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 FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING 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 violates the First Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case interests Cato because of its implications for the freedom of speech in a variety of contexts. In addition, as an advocate of less-restrictive immigration policies, Cato and its employees could run the risk of violating the criminal statute at issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

A popular YouTuber with a large following in the illegal immigrant community produces a video featuring an impassioned plea for illegal immigrants to stay in the country despite current anti-immigrant sentiment. He argues that, even if an alien is violating the law, it's better to stay here and prosper in America. The video goes viral, and the YouTuber produces a series of such videos, each one earning him more subscribers and more ad revenue. Would he have knowingly or recklessly "encourage[d] or induce[d] an alien to come to, enter, or reside in the United States" in vi-

[1] Rule 37 statement: Both parties have consented to the filing of this *amicus* brief. No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission. Also, with no direct financial gain from this case, *amicus* is ineligible for a subparagraph (B)(i) enhancement in the event this brief encourages unlawful aliens to remain within the United States.

olation of federal law? Would he be eligible for a sentencing enhancement because he arguably did it "for the purpose of commercial advantage or private financial gain"?

The fact that the answer to this question is unclear—and that under a plain reading of the statute at issue it seems that the YouTuber did commit a federal crime—says just about everything about this case.

To adapt the stunningly broad language used by the government in Ms. Sineneng-Smith's case, would the YouTuber have "inspired hope in his viewers" and "influenced their decision to stay in the country"? Gov. C.A. Br. at 33. The government claims it has never prosecuted such people as the hypothetical YouTuber, and, if asked, would certainly aver to this Court that it would never do so. But if pleading prosecutorial discretion defeated overbreadth challenges, then there would be no overbreadth challenges.

More importantly, if the YouTuber asked a lawyer about the law, should the lawyer, going off a plain reading of the statute, advise him that he may very well be violating federal law by making the videos? And if the YouTuber didn't make the videos—probably wisely—would that be a paradigmatic example of "chilling" First Amendment-protected speech?

Here's another not-so hypothetical: A member of the Socialist Party distributes fliers advocating that young men "assert their rights" and resist conscription, arguing that it violates the Thirteenth Amendment. *Schenck v. United States*, 249 U.S. 47, 51 (1919). Would a law prohibiting someone from "encouraging" or "inducing" someone to resist conscription run afoul of the First Amendment?

Title 8 U.S.C. § 1324(a)(1)(A)(iv) taken on its own criminalizes protected speech and is overbroad under the First Amendment. The Court need not adopt the government's rewritten version, which merges the predicate offence with the sentence enhancement. If the Court looks at this statute in the context of a sentencing enhancement charged below, however, the enhancement is still irrelevant to the chilling effect of the predicate offence. A vast swath of legitimate commercial speech is chilled by the predicate offence plus the sentence enhancement.

The enhancement in subparagraph (B)(i) does not thaw the chill of (A)(iv) simply because it offers increased penalties. The government misreads *United States v. Alvarez*, 567 U.S. 709 (2012), and proffers a theory that, in an overbreadth challenge, the Court may only evaluate the predicate offence in conjunction with any sentence enhancement the government happens to charge. *Alvarez* invalidated a statute proscribing false claims to have won service medals, with additional penalties for claiming to have won the Medal of Honor. But *Alvarez* does not require courts to look only at the predicate offence in conjunction with the applicable sentence enhancement. Justice Breyer's concurrence flatly rejected such a reading by positing that a statute limited to special awards might survive scrutiny. Nevertheless, the government treats the factual focus on lying about the Medal of Honor as though an overbroad statute may be saved by a sentence enhancement. That could lead to the absurd result of a ban on flag-burning that survives scrutiny because of a sentence enhancement for, say, inciting a riot.

Nor is it relevant to the chilling effects of the main statute that the elements of the sentencing enhancement be proven to a jury before they may increase a defendant's sentence. The jury instructions and forms in this case show that subparagraph (A)(iv) is the predicate offence where the chilling effect must lie. J.A. at 118–21. The jury here was asked whether the defendant was guilty of violating (A)(iv) and then asked if the financial gain enhancement could be applied. A defendant's ability to scrupulously prove she had not been motivated by financial gain would do nothing to save her from a guilty verdict—nor save the hypothetical YouTuber if he showed a lack of profit motive. The chilling effect remains with the predicate offence.

