No. 19-67

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EVELYN SINENENG-SMITH,

Respondent.

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

BRIEF FOR RESPONDENT

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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.

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BRIEF FOR RESPONDENT

INTRODUCTION

The Court has seen this fact pattern before. Congress enacts "a criminal prohibition of alarming breadth." *United States* v. *Stevens*, 559 U.S. 460, 474 (2010). The Executive Branch relies on the plain text's broad scope when pursuing and defending convictions in the lower courts. But when the case comes to this Court, the Solicitor General invokes "*noblesse oblige*," asserting that the statute is *actually* narrower than its plain language, that the government has never *actually* prosecuted protected speech, and that "prosecutorial discretion" will ensure the statute is never *actually* used to its full extent. *Id.* at 480.

The statute in this case ("the encouragement provision") is even more troubling than the law at issue in *Stevens*. It punishes as a felony any statement urging or persuading an undocumented noncitizen to enter or remain in the country—even legal advice from an immigration attorney or a plea from a grandmother to her grandson not to abandon her. That prohibition is unconstitutionally overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473.

The government's main tactic is to ask this Court to rewrite the encouragement provision as an aiding-and-abetting or solicitation statute. The provision's plain language and the surrounding statutory context defeat the government's redrafting. The government's interpretation makes the encouragement provision entirely redundant of other criminal statutes and is inconsistent with the government's own position in actual prosecutions, including this one. The government's eleventh-hour rewriting is also patently illogical—whatever a provision banning "encourag[ing] or induc[ing] an alien … [to] reside in the United States" covers, at the very least it covers telling an undocumented noncitizen "I encourage you to reside in the United States."

The government's fallback argument is to insist that it has not *actually* used the encouragement provision to lock people up for protected speech. If that were a valid defense, there would be no overbreadth doctrine. The "very existence" of statutes like the encouragement provision is pernicious, as it "may cause others not before the court to refrain from constitutionally protected speech or expression." *Members of City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S.

789, 799 (1984). The mere "threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech," "especially when the overbroad statute imposes criminal sanctions." *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003). Indeed, the government admits telling a district court that it could use the encouragement provision to prosecute an immigration attorney for advising an undocumented client to stay in the country, and notably does not disavow that position in its brief.

The government also conspicuously ignores two other constitutional doctrines briefed below, which suffice as alternative grounds of affirmance. First, the encouragement provision is impermissibly content-based and viewpoint-discriminatory. Speakers may encourage undocumented noncitizens to leave, but will go to prison if they encourage them to remain. The First Amendment does not allow Congress to outlaw one side of a public debate.

Second, the statute is unconstitutionally vague because it is so standardless as to permit discriminatory enforcement. The words "encourage or induce" embrace a wide variety of concepts, many of which turn on whether the listener is subjectively "inspired" or "persuaded" to remain here. Words that "encourage" or "induce" one listener may have no effect on another. A statute that gives the Executive the power to imprison based on a subjective, discretionary decision violates due process.

Overbroad, viewpoint-discriminatory, and vague, the encouragement provision cannot stand. The court of appeals' judgment should be affirmed.

STATEMENT

A. The Government's Immigration Enforcement Tools

"As a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona* v. *United States*, 567 U.S. 387, 407 (2012). Federal law does, however, criminalize numerous other acts related to immigration. Creating and disseminating fraudulent immigration documents is a crime, 18 U.S.C. § 1546, as are hiring, recruiting, and profitably referring unauthorized workers for employment, 8 U.S.C. §§ 1324a, 1324c. It is also a crime to bring or attempt to bring noncitizens here without prior authorization, *id.* § 1324(a)(2), to aid or assist the entry of certain inadmissible noncitizens, *id.* § 1327, and to import or attempt to import noncitizens for immoral purposes, *id.* § 1328.

None of these provisions is challenged here. Neither are the provisions, surrounding the subsection at issue, which make it a felony (i) to bring undocumented noncitizens to the country other than at a designated port of entry, (ii) to transport them within the country, and (iii) to "conceal[], harbor[], or shield[]" them from detection. 8 U.S.C. § 1324(a)(1)(A)(i)-(iii). A further provision, also unchallenged, criminalizes conspiracy to commit, and aiding and abetting the commission of, any offense listed in § 1324(a)(1)(A). *Id.* § 1324(a)(1)(A)(v).

The encouragement provision at issue here is both more expansive and more nebulous. Section 1324(a)(1)(A)(iv) broadly punishes anyone 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." There is no causation

element, meaning that a noncitizen need not actually remain here without authorization—much less commit a crime—as a result of the defendant's encouragement. Nor is there any *mens rea* requirement of intent to violate the immigration law or intent to defraud, as the government conceded below. JA35, 55. The encouragement provision is also subject to the conspiracy and aiding-and-abetting provisions in subsection (v), meaning that one can be charged with conspiracy to encourage undocumented noncitizens to remain here or with aiding and abetting such encouragement.

The maximum sentence for violating the encouragement provision is generally five years' imprisonment. 8 U.S.C. § 1324(a)(1)(B)(ii). The maximum is ten years' imprisonment if the government proves that the offense was "done for the purpose of commercial advantage or private financial gain." *Id.* § 1324(a)(1)(B)(i).

B. District Court Proceedings

1. Respondent Evelyn Sineneng-Smith, a U.S. citizen, worked as an immigration consultant in California. For nearly two decades, she helped employers and their noncitizen employees navigate our country's complex immigration system, including by successfully shepherding dozens of applications for lawful permanent residence.

This appeal arises from work Ms. Sineneng-Smith did in connection with two undocumented workers and their employers. Ms. Sineneng-Smith filed labor certification applications with the Department of Labor and, after these were approved, Form I-140 "immigrant petitions" with U.S. Citizenship and Immigration Services. (She also gave both workers "leniency letters" to

explain their situation in the event of questioning.) Although approval of these applications alone did not confer lawful immigration status, it secured a favorable priority date for an application for lawful permanent residence should the deadline for such an application change—a point the government's expert conceded below. Appellant's C.A. Br. 12-18; JA32. Specifically, the government's expert admitted that an approved I-140 petition provided the worker a "ticket" in line for adjusting status, thereby improving the worker's chances for lawful permanent residency should eligibility dates be extended. Appellant's C.A. Br. 14-15. Indeed, an immigration attorney hired by one of the employers who had previously consulted with Ms. Sineneng-Smith continued to pursue her strategy of seeking I-140 approvals, providing the same information Ms. Sineneng-Smith provided earlier. *Id.* 20-21.

Thus, the government did not assert that Ms. Sineneng-Smith ever filed a *fraudulent* application regarding the two workers or anyone else. JA34 (government conceding that "[s]he did not file any fraudulent applications"); Pet. App. 72a (district court recognizing "Defendant submitted no false information to USDOL or USCIS"). Rather, the government's criminal charges arose entirely from what she allegedly *said* with regard to the I-140 process.

With respect to counts not at issue here, the government asserted that Ms. Sineneng-Smith lied to the two workers about the labor certification process by supposedly stating "they could achieve legal permanent residency via [her] services." Pet. App. 57a. The government charged this as mail fraud under 18 U.S.C. § 1341. At trial, Ms. Sineneng-Smith argued that she had warned the workers that they could not obtain lawful status through labor certification unless the law

changed; a government investigator admitted hearing that from her. JA85, 90-92. However, the two workers—who were offered permission to work in the United States if they testified against her[1]—insisted that they could not recall Ms. Sineneng-Smith telling them that. *E.g.* JA77. Ms. Sineneng-Smith was convicted of mail fraud; those convictions are not at issue before this Court.

Ms. Sineneng-Smith was separately charged under 8 U.S.C. § 1324(a)(1)(A)(iv) with "encouraging" or "inducing" the two workers to reside in this country. Pet. App. 79a.[2] Ms. Sineneng-Smith moved to dismiss the encouragement counts under the First and Fifth Amendments. The government argued *inter alia* that Ms. Sineneng-Smith had encouraged or induced the workers to stay in the country by "counsel[ing] [them] on the[ir] paths to citizenship." JA33. Denying the motion, the district court reasoned that "[b]y suggesting to the aliens that the applications … would allow them to eventually obtain legal permanent residency in the United States … [she] encouraged the aliens to remain in the country within the meaning of § 1324(a)(1)(A)(iv)." Pet. App. 73a. The court acknowledged that she was prosecuted for holding out "[t]he *promise* of a path of legal permanent residency," which the court believed "was plainly powerful encouragement to those aliens to set up a life in the United States." *Id.* 74a (emphasis added). The court also held that the government need not prove that Ms. Sineneng-

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[1] *See* C.A.E.R. vol. IV, EDN 205 at 773; *id.* EDN 321 at 569.

[2] The government charged—but did not prevail on—additional counts in connection with work done for a third worker. Pet. App. 53a-54a, 64a.

