

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 RELIGIOUS ORGANIZATIONS  
AS *AMICI CURIAE* IN SUPPORT OF  
RESPONDENT**

---

JEREMY GIRTON  
SAMUEL LEHMAN  
VIVAAN NEHRU  
O'MELVENY & MYERS LLP  
1625 Eye Street, NW  
Washington, DC 20006  
(202) 383-5300

ANTON METLITSKY  
*(Counsel of Record)*  
ametlitsky@omm.com  
O'MELVENY & MYERS LLP  
Times Square Tower  
7 Times Square  
New York, NY 10036  
(212) 326-2000

---

*Attorneys for Amici Curiae*

---

**QUESTION PRESENTED**

Whether 8 U.S.C. § 1324(a)(1)(A)(iv), which criminalizes “encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States” without lawful status, is facially unconstitutional.

## TABLE OF CONTENTS

	<b>Page</b>
INTEREST OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	5
I. <i>Amici</i> Engage in Constitutionally Protected Speech and Activity in Support of Undocumented Immigrants .....	5
A. <i>Amici</i> Advocate for, Advise, and Support Undocumented Immigrants.....	5
B. <i>Amici's</i> Work Is Protected by the Constitution .....	13
II. The Encouragement Provision Is Unconstitutionally Overbroad .....	15
A. The Encouragement Provision Chills <i>Amici's</i> Speech under the Plain Language of the Statute .....	16
B. The Government's Reading of the Encouragement Provision Is Implausible and Still Chills <i>Amici's</i> Protected Expression .....	22
CONCLUSION.....	32

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Akwasi Agyei v. Holder</i> , 729 F.3d 6 (1st Cir. 2013).....	25
<i>Andrus v. Glover Constr. Co.</i> , 446 U.S. 608 (1980) .....	21
<i>Arizona v. United States</i> , 567 U.S. 387 (2012) .....	24
<i>Bd. of Airport Comm'rs v. Jews for Jesus, Inc.</i> , 482 U.S. 569 (1987) .....	16
<i>Bender v. Williamsport Area Sch. Dist.</i> , 475 U.S. 534 (1986) .....	14
<i>Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar</i> , 377 U.S. 1 (1964) .....	14
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969) .....	13
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973) .....	16
<i>Dodd v. United States</i> , 545 U.S. 353 (2005) .....	22
<i>Emp't Div., Dep't of Human Res. of Or. v. Smith</i> , 494 U.S. 872 (1990) .....	13, 14
<i>Heffron v. Int'l Soc. for Krishna Consciousness, Inc.</i> , 452 U.S. 640 (1981) .....	13

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>Holy Land Found. for Relief &amp; Dev. v. Ashcroft</i> , 219 F. Supp. 2d 57 (D.D.C. 2002), <i>aff'd</i> , 333 F.3d 156 (D.C. Cir. 2003) .....	15
<i>Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.</i> , 344 U.S. 94 (1952) .....	21
<i>Legal Servs. Corp. v. Velazquez</i> , 531 U.S. 533 (2001) .....	14
<i>Maness v. Meyers</i> , 419 U.S. 449 (1975) .....	14
<i>NAACP v. Button</i> , 371 U.S. 415 (1963) .....	14
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982) .....	13
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997) .....	16, 20, 28
<i>Riley v. Nat'l Fed'n of the Blind of N.C., Inc.</i> , 487 U.S. 781 (1988) .....	15
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984) .....	22
<i>Rumsfeld v. Forum for Acad. &amp; Institutional Rights, Inc.</i> , 547 U.S. 47 (2006) .....	22
<i>United States v. Henderson</i> , 857 F. Supp. 2d 191 (D. Mass. 2012) .....	30

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>United States v. Seeger</i> , 380 U.S. 163 (1965) .....	13
<i>United States v. Stevens</i> , 559 U.S. 460 (2010) .....	15
<i>United States v. Williams</i> , 553 U.S. 285 (2008) .....	13
<i>Vill. of Schaumburg v. Citizens for a Better Env't</i> , 444 U.S. 620 (1980) .....	13
<i>Virginia v. Hicks</i> , 539 U.S. 113 (2003) .....	15
<i>Watchtower Bible &amp; Tract Soc’y of N.Y., Inc. v. Vill. of Stratton</i> , 536 U.S. 150 (2002) .....	13
<b>STATUTES</b>	
8 U.S.C. § 1101(a)(27)(J) .....	11
8 U.S.C. § 1229b(b)(1)(A) .....	25
8 U.S.C. § 1324(a)(1) .....	passim
<b>OTHER AUTHORITIES</b>	
<i>About Us</i> , CLINIC (last visited Jan. 21, 2019), <a href="https://cliniclegal.org/about-us">https://cliniclegal.org/about-us</a> .....	6
<i>About Us</i> , Esperanza (last visited Jan. 21, 2019), <a href="https://www.esperanza-la.org/about-us">https://www.esperanza- la.org/about-us</a> .....	6

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<p><i>An Important Statement on Immigration Raids in New York from Monsignor Sullivan</i>, Catholic Charities of New York (July 12, 2019), <a href="https://catholiccharitiesny.org/news/i&lt;br/&gt;mportant-statement-immigration-&lt;br/&gt;raids-new-york-monsignor-sullivan">https://catholiccharitiesny.org/news/i mportant-statement-immigration- raids-new-york-monsignor-sullivan</a>.....</p>	6
<p>Catholic Legal Immigration Network, Inc. (CLINIC), Facebook (Sept. 6, 2017), <a href="https://www.facebook.com/cliniclegal/&lt;br/&gt;photos/a.10150295106843152.334381.&lt;br/&gt;39238118151/10155159638743152/?ty&lt;br/&gt;pe=3&amp;theater">https://www.facebook.com/cliniclegal/ photos/a.10150295106843152.334381. 39238118151/10155159638743152/?ty pe=3&amp;theater</a>.....</p>	9
<p><i>Denied a Day in Court: The Government’s Use of In Absentia Removal Orders Against Families Seeking Asylum</i>, CLINIC (Apr. 16, 2018), <a href="https://cliniclegal.org/resources/remov&lt;br/&gt;al-proceedings/denied-day-court-&lt;br/&gt;governments-use-absentia-removal-&lt;br/&gt;orders-against">https://cliniclegal.org/resources/remov al-proceedings/denied-day-court- governments-use-absentia-removal- orders-against</a>.....</p>	26

