes constitutionally unprotected solicitation, and when it remains constitutionally protected advocacy subject to the *Brandenburg* test. This case offers the opportunity to clarify this question, much as this Court has clarified what consti-

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus*'s employer (UCLA School of Law), make a monetary contribution to the preparation or submission of this brief. Counsel of record for each party has consented in writing to the filing of this brief.

tutes unprotected incitement, obscenity, child pornography, fighting words, and the like.

To be sure, if this Court concludes that 8 U.S.C. § 1324(a)(1)(A)(iv), which generally bans "encourag-[ing] or induc[ing]" illegal entry or residence, goes beyond solicitation and does extend to abstract advocacy—*e.g.*, someone writing a newspaper column broadly encouraging people to illegally enter the United States—then the statute could just be struck down as overbroad. But if the statute can be rendered constitutional by being read as limited to solicitation, then this Court should define just what solicitation means.

In particular, this case offers an opportunity to clarify the "important distinction" between unprotected solicitation of illegal activity and protected "abstract advocacy" of such activity. *Williams*, 553 U.S. at 298-99 (citing *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969)). This is especially so because the solicitation exception lacks the important "imminence" prong of the incitement exception—soliciting crimes that are to take place some substantial time in the future can be punishable.

The line between protected abstract advocacy and unprotected solicitation must instead turn on specificity: Solicitation should be limited to directly, specifically, and purposefully encouraging people to commit a particular crime. Occasionally this line may not be easy to draw, but often the distinction will be quite clear. And if § 1324(a)(1)(A)(iv) is read as limited to such solicitation of specific criminal conduct (even nonviolent criminal conduct), it is constitutional.

Moreover, because the premise of the solicitation exception is that solicitation is conduct integral to the commission of a crime, only solicitation of *criminal*

conduct can be made criminal consistently with the First Amendment. Solicitation of merely civilly punishable conduct cannot be made criminal, though it can be punished civilly.

Argument

I. Title 8 U.S.C. § 1324(a)(1)(A)(iv) should be read as a ban on solicitation

Amicus agrees with the Government that the prohibition on "encourag[ing] or induc[ing]" in 8 U.S.C. § 1324(a)(1)(A)(iv) should be read as limited to solicitation, not abstract advocacy. *See* U.S. Br. 18-28.

II. Defining solicitation

This of course leaves the question of just what constitutes solicitation that is excluded from First Amendment protection. Lower courts and prosecutors need guidance on this.

A. To be solicitation governed by *Williams*, rather than abstract advocacy governed by the *Brandenburg* incitement test, speech must be highly specific

To begin with, the *Williams* solicitation exception must coexist with the *Brandenburg* incitement exception. Simply allowing speech to be punished because it intentionally encourages some crime in the abstract, without a showing of imminence or likelihood of harm, would wrongly let *Williams* swallow up *Brandenburg*.

Indeed, American lawyers have been thinking about this problem since at least the late 1800s: The 1874 edition of Francis Wharton's influential criminal

law treatise, for instance, reasoned that too broad a view of solicitation would "greatly infringe[]" the "necessary freedom of speech and of the press." 2 Francis Wharton, A Treatise on the Criminal Law of the United States 850 (7th ed. 1874). And this Court in *Williams* discussed this explicitly:

> To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality See *Brandenburg* v. *Ohio* * * * . The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it. There is no doubt that this prohibition falls well within constitutional bounds. * * *
>
> * * *
>
> [T]he term "promotes" [in the statute] does not refer to abstract advocacy, such as the statement "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography." It refers to the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer.

553 U.S. at 298-99, 300. The decision distinguished specific advocacy—for instance, of a crime involving a specific item of contraband, a specific victim, or a specific tangible reward—and abstract advocacy.

Lower court solicitation decisions are generally consistent with that line. Several courts, for instance, have upheld criminal punishment for soliciting sex from minors, when the defendant was trying to arrange an assignation at a specific time and place with

someone whom he believed to be a specific minor. *See, e.g., United States* v. *Hite*, 896 F. Supp. 2d 17, 22-23 (D.D.C. 2012); *Neely* v. *McDaniel*, 677 F.3d 346, 350-51 (8th Cir. 2012); *Worth* v. *State*, 223 So. 3d 844, 851 (Miss. Ct. App. 2017). In *United States* v. *Freeman*, the Ninth Circuit specifically distinguished "statements that, at least arguably, were of abstract generality" (and thus constitutionally protected) from "advice to commit a specific criminal act" (there, a specific sort of income tax evasion), which would not be protected. 761 F.2d 549, 552 (9th Cir. 1985). Other cases agree. *See, e.g.*, *Sheeran* v. *State*, 526 A.2d 886, 891 (Del. 1987) (request that a person blow up a particular building was constitutionally unprotected solicitation, because it was sufficiently specific).