Smith actually "assisted" a noncitizen in residing here. *Id.*

2. In its closing argument at trial, the government referred to Ms. Sineneng-Smith's "dangerous words" and "words and … deeds" that, the government contended, encouraged the workers' continued residence. JA114. The government emphasized the message Ms. Sineneng-Smith sent: "What is she telling her clients through these leniency letters? She's telling them to stay." JA111. The government also contrasted her message with speech that would have discouraged the noncitizens from remaining here. *Id.* ("She doesn't tell her clients in these letters you need to go home. She doesn't say that[;] she tells them to stay, it is just the opposite. Stay, your patience is going to be rewarded, what's the reward? Permanent residency.").

The government separately invoked the sentencing enhancement of 8 U.S.C. § 1324(a)(1)(B)(ii), urging the jury to find that Ms. Sineneng-Smith encouraged or induced the workers for private financial gain. JA113. The government called the financial-gain sentencing enhancement a "separate standard" from the requirements of § 1324(a)(1)(A)(iv). *Id.* The district court instructed the jurors that, if they found Ms. Sineneng-Smith "*guilty* of encouraging or inducing illegal immigration," they must "*then*" determine whether she "committed *the offense*" for financial gain. JA117 (emphases added). The verdict form relatedly asked the jury to determine whether Ms. Sineneng-Smith was "guilty" of violating the encouragement provision alone, before determining whether Ms. Sineneng-Smith "committed the offense … for private financial gain." JA118-120. Accordingly, the jury was permitted to find Ms. Sineneng-Smith guilty of encouragement without also finding the financial-gain enhancement applicable.

When the time came to instruct the jury, the government did not suggest that the words "encourage" or "induce" were "criminal-law terms of art" as it now claims (Gov. Br. 19), nor did its proposed instructions mention "solicitation" or "aiding and abetting" at all, JA43-44. The district court found that "encourage" is a "straightforward" word, and the government agreed. JA100-101. The final jury instructions did not define "encouragement" or "inducement" and did not cabin their ordinary meaning in any way. JA116-117.

The jury returned guilty verdicts on the encouragement counts and found that the government proved the financial-gain sentencing enhancement. The district court denied Ms. Sineneng-Smith's motion for judgment of acquittal in relevant part. Pet. App. 53a-54a. The court rejected Ms. Sineneng-Smith's constitutional arguments, *id.* 53a-54a, 65a, even though it once again acknowledged that the government's proof of encouragement was based on Ms. Sineneng-Smith's speech—*i.e.*, she "encouraged [one worker] to remain in the United States by *promising* to help her obtain legal status." *Id.* 50a (emphasis added); *accord id.* 49a (government's proof was "based on *the impression* Sineneng-Smith *fostered* in her clients that they would be able to obtain a green card" (emphases added)).

Ms. Sineneng-Smith was sentenced to 18 months' imprisonment, three years' supervised release, a $15,000 fine, a $43,550 restitution award, and a $600 special assessment. Pet. App. 78a-93a.

C. Court of Appeals Proceedings

1. On appeal, Ms. Sineneng-Smith again argued that the encouragement provision violated the First and Fifth Amendments. Appellant's C.A. Br. 8. She

also contended that her conduct did not violate the encouragement provision at all, because the provision does not criminalize submitting accurate applications to the government. *Id.* 22-27.[3]

The government responded that the encouragement provision should be "broadly" construed to reach "statements" that "encouraged or induced the alien to remain in the United States." Gov. C.A. Br. 30. In the government's view, the provision covered defendants who "*reassured* their clients that they could remain in the United States, much as Sineneng-Smith has done here." *Id.* 31 (emphasis added). It also argued that Ms. Sineneng-Smith "inspired hope in her clients" and "influenced their decision to stay in this country," *id.* 33, urging that the provision's language "worked a substantial expansion in the types of activities held criminal under this statute," *id.* 31 (internal quotation marks omitted); *see also id.* 33 (arguing, citing legislative history, that a 1986 amendment to the encouragement provision "expanded criminal penalties").

The court of appeals requested supplemental *amicus* briefs on whether the encouragement provision violated the First or Fifth Amendments. JA3-5. The parties filed briefs responding to the *amicus* submissions. JA9. The government's supplemental brief nowhere mentioned "solicitation." It sought to construe the encouragement provision as prohibiting "non-*de-minim*[*i*]*s* acts that could assist a specific alien or aliens in violating" immigration law. Gov. C.A. Supp. Br. 4.

[3] Ms. Sineneng-Smith further argued there was insufficient evidence to support the convictions because the government did not establish that she encouraged or induced on the two specific days listed in the indictment—May 5 and June 18, 2007. *See* Appellant's C.A. Br. 41-48; Pet. App. 96a-97a. The court of appeals did not reach the issue.

At oral argument, government counsel conceded that the statute was "different from aiding and abetting" because merely "offering to assist someone suffices"—*i.e.*, the government need not prove that any noncitizen actually remained here without immigration status. C.A. Oral Arg. 47:45-48:04 (Feb. 15, 2018); *accord id.* 1:08:43-59.[4] The government relatedly acknowledged that the statute does not require that an undocumented noncitizen ever commit a crime. *Id.* 49:26-33. And when asked whether the encouragement provision was a "solicitation" statute, government counsel answered "no." *Id.* 48:03-08.

2. The court of appeals reversed Ms. Sineneng-Smith's encouragement provision convictions, holding the provision unconstitutionally overbroad under the First Amendment's Free Speech Clause. The court did not reach the alternative arguments that the provision (1) impermissibly discriminates based on content and viewpoint and (2) is void for vagueness. Pet. App. 8a & n.4, 39a n.15.

The court of appeals first construed the encouragement provision based on its plain language and the overall statutory context. The panel rejected the government's argument that the encouragement provision applies only to conduct, explaining that the ordinary meaning of "encourage[] and "induce[]" encompassed "speech, conduct, or both," and that nothing in the statute justifies "stray[ing] from the [terms'] plain meaning." Pet. App. 16a, 19a.

Addressing the government's contention that the encouragement provision was in fact an aiding-and-

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[4] Audio available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000013099 (visited Jan. 15, 2020).

abetting statute, the panel noted the government's concession that aiding and abetting requires proof of "elements that are not present in" the encouragement provision, notably (1) actual assistance by the defendant, (2) a completed criminal (not civil) violation by another, and (3) specific intent to facilitate the underlying crime. Pet. App. 32a.

The court of appeals also rejected the government's reliance on the financial-gain sentencing enhancement. Pet. App. 10a n.5. The court explained that 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." *Id.*

The court accordingly interpreted the 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. So construed, the statute criminalizes protected speech. *Id.* 28a-33a.

The court 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." Pet. App. 28a. The panel also ruled that the provision does not fall under the incitement to violence exception of *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), Pet. App. 28a-29a, a holding the government has not disputed.

Finally, the panel concluded that the encouragement provision's threat to speech was not hypothetical.

Rather, 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. It makes a felon of "a loving grandmother who urges her grandson to overstay his visa, by telling him 'I encourage you to stay.'" *Id.* 35a. And it also criminalizes the speech of "professionals who work with immigrants," as the government itself showed when it argued in another case "'that an immigration lawyer would be prosecutable … if he advised an illegal alien client to remain in the country.'" *Id.* 24a, 38a (discussing *United States* v. *Henderson*, 857 F. Supp. 2d 191, 203 (D. Mass. 2012)).

The panel also noted that the encouragement provision's independent legitimate application is "narrow," because most of its legitimate applications are already covered by other criminal statutes. Pet. App. 39a. By comparison, the provision's "impermissible applications are real and substantial," thus rendering the statute unconstitutionally overbroad. *Id.*

The government petitioned for rehearing en banc. No judge called for a response, and rehearing was denied. JA12.

SUMMARY OF ARGUMENT

I. The encouragement provision is unconstitutionally overbroad. The statute's plain language criminalizes "encourag[ing] or induc[ing]"—broad terms that dictionaries, the courts, and even the government (when it suits its purposes) have explained encompass speech. Construed as its language requires, the statute turns much free speech into a felony, criminalizing an immigration lawyer's advice to an undocumented client

and a family member's loving statement that "I encourage you to stay."

The government does not dispute that, if the encouragement provision's plain meaning holds, it is facially unconstitutional. The government's main defense is to ask this Court to rewrite the statute as an aiding-and-abetting or solicitation provision. But had Congress wanted to invoke those concepts, it knew how to do so; indeed, it included an express aiding-and-abetting provision in the very next subsection after the encouragement provision. *See* 8 U.S.C. § 1324(a)(1)(A)(v)(II). Moreover, the encouragement provision lacks the hallmarks of traditional aiding-and-abetting and solicitation provisions, most notably the fundamental requirement that the defendant assist or solicit *a crime*. Remaining in the United States without lawful immigration status is not a crime. The encouragement provision thus neither reads nor acts like an aiding-and-abetting or solicitation statute, and there is no reason to treat it like one.

