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 United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus The Rutherford Institute, a nonprofit civil liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the fundamental human rights of all people. The Rutherford Institute advocates for protection of civil liberties and human rights through *pro bono* legal representation and public education on a wide spectrum of issues affecting individual freedom in the United States and around the world. In particular, The Rutherford Institute advocates against government infringement of citizens' rights to freely express themselves, seeking redress in cases where citizens have been punished for exercising their First Amendment right to free speech.

Amicus The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to defending the principles of liberty and equality embodied in the Constitution. The ACLU has appeared as direct counsel and as *amicus curiae* in numerous First Amendment cases. Through its Immigrants' Rights Project, the ACLU engages in nationwide litigation and advocacy to protect the constitutional and civil rights of immigrants. *Amicus* The American Civil Liberties Union of Northern California is an affiliate of the national ACLU.

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for each party has consented in writing to the filing of this brief.

The Service Employees International Union (SEIU) is a two-million-member labor organization dedicated to improving the lives of workers and their families and creating a more just and humane society. First organized in 1921, SEIU unites healthcare workers, property-services workers, and public-sector employees, some of whom are foreign-born United States citizens, lawful permanent residents, and immigrants with work-authorized status in the United States. SEIU's members are united by their belief in the dignity and worth of workers and the services they provide. SEIU is deeply committed to ensuring that all workers are able to exercise their First Amendment right to free speech without fear of retribution or retaliation.

To ensure the vitality of the First Amendment, The Rutherford Institute, ACLU, ACLU of Northern California, and SEIU believe that the government should not be able to stifle speech by imposing criminal penalties on mere encouragement of unlawful conduct, which is protected advocacy.

SUMMARY OF THE ARGUMENT

Section 1324(a)(1)(A)(iv) is a content-based and viewpoint-discriminatory regulation of speech that violates the First Amendment. Its overbroad reach, as respondent argues, sweeps in abstract advocacy, *see* Resp. Br. 34-37; and, in so doing, the statute also impermissibly targets speech based on its content and viewpoint, making it a *felony* merely to advocate for,

and thereby encourage, certain violations of immigration laws that constitute civil offenses or misdemeanors. *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (criminalizing encouragement or inducement of entering or residing in the United States unlawfully). Expressing disagreement with laws through advocacy of their violation, however, is a traditional means of protest with deep roots in American democracy. If the government may criminalize encouragement of violations of immigration laws, as § 1324(a)(1)(A)(iv) does, so too may the government criminalize encouragement of civil disobedience in other contexts, silencing an irreplaceable form of protest speech. The Court should make clear that § 1324(a)(1)(A)(iv), as a content-based and viewpoint-discriminatory regulation of speech that fails strict scrutiny, violates the First Amendment and offers no such blueprint for suppressing speech with which the government disagrees.

Section 1324(a)(1)(A)(iv) is a presumptively unconstitutional, content-based law because it "applies to particular speech because of the topic discussed or the idea or message expressed," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)—here, speech that "encourages or induces" a violation of immigration laws. And even more "egregious" is § 1324(a)(1)(A)(iv)'s discrimination against a particular viewpoint. *See id.* at 2230 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). The statute "distinguishes between two opposed sets of ideas," *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019): encouraging versus discouraging entering and residing in the United States in violation of immigration laws.

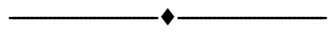
Lacking any element necessary to cabin its reach to speech-related crimes like incitement or solicitation, § 1324(a)(1)(A)(iv) sweeps well beyond those carefully limited exceptions to First Amendment protection, encompassing abstract advocacy of criminal—and even non-criminal—conduct alike.

Because § 1324(a)(1)(A)(iv) is not narrowly tailored to the government's interest in enforcing immigration law, which can be accomplished through existing statutes, it fails strict scrutiny and violates the First Amendment. *See Reed*, 135 S. Ct. at 2226; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (availability of content-neutral alternatives "undercut[s] significantly" defense of content-based restriction) (quoting *Boos v. Barry*, 485 U.S. 312, 329 (1988)). In light of the availability of conduct-focused prohibitions, *see, e.g.*, 8 U.S.C. § 1324(a)(1)(A)(i)-(iii), and constitutionally permissible restrictions on speech such as prohibitions on solicitation or aiding and abetting, § 1324(a)(1)(A)(iv)'s expansive sweep not only renders it overbroad, but also demonstrates Congress's failure to narrowly tailor the statute. Similarly, the statute's imposition of felony liability for the encouragement of violations that are punishable as misdemeanors or even civil offenses shows that it is not narrowly tailored to the government's compelling interest in enforcing immigration laws.