Likewise, in *Hess* v. *Indiana*, this Court concluded that a protester's statement that "we'll take the fucking street later" as police attempted to clear a crowd from a street was constitutionally protected: "Since the uncontroverted evidence showed that Hess's statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action." 414 U.S. 105, 108-09 (1973). This Court in *Hess* was speaking only about the incitement exception (hence the discussion of imminence, *id.*), but it is likely that Hess's speech would not be solicitation, either, because of its generality: the speech lacked any specificity as to audience, lacked any specificity as to timing ("at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time," *id.* at 108), and lacked a sufficient indication that the speech was really advocacy rather than just fulmination. But a statement to particular people that showed specificity of detail, such as "let us all come back and illegally

block the street next Monday," might well be punishable solicitation, albeit of a comparatively minor crime.

To decide whether § 1324(a)(1)(A)(iv) is unconstitutionally overbroad or vague on its face, this Court does not have to consider exactly how the line between solicitation and abstract advocacy should be drawn. But the cases do suggest some clear distinctions, and this Court should offer guidance on those distinctions.

In particular, merely arguing to the public at large that current immigration restrictions are wrong, and that it is morally proper for people to violate them in their search for a better life, would not be solicitation. *See, e.g.*, *Williams*, 553 U.S. at 299-300 (stressing that the solicitation ban in that case "does not prohibit advocacy of child pornography," or statements that "I believe that child pornography should be legal"). Indeed, even arguing in general that the listener should violate the law might not be punishable solicitation. *See id.* at 300 (stressing that the statute did not ban even statements such as "I encourage you to obtain child pornography"). Thus, "a loving grandmother who urges her grandson to overstay his visa, by telling him 'I encourage you to stay,'" *United States* v. *Sineneng-Smith*, 910 F.3d 461, 483 (9th Cir. 2018) (cleaned up), would not be engaged in punishable solicitation.

But deliberately urging people to break the law at particular times or in particular ways (e.g., "hire X to bring you across the border near Y" or "stay in the country, though I know it is a crime for you to do so, and hide from the enforcement authorities in this particular way") would be solicitation of criminal

conduct. There may, of course, be borderline cases in which it can be debated whether the statement is specific enough to be punishable solicitation. Yet that is true of criminal solicitation statutes generally, and it does not make such statutes substantially overbroad. *See, e.g.*, *Williams*, 553 U.S. at 299, 301-03.

B. Solicitation may be *criminally* punished only if it consists of solicitation of *crime*

This Court's decision in *Williams* builds on the principle that the First Amendment does not protect "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (cited in *Williams*, 553 U.S. at 297, as support for the proposition that "Offers to engage in illegal transactions are categorically excluded from First Amendment protection."); *see* Volokh, *The "Speech Integral to Criminal Conduct" Exception*, *supra*, 101 Cornell L. Rev. at 989-97. Of course, this requires a *valid* statute, which is to say one that is consistent with the First Amendment because it bans nonspeech conduct, or because it bans speech that falls within one of the existing First Amendment exceptions. But when there is such a statute—whether it bans murder, or distribution of child pornography (such as in *Williams*), or restraint of trade (such as in *Giboney*), or criminal immigration violations (such as in this case)—then soliciting violations of such a statute can generally be criminalized, too.

Yet this principle can only justify treating solicitation as akin to the solicited conduct. Solicitation of crime can be made criminal. Solicitation of civilly punishable or actionable conduct can lead to civil lia-

bility. *Cf., e.g.*, *Rumsfeld* v. *FAIR*, 547 U.S. 47, 62 (2006) (suggesting that threats of public accommodation discrimination can themselves be made actionable, on the theory that such threats are a form of punishable conduct). That would indeed be treating solicitation as "an integral part of [the solicited] conduct."

Solicitation of civilly punishable conduct, though, ought not be criminalizable consistently with the First Amendment, because that would go beyond treating the solicitation as "integral to criminal conduct," *United States* v. *Stevens*, 559 U.S. 460, 468 (2010). "There comes a time, of course, when speech and action are so closely brigaded that they are really one." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting) (citing *Giboney* as an example). But when "they are really one," they ought to be either treated generally alike, or with the speech being more protected than action—not with the speech being criminalized when the action is not.

The First Amendment often justifies protecting speech more than related action, as when abstract advocacy of crime is protected. It may sometimes tolerate treating speech as equally punishable with action.

