Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

EVELYN SINENENG-SMITH,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the United States Court of Appeals
For the Ninth Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Do the terms "encouraging" and "inducing" an alien to reside in the United States, within the meaning of 8 U.S.C. § 1324(a)(1)(A)(iv), extend to the filing of lawful and permissible immigration applications that confer some legitimate benefit to the alien, simply because the alien is allegedly misled as to the *extent* of the benefit?

2. May the terms "encourage" and "induce" as stated in 8 U.S.C. § 1324(a)(1)(A)(iv) be validly interpreted to include anything that helps or facilitates an alien who is already residing illegally in the United States, and already illegally employed in the United States, to remain there?

3. Does the language of 8 U.S.C. § 1324(a)(1)(A)(iv) provide fair notice that it encompasses conduct that provides a legitimate benefit to an alien and seeks certifications that can be lawfully applied for on the alien's behalf, simply on the ground that the alien is allegedly misled regarding the extent of the benefit, and is the statute unconstitutionally vague as applied to such conduct?

4. Did the application of Section 1324(a)(1)(A)(iv) in this case violate petitioner's First Amendment right to persuade aliens already residing and employed illegally in the United States to pursue available legal remedies?

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Evelyn Sineneng-Smith and respondent United States of America.

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2013 WL 6776188 (N.D. Cal. 2013).

The 2020 opinion of the Court of Appeals affirmed, upon remand from this Court, a judgment of conviction of the United States District Court for the Northern District of California (Hon. Ronald M. Whyte, J.), convicting petitioner (i)upon jury verdict of two counts of encouraging and inducing an alien to remain in the United States in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iv) and (B)(I) and two counts of mail fraud in violation of 18 U.S.C. § 1341, and (ii) upon her plea of guilty of two counts of willfully subscribing a false tax return in violation of 26 U.S.C. § 7206(1), and imposing sentence thereon.

The 2018 opinion and memorandum of the Court of Appeals, respectively, reversed petitioner's Section 1324 convictions on the ground that the statute was facially overbroad under the First Amendment, and affirmed her mail fraud convictions. The reversal of the Section 1324 convictions was vacated by order of this Court dated May 7, 2020.

The opinion of the district court granted in part and denied in part petitioner's

post-trial motion for judgment of acquittal; in particular, it granted judgment of acquittal as to a third Section 1324 count and a third mail fraud count.

The order of the Court of Appeals dated January 25, 2021, denying petitioner's application for panel rehearing and/or rehearing en banc, and the district court decision of October 12, 2011, denying her pretrial motion to dismiss, are unreported.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Ninth Circuit. The instant petition is timely because the Second Circuit's decision denying panel rehearing and/or rehearing en banc was issued on January 25, 2021, less than 150 days prior to the filing of this Petition. There have been no orders extending the time to petition for *certiorari* in the instant matter except to the extent that the time to petition for *certiorari* has been extended generally by this Court's COVID-19 guidance..

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

8 U.S.C. § 1324(A)(i)(A)

Any person who--

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) 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; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B)

STATEMENT OF FACTS

A, The Underlying Facts

The historical facts underlying this case are largely undisputed. Petitioner Evelyn Sineneng-Smith, a Filipino immigrant to the United States who has a law degree but is not an admitted attorney, operated an immigration consulting service in California during the period from approximately 1991 to 2008. Sineneng-Smith provided services chiefly to Filipinos who had sought and obtained work in the United States and were hoping to regularize their status.

At issue was petitioner's counseling and representation of certain aliens concerning the so-called "Section 245i Labor Certification" process. Pursuant to 8 C.F.R. § 245.10, aliens who arrived in the United States before December 21, 2000 were eligible to obtain green cards through a three-step process: (1) obtaining labor certification approval from the United States Department of Labor; (2) filing for I-140 alien worker approval from the United States Customs and Immigration Service; and (3) applying for legal permanent residence. Concededly, under the law at the time of the charged conduct, aliens who were not physically present in the United States on December 21, 2000 and who had not applied for labor certification on or before April 30, 2001 were not eligible to take the third step and receive permanent residency under the Section 245i process. However, it was undisputed at trial that aliens could continue to file labor certification and I-140 applications; that the government would continue to process and approve such applications, and that the date of filing would be the alien's priority date and the alien would receive an earlier place in line in the event

that Congress reopened the process. (Trial Tr. 184-244).

The evidence at trial showed that several aliens including Oliver Galupo, Amelia Guillermo and Hermancita Esteban retained Sineneng-Smith, for a fee, to file applications for Section 245i labor certification and/or I-140 applications on their behalf. Sineneng-Smith in fact filed these applications. After filing the applications, Sineneng-Smith sent the aliens periodic status letters informing them that the applications were still pending or (if applicable) had been approved, and also provided them with "leniency letters" that they could show to law enforcement and/or other governmental agencies requesting that those agencies forbear removing them from the United States because they were attempting to regularize their status.

Guillermo and Esteban (although not Galupo) claimed that petitioner misled them by not informing them that they were presently ineligible for the 245i process and that Congressional action would be required for them to obtain a green card under that program. Although the documentation they were given referenced their applications being "subject to 245i" and advised that they could not work until their status was adjusted, they stated that the meaning of this was never explained to them and that the advisements were undermined by petitioner responding that work was "why you are here" and/or that they could work "once the petition was filed." Likewise, they stated that when their laor certification applications were approved and they again retained Sineneng-Smith for the I-140 stage, they were shown a chart that stated "[i]f no 245i [w]ait 5 or more years unless Congress passes a new law" and that expedited processing was available "only if you have 245i eligibility," but that they

were not told what 245i meant.

Both Esteban and Guillermo testified that if they had been informed of their present ineligibility for 245i relief, they would have returned to the Philippines rather than remaining in the United States.

Evidence was also presented concerning a meeting that Sineneng-Smith held for potential clients in August 2007, which was attended by an undercover ICE special agent, Oliver Ramelb. At this meeting, Sineneng-Smith stated that aliens "technically cannot work until they get their green card" but stated that if their employers would "petition for [them]," she would give them a letter that could be shown to government officials that her clients had successfully used in the past (an apparent reference to the "leniency letters"). The purpose of these letters was to show accurately the immigration status of the alien and the alien's intent and effort to obtain legal status. She provided attendees with, *inter alia*, flyers listing her services, lists of clients who had obtained labor certifications and were "now eligible to apply for their legitimate work permits and green cards subject to certain Federal Regulations," and a copy of a Filipino newspaper advertisement stating that she had "helped 740 of our kababayan legalize their status in the US" in the past 16 years.[1]

The government did not dispute that hundreds of Section 245i and I-140 applications filed by Sineneng-Smith were approved by the relevant agencies, even during 2008 when her business was under investigation; however, it submitted that

[1] "Kababayan" is a Tagalog term meaning "fellow Filipino."

the majority of these clients were unable to regularize their status and that the minority who obtained legal status did so by means other than the 245i process.

B. Procedural History

On May 26, 2010, an eight-count indictment was lodged in the Northern District of California charging Sineneng-Smith with three counts of encouraging and inducing aliens to reside illegally in the United States for private financial gain (8 U.S.C. §§ 1324(a)(1)(A)(iv) and (B)(1)), three counts of mail fraud (18 U.S.C. § 1341) and two counts of willfully subscribing to a false tax return (26 U.S.C. § 7206(1)). (Doc. 1). Thereafter, by superseding indictment dated July 14, 2010, petitioner was additionally charged with two counts of engaging in monetary transactions in property derived from specified unlawful activity (18 U.S.C. § 1957). (Doc. 6).

Petitioner pled not guilty to all counts and moved to dismiss on, *inter alia*, vagueness and First Amendment grounds. The district court denied this motion, finding that the meaning of "encourage" for Section 1324 purposes was sufficiently clear and that the First Amendment did not forbid her prosecution for "representing to aliens that her efforts would enable them to become legal permanent residents when she knew that they could not." (App. 22-27).

Prior to trial, the tax and monetary-transaction counts were severed, and in July 2013, petitioner went to trial on the immigration and mail fraud counts only. On July 30, 2013, the jury rendered a verdict convicting her of those counts. (Doc. 195).

Petitioner thereafter moved for judgment of acquittal and/or a new trial, arguing that the evidence was insufficient, that her conduct was outside the scope of Section

1324(a)(1)(A)(iv), that the government was estopped from prosecuting petitioner for filing applications that were lawful and that it had approved, and that the charged conduct was protected by the First Amendment. (Doc. 213-14).

By order dated December 23, 2013, the district court granted petitioner's motion in part and denied it in part. (App. 28-46). The court found that Counts One and Four, which respectively charged a Section 1324 violation and mail fraud with respect to Oliver Galupo, must be dismissed because no evidence of petitioner's interaction with Galupo was offered other than the retainer agreement itself, and this did not establish that he was misled as to his chances of obtaining permanent residency. (App. 35-36, 43-44). However, the court found sufficient evidence as to Counts Two, Three, Five and Six, involving Amelia Guillermo and Hermansita Esteban, reasoning that by concealing their present ineligibility for the 245i program, petitioner defrauded them and unlawfully encouraged them to remain in the country. (App. 33-35, 40-43). Finally, the court rejected petitioner's First Amendment claims. (App. 45).

Subsequently, on January 12, 2015, petitioner pled guilty to Counts Seven and Eight (the two tax counts) without benefit of a plea agreement. (Doc. 243).

On December 14, 2015, the district court (Hon. Ronald M. Whyte, J.) sentenced Sineneng-Smith to concurrent 18-month prison terms on Counts Two, Three, Five, Six, Seven and Eight. (Doc. 262). Counts Nine and Ten, the monetary-transaction counts, were dismissed upon motion of the government. (Doc. 262).

Judgment was entered on December 17, 2015 (Doc. 263) and petitioner filed a timely notice of appeal (Doc. 265).

Petitioner appealed her conviction to the Ninth Circuit Court of Appeals. In her briefs to the Ninth Circuit, she challenged the sufficiency of the evidence on the immigration and mail fraud counts, and additionally argued that her conduct was beyond the scope of Section 1324(a)(1)(A)(iv). In support of the latter argument, she contended that the statute did not provide fair notice that it could be applied to the conduct at bar and that such conduct was protected by the First Amendment.

After oral argument was heard, the Ninth Circuit requested briefing on an issue not raised by the parties, namely whether Section 1324(a)(1)(A)(iv) was *facially* overbroad under the First Amendment. By opinion issued December 4, 2018, the Ninth Circuit found that the statute was indeed facially overbroad, holding that it encompassed sweeping categories of protected speech such as a family member, activist or attorney urging undocumented aliens to stay in the United States and fight for their rights. See United States v. Sineneng-Smith, 910 F.3d 461, 472-84 (9th Cir. 2018) (App. 47-88). By separate memorandum opinion issued the same date, the Ninth Circuit affirmed the mail fraud convictions, finding that Sineneng-Smith's statements to her clients regarding the retainer agreements were "at least deceitful half-truths that concealed material facts." United States v. Sineneng-Smith, 744 Fed. App'x 498, 500 (9th Cir. 2018) (App. 88-92). However, because two of the counts of conviction had been reversed, the court directed that the matter be remanded for resentencing.

The government timely sought, and was granted, certiorari to this Court. United States v. Sineneng-Smith, 140 S. Ct. 36 (2019). On May 7, 2020, this Court held that, in considering the facial overbreadth issue, the Ninth Circuit had "departed

from the principle of party presentation so drastically as to constitute an abuse of discretion." United States v. Sineneng-Smith, 140 S. Ct. 1575, 1578 (2020). This Court accordingly "remand[ed] the case for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties." Id. at 1582. This Court did not express an opinion on the merits, either as to the facial overbreadth issue or as to the issues not yet considered by the Ninth Circuit.

On remand, the Ninth Circuit considered petitioner's remaining claims without further briefing. By opinion dated December 8, 2020, that Court (Tashima, Berzon and Hurwitz, JJ.) determined that none of the remaining issues had merit and that the immigration convictions should be affirmed. (App. 1-21).'

The Ninth Circuit panel stated that Sineneng-Smith was "prosecuted for entering into retainer agreements with aliens, knowingly misrepresenting to them that her efforts through the § 245i Labor Certification process would, for a price, enable them to become legal permanent residents, and misleading them about their ability to work lawfully in the United States while they waited for the process to be completed." (App. 12-13). Thus framed, the court found that petitioner's conduct fell within the scope of Section 1324(a)(1)(A)(iv). In particular, the court found no support for the proposition that a violation of this statute must entail fraud against the government or provide no legitimate immigration benefit. (App. 13). The court stated that although previous cases had involved conduct that did not provide any legitimate benefit to the alien, they did not limit the statute's scope to that scenario, and

importing a false-document element into the statute would render 18 U.S.C. § 1546 superfluous. (App. 13-14). Additionally, the court found that even if the applications filed by Sineneng-Smith conferred some legitimate immigration benefit, "Sineneng-Smith encouraged [the aliens] to stay in the United States in violation of the law by misleading them about the full extent of the benefits they might realistically expect" from those applications. (App. 15).

Turning to the issue of fair notice, the Ninth Circuit found that even in the absence of prior prosecutions on similar facts, the statutory language itself was sufficient to put Sineneng-Smith on notice that her conduct was prohibited by Section 1324(a)(1)(A)(iv). (App. 15-16). For the same reason, the court found that an ordinary person would understand that "[m]isleading an alien with false hope about her ability to obtain a green card" was prohibited by the statute. (App. 16-17). The court also determined that Sineneng-Smith's conduct was not protected speech because it amounted to "false claims... made to effect a fraud or secure moneys or other valuable considerations," and that it did not implicate the Petition Clause of the First Amendment because it involved her representations to her clients, not to the government. (App. 17-18).

Finally, the court found the evidence sufficient to sustain Sineneng-Smith's conviction on both immigration counts, finding that her representations concerning the retainer agreements, the leniency and status letters, and her subsequent engagement to file I-140 labor applications, combined with Guillermo and Esteban's testimony that the "intricacies of § 245i eligibility" were not adequately explained to them, enabled a

rational trier of fact to find that she "encouraged [them] to remain in the United States" by "providing [them] with... false hope." (App. 20-21).

Petitioner timely sought panel rehearing and/or rehearing en banc, which was denied by order entered January 25, 2021. (App. 93). Now, for the reasons set forth below, petitioner seeks certiorari as to each of the claims raised before the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I. Section 1324(a)(1)(A)(iv) Should Not Extend to Persuading Aliens to Pursue Remedies that Confer Some Legitimate Benefit.

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

1, The prosecution of Evelyn Sineneg-Smith arises from her being retained to file immigration applications that she was indisputably allowed to file, and that indisputably conferred a real benefit upon the clients she filed them for. There is no dispute that, while the 245i and I-140 applications required Congress to revive the 245i program in order to confer a path to permanent residency, they did guarantee Sineneng-Smith's clients an earlier priority date and place in line if such revival did occur. Moreover, given that several bipartisan immigration reform bills were

introduced with the support of the White House during the period when Sineneng-Smith was active,[2] the possibility of favorable Congressional action was by no means remote. In the government's and the Ninth Circuit's conception, however, this constituted illegal "encouragement" of aliens to reside in the United States because Sineneng-Smith did not adequately explain the intricacies of the law to her clients and made overly optimistic statements to them about their chances of obtaining work permits.

In doing so, the court below converted a statute that was written and intended to define a crime against the government – inducing aliens to come to and reside illegally in the United States – into one that defines a crime against Sineneng-Smith's clients. It is now a federal crime to file applications that Sineneng-Smith's clients had a legal right to file and which did confer legal benefit on them, and which did not defraud the government in the least, so long as the clients were misled, intentionally or otherwise, about the odds of those applications leading to permanent residence and/or a work permit. There is no basis, textual or otherwise, to construe Section

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[2] For instance, the Secure America and Orderly Immigration Act (S.1033), proposed in May 2005; the Comprehensive Enforcement and Immigration Reform Act of 2005 (S.1438), proposed in July 2005; the Comprehensive Immigration Reform Act of 2006 (S.2611) which passed the Senate in May 2006 albeit failing in the House; and the Comprehensive Immigration Reform Act of 2007 (S.1348), proposed in May 2007. President Bush had also spoken earlier in his term about the need for comprehensive immigration reform, including a path to citizenship for many aliens residing in the United States illegally, including a televised joint speech with Mexican President Vicente Fox Quesada on the White House lawn in early September 2001. See Rermarks by President George Bush and President Vicente Fox of Mexico at Arrival Ceremony, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010905-2.html (visited June 22, 2021).

1324(a)(1)(A)(iv) as a statute that punishes frauds against clients. The rights protected by this statute are the government's rights, and those rights were not violated when Sineneng-Smith was retained to file applications that the government recognized, processed and approved.

2. "[W]e start where we always do: with the text of the statute," Van Buren v. United States, 141 S. Ct. 1648, 1654 (2021), which specifies that anyone who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law... be punished as provided in subparagraph (B)," see 8 U.S.C. § 1324(a)(1)(A)(iv). From this text, it can readily be seen that the evil it was intended to prevent was aliens "coming to, entering or residing" illegally in the United States – in other words, that the statute is written to protect the government's interest in securing its borders and enforcing its immigration laws.

This purpose is corroborated by the statute's placement and history. Title 8, Section 1324 of the United States Code is captioned "Bringing in and harboring certain aliens" and contains four subsections, each dealing with acts that in some respect defeat the immigration laws. These are bringing aliens into the United States other than at a designated port of entry, transporting or moving illegal aliens within the United States, harboring or concealing illegal aliens, and as charged here, encouraging or inducing aliens to come to, enter or reside illegally in the United States. See 8 U.S.C. § 1324(a)(1)(a)(i)-(iv). The statute also separately punishes conspiring to commit, or aiding and abetting the commission of, the listed acts. See 8 U.S.C. §

1324(a)(1)(a)(v)-(vi).

This statute was originally part of the Immigration and Nationality Act of 1952; however, "its language traces its roots to the Immigration Act of 1917," which in pertinent part made it illegal to encourage any contract worker to come to the United States, encouraging aliens to come to the United States through an advertisement for employment, or, being in the business of transporting aliens, to encourage or attempt to encourage any alien to come to the United States. See Lauren D. Allen, Illegal Encouragement: The Federal Statute That Makes It Illegal to "Encourage" Immigrants to Come to the United States and Why It Is Unconstitutionally Overbroad, 60 Boston Coll. L. Rev. 1205, 1208-10 (2019). In the 1952 act, these provisions were combined into substantially the form in which the subject statute exists today, although the subsequent Immigration and Reform Control Act of 1986 reduced the *mens rea* required to violate the statute. See id. at 1210-14. This language was untouched by the immigration legislation of 1996. Id. at 1214. Throughout, the focus of Congress was on giving teeth to the immigration laws by prohibiting acts that would directly impede the enforcement thereof, including such means as bringing aliens to the United States without inspection, moving them clandestinely from place to place within the country, shielding them from detection, and encouraging them to come and reside here in the first place.