If upheld, § 1324(a)(1)(A)(iv)'s blanket criminalization of encouragement of unlawful action—without any of the traditional safeguards required of other speech-related crimes—makes the statute a template for laws intended to silence a unique and effective form

of protest speech: encouragement of civil disobedience. Both historical and contemporary protest movements illustrate the value of advocating civil disobedience in bringing about social change. Susan B. Anthony campaigned for women to unlawfully register to vote during the Women's Suffrage Movement. Organizations such as the Student Non-Violent Coordinating Committee organized sit-ins to protest segregation. And more recently, advocates for the homeless and Second Amendment rights, as well as protesters seeking to raise awareness of climate change and gun violence, have engaged in speech that encourages civil disobedience as a means of highlighting their cause and criticizing the government. Although advocates who violate laws may be held liable for their unlawful conduct, it is a very different matter to punish them criminally for their *advocacy* of such conduct, which is protected speech.

This Court has repeatedly emphasized the Constitution's special protection for speech critical of the government. *E.g.*, *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the heirarchy [sic] of First Amendment values,' and is entitled to special protection.") (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). Permitting the government to criminalize and, indeed, make a felony of abstract encouragement of civil disobedience—as § 1324(a)(1)(A)(iv) does—would strike at core First Amendment values and eliminate a powerful tool for social change.



ARGUMENT

I. SECTION 1324(a)(1)(A)(iv) IS UNCONSTITUTIONAL BECAUSE IT IS A CONTENT-BASED AND VIEWPOINT-DISCRIMINATORY REGULATION OF SPEECH THAT IS NOT NARROWLY TAILORED TO A COMPELLING STATE INTEREST.

A. Section 1324(a)(1)(A)(iv) Regulates Speech Based On Its Content And Viewpoint.

Amici agree with the respondent that 8 U.S.C. § 1324(a)(1)(A)(iv) is invalid as a facially overbroad regulation of speech that criminalizes a substantial amount of protected speech relative to its legitimate sweep. Resp. Br. 16-43. But overbreadth is not the only reason the statute violates the First Amendment. Section § 1324(a)(1)(A)(iv) fails for the additional reason that it is a content-based regulation of speech that discriminates based on the viewpoint expressed by the speaker.

This subsection of § 1324 is particularly pernicious because it permits the federal government to suppress and penalize protected speech on *one side* of a matter of perennial public interest and controversy—United States immigration policy—through the threat of criminal prosecution. The chilling effect of that content-based and viewpoint-discriminatory restriction is damaging to public discourse and our democratic policymaking process.

Section 1324(a)(1)(A)(iv) imposes felony punishment on anyone who "encourages or induces an alien to come to, enter, or reside in the United States" unlawfully.

8 U.S.C. § 1324(a)(i)(A)(iv). While this provision regulates some conduct, it also covers speech. As respondent explains, the plain meanings of "encourage" and "induce" each cover "every form of influence and persuasion," including speech. Resp. Br. 18 (quoting *Int'l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 701-02 (1951)).[2] And, as respondent shows (at 26-30, 38-40), speech that merely encourages unlawful action does not fall within traditional categories of unprotected speech. To the contrary, § 1324(a)(1)(A)(iv) is precisely the type of content-based and viewpoint-discriminatory regulation of protected speech that the First Amendment prohibits.

This Court has long held that, absent a narrowly tailored law that furthers a compelling state interest, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 135 S. Ct. at 2226 (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)); *see also Iancu*, 139 S. Ct. at. 2299. When a law restricts speech based on the content of that speech—or, even more "egregious[ly]," based on the viewpoint of the speech—the law is presumptively unconstitutional. *Reed*, 135 S. Ct. at 2226 (citing, *inter alia*, *R.A.V.*, 505

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[2] The Court should reject the government's attempt to minimize the statute's impact on protected speech by arguing that Ms. Sineneng-Smith's violation included engaging in speech for financial gain. Pet. Br. 18, 25, 36. As respondent's brief explains, the financial-gain provision, 8 U.S.C. § 1324(a)(1)(B)(i), does not create a separate speech-related offense but instead is a sentencing enhancement for the primary, speech-based felony created in 8 U.S.C. § 1324(a)(1)(A)(iv). *See* Resp. Br. 40-43.

U.S. at 395); *Rosenberger*, 515 U.S. at 829-30; *see also Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment). Because "[v]iewpoint discrimination is poison to a free society," *Iancu*, 139 S. Ct. at 2302 (Alito, J., concurring), it is a "core postulate of free speech law" that "[t]he government may not discriminate against speech based on the ideas or opinions it conveys." *Id.* at 2299 (citing *Rosenberger*, 515 U.S. at 829-30). Content-based and viewpoint-discriminatory regulations of speech can stand only if narrowly tailored to achieve a compelling state interest. *Reed*, 135 S. Ct. at 2226. Section 1324(a)(1)(A)(iv) fails that test. *See infra* Part I.B.