Beyond these important textual clues, the provision's overall context and history demonstrate that the encouragement provision encompasses mostly speech. *Every* type of conduct the government asserts would fall only under the encouragement provision is in fact covered by another provision in § 1324(a)(1)(A) or another criminal statute. Yet even the government has previously—and rightly—noted that the encouragement provision is not entirely redundant of other statutes, but rather significantly expanded immigration-related criminal penalties. That expansion—the only independent work the provision does—is to criminalize speech. Given that the provision turns wide swaths of protected speech into felonies, yet has hardly any legitimate independent scope, its overbreadth is substantial.

The government repeatedly insists that Ms. Sineneng-Smith has not identified instances of "actual prosecutions" of protected speech. That ignores the government's own statement in open court that an immigration lawyer's advice to an undocumented client is prosecutable, a position the government tellingly does not disavow now. In any event, this Court has never required proof of "actual prosecutions" to invoke overbreadth, as such a rule would vitiate the doctrine entirely. Nor is there any basis for the government's attempt to extend the narrow First Amendment exception for "speech integral to criminal conduct" to cover speech that encourages what is at most a *civil* violation.

Finally, the government cannot rely on the fact that this case involved a sentencing enhancement for financial gain. The encouragement provision defines a freestanding crime that can be charged independently of the enhancement, and its chilling effect is significant, regardless of whether any defendant's sentence may be enhanced based on additional facts. In any event, the financial-gain enhancement does not alter the constitutional calculus, since speech made for pay—including legal, medical, or other paid advice—remains protected by the First Amendment.

II. The encouragement provision is facially unconstitutional for two additional reasons preserved but not reached below. First, it violates the First Amendment by discriminating based on viewpoint. The provision outlaws one side of an important public debate by criminalizing speech that urges undocumented noncitizens to stay here, while leaving speakers free to urge the same noncitizens to leave. The government cannot constitutionally criminalize "encouraging" words while leaving "discouraging" words untouched.

Second, the provision is unconstitutionally vague because it does not specify a standard of conduct that must be followed. Just as conduct that may annoy some people does not annoy others, words that "encourage" one noncitizen might have no effect on others. The statute's prohibition thus depends on the listener's subjective reaction, inviting arbitrary enforcement based on the whim of law enforcement. That result cannot be squared with due process.

ARGUMENT

I. THE ENCOURAGEMENT PROVISION IS UNCONSTITUTIONALLY OVERBROAD

"Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. Due to "the transcendent value to all society of constitutionally protected expression," *Gooding* v. *Wilson*, 405 U.S. 518, 520-521 (1972), this Court has recognized an "exception"—the overbreadth doctrine—"to [the] normal rule regarding the standards for facial challenges," *Virginia* v. *Hicks*, 539 U.S. 113, 118 (2003). While in a "typical facial attack," a litigant must show that a statute "lacks any 'plainly legitimate sweep,'" an overbroad statute facially violates the First Amendment if "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U.S. 460, 472-473 (2010).

This case is strikingly similar to *Stevens*, where this Court granted the Solicitor General's petition for certiorari only to affirm the unconstitutionality of a federal statute criminalizing depictions of animal cruelty. 559 U.S. at 482. There, as here, the government contended that the absence of "actual example[s] of a prosecution

based on protected speech" doomed a facial challenge. *Compare* Gov. Br. 28 *with Stevens*, 559 U.S. at 480 (highlighting government's promise that it had not brought and would not "bring a prosecution for anything less" than "'extreme' cruelty"). Both cases involved a commercial gain provision—although in *Stevens* it was an actual requirement for any conviction, whereas here it is simply a sentencing enhancement. *Compare* 559 U.S. at 469 *with* Gov. Br. 36, 39-41. And there, as here, the government asked the Court to deviate from the statute's plain text and "'rewrite [the] … law to conform it to constitutional requirements.'" *Compare* 559 U.S. at 481 (ellipsis in original) *with* Gov. Br. 26-28.

This Court should once again refuse the government's invitation to bless a statute that is fundamentally "[in]consistent with the freedom of speech guaranteed by the First Amendment." *Stevens*, 559 U.S. at 464.

A. The Encouragement Provision Criminalizes Protected Speech

The provision's plain text and structure, the government's own prosecutorial practices, and the provision's statutory history all show that "encourage" means "encourage." It does not mean "aid and abet," "solicit," or "facilitate." When correctly construed, the statute unquestionably criminalizes protected speech.

1. The words "encourage" and "induce" are expansive and encompass speech

This Court "start[s] … with the statutory text, and proceed[s] from the understanding that unless otherwise defined, statutory terms are generally interpreted

in accordance with their ordinary meaning." *Sebelius* v. *Cloer*, 569 U.S. 369, 376 (2013).

"The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *International Bhd. of Elec. Workers* v. *NLRB*, 341 U.S. 694, 701-702 (1951). The ordinary meaning of "encourage" manifestly includes speech; dictionaries published before and after the current statutory language was enacted define "encourage" using words like "inspire," "embolden," "give courage to," and "make confident." *Black's Law Dictionary* 620 (4th ed. 1968) ("to instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident"); *Merriam-Webster's Collegiate Dictionary* 380 (10th ed. 2001) ("to inspire with courage, spirit, or hope; to spur on; to give help or patronage to"); *Oxford English Dictionary* 216 (2d ed. 1989, reprinted 1998) ("[t]o inspire with courage, animate, inspirit").

The disjunctive use of "induce" likewise encompasses speech, as inducement means "[t]he act or process of *enticing* or *persuading* another person to take a certain course of action." *Black's Law Dictionary* 926 (11th ed. 2019) (emphases added). Dictionaries routinely equate inducement with persuasion, which clearly includes speech. *Webster's New International Dictionary* 1269 (2d ed. 1954) ("[t]o lead on, to influence, to prevail on, to move by persuasion or influence"); *Webster's Third New International Dictionary* 1154 (2002) ("to move and lead (as by persuasion or influence)"); *Webster's New World College Dictionary* 742 (5th ed. 2014) ("to lead on to some action, condition, belief, etc.; prevail on; persuade").

Courts have accordingly given the encouragement provision its expansive plain meaning. *See, e.g.*, *United*

States v. *Lopez*, 590 F.3d 1238, 1246 n.2, 1247-1249 (11th Cir. 2009) (affirming use of broad dictionary definitions of "encourage" and "induce"); *United States* v. *Thum*, 749 F.3d 1143, 1147 (9th Cir. 2014) (adopting a broad reading of "encourages or induces"). These interpretations are typically adopted at the government's urging, in its zeal to see convictions affirmed on appeal. *E.g.*, U.S. Br. 32-33, *United States* v. *Gonzalez-Rodriguez*, (11th Cir. Mar. 20, 2008), 2007 WL 5209821 (urging that "the natural and ordinary definitions of 'encouraging' and 'inducing'" are broad); *see also Thum*, 749 F.3d at 1147 (describing the government's interpretation as "broad"). In this very case, the government interpreted the provision "broadly" to prohibit "*statements* or actions [that] encouraged or induced the alien to remain in the United States." Gov. C.A. Br. 30 (emphasis added). It certainly did not argue that the words "encourage" and "induce" are narrow "criminal-law terms of art" (Gov. Br. 19), as it currently insists.

In an attempt to save the statute, the government now tries to "'rewrite [the] … law to conform it to constitutional requirements.'" *Stevens*, 559 U.S. at 481. The government's arguments deviate far from permissible statutory interpretation. *Reno* v. *ACLU*, 521 U.S. 844, 884 (1997) ("[T]his Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction.").

