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 NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities

Page(s)

Cases

Constitution and Statutes

Other Authorities

INTERESTS OF THE *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958. It has a nationwide membership of up to 40,000 attorneys including affiliates' members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper and efficient administration of justice and files numerous amicus briefs each year in federal and state courts addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

The members of the National Association of Federal Defenders ("NAFD") provide representation pursuant to 18 U.S.C. § 3006A to persons accused of federal crimes who lack financial means to hire private counsel. The NAFD membership advocates on behalf of the criminally accused, with the core mission of protecting the constitutional rights of their clients and safeguarding the integrity of the federal criminal justice system. Specific to this case, attorneys, investigators, and other NAFD personnel regularly work on behalf of individuals who are charged with immigration crimes or who are charged with non-immigration

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

crimes and have immigration notifications lodged against them.

NACDL and NAFD have a profound interest in assuring that 8 U.S.C. § 1324(a)(1)(A)(iv)—the criminal statute prohibiting activity that can be construed as "encourag[ing] or induc[ing]" a noncitizen to reside in the United States unlawfully—be declared unconstitutional so that ordinary advocacy and humane interactions with clients and their families and friends not be chilled or, if undertaken, criminalized. *Amici* are concerned that the statutory provision at issue in this case, 8 U.S.C. § 1324(a)(1)(A)(iv), offends core principles of due process.

INTRODUCTION AND SUMMARY OF ARGUMENT

Acts of kindness, gestures of solidarity, and words of advice—particularly legal advice about the perils and paths toward citizenship—are all capable of being viewed as criminal under the vague provision at issue in this case. By seeking to uphold the provision, the government would allow the force of the state to be leveled against words or deeds aimed at supporting people in need. The Due Process Clause does not tolerate enforcement of a criminal statute whose meaning is so uncertain and leaves so much room for arbitrary power.

Under 8 U.S.C. § 1324(a)(1)(A)(iv) ("Subsection (iv)"), any person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation

of law" commits a felony punishable by up to five years in prison.

Subsection (iv)'s terms have broad application, tying criminal culpability to any statement or act that "encourages or induces" an undocumented noncitizen to enter the United States—or to remain in the country if she is already here. Not only is Subsection (iv)'s scope unduly broad, but the precise contours of its broad reach are impossible to pin down. Accordingly, in addition to criminalizing recognized First Amendment protections in violation of the overbreadth doctrine, Subsection (iv) also violates the void-for-vagueness doctrine, "a faithful expression of ancient due process" principles. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring).

NACDL and NAFD submit that Subsection (iv) violates the Fifth Amendment's prohibition of vague criminal laws for several reasons. First, ordinary people have no way of knowing what the provision outlaws and what it permits. Encouragement and inducement are indefinite terms whose meaning depends on subjective determinations. What encourages one person may not encourage another, just as "[c]onduct that annoys some people does not annoy others." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). The inherent malleability of Subsection (iv)'s broad terms leads to the provision's second principal defect: Subsection (iv) is unconstitutionally vague because it affords prosecutors and law enforcement officers unrestrained discretion and therefore invites arbitrary and selective enforcement. In addition, the threat of criminal prosecution under such standardless terms has the collateral effect of stifling First

Amendment freedoms. While the twin concerns of the vagueness doctrine—fair notice and arbitrary enforcement—apply to any criminal statute, this Court requires stricter adherence when the statute involves speech, in order "to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2309–10 (2012). Subsection (iv)'s chilling effect is especially pernicious because of how the statute impedes the work of criminal defense attorneys and other professionals whose advice to undocumented noncitizens can be punished under Subsection (iv)'s broad scope.

For these reasons, Subsection (iv)'s vagueness represents an alternative and independent basis for facial challenge. Although the concepts underlying overbreadth and vagueness are often "logically related," *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983), the void-for-vagueness doctrine entails a separate inquiry deserving of this Court's attention given the severe uncertainty and risk of arbitrary enforcement that Subsection (iv) creates. The statute under which Ms. Sineneng-Smith was convicted cannot withstand constitutional scrutiny where, in addition to violating the First Amendment as the Ninth Circuit held, it also offends basic principles of due process guaranteed by the Fifth Amendment.