The government offers to rewrite the statute and rectify the "cosmetic drafting choice" Congress made in treating (B)(i) as a separate sentence enhancement rather than create two predicate offences, one with a financial gain element and one without. Pet. Br. at 40–41. But this Court should not be in the business of writing statutes, and even if this Court were to rewrite the statute, the base burden of the revised statute would be on speech. The statute as a whole would be unconstitutionally overbroad regardless of additional non-speech elements the government may look to.

Overbreadth cases necessitate hypotheticals because legitimate speakers are often cowed by the "severe penalties" incurred for violating speech prohibitions. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). Under the statute, immigration attorneys, medical professionals, YouTubers, Cato Institute policy scholars, and members of the Court's own bar can fear the consequences of their legitimate speech. Indeed, a good-faith agent in Ms. Sineneng-Smith's

place, one who was merely mistaken about the availability of certain immigration programs, could still face decades in prison for conduct that involved no fraud.

ARGUMENT

Title 8 U.S.C. § 1324(a)(1)(A)(iv), even limited by (B)(i), is facially invalid. When statutes regulate or punish protected speech, "the transcendent value to all society of constitutionally protected expression" justifies attacking the overinclusive prohibition. *Gooding v. Wilson*, 405 U.S. 518, 520–21 (1972). The Constitution protects people "from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft*, 535 U.S. at 244.

Under the First Amendment, a law is invalid "as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n.6 (2008)). "[A] statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it." *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984) (citing *Gooding*, 405 U.S. 518).

Amicus endorses respondent's arguments that subparagraph (A)(iv), itself, is overbroad. Furthermore, the government is wrong to suggest that subparagraph (B)(i) in some way limits this Court's review of (A)(iv). A statute limited to prohibiting commercial speech that encourages or induces aliens to remain in the United States would still have "a substantial number of its applications [be] unconstitutional."

I. THE GOVERNMENT'S MERGER OF THE PREDICATE OFFENCE AND THE SENTENCING ENHANCEMENT DOES NOT THAW THE CHILLING EFFECT OF § 1324(a)(1)(A)(iv)

Ms. Sineneng-Smith posits that § 1324(a)(1)(A)(iv), standing alone, is unconstitutionally overbroad and chills protected speech beyond the legitimate scope of the statute. Resp. Br. at 14 *et seq.* This provision should be viewed on its own for an overbreadth challenge. The sentencing enhancement provisions in (B)(i) are irrelevant to (A)(iv)'s chilling effect.

A. The Government's Understanding of *Alvarez* Is Wrong and Does Not Justify the Piecemeal Overbreadth Doctrine the Government Requests

Suppose Congress passed a proscription levying a $50 fine for burning cloth on sticks, but if that cloth is the American flag, then the fine is doubled. A court may wish to consider a challenge to that statute only in the context of the sentence enhancement. If, however, a statute proscribes burning the American flag with a $50 fine, and five days in jail are added if the flag is burned for financial gain, then a court would quickly invalidate the predicate offence regardless of the sentencing enhancement. *Cf. Texas v. Johnson*, 491 U.S. 397 (1989).

In *United States v. Alvarez*, neither the plurality nor the concurrence required or encouraged courts to look only at the predicate offence tied to a sentence enhancement. 567 U.S. 709 (2012). The concurrence's reasoning impliedly contradicts the government's reading. *See* 567 U.S. at 736 (Breyer, J., concurring in

judgment). Potential speakers gain no solace from *Alvarez* and will continue to be chilled by subparagraph (A)(iv) regardless of any militating influence of the subparagraph (B)(i) enhancement.