This is critical in understanding what "encourage" denotes within the meaning of the statute. The meaning of the term "encourage" in this context is not plain on its face, and indeed, "five circuit courts have recognized that the word 'encourage' is

ambiguous." Id. at 1208 (collecting cases). Moreover, "the legislative history offers little guidance regarding a potential construction," because the meaning of the term "encourage" was not debated on the floor of Congress or discussed in any report. See id. at 1237 n.233. Thus, resort must be had to other canons of construction in which the positioning of the subsection and the overall purpose of Section 1324 are paramount. See Yates v. United States, 574 U.S. 528, 537-44 (2015).

In Yates, this Court construed 18 U.S.C. § 1519, which provided that a person commits an offense if he "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation." Yates, a commercial fisherman, was charged with attempting to impede a federal investigation by throwing "tangible objects" – undersized fish – off the deck of his vessel. See Yates, 574 U.S. at 531, 533-34. This Court acknowledged that "[a] fish is no doubt an object that is tangible," and hence could be construed as within the reach of Section 1519 as defined in the dictionary. Nevertheless, this Court found that construing the scope of Section 1519 to include fish would "cut [the statute] loose from its financial-fraud mooring," and that since "Congress trained its attention on corporate and accounting deception and coverups," the term "tangible object" must be limited to objects "used to record or preserve information." Id. at 532.

In reaching this conclusion, this Court held that "[w]hether a statutory term is ambiguous... does not turn solely on dictionary definitions of its component words," but also "the specific context in which that language is used, and the broader context of the

statute as a whole." Id. at 537, quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) and citing Deal v. United States, 508 U.S. 129, 132 (1993). This Court further noted that it had "several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." Id. As such, rather than accepting the government's contention that the dictionary definitions of "tangible" and "object" were the e-all and end-all of Section 1519's scope, this Court resorted to "[f]amiliar interpretive guides." Id. at 539.

This Court first "note[d]... § 1519's caption: 'Destruction, alteration or falsification of records in Federal investigations and bankruptcy,'" which "conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records." Id. Nor did the title of the act of which Section 1519 was part convey such a suggestion. Id. at 539-40, citing Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ("The title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute"). This Court also considered Section 1519's position within the statutory scheme created by the adjacent sections, noting that "each of them prohibit[ed] obstructive acts in specific contexts." Id. at 540. "Congress thus ranked § 1519... together with specialized provisions expressly aimed at corporate fraud and financial audits." Id. at 541.

These considerations led this Court to "rely on the principle of *noscitur a sociis* - a word is known by ihe company it keeps." Id. at 543 (emphasis in original). This rule of construction is designed to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the

Acts of Congress." Id., quoting Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995). Using this method, this Court found that "tangible object" was "appropriately read to refer, not to any tangible object, but to the subset of tangible objects involving records and documents." Id. at 544. Such a "moderate interpretation," this Court also found, "accords with the list of actions § 1519 proscribes." Id.

A similar analysis in this case makes clear that being retained to file lawful immigration applications on behalf of clients – even if the clients are misled concerning the extent of the benefit they would obtain by virtue of such applications – is not "encouragement" within the meaning of Section 1324(a)(1)(A)(iv). The caption of Section 1324 – as noted above,"Bringing in and harboring certain aliens" – does not convey an intent by Congress to punish the filing of lawful applications on behalf of undocumented aliens who are already here, and it certainly does not convey an intent that Section 1324 act as a consumer protection statute for illegal aliens in their dealings with immigration consultants.

Likewise, the "company [the word 'encourage'] keeps" – the other subsections of Section 1324 – relate to actions that directly defeat, and impede the enforcement of, the immigration laws – bringing aliens into the United States illegally, moving them from place to place (which enables them to evade detection in obvious ways, and also facilitates trafficking), and/or harboring and concealing them. And the other penalty provisions in Part VIII of Title 8 (see 8 U.S.C. §§1321-23, 1324a-c, 1325-28) are similarly directed to acts that directly defeat the immigration laws, such as bringing aliens into the country, unlawfully employing them, and assisting them to enter. Thus,

as in Yates, *noscitur a sociis* dictates that the ambiguity in the term "encourage," within the meaning of Section 1324(a)(1)(A)(iv), must be resolved to include only words or acts that encourage aliens to directly defeat the immigration laws, i.e., by coming to the United States to work or reside, or concealing themselves within the country.

Sineng-Smith's conduct obviously did not amount to that. She filed lawful applications on behalf of aliens who were already residing in this country. It certainly cannot defeat the immigration laws to file applications that those very laws entitled Sineneng-Smith's clients to file, and that did confer a putative benefit on them under those same laws. Nor did the filing of those applications conceal the clients or make it harder for immigration authorities to detect them; if anything, the filings made them *easier* to find by providing the government with their addresses and the names of their employers. The *government's* rights were not defeated here, and in the absence of any indication by Congress that it intended to enact a consumer protection statute for the benefit of illegal aliens and make it an offense to cause them to believe that they have a better chance of getting a green card or work permit than they actually do, that is sufficient to exclude Sineneng-Smith's acts from the scope of the statute.

3. This Court's recent decision in Van Buren, supra, is also instructive here. The Van Buren Court considered whether 18 U.S.C. § 1030(a)(2), which made it a crime to intentionally "exceed[] authorized access" to a computer, reached a defendant who obtained information via computer that he was authorized to obtain but did so for an unauthorized purpose. In particular, the defendant, a police sergeant, was the target of an FBI sting operation in which an informant bribed him to run the license

plate of a woman he had purportedly met at a local strip club. See Van Buren, 141 S. Ct. at 1653. It was undisputed that he was entitled, as a police officer, to use police computers to run license plates, but he was obviously not authorized to do so in exchange for payment from a private citizen.

This Court, reversing the Eleventh Circuit, found that Section 1030(a)(2) did not extend to "those who misuse access that they otherwise have" by obtaining data "for an inappropriate reason." Id. at 1653-54. Reading the statute narrowly, this Court found that a person is "entitled so to obtain" information where he obtains it using a means to which he is entitled, whether or not he did so for a prohibited purpose. See id. at 1654-55. Likewise, this Court found that the statutory term "entitled" spoke to the means by which information was obtained rather than the reason or motive for obtaining it. Id. at 1656-57. Moreover, the term "access" must be interpreted in light of the way that term is used with regard to computers, which connotes "the act of entering a computer system itself" or a particular part thereof. Id. at 1658. Finally, as in Yates, this Court looked to the "wider... structure" of the statutory scheme, agreeing with the defendant that it was designed primarily to forestall hacking and prevent "technological harms." Id. at 1658-60.

Here, as in Van Buren, the gravamen of the charges against Sineneng-Smith is that she did something she was legally permitted to do – act as an immigration consultant and file lawful immigration applications on behalf of her clients – but that she did so with an impure heart by taking advantage of the clients' ignorance. But again, nothing in either the text or history of Section 1324 suggests that this should

be the case. Where, as here, Sineneng-Smith was doing something that the immigration laws authorized her to do by filing applications with the appropriate authorities – the equivalent, in immigration terms, of "accessing" to a computer system – such action cannot be transformed into unlawful "encouragement" simply by virtue of the fact that she may have done so for an improper reason or in a misleading way.

Indeed, the government itself suggested as much during this case's first trip to this Court, when the facial overbreadth of Section 1324(a)(1)(A)(iv) was at issue. The government argued that the statute could be saved from overbreadth by construing it to "prohibit only speech facilitating or soliciting illegal activity." Sineneng-Smith, 140 S. Ct. at 1581 n.6. Here, Sineneng-Smith's speech to her clients facilitated and solicited *legal* activity – namely, the filing of Section 245i and/or I-140 applications. To the extent that she may have misled them into doing so, other statutes, such as mail and wire fraud, may be available, but there is no need, and no basis, to invoke Section 1324's prohibitions on behalf of the government.

4. "Finally, if... recourse to traditional tools of statutory construction leaves any doubt about the meaning of [a statutory term], we would invoke the rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Yates, 574 U.S. at 547-48, quoting Cleveland v. United States, 531 U.S. 12, 25 (2000). One factor to be considered in invoking the rule of lenity is whether "the government's interpretation of the statute would attach criminal penalties to a breathtaking amount of commonplace [conduct]." Van Buren, 141 S. Ct at 1661. And here, if Sineneng-Smith's conviction were permitted to stand, that would be the case.

It would subject immigration consultants, and indeed attorneys, to liability whenever, in the sole opinion and discretion of a prosecutor, they did not explain carefully enough the pitfalls of the legal procedures they invoke on behalf of their clients. Such an interpretation would essentially transform a rule of ethics into a penal statute and open the door to unlimited second-guessing – on pain of prison – of the advice that immigration lawyers and consultants give their clients.

Moreover, according to the Ninth Circuit's view of the matter, criminal liability would hinge on matters that immigration consultants cannot possibly know or affect – i.e., whether the advice given to the aliens in question actually affects their desire to remain in the country. As discussed above, the Ninth Circuit hung its hat in part on the *post hoc* testimony of Sineneng-Smith's clients that they would have returned to the Philippines if they had been accurately informed of the chances that their applications would succeed, which of course was never disclosed by them to Sineneng-Smith. Presumably, if the aliens in question had been determined to remain in the United States no matter what, thus needing no spiritual or moral "encouragement," then Sineneng-Smith would not have been guilty, even if Sineneng-Smith's acts and representations as to them were precisely the same. See Zavala v. Wal-Mart Stores, Inc., 691 F.3d 527, 542 (3d Cir. 2012) (finding that Wal-Mart's employment of illegal aliens did not violate Section 1324(a)(1)(A)(iv) where they did not "allege that they would not or could not have resided in the United States without having been employed by Wal-Mart"). The rule of lenity is an appropriate exercise where the government's construction of a statute would make the same acts either criminal or

non-criminal depending on a third party's subjective state of mind that the defendant did not know and could not have known. See Yates, 574 U.S. at 548 (finding it untenable to construe Section 1519 to include any item that *might* be of use in an investigation, "no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil").

Thus, the Ninth Circuit erred in finding that "encourage," for purposes of Section 1324(a)(1)(A)(iv) must be read to include possibly-misleading statements made in the course of being retained to pursue lawful remedies that, if approved, will in fact benefit the aliens on whose behalf they are filed. Both the canons of statutory construction and the rule of lenity, as framed in Yates and Van Buren, supra, preclude such a finding. This Court should "resist reading § [1324(a)(1)(A)(iv)] expansively to create a coverall [consumer protection for illegal aliens] statute, advisable as such a measure might be," see Yates, 574 U.S. at 549, and should find that possibly-misleading conduct in the course of soliciting and filing a lawful immigration application does not violate the statute. Certiorari should issue.

II. "Encourage" and "Induce" Do Not Mean "Help," and "Reside" Does Not Mean "Remain."

5. Construing Section 1324(a)(1)(A)(iv) to apply to representations concerning the odds that lawful immigration applications would succeed is not the only way in which the Ninth Circuit's construction of the statute was overbroad. The Ninth Circuit also, in accordance with its prior decisions, construed "encourage" to mean "help," and held at least implicitly that the term "reside," for purposes of statutory

encouragement, included words or deeds that encouraged an alien who was *already* residing illegally in the United States to remain there.

To be sure, the Ninth Circuit, and other courts that have adopted similar constructions of "encourage," have found support in dictionary definitions that include "help" as a secondary meaning of that term. However, as this Court made clear in Yates, the meaning of a statutory term is not defined only by the dictionary. Yates, 574 U.S. at 537. Moreover, this Court has also cautioned against resort to obscure or little-used dictionary definitions in statutory interpretation, preferring instead to use the meanings in "common parlance." See Robertson v. Salomon, 130 U.S. 412, 414 (1889) (finding that while beans were technically seeds, they were not treated as such "in commerce" or "in common parlance"); Nix v. Hedden, 149 U.S. 304, 307 (1893) (finding that "in the common language of the people," tomatoes were vegetables and not fruits); McBoyle v. United States, 283 U.S. 25, 26 (1931) (finding that the statutory term "vehicle" did not include aircraft, because "in everyday speech 'vehicle' calls up the picture of a thing moving on land"); Milner v. Department of Navy, 562 U.S. 562, 578 (2011) (rejecting sweeping construction of the term "personnel rules" that "no one using ordinary language" would recognize). And in common parlance, encourage does not mean help.

If my neighbor is moving house and I show up with a van, I am not encouraging him to move; I am helping him move. More analogously, if I, as an attorney, meet with a client who asks that I defend him in a breach-of-contract action, I am not encouraging him to breach – that is something he has already done – but instead

helping him avoid liability to the extent possible. And if my advice to him proves overly optimistic, that unfortunately is something that often happens in litigation as the case develops.

Nor does "reside," by its everyday meaning, encompass "continue residing." If an ordinary person says that someone was encouraged to reside somewhere, he or she means that the other person was encouraged to move in, not that such person was encouraged to stay where she was *already* residing. There are other words in common parlance for that – for instance "stay" or "remain" – which, notably, Congress *did not* use in enacting Section 1324(a)(1)(A)(iv). The statute prohibits encouraging an alien to illegally "come to, enter, or reside in" the United States – i.e., to travel to the border, cross it, and take up residence – but does not contain any language prohibiting the encouragement of a person already residing in the United States from remaining.

And rightly so, because if "encourage" indeed means "help" and "reside" indeed means "remain," this would, in the words of the Van Buren Court, open the door to unlimited criminal liability. Nearly any aid given to an undocumented alien can help him or her remain here – a drink of water, a meal, an apartment, certainly a job. But it has been held that merely renting an apartment to an illegal alien does not violate the statute, see DelRio-Mocci v. Connolly Properties, Inc., 672 F.3d 241, 249 (3d Cir. 2012), and that even employing an illegal alien does not constitute unlawful encouragement to reside in the country, see Zavala, supra, 691 F.3d at 542. Nor does the mere act of escorting an alien to a van that he knows is headed for the United States. United States v. Thum, 749 F.3d 1143, 1147 (9th Cir. 2014). There is no

apparent logical basis to divide the kinds of help that will "encourage" an alien already living in the United States to stay here from those that do not – especially if, as the Ninth Circuit appears to believe, the distinction between encouraging and non-encouraging help hinges on the undisclosed mental state of the alien concerning the conditions under which he or she will stay or leave.

Therefore, this Court should find that an act of illegal "encouraging" under Section 1324(a)(1)(A)(iv) cannot be committed by means of words or deeds directed to an alien who has already taken up illegal residence in the United States, nor can merely helping or facilitating an alien to remain in the country constitute unlawful encouragement, and that for this reason too, certiorari should be granted and Sineneng-Smith's Section 1324 convictions reversed.

III. Section 1324(a)(1)(A)(iv) is Unconstitutionally Vague As Applied Because It Does Not Provide Fair Notice that it Applies to Conduct Conferring a Legitimate Benefit on an Alien.

6. As a separate and independent ground for granting certiorari, Sineneng-Smith did not receive fair notice, either from the statutory text or prior case law, that Section 1324(a)(1)(A)(iv) prohibited her from expressing excessive optimism concerning the success of lawful immigration applications that she was retained to file. It is well settled that "due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Buckley v. Valeo, 424 U.S. 1, 7 (1976); see also City of Chicago v. Morales, 527 U.S. 41, 58 (1999) ("no one may be required at peril of life,

liberty and property to speculate as to the meaning of penal statutes"). The requirement of due notice, which has become known as the "void for vagueness" doctrine, "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited *and in a manner that does not encourage arbitrary and discriminatory enforcement*." Kolender v. Lawson, 461 U.S. 352, 357 (1983) (emphasis added). This means that, in order to withstand a vagueness challenge, a statute must "*both...* provide notice to the public and... adequately curtail arbitrary enforcement," and that in fact "preventing arbitrary enforcement is the more important aspect" of the standard. United States v. Klecker, 348 F.3d 69, 71 (4th Cir. 2003) (emphasis added).

Where a penal statute does not implicate First Amendment liberties, this Court must determine whether it satisfies constitutional due process standards as applied to the specific facts of the case. See Klecker, 348 F.3d at 71-72. In other words, it must be sufficiently precise to provide the defendant with fair notice that his specific conduct falls within its prohibitions, as well as ensuring that the indictment was not the product of unbridled prosecutorial discretion. See id. As such, criminal statutes may be unconstitutionally vague if there is either "uncertainty about the normal meaning" of statutory terms, or if the statute does not give adequate notice "of what specific conduct is covered... and what is not." Lytle v. Doyle, 326 F.3d 463, 469 (4th Cir. 2003).

In United States v. Lanier, 520 U.S. 259, 271 (1997), this Court stated that "[d]ue process bars courts from applying a novel construction of a criminal statute to conduct that *neither the statute nor a prior judicial decision* has fairly disclosed to be

within its scope" (emphasis added). *"If we are not to lapse into defining a common law crime, the outer boundary of this facially vague criminal statute must be determined from the factual circumstances supporting affirmed convictions, not by negative implication from the few constraints mentioned in disparate cases...* [T]he scope of [a penal statute] is defined by the set of cases in which convictions have been upheld, not by the complement of the set of cases in which convictions have been reversed." United States v. Brown, 459 F.3d 509, 520 & n.9 (5th Cir. 2006) (emphasis added). Any other construction would lead to unacceptable "incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases." Id. at 522.

Here, as the Ninth Circuit had no choice but to acknowledge, "the set of cases in which convictions have been upheld" does not include any prosecutions on facts remotely like these. In her brief to that Court, Sineneng-Smith showed that, to the extent that Section 1324(a)(1)(A)(iv) prosecutions had arisen at all from filing or preparation of documents, they had involved preparation of *fraudulent* documents – an act that obviously helps an illegal alien conceal himself or herself, and that is thus similar to the acts prohibited in the other subsection of Section 1324. Nor could the government, or the Ninth Circuit itself, point to any prosecutions that had arisen from similar facts – or indeed, to any cases in which misleading aliens about the extent of the benefit that would redound to them from the filing of a lawful application .

Faced with the dearth of case law placing Sineneng-Smith on notice that her alleged conduct violated the statute, the Ninth Circuit held that she was put on notice

by the statutory language itself – but there, too, it was wrong. As discussed above, the term "encourage," in common parlance, does not mean "help" or "facilitate," and a person of ordinary intelligence would not be placed on notice by that word that filing lawful immigration applications would be a crime. And even to the extent that the charges against Sineneng-Smith hinged on her giving the clients an overly rosy assessment of whether they would succeed in regularizing their status, and even if such advice might be deemed "encouragement" (which as stated above, it should not), the fact remains that the statutory language speaks only to encouragement of aliens to "come to, enter or reside in" the United States, not to encouragement of those *already* residing here to remain in the country. The statutory language, in and of itself, thus cannot give fair notice that conduct such as Sineneng-Smith's was punishable, and therefore, in the absence of case law affirming convictions on similar facts, Section 1324(a)(1)(A)(iv) could not be constitutionally applied.