ARGUMENT

I. Subsection (iv) is unconstitutionally vague.

The question presented before this Court is "[w]hether the federal criminal prohibition against encouraging or inducing illegal immigration . . . is facially unconstitutional." Pet. I. While the Ninth

Circuit invalidated Subsection (iv) on First Amendment overbreadth grounds, *amici* explain that the provision's vagueness represents another basis for finding Subsection (iv) facially unconstitutional and for affirming the Ninth Circuit's judgment.[2]

A. Subsection (iv) violates the Fifth Amendment's prohibition of vague criminal laws.

"No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The constitutional prohibition of vague criminal statutes is "consonant alike with ordinary notions of fair play and the settled rules of law." *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). A criminal statute is unconstitutionally vague in violation of due process for either of two reasons: first, if "it fails to give ordinary people fair notice" of what is proscribed; and, second, if it is "so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556.

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[2] The Ninth Circuit invited briefing on three discrete issues, one of which included whether Subsection (iv) was void for vagueness. After invalidating Subsection (iv) as overbroad, the court of appeals declined to "reach the separate issue of whether the statute is void for vagueness." Pet. App. 39a n.15. Ms. Sinenenng-Smith argued vagueness in district court proceedings and in her opening brief on appeal. Dist. Ct. Dkt. No. 46 at 13–18; Appellant's C.A. Br. 27–34. The issue of Subsection (iv)'s unconstitutional vagueness warrants this Court's review, especially considering that it falls squarely within the question presented and Respondent pressed the argument below.

1. The statute's expansive, subjective terms fail to give fair notice of what is prohibited.

Subsection (iv)'s terms violate the fair notice element of the void-for-vagueness doctrine, whose "purpose is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality opinion); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."). A criminal law provides inadequate notice where it lacks "any ascertainable standard," *Smith v. Goguen*, 415 U.S. 566, 578 (1974), and the meaning of its terms depends on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *United States v. Williams*, 553 U.S. 285, 306 (2008).

Subsection (iv)'s expansive terms establish few parameters, creating intolerable ambiguity about what the law intends to criminalize. Without guidance, courts of appeals have relied on definitions in Black's Law Dictionary and interpreted Subsection (iv)'s terms broadly to mean everything from "to inspire with courage," *see* Pet. App. 14a–15a (quoting *United States v. He*, 245 F.3d 954, 960 (7th Cir. 2001)), to "to embolden" and "to raise confidence," *see United States v. Lopez*, 590 F.3d 1238, 1249 (11th Cir. 2009)). The sheer expansiveness of these terms is troubling. As the government itself has conceded, "encourages or induces" can allow for wholesale prosecution of legal professionals who help undocumented clients already

in the country navigate immigration laws.[3] Indeed, the statute poses a serious concern for the criminal defense bar. *See infra* pp. 21–24. Yet, for purposes of compliance with due process, it is the statute's imprecision that is particularly dangerous.

Taking the statutory terms at face value, it is unclear whether people whose contact with undocumented noncitizens is *even more* attenuated than the immigration attorney's may be found liable for offering innocent help amounting to encouragement or inducement. Would "soup kitchen managers" or "low-income shelters"[4] who serve a hot meal on a winter's day, knowing that undocumented noncitizens are among its clientele, be liable for encouragement? Would a volunteer who provides a group of undocumented immigrants with English language tutoring "encourage" them to remain in the country? Would an attorney or staff member who refers a person to a soup kitchen potentially commit a crime? At their core, these acts broadcast a message of care and compassion that may, in fact, inspire undocumented immigrants to stay in the country. The same questions apply to schools, health clinics and religious groups, and virtually any other actual assistance to or expressions of support for undocumented immigrants.

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[3] The government admitted as much in another case when it took the position that, "an immigration lawyer would be prosecutable for the federal felony created by § 1324(a)(1)(A)(iv) if he advised an illegal alien client to remain in the country because if the alien were to leave the alien could not return to seek adjustment of status." Pet. App. 24a (quoting United States v. Henderson, 857 F. Supp. 2d 191, 203 (D. Mass. 2012)).

[4] *See* United States v. Delgado-Ovalle, No. 13-20033-07-KHV, 2013 WL 6858499, at *7 (D. Kan. Dec. 30, 2013).