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
Dianna M. Náñez, <i>Why a Phoenix Church Voted to Act as a Sanctuary</i> , Ariz. Republic (Mar. 3, 2017), <a href="https://www.azcentral.com/story/news/politics/immigration/2017/03/03/phoenix-church-sanctuary-movement-immigrants/98113336/">https://www.azcentral.com/story/news/politics/immigration/2017/03/03/phoenix-church-sanctuary-movement-immigrants/98113336/</a> .....	9
Eileen Johnson, <i>Two New Haven Churches Declared Sanctuaries for Undocumented Immigrants</i> , Yale Daily News (Apr. 27, 2017), <a href="https://yaledailynews.com/blog/2017/04/27/new-haven-churches-to-be-sanctuary-for-undocumented-immigrants/">https://yaledailynews.com/blog/2017/04/27/new-haven-churches-to-be-sanctuary-for-undocumented-immigrants/</a> .....	9
<i>Gilbert and Eleanor Kraus Initiative Immigrant and Refugee Justice Action Center</i> , Religious Action Center of Reform Judaism, <a href="https://rac.org/kraus">https://rac.org/kraus</a> (last visited Jan. 21, 2020).....	8
<i>Green Light Bill Gets the Green Light from Albany</i> , Catholic Charities Blog (June 20, 2019), <a href="https://catholiccharitiesny.org/blog/green-light-bill-gets-green-light-albany">https://catholiccharitiesny.org/blog/green-light-bill-gets-green-light-albany</a> .....	18
<i>Immigration &amp; Legal Services</i> , LSSNY, <a href="https://lssny.org/life-services/life-shield/">https://lssny.org/life-services/life-shield/</a> (last visited Jan. 21, 2019) .....	6

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>Immigration</i> , Religious Action Center of Reform Judaism, <a href="https://rac.org/immigration">https://rac.org/immigration</a> (last visited Jan. 21, 2020) .....	8
<i>Liberian Refugee Immigration Fairness</i> , CLINIC, <a href="https://cliniclegal.org/issues/liberian-refugee-immigration-fairness">https://cliniclegal.org/issues/liberian-refugee-immigration-fairness</a> (last visited Jan. 21, 2020) .....	7
Memorandum from the Attorney General (Apr. 11, 2017), <i>available at</i> <a href="https://www.justice.gov/opa/press-release/file/956841/download">https://www.justice.gov/opa/press-release/file/956841/download</a> .....	30
<i>NYS Liberty Defense Project &amp; Catholic Charities of New York Launch Statewide Pro Bono Project to Expand Legal Services for Immigrants</i> , N.Y. Dep’t of State (Feb. 1, 2019), <a href="https://apps.cio.ny.gov/apps/mediaContact/public/view.cfm?parm=A5188CAC-EA18-80B1-EBDFA4346E3337CB">https://apps.cio.ny.gov/apps/mediaContact/public/view.cfm?parm=A5188CAC-EA18-80B1-EBDFA4346E3337CB</a> .....	7
<i>Reform Jewish Movement Decries Mississippi ICE Raid</i> , Religious Action Center of Reform Judaism (Aug. 8, 2019), <a href="https://rac.org/reform-jewish-movement-decries-mississippi-ice-raid">https://rac.org/reform-jewish-movement-decries-mississippi-ice-raid</a> .....	6

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
Rev. Randall Keeney, <i>Want to Provide Sanctuary to an Undocumented Person? This Is What it Takes.</i> , Wash. Post (July 14, 2019), <a href="https://www.washingtonpost.com/opinions/2019/07/14/want-provide-sanctuary-an-undocumented-person-this-is-what-it-takes/">https://www.washingtonpost.com/opinions/2019/07/14/want-provide-sanctuary-an-undocumented-person-this-is-what-it-takes/</a> .....	9
<i>Temporary Protected Status (TPS) and Deferred Enforced Departure (DED)</i> , CLINIC, <a href="https://cliniclegal.org/issues/temporary-protected-status-tps-and-deferred-enforced-departure-ded">https://cliniclegal.org/issues/temporary-protected-status-tps-and-deferred-enforced-departure-ded</a> (last visited Jan. 21, 2020).....	7
Teo Armus, <i>After Helping Migrants in the Arizona Desert, an Activist Was Charged With a Felony. Now, He's Been Acquitted.</i> , Wash. Post (Nov. 21, 2019), <a href="https://www.washingtonpost.com/nation/2019/11/21/arizona-activist-scott-warren-acquitted-charges-helping-migrants-cross-border/">https://www.washingtonpost.com/nation/2019/11/21/arizona-activist-scott-warren-acquitted-charges-helping-migrants-cross-border/</a> .....	30
Wayne R. LaFave, 2 Substantive Criminal Law § 11.1 (3d ed. 2017).....	24

**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici* are religious and religiously affiliated organizations that provide charitable services to undocumented immigrants as a core part of their faith. Their work includes, among other things, engaging in public advocacy, providing legal representation and advice, and operating various charitable organizations that serve immigrant populations. The First Amendment’s guarantees of freedom of speech, petition, and religious exercise protect *amici*’s activities. Yet much of *amici*’s work is threatened by the criminal prohibition of statements or expressive acts that “encourage” or “induce” noncitizens to reside in the United States unlawfully. *See* 8 U.S.C. § 1324(a)(1)(A)(iv). This overbroad criminal statute threatens to chill *amici*’s constitutionally protected speech and activity. *Amici* thus have a substantial interest in resolution of the question presented in this case.

A full list of *amici* is below:

- American Friends Service Committee (“AFSC”)
- Catholic Charities Community Services of the Archdiocese of New York (“Catholic Charities”)
- Catholic Legal Immigration Network (“CLINIC”)
- Catholic Migration Services

---

<sup>1</sup> Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel of record for each party has consented in writing to the filing of this brief.