IV. Petitioner's Prosecution Under Section1324(a)(1)(A)(iv) Violated Her First Amendment Rights As Applied.

7. Finally, this Court should grant certiorari on Sineneng-Smith's as-applied First Amendment challenge to her immigration convictions. Not only is the speech underlying the charges not "integral to criminal conduct" as the Ninth Circuit found, but speech like hers is integral to immigration representatives – whether consultants or attorneys – doing their work.

The Ninth Circuit, relying on United States v. Alvarez, 567 U.S. 709, 723 (2012), held that First Amendment protections "generally do not extend to false claims that

are made to effect a fraud or secure moneys or other valuable considerations." (App. 17). But if optimistic – even excessively optimistic – advice to clients is construed as a "false claim," then representatives assisting aliens with immigration matters will be chilled in advising their clients to pursue available remedies, even remedies to which they are legally entitled. Indeed, fear of prosecution for being overly optimistic will force immigration consultants and attorneys to be overly *pessimistic* and to warn their clients away from procedures that might be beneficial to them.

Notably, none of what Sineneng-Smith allegedly told her clients was *patently* false. Although Congressional action was necessary for the 245i and/or I-140 claims she filed to lead to permanent residence, it was far from implausible at the time to believe that there was a good chance of such action being forthcoming. As detailed in footnote 2 supra, then-President Bush made a high-profile statement advocating immigration reform in September 2001, and several bipartisan bills were introduced in the Senate between 2005 and 2007. Although these bills failed, it was not a foregone conclusion that they would do so, given that all of them had the support of lawmakers from both parties as well as the White House. Therefore, it was hardly fraudulent for Sineneng-Smith to tell her clients that the filing of these applications would improve their chances to obtain work authorization and ultimately green cards. Nor, given her experience, was it necessarily false for her to represent that the filing of such applications might lead to interim forbearance from the authorities, as requested in the "leniency letters" her firm issued.

Moreover, it is undisputed that Sineneng-Smith did give paperwork to her

clients that mentioned Section 245i and referred to Congressional action being necessary. She did not guarantee success or tell her clients that they would surely obtain green cards (which some of them, in any event, did obtain). Thus, the allegations on which she was prosecuted amounted to not explaining the obstacles carefully enough and not being emphatic enough about the pitfalls.

The manner in which such an application of Section 1324 trenches on protected speech is obvious. Applying the "encouragement" statute to overly rosy advice concerning a lawful and proper immigration application would interfere with the relationship between representative and client, and as set forth above, representatives would indeed be required to warn prospective clients away from taking measures they were entitled to take lest a prosecutor later decide they were not diligent enough in explaining the risks thereof. Moreover, advocates would be subject to prosecution even for risks that they did disclose – such as the mentions of Section 245i and the need for Congressional action on the paperwork Sineneng-Smith provided – if it were later determined that their clients, despite such disclosure, remained subjectively confused.

Accordingly, contrary to the Ninth Circuit's holding, the application of Section 1324(a)(1)(A)(iv) to Sineneng-Smith's alleged conduct does have a "sufficiently substantial impact on conduct protected by the First Amendment," see City of Chicago v. Morales, 527 U.S. 41, 52-53 (1999); see generally R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992), to render it unconstitutional as applied to cases like hers. Whether or not the speech at issue in her particular case crossed the line – and as discussed above, there are compelling reasons to find that, in the circumstances prevailing at the

time, it did not – the fact remains that applying the "encouragement" law at all in the context of a representative-client relationship will *blur* the line in such a way that immigration representatives can never be sure that the advice they give to clients will not subject them to later federal prosecution.

8. Moreover, contrary to the Ninth Circuit's conclusion, the charged conduct does implicate the Petition Clause as well as the Free Speech Clause of the First Amendment. The Petition Clause is subject to the same constitutional analysis as the Free Speech Clause, see Wayte v. United States, 470 U.S. 598, 611 n.11 (1985), and shares a common purpose of ensuring freedom of communication on matters relating to legal rights and the functioning of government, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982). The filing of legal process is, of course, a form of petitioning activity protected by this clause, see McDonald v. Smith, 472 U.S. 479, 485 (1985), and includes process addressed to administrative agencies as well as the courts, Cal. Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

The Ninth Circuit sidestepped the Petition Clause on the basis that Sineneng-Smith was prosecuted for her representations to her clients, not the filings she made to government agencies. But in fact the two cannot be separated. Aliens require the assistance of representatives to make their petitions to the government, and as such, the representatives' discussion of prospective petitions with their clients is integral to the clients' ability to file those petitions at all. Petitioner submits that where, as here, a penal statute is applied to conduct that chills a representative's freedom to recommend and file legal process on behalf of her clients, the Petition Clause is

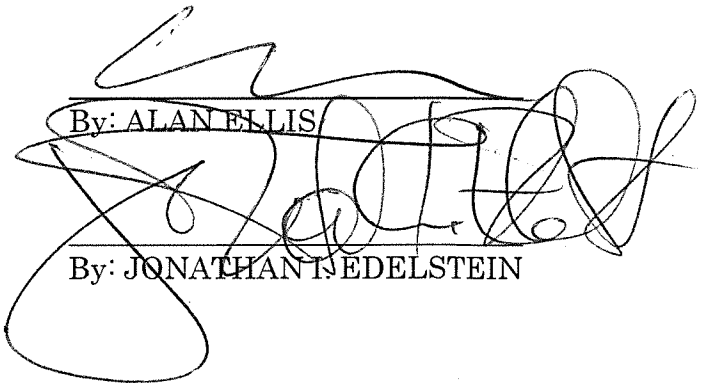
implicated even if the statements underlying the criminal charge involved discussion of the prospective petition rather than being part of the petition itself. Sineneng-Smith's as-applied First Amendment challenge thus warrants this Court's review.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and grant such other and further relief as may be appropriate.

Dated: Gualala, CA
June 23, 2021

Respectfully Submitted,
LAW OFFICE OF ALAN ELLIS
Attorney for Petitioner



By: ALAN ELLIS

By: JONATHAN I. EDELSTEIN

OPINION OF THE NINTH CIRCUIT COURT OF APPEALS DATED DECEMBER 8, 2020 [APP. 1-21]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	No. 15-10614
v.	D.C. No. 5:10-cr-0414-RMW
EVELYN SINENENG-SMITH, *Defendant-Appellant.*	OPINION

On Remand from the Supreme Court of the United States

Filed December 8, 2020

Before: A. Wallace Tashima, Marsha S. Berzon, and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Tashima

SUMMARY*

Criminal Law

On remand from the Supreme Court, the panel affirmed convictions on two counts of encouraging and inducing an alien to remain in the United States for the purposes of financial gain (8 U.S.C. §§ 1324(a)(1)(A)(iv) and 1324(a)(1)(B)(i)), in a case in which the defendant, who operated an immigration consulting firm, continued to sign retainer agreements and inform clients that they could obtain green cards via a labor certification program under Section 245i of the Immigration and Nationality Act, which the defendant knew had expired.

The panel rejected the defendant's argument that Subsection (A)(iv) is limited to conduct involving fraud, false documents, or fraud against the government; and held that the fact that engaging in the underlying § 245i process may have yielded some legitimate benefit to the defendant's clients does not detract from the defendant's culpability under Subsection (A)(iv).

Rejecting the defendant's contention that she lacked fair notice that her conduct violated the law, the panel wrote that the charged conduct fell within the plain meaning of the statute. The panel wrote that the fact that the government approved numerous labor certification and I-140 alien-worker petitions for the defendant's clients did not deprive her of fair notice that her representations to the clients covered by the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

charges—knowingly misleading them into believing that the approved petitions could lead to permanent residence and thereby encouraging them to remain illegally in the country—constituted unlawful encouragement.

The panel rejected the defendant's contention that interpreting Subsection (A)(iv) to prohibit the charged conduct renders the statute impermissibly vague as applied to her. The panel also rejected the defendant's contention that the charged conduct was protected by the Free Speech and Petition Clauses of the First Amendment.

Rejecting the defendant's challenge to the sufficiency of the evidence, the panel held that a rational trier of fact could have found beyond a reasonable doubt that the defendant, who provided two clients with the false hope that their retention of her services for each step in the § 245i labor certification process could lead to permanent residency, encouraged them to remain in the United States in violation of Subsection (A)(iv).

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OPINION

TASHIMA, Circuit Judge:

INTRODUCTION

This case is back before us on remand from the Supreme Court. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). Evelyn Sineneng-Smith appeals her convictions on two counts of encouraging and inducing an alien to remain in the United States for the purposes of financial gain, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iv) and 1324(a)(1)(B)(i).[1] She contends that the district court erred by denying her motion to dismiss these charges, and that the evidence at trial was insufficient to establish her guilt beyond a reasonable doubt. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

FACTS AND PROCEDURAL HISTORY

I. Factual Background

Sineneng-Smith operated an immigration consulting firm in San Jose, California. As part of her work, Sineneng-Smith counseled foreign nationals, mostly natives of the Philippines who were employed without authorization in the home health care industry in the United States, on applying for and

[1] Sineneng-Smith was also convicted of filing false tax returns, in violation of 26 U.S.C. § 7206(1), and mail fraud, in violation of 18 U.S.C. § 1341. Sineneng-Smith did not appeal the tax fraud convictions, and we affirmed the mail fraud convictions in a memorandum disposition, *United States v. Sineneng-Smith*, 744 F. App'x 498 (9th Cir. 2018). The tax and mail fraud convictions were not affected by the Supreme Court's mandate.

obtaining employment-based visas, including permanent resident employment-based visas ("green cards").

A. The § 245i Labor Certification Program

Prior to December 21, 2000, Section 245i of the Immigration and Naturalization Act, 8 U.S.C. § 1255(i), permitted certain aliens who had entered the country illegally, accepted unauthorized work, or overstayed their tourist visas, to seek an employment-based adjustment of their immigration status and obtain green cards through the "§ 245i Labor Certification" process. *See* 8 C.F.R. § 245.10. Obtaining a green card through this process involved three sequential steps: (1) obtaining labor certification approval from the United States Department of Labor ("DOL"); (2) obtaining alien worker approval ("I-140 approval") from the United States Customs and Immigration Service ("CIS"); and (3) applying for legal permanent residence. Aliens seeking to obtain permanent residence via § 245i Labor Certification were not entitled to work in the United States until the end of the process when they received their green card.

The § 245i Labor Certification process expired on April 30, 2001, and aliens who arrived in the United States after December 21, 2000, were not eligible to receive permanent residence through the program. *See Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 n.1 (9th Cir. 2010). But ineligible aliens could nevertheless continue to apply for labor certification at step one and I-140 approval at step two. Completing these two steps would give the alien a priority date and a place in line if Congress ever changed the law and reopened eligibility for adjusted legal status at step three. However, without further congressional action, an alien who

completed steps one and two would be standing in line for a closed door.

Sineneng-Smith knew that the § 245i Labor Certification program had expired. Nevertheless, between 2001 and 2008, she continued to sign retainer agreements and inform clients whom she knew to be ineligible under § 245i that they could obtain green cards via Labor Certification.

B. Guillermo and Esteban

Amelia Guillermo and Hermansita Esteban are natives of the Philippines. They entered the United States separately on tourist visas in November 2001 and April 2002, respectively, and were thereafter offered employment as caregivers. In April 2002, Sineneng-Smith met with Guillermo and had her sign an agreement to retain Sineneng-Smith's services "for purposes of [Sineneng-Smith] assisting [Guillermo] (alien), to obtain permanent residence through Labor Certification." In May 2002, Esteban also signed a functionally identical retainer agreement. Neither Sineneng-Smith nor her employees, however, explained the § 245i Labor Certification process to Guillermo or Esteban, or informed either that, because she entered the United States after December 21, 2000, she was ineligible for lawful permanent residence through Labor Certification. On the contrary, Esteban was told that Sineneng-Smith's office was trustworthy and had worked with many people whose petitions, which Esteban understood to mean applications for green cards, had been approved. Both aliens began working after retaining Sineneng-Smith, and Esteban did not extend her then-unexpired tourist visa, because she thought that a petition had been filed to legalize her status.

After the initial meetings in 2002, and until 2008, Sineneng-Smith periodically sent Guillermo and Esteban copies of "leniency letters" addressed to state and federal agencies, which requested that the agencies allow each alien "to remain in the United States at least during the process of the application for Labor Certification" because "[t]his alien is taking steps to legalize his/her immigration status in the United States." Sineneng-Smith also periodically sent "status letters" to each alien, which advised her to "[p]lease be patient and cooperate with us so that we will be successful in obtaining your permanent residency in the United States. The State and Federal Governments will reward your patience later."

DOL approved Guillermo's and Esteban's labor certification petitions on May 5, 2007, and June 18, 2007, respectively. On those same dates, Sineneng-Smith mailed second retainer agreements to each alien, providing for an additional fee for assistance in obtaining I-140 approval from CIS. Along with the new retainer agreements, Sineneng-Smith included a "premium processing" chart that showed a path from the step one labor certification, to the step two I-140 petition, to a step three "work permit" and "green card." The chart stated "[i]f no 245i [w]ait 5 or more years until Congress passes a new law," but Guillermo and Esteban both testified at trial that they did not know what "245i" meant. Esteban also received another chart that described "the road to obtaining permanent residence," and contained more references to § 245i, which Esteban also did not understand.

Guillermo testified that if she had been told that she could not obtain a green card through the § 245i Labor Certification process, she would have returned to the Philippines, but she stayed because Sineneng-Smith and her associates told her

that she could work. Esteban similarly testified that she would not have stayed in the United States if she had known she could not get a green card.

II. Procedural History

On July 14, 2010, a grand jury returned a superseding indictment charging Sineneng-Smith with, as relevant to this appeal, three counts of violating 8 U.S.C. § 1324(a)(1)(A)(iv) ("Subsection (A)(iv)") and § 1324(a)(1)(B)(i) ("Subsection (B)(i)"). Subsection (A)(iv) prohibits "encourag[ing] or induc[ing] 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 in violation of the law." Subsection (B)(i) imposes additional penalties if "the offense was done for the purpose of commercial advantage or private financial gain." The indictment charged, as to each § 1324 count, that the violation occurred on the dates that Guillermo, Esteban, and another alien (Oliver Galupo) executed the retainer agreement for Sineneng-Smith to file an I-140 petition at step two of the § 245i process.

Before trial, the district court denied Sineneng-Smith's motion to dismiss the immigration counts, rejecting her arguments that: (1) her conduct as charged was not within the scope of Subsection (A)(iv); (2) Subsection (A)(iv) is impermissibly vague under the Fifth Amendment; and (3) Subsection (A)(iv), as applied to Sineneng-Smith's activities, violates the First Amendment because it is a content-based restriction on her speech.

After a twelve-day trial, the jury found Sineneng-Smith guilty on all three counts of violating Subsections (A)(iv) and (B)(i). Sineneng-Smith then moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c), renewing the arguments from her motion to dismiss and further contending that the evidence adduced at trial did not support the verdicts. The district court concluded that sufficient evidence supported the convictions for the two § 1324 counts relating to Guillermo and Esteban, but that sufficient evidence did not support the conviction for the § 1324 count relating to Galupo.

Sineneng-Smith timely appealed, again arguing that the immigration charges should have been dismissed for the reasons asserted in her motion to dismiss, and that the evidence did not support the convictions. We then reversed Sineneng-Smith's immigration convictions, holding that Subsection (A)(iv) was unconstitutionally overbroad in violation of the First Amendment. *See United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018).

The Supreme Court granted the government's petition for certiorari, *United States v. Sineneng-Smith*, 140 S. Ct. 36 (2019) (mem.), and vacated and remanded "the case for reconsideration shorn of the overbreadth inquiry." *Sineneng-Smith*, 140 S. Ct. at 1582. We now affirm Sineneng-Smith's convictions for encouraging or inducing an alien to illegally reside in the United States, in violation of § 1324(a)(1)(A)(iv) and § 1324(a)(1)(B)(I)

ANALYSIS

I. The Denial of Sineneng-Smith's Motion to Dismiss the Charges under Subsection (iv)

A. Standard of Review

We review de novo the district court's denial of a motion to dismiss the indictment. *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048 (9th Cir. 2014). The district court's construction of a statute is reviewed de novo. *United States v. Frega*, 179 F.3d 793, 802 n.6 (9th Cir. 1999).

B. The Scope of § 1324(a)(1)(A)(iv)

Sineneng-Smith first argues that the district court erred by denying her motion to dismiss the indictment because the conduct charged is beyond the scope of Subsection (A)(iv). She contends that her conduct was not unlawful under the statute because it did not involve fraud, false documents, or bribery, and because the aliens could obtain a legitimate benefit from engaging in the § 245i Labor Certification process, even if they were not ultimately eligible for permanent residence. We are unpersuaded on all counts.

As an initial matter, Sineneng-Smith's arguments are all premised on a fundamental mischaracterization of the charges in the superseding indictment. She alleges that she was prosecuted solely for being hired to file putatively lawful I-140 petitions on behalf of Guillermo and Esteban's employers. However, as the district court correctly noted, Sineneng-Smith was actually prosecuted for entering into retainer agreements with aliens, knowingly misrepresenting to them that her efforts through the § 245i Labor Certification

process would, for a price, enable them to become legal permanent residents, and misleading them about their ability to work lawfully in the United States while they waited for the process to be completed. We agree with the district court that the charged conduct is forbidden by Subsection (A)(iv).

Subsection (A)(iv) proscribes "encourag[ing] or induc[ing] an alien to . . . reside in the United States, knowing or in reckless disregard of the fact that such . . . residence is or will be in violation of law." We have previously defined "encourage" as "to inspire with courage, spirit, or hope . . . to spur on . . . to give help or patronage to," *United States v. Thum*, 749 F.3d 1143, 1148 (9th Cir. 2014) (*quoting United States v. He*, 245 F.3d 954, 960 (7th Cir. 2001)), and have indicated that a defendant's encouragement or inducing must be knowing, *see United States v. Yoshida*, 303 F.3d 1145, 1149–51 (9th Cir. 2002). Nothing in the statutory language or our case law supports Sineneng-Smith's argument that encouragement or inducing is unlawful under Subsection (A)(iv) only if it is accomplished by unlawful means, entails fraud against the government or the use of false documents, or bribery, or provides no legitimate benefit to an alien.

Sineneng-Smith points to several out-of-circuit decisions—notably *United States v. Ndiaye*, 434 F.3d 1270, 1298 (11th Cir. 2006) (defendant encouraged alien by improperly supplying a Social Security number) and *United States v. Oloyede*, 982 F.2d 133, 135–37 (4th Cir. 1993) (per curiam) (defendant encouraged aliens by providing false documents for citizenship applications)—to support her contention that there is a fraud or false documents limitation to Subsection (A)(iv). Her efforts are unavailing. Although *Ndiaye* and *Oloyede* involved defendants who used false documents or provided illegitimate benefits to aliens, neither

case limited the scope of Subsection (A)(iv) to such factual scenarios. *See, e.g.*, *Oloyede*, 982 F.2d at 137 ("'encouraging' relates to actions taken to convince the illegal alien to … to stay in this country"). We previously analyzed both cases when construing the meaning of "encourage" under Subsection (A)(iv), and noted merely that the opinions "demonstrate[that] a defendant encourages an illegal alien to reside in the United States when the defendant takes *some action* to convince the illegal alien to stay in this country, or to facilitate the alien's ability to live in this country indefinitely." *Thum*, 749 F.3d at 1148 (internal citations, quotation marks, and alterations omitted) (emphasis added). Moreover, we can discern no principled reason for reading a fraud or false document limitation into the statute.