Amici do not present these examples merely to illustrate that Subsection (iv) is imprecise at its margins. As this Court recognizes, difficulty in "determin[ing] whether the incriminating fact . . . has been proved" is not what renders a statute vague. *Williams*, 553 U.S. at 306. Instead, vagueness results when it is impossible to determine "precisely what that [incriminating] fact is." *Id.* That an endless array of cases are prosecutable under Subsection (iv) illustrates its indeterminacy about what *kind* of conduct is covered and what kind is not.

The crux of Subsection (iv)'s imprecision is its subjectivity. Whether one criminally encourages or induces an undocumented noncitizen to reside in the country unlawfully is incapable of objective meaning: what encourages one person may have no effect on, or may even discourage, another. *Compare Morales*, 527 U.S. at 62 (plurality opinion) (holding an anti-loitering ordinance void for vagueness where whether someone had "no apparent purpose" for standing on a sidewalk was "inherently subjective"); *Coates*, 402 U.S. at 614 (finding unconstitutionally vague an ordinance criminalizing conduct "annoying to persons passing by" because "[c]onduct that annoys some people does not annoy others"); *Baggett v. Bullitt*, 377 U.S. 360, 368 (1964) (invalidating on vagueness and overbreadth grounds an oath requiring teachers to forswear an "undefined variety" of behavior considered "subversive" to the government). As with these examples, liability under Subsection (iv) hinges on the subjective reactions of others and therefore fails to give the ordinary person notice of what the state permits and what it forbids. The inherent subjectivity of the terms is doubly problematic because it creates risk

that charging decisions will be based on the whims of law enforcement officials. *See infra* pp. 10–13.

Subsection (iv)'s failure to specify an explicit *mens rea* standard for "encourages or induces" exacerbates the notice problem, potentially extending criminal liability to good-faith actors. This Court instructs that a statute's constitutionality under the vagueness doctrine is "closely related" to whether it contains a *mens rea* requirement. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979) ("Because of the absence of a scienter requirement in the provision . . . the statute is little more than 'a trap for those who act in good faith.'") (quoting *United States v. Ragen*, 314 U.S. 513, 524 (1942)). Subsection (iv) is silent on the *mens rea* required for "encourages or induces." Further, Subsection (iv) only imposes on defendants a knowing or reckless disregard standard for the fact an unauthorized immigrant's entry or residence "will be in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv). Subsection (iv)'s lack of an explicit, heightened scienter requirement contributes to the law's failings in meeting the demand of fair notice. "The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains." *Baggett*, 377 U.S. at 373.

Finally, Subsection (iv) lacks any "narrowing context", *cf. Williams*, 553 U.S. at 306, that might otherwise clarify the uncertain meaning of "encourages or induces." Subsection (iv) stands in stark contrast to other criminal statutes that this Court has upheld against vagueness challenges. In *Williams*, for example, this Court upheld a provision that criminalizes "advertis[ing], promot[ing], present[ing],

distribut[ing], or solicit[ing]" child pornography. *Williams*, 553 U.S. at 289–90 (quoting 18 U.S.C. § 2252A). In finding the provision neither overbroad nor vague, this Court credited the steps Congress took in the interim to define its scope after its predecessor version was declared unconstitutional in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Between *Free Speech Coalition* and *Williams*, Congress "responded with a carefully crafted attempt to eliminate" the constitutional problems the Court identified. *Williams*, 553 U.S. at 307. This Court described the legislative narrowing that saved the successor statute from both an overbreadth and a vagueness challenge, especially the sections defining "sexually explicit conduct" and "the commonsense canon of *noscitur a sociis*" used to limit the otherwise broad meaning of "promotes" and "presents." *Id.* at 293, 294; *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 20–21 (2010) (noting that "Congress also took care to add narrowing definitions to the material-support statute over time" which "increased the clarity of the statute's terms"). Here, though, Congress has taken no such action: the operative language "encourages or induces" remains undefined. Nor has Congress returned to the "drawing board" as it did after *Free Speech Coalition* to specify the meaning of terms. If anything, Subsection (iv)'s scope has broadened over time rather than narrowed. *See infra* pp. 16–17.