The government's lead argument is that the words "encourage" and "induce" should be replaced with "aid," "abet," "solicit," and/or "facilitate." Gov. Br. 19-22. Had Congress wished to invoke those concepts, however, it would have used those words. *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (courts "presume … 'that [the] legislature says … what it means and means … what it says'" (ellipses

in original)). Congress knows how to use those terms; indeed, it included an express aiding-and-abetting provision in the *very next subsection*. *See* 8 U.S.C. § 1324(a)(1)(v)(II) (extending culpability to anyone who "aids or abets the commission of any of the preceding acts"); *see also, e.g.*, 18 U.S.C. § 373 (criminalizing "solicit[ing]" a felony that "has as an element the use of … physical force"). "[W]hen 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presumes' that Congress intended a difference in meaning." *Loughrin* v. *United States*, 573 U.S. 351, 358 (2014).[5]

Unable to point to anything in the encouragement provision's text, the government cites *different* state and federal statutes in an effort to make the encouragement provision seem routine. Gov. Br. 19-22. But the government's examples bury "encouraging" and "inducing" in strings of other, narrower terms, and thus trigger the canon of *noscitur a sociis*, under which courts "avoid[] ascribing to one word a meaning so broad that it is inconsistent with its *accompanying* words." *Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015) (emphasis added). Every one of the government's examples follows this pattern of listing "encouraging" and "inducing" along with "soliciting," "aiding," "abetting," or like terms, thus narrowing the overall provision's scope. *E.g.*, Tex. Penal Code Ann. § 7.02(a)(2) (listing "aid[]" and "solicit[]" alongside "encourage"). Congress likewise knows how to apply that

[5] This also disposes of the government's argument that a handful of dictionaries use "encourage" as one of a string of words in defining "abet." Gov. Br. 19. Had Congress intended the encouragement provision to criminalize abetting, it would have referenced "abetting" expressly.

narrowing approach in drafting. *E.g.*, 8 U.S.C. § 1182(a)(6)(E)(i) ("Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible."). The government tellingly does not identify any statute that, like the encouragement provision, criminalizes encouraging or inducing *alone*. *See* 2 LaFave, *Substantive Criminal Law* § 13.2(a), at 457 (3d ed. 2018) (noting that such words are often used in varying combinations and results "may depend upon the precise combination of terms included").[6]

This refutes the government's heavy reliance on *United States* v. *Williams*, 553 U.S. 285 (2008), which involved a law that—unlike the encouragement provision—prohibited a string of verbs: "'advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]'" child pornography, *id.* at 289-290 (quoting 18 U.S.C. § 2252A). "Important to [the Court's] analysis" in *Williams* was the fact that two broad verbs in that list—"promote" and "present"—were "narrowed by the commonsense canon of *noscitur a sociis*." *Id.* at 294. Otherwise, if "taken in isolation," the words "promote"

[6] The government's citation (at 20-22) to the Model Penal Code fares no better; it too places "encourage" in a string of verbs including "commands" and "requests" (and, unlike the encouragement provision, requires that the primary conduct be "a crime," *see infra* pp. 26-30). Model Penal Code § 5.02(1) (1985). And while the National Commission on Reform of Federal Criminal Laws proposed criminalizing "induc[ing], entreat[ing], or otherwise attempt[ing] to persuade another person to commit a particular felony," *see* Gov. Br. 21-22, the relevant Senate Subcommittee *rejected* this proposal, observing that it created "free speech problems." *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Law and Procedures of the S. Comm. on the Judiciary*, 92d Cong. at 3504-3505 (1971).

and "present" are "susceptible of multiple and wide-ranging meanings." *Id.*

Here, unlike in *Williams*, the words "encourage and induce" *do* appear "in isolation." They have their ordinary, expansive meaning precisely because they are *not* narrowed by surrounding words. Indeed, the encouragement provision is indistinguishable from the Court's example of a constitutionally defective statute that prohibits mere encouragement—*e.g.*, "I encourage you to obtain child pornography." *Williams*, 553 U.S. at 300.

At bottom, the government's position would mean that a prohibition against "encouraging" remaining here is not violated by the words "I encourage you to remain here"—simply because such a statement would not constitute aiding and abetting or solicitation. Gov. Br. 35. The government's illogical argument cannot be right, and it only demonstrates that the government is not seeking to construe the statute, but to rewrite it.

2. The statutory context and the government's own enforcement practices confirm the encouragement provision's sweeping scope

The structure of the surrounding provisions in § 1324(a)(1)(A) and the overall statutory scheme confirm that the encouragement provision's primary function is to criminalize speech and not much else. *See Henson*, 137 S. Ct. at 1722 (considering both "the narrow statutory provision" and "the larger statutory landscape").

The best contextual clue that the encouragement provision is not an aiding-and-abetting statute is the fact that § 1324(a)(1)(A) already includes overarching

conspiracy and aiding-and-abetting provisions. 8 U.S.C. § 1324(a)(1)(A)(v)(I)-(II). If Congress meant the encouragement provision to serve as an aiding-and-abetting statute, drafting a separate aiding-and-abetting provision immediately afterwards is an odd way to say so. Moreover, if the encouragement provision is read as the government proposes, one could be charged with conspiracy to aid and abet, or with aiding-and-abetting aiding and abetting—which is counterintuitive, if not absurd. *See Clinton* v. *City of N.Y.*, 524 U.S. 417, 429 (1998) (rejecting interpretation of statute that would "'produce an absurd … result'").

Moreover, all five examples of conduct the government marshals are already covered by another provision in § 1324 or other criminal statutes. This is not a situation of incidental "overlap" among statutes that otherwise have significant independent scope (Gov. Br. 38-39); rather, the government identifies no conduct not already criminalized elsewhere. As a result, the only independent work the encouragement provision does is to criminalize speech that could persuade or influence someone to enter or remain in this country.

First, the government urges that only the encouragement provision serves as a "general criminal prohibition against facilitating an alien's continued unauthorized presence in the United States." Pet. 12. But the government's broad view of the "harboring" provision in § 1324(a)(1)(A)(iii) encompasses exactly such conduct. *See, e.g.*, U.S. Br. 15, *United States* v. *Martinez-Medina* (5th Cir. Sept. 12, 2008), 2008 WL 6082721 (arguing that defendant "'harbored' [undocumented noncitizens] by engaging in conduct that 'tended to substantially facilitate the alien[s] remaining in the United States illegally'"); U.S. Br. 15, *United States* v. *Tipton* (8th Cir. May 3, 2007), 2007 WL 6625192 ("'Har-

boring' an illegal alien includes any conduct that tends to[] 'substantially facilitate an alien's remaining in the United States illegally.'").

Second, the government insists that it needs the encouragement provision to prosecute "acts of procuring and providing fraudulent documents and identification information to unlawfully present aliens." Gov. Br. 29. But again, the government has used the harboring provision of § 1324(a)(1)(A)(iii) for precisely that purpose. *See*, *e.g.*, *United States* v. *Kim*, 193 F.3d 567, 575 (2d Cir. 1999) (government secured harboring convictions where defendant "instructed [a worker] to obtain false documentation and to submit an I-9 form").[7] And other statutes specifically target immigration-document fraud. *See* 8 U.S.C. § 1324c; 18 U.S.C. § 1546 (prohibiting "[f]raud and misuse of visas" and other immigration documents).

Third, the government claims that the encouragement provision targets "provid[ing] assistance for unlawful entry, or misleadingly lur[ing] aliens into the country for unlawful work." Gov. Br. 29. This conduct is covered by § 1324(a)(1)(A)(i) and (ii), which prohibit (1) "bring[ing]" or "attempt[ing] to bring" undocumented persons into the country other than through a lawful port of entry "in any manner whatsoever," and (2) "transport[ing]," "mov[ing]," or "attempt[ing] to transport or move" undocumented persons "by means of transportation or otherwise." The reach of these two

[7] *See also United States* v. *Ye*, 588 F.3d 411, 413, 417 (7th Cir. 2009) (upholding harboring convictions for defendant who "advised [immigrant workers] they could purchase fake documents in Chicago"); *United States* v. *Shum*, 496 F.3d 390, 392 (5th Cir. 2007) (affirming harboring conviction based in part on evidence that defendant "provided false identifications" and "did not file social security paperwork" for unauthorized employees).

statutes is increased by § 1324(a)(1)(A)(v)'s conspiracy and aiding-and-abetting provisions.

Fourth, the government contends the encouragement provision is necessary to target "smuggling activities." Gov. Br. 30. Yet such activity is again covered by the full array of prohibitions in § 1324(a)(1)(A)—assisting unlawful entry of, transporting, or harboring undocumented persons—especially given that any conspiracy or complicity in these crimes is also covered by § 1324(a)(1)(A)(v). *See* Opp. 12-13 (collecting cases).

Finally, the government urges that Ms. Sineneng-Smith herself could not have been prosecuted under "the neighboring substantive provisions." Gov. Br. 38. But the government did prosecute and convict her for mail fraud, and those convictions are not challenged here. To the extent the government claims that someone in Ms. Sineneng-Smith's position should be criminally liable even where the government does *not* prove fraud, that argument lacks merit. The filing of concededly-truthful labor certification and immigration petitions that the government ultimately approves, *see supra* pp. 5-6, is not criminal.

In sum, *every example* of conduct that the government says the encouragement provision covers is in fact covered by the rest of § 1324(a)(1)(A) or other criminal provisions. The only way the encouragement provision has any independent effect is if "encourage" means "encourage," *i.e.*, speech. *See Corley* v. *United States*, 556 U.S. 303, 314 (2009) ("one of the most basic interpretive canons" is that "'effect is given to all [a statute's] provisions, so that no part will be inoperative or superfluous, void or insignificant'"); *see also* Gov. C.A. Br. 34-35 (citing this canon to persuade the court

of appeals to interpret the encouragement provision broadly).[8]

3. The encouragement provision lacks critical indicia of an "aiding-and-abetting" or "solicitation" statute

The government's attempt to spin the encouragement provision as a traditional aiding-and-abetting or solicitation statute fails for the added reason that such statutes include criteria that the encouragement provision conspicuously omits.

a. The encouragement provision is not an "aiding-and-abetting" statute

The encouragement provision lacks many of the traditional requirements of an aiding-and-abetting statute, as the government admitted below. Pet. App. 32a.