As to importing a false documents limitation into Subsection (A)(iv), we note that the 1985 Senate Judiciary Committee Report on the Immigration Reform and Control Act indicates that the purpose of a related statute, 18 U.S.C. § 1546, is to "enable[] the prosecution of procurers and purveyors of false, altered, or fraudulently obtained documents and the aliens who use such documents to remain in the United States in violation of the law". S. Rep. No. 99-132, at 31 (1985). Reading a false documents element into Subsection (A)(iv) would therefore render § 1546 superfluous. *See Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) ([C]ourts are to "resist[] a reading of [a statute] that would render superfluous an entire provision passed in proximity as part of the same Act.").

Sineneng-Smith's suggestion that only fraud against the government may be prosecuted under Subsection (A)(iv) fares no better. Again, there is nothing in the statute suggesting such a limitation. We therefore reject Sineneng-

Smith's argument that the scope of Subsection (A)(iv) is limited to conduct involving fraud, false documents, or fraud against the government.

Finally, we reject the argument that the charged conduct was outside the scope of Subsection (A)(iv) because Sineneng-Smith lawfully provided Guillermo and Esteban with a legitimate benefit—namely, a place in line if Congress changed the law and expanded eligibility for adjustment of status—by pursuing the § 245i Labor Certification process on their behalf. Neither the language of Subsection (A)(iv) nor our previous constructions of the statute requires that a defendant's encouragement be accomplished by means of an illegitimate process or involve only illegitimate benefits. *See Thum*, 749 F.3d at 1148. Furthermore, the gravamen of the encouragement offense was that Sineneng-Smith encouraged Guillermo and Esteban to stay in the United States in violation of the law by misleading them about the full extent of the benefits they might realistically expect from engaging in the § 245i Labor Certification process. The fact that engaging in the underlying § 245i process may have yielded some legitimate benefit to Guillermo and Esteban does not detract from Sineneng-Smith's culpability under Subsection (A)(iv).

C. Lack of Fair Notice

Sineneng-Smith also contends that she lacked fair notice that her conduct violated the law because the instant case involved a novel construction of the statute and no prior case law supported the statutory construction underlying the government's prosecution. We disagree. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior

judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). "[T]he touchstone is whether the statute, *either standing alone* or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267 (emphasis added). Although previously reported Subsection (A)(iv) cases involved distinguishable fact patterns, Sineneng-Smith's prosecution did not violate due process because, as noted above, the conduct charged fell with the plain meaning of the statute standing alone, including the meaning of "encourag[ed]" as construed in *Thum*, 749 F.3d at 1148. *See Lanier*, 520 U.S. at 267.

Also unavailing is Sineneng-Smith's contention that her reasonable reliance on DOL and CIS's issuance of numerous labor certification and I-140 approvals for her clients deprived her of fair notice that her conduct was criminal under Subsection (A)(iv). This argument relies on the same mischaracterization of the charges that we have previously rejected. Because the charged conduct— knowingly misleading aliens into believing that the approved petitions could lead to permanent residence and thereby encouraging them to remain illegally in the country—was clearly covered under Subsection (A)(iv), the fact that DOL and CIS approved the labor certification and I-140 petitions did not deprive Sineneng-Smith of fair notice that her representations to Guillermo and Esteban constituted unlawful encouragement.

D. Vagueness

We also find unavailing Sineneng-Smith's contention that interpreting Subsection (A)(iv) to prohibit the conduct charged in the indictment renders the statute impermissibly

vague as applied to her.[2] "In an as-applied challenge, a statute is unconstitutionally vague if it fails to put a defendant on notice that his conduct was criminal." *United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013) (cleaned up). Misleading an alien with false hope about her ability to obtain a green card falls within the plain meaning of Subsection (A)(iv)'s proscription against encouraging an illegal alien to remain in the United States in violation of the law, and an ordinary person would have understood that such conduct is prohibited by the statute. As such, the Subsection (A)(iv) charges against Sineneng-Smith were not impermissibly vague, and the district court did not err by refusing to dismiss them.

E. First Amendment Free Speech and Petition Clause Protections

Sineneng-Smith next contends that the immigration charges in the indictment should have been dismissed because the conduct charged therein was protected by the Free Speech and Petition Clauses of the First Amendment. These arguments, which rely yet again on the faulty premise that she was prosecuted for being hired to file I-140 petitions, lack merit. Sineneng-Smith was prosecuted for a course of conduct that involved misrepresentations made to convince Guillermo and Esteban to retain her services as an immigration consultant. To the extent that Sineneng-Smith was specifically prosecuted for her speech, First Amendment protections generally do not extend to "false claims that are made to effect a fraud or secure moneys or other valuable considerations." *United States v. Alvarez*, 567 U.S. 709, 723

[2] Sineneng-Smith's briefing raised only the question of whether Subsection (A)(iv) was vague as applied to her conduct.

(2012). Furthermore, these representations to Guillermo and Esteban did not fall under the protections of the Petition Clause because "the right to petition is generally concerned with expression directed to the government seeking redress of a grievance," *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011), not with expression directed to a private individual regarding a government petition.

Because Sineneng-Smith's own conduct, as charged in the indictment, was not protected by the First Amendment,[3] we conclude that the district court did not err by denying Sineneng-Smith's motion to dismiss the charges on First Amendment grounds.

II. The Sufficiency of the Evidence as to Encouragement or Inducing under Subsection (iv).

Sineneng-Smith also contends that the evidence was insufficient to establish beyond a reasonable doubt that, on the dates charged in the indictment, she encouraged or induced Guillermo or Esteban to remain in the United States.

A. Standard of Review

We review the denial of a motion for acquittal based on insufficiency of the evidence de novo. *See United States v. Suarez*, 682 F.3d 1214, 1218 (9th Cir. 2012). We determine whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could

[3] We express no opinion about whether Subsection (A)(iv) is facially overbroad in violation of the First Amendment. *See Sineneng-Smith*, 140 S. Ct. at 1582 ("we vacate the Ninth Circuit's judgment and remand the case for reconsideration shorn of the overbreadth inquiry").

have found the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original).

B. Elements of the Offense

To sustain the Subsection (A)(iv) charges, the government was required to prove that Sineneng-Smith knowingly (1) "encourage[d] or induce[d]," (2) "an alien to come to, enter, or reside in the United States," (3) "knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." To prove a violation of Subsection (B)(i), the government also needed to show that "the offense was done for the purpose of commercial advantage or private financial gain." 8 U.S. C. § 1324(a)(1)(B)(i).

Sineneng-Smith challenges the sufficiency of the evidence only as to the first element, claiming that the evidence was legally insufficient to establish that she encouraged Guillermo or Esteban to reside in the United States on the dates charged, respectively, in Counts 2 and 3 of the indictment. We disagree.

C. Evidence at Trial

The evidence at trial showed that, in 2002, Sineneng-Smith entered into retainer agreements with Guillermo and Esteban, which stated that the purpose of hiring Sineneng-Smith was "to obtain permanent residence through Labor Certification." The evidence also established that, from 2002 through 2008, Sineneng-Smith periodically sent copies of "leniency letters" to Guillermo and Esteban that requested

leniency from state and federal agencies in allowing each alien "to remain in the United States at least during the process of the application for Labor Certification," because she was "taking steps to legalize []her immigration status in the United States." The government also introduced evidence showing that, during the same time frame of 2002–2008, Sineneng-Smith also periodically sent Guillermo and Esteban "status" letters that requested them to "be patient and cooperate with us so that we will be successful in obtaining permanent residency." Additionally, the government established, as charged in the indictment, that on May 5, 2007, and June 18, 2007, Guillermo and Esteban, respectively, signed retainer agreements for Sineneng-Smith's assistance in obtaining I-140 approvals; these retainer agreements were accompanied by documents that referenced receiving a "work permit" and "green card" and purported to show Guillermo and Esteban "the road to obtaining permanent residence" through the Labor Certification program.

Sineneng-Smith provided the jury with evidence that completing steps one and two of the § 245i Labor Certification process could have benefited Guillermo and Esteban because they could receive a place in line if Congress changed the law to give them eligibility for permanent residence through the § 245i Labor Certification program. However, both Guillermo and Esteban testified at trial that they did not understand the intricacies of § 245i eligibility, no one informed them that they were ineligible for green cards under § 245i, and they would not have remained in the United States had Sineneng-Smith not given them the impression that they were eligible to obtain permanent residence through the Labor Certification process.

D. Analysis

The evidence as a whole showed that Sineneng-Smith had ongoing professional relationships with both Guillermo and Esteban, and that at numerous times during those relationships—including, specifically, on the dates charged in the indictment—Sineneng-Smith took some action to provide these individuals with the false hope that their retention of her services for each step in the § 245i Labor Certification process could lead to permanent residency. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Sineneng-Smith encouraged Guillermo and Esteban to remain in the United States in violation of Subsection (A)(iv).

When she provided them with the retainer agreements, she bolstered their false hope that using her services to file I-140 petitions would be another step on the road to obtaining permanent residency.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court as to Sineneng-Smith's convictions under 8 U.S.C. §§ 1324(a)(1)(A)(iv) and 1324(a)(1)(B)(i) is **AFFIRMED.**

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED OCTOBER 12, 2011 [APP. 22-27]

E-FILED on 10/12/2011

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. EVELYN SINENENG-SMITH, Defendant.	No. CR-10-00414 RMW ORDER DENYING MOTION TO DISMISS COUNTS ONE THROUGH THREE, NINE, TEN, AND THE FORFEITURE ALLEGATIONS OF THE SUPERSEDING INDICTMENT **[Re Docket No. 46]**

Defendant Evelyn Sineneng-Smith moves to dismiss counts one through three, counts nine and ten, and the forfeiture allegations of the superseding indictment filed against her. The counts in question allege violations of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(I), which impose criminal liability and penalties on 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 the law . . . ." For the reasons set forth below, the court denies the motion to dismiss.

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I. BACKGROUND[1]

From approximately 1990 to April 2008, defendant Evelyn Sineneng-Smith owned and operated an immigration consultation business located in San Jose, California, with additional offices in Beverly Hills, California, La Jolla, California, Las Vegas, Nevada, and New York, New York. Sineneng-Smith counseled foreign nationals on applying for and obtaining employment-based visas in order to enable them to work in the residential health care industry.

An alien can obtain an employment-based visa under United States immigration law from the Department of State by filing form I-485, Application to Register Permanent Residence or Adjust Status. Certain aliens are ineligible for adjustment of status. However, in 1994, Congress enacted Section 245(i) of the Immigration and Naturalization Act, known as the Legal Immigration Family Equity Act ("LIFE Act"), which permitted certain aliens who were otherwise ineligible for adjustment of status to pay a penalty in order to adjust their status without leaving the United States if the alien was the beneficiary of a qualifying immigrant visa petition or application for labor certification and met statutory and regulatory requirements before April 30, 2001. The relevant labor certification application, known as Form ETA-750, is filed with the United States Department of Labor ("USDOL") by the employer seeking to hire the alien. If the USDOL approves the form, an employer can apply on the alien's behalf to obtain a visa number and file an application with the United States Citizenship and Immigration Services ("USCIS") called the I-140, Petition for Alien Worker.

Counts one through three each allege that for the purpose of private financial gain, Sineneng-Smith encouraged or induced an alien to reside in the United States, knowing or in reckless disregard of the fact that such residence was in violation of the law. The indictment lists the initials of each alien, the date he or she entered into a retainer agreement with the defendant, and the admission number listed in Form I-94, the record of the alien's arrival into the United States.

The defendant is also charged with three counts of mail fraud. In support of those allegations, the superseding indictment alleges that Sineneng-Smith entered into retainer agreements

[1] Unless otherwise noted, background facts are taken from the superseding indictment.

with foreign nationals, most of whom entered the United States on visitor's visas from the Philippines, and their employers. The superseding indictment alleges that Sineneng-Smith fraudulently promoted USDOL's labor certification program as a way for foreign nationals to obtain a permanent resident employment-based visa, while knowing that foreign nationals who did not file petitions with USDOL or USCIS prior to April 30, 2001 would not be eligible to obtain employment-based visas. She charged $5,900 for the filing of an application for a foreign labor certification with USDOL and $900 for the filing of the I-140 Form with USCIS–filings that she allegedly knew were futile. Sineneng-Smith also allegedly knew that her clients had overstayed the amount of time they were allowed to be in the United States and worked illegally at various health care facilities.

II. ANALYSIS

A. Motion to Dismiss

Under Rule 12(b) of the Federal Rules of Criminal Procedure, a party may file a motion to dismiss based on "any defense, objection, or request that the court can determine without a trial of the general issue." Fed. R. Crim. P. 12(b); *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986). In considering a motion to dismiss, the court is limited to the face of the indictment and must accept the facts alleged in the indictment as true. *Winslow v. United States*, 216 F.2d 912, 913 (9th Cir. 1955).

B. The Scope of the Charged Statute

Section 1324(a)(1)(A) provides:

> Bringing in and harboring certain aliens
>
> (a) Criminal penalties.
>
> (1) (A) Any person who –
>
> . . . .
>
> (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of the law.

Section 1324(a)(1)(B)(I) sets the penalty when such conduct was done for commercial purposes or private financial gain.

The primary issue raised in the motion is whether defendant "encourage[d]" illegal aliens to continue to reside in the United States within the meaning of the statute by encouraging or inducing illegal aliens and their employers to pay her to pursue what she knew were hopeless applications for permanent residency. Defendant submitted no false information to USDOL or USCIS. A number of courts have considered the meaning of "encourages" under § 1324(a)(1)(A)(iv).

In *United States v. Oloyede*, 982 F.2d 133 (4th Cir. 1992), defendants had been convicted of a scheme to defraud the INS by falsifying documents for citizenship applications for illegal aliens already residing in the United States. Analyzing the meaning of "encourage" in a predecessor statute to § 1324(a)(1)(A)(iv), the court compared the language of that statute's predecessor statute, which had only proscribed conduct that encouraged "entry into the United States." It explained:

> IRCA [Immigration Reform and Control Act] worked a substantial expansion in the types of activities held criminal under this statute. IRCA's plain language distinguishes between these distinct categories of behavior and indicates that "encouraging" is not limited to bringing in, transporting or concealing illegal aliens. Rather, "encouraging" relates to actions taken to convince the illegal alien to come to this country or *to stay in this country*. Appellants' actions reassured their clients that they could continue to work in the United States, that they would not be subject to the threat of imminent detection and deportation, and that they could travel back to their homeland without risk of being prevented from returning, thus providing all the benefits of citizenship. The selling of fraudulent documents and immigration papers under these circumstances constitutes "encourages" as that word is used in the statute.

Id. at 137 (emphasis added).

In *United States v. Ndiaye*, 434 F.3d 1270, 1296 (11th Cir. 2006), the Eleventh Circuit held that the defendant had encouraged and induced an illegal alien to reside in the United States by helping him fraudulently obtain a Social Security number. The court explained that the defendant "may not have encouraged or induced an alien to come to or enter the United States, but a jury could have found that he encouraged or induced an alien . . . to reside in the United States, knowing it was in violation of the law. This violates the plain language of the statute."

Sineneng-Smith argues that her case is unlike *Oloyede*, *Ndiaye*, or other cases upholding convictions under the subject statute because she is not accused of helping aliens to obtain a benefits to which the aliens were not entitled. But the plain language of the statute imposes no requirement that the "encouragement" be accomplished through conduct that involves fraud against the United States. Here, the victims of defendant's alleged scheme were the aliens themselves. By suggesting to the aliens

that the applications she would make on their behalf, in exchange for their payments, would allow them to eventually obtain legal permanent residency in the United States, Sineneng-Smith encouraged the aliens to remain in the country within the meaning of § 1324(a)(1)(A)(iv). Indeed, the fact that she is accused of defrauding the aliens themselves, as opposed to the federal government, more strongly supports the conclusion the Sineneng-Smith encouraged or induced the aliens to remain in the United States than if she had merely assisted the aliens in obtaining fraudulent documents. The promise of a path to legal permanent residency that Sineneng-Smith held out to the alleged victims of her scheme was plainly powerful encouragement to those aliens to set up a life in the United States.

Sineneng-Smith cites the unreported district court decision in *Hagar v. ABX Air, Inc.*, 2008 WL 819293 (S.D. Ohio Mar. 25, 2008) for the proposition that merely employing an illegal alien does not constitute "encourag[ing]" or "induc[ing]" an alien to reside in the United States in violation of § 1324(a)(1)(A)(iv). That court held that "at a minimum the defendant must take some affirmative act to assist an alien to enter or remain in the United States" and that allegations that the defendants knowingly hired unauthorized aliens did not allege affirmative conduct that constituted encouraging or inducing. *Id.* *Hagar* appears questionable to the extent that it implies that the statute requires that a person actually *assist* the alien as opposed to merely encouraging the alien. The fact that Sineneng-Smith may not have assisted her clients to remain in the United States does not mean that she did not wrongfully encourage or induce them to continue to reside in the United States. The facts alleged demonstrate that she did.

In addition, interpreting § 1324(a)(1)(A)(iv) to prohibit the conduct of which Sineneng-Smith is accused does not cause the statute to be impermissibly vague. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with such definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. United States*, 130 S.Ct. 2896, 2927-27 (2010) (*quoting Koleder v. Lawson*, 461 U.S. 352, 357 (1983)). Sineneng-Smith argues that she is being prosecuted "for the simple act of being hired to provide immigration consultancy services to an unlawful alien." (Mot. at 14.) In fact, she is being prosecuted for allegedly fraudulently entering into retainer agreements by which she represented to illegal aliens that she would pursue a viable path to legal permanent residency on their

behalf, when she knew that the aliens she represented could not become legal permanent residents. As explained above, that conduct falls within the plain meaning of the statute, and an ordinary person would have understood that such conduct is prohibited. Defendant cites a number of cases involving the infamous honest services statute, 18 U.S.C. § 1346, but does not explain how 1324(a)(1)(A)(iv) resembles that statute in vagueness or novelty of application. The mere fact that there have been no prior cases directly on point does not mean that Sineneng-Smith did not have notice that her conduct was prohibited.

Similarly, Sineneng-Smith does not accurately describe the charges against her in her argument that she lacked notice because she relied on numerous USDOL and USCIS approvals of applications or that her First Amendment rights have been violated. She is not being prosecuted for making applications to the USDOL or USCIS. She is being prosecuted for allegedly entering into allegedly retainer agreements with illegal aliens, accepting payment from aliens and representing to aliens that her efforts would enable them to become legal permanent residents when she knew that they could not. That conduct, if proven, would be illegal under § 1324(a)(1)(A)(iv).