- Central Conference of American Rabbis
- Church World Service
- Council on American-Islamic Relations (“CAIR”)
- Council on American-Islamic Relations California (“CAIR-CA”)
- Episcopal City Mission
- Esperanza Immigrant Rights Project (“Esperanza”)
- HIAS (formerly the Hebrew Immigrant Aid Society)
- Lutheran Social Services of New York (“LSSNY”)
- Men of Reform Judaism
- National Council of Jewish Women
- New Sanctuary Coalition
- National Justice for Our Neighbors
- New York Justice for Our Neighbors
- Union for Reform Judaism
- Unitarian Universalist Service Committee
- United Methodist Committee on Relief (“UMCOR”)
- Women of Reform Judaism

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

*Amici* are religious and religiously affiliated organizations that provide humanitarian and charitable services to those in need. Central to *amici*’s faiths is a commitment to a wide range of religiously motivated advocacy and activity in support of the dignity of all human beings, irrespective of immigration status. For *amici*, this is a matter of moral duty and conscience. Yet the statute at issue here would require *amici* to either turn away those in need based on immigration status, cease to perform certain charity and

advocacy work entirely, or face the realistic possibility of criminal prosecution. That renders the law unconstitutional.

1. Many faith traditions share the message of welcoming and loving the stranger, which appears in multiple religious texts, including the Bible, *see, e.g., Leviticus* 19:33–34; *Deuteronomy* 10:19; *Matthew* 25:35–40; *Colossians* 3:11; *Hebrews* 13:1, and the Qur’an, *Al-Baqarah* 2:177; *An-Nisa* 4:36; *Al-Anfal* 8:41; *At-Tawbah* 9:60. *Amici’s* commitment to this message informs and drives their work on behalf of immigrants, including impact litigation and legislative advocacy; religious, spiritual, and legal counseling and services; and charitable activities directed toward immigrant communities and other vulnerable populations. This work enjoys ample constitutional protection, particularly under the Free Speech and Free Exercise clauses of the First Amendment.

2. Federal law makes it a felony to “encourage[] or induce[] 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 law.” 8 U.S.C. § 1324(a)(1)(A)(iv). Under this provision (the “Encouragement Provision”), anyone who “encourages or induces” an undocumented person to remain in the United States faces a five-year prison sentence.

a. Read plainly, the Encouragement Provision prohibits advocacy for undocumented immigrants, including in support of laws that would make it easier for undocumented immigrants to remain in the United States. The Provision also limits what immi-

gration attorneys can advise their clients, particularly when remaining in the United States without status could improve the client's chances of obtaining legal status.

There is also a serious risk that the Provision could be read to prohibit providing services or sanctuary to unaccompanied children, victims of abuse, and those at risk of removal. This would sweep in much of *amici's* charitable work, including running soup kitchens and homeless shelters in communities with a high percentage of undocumented immigrants. Nothing in the text indicates congressional intent to exclude from the Provision's reach such religiously motivated speech and activity. On the contrary, the only textual clues that do exist, beyond the sweeping nature of the "encourage[] or induce[]" language itself, further underscore the Provision's breadth. The statute's broad language creates a realistic danger that *amici* will be prosecuted for their religiously motivated humanitarian efforts.

b. The Government's interpretation—that the Provision reaches only the solicitation or facilitation of a specific immigration offense—is incompatible with the statute's text and fails to solve the constitutional problem. The Government's critical concessions in its brief and below mean that any "solicitation" reading of the Provision would capture a vast array of speech and conduct—potentially criminalizing many of *amici's* protected statements and activities. Some *amici*, for instance, regularly advise clients of immigration benefits that are available only if they continue to reside in the country without status for a certain period of time; or describe, accurately, what

actions increase the risk of family separation or removal. But even though such advice enjoys First Amendment protection, under the Government’s necessarily expansive reading of the Encouragement Provision, this advice potentially “facilitates” a civil infraction—and therefore could, on the Government’s view, result in a felony conviction.

*Amici* believe they are obligated by their faith to both (1) help those in need and (2) do so regardless of immigration status. The Encouragement Provision forces *amici* into a Hobson’s choice: provide their services only to those with lawful immigration status or give up their work altogether. Either option requires *amici* to compromise their faith commitments, thereby chilling protected expression. Because the Encouragement Provision threatens to criminalize so much constitutionally protected speech and conduct, and serves few other legitimate law-enforcement purposes, it is facially unconstitutional.

## ARGUMENT

### I. *AMICI* ENGAGE IN CONSTITUTIONALLY PROTECTED SPEECH AND ACTIVITY IN SUPPORT OF UNDOCUMENTED IMMIGRANTS

#### A. *Amici* Advocate for, Advise, and Support Undocumented Immigrants

*Amici* engage in various activities aimed at supporting immigrants, including those residing in the United States without legal status. That work includes engaging in religiously motivated advocacy, offering religious and legal counseling, and providing humanitarian and charitable services to individuals regardless of immigration status.

**Social and Political Advocacy.** Many *amici* are compelled by their faith to speak out on behalf of immigrants and their families, including individuals without lawful immigration status and those whose status is in dispute. Although *amici*'s advocacy is wide-ranging, it shares a common through line grounded in their respective faiths: those who enter or remain in the United States (with or without proper documentation) deserve to be treated like human beings. They are entitled to dignity, compassion, and access to basic services. See, e.g., *Reform Jewish Movement Decries Mississippi ICE Raid*, Religious Action Center of Reform Judaism (Aug. 8, 2019), <https://rac.org/reform-jewish-movement-decries-mississippi-ice-raid>; *An Important Statement on Immigration Raids in New York from Monsignor Sullivan*, Catholic Charities of New York (July 12, 2019), <https://catholiccharitiesny.org/news/important-statement-immigration-raids-new-york-monsignor-sullivan>; *About Us*, CLINIC (last visited Jan. 21, 2019), <https://cliniclegal.org/about-us>; *Immigration & Legal Services*, LSSNY, <https://lssny.org/life-services/life-shield/> (last visited Jan. 21, 2019); *About Us*, Esperanza (last visited Jan. 21, 2019), <https://www.esperanza-la.org/about-us>.