Determining whether a statute is a content-based regulation of speech is straightforward: "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. Section 1324(a)(1)(A)(iv) easily satisfies that test because it prohibits speech conveying a message that encourages violations of certain immigration laws—whether civil or criminal.

In addition, because § 1324(a)(1)(A)(iv) targets speech that encourages conduct that the federal government has formally disapproved, the subject matter suggests that the statute was "adopted by the government 'because of disagreement with the message [the speech] conveys,'"—further confirmation that it is a content-based regulation. *See id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791

(1989)). Moreover, even a benign motive cannot save a law that is content based on its face, as is § 1324(a)(1)(A)(iv). *See Reed*, 135 S. Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.") (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

Even more "egregious" is § 1324(a)(1)(A)(iv)'s discrimination against a specific viewpoint. *See Reed*, 135 S. Ct. at 2230 (quoting *Rosenberger*, 515 U.S. at 829). Section 1324(a)(1)(A)(iv) "distinguishes between two opposed sets of ideas." *Iancu*, 139 S. Ct. at 2300. It prohibits *encouragement*, but not *discouragement*, of specified unlawful immigration conduct. Any statute that, like § 1324(a)(1)(A)(iv), targets "a specific premise, a perspective, [or] a standpoint from which a variety of subjects may be discussed and considered" is viewpoint-discriminatory and therefore presumptively unconstitutional. *See Rosenberger*, 515 U.S. at 831.

It is true, of course, that laws prohibiting certain types of unprotected speech, such as incitement and solicitation, proscribe speech encouraging lawless action and not speech urging adherence to the law. But, unlike the viewpoint-discriminatory crime created by § 1324(a)(1)(A)(iv), solicitation and incitement are defined not merely by the "encouragement" of illegal conduct, but by additional requirements that place the speech involved beyond the protection of the First Amendment. *See Brandenburg v. Ohio*, 395 U.S. 444,

447 (1969) (incitement requires that speech be "directed to inciting or producing imminent lawless action" and also be "likely" to do so); *see also United States v. Williams*, 553 U.S. 285, 298-99 (2008) (solicitation requires a concrete "proposal to engage in illegal activity"); Resp. Br. 28-30, 38-39.

Despite the government's argument that this Court should read an additional requirement of "criminal complicity" into the statute where the plain language indicates none, Pet. Br. 20; *see also id.* 26 (arguing for the canon of constitutional avoidance), liability under § 1324(a)(1)(A)(iv) turns only on the viewpoint of the speaker—whether that speaker is "encourag[ing] or induc[ing]" actions that would violate immigration laws. And this Court has made clear that, when a saving construction "requires rewriting, not just reinterpretation," it cannot cure a First Amendment problem. *United States v. Stevens*, 559 U.S. 460, 481 (2010).

B. Section 1324(a)(1)(A)(iv) Fails Strict Scrutiny.

Because § 1324(a)(1)(A)(iv) is a content-based and viewpoint-discriminatory law, it is presumptively unconstitutional and can continue to be enforced only if it survives the rigors of strict scrutiny. *See Reed*, 135 S. Ct. at 2226 (citing *R.A.V.*, 505 U.S. at 395). Thus, it may be upheld only if narrowly tailored to further a compelling state interest—a high bar the government clears only by showing that the curtailment of speech

is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (citing *R.A.V.*, 505 U.S. at 395); *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). And the existence of alternative, content-neutral solutions to the problem "undercut[s] significantly" any defense of a content-based restriction. *R.A.V.*, 505 U.S. at 395 (alteration in original) (quoting *Boos*, 485 U.S. at 329).

The government has a compelling interest in enforcing its immigration laws, but § 1324(a)(1)(A)(iv) is anything but narrowly tailored to achieve that interest.[3] Instead of precisely targeting unprotected speech or conduct, such as criminal solicitation, incitement, accomplice liability, or conspiracy, Congress instead expansively targeted mere encouragement of violations of immigration law—including civil immigration violations—instead of using less-restrictive, more targeted means.