First, a criminal aider-and-abettor must assist in a *crime*, not a civil or regulatory infraction. *See* 2 LaFave, *supra*, § 13.3(c), at 498 ("If the acts of the principal in the first degree are found not to be criminal, then the accomplice may not be convicted."). The Department of Justice's own Criminal Resource Manual states that an element of aiding and abetting is a "specific intent to

[8] This disposes of the government's assertion that its reading of the statute is not redundant of the aiding-and-abetting provision in § 1324(a)(1)(V)(ii). Gov. Br. 38. Given that every possible application of the encouragement provision that the government cites falls under another criminal provision, including § 1324(a)(1)(a)(i)-(iii) (alone or paired with the statute's aiding-and-abetting and conspiracy provisions), the only non-redundant work the encouragement provision could possibly do is to criminalize speech.

facilitate the commission of a *crime* by another."[9] Here, the government admits—and indeed trumpets—that the person being "encouraged" need not commit a crime, since remaining in the United States without immigration status is not criminal. *E.g.*, Gov. Br. 42 (asserting that encouragement provision targets "certain civil immigration offenses").

Second, aiding-and-abetting convictions require that the "principal" actually *complete* the asserted criminal act. Again, the government's own handbook concedes the point: aiding-and-abetting requires proof that "someone committed the underlying offense."[10] *See also* 2 LaFave, *supra*, § 13.3(c), at 498 ("[T]he guilt of the principal must be established at the trial of the accomplice as part of the proof on the charge against the accomplice."). The government notably does not dispute—and indeed insisted below—that the encouragement provision has no comparable requirement: it applies even if the undocumented noncitizen does not ultimately enter or remain in the country. *See supra* pp. 10-11.

Finally, a criminal aider-and-abettor must act with "specific intent."[11] *See also* Model Penal Code § 2.06(3)(a) (acting as an accomplice requires having the "purpose of promoting or facilitating the [underlying] offense"). Yet although the encouragement provision previously required the government to prove that the defendant "willfully and knowingly" encouraged or in-

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[9] https://www.justice.gov/jm/criminal-resource-manual-2474-elements-aiding-and-abetting (emphasis added) (visited Jan. 15, 2020).

[10] *Id.*

[11] *Id.*

duced, Congress deleted that requirement in 1986. *See infra* pp. 32-33. And in this very case, the government opposed any effort to read such a *mens rea* requirement into the encouragement provision, urging the district court that the defendant need only "know that the aliens in question are present in the United States illegally. Otherwise you simply have to encourage or induce." JA54. The government prevailed on that point: the jury instructions contained no *mens rea* requirement for encouraging or inducing—much less a specific intent requirement. JA117.

The government once again seeks to edge away from its prosecutorial practice, suggesting in a footnote that its (winning) trial strategy is a "case-specific fact" that is "inappropriate" to consider here. Gov. Br. 25-26 & n.*. But the government's argument below shows how it *actually* interprets the encouragement provision in criminal prosecutions. It is entirely appropriate to consider the government's prior successful litigation positions, which belie the Solicitor General's *post hoc* effort to narrow the statute before this Court.

b. The encouragement provision is not a "solicitation" statute

The government first tried to liken the encouragement provision to a "solicitation" statute in its petition for certiorari. Below, the government not only avoided such a comparison, but expressly disavowed it at oral argument. *See supra* p. 11.[12] The government was

[12] The government misleadingly suggests that the court of appeals rejected "the government's contention" that the encouragement provision is a "solicitation provision." Gov. Br. 12. But the government did not raise solicitation below, and the court of appeals discussed solicitation only briefly in response to arguments raised by an *amicus*. Pet. App. 28a & n.9.

well-advised to do so, as the encouragement provision bears no resemblance to a traditional solicitation crime.

First, like aiding and abetting, the crime of solicitation is confined to solicitation of *criminal* (not civil) offenses. *See* 2 LaFave, *supra*, § 11.1(a), at 265-267 (surveying state solicitation statutes and identifying no example that applied to civil violations). Each of the government's cited state statutes (Br. 20) proscribes solicitation of criminal acts, not civil violations. *E.g.*, Ariz. Rev. Stat. Ann. § 13-1002(A) (2010) (confining solicitation to conduct by the solicited party that would "constitute [a] felony or misdemeanor"). Model Penal Code § 5.02(1) likewise defines "solicitation to commit a crime" as solicitation of "specific conduct that would constitute *such crime* or an attempt to commit *such crime* or would establish [a person's] complicity in its commission or attempted commission." (Emphases added.) The government misleadingly states that the Model Penal Code refers to "'specific conduct' that would violate the law." Gov. Br. 20. Not so; it requires solicitation of a *crime*.[13]

Second, solicitation (like aiding and abetting) requires a special *mens rea*—the specific intent to both have "the [requested] crime be committed and [for] the other [to] commit it as a principal in the first degree[.]"

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[13] *Amicus* Eugene Volokh agrees that, if the encouragement provision is understood to prohibit "[s]olicitation of civilly punishable conduct"—the government's interpretation—it would be unconstitutional. Volokh Br. 2-3. Professor Volokh does not explain how the encouragement provision can be read to ban only solicitation of a crime. Moreover, adoption of Professor Volokh's theory would still require affirmance here, because the government did not prove that either of the noncitizens Ms. Sineneng-Smith supposedly "encouraged" ever committed (or was "solicited" to commit) any crime.

See 2 LaFave, *supra*, § 11.1(c), at 273; *accord* Model Penal Code § 5.02 ("A person is guilty of solicitation … [if they act] with the purpose of promoting or facilitating its commission."). Even the government's own illustrative example (Br. 21) requires that the defendant "inten[d] that another person engage in conduct constituting [a crime of violence]." 18 U.S.C. § 373(a). As discussed above, however, the encouragement provision does not require specific intent, as the government successfully advocated in this very case. *See supra* pp. 27-28.

The government also half-heartedly argues that the encouragement provision is a "facilitation" statute. It is not clear what the government means, as its only analogies are aiding-and-abetting and solicitation statutes that do not mention "facilitation." *See* Gov. Br. 18-22. This is no surprise; this Court has suggested the word "facilitate" is simply the "equivalent" of aiding and abetting. *Abuelhawa* v. *United States*, 556 U.S. 816, 820-821 (2009). Moreover, according to its dictionary definition, the term generally encompasses behavior that makes "commission of a *crime* easier," *Black's Law Dictionary* (11th ed. 2019) (emphasis added), making it another poor comparison for the encouragement provision's punishment for encouraging or inducing noncriminal activity, *see supra* pp. 26-29.

4. The encouragement provision's statutory history also confirms its broad sweep

The government clings to statutory history, leading off its statement of the case (Br. 4-7) and discussion of "context" (Br. 22-24) with excursions into earlier statutes. Because the meaning of the encouragement provision is clear from its text and surrounding provisions, this Court "need not consider … extra-textual evi-

dence." *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017). In any event, the history confirms that Congress enacted the encouragement provision to *broaden* criminalization of immigration-related behavior, including speech.

The 1885 statute the government relies on was another instance where *noscitur a sociis* narrowed the word "encourage" by combining it with other verbs: "knowingly *assisting*, encouraging or *soliciting* the migration or importation of any alien … to perform labor or service of any kind under contract or agreement." Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333 (emphases added). Thus, when the Court considered the statute, it identified it as prohibiting "assisting" the unlawful importation of foreign workers. *Lees* v. *United States*, 150 U.S. 476, 480 (1893). The 1885 law was narrower in another respect: it applied only to migrant laborers who were lured to the United States via contracts or employment agreements.[14]

The Immigration Act of 1917 likewise placed "encourage" and "induce" alongside other verbs: "induce, *assist*, encourage, or *solicit*, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract labor … into the United States." Act of Feb. 5, 1917, ch. 29, § 5, 39 Stat. 879 (emphases added). Moreover, like the 1885 law, the 1917 Act's scope was "clearly limited" to the special context of preventing the "migration of aliens under the attraction of work in the United States." *United States* v. *Royal Dutch W. India Mail*, 250 F. 913, 915 (S.D.N.Y. 1918) (L. Hand, J.). Accordingly, conviction required proof that "the

[14] Contrary to the government's insinuation (Br. 5), *Lees* did not mention the First Amendment; its holding turned solely on Congress's Article I power to exclude aliens. *See* 150 U.S. at 479.

incentive held out to the alien [to travel to the United States] must be employment here." *Id.*

The government is thus incorrect to treat these employment-luring provisions as true antecedents to the encouragement provision. Rather, the first provision criminalizing encouragement or inducement alone surfaced in the Immigration and Nationality Act of 1952 ("INA"). Before 1952, the predecessor to § 1324(a)(1)(A) barred only bringing, concealing, or harboring, and attempting, assisting, or abetting those offenses. 8 U.S.C. § 144 (1946). The INA added a provision banning "willfully and knowingly" "encourag[ing] and induc[ing]" entry into the United States—without including any of the narrowing associated terms like assisting or soliciting that appeared in the earlier statutes, and without limitation to offering employment contracts. *See* Pub. L. No. 82-414, § 274, 66 Stat. 163, 228-229 (1952); *see also* S. Rep. No. 82-1145 at 3 (1952) (comparison showing the new offense of encouraging and inducing).