Advocacy to uphold that basic dignity and humanity takes numerous forms. Many *amici* advocate for changes to laws or regulations that particularly affect immigrant communities at the local, state, and national level. Catholic Charities, for instance, has testified before the New York City Council on various topics, including City budgeting for immigrant services and initiatives, changes to federal “public charge” rules, and resources for immigrants with

mental health needs. It has also partnered with the State of New York's Liberty Defense Project to offer free legal services to immigrants through its Pro Bono Program. *See NYS Liberty Defense Project & Catholic Charities of New York Launch Statewide Pro Bono Project to Expand Legal Services for Immigrants*, N.Y. Dep't of State (Feb. 1, 2019), <https://apps.cio.ny.gov/apps/mediaContact/public/view.cfm?parm=A5188CAC-EA18-80B1-EB-DFA4346E3337CB>. CLINIC regularly advocates for changes to immigration law that would benefit individuals without lawful status or at risk of losing status, such as extensions of Temporary Protected Status designations for individuals from places with unsafe country conditions. *See Liberian Refugee Immigration Fairness*, CLINIC, <https://cliniclegal.org/issues/liberian-refugee-immigration-fairness> (last visited Jan. 21, 2020); *Temporary Protected Status (TPS) and Deferred Enforced Departure (DED)*, CLINIC, <https://cliniclegal.org/issues/temporary-protected-status-tps-and-deferred-enforced-departure-ded> (last visited Jan. 21, 2020).

*Amici* also arrange opportunities for clergy and congregants to contact or meet with their members of Congress in support of the right of asylum and against harsh immigration enforcement, identify opportunities to participate in rallies opposing family separation, and facilitate connections between congregations and local immigrant rights groups. Some *amici* also participate directly in litigation on behalf of undocumented people. *See, e.g., Complaint, Catholic Legal Immigration Network, Inc. v. U.S. Citizenship & Immigration Servs.*, No. 8:19-cv-01074 (D. Md. May 3,

2019) (seeking release of immigration records of formerly separated families); Brief of *Amici Curiae* 127 Religious Organizations in Support of Respondent, *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, No. 18-587 (Oct. 4, 2019); Brief of *Amici Curiae* 75 Religious Organizations in Support of Plaintiffs, *Sierra Club v. Trump*, Nos. 19-16102, 19-16299, 19-16300, 19-16336 (9th Cir. Aug. 22, 2019).

Many *amici* provide resources for affiliated congregations to incorporate advocacy on immigration issues into their worship. For example, the Union for Reform Judaism and Central Conference of American Rabbis publish material for incorporation into Shabbat services that promotes a legislative solution for DACA, provide language for rabbis to include in prayers during worship to raise awareness about those affected by family separation, and host resources for Torah study that focus on treatment of immigrants. See *Gilbert and Eleanor Kraus Initiative Immigrant and Refugee Justice Action Center*, Religious Action Center of Reform Judaism, <https://rac.org/kraus> (last visited Jan. 21, 2020); *Immigration*, Religious Action Center of Reform Judaism, <https://rac.org/immigration> (last visited Jan. 21, 2020).

*Amici* also participate in a wide variety of broader public campaigns aimed at welcoming immigrants. For example, CLINIC created a social media campaign around the message “#HereToStay” in support of noncitizen youth who seek to remain in the country through the Deferred Action for Childhood Arrivals (“DACA”) program, and has published graphics encouraging the public to “urge” elected officials “to stand against th[e] cruel act” of rescinding DACA. See Catholic Legal Immigration Network, Inc. (CLINIC),

Facebook (Sept. 6, 2017), <https://www.facebook.com/cliniclegal/photos/a.10150295106843152.334381.39238118151/10155159638743152/?type=3&theater>.

**Religious Advice and Legal Counseling.**

*Amici* regularly advise undocumented individuals on matters both legal and spiritual. Religious advice may come from the pulpit or the confessional, as a statement to multitudes or advice to an individual. Religious leaders at sanctuary congregations often urge congregants to support undocumented immigrants in their communities and their families. *See, e.g.*, Eileen Johnson, *Two New Haven Churches Declared Sanctuaries for Undocumented Immigrants*, Yale Daily News (Apr. 27, 2017), <https://yaledailynews.com/blog/2017/04/27/new-haven-churches-to-be-sanctuary-for-undocumented-immigrants/> (“[A] pastor at the . . . United Methodist Church . . . decided to preach a sermon calling on members of his church to support offering sanctuary to undocumented immigrants . . .”); Dianna M. Nájuez, *Why a Phoenix Church Voted to Act as a Sanctuary*, Ariz. Republic (Mar. 3, 2017), <https://www.azcentral.com/story/news/politics/immigration/2017/03/03/phoenix-church-sanctuary-movement-immigrants/98113336/> (“Parishioners were handed a flier [advertising] a ‘sanctuary walk’ . . . to encourage communities of faith to open their church doors [to undocumented immigrants] for sanctuary.”); Rev. Randall Keeney, *Want to Provide Sanctuary to an Undocumented Person? This Is What it Takes.*, Wash. Post (July 14, 2019), <https://www.washingtonpost.com/opinions/2019/07/14/want-provide-sanctuary-an-undocumented-person-this-is-what-it->

takes/ (op-ed from religious leader describing how commitment to “serving [undocumented individuals] in sanctuary” “may be the most significant gift [one] can offer”). In the course of providing religious counseling and pastoral care to an undocumented individual, a religious leader may provide advice about whether remaining in the United States is the best option for that person or that person’s family.

Guided by a moral imperative to welcome immigrants, many *amici* also provide free or low-cost legal services to immigrants, including individuals without legal status. These services can include offering representation and legal advice to applicants seeking asylum, family-based immigration status, citizenship, and other forms of immigration relief. In addition to direct representation, many *amici* regularly consult with noncitizens about immigration law through legal clinics and “know your rights” presentations. Several *amici* maintain free drop-in legal clinics where individuals can meet with a lawyer and obtain advice about their rights and legal options or obtain resources enabling immigrants to represent themselves pro se. They also conduct presentations informing immigrants about their legal rights, and provide similar services in one-on-one meetings with individuals recently released from detention. Many congregations provide counseling through referral arrangements with local legal assistance organizations and social services.

*Amici* also provide other ancillary services to help immigrants as they navigate the legal terrain. These include offering free translation services, preparing country condition reports, providing group orienta-

tions and pro se workshops at detention centers, operating hotlines for immigrants in need, providing transportation to and from hearings and detention centers, coordinating pro bono counsel to assist with legal proceedings, and contacting detainees' families to collect documents in support of a request for relief.