2. Subsection (iv) authorizes arbitrary and discriminatory enforcement.

By predicating liability on such imprecise terms, Subsection (iv) also violates the vagueness doctrine's

second test—that criminal laws must "establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (citation omitted). The concern is that "[v]ague laws invite arbitrary power." *Dimaya*, 138 S. Ct. at 1223 (Gorsuch, J., concurring); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis"). The indeterminate nature of what behavior might rise to the level of "encourages or induces" grants prosecutors unrestrained discretion, creating risk of unguided enforcement under the statute. This risk "amounts to a denial of due process." *Goguen*, 415 U.S. at 576 (finding a state law void for vagueness where its prohibition of treating an American flag "contemptuously" permitted selective enforcement). These concerns are especially pronounced here, where (1) the statute threatens criminal punishment, (2) criminal defense lawyers and staff are potential targets under the statute, and (3) there is potential not only for arbitrary treatment, but also "seriously discriminatory" treatment. *Williams*, 553 U.S. at 304.

Vagueness concerns are intensified where a statute such as Subsection (iv) imposes criminal penalties. *Cf. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982) ("The Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

Moreover, as this Court has noted, "[t]he inquiry is of particular relevance when one of the classes most

affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the state." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) (invalidating on vagueness grounds a state attorney discipline rule barring extrajudicial statements). In discussing the provision's risk of selective enforcement, this Court in *Gentile* explained that there is a special interest in avoiding vagueness when a law potentially affects criminal defense lawyers because of their vital role in serving as a check against law enforcement, both through their speech and through their actions defending clients. *Id.* (noting that the sanctioned attorney "succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government"). Subsection (iv) similarly affects criminal defense lawyers and immigration attorneys who often defend against state action and possible instances of governmental overreach. A law as imprecise as Subsection (iv) invites selective treatment of these individuals.

Finally, the concern about arbitrary enforcement should apply with special force in the context of immigration, which raises the stakes of discriminatory treatment. With such unfettered discretion, future Executive branch and enforcement officials could in theory wield that power to target individuals who are allied with or who support specific groups of undocumented noncitizens based on race, religion, or national origin, all under the guise of controlling illegal immigration. *See, e.g.*, *Melendres v. Arpaio*, 784 F.3d 1254, 1260–61 (9th Cir. 2015) (upholding injunction against race-based stops related to immigration enforcement). Members of the criminal defense bar,

who frequently advocate on behalf of minority communities and help them secure access to the courts and vindicate their rights, could end up bearing the brunt of enforcement under Subsection (iv). *Cf. NAACP v. Button*, 371 U.S. 415, 434 (1963) (declaring a state law unconstitutional where it risked "smothering" the efforts of NAACP to pursue litigation on behalf of minorities).

In the court of appeals, the government characterized "speeches, publications, and public debate expressing support for immigrants" as beyond the scope of Subsection (iv)'s prohibitions. Pet. App. 36a. But any assurances by the government of fair enforcement of Subsection (iv), even if "well-intentioned", "do not neutralize the vice of a vague law." *Baggett*, 377 U.S. at 373. Again, in its opening brief, the government tries to allay concerns about the statute's constitutionality by pointing to the "[a]ctual prosecuted cases, under the current and former versions of the statute." Gov. Br. 28–29. The government says these examples demonstrate that Ms. Sineneng-Smith's statute of conviction is legitimate in scope. *Id.* However, "[i]t is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta*, 306 U.S. at 453. Allowing prosecutors to "shap[e] a vague statute's contours through their enforcement decisions" would transfer to them a job that belongs to Congress. *Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring).

3. **"Encourages or induces" cannot be clarified in the way the government seeks.**

In an attempt to ascribe narrower and clearer meaning to "encourages or induces," the government strains to equate these terms with familiar terms involving criminal complicity. In its reply brief at the petition stage, the government said that finding Subsection (iv) unconstitutionally vague would "suggest[] that many standard state accomplice-liability and solicitation laws are themselves unconstitutionally vague." Pet. Reply. 11. The government presses this argument further in its opening brief, suggesting Subsection (iv)'s terms have established meaning because the provision is akin to an aiding-and-abetting or criminal solicitation provision. *See* Gov. Br. 19 (asserting that encourage and induce are "familiar criminal-law terms of art that refer to the facilitation or solicitation of illegal conduct").