Indeed, § 1324(a)(1)(A) already includes a number of separate provisions prohibiting specific conduct without targeting speech. Subsection (i) criminalizes smuggling an undocumented noncitizen into the United States; subsection (ii) criminalizes transporting

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[3] Any interest the government has in silencing speech contrary to its policies is not constitutionally cognizable, let alone compelling. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.").

an undocumented noncitizen within the United States "in furtherance" of violating immigration laws; and subsection (iii) criminalizes concealing, harboring, or shielding an undocumented noncitizen from detection. *See* 18 U.S.C. § 1324(a)(1)(A)(i)-(iii). In addition, subsection (v) makes it a crime to conspire to commit any of the acts listed in the first four subsections or to aid or abet any of those acts. *Id.* § 1324(a)(1)(A)(v). There are also other conceivable content-neutral or conduct-focused provisions that could be permissible, such as an actual criminal solicitation provision that *requires* (as does the Model Penal Code) a request to "engage in specific conduct that would constitute [a certain] crime." MODEL PENAL CODE § 5.02 (AM. LAW INST., Official Draft and Explanatory Notes 1985).[4] All of those options demonstrate that criminalizing the mere encouragement of immigration violations is not the least restrictive means of enforcing immigration law. *See R.A.V.*, 505 U.S. at 395.

The government contends that the "encourages" provision is "a conventional prohibition against the facilitation or solicitation of unlawful conduct." Pet. Br. 13; *see also id.* 18-26. But general criminal statutes already give federal prosecutors the power to prosecute facilitation-related crimes that involve aiding and

[4] Although a specific request that someone enter or reside in the United States in violation of immigration laws might be described as encouragement or inducement, it is not true that encouragement or inducement always amounts to solicitation. As respondent and numerous *amici* establish, the far broader sweep of encouragement and inducement is what unconstitutionally brings protected speech within § 1324(a)(1)(A)(iv)'s ambit and renders the statute facially overbroad. *See*, *e.g.*, Resp. Br. 34-36.

abetting, conspiracy, and similar theories. *See*, *e.g.*, 18 U.S.C. § 2 (aiding and abetting an offense against the United States); *id.* § 3 (accessory after the fact); *id.* § 4 (misprision of felony).

Moreover, on its face, § 1324(a)(1)(A)(iv) is not limited to those crimes. It encompasses abstract advocacy of unlawful conduct, which—provided it does not rise to the level of imminence required for incitement, *Brandenburg*, 395 U.S. at 447, or involve the concrete proposal and *mens rea* required for solicitation—is shielded by the First Amendment as protected speech. *See Williams*, 553 U.S. at 298-99 (distinguishing "a proposal to engage in illegal activity and the abstract advocacy of illegality"); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."); Resp. Br. 28-30, 38-39. As this Court has made clear, while "the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,'" it "has never 'include[d] a freedom to disregard these traditional limitations.'" *Stevens*, 559 U.S. at 468 (alteration in original) (quoting *R.A.V.*, 505 U.S. at 383). Yet "disregard these traditional limitations," *id.*, is precisely what § 1324(a)(1)(A)(iv) does. Even if the government believes harm will ensue from encouragement of immigration violations, that belief is insufficient to justify what would effectively become a new category of speech excluded from First Amendment protection. *See Stevens*, 559 U.S. at 470, 472 (cautioning that there is no "freewheeling

authority to declare new categories of speech outside the scope of the First Amendment" based on "an ad hoc balancing of relative social costs and benefits").

Additionally, § 1324(a)(1)(A)(iv) imposes felony punishment not only on someone who encourages an actual crime, such as entering the United States without inspection or through fraud, *see* 8 U.S.C. § 1325(a), but also on someone who merely encourages unauthorized residence in this country, which can be a ground for deportation or, in limited circumstances, a civil penalty, but not a criminal offense. *See, e.g.*, *id.* § 1227(a)(1) (setting out classes of "deportable aliens"); *id.* § 1324d(a) (authorizing a civil penalty if the government issues a final order of removal with which the recipient refuses to comply). As discussed in Professor Volokh's amicus brief, § 1324(a)(1)(A)(iv)'s imposition of felony punishment in connection with non-criminal violations of immigration law exceeds the permissible reach of a solicitation statute. *See* Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party 7-9. Because solicitation can be prohibited only as "an integral part of [the solicited] conduct," as Professor Volokh explains, solicitation of a civil violation may result only in civil liability. *Id.* 7-8. Similarly, if the government's compelling interest in enforcing residence requirements results in at most potential civil exposure, it is difficult to see how § 1324(a)(1)(A)(iv)'s criminalization of encouraging unlawful residence could be *narrowly tailored* to that interest. Thus, the expansive sweep of § 1324(a)(1)(A)(iv) not only renders it overbroad, *see*

Resp. Br. 16-43, but also demonstrates that Congress failed to narrowly tailor the statute, violating the First Amendment in multiple respects.

II. CRIMINALIZING MERE ENCOURAGEMENT OF UNLAWFUL CONDUCT WOULD IMPEDE CIVIL DISOBEDIENCE AND CHILL SPEECH ESSENTIAL TO MOVEMENTS ADVOCATING POLITICAL AND SOCIAL CHANGE.