But it cannot allow treating speech as *more* punishable than the action that it encourages. The government cannot "afford[] a greater degree of protection to commercial than to noncommercial speech," *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 513 (1981) (plurality op.), because that would "invert[the] judgment" that "noncommercial speech [is accorded] a greater degree of protection than commer-

cial speech," *id.* Likewise, the government cannot afford a greater degree of protection to conduct than to noncommercial speech that is supposedly "integral" to that conduct.

(As applied, a criminal law banning both conduct and its solicitation might sometimes end up punishing the solicitor but not the direct actor: The solicitor, for instance, may know of the circumstances that make an act criminal but the direct actor might not know and thus lack the required *mens rea*—e.g., Susan solicits Agnes to transport something that Susan knows is drugs, when Agnes doesn't know what the item actually contains. *Cf.* Model Penal Code § 2.06(2)(a) (holding people accountable as accomplices when they cause "an innocent or irresponsible person to engage in [prohibited] conduct"). Or the direct actor may be mentally incompetent or underage, while the solicitor is fully competent. But that does not change the broader principle: If the law treats conduct as categorically only civilly actionable, it cannot treat solicitation of that conduct as categorically criminal.)

C. Solicitation of crime may be punished even if it purposefully solicits conduct that would happen months in the future

Solicitation generally requires simply a purpose to persuade someone to commit a crime against a specific enough victim or in a specific enough way, coupled with words that are intended to so persuade. "In the case of a criminal solicitation, the speech—asking another to commit a crime—is the punishable act. * * * [T]he crime is complete once the words are spoken with the requisite intent * * * ." *White*, 610 F.3d at

960. This intent is the "inten[t] that acts constituting a federal offense result," *United States* v. *Korab*, 893 F.2d 212, 215 (9th Cir. 1989), labeled "purpose" in Model Penal Code terms: "A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime * * * ." Model Penal Code § 5.02(1).

Urging someone to criminally enter the United States or to remain here when it is a crime to do so, with the purpose that the hearer act on this urging, is thus punishable solicitation. And such solicitation (as opposed to incitement) is not limited to speech soliciting *imminent* criminal conduct, at least in the sense of conduct that will happen in minutes or hours.

The classic examples of solicitation often involve speech urging criminal conduct at some definite or indefinite time in the future. Speech asking one's followers to kill a particular juror may be solicitation even if one is not encouraging the followers to impulsively act right away. *See, e.g.*, *White,* 610 F.3d at 957-58, 961 (concluding that soliciting murder was punishable even though no timetable had been set); *United States* v. *Dvorkin*, 799 F.3d 867, 871-73, 878-79 (7th Cir. 2015) (likewise). Indeed, the speaker would presumably want to encourage the followers to plan carefully and deliberately, taking what time is needed.

Likewise, speech arranging a tryst with a minor can be criminal solicitation even if the encounter is to take place in a week or a month. *See, e.g.*, *Worth*, 223 So. 3d at 847 (series of e-mails starting on March 8 that culminated in arranging to meet a 15-year-old

girl for sex on April 20). Speech urging someone to cheat in a particular way on his tax return should be solicitation on January 14 as much as on April 14.

Some courts have offhandedly characterized criminal solicitation as focused on requests for imminent criminal conduct. *See United States* v. *Phipps,* 595 F.3d 243, 247 (5th Cir. 2010) (holding that counseling tax violations constituted a solicitation because it would lead to imminent lawlessness); *State* v. *Ferguson*, 264 P.3d 575, 578 (Wash. Ct. App. 2011) (upholding an accomplice liability statute banning soliciting, aiding, and abetting crime, on the grounds that the statute is supposedly limited to advocacy of imminent criminal conduct); *Freeman*, 761 F.2d at 552 (concluding that urging someone to commit tax fraud, if specific enough, could be punishable because it is "intended and likely to produce an imminent criminal act").

But, for the reasons given above, such a limitation is not consistent with the logic of the solicitation exception recognized by *Williams*. Indeed, some of the cases that purport to apply an imminence requirement for solicitations do so just by implicitly redefining imminence, so that even behavior many months in the future would qualify as "imminent." *See, e.g.*, *State* v. *March*, 494 S.W.3d 52, 63, 75-76 (Tenn. Ct. Crim. App. 2010) (concluding that solicitation of murder involved an "imminent" crime even when "the plan was for [the solicitee, who was in jail] to get out of jail on bond, lay low for a while, observe the [prospective victims], and find a routine where he could catch them together"); *Freeman*, 761 F.2d at 552 (describing solicitation of tax fraud as involving urging of imminent conduct, even though there was no indication that the solicitation happened on the eve of the

tax filing); *Phipps*, 595 F.3d at 247 (likewise); *People* v. *Rubin*, 96 Cal. App. 3d 968, 978 (1979) (requiring imminence but defining it to include actions that "may be some weeks away," on the theory that "time is a relative dimension and imminence a relative term, and the imminence of an event is related to its nature").