A four-justice plurality and two-justice concurrence together invalidated the Stolen Valor Act in *Alvarez*. *Id.* at 730. As the government notes, Pet. Br. at 38, the plurality reached this conclusion by examining the act's general prohibition against falsely claiming to have won military honors, along with the sentence enhancement for falsely claiming to have won the Congressional Medal of Honor. *Alvarez*, 567 U.S. at 715–16. The concurrence, however, did not distinguish between general and enhanced offences. *See id.* at 736 (Breyer, J., concurring in judgment) (noting that the statute covers marksmanship awards).[2]

Instead, the concurrence contemplated versions of the statute that may have survived. Pertinent to the government's reading, Justice Breyer suggested that Congress could determine that certain awards, like the Medal of Honor, deserve greater protection and thus limit the Stolen Valor Act to encompass only those.[3] *Id.* at 737. Despite the ability to reconstruct a more First Amendment-conscious statute, the concurrence still noted that the statute as written was unconstitutional.

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[2] Nor can the government look to the dissent, which makes no suggestion that analysis should be limited to the Medal of Honor enhancement. *See Alvarez*, 567 U.S. at 739 (Alito, J., dissenting).

[3] Congress, accepting that the predicate offense of claiming military honors was invalidated by *Alvarez*, took Justice Breyer's suggestion to heart and limited the act to certain specific medals. H.R. Rep. No. 113-84, at 4 (2013). It also added the requirement of specific intent to obtain a tangible benefit. *Id.*

Nevertheless, the government treats the factual focus on lying about the Medal of Honor as if the predicate offence may be ignored if a sentence enhancement is present. This is a stretch from the more reasonable conclusion that the plurality mainly considers the Medal of Honor because that is the lie the defendant happened to tell. *See id.* at 713 (plurality).

Even if the distinction in *Alvarez* was relevant, it was left unremarked upon. The sentence enhancement in *Alvarez* forbade a particular lie as opposed to a general lie. The act proscribed generally stating, "I won awards in the army" and added additional penalties for specific speech: "I won the Congressional Medal of Honor." But subparagraph (B)(i) does not, in any way, alter the proscribed speech as in *Alvarez*. Thus, the lower court was correct that subparagraph (B)(i) is irrelevant to the chilling analysis of subparagraph (A)(iv).

As with the hypothetical flag burning statute, the chilling effect of subparagraph (A)(iv) has to be viewed on its own. Any person reading § 1324(a)(1) would read subparagraph (A)(iv) as self-actualizing, just as any person who read the Stolen Valor Act would be chilled from claiming to have won medals, whether the Medal of Honor or for marksmanship. And anyone who reads the hypothetical Flag Burning Act above would be chilled from flag burning, regardless of whether they stand to gain financially. Similarly, any person reading § 1324 would be chilled by (A)(iv) alone, regardless of the sentence enhancements in (B)(i)–(iv). This is emphasized, not lessoned, by the government's arguments invoking *Apprendi v. New Jersey*.

B. *Apprendi* Is a Shield Protecting Against Increased Sanctions for Facts not Found by a Jury, not a Sword Allowing the Government to Evade the First Amendment with Sentencing Enhancements

1. Apprendi *focuses on the requisite burden of proof for increased sentencing.*

The government is attempting to weaponize *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* states the Constitution's guarantee that every fact supporting an upward departure from a crime sentencing range must meet the same burden of proof as the facts of the predicate offence. *Id.* at 482. The government must submit additional facts needed for a sentence enhancement—like facts supporting a financial gain incentive per (B)(i)—to a jury before seeking the enhanced sentence; nothing more, nothing less. In this case, the facts of the predicate offence—encouraging or inducing an alien to immigrate illegally—must be found by a jury beyond a reasonable doubt, which automatically qualifies for sentencing under subparagraph (B)(ii). If the government adds a financial-gain enhancement, then a jury must find the facts supporting that charge beyond a reasonable doubt as well.[4]

That distinction is seen in the instructions given to the jury below. J.A. at 118–21. Counts one, two, and

[4] This is only true for subparagraphs (A)(ii), (iii), and (iv). If a jury find the requisite facts for a violation of subparagraphs (A)(i) or (A)(v)(I) then the sentence automatically falls under subparagraph (B)(i) with no necessary additional facts to find under *Apprendi*. 8. U.S.C. § 1324(a)(1)(B)(i). No charge of aiding and abetting under (A)(v)(II) will qualify for (B)(i) enhancement.

three ask the same questions with respect to three aliens. *Id.* Each is divided into parts (a) and (b). *Id.* Count one reads:

> On or About June 5, 2005, Encouraging or Inducing an Alien Identified by the Name Oliver Galupo to Reside in the United States

Id. at 118. There is no mention here of a financial gain. Question 1(a) then asks:

> As to Count One of the Superseding Indictment, WE FIND defendant Evelyn Sineneng-Smith:

Id. This instruction provides the jury foreman with a choice of not guilty and guilty, still with no mention of the financial gain incentive. The jury foreman is next told.