To benefit from most of these services, noncitizens usually must be residing in the United States. Helping noncitizens vindicate their legal rights often implicitly encourages those individuals to maintain presence in the forum where those rights are adjudicated. Indeed, *amici* frequently help noncitizens pursue forms of immigration relief that are either expressly or implicitly conditioned on continuing to reside in the United States. For instance, victims of human trafficking or other crimes who are candidates for U or T visas—which can eventually lead to permanent residence status—as a practical matter must remain in the United States while the underlying crime is investigated or prosecuted. Undocumented young persons who are eligible for Special Immigrant Juvenile (“SIJ”) status must remain in the United States during the pendency of family court proceedings. See 8 U.S.C. § 1101(a)(27)(J) (defining SIJ as “an immigrant who is present in the United States” who meets certain criteria). In the vast majority of these cases, the applicants are in the United States without lawful status until these applications are adjudicated.

**Charitable Services.** In addition to advocating publicly and privately on topics related to immigration, *amici* provide a variety of other services to undocumented individuals and their families. Esperanza, for example, provides free diapers, clothing, schools supplies, and hygiene products to immigrants

in need. They also direct individuals to agencies that assist with mental health services, school enrollment, rent assistance, medical care, food banks, employment resources, supplemental nutrition assistance programs, and other related services. LSSNY operates childcare facilities, provides food and clothing assistance, coordinates foster care placements, and provides apartments for formerly homeless individuals, all without regard to immigration status. Through its New International Center, Catholic Charities provides free English language and citizenship preparation classes to anyone, irrespective of legal status.

These types of services are intended to help noncitizens feel included and welcomed in this country. For instance, CLINIC operates an annual holiday gift drive for children of formerly separated families. Children connected to the organization draft letters identifying gifts they want, and CLINIC makes the wish lists available to the public to facilitate donation of the gifts.

Finally, many *amici* are congregations affiliated with the New Sanctuary Movement. These houses of worship hold themselves out as places where immigrants at risk of apprehension are welcome, thereby explicitly expressing support for individuals who are undocumented. Importantly, *amici* do this work openly, in compliance with judicial warrants, and in a manner that does not otherwise impede immigration enforcement. In many cases, sanctuary is offered to individuals who have been in the United States for long periods and have U.S. citizen children, but do not have an open immigration case. Offering sanctuary provides these individuals time to avail themselves of

their legal options. By providing sanctuary and publicly adopting policies that welcome all persons, regardless of immigration or citizenship status, and that respect privacy by not inquiring about status, sanctuary congregations advocate for greater social acceptance and inclusion of undocumented persons and their families.

### **B. *Amici's* Work Is Protected by the Constitution**

All of this work is protected by the Constitution. Religiously motivated advocacy is protected by the First Amendment's protections of speech, petition, and the free exercise of religion. As this Court has explained, "oral and written dissemination of . . . religious views and doctrines is protected by the First Amendment." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). And "[t]he free exercise of religion means, first and foremost, the right to believe and *profess* whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added).

Accordingly, neither the federal government nor the states may dictate what a religious organization advocates. *See id.*; *cf. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160–64 (2002); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). That is true even if the organization advocates for actions that violate the law. *See United States v. Williams*, 553 U.S. 285, 298–99 (2008); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam); *cf. United States v.*

*Seeger*, 380 U.S. 163, 169–73 (1965) (discussing history of exemptions from conscription for religiously motivated conscientious objectors).

Providing specific religious advice to an individual is also constitutionally protected. “[I]ndividual participation and advocacy of religion . . . is affirmatively protected by the Free Exercise and Free Speech Clauses of the First Amendment.” *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 553 (1986) (emphasis removed). Just as the Government cannot dictate what is said in the pulpit, *Smith*, 494 U.S. at 877, it likewise cannot mandate what religious leaders advise individual congregants regarding matters of faith and conscience.

Legal counseling carries similar protections; what an attorney advises a client is “constitutionally protected expression.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001); *see also NAACP v. Button*, 371 U.S. 415, 428–29 (1963). *Amici*’s efforts to advise undocumented immigrants of their legal rights, or to connect them with qualified attorneys, are undoubtedly protected by the Constitution’s guarantees of free speech, petition, assembly, and due process. *See, e.g., Maness v. Meyers*, 419 U.S. 449, 471–72 (1975) (Stewart, concurring) (explaining that the “due process right to retained counsel in civil proceedings” does not permit a court to “arbitrarily prohibit or punish good-faith advice given by retained counsel”); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5–8 (1964) (holding that the First and Fourteenth Amendments protect the right of workers to form a legal referral organization).

The First Amendment also protects *amici*'s provision of religiously motivated and expressive humanitarian services to immigrant populations. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002) (“[C]haritable activities may constitute religious exercise if performed by religious believers for religious reasons . . .”), *aff’d*, 333 F.3d 156 (D.C. Cir. 2003); see also *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) (“[T]he solicitation of charitable contributions is protected speech . . .”). In addition to their religious motivation, many *amici* provide services to undocumented individuals out of a desire to express a message of welcome to those individuals particularly. These expressive acts are also entitled to First Amendment protections.

## II. THE ENCOURAGEMENT PROVISION IS UNCONSTITUTIONALLY OVERBROAD

The Encouragement Provision’s chilling effect on *amici*’s constitutionally protected work is exactly the type of concern that the overbreadth doctrine is designed to address. This Court has recognized that the protections of the First Amendment are of such vital importance that they justify “‘a second type of facial challenge,’ whereby a law may be invalidated as overbroad” based on its potential application to parties not before the Court. *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008)). The overbreadth doctrine was born “out of concern” that the threat of enforcement of an overbroad law may “deter or ‘chill’ constitutionally protected speech.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

That concern is heightened “when the overbroad statute imposes criminal sanctions,” *id.*, because “[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even *arguably* unlawful words, ideas, and images,” *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (emphasis added) (explaining that a vague criminal statute imposing “penalties including up to two years in prison for each act of violation” raised “special First Amendment concerns”).

To be invalidated on overbreadth grounds, a statute must punish a “substantial” amount of protected speech “judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Put otherwise, the statute must pose a “realistic danger” that it will “significantly compromise recognized First Amendment protections of parties not before the Court.” *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)).