The parties agreed that the ruling on counts one through three dictate the outcome on counts nine and ten and the forfeiture allegations.

III. ORDER

For the foregoing reasons, the court denies defendant's motion.

DATED: 10/11/2011

Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED DECEMBER 23, 2013 [APP. 28-46]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. EVELYN SINENENG-SMITH, Defendant.	Case No. CR-10-00414-RMW **ORDER GRANTING-IN-PART AND DENYING-IN-PART DEFENDANT EVELYN SINENENG-SMITH'S MOTION FOR ACQUITTAL AND DENYING DEFENDANT'S MOTION FOR A NEW TRIAL** **[Re: Docket Nos. 213, 214]**

Defendant Evelyn Sineneng-Smith moves for a judgment of acquittal and a new trial with respect to three counts of violating § 1324(a)(1)(A)(iv) and (b)(i), and three counts of mail fraud. Dkt. Nos. 213, 214. For the reasons explained below, the court grants the motion for judgment of acquittal as to Counts One and Four, and denies the motion for judgment of acquittal as to Counts Two, Three, Five, and Six. The court conditionally grants the motion for a new trial as to Counts One and Four, and denies the motion for a new trial as to Counts Two, Three, Five, and Six.

I. BACKGROUND

From approximately 1990 to April 2008, defendant Evelyn Sineneng-Smith owned and operated an immigration consultation business located in San Jose, California, with additional offices in Beverly Hills, California, La Jolla, California, Las Vegas, Nevada, and New York, New

York. Sineneng-Smith counseled foreign nationals on applying for and obtaining employment based visas in order to enable them to work in the residential health care industry. An alien can obtain an employment-based visa under United States immigration law from the Department of State by filing form I-485, Application to Register Permanent Residence or Adjust Status. Certain aliens are ineligible for adjustment of status. However, in 1994, Congress enacted Section 245(i) of the Immigration and Naturalization Act, known as the Legal Immigration Family Equity Act ("LIFE Act"), which permitted certain aliens who were otherwise ineligible for adjustment of status to pay a penalty in order to adjust their status without leaving the United States if the alien was the beneficiary of a qualifying immigrant visa petition or application for labor certification and met statutory and regulatory requirements before April 30, 2001. The relevant labor certification application, known as Form ETA-750, is filed with the United States Department of Labor ("USDOL") by the employer seeking to hire the alien. If the USDOL approves the form, an employer can apply on the alien's behalf to obtain a visa number and file an application with the United States Citizenship and Immigration Services ("USCIS") called the I-140, Petition for Alien Worker.

Counts one through three each allege that for the purpose of private financial gain, Sineneng-Smith encouraged or induced an alien to reside in the United States, knowing or in reckless disregard of the fact that such residence was in violation of the law. The indictment lists the initials of each alien, the date he or she entered into a retainer agreement with the defendant, and the admission number listed in Form I-94, the record of the alien's arrival into the United States. These aliens have since been revealed to be Oliver Galupo (Counts One and Four), Amelia Guillermo (Counts Two and Five), and Hermansita Esteban (Counts Three and Six).

The defendant is also charged with three counts of mail fraud. In support of those allegations, the superseding indictment alleges that Sineneng-Smith entered into retainer agreements with foreign nationals, most of whom entered the United States on visitor's visas from the Philippines, and their employers. The superseding indictment alleges that Sineneng-Smith fraudulently promoted USDOL's labor certification program as a way for foreign nationals to obtain a permanent resident employment-based visa, while knowing that foreign nationals who did not file

petitions with USDOL or USCIS prior to April 30, 2001 would not be eligible to obtain employment-based visas. She charged $5,900 for the filing of an application for a foreign labor certification with USDOL and $900 for the filing of the I-140 Form with USCIS–filings that she allegedly knew were futile. Sineneng-Smith also allegedly knew that her clients had overstayed the amount of time they were allowed to be in the United States and worked illegally at various health care facilities.

On July 30, 2013, after a twelve-day trial, a jury convicted Sineneng-Smith on all six counts. Dkt. No. 195. Sineneng-Smith now moves the court for a judgment of acquittal and, in the alternative, for a new trial on all six counts.

II. ANALYSIS

Federal Rule of Criminal Procedure 29(c) permits a court to "set aside the verdict and enter an acquittal" if the jury has returned a guilty verdict or "[i]f the jury has failed to return a verdict." Fed. R. Crim. P. 29(c)(2). "In ruling on a Rule 29 motion, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Alarcon-Simi*, 300 F.3d 1172, 1176 (9th Cir. 2002) (internal quotation marks omitted). The court "must bear in mind that it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts." *United States v. Rojas*, 554 F.2d 938, 943 (9th Cir. 1977) (internal quotation marks omitted); *see also Alarcon-Simi*, 300 F.3d at 1176.

As for the new trial motion, Federal Rule of Criminal Procedure 33 permits the court, on defendant's motion, to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The court's power to grant a new trial is broader than its power to grant a motion for judgment of acquittal because the court "is not obliged to view the evidence in the light most favorable to the verdict, and it is free to weigh the evidence and evaluate for itself the credibility of the witnesses." *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000). However, the court's discretion is not unconstrained. The court may only grant a new trial if it finds that "the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of

justice may have occurred." *Id.* (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)).

A. Sufficiency of the Evidence on the Immigration Charges

To prove that Sineneng-Smith was guilty under § 1324(a)(1)(A)(iv) and (b)(i), the government had to show beyond a reasonable doubt that (1) the person identified in the count was an alien; (2) Sineneng-Smith encouraged or induced the alien to reside in the United States in violation of the law; (3) Sineneng-Smith knew that the alien's residence in the United States was or would be in violation of the law; and (4) Sineneng-Smith did so for private financial gain. The parties agree that a violation of § 1324(a)(1)(A)(iv) is not a continuing offense. Therefore, the government must prove that the offense was completed on the charged date. However, as the court ruled in considering the defendant's motions in limine, "[e]vidence of defendant's continued encouragement or inducement of the specific clients charged in the counts is relevant if it tends to prove acts consistent with the alleged inducement or encouragement such as showing that the inducement or encouragement was carried out." Dkt. No. 131, at 5.

The defendant did not dispute that Guillermo, Esteban, and Galupo are aliens. The government introduced evidence proving this element as to all three alleged victims. RT: 686:16-17; 688:5-6; Gov't Exh. 13B; Gov't Exh. 14 (as to Guillermo); RT: Vol. 6, 4:19-20; 6:5-8; Gov't Exh. 17B (as to Esteban); Gov't Exh. 10 (as to Galupo).

It is also undisputed that Sineneng-Smith knew that Guillermo's, Esteban's, and Galupo's residences in the United States were in violation of the law. Sineneng-Smith knew of her clients' immigration status because she routinely examined her clients' passports and visas and made copies for her files. RT: 1019:2-6. The defendant also admitted to ICE Special Agent Anthony Villacorta that she knew that "most of [her clients] were here illegally." *Id.* at 1018:24-1019:1. Therefore, the government presented sufficient evidence from which a reasonable jury could have found the first and third elements of the immigration charges proven beyond a reasonable doubt.

Finally, there is no dispute that Sineneng-Smith committed the immigration offenses for private financial gain. The government introduced checks to the defendant written on behalf of Galupo, Gov't Exh. 11, Esteban, Gov't Exh. 19, and Guillermo, Gov't Exh. 15. Esteban and

Guillermo both testified that they paid Sineneng-Smith for their retainer agreements. RT: Vol. 6, 19:18-23; 30:9-10 (Esteban); RT: 701:12-24; 715:19-24 (Guillermo).

1. Count Two: "Encouragement" as to Guillermo

The defendant argues that the government presented insufficient evidence for a reasonable jury to find beyond a reasonable doubt that Sineneng-Smith encouraged or induced Guillermo to reside in the United States in violation of the law. The government in response directs the court to several excerpts of Guillermo's testimony at trial. In particular, Guillermo testified that she met with the defendant, the defendant's staff member, and Guillermo's employer, Marilyn Santiago, on April 10, 2002. RT: 693:11-24. At that meeting, Guillermo signed a retainer agreement for Sineneng-Smith to guide her through the labor certification process, paying Sineneng-Smith $200 per month plus a $500 down payment for a total of $5,900. *Id*. at 701:3-5; 12-15; 23-24. Guillermo testified that she then asked the defendant's staff member—apparently while Sineneng-Smith was present—whether she could work, and the staff member replied "that's why you are here." *Id*. at 704:9-12. Shortly after Guillermo's meeting with the defendant, she began working for Santiago. *Id*. at 705:14-18.

Guillermo testified that five years later, Santiago informed her that her labor certification was approved. RT: 713:22-24. Sineneng-Smith mailed her a retainer for a Petition for Alien Worker (I-140), which Guillermo signed on May 5, 2007, the charged date. *Id*. at 714:14-23; 715:25-716:3. This retainer agreement cost Guillermo $1,000, and she paid $300 down. *Id*. at 715:12-24. Santiago signed the agreement on June 20, 2007, and Guillermo mailed the retainer back to Sineneng-Smith. *Id*. at 716:12-16; 720:16-20. The government introduced several of Guillermo's retainer agreements with Sineneng-Smith into evidence. Gov't Exh. 13A at 346-47; Gov't Exh. 13D; Gov't Exh. 13F. Along with the retainer agreement for the Petition for Alien Worker, the government introduced a document from Sineneng-Smith advising Guillermo on a premium processing service for the Petition for Alien Worker. Gov't Exh. 13F at 182-83. This document mentions the possibility of Guillermo receiving a work permit and green card, and the accompanying chart states that the "Next Step if result is Approval" is to "Apply for Work Permit/Green Card." *Id*.

From this evidence, a reasonable jury could have found beyond a reasonable doubt that Sineneng-Smith encouraged Guillermo to reside illegally in the United States on May 5, 2007. This court previously held in denying the defendant's motion to dismiss that Sineneng-Smith could "encourage" within the meaning of § 1324(a)(1)(A)(iv) "[b]y suggesting to the aliens that the applications she would make on their behalf, in exchange for their payments, would allow them to eventually obtain legal permanent residency in the United States." Dkt. No. 51, at 4-5. The jury could have concluded that Sineneng-Smith suggested to Guillermo that, by proceeding with the retainer agreements and various applications, Guillermo would eventually be able to obtain legal status. While the defendant was present, her employee told Guillermo that the purpose of the meeting was to allow Guillermo to work in the United States. The defendant had Guillermo sign and pay for retainer agreements that would purportedly help Guillermo achieve legal status, when in fact legal status was impossible.

The evidence at trial was sufficient for a reasonable jury to find that through advertisements in Filipino newspapers and flyers at residential healthcare facilities, Sineneng-Smith attracted individuals she knew were working illegally in the United States, promising them that a successful labor certification and I-140 petition would allow them to obtain legal permanent residency, all the while knowing that without a change in the law, many of her clients were not allowed to work even after the labor certification and I-140 were approved. RT: 1018:9-11; 16-18; 1019:19-21; 1020:1-5; 13-18; 1022:9-17. This evidence could have provided the jury with context for Sineneng-Smith's specific meeting with Guillermo, lending credibility to Guillermo's testimony on her perception of the meeting's purpose. This evidence also could have provided context for Sineneng-Smith's employee's "that's why you are here" statement, allowing a reasonable jury to find beyond a reasonable doubt that Sineneng-Smith "encouraged" Guillermo to reside illegally within the United States on the day Guillermo signed the Petition for Alien Worker, as prohibited by § 1324(a)(1)(A)(iv).

Sineneng-Smith argues that she never met with Guillermo or talked to her about the Petition for Alien Worker. The defendant contends that she merely filed paperwork for Guillermo. But the jury could have reasonably concluded otherwise. Sineneng-Smith did meet with Guillermo with

respect to the labor certification, and the documents surrounding the Petition for Alien Worker indicate that Sineneng-Smith held out her services as a vehicle to obtain a legal work permit and green card. The evidence shows an ongoing relationship between Guillermo and the defendant, and Guillermo testified repeatedly that she "trusted Evelyn Sineneng-Smith," even though Sineneng-Smith was not providing Guillermo with legal advice. RT: 720:1-9. A reasonable jury could have found beyond a reasonable doubt that the retainer agreements, meetings, and other documents exchanged by Sineneng-Smith and Guillermo rose to the level of the defendant "encouraging" Guillermo to reside illegally in the United States.

Sineneng-Smith also argues, with respect to Counts Two and Three, that the retainer agreements were not signed until after the charged date, meaning that they were not in legal effect on the charged date. But this fact is irrelevant. The government's allegations are not based on the legal relationship between the defendant and her clients. In fact, as the defendant repeatedly asserts, the legal relationship was relatively circumscribed. Instead, the government alleges that Sineneng-Smith encouraged her clients to reside illegally in the United States by suggesting to them that the applications she would make on their behalf would allow them to eventually obtain legal permanent residency in the United States. In other words, the government's proof of encouragement is based on the impression Sineneng-Smith fostered in her clients that they would be able to obtain a green card through her services. Having her clients sign a retainer agreement was the mechanism of the defendant's encouragement, but the retainer agreement having immediate legal effect was unnecessary for encouragement to have occurred.

2. Count Three: "Encouragement" as to Esteban

Esteban's testimony at trial tells a similar story to Guillermo's. Esteban testified that she met with Sineneng-Smith on May 13, 2002. RT: Vol. 6 at 8:17-22. At that meeting, Esteban signed a retainer agreement, which the government admitted into evidence. Gov't Exh. 17A at 245-46. Like Guillermo, Esteban paid the defendant a $5,900 retainer fee. RT: Vol. 6 at 19:23. Esteban testified that during the May 13, 2002 meeting, Sineneng-Smith told her that she "was able to work once the [labor certification] was filed." *Id*. at 11:10-13. Esteban also testified that, with respect to Esteban's ability to remain in the United States, Sineneng-Smith advised her that "[she] was here in the U.S.

and that [she] could stay here in the U.S." *Id*. at 11:14-24. It was Esteban's understanding that at the end of the process, she "would receive a green card." *Id*. at 11:25-12:2.

Esteban testified that after the May 13, 2002 meeting, she began to work at Soquel Leisure Villa. RT: Vol. 6 at 23:4-5. Esteban did not attempt to extend her visa, which expired on October 12, 2002, because she "thought that [she] had a petition that had been filed and that that was [her] way of being legalized." *Id*. at 23:7-13. Later, Esteban testified that she received a letter notifying her that her labor certification application had been approved. *Id*. at 29:3-5. Sineneng-Smith then sent Esteban a retainer agreement for immigrant petition, which Esteban signed. *Id*. at 29:11-30:1. As with Guillermo, Esteban paid $1,000 for this retainer agreement. RT: Vol. 6 at 29:17-23. Esteban testified that she gave the second retainer agreement, dated June 18, 2007—the charged date—to her employer to mail to Sineneng-Smith. The government introduced this retainer agreement, along with several related documents, into evidence. Gov't Exh. 17E.

The evidence as to Esteban is stronger than the evidence as to Guillermo. The jury could reasonably believe Esteban's testimony that the defendant personally represented to her that she could stay in the United States and work while her labor certification was pending. It is uncontested that Sineneng-Smith knew that Esteban's continued residence in the United States was illegal. Thus, based on Esteban's testimony, a reasonable jury could find beyond a reasonable doubt that Sineneng-Smith encouraged Esteban to remain in the United States on the charged date by promising to help her obtain legal status.

3. Count One: "Encouragement" as to Galupo

The court finds the evidence presented at trial insufficient as to Galupo. Unlike Esteban or Guillermo, Galupo did not testify at trial, nor did his employer. The only evidence presented by the government at trial connecting Galupo and Sineneng-Smith was the retainer agreement for the defendant's services signed by Galupo. The government argues that the "jury could infer from reviewing Galupo's June 2, 2005 retainer agreement that the defendant also encouraged him to reside in the United States." Gov. Opp. at 6-7. In doing so, the government wishes to criminalize the signing of a retainer agreement with an illegal resident in the United States for the filing of a labor certification on the alien's behalf. This simple act, as the defendant argues, is certainly not a

violation of § 1324(a)(1)(A)(iv). Rather, as the court ruled in denying Sineneng-Smith's motion to dismiss, encouragement under the statute requires "suggesting to the aliens that the applications [Sineneng-Smith] would make on their behalf, in exchange for their payments, would allow them to eventually obtain legal permanent residency in the United States." Dkt. No. 51, at 4-5. Therefore, to present sufficient evidence of encouragement, the government must demonstrate that Sineneng-Smith suggested to Galupo that the applications she would make on his behalf would potentially lead to legal permanent residency in the United States.

However, the government has introduced no evidence that Sineneng-Smith made any representations to Galupo that her services could allow him to obtain legal permanent residency in the United States. The government presented no testimony concerning statements made by Sineneng-Smith to Galupo, nor did it introduce any documentary evidence to that effect. Moreover, the retainer agreement between Galupo and Sineneng-Smith by itself is insufficient—on its face, it merely states that Sineneng-Smith will assist Galupo in attaining a labor certification. The retainer agreement does not promise that the labor certification can lead to legal permanent residency for Galupo.

Although the circumstances surrounding the signing of Galupo's retainer agreement appear similar to those of Guillermo and Esteban, the court—and a reasonable jury—must examine the evidence as to each count separately. If the court were to allow the jury to infer solely from the retainer agreement that Galupo had an experience with Sineneng-Smith similar to Guillermo's and Esteban's, it would allow the jury to convict Sineneng-Smith on Count One based solely on other crimes she committed. From the government's presentation of a few otherwise neutral documents from Galupo's file that are similar to documents found in Guillermo's and Esteban's files, the government wished the jury to infer that the representations the defendant made to Guillermo and Esteban also were made to Galupo. This sort of inference is prohibited by Fed. R. Ev. 404(b)(1). And without any evidence that Sineneng-Smith made any representations at all regarding Galupo's ability to obtain legal permanent residency, no reasonable jury could find beyond a reasonable doubt that Sineneng-Smith encouraged Galupo to reside illegally in the United States.

The government contends that the jury could have found that once Galupo signed the retainer agreement with Sineneng-Smith, he had to remain in the United States so he could work to pay her. This argument suggests that any person who lends an alien money could be guilty of violating § 1324(a)(1)(A)(iv). Another court has held, and the Third Circuit has affirmed, that an employer does not encourage an alien within the meaning of § 1324(a)(1)(A)(iv) by hiring an undocumented worker. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 308 (D.N.J. 2005) *aff'd sub nom. Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527 (3d Cir. 2012). If actually hiring an alien to work does not constitute "encouragement," it is certainly not "encouragement" to make an agreement with an alien that, under the circumstances, requires him to work to pay money owed under the agreement. Even further, nothing about simply owing the defendant money required Galupo to live and work in the United States. Galupo could have sent Sineneng-Smith the money from the Philippines. He could have obtained the money from a generous relative. The government's argument here fails.