Such redefining of "imminent" is not sound, and it could tend to erode the imminence threshold rightly required under the *Brandenburg* test for abstract advocacy of crime. But even if this Court thinks that the crime of solicitation should include some proximity element, it should (1) uphold § 1324(a)(1)(A)(iv) as implicitly including such an element (much as *Freeman* and *Phipps* appeared to do as to the solicitation of tax fraud), and (2) make clear that this element can be satisfied—unlike with incitement under *Brandenburg*—even when there is a delay of weeks or months between the solicitation and the prospective criminal conduct being solicited.

D. Solicitation may be punished even when the solicited crime is nonviolent

One court has suggested (without expressly so concluding) that soliciting nonviolent crimes might not be punishable. *United States* v. *Bell*, 414 F.3d 474, 483 (3d Cir. 2005) (distinguishing "advocacy provoking violence" from "advocating against the income tax"). But the dominant view is to the contrary. *See, e.g.*, *Phipps*, 595 F.3d at 247 (solicitation of tax evasion can be punished); *Freeman*, 761 F.2d at 552 ("Tax evasion is a wrong of sufficient gravity that Congress can punish incitement to the crime."). Justice Brandeis's opinion in *Whitney* v. *California*, 274 U.S. 357, 378 (1927), acknowledged that a state may

"punish an attempt, a conspiracy, or an incitement to commit" "any trespass upon the land of another"—and that logic would equally cover solicitation—even though he argued that a state may not punish mere teaching and abstract advocacy of such trespass.

Indeed, in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this Court held that First Amendment law cannot protect some speech more than other speech based on the severity of the crime to which the speech is relevant. In that case, journalists (and some of the dissenting Justices, *id.* at 745 n.35) argued that reporters might be subpoenaed to testify about confidential sources in criminal investigations of serious crimes, but not in criminal investigations of minor crimes. No, said this Court: "[B]y considering whether enforcement of a particular law served a 'compelling' governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws," which would have courts improperly "making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution." *Id.* at 705-06; *see also* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 Va. L. Rev. 1957, 1975-82 (2004) (arguing that any such constitutional lines based on case-by-case judgments of crime severity are hard to enforce in any principled way).

To be sure, in some contexts even speech that may end up encouraging criminal conduct might be constitutionally protected. *See, e.g.*, *Conant* v. *Walters*, 309 F.3d 629, 637-39 (9th Cir. 2002) (reasoning that physicians' advice to patients about the medical benefits

of marijuana—even when marijuana possession remains illegal under federal law—may be constitutionally protected). Likewise, while lawyers ought not actively counsel their clients to violate the law, some statements that have the effect of increasing clients' willingness to violate the law (e.g., "I think that under these circumstances you're not likely to be criminally prosecuted for illegally remaining in the United States") may be protected.

But these unusual scenarios should be handled either through recognizing narrow constitutional privileges for such situations, or through making clear that simply explaining the likely consequences of a particular course of action does not constitute "encourag[ing] or induc[ing]" that action. Indeed, striking down § 1324(a)(1)(A)(iv) as unconstitutionally vague or overbroad simply because of these professional speech scenarios would endanger a wide range of criminal solicitation statutes, such as 18 U.S.C. § 2, which generally do not have any express exceptions for professional-client speech.

This analysis does suggest that discussions among friends or even family members might be covered by § 1324(a)(1)(A)(iv): The "loving grandmother who urges her grandson to overstay his visa," *Sineneng-Smith*, 910 F.3d at 483 (cleaned up), could indeed be viewed as soliciting an offense (whether civil or criminal) if she offers specific details as to how he might commit the offense.

But loving grandmothers, no less than others, are subject to the constraints of solicitation law. If a grandmother encourages her grandson to engage in a specific course of fraud or violence, she can be pun-

ished for that. The same is true for encouraging the grandson to violate immigration laws.

Perhaps in some such situations, a prosecutor may choose not to prosecute the grandmother, or any other friend or family member, especially if the prosecutor believes that immigration violations are not very serious offenses. The desire to enforce the law may sometimes be tempered by an understanding of how the bonds of affection can lead people to violate the law in comparatively minor ways. But the First Amendment does not protect solicitation of crimes even within families.

Conclusion

This Court has recognized that there is a criminal solicitation exception to the First Amendment. This case offers an opportunity to carefully define the boundaries of this exception, establishing when the exception stops and the protection for abstract advocacy (governed by the *Brandenburg* test) starts.

Respectfully submitted,

Eugene Volokh
Counsel of Record
Amicus Curiae
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

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