Speech encouraging a violation of law has a long and noble history in this country. Civil disobedience—the intentional defiance of laws as a form of protest—has played a central part in some of this country's most important struggles for equality, including the Women's Suffrage and Civil Rights Movements. Moreover, civil disobedience—and its encouragement—remains a central part of protests today, spanning the political spectrum. If the government were free to criminalize encouragement of civil disobedience, that threat would imperil a critically important form of social protest, chilling historically protected advocacy and impeding national debate on pressing issues.

To be sure, protesters who violate valid laws can be held liable for those violations regardless of the protesters' motivations, political or otherwise. But it is a very different matter for the government to punish someone solely for *speech* encouraging unlawful conduct. That type of advocacy implicates core values of this Nation that the Framers celebrated, the First Amendment enshrines, and this Court's jurisprudence

squarely protects. And that type of speech—separate and apart from the unlawful conduct it advocates—is vital because it has the potential to be transformative, elevating individual acts of defiance into a cohesive social movement with a message that can change minds and lives.

A. Protest Speech, Including Speech Encouraging Civil Disobedience, Furthers Public Discourse And Protects Democracy.

If the First Amendment permits the government to make it a felony to encourage, for example, residing in the United States in violation of the conditions for admission (a ground for deportability but not a crime, *see*, *e.g.*, 8 U.S.C. § 1227(a)(1)) or unlawful entry into the United States (a misdemeanor under 8 U.S.C. § 1325 but not a felony), *see* § 1324(a)(1)(A)(iv), the government would be equally free to criminalize encouragement of other forms of unlawful conduct, whether criminal or civil. It thus would be free to criminalize speech that has played a vital role in American history: advocacy of civil disobedience as a means of challenging laws that the speaker considers unjust. That result is not only unconstitutional but dangerously undemocratic.

A robust application of the First Amendment is needed most when a statute targets speech that criticizes the government or challenges its rules. Indeed, there is a long history of protecting protest speech as vital to American democracy. As early as 1737, Benjamin Franklin urged that "[r]epublics and

limited monarchies derive their strength and vigour from a popular examination into the action of the magistrates." Benjamin Franklin, *On Freedom of Speech and the Press*, PA. GAZETTE (Nov. 1737), *reprinted in* 2 BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 431, 431 (1840). And James Madison argued that the popular sovereignty underlying the American government meant that the validity of government actions ultimately depended on the "temperate consideration and candid judgment of the American public." James Madison, *Virginia Report of 1799*, *reprinted in* THE VIRGINIA REPORT OF 1799–1800, at 196 (Leonard W. Levy ed., Da Capo Press reprinted 1970) (1850).

This Court, too, has repeatedly emphasized that "[t]he First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). That is because free speech is "essential to our democratic form of government, and it furthers the search for truth." *Janus v. Am. Fed'n of State, Cty, & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (citations omitted). Accordingly, debate on "public issues occupies the 'highest rung of the heirarchy [sic] of First Amendment values,' and is entitled to special protection." *Connick*, 461 U.S. at 145 (quoting *Claiborne Hardware*, 458 U.S. at 913).

At critical junctures in the evolution of American democracy, leaders of protest movements have sparked

debate on public issues and exposed societal injustices by advocating defiance of laws that deprive individuals of equal rights and fundamental dignity. Henry David Thoreau lectured and wrote about the importance of civil disobedience after being jailed in 1846 for refusing to pay taxes, an act of protest against slavery and America's war with Mexico. Stephen R. Alton, *In the Wake of Thoreau: Four Modern Legal Philosophers and the Theory of Nonviolent Civil Disobedience*, 24 LOY. U. CHI. L.J. 39, 40-41 & n.9 (1992). Thoreau urged citizens to "break the law" and "[l]et your life be a counter friction to stop the machine" to avoid becoming agents of the government's injustice to others. *Id.* at 43 & n.24 (alteration in original) (quoting HENRY DAVID THOREAU, *On the Duty of Civil Disobedience* (1849), *reprinted in* WALDEN 85, 92 (Bantam Classic 1981)).

A century later, advocacy of civil disobedience would become essential to the modern Civil Rights Movement. As Dr. Martin Luther King, Jr., explained:

> One may well ask, "how can you advocate breaking some laws and obeying others?" The answer is found in the fact that there are two types of laws: There are *just* laws, and there are *unjust* laws. I would agree with Saint Augustine that "An unjust law is no law at all."

Letter from Martin Luther King, Jr., to Alabama Christian Movement for Human Rights, at 7 (April 16, 1963), https://kinginstitute.stanford.edu/king-papers/documents/letter-birmingham-jail/. Indeed, it is difficult to imagine the Civil Rights Movement

unfolding without encouragement of civil disobedience in defiance of the unjust laws that were protested as "no law at all." *Id.* at 7.