However, the government's argument defies basic principles of statutory interpretation. In trying to equate "encourage" or "induce" with other terms, the government resorts to citing several state and federal criminal statutes that define criminal complicity and criminal solicitation. *See* Gov. Br. 20–21. Yet, in these state and federal statutes, "encourage" or "induce" appear alongside a string of other verbs, such as aid, abet, advise, solicit, and command. For each statute cited, the canon of *noscitur a sociis*, which allows words listed together to help define the others, counsels that "encourages" or "induces" conform to a narrower, more precise meaning by virtue of their

proximity to other verbs. In *Williams*, this Court applied the same principle when considering whether "promotes" and "presents" were impermissibly vague. *Williams*, 553 U.S. at 294 (assigning a narrower meaning to "presents" and "promotes", otherwise susceptible to "wide-ranging meanings," where the law listed them with "distributes," "advertises," and "solicits"). Here, unlike the statutory provision in *Williams*, and unlike the state and federal criminal statutes that the government cites, "encourages" and "induces" appear by themselves and without definition, retaining their broad, nebulous meaning.[5]

Subsection (iv) lacks another important feature of criminal aiding-and-abetting and solicitation statutes: the conduct assisted must be a criminal offense, not just a civil infraction. As the Ninth Circuit noted below, "aiding and abetting requires the commission of a crime by another, but Subsection (iv) applies to both criminal and civil violations of the immigration laws." Pet. App. 32a. Indeed, an undocumented immigrant who resides in the United States in violation of law commits a civil offense. *See Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general rule, it

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[5] In cases outside of the context of Section 1324(a)(1)(A)(iv), this Court and others have given the statutory terms "encourages" or "induces" a much broader meaning than what the government proposes here. *See, e.g.*, Int'l Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 701–02 (1951) ("The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion."); State v. Melchert-Dinkel, 844 N.W.2d 13, 23–24 (Minn. 2014) (holding that the words "encourages" and "advises" must be severed from state statute that prohibits encouraging, advising, or assisting another person's suicide because "the common definitions of 'advise' and 'encourage' broadly include speech that provides support or rallies courage").

is not a crime for a removable alien to remain present in the United States."). Therefore, the underlying conduct that is either encouraged or induced under Subsection (iv) is not a crime.

The government asserts that the statutory history confirms that Subsection (iv)'s terms refer to criminal solicitation and facilitation. *See* Gov. Br. 18, 22¬24. This assertion is without merit. Although a statute's history can provide clues about otherwise uncertain text, in this case, the history that the government presents is inapt. The government cites earlier immigration laws in an attempt to draw a straight line between them and the current law at Subsection (iv). *Id*. at 22 ("[Section 1324(a)(1)(A)(iv)] was developed as, and remains today, a prohibition on facilitation and solicitation."). However, the government's version of the statutory history glosses over developments showing that Subsection (iv)'s path was non-linear, and its scope became broader and much less defined over time.

In particular, the provision that Congress enacted in 1952 as part of the Immigration and Nationality Act (INA) deviated from earlier immigration laws in 1885 and 1917, which targeted only the use of contract-labor to draw immigrants into the country. *See* Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333 (prohibiting "knowingly assisting, encouraging or soliciting the migration or importation of any alien . . . to perform labor or service of any kind under contract or agreement"); Act of Feb. 5, 1917, ch. 29, § 5, 39 Stat. 879 (prohibiting "induc[ing], assist[ing], encourag[ing], or solicit[ing] the importation of migration of any contract labor . . . into the United

States"). The 1952 provision, on the other hand, is untethered from a focus on labor contractors. *See* Pub. L. No. 82-414, § 274, 66 Stat. 163, 228–29 (1952). It also removed the words "assist" and "solicit" that might have narrowed the meaning of the otherwise vague standard of encouragement.[6] The current version of Subsection (iv), as amended in 1986, applies not only to encouraging unlawful entry by undocumented noncitizens without reference to contract labor; it further criminalizes encouraging those who are already in the country to continue to "reside" unlawfully. 8 U.S.C. § 1324(a)(1)(A)(iv). Subsection (iv), broader in scope and cut loose from its specific contract-labor application, bears little resemblance to the 1885 and 1917 statutes on which the government relies.