In 1986, Congress expanded the encouragement provision to its current form. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112, 100 Stat. 3359, 3381-3382. *First*, it lowered the *mens rea* element by eliminating "willfully and knowingly" and requiring only that the defendant be "knowing or in reckless disregard" of the person's immigration status. *Id.* *Second*, it extended the prohibition to encouraging/inducing not only entry into, but also residence in, the United States. *Id.*[15]

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[15] Congress's decision to omit the words "solicit," "aid," and "abet" from the encouragement provision's recent amendments is further proof that it did not intend the statute to be an aiding-and-abetting or solicitation provision. *See Stone* v. *INS*, 514 U.S. 386,

Although the Solicitor General now tries (incorrectly) to spin this history as a gradual narrowing of the criminal ban, the government has gotten it right elsewhere. The government told the Fifth Circuit that the 1952 INA "'*broadened* the coverage of the 1917 immigration legislation by creating the *additional* offense[of] … inducing or encouraging the entry of aliens into the United States.'" U.S. Br. 11-12, *United States* v. *Martinez Ruiz* (5th Cir. Apr. 22, 1999), 1999 WL 33638104 (emphases added). It repeated this explanation three years later, noting that "'Congress has *steadily broadened*'" restrictions on illegal immigration, including by "'creating the additional offense[] of … inducing or encouraging the entry of aliens into the United States.'" U.S. Br. 10-11, *United States* v. *Solis-Campozano* (5th Cir. July 3, 2002), 2002 WL 32104235 (emphasis added). Even in this case, the government asserted that the 1986 amendment "expanded" the scope of the encouragement provision. Gov. C.A. Br. 33.

5. Constitutional avoidance cannot save the encouragement provision

The government's last refuge is a plea for this Court to prune the statute back to avoid unconstitutionality. Gov. Br. 26-28. But constitutional avoidance applies only "if a reasonable alternative interpretation poses no constitutional question." *Gomez* v. *United States*, 490 U.S. 858, 864 (1989). As explained above, the government's interpretation is not a "reasonable alternative"; it cannot be squared with the statute's plain text or basic rules of statutory construction. *See, e.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018)

397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

(constitutional avoidance does not justify "implausible" narrowing constructions).

In sum, the government cannot evade Congress's actual language by proffering a late-breaking and atextual construction of the law. "Encourage or induce" means "encourage or induce," and thus includes protected speech.

B. The Encouragement Provision Encompasses A Substantial Amount Of Protected Speech And Is Unconstitutionally Overbroad

When the encouragement provision is read as it is written, it is unquestionably overbroad. Indeed, the government does not meaningfully argue otherwise; nearly all of its defenses depend on its untenable construction of the statute.

1. When correctly interpreted, the encouragement provision covers a broad swath of protected speech. As the court of appeals observed, the provision would reach even "[a] loving grandmother's urging her grandson to overstay his visa" and an attorney who correctly tells an undocumented client to remain in the country because "non-citizens within the United States have greater due process rights than non-citizens outside the United States." Pet. App. 36a, 38a.

These are not "fanciful" hypotheticals, as the government wrongly suggests. Gov. Br. 32, 36. In *United States* v. *Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012), the government charged the defendant under the encouragement provision for *inter alia* cautioning her undocumented housekeeper that "'if you leave they won't let you back.'" *Id.* at 196, 203, 208-209. When the district court inquired about the encouragement provision's scope, the government confirmed "that an immi-

gration lawyer would be prosecutable [under the encouragement provision] if he advised an illegal alien client to remain in the country." *Id.* at 203. While the Solicitor General seeks to minimize the government's argument in *Henderson*, he tellingly does not disavow it. *See* Gov. Br. 33-34; *see also Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 548 (2001) (attorney's advice to client is "constitutionally protected expression").

Even beyond the specific example discussed in *Henderson*, the encouragement provision plainly applies to all manner of U.S. citizens who routinely give advice and support to undocumented noncitizens. As *amici* supporting Respondent also explain, the encouragement provision reaches:

- A lawyer advising an undocumented noncitizen client to stay in the country in order to qualify for immigration benefits that turn on physical presence;
- A community organizer explaining to undocumented noncitizens their civil rights on U.S. soil;
- A city council member holding an information session about the ability of undocumented residents to obtain municipal services;
- A religious leader telling undocumented congregants that they are welcome to stay and freely exercise their religion; and
- A charity worker at the southern border who informs an undocumented family that they can get food at a local soup kitchen.

The government does not deny that such speech is protected by the First Amendment, nor could it. And unlike the statute in *Stevens*, the encouragement provi-

sion does not even have an "exceptions clause" for speech of political, artistic, or educational value (though even that did not save the statute in *Stevens*, 559 U.S. at 477-480). Given that Congress has not drawn a "clear line" excluding any of these scenarios from the encouragement provision's reach, *Reno*, 521 U.S. at 884, the provision will chill numerous Americans from engaging in protected speech for fear of prosecution.

2. Beyond its implausible statutory rewrite, the government makes three arguments to defend the encouragement provision's constitutionality. None is persuasive.

First, the government repeatedly asserts (Br. 14, 28, 32, 33), that the provision's overbreadth cannot be "substantial" unless Ms. Sineneng-Smith identifies "'actual' prosecutions" of protected speech. But the government admits telling a district court that "an immigration lawyer's advice to a client" would be prosecutable, and does not disavow that position now. *See supra* pp. 34-35. Respondent need not show that the government "actually" prosecuted protected speech when the government has boasted in open court that it *could* do so.

Regardless, this Court has never required proof of "actual prosecutions" of free speech as a condition for overbreadth; doing so would effectively eliminate the overbreadth doctrine. Nor has this Court required that a criminal defendant bring an as-applied challenge before attacking an overbroad criminal statute. *See Stevens*, 559 U.S. at 473 n.3 (striking down statute as

overbroad even though "no as-applied claim has been preserved").[16]

The overbreadth doctrine exists precisely because the First Amendment abhors a ban—particularly a *criminal* ban, *Hicks*, 539 U.S. at 119—on substantial protected speech, regardless of how the government pledges to employ it. Congress cannot enact a law that scares speakers into silence, simply because the Executive "promise[s] to use it responsibly." *Stevens*, 559 U.S. at 480.[17]

The encouragement provision's overbreadth is thus plainly substantial. It covers every time attorneys, counselors, teachers, religious ministers, advocates, physicians, friends, or relatives tell someone they know (or recklessly disregard) is undocumented that she is better off remaining in the United States. Such constitutionally-protected conversations are routine, as *amici* supporting Respondent also explain.

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[16] *Taxpayers for Vincent*, which the government repeatedly cites (Br. 14, 28, 33, 34), is not to the contrary. The plaintiffs there had not even "*attempted* to demonstrate that the ordinance applies to any conduct more likely to be protected by the First Amendment than their own"; the case was "basically a challenge to the ordinance as applied to their activities." 466 U.S. at 801, 803 (emphasis added). Here, the encouragement provision's plain text manifestly "applies" to others' protected speech.

[17] The Court's offhand comment in *Williams* that "we are aware of no prosecution for giving child pornography to the police" (553 U.S. at 302) did not *sub silentio* create a requirement that an overbreadth challenger point to actual prosecutions of protected speech. Rather, it reinforced the point (made earlier in the same paragraph) that the statute at issue likely did not reach such behavior.

By contrast, the government has not identified *any* unprotected conduct targeted by the encouragement provision that is not criminalized by other unchallenged provisions. *See supra* pp. 22-26. This is accordingly not a situation where the overbreadth doctrine has the "harmful effects" of blocking prosecution of significant amounts of unprotected behavior; the numerous other provisions forbidding actual unprotected conduct will remain in force. *Williams*, 553 U.S. at 292. And whatever legitimate sweep the encouragement provision itself has—if any—it is dwarfed by the frequency and variety of *protected* speech it criminalizes and chills. As a result, it is substantially overbroad and facially invalid. *See Stevens*, 559 U.S. at 481-482; *Reno*, 521 U.S. at 878-879; *Board of Airport Comm'rs of L.A.* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 577 (1987).