If mere encouragement of unlawful conduct can be punished as a crime—indeed if, as under § 1324(a)(1)(A)(iv), the government can make even advocacy of a violation of *civil* law into a felony—dissenting voices will be silenced, making it easier for injustices to become entrenched. Although the government disclaims any interest in using § 1324(a)(1)(A)(iv) to criminalize "abstract or generalized advocacy of illegality," Pet. Br. 34, that assurance at this late stage of this litigation cannot cure the statute's constitutional infirmity. The government's position runs contrary to the plain language of the statute, which would have to be rewritten to exempt protected speech from its ambit in the manner the government suggests. *See* Resp. Br. 17-30, 33-34. Moreover, the chilling effect of a speech-focused law does not evaporate merely because the government "promise[s] to use it responsibly." *Stevens*, 559 U.S. at 480. This Court has long established that "[t]he assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded" when overbroad statutes impact speech. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

If upheld, § 1324(a)(1)(A)(iv) would offer a model for future government efforts to impede protest movements by criminalizing speech that encourages unlawful conduct as a form of protest. And, even if the government were to refrain from exercising its

power to silence all calls for civil disobedience by prosecuting vocal proponents, leaders of protest movements may nonetheless "hedge and trim" their speech, *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (per curiam) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)), blunting a traditional tool for stirring debate and facilitating change. That result is antithetical to the core values the First Amendment protects. This Court therefore should reaffirm the First Amendment's protection of advocacy of unlawful conduct, preserving America's long history of activism rooted in encouraging civil disobedience as a force to drive social and political change.

B. Historical And Contemporary Protest Movements Demonstrate The Importance Of Protecting Speech That Encourages Unlawful Conduct As A Means For Effecting Societal Change.

Countless critics of the status quo continue to advocate and practice civil disobedience as a way of protesting laws with which they disagree. A brief review of some examples makes clear that allowing the government to make it a crime to encourage a violation of law would cut deeply into the political freedoms central to this nation.

1. Encouragement of unlawful conduct in the Women's Suffrage Movement

Protest speech encouraging defiance of gender-discriminatory voting laws was central to the success of the Women's Suffrage Movement. As of 1911, most states restricted the political franchise to men. *See generally* BERTHA REMBAUGH, THE POLITICAL STATUS OF WOMEN IN THE UNITED STATES: A DIGEST OF THE LAWS CONCERNING WOMEN IN THE VARIOUS STATES AND TERRITORIES (1911) (collecting state statutes and constitutional provisions allowing only men to vote); *see also, e.g.*, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (holding that it is "within the power of a State to withhold" the vote from women). And federal law made it a crime to vote without a legal right to do so. Enforcement Act of 1870, § 19, 16 Stat. 140, 144-45.

Although women's disenfranchisement was enshrined in the law, leaders of the suffrage movement actively encouraged women to attempt to vote unlawfully—a strategy that benefited the movement beyond each protester's moment of defiance at the polls. First, encouraging women to attempt to vote helped ensure that at least some women would have standing to litigate the issue, having been prevented from casting their vote. *See* Susan C. Del Pesco, *Quieting the Sentiments*, 37 DEL. LAW, Winter 2019, at 9. Second, attempts to vote helped mobilize supporters, as women banded together in large groups at the polls, both to draw attention to the issue and to force change through collective action. *See* 2 HISTORY

OF WOMAN SUFFRAGE 587 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881) (recounting that, in 1871, seventy-two women marched to the polls in Washington, D.C., and attempted to vote). Susan B. Anthony, in particular, "preached militancy to women throughout the presidential campaign of 1872, urging them to claim their rights under the Fourteenth and Fifteenth Amendments by registering and voting in every state in the Union." ALMA LUTZ, SUSAN B. ANTHONY: REBEL, CRUSADER, HUMANITARIAN 198 (1959). Encouragement of voting in violation of state and federal laws was a crucial component of the Women's Suffrage Movement. And it is precisely that type of provocative protest speech that stirs debate on public issues and implicates the core values the First Amendment protects.

2. Encouragement of unlawful conduct in the Civil Rights Movement

Advocacy of civil disobedience was also an iconic aspect of the twentieth-century Civil Rights Movement, which relied on organized protests, marches, and sit-ins—often in violation of state and local laws—to expose the injustice of racial inequality and segregation. Many of those laws had been enacted during Reconstruction, when states and localities began mandating racial segregation. *See generally* FRANKLIN JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO (Greenwood Press 1979) (1918) (surveying state laws mandating segregation of schools, marriage, transportation, public

places, and troops). At first, the National Association for the Advancement of Colored People (NAACP) led efforts to challenge those laws using lobbying and litigation to fight segregation. David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 647-48 (1995). But new strategies began to take shape in 1955 when Rosa Parks refused to give up her seat on a bus to accommodate white passengers. *See id.* at 648-49. Her act of defiance—one of the most significant and storied examples of nonviolent civil disobedience in modern memory—prompted widespread encouragement of that type of unlawful conduct as a defining strategy of the Civil Rights Movement.