The government invokes the canon of constitutional avoidance in urging this Court to adopt a narrower construction of Subsection (iv) so that it passes muster and is "not a far-reaching prohibition on innocent advocacy." *See* Gov. Br. 27–28. The problem, though, is that the government's reading of the provision as a "conventional criminal prohibition on facilitating or soliciting illegal activity," *id.*, simply inserts different words into the provision. That reading also has no basis in Subsection (iv)'s statutory history.

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[6] In 1952, testimony by then-Attorney General James P. McGranery expressed concerns that section 274—the 1952 encouragement provision—was vague, needed to be "clarified", and was "seriously inadequate." H. Comm. on the Judiciary, 82d Cong., Hearings Before the President's Comm'n on Immigration and Naturalization 1350–51 (Comm. Print 1952) (statement of the Hon. James P. McGranery, Att'y Gen. of the United States).

The government's proposed reading thus replaces "encourages or induces" with two verbs that Subsection (iv) plainly lacks: solicits and facilitates.

Rewriting the text of Subsection (iv) in this manner violates separation of powers principles. This Court recognizes that the vagueness doctrine is often a function of the separation of powers. *See Dimaya*, 138 S. Ct. at 1212 ("[T]he [vagueness] doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not"). In rejecting the government's proposed use of the avoidance canon in another case involving a vagueness challenge, this Court held that "[r]espect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (finding 18 U.S.C. § 924(c)(3)(B)'s residual clause unconstitutionally vague and declining to employ the avoidance canon). If Congress wanted "encourage" and "induce" to carry a similar meaning to facilitate and solicit, it could include those terms or define "encourage" and "induce" accordingly rather than leaving prosecutors, police, jurors, and the judiciary to guess with too large a degree of uncertainty. "It is for the people, through their elected representatives, to choose the rules that will govern their future conduct." *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring). Therefore, this Court should find Subsection (iv) invalid rather than strain to write in alternative text it does not contain.

B. Subsection (iv)'s vagueness chills protected speech in violation of the First Amendment, compounding the statute's constitutional infirmities.

A statute deserves even more exacting scrutiny when it interferes with First Amendment freedoms. While the vagueness doctrine is "an outgrowth not of the First Amendment, but of the Due Process Clause," *Williams*, 553 U.S. at 304, this Court applies "a more stringent vagueness test," requiring greater statutory precision, where "the law interferes with the right of free speech or of association." *Hoffman Estates*, 455 U.S. at 499. The reason why the test is stricter in the First Amendment context is "to ensure that ambiguity does not chill protected speech." *Fox Television Stations*, 132 S. Ct. at 2309–10; *Hoffman Estates*, 455 U.S. at 499 ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.").

First, Subsection (iv) interferes with the right of free speech. Subsection (iv)—by its plain terms and scope—criminalizes protected speech.[7] This Court in *Williams* cited the statement "I encourage you to obtain child pornography" as an example of speech that

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[7] The government argues that, to the extent Subsection (iv) covers speech, it only covers speech undeserving of First Amendment protection under the "speech integral to criminal conduct" exception. *See* Gov. Br. 31–32. Yet, the government's arguments seeking to narrow the plain scope of Subsection (iv) by suggesting the law only prohibits unprotected criminal solicitation or aiding-and-abetting is incorrect. *See supra* Section I.A.3; *see also* Pet. App. 33a ("Subsection (iv) looks nothing like an aiding and abetting statute.").

the government could not constitutionally regulate. *Williams*, 553 U.S. at 300. Worse yet, the very threat of prosecution under Subsection (iv) deters people from exercising their free speech rights. Due to its ambiguity, the surest way to avoid prosecution under the statute is self-censorship. Lawyers, teachers, doctors, friends, and family members who might otherwise speak or write about immigration-related issues will "'steer far wide[] of the unlawful zone.'" *Baggett*, 377 U.S. at 372 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). As a result, "the free dissemination of ideas may be the loser." *Baggett*, 377 U.S. at 379 (citation omitted); *see also* Pet. App. 37a ("Criminalizing expression like this threatens almost anyone willing to weigh in on the debate.").