Second, the government references the unprotected nature of "speech integral to criminal conduct." Br. 41-44. But while there is such a "'narrowly limited'" exception to the First Amendment, *Stevens*, 559 U.S. at 468-469, it does not apply here. As its name suggests, the exception applies only to speech integral to *crimes*. *See id.* ("speech integral to criminal conduct"); *accord United States* v. *Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27 n.5 (2010) ("speech effecting a crime"); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) ("speech or writing used as an integral part of conduct in violation of a valid criminal statute"). And as the government concedes, remaining in the United States without immigration status is not a crime. Gov. Br. 42 (referencing "civil immigration offenses").

The government cites *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). But as the Court later explained, that case

ruled only that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *Williams*, 553 U.S. at 297. The Court held that a newspaper may be forbidden from publishing certain advertisements for transactions that were unlawful under a civil ordinance (prohibiting discrimination on the basis of sex) or under a criminal statute (prohibiting ads for prostitution or narcotics). *Pittsburgh Press*, 413 U.S. at 387. By contrast, the encouragement provision is not limited to offers to engage in illegal transactions.[18] The other cases the government cites—*International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951), and *International Brotherhood of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 293 (1957)—are inapposite because they involved picketing, which this Court has held to be a unique "mixture of conduct and communication" distinct from purely expressive speech. *See, e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 580 (1988) ("picketing is qualitatively different from other modes of communication"). In any event, those cases do not even mention the speech-integral-to-crime exception.

Lacking any authority supporting its position, the government argues (Br. 43-44) that limiting the speech-integral-to-crime exception to speech integral to *crime* would "introduce unwarranted complexities into First Amendment law." But it is the government that is trying to stretch a "narrowly limited" exception for "speech integral to *criminal* conduct" into a nebulous exception for "speech encouraging certain noncriminal

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[18] *Pittsburgh Press* also relied at least in part on the now-outdated principle that commercial speech is "unprotected by the First Amendment." 413 U.S. at 384.

conduct." The Constitution "is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" *Stevens*, 559 U.S. at 470. The government's concern is misplaced in any event, as the handful of statutes the government fears may be affected—*e.g.*, state laws criminalizing "assist[ing]" in furnishing alcohol to a minor (Gov. Br. 43)—do not implicate the First Amendment because they prohibit conduct, not speech.

Finally, the government argues that the encouragement provision's coverage of protected speech is meaningfully narrowed by the financial-gain sentencing enhancement. Gov. Br. 36, 39-41. But the encouragement provision can be charged separately from the sentencing enhancement, as it was here. The government's own argument at trial and the district court's jury instructions and verdict form treated the encouragement offense separately from the financial-gain enhancement. *See supra* pp. 8-9.

More broadly, the government does not explain why an overbroad law can remain on the books simply because the government sometimes charges it with a sentencing enhancement. The overbreadth doctrine protects against laws whose "continued *existence* … in unnarrowed form would tend to suppress constitutionally protected rights." *Gooding*, 405 U.S. at 521 (emphasis added). Adopting the government's position would allow Congress to criminalize—and thereby chill—vast amounts of protected speech, as long as it affixed sentencing enhancements as well. Consider a law that made it a felony to criticize the President, accompanied by a sentencing enhancement for statements that threaten the President with violence. Although threatening the President may be constitutionally criminalized, *Watts* v. *United States*, 394 U.S. 705,

707-708 (1969) (per curiam), the base offense would chill substantial political dissent and be clearly unconstitutional. Yet by the government's argument, the overbroad provision banning statements criticizing the President could remain in force as long as the government was careful enough not to actually charge it without the sentencing enhancement. That cannot be correct.[19]

The government (Br. 39) cites *United States* v. *Alvarez*, 567 U.S. 709 (2012), but *Alvarez* did not hold that the overbreadth doctrine ignores the base offense that was actually charged and convicted. Rather, the plurality opinion simply took the government's interests on their strongest terms and *still* held the law unconstitutional. *Alvarez* involved a law criminalizing false statements about earning military awards, with an enhanced punishment for lying about the Congressional Medal of Honor. *Id.* at 713. The law was undisputedly content-based, requiring the government to show "compelling interests" justifying it. *Id.* at 724. The plurality held that even the government's strongest stated interest (protecting the integrity of "the Congressional Medal of Honor in particular") did not justify the content-based prohibition. *Id.* at 724-730. The plurality did not suggest that the Court *cannot* analyze a base offense for overbreadth; indeed, where the key

[19] The government points out (Br. 36, 40) that the financial-gain sentencing enhancement must be charged separately and found by the jury in order to comply with the *Sixth* Amendment, but cites no authority making that relevant to overbreadth under the *First* Amendment. And for the government to discard Congress's statutory language as a "cosmetic drafting choice" (Gov. Br. 41) shows startling disregard for the separation of powers, and would "sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" *Stevens*, 559 U.S. at 481.

concern is the statute's chilling effect, it would scarcely make sense to ignore its full reach.

In any event, focusing on the sentencing enhancement here does not help the government any more than it did in *Alvarez*. Simply because speech is made for financial gain does not make it unprotected. "Some of our most valued forms of fully protected speech are uttered for a profit." *Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 482 (1989). After all, "the pamphlets of Thomas Paine were not distributed free of charge." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943).

It is accordingly well-established that "tutoring, legal advice, and medical consultation provided (for a fee) … consist of speech for profit," but nonetheless enjoy First Amendment protections. *Fox*, 492 U.S. at 482. 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). Rather, immigration attorneys, criminal defense lawyers, social workers, teachers, and physicians are all paid for their advice and speech. All may readily find themselves advising or counseling—for financial gain—undocumented noncitizens to stay in the country. Their speech is protected even when they are paid for it. Indeed, the Court did not hesitate to strike down an overbroad statute prohibiting only depictions of animal cruelty "made, sold, or possessed *for commercial gain*." *Stevens*, 559 U.S. at 469 (emphasis added).

The government tries to sidestep the broad implications of its position, suggesting that the financial-gain enhancement does not apply to those who receive an "ancillary financial benefit." Gov. Br. 36. It is not clear what that means or where it comes from; it is certainly

not in the statute. And once again, the government's eleventh-hour assurances are belied by its actual enforcement practices. It has previously sought to apply the financial-gain enhancement even without any proof that the defendant "actually received money or other pecuniary benefits." *See, e.g.*, U.S. Br. 46, *United States* v. *Angwin*, (9th Cir. Dec. 6, 2000), 2000 WL 33982141; *see also id.* 47 (arguing "it is not even necessary for the Government to establish an actual exchange for value to anyone").

II. THE ENCOURAGEMENT PROVISION IS FACIALLY UNCONSTITUTIONAL ON OTHER GROUNDS

While the encouragement provision's overbreadth is ample reason to affirm the court of appeals' judgment, the question on which the government sought and this Court granted review asks, without limitation, whether the provision is "facially unconstitutional." Pet. I. This implicates two additional arguments pressed below that the court of appeals did not need to reach, but that remain available as alternative grounds of affirmance.

A. The Encouragement Provision Impermissibly Discriminates Based On Content And Viewpoint

The encouragement provision is impermissibly content-based and viewpoint-discriminatory, thus violating "the most basic of [First Amendment] principles"—that the "'government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content.'" *Brown* v. *Entertainment Merch. Ass'n*, 564 U.S. 786, 790-791 (2011).

The "government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2299 (2019). The encouragement provision does just that: it criminalizes speech that urges undocumented noncitizens to *remain* here, while fully permitting speech that urges them to *leave*. As discussed above, the provision makes it a felony for a lawyer to truthfully advise an undocumented client to remain in the country because she has greater constitutional rights inside the United States than outside, but gives someone else free rein to falsely tell the same person that she has no rights at all and should leave the country immediately. *See supra* pp. 34-35; *Holder*, 561 U.S. at 27 (statute "regulates speech on the basis of its content" where a person's ability to speak "depends on what they say").

The encouragement provision is indistinguishable from other content-based and viewpoint-discriminatory proscriptions this Court has invalidated. In *Matal* v. *Tam*, 137 S. Ct. 1744 (2017), this Court struck down a law that permitted applicants to "register a positive or benign [trade]mark but not a derogatory one," *id.* at 1750 (Kennedy, J., concurring). The law "reflect[ed] the Government's disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination." *Id.*; *see also id.* at 1763 (Alito, J., concurring) (statute that barred only "offensive" speech was viewpoint-discriminatory).

This Court likewise invalidated a public university's refusal to fund a newspaper that "promoted or manifested a particular belief in or about a deity or an ultimate reality." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 827 (1995) (original alterations omitted). The funding decision did not "exclude religion as a subject matter," but rather singled out

"for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. Just so here: the encouragement provision does not ban all discourse regarding the presence of undocumented noncitizens, but only the speech of those who favor it.