Inspired by Rosa Parks, groups like the Student Non-Violent Coordinating Committee (SNCC), the Southern Christian Leadership Conference, and the Alabama Christian Movement for Human Rights urged citizens to violate segregation mandates as a means of protesting the laws' injustice while forcing citizens and politicians to "confront[] the immorality of segregation." *See id.* at 648-54 (discussing organized sit-ins to desegregate lunch counters and buses, swim-ins to desegregate public pools and parks, read-ins to desegregate libraries, and pray-ins to desegregate churches). Indeed, SNCC's reliance on encouragement of unlawful conduct in organizing lunch-counter sit-ins is credited with desegregating twenty-seven southern cities within the first five months of those protests. Christopher W. Schmidt, *Divided by Law: The Sit-Ins*

and the Role of the Courts in the Civil Rights Movement, 33 L. & HIST. REV. 93, 100-01 (2015) (noting that both owners of private establishments and city governments desegregated in response to sit-ins). And, on an even broader scale, the "sit-in movement transformed the agenda of the national civil rights debate." *Id.* at 101.

Encouragement of civil disobedience helped bring about a change in public opinion regarding the injustice of racial segregation, and that change in public opinion in turn led to changes in the law. *See* Oppenheimer, *supra*, at 678. A statute criminalizing the encouragement of unlawful conduct would have threatened that form of advocacy, jeopardizing the First Amendment's core protection of the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

3. Encouragement of unlawful conduct in contemporary protest movements

Encouragement of civil disobedience is just as essential for protest movements today. Cities and states continue to grapple with significant social issues, and proponents of legal change often rely on the same time-tested advocacy tools—including encouragement of civil disobedience—to publicize injustices and spur public debate.

For instance, activism in the form of encouragement of unlawful conduct has arisen in

cities wrestling with pervasive homelessness and, in particular, whether to regulate individuals' efforts to feed homeless persons they encounter in public spaces. After some cities enacted what have become known as "feeding bans," protests ensued. In response, several cities, such as Philadelphia, repealed previously enacted ordinances; but numerous others continue to enforce feeding-ban laws. *Compare* Damon Williams, *City ends ban over feeding homeless in parks*, PHILA. TRIB. (July 12, 2016), https://www.phillytrib.com/metros/city-ends-ban-over-feeding-homeless-in-parks/article_4bce7f05-7ce9-5622-b878-b44f5c003d7e.html, *with* ATLANTA, GA., CODE OF ORDINANCES § 86-2 (incorporating on city property county and state permitting requirements for serving food to the public); EL CAJON, CAL., CODE § 2.56.030(Z)(3) (prohibiting the distribution of food to the general public in any city park or playground); Hous., Tex., Code of Ordinances ch. 20, art. V, § 20-252 (requiring permission from the city before distributing food on public property).

Critics of ongoing feeding bans have turned to America's long-held tradition of civil disobedience and encouraged individuals to continue providing food to homeless persons despite the bans. For example, the organization Break the Ban formed after the El Cajon City Council unanimously passed a public-feeding ban, and the group actively advocates defiance of the law through events designed not only to increase public awareness, but also to prompt arrests that create standing to challenge the law in court. *See* Lyndsay Winkley, *About a dozen people arrested for feeding the*

homeless in El Cajon park, SAN DIEGO UNION-TRIB. (Jan. 14, 2018), https://www.sandiegouniontribune.com/news/public-safety/sd-me-20180114-story.html. As one of the organizers explained, the group's advocacy of unlawful conduct as a means of promoting legal and societal change is "a familiar legal strategy that played a critical role during the civil rights movement and other social justice movements." *Id.*

In Florida, the group Tampa Food Not Bombs continued organized efforts to provide food to homeless persons notwithstanding warnings from the police that participants would be arrested if they violated an ordinance requiring city approval before distributing food to the general public. *See* Kathryn Varn, *Seven arrested while serving food to homeless in Tampa without a permit*, TAMPA BAY TIMES (Jan. 10, 2017), https://www.tampabay.com/news/localgovernment/seven-arrested-while-serving-food-to-homeless-in-tampa/2308868. The group used Facebook to livestream the arrests of seven members who distributed food at a table featuring the group's name and its mission statement: "Serving vegan/vegetarian meals to the houseless and hungry in Tampa." *Id.* Despite the arrests, members vowed to remain vocal advocates and return the following week to spread their message and provide food. *Id.*