> *If you find Ms. Sineneng-Smith not guilty of Count 1 in question 1(a), skip question 1(b) and go directly to Count Two. If you find Ms. Sineneng-Smith guilty of Count 1 in question 1(a), please answer question 1(b).*

Id. (emphasis in original). If the jury finds Ms. Sineneng-Smith guilty of the predicate offence, then, and only then, does *Apprendi* come into play. For sentencing, the district judge must know beyond a reasonable doubt the answer to 1(b):

> Has the government proven beyond a reasonable doubt that defendant Evelyn Sineneng-Smith committed the offense in Count One for private financial gain?

Id. at 119. It is only with an affirmative answer to 1(b) that the judge can constitutionally move from the default sentencing scheme in subparagraph (B)(ii) to the

enhanced sentencing scheme in (B)(i). Had the jury returned a negative, Ms. Sineneng-Smith would still face prison. 8 U.S.C. § 1324(a)(1)(B)(ii). The question of financial gain arose only if the jury finds that Ms. Sineneng-Smith committed the elements necessary to be guilty under subparagraph (A)(iv) alone.

The government cautions against ascribing constitutional significance to the "label" of sentencing enhancement. Pet. Br. at 40 (quoting *United States v. Booker*, 543 U.S. 220, 231 (2005)). This is fine advice in the context of *Booker*, where that label meant the difference between a defendant receiving his full rights under the Constitution and the government working around the constitutional standard for criminal convictions by labeling crimes as sentence enhancements. The advice is inapposite here. The label here is an easy means of distinguishing between the predicate offence that threatens to chill speech and one of several additional penalties for the speech.

Speech is chilled by the command against "encourag[ing] or induc[ing]" regardless of whether a (B)(i) or (B)(ii) sentence is tacked on. The innocent speaker cannot take heart in her ability to flawlessly prove to a jury that she neither sought nor received any commercial advantage or financial gain. If the jury answers that she is guilty of encouragement or inducement and returns a negative to the financial gain question, the government will not let her walk free with a handshake and apology. They will seek a sentence under the default of subparagraph (B)(ii) where no *Apprendi* factors impede them. *Apprendi* does nothing to thaw the chill of this statute because the additional conduct and additional sentence are irrespective of the speech forming the predicate offence.

2. Statutory interpretation matters outside of Apprendi's *core holding should be limited to statutes passed in* Apprendi*'s wake.*

Unquestionably, *Apprendi* applies retroactively to every substantive crime masquerading as a sentence enhancement, regardless of when it was written into law. *See*, *e.g.*, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (overruling in part *Hildwin v. Florida*, 490 U.S. 638 (1989), which applied *Apprendi* to a sentencing scheme previously upheld under pre-*Apprendi* case law). Accordingly, the Court may reasonably believe that legislation passed after *Apprendi* is written cognizant of the requirement that sentence enhancements receive the same fact-finding rigor as the predicate offence.

But subparagraph (B)(i) was added to the statute in 1986, 14 years before *Apprendi*. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112. And the portion of (B)(i) concerning financial gain was added four years before *Apprendi*. Omnibus Consolidated Appropriations Act, 1997, H.R. 3610, 104th Cong. § 203 (1996). Under *Apprendi*, the government acted properly at the sentencing stage by asking the jury whether this enhancement has been proved beyond a reasonable doubt. Before *Apprendi* clarified the rights of defendants, it is unclear that Congress considered (B)(i) as anything other than an add-on to the predicate violations of subparagraph (A).

Even interpreting § 1324 in light of *Apprendi*, that case only adds a jury requirement if, and only if, a defendant is convicted under the predicate offence. the predicate offence alone should be the basis for an overbreadth challenge.