#### **A. The Encouragement Provision Chills *Amici*’s Speech under the Plain Language of the Statute**

On its face, the Encouragement Provision threatens to chill much of *amici*’s constitutionally protected work. The Provision imposes severe criminal penalties on anyone who “encourages or induces” an individual to reside in the United States in reckless disregard of whether that individual has lawful status. 8 U.S.C. § 1324(a)(1)(A)(iv). Nearby provisions of Section 1324 separately prohibit, *inter alia*, transporting, concealing, or harboring undocumented immigrants,

conspiring to do so, or aiding and abetting such offenses. *See* 8 U.S.C. § 1324(a)(1)(A)(i)–(iii), (v). As the Ninth Circuit explained, the phrase “encourages or induces” forms the basis of a discrete offense that, far from being narrowed by neighboring offenses, must, to retain any meaning, capture conduct *other* than what those separate offenses prohibit. *See* Pet. App. 17a–18a.

The Encouragement Provision must therefore be read in accord with its ordinary meaning. “Encourage” ordinarily means to “spur on” or to “give help or patronage to,” while “induce” means “to lead on, move, influence, [or] prevail upon (any one) to do something.” Pet. App. 14a–15a (quotations omitted). And those terms unavoidably sweep in a vast array of both protected speech and expression—potentially including a “speech addressed to a gathered crowd,” an online campaign “directed at undocumented individuals on social media,” and other “general advocacy.” Pet. App. 37a.

Given the Provision’s broad sweep, there can be little doubt that it creates a “realistic danger” of significantly compromising *amici*’s First-Amendment-protected speech and expressive conduct. And should it remain standing, the possibility of enforcement is certain to chill *amici*’s expression. To illustrate the chilling effect, consider how the law could apply to just some examples of *amici*’s work:

- CLINIC’s #HereToStay social media campaign was aimed at expressing the group’s position that undocumented immigrants participating in DACA should be able to remain in the United States. CLINIC shared the symbol both

to raise awareness about DACA and the risk that it might be rescinded, as well as to encourage DACA participants to state publicly their desire and intention to stay in the country. That undoubtedly could be considered “encouragement.”

- Catholic Charities’ advocacy in favor of New York’s “green light law,” which permits individuals to obtain New York driver’s licenses irrespective of immigration status, was aimed at ensuring undocumented immigrants can travel to and from work and otherwise move freely without fear of facing deportation due to traffic stops. The group’s work on this legislation was explicitly premised on making undocumented immigrants feel welcome in New York and “prov[ing] to them what they already know—that they too are New Yorkers.” *Green Light Bill Gets the Green Light from Albany*, Catholic Charities Blog (June 20, 2019), <https://catholic-charitiesny.org/blog/green-light-bill-gets-green-light-albany>. The policy facilitates the integration of undocumented individuals into American society and reduces the legal risk of remaining. This likely encourages (or induces) some individuals without status to remain when they otherwise might not.
- Likewise, among the pastoral responsibilities of clergy affiliated with *amici*’s respective religions and religious movements is counseling congregants on how to deal with challenging life events in a manner consistent with their faith. There is a realistic danger that the En-

couragement Provision could be applied, for example, to a rabbi's advice to a congregant that it would be better to remain in the United States to stay close to her family when the rabbi knows or recklessly disregards that she is undocumented. The statute threatens to sweep in other, similar advice and counseling, such as connecting an undocumented congregant with those who could provide temporary housing or *pro bono* immigration legal advice.

- Houses of worship affiliated with several *amici* serve as sanctuary congregations, sheltering and supporting individuals at risk of removal. For example, AFSC, a Quaker organization with programs throughout the United States that work with immigrants through legal representation, leadership training, community organizing, and policy advocacy, works with congregations of different denominations that welcome, house, feed, and visit undocumented immigrants within their houses of worship or sanctuary spaces. Similarly, the New Sanctuary Coalition works to connect and engage with houses of worship that might be willing to serve as temporary safe spaces for immigrants at risk of deportation or to organize their congregants to accompany immigrants to check-ins with Immigration and Customs Enforcement. Such humanitarian work risks being categorized as encouraging or inducing undocumented immigrants to remain in the country.
- *Amici* and countless other religious groups engage in expressive charitable activities aimed

at aiding individuals irrespective of immigration status. Many *amici* provide food, toys, diapers, clothing, school items, and hygiene products to those in need, without regard to immigration status. They also provide services specifically aimed at immigrants, such as English-as-a-second-language classes. For undocumented persons in the greatest need, such charitable assistance can help make their life in this country possible. As such, there is a reasonable risk that these and other examples of direct support could be deemed violations of the Encouragement Provision.

These examples capture only a handful of *amici*'s advocacy, counseling, and charitable activities which could be construed to fall within the broad scope of the statute's prohibition against "encourag[ing]" an immigrant to remain in the United States unlawfully. The risk Section 1324(a)(1)(A)(iv) poses is not merely the risk of prosecution, but the risk also that *amici* are compelled to "remain silent" and curtail these important and religiously motivated activities (including those that benefit immigrants *with* legal status) to avoid the danger of prosecution. *See Reno v. ACLU*, 521 U.S. at 872. While constitutional protections for *amici*'s work are not absolute, they undoubtedly prevent the Government from enacting wholesale proscriptions against religious charities providing food, clothing, medical supplies, and other humanitarian aid to people in need, simply because those people lack immigration status. To do so would require *amici* to violate a core tenet of their faith and undermine the very message of welcome that motivates their work.

The breadth of the Encouragement Provision’s sweep is only further highlighted by its narrow “minister or missionary” exception. That exception provides that “[i]t is not a violation of” the Provision for a religious organization “to encourage . . . an alien who is present in the United States to perform the vocation of a minister or missionary . . . as a volunteer who is not compensated,” except for room and board, so long as “the minister or missionary has been a member of the denomination for at least one year.” 8 U.S.C. § 1324(a)(1)(C). The existence of the exception serves only to underscore that the Encouragement Provision is so broad it would otherwise criminalize a religious organization’s mere *invitation* to a *volunteer* missionary who is already residing in the United States. And the exception’s narrow application confirms that the Encouragement Provision reaches practically all religiously motivated activity that is *not* expressly exempted, including the conduct highlighted above. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”). As such, it potentially runs afoul of the long-understood autonomy afforded to religious institutions to determine their own affairs. *See, e.g., Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (noting that the Court’s Free Exercise jurisprudence “radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”).