Gun-rights advocates have also encouraged civil disobedience as a means to protest gun-control laws. In response to registration laws they believe infringe on their Second Amendment rights, many gun owners have refused to register their guns under applicable

statutes and have encouraged others to join them. As the chairman of a California gun-owners group advocating noncompliance with a registration law put it: "I'm encouraging all gun owners to stand up for their rights now before they have to fight for their rights later." Seth Mydans, *California Gun Control Law Runs Into Rebellion*, N.Y. TIMES (Dec. 24, 1990), https://www.nytimes.com/1990/12/24/us/california-gun-control-law-runs-into-rebellion.html.

Similarly, in Boulder, Colorado, the Second Amendment group Rally for Our Rights distributed T-shirts and stickers reading "We Will Not Comply" to encourage non-compliance with a gun-registration law, while a local columnist and television host encouraged others by publicizing his own refusal to comply. Valerie Richardson, *'Gun-toting Hippies' Greet Boulder 'Assault Weapons' Ban with Mass Noncompliance*, WASH. TIMES (Jan. 3, 2019) https://www.washingtontimes.com/news/2019/jan/3/boulder-colorado-assault-weapons-ban-met-mass-non-/.

Those who refuse to comply with registration requirements know that their actions may result in punishment but characterize their advocacy of resistance as part of the United States's longstanding tradition of using civil disobedience as a tool to advocate for change. A California field representative for the National Rifle Association called it "civil disobedience in the finest traditional sense." *See* Mydans, *supra*. Opinions will differ on whether these citizens' actions are in fact justified under the Second Amendment. But allowing the government to

criminalize the encouragement of those actions would impede debate on an issue of constitutional importance.

Another burgeoning area in which advocacy of civil disobedience plays a role involves student walkouts. Such walkouts can violate truancy laws, which have been enacted in every state. *See* Jason Scronic, *Take Your Seats: A Student's Ability to Protest Immigration Reform at Odds with State Truancy and Compulsory Education Laws*, 2 FLA. A&M U. L. REV. 185, 188 & n.23 (2007) (citing each state's truancy law). States vary both in the number of absences required to trigger truancy and in the consequences imposed, which can include not only administrative oversight but also truancy citations that tarnish students' permanent records, civil and criminal fines, and penalties on parents of truants that range from fines to criminal punishment. *See id.* at 186-87 (recounting California's 2006 crackdown on student walkouts to protest a proposed immigration bill, with the Los Angeles County School District classifying as truant any student who participated or otherwise left school that day); *see also*, *e.g.*, ALA. CODE § 16-28-12 (stating that parents who fail to send their children to school or have them otherwise educated during required school hours "shall be guilty of a misdemeanor" punishable by a fine or "hard labor for the county for not more than 90 days"); ME. STAT. tit. 20-A, § 5053-A(1) (stating that a parent primarily responsible for a child's truancy commits a civil violation with up to a $250 fine); OHIO REV. CODE ANN. § 3321.38 (authorizing $500 fine

against parents who fail to compel their children's school attendance as required by law).

Yet students, activists, and parents have encouraged school walkouts as a form of protest. Such walkouts reached a global scale recently when children around the world were called on to join the Global Climate Strike. *See* Somini Sengupta, *Protesting Climate Change*, *Young People Take to Streets in a Global Strike*, N.Y. TIMES (Sept. 21, 2019), https://www.nytimes.com/2019/09/20/climate/global-climate-strike.html. And similar protests were organized in the wake of school shootings to draw attention to gun violence. *See* Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.*, N.Y. TIMES (Mar. 14, 2018), https://www.nytimes.com/2018/03/14/us/school-walkout.html (discussing student walkouts "in defiance of school authorities"). But if mere encouragement of unlawful conduct were itself a crime, anyone who urged participation in walkouts that triggered student truancy could face prosecution for encouraging those absences.

As historical and present-day protest movements confirm, encouragement of civil disobedience is a powerful tool for unifying citizens to push for social reform, calling attention to societal injustices, and promoting the public exchange of differing viewpoints. Criminalizing the mere encouragement of unlawful conduct might not put an end to all individual acts of civil disobedience, but it would unnecessarily chill the type of protest speech that transforms those individual acts into cohesive, national movements that force

society at large to confront uncomfortable truths about enduring injustices within American democracy. The Court should reaffirm that the First Amendment protects abstract advocacy—or "encouragement"—of unlawful conduct, preserving America's long history of activism rooted in encouraging civil disobedience as a force to drive social and political change.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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