4. Summary: Immigration Charges

In sum, the evidence presented at trial was sufficient as to Counts Two (Guillermo) and Three (Esteban), and insufficient as to the encouragement element of Count One (Galupo). Sineneng-Smith argues, as she did in her motion to dismiss earlier in this case, Dkt. No. 46, that her conduct cannot fall within the scope of § 1324(a)(1)(A)(iv), and that interpreting § 1324(a)(1)(A)(iv) to prohibit the conduct of which defendant is accused would cause it to be unconstitutionally vague. But for the reasons stated above and in the court's denial of her motion to dismiss, Dkt. No. 51 at 4-6, the court finds that the conduct proven as to Counts Two and Three constitutes "encouragement" under § 1324(a)(1)(A)(iv), [1] and that this interpretation of

[1] Sineneng-Smith makes the same arguments as before. However, the court will address one argument in particular, as the government further refuted it with evidence presented at trial. Sineneng-Smith contends that she must be acquitted because there can be legitimate reasons for someone to file a labor certification or petition for alien worker. The defendant relies on USCIS Associate Center Director Kurt Gooselaw's grand jury testimony that individuals have a right to file foreign labor certifications and I-140s, and that thousands of foreign labor certifications and I-140s for aliens unlawfully present in the United States have been approved. But the government sufficiently responded to this argument with Mr. Gooselaw's trial testimony. Mr. Gooselaw testified that an alien with an approved labor certification and I-140, who is ineligible for § 245(i) and residing in the United States, is creating an "unlawful presence." RT: 244:4-11. "That means if they

§ 1324(a)(1)(A)(iv) does not render it unconstitutionally vague or deny Sineneng-Smith fair notice. Therefore, the court grants the defendant's motion for judgment of acquittal as to Count One, and denies it as to Counts Two and Three. Upon a similar review of the evidence, but without construing the evidence in the light most favorable to the government, the court finds that failing to grant a new trial on Counts Two and Three would not result in "a serious miscarriage of justice," *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000), so the court accordingly denies Sineneng-Smith's motion for a new trial as to Counts Two and Three. As to Count One, the court conditionally grants Sineneng-Smith's motion for a new trial.

B. Sufficiency of the Evidence on the Mail Fraud Charges

To prove that Sineneng-Smith committed mail fraud, the government had to show beyond a reasonable doubt that: (1) Sineneng-Smith knowingly devised and intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money by means of false or fraudulent pretenses, representations, or promises; (2) the statements made or facts omitted as part of the scheme were material; (3) Sineneng-Smith acted with the intent to defraud; and (4) Sineneng-Smith used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme. Sineneng-Smith in her motions for judgment of acquittal and new trial only contests the first two elements.

The defendant does not dispute that if a scheme to defraud is found, the mails were used to carry out an essential part of the scheme. As to Count Four, ICE Special Agent Wendell Wright testified that he discovered a letter dated December 2, 2005 from the defendant transmitting a Department of Labor Application for Permanent Employment Certification for Galupo that was mailed from San Jose, CA to Chicago, IL. RT: 1162:11-1163:3; *see* Gov't Exh. 9E. Special Agent Wright found a U.S. Postal certified mail receipt with the document. *Id*. at 1163:4-7. As to Count Five, Special Agent Wright testified that he found a letter, dated July 12, 2007, signed by Sineneng-

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accrue more than 180 days in less than a year they could be barred from the United States if they depart. And more than one year unlawful presence, they depart the United States, they could be barred for ten years." *Id*. at 244:13-16. Therefore, Sineneng-Smith did not file for labor certifications and I-140s for legitimate reasons, but rather that the defendant harmed her clients by worsening their immigration status.

Smith, and accompanying the I-140 Form for Guillermo, that was mailed from San Jose, CA to Lincoln, NE. *Id*. at 1167:16-1168:14; *see* Gov't Exh. 13H. Special Agent Wright found a U.S. Postal certified mail receipt with these documents as well. *Id*. at 1168:15-18. As to Count Six, Esteban testified that she received a leniency letter dated October 22, 2007 in the mail from Sineneng-Smith. RT: Vol. 6 27:17-28:6.

Sineneng-Smith also does not appear to dispute that if a scheme to defraud is found, a reasonable jury could have concluded beyond a reasonable doubt that she acted with intent to defraud. The government presented sufficient evidence as to this element. ICE Special Agent Anthony Villacorta testified that Sineneng-Smith admitted to him that she knew that her clients could not obtain legal permanent residency through labor certification, that she knew how the § 245(i) legislation operated, and that her clients could not work even after the labor certification and petition for immigrant worker were approved. RT: 1020:1-18; 1022:9-14. According to Special Agent Villacorta's testimony, Sineneng-Smith explained to him the proper procedure for her clients to be able to legally adjust their immigration status, which required them to wait in their home country until they were approved for a work visa to enter the United States. *Id*. at 1022:17-1023:8. Sineneng-Smith knew that she was not following the proper procedure with her clients. *Id*. at 1023:5-8. The government also presented evidence that Sineneng-Smith, through advertisements in Filipino newspapers and flyers at residential healthcare facilities, attracted clients she knew were working illegally in the United States. *Id*. at 1018:9-11; 16-18; 1019:19-21. From all of this evidence, the jury could have reasonably concluded beyond a reasonable doubt that Sineneng-Smith acted with intent to defraud.

1. A Scheme or Plan to Defraud

"Proof of an affirmative, material misrepresentation supports a conviction of mail fraud" without any additional proof of a fiduciary duty to the victim. *United States v. Benny*, 786 F.2d 1410, 1418 (9th Cir. 1986). However, "[a] defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved." *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981) (citing *United States v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980); *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967); *Lemon v. United States*, 278 F.2d 369,

373 (9th Cir. 1960)). In addition, "deceitful statements of half truths or the concealment of material facts is actual fraud violative of the mail fraud statute. . . . [T]he deception need not be premised upon verbalized words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance." *United States v. Woods*, 335 F.3d 993, 998 (9th Cir. 2003) (citing *Lustiger*, 386 F.2d at 138). Note also that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Neder v. United States*, 527 U.S. 1, 25 (1999).

The government alleges that Sineneng-Smith misled Guillermo, Esteban, and Galupo into believing that they could achieve legal permanent residency via the defendant's services. The relevant inquiry, then, is whether, as to each alleged victim, the government presented sufficient evidence from which a reasonable jury could conclude beyond a reasonable doubt that Sineneng-Smith engaged in a scheme to defraud by creating the false impression that her client could achieve legal permanent residency. The government must also have introduced sufficient evidence from which a jury could conclude that the falsehood was material. The court finds that the government upheld its burden with respect to Count Five (Guillermo) and Count Six (Esteban), but not as to Count Four (Galupo). Sineneng-Smith's motion for judgment of acquittal is therefore denied as to Counts Five and Six and granted as to Count Four.

2. Count Five: Scheme to Defraud as to Guillermo

The relevant facts for the mail fraud charge are similar to the facts for the immigration charge. Guillermo testified that she met Sineneng-Smith on April 10, 2002. RT: 693:11-24. There, Guillermo sat at a table with Santiago (her employer), the defendant, and the defendant's staff member. *Id*. At the meeting, Guillermo signed a retainer agreement for Sineneng-Smith to assist her in "obtain[ing] permanent residence through Labor Certification." Gov't Exh. 13A at 346-47. Guillermo testified that she asked the defendant's staff member whether she could work, and the staff member replied "that's why you are here." RT: 704:9-12.

Guillermo testified that she began working for Santiago about a month after the meeting, on May 5, 2002. RT: 705:14-18. Guillermo also testified that she received a number of leniency letters from Sineneng-Smith. *Id*. at 706:16-25. The letters indicated that Guillermo was "taking steps to

legalize his/her immigration status in the United States," and they were addressed to various state and federal agencies. Gov't Exh. 13C. Eventually, Santiago told Guillermo that her labor certification had been approved. RT: 713:22-24. Shortly thereafter, Sineneng-Smith sent Guillermo a retainer for an I-140, which Guillermo signed. *Id*. at 714:14-23; 715:25-716:3. Guillermo testified that she also paid a $300 down payment on the retainer agreement's $1,000 total cost. *Id*. at 715:12-24. As described in the section on Count Two, Guillermo testified that she signed a document on "premium processing." Gov't Exh. 13F at 182-83. This document mentions the possibility of Guillermo receiving a work permit and green card, and the accompanying chart states that the "Next Step if result is Approval" is to "Apply for Work Permit/Green Card." *Id*.

Sineneng-Smith, contending that the evidence only reveals material omissions, argues that "a non-disclosure can only serve as a basis for a fraudulent scheme when there exists an independent duty that has been breached by the person so charged." *United States v. Dowling*, 739 F.2d 1445, 1449 (9th Cir. 1984), *rev'd on other grounds*, 473 U.S. 207 (1985). But the evidence introduced at trial establishes that the defendant's statements to Guillermo are better characterized as half-truths, or even as being affirmatively misleading. Various different documents suggested that Guillermo could obtain a green card, and the defendant's staff member indicated to Guillermo that following Sineneng-Smith's advice would allow Guillermo to legally work in the United States. A jury could have reasonably concluded from the evidence that Sineneng-Smith intentionally led Guillermo to believe that Guillermo could obtain legal permanent residency.

Finally, the government presented unequivocal evidence of materiality. Guillermo testified that if the defendant told her that she could not obtain a green card, she would have gone home. RT: 796:17-19. Guillermo reasonably relied on Sineneng-Smith's representations that Guillermo could obtain a green card. The evidence introduced at trial was sufficient as to Count Five.

3. Count Six: Scheme to Defraud as to Esteban

As Esteban's testimony was detailed in the section on Count Three, and the testimony was largely similar to Guillermo's, the court will only highlight a few key facts. Esteban testified that when she met with Sineneng-Smith, the defendant told her "to trust her because she studied law, and that her office was trustworthy, and that there were many people whose petitions had been

approved." RT: Vol. 6, 10:11-16. Esteban believed that at the end of the process, she "would receive a green card." *Id*. at 11:25-12:2. Esteban signed a retainer agreement with similar language to the one Guillermo signed. The agreement stated that "Evelyn Sineneng-Smith, has been retained by me Hermansita Esteban (alien) for the purposes of assisting me (alien), to obtain permanent residence through Labor Certification." Gov't Exh. 17A at 245-46. Esteban testified that after the meeting, she was under the impression that her petition "was [her] way of being legalized." RT: Vol. 6, 23:7-13. As a result, Esteban did not extend her visa. *Id*.

Esteban testified that, like Guillermo, she received leniency letters "almost every month." RT: Vol 6, 25:19-20; Gov't Exh. 17C. The leniency letters stated that "[t]his alien is taking steps to legalize his/her immigration status in the United States," again indicating to Esteban that she was going through the process to achieve legal permanent residency. Gov't Exh. 17C. The government also admitted status letters sent by Sineneng-Smith to Esteban. These letters told Esteban to "[p]lease be patient and cooperate with us so that we will be successful in obtaining your permanent residency in the United States." Gov't Exh. 17C. Esteban later signed a retainer agreement for Sineneng-Smith to assist her in filing a Petition for Alien Worker. Gov't Exh. 17E at 42-43.

The record is replete with explicit misrepresentations made to Esteban. A reasonable jury could have found beyond a reasonable doubt that Sineneng-Smith's repeated allusions to Esteban attaining legal status or permanent residency fraudulently misled Esteban into believing that she could obtain a green card, when in fact it was impossible. Esteban's testimony demonstrates that Esteban assumed she was taking the proper steps to achieve legal permanent residency, and that Sineneng-Smith's actions were instrumental in forming this belief. Unlike the defendant contends, this count is not based purely on an omission. Rather, Sineneng-Smith's affirmative statements to Esteban in person and through retainer agreements and letters misled Esteban.

As to materiality, although the government does not point to an express statement from Esteban that she would not have reasonably retained Sineneng-Smith had Esteban known that she was ineligible for a green card, the jury could reasonably infer materiality beyond a reasonable doubt based on all of Esteban's testimony detailing her belief that she could work and reside in the

United States while proceeding to obtain a green card. The court therefore denies the defendant's motions with respect to Count Six.

4. Count Four: Scheme to Defraud as to Galupo

As mentioned in the section on Count One, Galupo did not testify at trial. The government directs the court to two documents introduced at trial to support the jury's verdict: Galupo's retainer agreement, Gov't Exh. 9 at 189-91, and a chart entitled "The Road to Obtaining Permanent Residence is a Rocky and Frustrating Road," Gov't Exh. 9 at 195. Because the government cannot demonstrate that Sineneng-Smith engaged in a scheme to defraud Galupo, the court grants the defendant's motion for judgment of acquittal as to Count Four.

The government highlights the first line of Galupo's retainer agreement, which reads "This will acknowledge that Evelyn Sineneng-Smith has been retained by me Oliver Galupo (alien worker) for purposes of assisting me to obtain my Labor Certification thru PERM." Nothing about this statement is misleading. It does not suggest that Galupo will receive legal status or a green card. Not only is it apparently true that Galupo retained Sineneng-Smith, but the government does not contend that Galupo could not have obtained a labor certification.

The government also points to an addendum to the retainer agreement: "As of today, 245i was not renewed, but Congress may reintroduce 245i during their next session." The government argues that a "jury could find that the statement is misleading because it does not provide an explanation of what 245(i) [sic] and speculates that Congress may take action." Dkt. No. 218 at 15-16. If anything, this addendum is more consistent with full disclosure than with misrepresentation. In adding this language, Sineneng-Smith made only truthful statements. These truthful statements disclosed the current state of the law to Galupo. Because there is no evidence as to what either Sineneng-Smith or Galupo said at the time the retainer agreement was signed, there is insufficient evidence from which a reasonable jury could find that the defendant should have explained what § 245(i) is or that she should have told Galupo that he was ineligible for a green card. In fact, because there is a lack of evidence, it is reasonable to conclude that Sineneng-Smith may have told Galupo that, without a change in the law, he could not obtain a green card. No reasonable jury could

conclude beyond a reasonable doubt from the retainer agreement that Sineneng-Smith misled Galupo.

The analysis as to the "Rocky and Frustrating Road" chart is similar. This chart indicates that attaining a work permit and green card may be possible, but that it is a difficult and "frustrating" process. Gov't Exh. 9 at 195. Under the portion of the chart mentioning a work permit and green card, a note reads "If applicable, 245i effective here." Again, because the government presented no evidence of the discussion surrounding this chart, there was no evidence from which a jury could conclude that Sineneng-Smith did or did not represent to Galupo that he could obtain a green card. The only evidence that the government showed the jury was the chart itself, without any context. No reasonable jury could find beyond a reasonable doubt based on this ambiguous chart that Sineneng-Smith engaged in a scheme to defraud Galupo.

Taken together, the retainer agreement and chart fare no better. As both documents specially mention § 245(i), Sineneng-Smith may have highlighted the issue rather than concealed it. The government introduced no testimony concerning the meeting, nor did the jury have any context for how the defendant presented these two documents to Galupo.

Furthermore, even if a reasonable jury could accept beyond a reasonable doubt that the retainer agreement and the "Rocky and Frustrating Road" chart proved a scheme to defraud, the government could not prove that the falsehood was material. Without any testimony as to Galupo's motives for retaining Sineneng-Smith, the government presented no evidence that Galupo even intended to pursue a green card. Any conclusion that Galupo would not have reasonably retained Sineneng-Smith had he known that he was ineligible for legal permanent residency would have been based on pure speculation, much less evidence beyond a reasonable doubt. The evidence as to Galupo is clearly insufficient.

5. Summary: Mail Fraud Charges

In sum, the evidence presented at trial was sufficient as to Counts Five (Guillermo) and Six (Esteban), and insufficient as to the scheme to defraud and materiality elements of Count Four (Galupo). Therefore, the court grants the defendant's motion for judgment of acquittal as to Count Four, and denies it as to Counts Five and Six. Upon a similar review of the evidence, but without

construing the evidence in the light most favorable to the government, the court finds that failing to grant a new trial on Counts Five and Six would not result in "a serious miscarriage of justice," *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000), so the court accordingly denies Sineneng-Smith's Motion for a new trial as to Counts Five and Six. As to Count Four, the court conditionally grants Sineneng-Smith's motion for a new trial.

C. Entrapment by Estoppel

Sineneng-Smith argues that the government is estopped from prosecuting her for the act of being hired to do immigration consultant work. But, as the court stated in addressing this same assertion in the defendant's motion to dismiss, Sineneng-Smith is not being prosecuted for the act of being hired to do immigration consultant work. "She is being prosecuted for allegedly entering into allegedly retainer agreements with illegal aliens, accepting payment from aliens and representing to aliens that her efforts would enable them to become legal permanent residents when she knew that they could not. That conduct, if proven, would be illegal under § 1324(a)(1)(A)(iv)**."** Dkt. No. 51 at 6.

D. First Amendment Arguments

Sineneng-Smith contends that her conviction on the immigration charges violates her rights under the Petition Clause and Free Speech Clause of the First Amendment. The defendant makes the same arguments here—almost verbatim—as she made in her motion to dismiss. *See* Dkt. No. 46 at 20-25. For the same reasons as the court expressed in its order denying Sineneng-Smith's motion to dismiss, it rejects the defendant's contentions here. Dkt. No. 51 at 6.

E. Objections to Evidence and Jury Instructions

1. Scheme Evidence and Relevant Time Period

The court previously considered and rejected the defendant's arguments to exclude evidence of mail fraud based on a scheme mail fraud theory in its Rulings on Defendant's Motions *In Limine* I-IV. Dkt. No. 131. The court denied the defendant's motion in limine to exclude evidence based on a scheme mail fraud theory because Sineneng-Smith's arguments all rested on the erroneous premise that the scheme is not relevant to establish liability for the three specific counts charged. *Id.* at 1-3. The summary witnesses' testimony was relevant to the existence and scope of the charged

offenses, and the witnesses properly laid foundation for each of the summary charts introduced under Federal Rule of Evidence 1006. For the reasons stated here and those given in the order on the defendant's motions in limine, Sineneng-Smith is not entitled to a new trial based on the court's allowance of this evidence.

2. La Jolla Recording and Ramelb Testimony

The court also previously considered and rejected Sineneng-Smith's arguments as to the La Jolla recording and ICE Special Agent Ramelb testimony in its Rulings on Defendant's Motions *In Limine* I-IV. Dkt. No. 131. As Special Agent Ramelb sufficiently authenticated the recording in his testimony at trial, RT: 1097:5-6; 1098:17-24; 1099:1-4; 1100:23-25; 1101:19-21; 1102:11-20; 1103:1-11, and the defendant concedes that her arguments here are the same as in the motion in limine, the court concludes that Sineneng-Smith is not entitled to a new trial based on the court's allowance of this evidence.