The Encouragement Prohibition thus threatens to chill a substantial amount of *amici*'s protected speech and expressive activity. To avoid running afoul of the law, *amici* would have to close their doors to those seeking assistance upon learning, or even strongly suspecting, that the individuals lack lawful status. That is antithetical to *amici*'s religious mission. The Government cannot force religious humanitarian organizations to discriminate against the undocumented in violation of their personal and religious beliefs, just as it cannot "forc[e] a student to pledge allegiance, or forc[e] a Jehovah's Witness to display the motto 'Live Free or Die.'" *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006); see *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government . . . could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

**B. The Government's Reading of the Encouragement Provision Is Implausible and Still Chills *Amici*'s Protected Expression**

The Court "must presume that [the] legislature says in a statute what it means and means in a statute what it says." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (alteration in original) (quotation omitted). The Encouragement Provision, by its own terms, means that anyone who inspires, emboldens, or helps noncitizens remain in the country without lawful status faces a potential felony prosecution. That possibility impermissibly chills *amici*'s protected speech and expressive activity.

The Government, for its part, attempts to narrow the reach of the Encouragement Provision to assure the Court that it would never prosecute preachers for their sermons or charities for handing out food and clothing. But as Respondent explains, *see* Br. for Resp't 19–22, the Government's reading of the statute is less an alternative interpretation than it is a wholesale rewrite of the statute. As discussed above, the Government's interpretation conflicts with the plain text of the statute, so it cannot be correct. Regardless, even under the Government's implausible construction, the statute would still chill *amici's* speech and expressive activities.

The Government argues that the Encouragement Provision reaches only direct facilitation or solicitation of another's illegal activity. Br. for United States ("U.S. Br.") 18–22. Yet even it concedes that the Provision is broader than an ordinary facilitation or solicitation statute. For one thing, the Government maintains that the provision *criminally* punishes the facilitation of *civil* immigration violations. *See* U.S. Br. at 41–44. Thus, the Encouragement Provision makes no distinction between encouraging likely *remediable* civil violations (*e.g.*, encouraging a noncitizen without status to remain in the country where doing so may improve his or her ultimate chance of obtaining legal status), and encouraging criminal or obviously un-remediable civil violations. The Government also has conceded, as it must, that the Encouragement Provision does not require any specific intent to violate immigration law—instead, it merely requires showing that the defendant's encouraging statements were "in reckless disregard" of whether the intended recipient is in the country unlawfully.

See U.S. Br. at 25; 8 U.S.C. § 1324(a)(1)(A)(iv).

Taken together, the Government’s reading would still render the Encouragement Provision an exceptionally broad criminal offense. Whereas ordinary facilitation or solicitation offenses criminalize only encouraging a specific *criminal* offense with the *intent* to facilitate its commission, see Wayne R. LaFave, 2 Substantive Criminal Law § 11.1 (3d ed. 2017) (solicitation); *id.* § 13.2 (accomplice liability), the Encouragement Provision would, on the Government’s view, criminalize encouraging a *civil* infraction with *reckless disregard* for whether the offense results. Moreover, whether it would actually constitute a civil offense for an immigrant to remain is particularly uncertain in this context, given that immigration status is often fluid and enforcement is often a matter of “broad [executive] discretion” based on the “equities of [each] individual case.” *Arizona v. United States*, 567 U.S. 387, 395–96 (2012). The severe criminal consequences attending such a sweeping solicitation offense is all but certain to chill *amici*’s protected speech and activity.

Consider that many *amici* offer consultations to individuals with and without lawful status, and that such consultations sometimes include descriptions or assessments of immigration benefits that flow from continuing to reside in the United States without status. For example:

- For non-lawful permanent residents to become eligible for cancellation of removal (“non-LPR cancellation”) they must maintain continuous physical presence in the country for at least ten

years. See 8 U.S.C. § 1229b(b)(1)(A). See generally *Akwasi Agyei v. Holder*, 729 F.3d 6, 15 (1st Cir. 2013) (describing non-LPR cancellation). If someone who has resided in the country without status for nine and a half years were to seek counsel through one of *amici*'s programs, the attorney may advise the individual that, if they remain a few more months, they would potentially become eligible for non-LPR cancellation.

- In a similar vein, *amici* might advise someone without status that her U.S. citizen child could sponsor her permanent residency should she remain until the child reaches a certain age. Or more simply, *amici* might inform an individual with a removal order of the risks involved with providing DHS an updated change of address form, or other actions and behavior that may increase the chance of imminent removal.
- As discussed *supra* at 11, individuals eligible for U or T visas, as a practical matter, must remain in the United States during the pendency of related criminal proceedings to be eligible to seek lawful immigration status. Likewise, those eligible for SIJ status must stay in the country until the conclusion of family court proceedings. In counseling such individuals, *amici* would likely advise them of those requirements, which in the vast majority of cases means the applicant must remain without status in the United States in order to remain eligible for acquiring status.
- And even where someone has an existing order

of removal, legal avenues to lawful status may be available. For instance, CLINIC has successfully challenged dozens of *in absentia* removal orders issued to families from El Salvador, Guatemala, and Honduras that had valid asylum claims. See *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum*, CLINIC (Apr. 16, 2018), <https://clinicgal.org/resources/removal-proceedings/denied-day-court-governments-use-absentia-removal-orders-against>.

Such advice is unquestionably protected by the First Amendment. See *supra* Part I.B. Yet it is not difficult to see how any of the hundreds of religious organizations and groups that offer such free advice and consultation face a realistic danger of prosecution under the Government's necessarily expansive reading of the Encouragement Provision. Whether or not the attorney explicitly advises the immigrant to remain, the effect of accurately describing the immigrant's legal options would undoubtedly have the same effect. Because the purported solicitation of offense lacks any purpose requirement, and the underlying offense need not be criminal, the Government could plausibly argue that *amici's* accurate legal advice facilitates the commission of a civil offense (*e.g.*, continuing to "reside" unlawfully).