Finally, in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), this Court struck down a local ordinance criminalizing expressive activity that "'one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'" *Id.* at 380. This Court noted that the statute did not bar all forms of "fighting words," but rather only those related to "racial, gender, or religious intolerance." *Id.* at 392-394. Such a rule improperly favored those arguing in favor of "tolerance and equality," giving them the right to "fight freestyle, while requiring the other [side] to follow Marquis of Queensberry rules." *Id.* at 392. Likewise here, speakers who wish to give undocumented noncitizens reasons to leave may speak freely, whereas those who wish to give them reasons to stay must remain silent or risk prosecution.

Although this issue was discussed in the brief in opposition (at 16-17) and falls within the question presented, the government's opening brief fails to argue either (A) that the encouragement provision is not content-based or viewpoint-discriminatory or (B) that it could prove that the provision is narrowly tailored to a compelling government interest.[20] Instead, the gov-

[20] Far from being narrowly tailored, the encouragement provision prohibits *all* speech that encourages or induces a known undocumented noncitizen to reside here. *See supra* pp. 17-19. And while the government has an interest in regulating illegal immigration, criminalizing professional advice and expressions of comfort and support is hardly the least restrictive means to advance it.

ernment has made two weak attempts to sidestep the issue.

First, the government has contended (Pet. Reply 10) that viewpoint discrimination was not adequately raised below. Not so; the court of appeals acknowledged the viewpoint discrimination argument pressed before it. Pet. App. 7a-8a & n.4; *see also* Appellant's C.A. Br. 38 ("[L]aws that purport to proscribe or regulate speech based on its content are presumptively unconstitutional."). The government addressed the argument on the merits. Gov. C.A. Supp. Br. 29-30. Although the court's overbreadth ruling made it unnecessary to address viewpoint discrimination (Pet. App. 8a n.4), the argument was preserved.

Moreover, Ms. Sineneng-Smith raised the First Amendment at trial and on appeal. *See supra* pp. 7-13. That constitutional claim itself sufficed to preserve a viewpoint-discrimination challenge. *Citizens United* v. *FEC*, 558 U.S. 310, 330-331 (2010) ("'[O]nce a federal claim is properly presented, a party can make any argument in support of that claim[.]'"); *see also R.A.V.*, 505 U.S. at 381 n.3 (question presented raising overbreadth issue also "fairly included" content-based discrimination challenge).

Second, the government suggested (Pet. Reply 10-11) that a viewpoint discrimination challenge rises or falls with the overbreadth challenge. Again, not so. Were the Court to agree with the government that the encouragement provision falls under the "speech integral to criminal conduct" exception (though it does not, *see supra* pp. 38-40), the provision would still fail as viewpoint discrimination. The government cannot discriminate against a particular viewpoint even if it could otherwise bar the underlying speech. *See R.A.V.*, 505

U.S. at 391-392 (striking down ordinance that banned only "fighting words" expressing a particular viewpoint); *cf. id.* at 384 ("[The] government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.").

The government may well prefer that Americans urge undocumented noncitizens to remain outside the United States and implore those already here to leave and never return. And while the government *itself* may state that view, *see Matal*, 137 S. Ct. at 1757, it may not forbid the expression of a contrary view by private speakers—least of all through threat of felony prosecution. When "content-based prohibitions" like the encouragement provision are "enforced by severe criminal penalties, [they] have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004). The encouragement provision is therefore presumptively invalid, *see id.*, and the government has not even attempted to justify it.

B. The Encouragement Provision Is Impermissibly Vague

The encouragement provision fails separately because it "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. Such statutes violate the Due Process Clause of the Fifth Amendment because they "threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *United States* v. *Davis*, 139 S. Ct. 2319, 2325 (2019).

An even "more stringent vagueness test" applies to statutes that "interfere[] with the right of free speech." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). This is so because "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972).

The encouragement provision is unconstitutionally vague because it does not "specif[y]" any "standard of conduct." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). As discussed above, "encourage" and "induce" embrace a wide variety of concepts, many of which turn on the subjective reaction of the listener. *See supra* pp. 17-22 ("make confident," "inspire with courage, spirit, or hope," "persuasion"). Crimes defined by such indeterminate and subjective terms cannot be punished consistent with the Due Process Clause. In *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921), for example, the Court held that a prohibition on "'unjust or unreasonable rate[s] or charge[s]'" was unconstitutionally vague because assessment of whether charges were "unjust or unreasonable" was left entirely to the "estimation of the court and jury." *Id.* at 89. The Court likewise struck down an ordinance that criminalized behaving in a manner "annoying to persons passing by." *Coates*, 402 U.S. at 611-612. Because "[c]onduct that annoys some people does not annoy others," the ordinance did not "specif[y] any "standard of conduct … at all." *Id.* at 614. And in *City of Chicago* v. *Morales*, 527 U.S. 41 (1999), the Court invalidated a statute that prohibited loitering "with no apparent purpose," because it improperly left "'it to the courts to step inside and say who could be rightfully detained,

and who should be set at large.'" *Id.* at 60 (quoting *United States* v. *Reese*, 92 U.S. 214, 221 (1876)).

The encouragement provision has the same flaws. The statute's operative terms are defined by reference to the listener's subjective reaction. Just as conduct that annoys some people does not annoy others, words that "encourag[e]" or "induc[e]" some will have no effect on others. How is a speaker to know whether telling an undocumented interlocutor that America is more free and humane than other countries will "encourage" the undocumented person to remain here? How is a teacher to know whether a unit on the valuable contributions of immigrants to this country will make undocumented students in the class feel welcome, and thus "inspire" them to remain here? The result is that the provision's scope "may entirely depend" on a law enforcement official's unbounded speculation about a listener's subjective reaction, *Coates*, 402 U.S. at 614, thus subjecting "individuals to the risk of arbitrary or discriminatory prosecution and conviction," *United States* v. *Kozminski*, 487 U.S. 931, 949-950 (1988) (holding statute unconstitutionally vague where liability "depend[ed] entirely upon the victim's state of mind"). The government's ever-shifting position on the scope of the encouragement provision in this case only underscores the danger of arbitrary or discriminatory enforcement in the future. *See supra* pp. 18-19, 33, 42-43.

Again, although the provision's vagueness falls within the question presented, the government does not address it in its opening brief. Its reply at the petition stage raised three arguments, but none has merit.

First, the government again argued waiver. Pet. Reply 10. But Ms. Sineneng-Smith raised a vagueness challenge in her opening brief on appeal, Appellant's

C.A. Br. 27-34, and the court of appeals requested and received supplemental party and *amicus* briefing on the issue, JA3-9; *see also*, *e.g.*, C.A. Dkt. No. 51 at 25 (*amicus* arguing that "[t]he uncertain reach of the encouragement provision also creates an alarming risk of arbitrary and discriminatory enforcement"). The vagueness issue thus was "pressed" below and is an available alternative ground for affirmance. *Timbs* v. *Indiana*, 139 S. Ct. 690, 690 (2019); *see also supra* p. 46 (noting that once a federal claim is made, a party can make new supporting arguments on appeal).[21]

Second, the government contended, citing *Holder*, that Ms. Sineneng-Smith cannot raise this vagueness challenge because the statute "clearly" applies to her. Pet. Reply 11. That is wrong. *Holder* acknowledged that a statute can be vague for two distinct reasons: if it "[1] fails to provide a person of ordinary intelligence fair notice of what is prohibited, *or* [2] is so standardless that it authorizes or encourages seriously discriminatory enforcement." 561 U.S. at 18 (emphasis and bracketed numerals added). *Holder* involved only the first option: a pre-enforcement challenge to a criminal statute based on "lack of notice." *Id.* at 20 ("Plaintiffs do not argue that the [challenged] statute grants too much enforcement discretion to the Government."). The Court accordingly decided only that a plaintiff whose speech is clearly proscribed cannot assert vagueness "for lack of notice." *Id.*

Ms. Sineneng-Smith's argument is of the second variety: the statute's terms are so subjective that they

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[21] Ms. Sineneng-Smith's vagueness argument included an as-applied challenge based on lack of fair notice. This argument, which falls outside the question presented, should (if necessary) be addressed in any remand.

lack "any ascertainable standard" to determine guilt. *Smith* v. *Goguen*, 415 U.S. 566, 577-578 (1974). This flaw "affects all who are prosecuted under the statutory language." *Id.* at 578. Thus, in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), the Court found the residual clause of the Armed Career Criminal Act unconstitutionally vague without considering its application to the petitioner, because the Court's holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* at 2560-2561; *accord Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1214 n.3 (2018) (reaffirming this principle).

Finally, the government argued that a ruling that the encouragement provision is vague would invalidate "many" accomplice-liability and solicitation laws. Pet. Reply 11. That is wrong yet again; the encouragement provision is not an aiding-and-abetting or solicitation law. *See supra* pp. 26-30. Nor would a vagueness finding here affect any of the federal or state contributory liability laws the government cites, as they all place "encourage" or "induce" in the company of other verbs clarifying that the crimes do not turn on the listener's subjective reaction. The encouragement provision does, however, and is therefore unconstitutionally vague.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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