3. Vicarious Liability Instruction

The court has previously denied the defendant's request for a vicarious liability instruction. The government did not rely upon a vicarious liability theory, and the evidence the government offered from Sineneng-Smith's employees was limited to conduct within the scope of the employees' agency as proscribed by Sineneng-Smith.

III. ORDER

For the above stated reasons, the court grants defendant Evelyn Sineneng-Smith's motion for judgment of acquittal as to Counts One and Four. The motion for judgment of acquittal is denied as to Counts Two, Three, Five, and Six. The motion for a new trial is conditionally granted as to Counts One and Four, and denied as to Counts Two, Three, Five, and Six.

Dated: December 23, 2013

Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

OPINION OF THE NINTH CIRCUIT COURT OF APPEALS DATED DECEMBER 4, 2018 [APP. 47-88]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. EVELYN SINENENG-SMITH, *Defendant-Appellant.*	No. 15-10614 D.C. No. CR 10-414 RMW OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, Senior District Judge, Presiding

Argued and Submitted April 18, 2017
San Francisco, California
Reargued and Resubmitted February 15, 2018
Pasadena, California

Filed December 4, 2018

Before: A. Wallace Tashima, Marsha S. Berzon, and Andrew D. Hurwitz,* Circuit Judges.

Opinion by Judge Tashima

* Judge Reinhardt, who was originally a member of this panel, died after this case was reargued and resubmitted for decision. Judge Hurwitz was randomly drawn to replace him. Judge Hurwitz has read the briefs, reviewed the record, and watched video recordings of the oral arguments.

SUMMARY[**]

Criminal Law

The panel reversed the district court's judgment with respect to the defendant's convictions on two counts of encouraging and inducing an alien to remain in the United States for the purposes of financial gain, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iv) & 1324(a)(1)(B)(i); vacated the defendant's sentence; and remanded for resentencing.

The panel held that subsection (iv) – which permits a felony prosecution of any person who "encourages or induces" an alien to come to, enter, or reside in the United States if the encourager knew, or recklessly disregarded the fact that such coming to, entry, or residence is or will be in violation of law – is unconstitutionally overbroad in violation of the First Amendment because it criminalizes a substantial amount of protected expression in relation to its narrow band of legitimately prohibited conduct and unprotected expression.

In a concurrently filed memorandum disposition, the panel affirmed the judgment with respect to the defendant's convictions on two counts of mail fraud in violation of 18 U.S.C. § 1341.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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OPINION

TASHIMA, Circuit Judge:

INTRODUCTION

Defendant-Appellant Evelyn Sineneng-Smith was convicted on two counts of encouraging and inducing an alien to remain in the United States for the purposes of financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) & § 1324(a)(1)(B)(i).[1] Section 1324(a)(1)(A)(iv) ("Subsection (iv)") permits a felony prosecution of any person who "encourages or induces an alien to come to, enter, or reside in the United States" if the encourager knew, or recklessly disregarded "the fact that such coming to, entry, or residence is or will be in violation of law." We must decide whether Subsection (iv) abridges constitutionally-protected speech. To answer this question, we must decide what "encourages or induces" means.

[1] Sineneng-Smith was also convicted of two counts of mail fraud in violation of 18 U.S.C. § 1341. We affirm those convictions in a separate, concurrently filed memorandum disposition.

The parties have widely divergent views about how to interpret the statute. Sineneng-Smith and several *amici* contend that encourage and induce carry their plain meaning and, therefore, restrict vast swaths of protected expression in violation of the First Amendment. The government counters that the statute, in context, only prohibits conduct and a narrow band of unprotected speech.

We do not think that any reasonable reading of the statute can exclude speech. To conclude otherwise, we would have to say that "encourage" does not mean encourage, and that a person cannot "induce" another with words. At the very least, it is clear that the statute potentially criminalizes the simple words – spoken to a son, a wife, a parent, a friend, a neighbor, a coworker, a student, a client – "I encourage you to stay here."

The statute thus criminalizes a substantial amount of constitutionally-protected expression. The burden on First Amendment rights is intolerable when compared to the statute's legitimate sweep. Therefore, we hold that Subsection (iv) is unconstitutionally overbroad in violation of the First Amendment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Facts

Sineneng-Smith operated an immigration consulting firm in San Jose, California. Her clients were mostly natives of the Philippines, unlawfully employed in the home health care industry in the United States, who sought authorization to work and adjustment of status to obtain legal permanent residence (green cards). Sineneng-Smith assisted clients with

applying for a "Labor Certification," and then for a green card. She signed retainer agreements with her clients that specified the purpose of the retention as "assisting [the client] to obtain permanent residence through Labor Certification." The problem was that the Labor Certification process expired on April 30, 2001; aliens who arrived in the United States after December 21, 2000, were not eligible to receive permanent residence through the program. *See Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 n.1 (9th Cir. 2010). Sineneng-Smith knew that the program had expired. She nonetheless continued to sign retainer agreements with her clients and tell them that they could obtain green cards via Labor Certifications. And she also continued to sign new retainer agreements purportedly to assist additional clients in obtaining Labor Certification. At least two of Sineneng-Smith's clients testified that they would have left the country if Sineneng-Smith had told them that they were not eligible for permanent residence. Sineneng-Smith's words and acts which allegedly violated the statute were alleged to have occurred from 2001 to 2008.

B. Procedural History

On July 14, 2010, a grand jury returned a ten-count superseding indictment charging Sineneng-Smith with, as relevant to this appeal, three counts of violating 8 U.S.C. § 1324(a)(1)(A)(iv) & § 1324(a)(1)(B)(i) – encouraging or inducing an alien to reside in the country, knowing and in reckless disregard of the fact that such residence is in violation of the law.

Before trial, Sineneng-Smith moved to dismiss the immigration counts of the superseding indictment. Sineneng-Smith argued that: (1) her conduct was not within the scope

of Subsection (iv); (2) Subsection (iv) is impermissibly vague under the Fifth Amendment; and (3) Subsection (iv) violates the First Amendment because it is a content-based restriction on her speech. The district court denied the motion to dismiss, but did not explicitly address the First Amendment argument.

After a twelve-day trial, the jury found Sineneng-Smith guilty on all three counts of violating Subsection (iv) and § 1324(a)(1)(B)(i), and all three counts of mail fraud. Sineneng-Smith then moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c), renewing the arguments from her motion to dismiss and contending that the evidence elicited at trial did not support the verdicts. The district court concluded that sufficient evidence supported the convictions for two of the three § 1324 counts and two of the three mail fraud counts.[2]

Sineneng-Smith timely appealed, again arguing that the charges against her should have been dismissed for the reasons asserted in her motion to dismiss, and that the evidence did not support the convictions. We first held oral argument on April 18, 2017, and submitted the case for decision. Subsequent to submission, however, we determined that our decision would be significantly aided by further briefing. On September 18, 2017, we filed an order inviting interested *amici* to file briefs on the following issues:

[2] The court sentenced Sineneng-Smith to 18 months on each of the remaining counts, to be served concurrently; three years of supervised release on the § 1324 and mail fraud counts, and one year of supervised release on the filing of false tax returns count, all to run concurrently. She was also ordered to pay $43,550 in restitution, a $15,000 fine, and a $600 special assessment.

1. Whether the statute of conviction is overbroad or likely overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?

2. Whether the statute of conviction is void for vagueness or likely void for vagueness, either under the First Amendment or the Fifth Amendment, and if so, whether any permissible limiting construction would cure the constitutional vagueness problem?

3. Whether the statute of conviction contains an implicit mens rea element which the Court should enunciate. If so: (a) what should that mens rea element be; and (b) would such a mens rea element cure any serious constitutional problems the Court might determine existed?

We received nine *amicus* briefs,[3] as well as supplemental briefs from both Sineneng-Smith and the government. On February 15, 2018, we again held oral argument and resubmitted the case for decision.

STANDARD OF REVIEW

The government urges us to review Sineneng-Smith's First Amendment overbreadth claim for plain error, arguing that she waived the issue by not raising it until we requested supplemental briefing.

Although Sineneng-Smith never specifically argued overbreadth before our request for supplemental briefing, she

[3] We thank all *amici* for their helpful briefs and oral advocacy.

has consistently maintained that a conviction under the statute would violate the First Amendment. Sineneng-Smith's motion to dismiss argued that "[t]he crime alleged here is rooted in speech *content* – performing immigration consultancy work on behalf of aliens and their employers by petitioning the government on their behalf – not in conduct lacking any First Amendment protection." Likewise, her opening brief on appeal reasserted a First Amendment challenge: "Such communication is 'pure' speech entitled to the highest level of protection."

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Because Sineneng-Smith has asserted a First Amendment claim throughout the litigation, her overbreadth challenge "is – at most – a new argument to support what has been a consistent claim." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (internal quotation marks omitted). We thus conclude that she preserved her overbreadth argument, and review it de novo.

ANALYSIS

The First Amendment dictates that "Congress shall make no law . . . abridging the freedom of speech." "[A] law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

Of course, like most constitutional principles, the right to free speech "is not absolute." *Ashcroft* v. *Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002). For example, laws or

policies that target conduct but only incidentally burden speech may be valid. *See, e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 122–23 (2003). Further, traditional narrow carve-outs to the First Amendment, "long familiar to the bar," allow Congress to restrict certain types of speech "including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks and citations omitted).

Sineneng-Smith and several *amici* argue that the statute explicitly criminalizes speech through its use of the term "encourages or induces," and that the speech restriction is content-based and viewpoint-discriminatory, because it criminalizes only speech *in support* of aliens coming to or remaining in the country. Alternatively, Sineneng-Smith asserts that even if the statute targets some conduct, it sweeps in too much protected speech and is therefore unconstitutionally overbroad. The government counters that Subsection (iv) should be read as referring only to conduct and, to the extent it affects speech, restricts only unprotected speech.

We address those competing constructions below, beginning with the topic of overbreadth.[4]

[4] We follow the Supreme Court's lead in assessing the statute's overbreadth before engaging in the strict scrutiny analysis that would follow if we concluded that Subsection (iv) was a content-based restriction on speech. *See Stevens*, 559 U.S. at 474 (recognizing that the statute at issue explicitly regulated expression based on content, but analyzing the statute for overbreadth rather than for whether it survived strict scrutiny).

I. First Amendment Overbreadth

Because of the "sensitive nature of protected expression," *New York v. Ferber*, 458 U.S. 747, 768 (1982), "[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere," *Free Speech Coal.*, 535 U.S. at 244. To implement this protection, the general rules governing facial attacks on statutes are relaxed under the First Amendment. Typically, to succeed on a facial attack, a challenger would need "to establish that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." *Stevens*, 559 U.S. at 472 (internal quotation marks and citations omitted).

However, "[i]n the First Amendment context . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n. 6 (2008)). This exception to the typical rule is based on the idea that speakers may be chilled from expressing themselves if overbroad criminal laws are on the books. *See Farber*, 458 U.S. at 768–69 (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980)). To combat that chilling effect, even a person whose activity is clearly not protected may challenge a law as overbroad under the First Amendment. *See id.*

To determine whether Subsection (iv) is overbroad, we must first construe the statute. Next, we must ask whether Subsection (iv), as construed, restricts speech and, if so, whether that speech is protected. Finally, we must weigh the

amount of protected speech that the statute restricts against the statute's legitimate sweep.

Recognizing that striking down a statute as overbroad is "strong medicine," and the justification for facially striking down a statute "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct," we conclude that the chilling effect of Subsection (iv) is both real and substantial. *Broadrick v. Oklahoma*, 413 U.S. 601, 615–16 (1973). The only reasonable construction of Subsection (iv) restricts a substantial amount of protected speech in relation to the narrow band of conduct and unprotected expression that the statute legitimately prohibits. Therefore, we hold that Subsection (iv) is facially invalid.

A. Construing the Statute

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). Subsection (iv) reads: "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 . . . shall be punished as provided in subparagraph (B)."[5]

[5] The government argues that the "statute of conviction is not 8 U.S.C. § 1324(a)(1)(A)(iv), standing alone. Rather, the indictment charged and the jury found that Sineneng-Smith acted 'for the purpose of commercial advantage or private financial gain' under 8 U.S.C. § 1324(a)(1)(B)(i) . . . . Accordingly, the 'statute[s] of conviction' are 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i)." Subsection (B)(i) is a commercial enhancement of Subsection (A)(iv). For the purposes of our

Construing the statute also requires us to look beyond the plain text of Subsection (iv). *See Stevens*, 559 U.S. at 474. Thus, to interpret Subsection (iv), we analyze: the *mens rea* required for conviction; what "encourages or induces" means; whether "an alien" limits the scope of the statute; and whether "in violation of law" refers to both criminal and civil laws.

The government contends that a defendant runs afoul of Subsection (iv) only when she (1) knowingly undertakes, (2) a non-*de-minimis*, (3) act that, (4) could assist, (5) a specific alien (6) in violating, (7) civil or criminal immigration laws.

While we endeavor to "construe[] [a statute] to avoid serious constitutional doubts," we can only do so if the statute is "readily susceptible to such a construction." *Stevens*, 559 U.S. at 481 (internal quotation marks and citations omitted). "We will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain, and sharply diminish Congress' incentive to draft a narrowly tailored law in the first place." *Id.* (internal quotation marks and citations omitted).

The government's interpretation of Subsection (iv) rewrites the statute. For the following reasons, we hold that to violate Subsection (iv), a defendant must knowingly encourage or induce a particular alien – or group of aliens –

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overbreadth analysis, the commercial enhancement is irrelevant. Subsection (A)(iv) is the predicate criminal act; without the encouraging or inducing, Sineneng-Smith could not have been convicted. And, as the meaning of § 1324(a)(1)(A)(iv) does not vary depending upon whether the financial gain enhancement also applies, the chilling effect of the "encourage or induce" statute extends to anyone who engages in behavior covered by it, whether for financial gain or not.

to come to, enter, or reside in the country in reckless disregard of whether doing so would constitute a violation of the criminal or civil immigration laws on the part of the alien. As properly construed, "encourage or induce" can mean speech, or conduct, or both, and there is no substantiality or causation requirement.

1. Mens Rea

We first address what *mens rea* is required to sustain a conviction under Subsection (iv). As an initial matter, the most natural reading of Subsection (iv) requires us to break it into two prongs for the purposes of determining the requisite *mens rea*: first, the "encourage or induce" prong; and, second, the violation of law prong. Subsection (iv) is silent about the *mens rea* required for the encourage prong, but explicitly provides that a defendant must "know[] or reckless[ly] disregard" the fact that an alien's "coming to, entry, or residence is or will be in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv).

a. Mens Rea *for "encourage or induce" Prong*

In *United States v. Yoshida*, the defendant was indicted for "knowingly encouraging and inducing" three aliens to enter the United States. 303 F.3d 1145, 1149 (9th Cir. 2002). On appeal, Yoshida argued that "there [was] insufficient evidence that she . . . knowingly encouraged or induced in some way [the aliens'] presence in the United States." *Id.* at 1149–50. In affirming the conviction, we concluded that "[a] number of events revealed at trial creates a series of inescapable inferences leading to the rational conclusion that Yoshida knowingly 'encouraged and induced' [the aliens] to enter the United States." *Id.* at 1150. We repeatedly

emphasized the knowledge requirement. *See id.* ("The government also offered circumstantial evidence that Yoshida knowingly encouraged [the aliens] to enter the United States"); *id.* at 1151 ("a reasonable jury could easily conclude that Yoshida knowingly led the aliens to the flight"). Therefore, we think it clear that Subsection (iv) has a knowledge *mens rea* for the encourage prong.

b. Mens Rea *for the Violation of Law Prong*

Despite the fact that Subsection (iv) explicitly states that a defendant must "know[] or reckless[ly] disregard" the fact that an alien's "coming to, entry, or residence is or will be in violation of law," the government argues that we have increased that *mens rea* requirement to an "intent" to violate the immigration laws. We disagree, but recognize that our prior cases provide some support for the government's position.

The government's argument is based on *United States v. Nguyen*, 73 F.3d 887 (9th Cir. 1995), in which we reviewed a conviction under subsection (i) of § 1324(a)(1)(A). Subsection (i) criminalizes "bring[ing]" an alien "to the United States . . . at a place other than a designated port of entry" when the defendant "know[s] that [such] person is an alien." 8 U.S.C. § 1324(a)(1)(A)(i). "Read literally, then, the statute criminalizes bringing, purposefully or otherwise, any alien, illegal or otherwise, into the country other than at a designated port of entry." *Nguyen*, 73 F.3d at 890. In the absence of an explicit *mens rea* standard, we considered the legislative history of the statute and concluded that Congress did not intend to "dispense with a *mens rea* requirement for the felony offense." *Id.* at 893. "Accordingly, we [held] that to convict a person of violating [§] 1324(a)(1)(A), the

government must show that the defendant acted with criminal intent."[6] *Id.*

Subsequent cases adding a *mens rea* element to the other subsections of § 1324(a)(1)(A) adopted *Nguyen*'s criminal intent language. *See United States v. Barajas-Montiel*, 185 F.3d 947, 951–53 (9th Cir. 1999). Central to the government's argument, in *Yoshida* we stated, "[w]e have held that 'to convict a person of violating section 1324(a)(1)(A), the government must show that the defendant acted with criminal intent, i.e., the intent to violate United States immigration laws.'" *Yoshida*, 303 F.3d at 1149 (quoting *Barajas-Montiel*, 185 F.3d at 951).

However, the passing reference to "criminal intent" in *Yoshida* did not increase the *mens rea* of the violation of law prong to intent. We affirmed Yoshida's conviction because "the jury had ample evidence before it to conclude, beyond a reasonable doubt, that Yoshida encouraged the aliens to enter the United States, with *knowledge or in reckless disregard of the fact that the aliens' entry was in violation of law*." *Id.* at 1151 (emphasis added). Not only does *Yoshida* foreclose the government's argument that we have increased the *mens rea* level of Subsection (iv), it confirms that we have not read out of the statute the "reckless disregard" standard that appears explicitly in it.

[6] "Criminal intent" is an amorphous term that can signify different levels of culpability. For example, Black's Law Dictionary defines the term as "mens rea," or "[a]n intent to commit an actus reus without any justification, excuse, or other defense." *Intent*, *Black's Law Dictionary*, 930–31 (10th ed. 2014). However, Black's also recognizes that sometimes "criminal intent" means "an intent to violate the law, — implying a knowledge of the law violated." *Id.* (citations omitted).

2. "Encourages or Induces"

a. Our Construction of "encourage or induce"

Next, we turn to the meaning of "encourage or induce." As always, we begin with the language of the statute to determine whether it has "a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). A critical dispute in this case is whether, and to what extent, the words "encourage and induce" criminalize protected speech.