Second, Subsection (iv) burdens associational rights under the First Amendment. Given the indefiniteness of "encourages or induces," Subsection (iv) interferes with "the freedom to engage in association of beliefs and ideas" in support of undocumented immigrants. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The provision can be read to criminalize allying with organizations and interest groups dedicated to promoting the goals and rights of noncitizens. The First Amendment does not allow the freedoms of speech and association to be so inhibited, especially when it comes to matters of public debate and discourse such as immigration.

The government cites specific cases prosecuted under Subsection (iv) in order to demonstrate encouragement prosecutions are "wholly valid under the First Amendment." Gov. Br. 30. However, in doing so,

the government ignores the statute's First Amendment defect that warrants greater attention under the vagueness doctrine—the provision's chilling effect. The government fails to account for people who may forfeit their speech in response to a criminal statute whose standard for guilt is so ambiguous. That there have been fewer prosecutions under Subsection (iv) based on speech alone "says nothing about whether Subsection (iv) *chills* speech." Pet. App. 25a (emphasis added).

II. Subsection (iv)'s unconstitutional vagueness undermines the abilities of lawyers to advocate on behalf of noncitizens.

Another peril of Subsection (iv)'s vague language is its stifling effect on constitutionally-protected legal advice. Relevant to the work of NACDL and NAFD, criminal defense lawyers, investigators, and other legal professionals whose practice intersects with immigration issues can avoid prosecution "only by restricting their conduct to that which is unquestionably safe." *Baggett*, 377 U.S. at 372.[8] On one hand, attorneys must be able to advise clients unencumbered by fear of recrimination. Attorneys owe a professional and ethical duty to their clients to provide zealous advocacy. On the other hand, Subsection (iv) criminalizes any behavior that could be construed as

[8] The Court has recognized the interconnected nature of criminal defense and immigration matters. *See Dimaya*, 138 S. Ct. at 1213 (plurality opinion) ("[W]e have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more intimately related to the criminal process.") (internal quotation marks and citation omitted).

encouraging an undocumented client to come to, enter, or reside in the United States unlawfully.

This would not be the first time this Court has held a criminal law void for vagueness where the law risks creating an untenable tension between (1) professional duties and (2) self-interest in avoiding prosecution. In *Colautti v. Franklin*, this Court held unconstitutional a statute requiring physicians to assess whether a fetus "is viable" or "may be viable" before performing an abortion. 439 U.S. 379. In finding the viability-determination standard impermissibly vague, the Court reasoned that "where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." *Id.* at 400–01. Likewise, in *Baggett*, this Court struck down a state oath requirement on vagueness grounds, finding that it created an impermissible conflict of duties: "The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession." *Baggett*, 377 U.S. at 374. Finally, in *Gentile v. State Bar of Nevada*, this Court highlighted the effects of a state attorney discipline rule barring extrajudicial statements that leaves "the lawyer [with] no principle for determining when his remarks pass from the safe harbor . . . to the forbidden . . . ." *Gentile*, 501 U.S. at 1049.

The government suggests that Model Rule of Professional Conduct 1.2(d) relieves these concerns.[9] Pet. 18; Gov. Br. 35. However, given the breadth and imprecision of Subsection (iv), an ethical attorney who seeks to practice within the bounds of Rule 1.2(d) by honestly "discuss[ing] the legal consequences of any proposed course of conduct with a client" may *still* be held liable—or nevertheless chilled—under Subsection (iv) for conduct that approximates encouragement.

For example, in the course of representing an undocumented client, a criminal defense lawyer may do the following:

- Inform a client that relief from removal may be available if she can establish continuous presence for 10 years, among other factors. *See* 8 U.S.C. § 1229b(b).

- Advise clients about the risks involved with leaving the United States, including the possibility of triggering grounds of inadmissibility that could bar them from reentering the country for years. *See*, *e.g.*, 8 U.S.C. § 1182(a)(9)(B)(i) (3 or 10-year inadmissibility bar for noncitizens who spent a period of time in the United States without authorization); *id.* § 1182(a)(9)(A)(ii) (10-year inadmissibility for

[9] Rule 1.2(d) reads: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client . . . ." Model Rules of Prof'l Conduct R. 1.2(d) (2018).

noncitizens who leave the United States with an outstanding order of removal).

- Share a professional opinion with a client about the strength of her case (*e.g.*, "You have a strong case to adjust status").