C. Even the Government's Most Radical Rewrite Fails to Prevent the Chilling Effects Respondents Describe

The government finally defends the inclusion of subparagraph (B)(i) in the overbreadth analysis of subparagraph (A)(iv) by urging the Court not to invalidate the statute for a "cosmetic drafting choice." Pet. Br. at 40–41. But that "cosmetic" choice is the entire statutory organization. The government contends that there is no difference between the statutory scheme that Congress created after deliberation and a reorganization where Congress instead created two versions of subparagraph (A)(iv): subsection (i) with a financial-gain enhancement and subsection (ii) without.

Despite the government's cosmetology, this change would represent a radical departure from this Court's usual constitutional interpretive method. While courts must construe a statute to avoid constitutional problems where it is "fairly possible" to do so, *INS v. St. Cyr*, 533 U.S. 289, 300 (2001), this Court is not required to redraft statutes in a form aligned with the Constitution. *See Alvarez*, 567 U.S. at 736–38 (Breyer, J., concurring in judgment) (examining possible alternative formulations of the statute at issue). The legislative power is not vested in this branch.

Even with this "cosmetic" reorganization, the fact that a sub-subparagraph of (A)(iv) would contain an additional financial gain element would be immaterial to the chilling effect of (A)(iv) as a whole. Speech said with the intent of financial gain—commercial speech—is protected by the First Amendment.

II. CRIMINALIZING ENCOURAGEMENT AND INDUCEMENT FOR FINANCIAL GAIN CHILLS A BROAD SWATH OF PROTECTED COMMERCIAL SPEECH

This law criminalizes protected commercial speech that incidentally encourages or induces aliens to unlawfully remain in the United States. As Ms. Sineneng-Smith notes, the breadth of protected speech criminalized here "dwarfs" any legitimate sweep the statute has. Resp. Br. at 35. While *amicus* has previously argued to this Court that the commercial/non-commercial speech distinction should be eliminated, lesser scrutiny for commercial speech does not matter here. "Some of our most valued forms of fully protected speech are uttered for a profit," and some of our most valued forms of protected commercial speech are chilled by the statute here. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989).

Overbreadth cases necessitate hypotheticals about scenarios not before the Court. As the Court has noted, legitimate speakers are often cowed by "severe penalties" risked by violating unconstitutional speech prohibitions. *See Free Speech Coal.*, 535 U.S. at 244. As in any law school class, hypotheticals are a necessary evil.[5] This Court must "strike a balance between competing social costs." *United States v. Williams*, 553 U.S. 285, 292 (2008). A statute is invalid under the

[5] The government correctly notes that the Court below did not cite any actual prosecutions, but rather presented a series of examples of speech that could be chilled by the statute. Pet. Br. 32. Had the government prosecuted this conduct the First Amendment violation would be obvious to all. But this ignores the very reason this Court recognizes facial challenges when protected speech is at risk: the chilling effect on law-abiding citizens who will avoid prosecution by abiding by the law.

First Amendment "if it prohibits a substantial amount of protected speech," which necessitates thinking beyond the case at bar to the protected speech of the community. *Id.*

For example, the government may convict an immigration attorney of this crime merely by showing that the attorney, knowing her client was present unlawfully, counseled her about the advantages to remaining in the United States—and did so in the hope that she might receive a fee. Indeed, as noted by Respondents, the government admits this point. Res. Br. at 3.

The government offers two answers to neutralize this hypothetical. First, citing the Model Rules of Professional Conduct, it suggests that instead of advising her client to remain in the country, the lawyer must merely state the client is "unlikely to be removed." Pet. Br. at 35. Left unexplained is how this would not qualify as encouragement, or why requiring a lawyer to limit her communication with clients to vague suppositions rather than clear answers is not an example of chilled speech. A lawyer would still be forbidden from telling her client what she most needs to know, the benefits of staying rather than leaving, which could induce the client to remain. Additionally, Model Rule 1.2(d) concerns advising clients on future *criminal* endeavors. Continued residence is not criminal. *Arizona v. United States*, 567 U.S. 387, 407 (2012). A lawyer should be able to advise this course of action without running into Model Rule 1.2 issues.