And the Encouragement Provision, even as construed by the Government, would still present an intolerable risk of criminalizing *amici's* religious advocacy, counseling, and humanitarian services. For instance:

- If a religious leader directly encourages an undocumented immigrant to “stay” in the United States to be close to her U.S. citizen children or grandchildren for whom she may be the sole caregiver, or to continue working here as the primary breadwinner for her family, this would still be prohibited under the Government’s reading of the statute.
- Providing an undocumented immigrant with food, clothing, and physical shelter—as many sanctuary congregations do—would, in the Government’s view, still “assist” the immigrant with committing the civil offense of remaining in the United States without documentation.
- Driving a congregant to a medical appointment or a legal client to an asylum interview would still help the individual remain in the United States.
- Helping undocumented students obtain religious scholarships for college would undoubtedly “induce” or “encourage” those students to remain in the United States.

That is more than enough to chill *amici*’s expressive and religious activities. Violation of the Encouragement Provision carries a hefty penalty—a felony conviction, a fine, and up to five years imprisonment for the baseline offense. 8 U.S.C. § 1324(a)(1)(B)(ii). For those providing legal services, a conviction would almost certainly lead to disbarment. The “opprobrium and stigma of a [potential] criminal conviction” combined with “[t]he severity of criminal sanctions” is practically certain to cause *amici* “to remain silent rather than communicate even *arguably* unlawful

words [or] ideas.” *Reno*, 521 U.S. at 872 (emphasis added).

The Government does not refute the risk of prosecution under any of the scenarios described above. In response to the Ninth Circuit’s legitimate concerns about the statute’s broad sweep, the Government offers the threadbare assurance that merely encouraging another to unlawfully reside in the United States does not fall within the statute—*e.g.*, “[j]ust as a teenager does not . . . solicit marijuana possession merely by saying to a friend ‘I encourage you to try smoking pot,’ a grandmother does not violate [the Encouragement Provision] merely by saying to her grandson whose visa has expired, ‘I encourage you to stay.’” U.S. Br. at 35. But the Government offers no reasoning or legal citation to support this declaration. It fails to explain why such speech (and other, similar speech) cannot possibly fall within the Encouragement Provision, as the Government has construed it.

Instead, the Government simply insists that its reading would not reach abstract advocacy, and that solicitation offenses must generally be directed at *specific* noncitizens. See U.S. Br. at 34–35 (contending that “[t]he hypothetical scenarios that the Ninth Circuit invented are . . . misplaced because” “[f]acilitation and solicitation laws like [the Encouragement Provision] are ordinarily understood not to prohibit abstract or generalized advocacy,” and because the Provision requires “that any inducement or encouragement be directed to a particular identifiable alien or aliens”). But that does not solve the constitutional problem. The grandmother who encourages her grandson to stay in the United States in violation of the law is not engaged in “abstract advocacy”; she is

encouraging a particular, known individual. Thus, even if generalized advocacy is not covered under the Government’s construction, *amici*’s one-on-one religious advice and legal counsel would be—it involves specific advice offered to particular undocumented individuals. The same goes for many of the services that *amici* offer, which are provided to *specific* immigrants that *amici* know are, or are likely to be, undocumented.

There is also nothing to the Government’s contention that the Court must limit its focus to Encouragement Provision offenses committed for the purpose of commercial advantage or financial gain. See U.S. Br. 36. The statute establishes a baseline offense for anyone who commits a “violation of” the Encouragement Provision, regardless of motivation. 8 U.S.C. § 1324(a)(1)(B)(ii). Various enhancements can increase the maximum term of imprisonment, but they are not elements of the baseline offense. Regardless, while many *amici* provide legal services to immigrants for free, some also provide services at reduced cost. Thus, in instances where an *amicus* accepts a minimal fee for legal services, it would still be at risk of prosecution if it provided the types of counseling discussed above.

Finally, the Government seeks to get out from under the weight of these scenarios by arguing that there are no real-world examples of it pursuing these types of prosecutions. U.S. Br. 32. But the Government has already attempted to prosecute humanitarian workers offering food and water to migrants crossing the border. See, e.g., Teo Armus, *After Helping Migrants in the Arizona Desert, an Activist Was Charged With a Felony. Now, He’s Been Acquitted.*,

Wash. Post (Nov. 21, 2019), <https://www.washingtonpost.com/nation/2019/11/21/arizona-activist-scott-warren-acquitted-charges-helping-migrants-cross-border/>. And the Department of Justice has identified “all conduct proscribed pursuant to 8 U.S.C. § 1324”—which includes the Encouragement Provision—as a high prosecution priority. See Memorandum from the Attorney General 1 (Apr. 11, 2017), *available at* <https://www.justice.gov/opa/press-release/file/956841/download>.

Indeed, the Government’s own attorneys acknowledged that it *could* prosecute an attorney for providing accurate legal advice to an immigrant that would encourage or induce the immigrant to remain in the United States. In *United States v. Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012), “[t]he government [took] the position that giving illegal aliens advice to remain in the United States while their status is disputed constitutes felonious conduct under § 1324(a)(1)(A)(iv) because it constitutes encouragement or inducement under the statute.” *Id.* at 203. There is little doubt, in light of this history, that the Encouragement Provision threatens *amici*’s work with the realistic danger of prosecution, thereby chilling *amici*’s speech.

Indeed, the Government does not seriously attempt to persuade this Court that no “realistic danger” of prosecution exists under its newly crafted solicitation crime. Rather, the Government’s position boils down to a single belated plea to trust that it will not abuse its discretion and pursue protected speech and religious expression that plainly falls within the statute. But the Government’s eleventh-hour com-

mitment to *noblesse oblige* is irrelevant; it cannot defeat the realistic danger created by the Encouragement Provision itself, even accepting the Government's own implausible interpretation. The statute simply sweeps too broadly to be allowed to stand.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JEREMY GIRTON	ANTON METLITSKY
SAMUEL LEHMAN	<i>(Counsel of Record)</i>
VIVAAN NEHRU	ametlitsky@omm.com
O'MELVENY & MYERS LLP	O'MELVENY & MYERS LLP
1625 Eye Street, NW	Times Square Tower
Washington, DC 20006	7 Times Square
	New York, NY 10036
	(212) 326-2000

*Attorneys for Amici Curiae*

January 22, 2020