Under each of these scenarios, a lawyer heeding the plain language of Subsection (iv) may decline to present advice to clients for fear of facing criminal prosecution for encouraging them to stay in violation of civil immigration laws. Criminal defense lawyers are but one group whose work is undermined and harmed by the operation of Subsection (iv). *Amici* recognize others will experience similar difficulties in discerning where impermissible encouragement begins and ends.

III. Ms. Sineneng-Smith is not precluded from challenging Subsection (iv) on facial grounds.

Contrary to the government's assertions, Ms. Sineneng-Smith may challenge Subsection (iv) *facially* for vagueness. In its reply brief at the petition stage, the government argued that Ms. Sineneng-Smith's vagueness challenge must fail because "[s]he raises no doubt that her own conduct was clearly proscribed by the statute." Pet. Reply 11. However, the government overstates the extent to which such a *per se* bar on facial vagueness challenges exists.[10]

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[10] More generally, this Court has instructed that "the distinction between facial and as-applied challenges is not so well defined

This Court's precedents demonstrate that facial vagueness challenges may prevail without considering the challenger's conduct. This Court recently sustained a facial vagueness challenge to 18 U.S.C. § 16's definition of "crime of violence," as incorporated into the INA, even though the respondent's prior convictions for first-degree residential burglary appeared to fall within the scope of the challenged provision. *See Dimaya*, 138 S. Ct. at 1211, 1242; *see also Johnson*, 135 S. Ct. at 2560–61 (finding the residual clause of the Armed Career Criminal Act unconstitutionally vague without considering its application to the petitioner, and noting that the Court's "holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp").

The government relies on *Holder* for the proposition that Ms. Sineneng-Smith's facial vagueness argument must fail. Pet. Reply 11. Even if *Holder* says that an individual whose conduct clearly falls within a vague law "cannot raise a successful claim . . . for lack of notice," *Holder*, 561 U.S. at 20, the question remains whether a law that promotes arbitrary enforcement would support a facial challenge. In *Holder*, this Court emphasized that plaintiffs did not specifically argue that the material-support statute granted too much enforcement discretion to the government. *Id.* Here, in contrast, a facial challenge supported by

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that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

Subsection (iv)'s potential for arbitrary enforcement is available. For these types of vagueness cases, "[t]he question is not whether discriminatory enforcement occurred [in the case] . . . but whether [the law] is so imprecise that discriminatory enforcement is a real possibility." *Gentile*, 501 U.S. at 1051.[11]

Even if such a categorical rule were to apply to facial vagueness challenges premised solely on due process, this Court instructs that the calculus changes in the First Amendment context. *See Kolender*, 461 U.S. at 358 n.8 (affirming the validity of facial vagueness challenges if the law "reaches a substantial amount of constitutionally protected conduct") (internal citation and quotation marks omitted); *Morales*, 571 U.S. at 55 (plurality opinion) (same); *see also Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (noting that a facial vagueness challenge may proceed where the statute has a substantial "deterrent effect" on protected expression). And as

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[11] *Holder*, as well as *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008), the other case that the government cites in its discussion of facial challenges, are distinguishable on another basis. In those two cases, both sets of plaintiffs brought pre-enforcement facial challenges to laws. Here, however, Ms. Sineneng-Smith is a Defendant who, along with others, has already been indicted, tried, and convicted under Subsection (iv). The application of Subsection (iv) to third parties not before the court is not "speculative" or "imaginary" as in *Grange*, where the state's primary initiate had not yet gone into effect. *Grange*, 552 U.S. at 450. Therefore, the Court would not be *premature* in evaluating Subsection (iv) "on the basis of factually barebones records." *Grange*, 552 U.S. at 450 (internal citation and quotation marks omitted). *See also Citizens United*, 558 U.S. at 332 (distinguishing *Grange* on this basis and entertaining a facial challenge to an independent expenditure provision of the Bipartisan Campaign Reform Act of 2002).

demonstrated above, Subsection (iv)'s standardless language and its potential for arbitrary enforcement impose a chilling effect on First Amendment liberties.

CONCLUSION

Subsection (iv) affords too little notice to individuals about what it criminalizes and grants too much discretion to law enforcement, beyond what the Fifth Amendment and First Amendment provide. The court of appeals' judgment should be affirmed.

Respectfully submitted,

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