The government understandably views immigration matters from an enforcement perspective. In response to the Ninth Circuit's example of an immigration attorney, the government points to the requirement that the alien's residence be in violation of law.

Cert. Pet. at 18. Because aliens already in removal proceedings are not in violation of the law when given a reprieve during the proceedings, the government suggests that the legal advice they seek after the commencement of proceedings will not violate (A)(iv) and (B)(i). *Id.* This is true, and immigration attorneys entering at this stage need not be chilled. But illegal aliens are often concerned with the uncertainty of their status, and they often seek immigration assistance *before* the government catches them and grants them temporary legal reprieve. That large body of aliens concerned with their own status includes, pertinently, the aliens "encouraged" by Ms. Sineneng-Smith in this case, who sought preventative immigration assistance.

This statute also criminalizes this hypothetical exchange with a proactive concerned alien of indeterminate status who seeks advice about the Deferred Action for Childhood Arrivals (DACA) program. Imagine this conversation:

> Alien: I want to stay in America. My parents brought me here from Ruritania when I was four. I don't even speak Ruritanian. But if I can't figure out whether I qualify for DACA, I will have to leave.
>
> Attorney: I am an immigration lawyer and can help. Come by my office at 123 Fake Street. I normally bill $75 per hour.
>
> Alien: I don't know, I think I should just leave.
>
> Attorney: How about we look at your situation first? Stay put until we have done that, let's schedule a consultation next week.

Here the attorney has knowingly encouraged a particular alien to remain in the country in reckless disregard for whether remaining violates federal law, and for financial gain.

Apart from lawyers, additional vital services rely on commercial speech that would be sanctioned by the combined statute. A pediatrician may encourage patients to stay in America because of vital care being delivered to an illegally present child. To convict the pediatrician of this crime, the government need only prove that, for the purpose of financial gain, she knowingly encouraged specific aliens—her patients or their families—to remain in the United States in knowing or reckless disregard of the fact that such residence is in violation of law. Informing the patient that there is no better available care than what they can receive in the United States is protected speech. That information would certainly "encourage" or "induce" a patient to remain where medical care is superior.

This statute also covers public servants trying to help aliens access state programs. To convict a California Department of Motor Vehicles employee of this crime, the government need only prove that she knowingly encouraged or induced a particular alien—any of the available customers—to reside in the United States by informing them about the California's special licenses for unlawful aliens.[6] The special licenses allow such persons to drive and thus be more likely to

[6] California forbids employees from denying a driver license because the candidate is an unlawful alien, if such person can prove California residency. Cal. Veh. Code § 12801.9. Such employees are caught between violating state and federal law. *See also* Cal. DMV, AB 60 Driver License, https://www.dmv.ca.gov/portal/dmv/detail/ab60 (last visited Jan. 17, 2020).

remain in the United States. The DMV's workers salary would be the financial gain.

Despite the statute's sweeping range, on reading the government's brief, one is left with the impression that if not for § 1324(a)(1)(A)(iv), in conjunction with (B)(i), it would be unable to prosecute immigration fraud. Unfortunately for Ms. Sineneng-Smith, that is not the case. Ms. Sineneng-Smith's fraudulent activities were charged and convicted under a separate statute. But if Ms. Sineneng-Smith had instead acted under the wrong impression that the program she was utilizing was still valid, she would have lacked the *mens rea* for fraud. If she advised her clients about the existence of a legitimate program, and her clients were induced to remain unlawfully in the country, no fraud would have been committed. But she could have been convicted under this overbroad statute that captures malicious fraud and innocent advice alike.

In a "textbook example" of why the facial challenges to statutes that burden expression are a necessity, this Court has noted that "severe penalties" would prove too great a risk to legitimate speakers. *Free Speech Coal.*, 535 U.S. at 244. Here the Court need only ask whether this defendant, if she had not committed any *malum prohibitum* act of fraud, would be punished solely for her speech. She would have faced decades in prison and undefined fines.

CONCLUSION

For the foregoing reasons, and those presented by respondent, the Court should affirm the court below.

Respectfully submitted,

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