We have previously recognized that "encourage" means "to inspire with courage, spirit, or hope . . . to spur on . . . to give help or patronage to." *United States v. Thum*, 749 F.3d 1143, 1147 (9th Cir. 2014) (alterations in original) (quoting *United States v. He*, 245 F.3d 954, 960 (7th Cir. 2001) (quoting Merriam Webster's Collegiate Dictionary 381 (10th ed. 1996))). This definition is well-accepted. *See, e.g.*, *Encourage*, *Oxford English Dictionary Online* (3d ed. 2018) ("to inspire with courage, animate, inspirit . . . . [t]o incite, induce, instigate"). Similarly, induce means "[t]o lead (a person), by persuasion or some influence or motive that acts upon the will . . . to lead on, move, influence, prevail upon (any one) to do something." *Induce*, *Oxford English Dictionary Online* (3d ed. 2018).

In isolation, "encourage or induce" can encompass both speech and conduct. It is indisputable that one can encourage or induce with words, or deeds, or both. The dictionary definitions do not, however, necessarily resolve the dispute in this case. We must also examine the context in which the words are used to determine whether we can avoid First

Amendment concerns. *See Williams*, 553 U.S. at 294–95. We look to the principle of *noscitur a sociis* to determine whether the language surrounding "encourage or induce" provides those words with a more precise definition. *Id.* at 294.

In *Williams*, the Supreme Court analyzed whether 18 U.S.C. § 2252A(a)(3)(B)'s prohibition on "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" purported child pornography was overbroad. *Id.* at 293–94. In construing the statute, the Court narrowed the meanings of "promotes" and "presents" in light of their neighboring verbs. *Id.* at 294. The Court reasoned that "advertises," "distributes," and "solicits" all had an obvious transactional connotation: "Advertising, distributing, and soliciting are steps taken in the course of an actual or proposed transfer of a product." *Id.* "Promotes" and "presents," on the other hand, are not obviously transactional. In context, however, the Supreme Court read them as having a transactional meaning as well. *Id.* at 294–95. Thus, the Court interpreted "promotes" to mean "recommending purported child pornography to another person for his acquisition," and "presents" to "mean[] showing or offering the child pornography to another person with a view to his acquisition." *Id.* at 295.

By contrast, Subsection (iv) does not have a string of five verbs – it is limited to only two: "encourages or induces." Here, the proximity of encourage and induce to one another does not aid our analysis. As discussed above, both encourage and induce can be applied to speech, conduct, or both. Therefore, unlike the string of verbs in *Williams*, neither of these verbs has clear non-speech meanings that would inform and limit the other's meaning. In other words,

when read together, they do not provide a more precise definition or one that excludes speech. Nor are the words necessarily transactional like those in *Williams*. Thus, the application of *noscitur a sociis* to the two operative verbs here, does not narrow our search; our conclusion that Subsection (iv) could cover speech, as well as conduct, remains.

Beyond their immediate neighbors in Subsection (iv), encourage and induce also "keep company" with the verbs in the other subsections of § 1324(a)(1)(A). The neighboring subsections prohibit: (i) "bring[ing]" an alien to the United States "at a place other than a designated port of entry;" (ii) "transport[ing] or mov[ing]" an alien in furtherance of a violation of the immigration laws; and (iii) "conceal[ing], harbor[ing], or shield[ing] from detection" an alien in the country in violation of the immigration laws. 8 U.S.C. § 1324(a)(1)(A)(i), (ii), & (iii). Bringing, transporting, moving, concealing, harboring, and shielding all clearly refer to some type of action.

The government contends, in light of these other verbs in the other subsections, that "encourage or induce" "should likewise be interpreted to require specific actions that facilitate an alien's coming to, entering, or residing in the United States illegally. So understood, § 1324(a)(1)(A)[(iv)] serves as a 'catch-all' provision that covers actions other than 'bringing,' 'transporting,' etc., that might facilitate illegal immigration." (Citation omitted.) Conversely, *Amicus* American Civil Liberties Union contends that subsections (i)–(iii) criminalize so much conduct that the only thing left to criminalize in Subsection (iv) is pure speech.

The government's proposed interpretation of "encourage or induce" in the context of §1324(a)(1)(A) is strained. While we agree that the statute is intended to restrict the facilitation of illegal immigration and that subsections (i)–(iii) prohibit specific actions, it does not follow that Subsection (iv) covers only actions. Instead, the structure of the section lends itself to the more obvious conclusion that the verbs in the subsections must mean different things because they form the basis of separate charges. *See Thum*, 749 F.3d at 1146–47.

In § 1324, "Congress created several discrete immigration offenses including," among others, the crimes outlined in subsections (a)(1)(A)(i)–(iv). *United States v. Lopez*, 484 F.3d 1186, 1190–91, 1193–94 (9th Cir. 2007) (en banc); *see Thum*, 749 F.3d at 1146. We have held that construing § 1324(a)(1)(A) "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," requires Subsection (iv) to be read as excluding the conduct criminalized in the remaining subsections. *Thum*, 749 F.3d at 1147 (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). If encouraging or inducing cannot mean bringing, transporting, moving, concealing, harboring, or shielding, what is left?

The government offers a few limited examples of other actions that could potentially be covered under Subsection (iv), but not reached by subsections (i)–(iii). These examples include: (1) providing aliens with false documents; (2) selling a border-crossing kit to aliens, including a map of "safe crossing" points and backpacks filled with equipment designed to evade border patrol; (3) duping foreign tourists into purchasing a fake "visa extension;" or (4) providing a "package deal" to foreign pregnant women who wish to give

birth in the United States that includes a year of room and board, a six-month tourist visa, and instructions on how to overstay the visa without detection. But we doubt Congress intended to limit Subsection (iv) to actions such as these, as the provision does not appear necessary to prosecute any of these actions. Subsection (i), (iii), and (v)(II), which, respectively, restrict bringing, shielding from detection, and aiding and abetting the commission of any of these acts, cover the examples raised by the government. Additionally, 8 U.S.C. § 1324c and 18 U.S.C. § 1546 provide broad criminal prohibitions against document fraud in violation of the immigration laws. These few, unpersuasive examples therefore do not convince us that "encourage" and "induce" can be read so as not to encompass speech, even though their plain meaning dictates otherwise.

In sum, the structure of the statute, and the other verbs in the separate subsections, do not convince us to stray from the plain meaning of encourage and induce – that they can mean speech, or conduct, or both. Although the "encourage or induce" prong in Subsection (iv) may capture some conduct, there is no way to get around the fact that the terms also plainly refer to First Amendment-protected expression. In fact, in *Williams*, one of the seminal overbreadth cases, Justice Scalia used the statement, "I encourage you to obtain child pornography" as an example of protected speech. 553 U.S. at 300. We see no reason why "I encourage you to overstay your visa" would be any different. And interpreting "encourage or induce" to exclude such a statement would require us to conclude that "encourage" does not mean encourage. The subsection is not susceptible to that construction. Subsection (iv), therefore, criminalizes encouraging statements like Justice Scalia's example and other similar expression.

b. Other Courts' Construction of "encourage or induce"

Only one other Circuit has considered a First Amendment overbreadth challenge to Subsection (iv), and that was in an unpublished disposition. In *United States v. Tracy*, the defendant "pled guilty to one count of conspiring to encourage non-citizens to enter the United States illegally . . . but reserved the right to appeal the district court's denial of his motion to dismiss that charge." 456 F. App'x 267, 268 (4th Cir. 2011) (per curiam). The Fourth Circuit rejected the defendant's argument "that speech that encourages illegal aliens to come to the United States is protected by the First Amendment in certain instances." *Id.* at 272. Instead, the court stated "that speech that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment," and concluded that the statute did not prohibit a substantial amount of protected speech. *Id.* (alteration and citations omitted). We will address the extent to which Subsection (iv) can be read to prohibit only aiding and abetting in more detail below, but it is clear that *Tracy* recognized that the subsection reaches some speech. *Id.* ("[T]here may be some instances in which we might find that the statute chills protected speech.").

Although not addressing Subsection (iv) from a First Amendment perspective, other courts have interpreted what "encourage or induce" means in the subsection. Somewhat recently, we touched upon the issue in *Thum*. *Amici* put quite a bit of stock in our use of a "broad" definition of "encourage" in *Thum*, but we agree with the government that *Thum* is inconclusive about whether "encourage" (or "induce") includes speech.

In *Thum*, we considered whether the defendant encouraged or induced an alien to reside in the United States when the defendant escorted an alien from a fast food restaurant near the San Ysidro Port of Entry – on the U.S. side of the border – to a nearby vehicle headed north. 749 F.3d at 1144–45. In interpreting "encourage," we relied on the general dictionary definition. *Id.* at 1147. We also recognized that we "ha[d] previously equated 'encouraged' with 'helped.'" *Id.* (citing *Yoshida*, 303 F.3d at 1150). But the main question in that case was whether the defendant had done enough to encourage the alien to reside in the U.S. *Thum*, 749 F.3d at 1147. On that point, we agreed with the defendant that escorting an alien to a van bound for Northern California was at most "aid[ing] in the attempted *transportation* of the alien, which would be covered under 8 U.S.C. § 1324(a)(1)(A)(ii)," and did not "convince the illegal alien to stay in this country . . . or . . . facilitate the alien's ability to live in this country indefinitely." *Id.* at 1148 (internal quotation marks and citations omitted). *Thum* thus stands for the proposition that "[e]ncouraging an illegal alien to reside in the United States must mean something more than merely transporting such an alien within this country." *Id.* at 1149.[7] We did not address whether the statute reached speech.

Many other courts have concluded that encourage can mean "to help." *See United States v. Lopez*, 590 F.3d 1238, 1249–52 (11th Cir. 2009) (upholding a supplemental jury

[7] Likewise, *Yoshida* does not aid our analysis. *Yoshida*, examining whether there was sufficient evidence to sustain the defendant's conviction under Subsection (iv), held only that escorting aliens through an airport to a United States-bound flight constituted encouragement. *Yoshida*, 303 F.3d at 1150–51.

instruction which, in part, defined "encourage" as "to help"); *United States v. Fujii*, 301 F.3d 535, 540 (7th Cir. 2002); *He*, 245 F.3d at 957–58; *United States v. Oloyede*, 982 F.2d 133, 135–37 (4th Cir. 1993) (per curiam). However, as mentioned above, none of these cases considered a First Amendment challenge to Subsection (iv), nor do they foreclose the conclusion that "encourage or induce" can mean speech. To "help" is not a helpful limitation in terms of excluding expression, because speech can *help* someone decide to enter or to reside in the United States.

Additionally, the government cites out-of-circuit cases for the argument that encouraging or inducing "requires substantial assistance (or offers of assistance) that the defendant expects to make an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise would have been." For example, in *DelRio-Mocci v. Connolly Props. Inc.*, the Third Circuit

> read subsection (iv) as prohibiting a person from engaging in an *affirmative act that substantially encourages or induces* an alien lacking lawful immigration status to come to, enter, or reside in the United States where the undocumented person otherwise might not have done so. Thus, subsection (iv) has the distinct character of foreclosing the type of substantial assistance that will spur a person to commit a violation of immigration law where they otherwise might not have.

672 F.3d 241, 249 (3d Cir. 2012) (emphasis added). The court reasoned that if it interpreted "encourage or induce" too

broadly it would "render subsections (i)–(iii)] redundant or superfluous." *Id.* The court thus read the following elements into what constituted encouragement under Subsection (iv): it must be (1) an affirmative act that (2) substantially encourages (3) an alien lacking lawful immigration status to (4) come to, enter, or reside in the United States where (5) the undocumented person otherwise might not have done so. *Id.* At least one other court has adopted the Third Circuit's interpretation. *See United States v. Henderson*, 857 F. Supp. 2d 191, 204–08 (D. Mass. 2012).

There is a lot to unpack in this interpretation of the statute, but at bottom, *DelRio-Mocci* added an act requirement, a substantiality requirement, and a causation requirement to the text of Subsection (iv). The Third Circuit adopted the substantiality requirement from its "harboring" decisions under § 1324(a)(1)(A)(iii), which hold that a defendant can only be convicted where his "conduct tend[s] to substantially facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting the alien's unlawful presence." *Id.* at 246–48 (quoting *United States v. Ozcelik*, 527 F.3d 88, 97 (3d Cir. 2008) (internal quotation marks omitted)). The Ninth Circuit, however, does not have such a precedent and we do not think the statute is reasonably susceptible to this interpretation in the absence of statutory text to that effect. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1017 n.9 (9th Cir. 2013) (recognizing that the Ninth Circuit broadly defines harboring "to mean 'afford shelter to'") (quoting *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976)). We therefore reject the government's proposed interpretation that "encourage or induce" must mean an act that provides substantial assistance (or non-*de-minimis* help) to an alien for entering or remaining in the country.

We also disagree with the Third Circuit that a causation requirement can be read into the statute. On its face "the plain language of the statute makes clear that the relevant inquiry is the conduct of the defendant," and not the alien. *See United States v. Dhingra*, 371 F.3d 557, 561 (9th Cir. 2004) (rejecting vagueness and overbreadth challenges to 18 U.S.C. § 2422(b), which prohibits "knowingly persuad[ing], induc[ing], entic[ing], or coerc[ing] any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense").

One district court's struggle to interpret Subsection (iv) illustrates our concerns. In *Henderson*, defendant was convicted pursuant to Subsection (iv) because she had "employed a person she came to learn was an illegal alien to clean her home from time to time and, when asked, advised the cleaning lady generally about immigration law practices and consequences." 857 F. Supp. 2d at 193. Considering a post-verdict motion for judgment of acquittal, the district court reviewed the "Developing Appellate Case Law" to determine the scope of Subsection (iv), and adopted the Third Circuit's test from *DelRio-Mocci*. *Id.* at 204, 208.

In arguing against the motion, the 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."[8] Doubling down, "the government contended that an immigration lawyer would be prosecutable for the federal

[8] The defendant in *Henderson* does not appear to have made an explicit First Amendment argument.

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." *Id.* at 203.

The district court expressed discomfort with the government's position and incredulity that the government would continue to pursue the felony prosecution. *See id.* at 193–94, 211–14. However, applying the *DelRio-Mocci* test, the district court concluded that "a jury could find that [defendant's] employment together with her [immigration] advice could have caused [the alien], or a person in her position, to reside here when she otherwise might not have." *Id.* at 208. The court denied the motion for acquittal, but granted defendant's motion for a new trial in order to give new jury instructions. *Id.* at 210, 214.

Despite *Henderson*, the government now argues that "[n]o reported decision applies Subsection (iv) to efforts to persuade, expressions of moral support, or abstract advocacy regarding immigration." Even if this were correct, it misses the point. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S at 480. Thus, the absence of convictions based purely on protectable expression is not evidence that the statute does not criminalize speech. Just because the government has not (yet) sought many prosecutions based on speech, it does not follow that the government cannot or will not use an overbroad law to obtain such convictions. Further, the lack of convictions says nothing about whether Subsection (iv) chills speech. Indeed, *Henderson* exemplifies why we cannot take the government's

word for how it will enforce a broadly written statute, and suggests that any would-be speaker who has thought twice about expressing her views on immigration was not being paranoid.

3. "An alien"

The government contends that Subsection (iv) is limited to encouraging "a particular alien or aliens," rather than "the general public." For the purposes of this appeal, and to avoid serious constitutional concerns, we think the government's proposed interpretation is reasonable, but not ultimately dispositive to our overbreadth analysis. And while it is easy to foresee arguments about what constitutes a group of particular aliens versus the "general public," we accept that Subsection (iv) requires a defendant to direct his or her encouragement or inducement toward some known audience of undocumented individuals.

4. "In Violation of Law"

Recognizing the breadth of the statute, the government admits that "in violation of law" refers not only to criminal law, but also to civil violations of the immigration laws. We agree. *Amicus* Professor Eugene Volokh argues that we could narrow the scope of the statute by reading "violation of law" to mean only violations of the criminal law. But, because simple residence in the United States without legal status is not a crime, and the statute reaches inducing or encouraging an alien to "reside" in the United States, the subsection is not susceptible to this limiting construction. *See Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the

United States."). The proposed limiting construction would render "reside" superfluous.

5. Construction of the Statute

To recap, we interpret Subsection (iv) as follows: to violate the subsection, a defendant must knowingly encourage or induce a particular alien – or group of aliens – to come to, enter, or reside in the country, knowing or in reckless disregard of whether doing so would constitute a violation of the criminal or civil immigration laws. As construed, "encourage or induce" can mean speech, or conduct, or both, and there is no substantiality or causation requirement.

Ultimately, the government asks us to rewrite the statute. Under no reasonable reading are the words "encourage" and "induce" limited to conduct. We think the statute is only susceptible to a construction that affects speech. As an illustration – under the government's reading of the statute, it would argue that a mother telling an undocumented adult child "If you leave the United States, I will be very lonely. I encourage you to stay and reside in the country" would not subject the mother to prosecution. But, in this example, the mother is merely repeating the words of the statute in an attempt to get her child to stay. We think any reasonable person reading the subsection would assume that the mother's statement makes her vulnerable to prosecution, that the words of the statute have their plain meaning, and that a person can encourage or induce another by verbally, explicitly encouraging or inducing her.

B. Subsection (iv) Restricts Protected Speech

The conclusion that Subsection (iv) reaches speech does not end our inquiry. We must now examine: (1) whether the statute reaches protected speech and, if so, (2) whether the statute restricts a substantial amount of such speech in relation to the statute's legitimate sweep. *See, e.g.*, *Hicks*, 539 U.S. at 118–19.

Not all speech is protected under the First Amendment. Congress is allowed to restrict certain types of speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See Stevens*, 559 U.S. at 468. The most relevant exception to the First Amendment for this case is speech integral to criminal conduct, but incitement also deserves mention.

The government asserts that even if we interpret Subsection (iv) to reach speech, it does not constrain protected speech because the speech is integral to assisting others in violating the immigration laws. In the government's reading, Subsection (iv) is analogous to an aiding and abetting statute. But, to repeat, continuing to reside in the U.S. is not a criminal offense; therefore, assisting one to continue to reside here cannot be aiding and abetting a crime. One *amicus*, supporting the constitutionality of the statute, reads it as a solicitation restriction.[9]

[9] *Amicus* Professor Eugene Volokh proposes construing the statute to restrict a defendant from "directly, specifically, and purposefully encouraging" criminal violations of the immigration laws. We do not think that the statute is reasonably susceptible to this interpretation. First, we decline to read a specificity or directness requirement into the statute because the plain meanings of encourage and induce do not include such principles. Second, Congress clearly knows how to write a solicitation

1. Incitement

Under the incitement exception to the First Amendment, the government may not "proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). "Abstract advocacy," even of a crime, on the other hand, is protected speech. *See Williams*, 553 U.S. at 298–99. As we have construed Subsection (iv), it does not require that an alien imminently violate the immigration law. Nor does Subsection (iv) require that any encouragement or inducement make it "likely" that an alien will violate the immigration law. Plainly, the incitement doctrine is a poor fit for this particular statute, especially considering that other incitement cases typically involve incitements to violence, riot, or breach of the peace. *See, e.g.*, *Brandenburg*, 395 U.S. at 447–48; *see also Hess v. Indiana*, 414 U.S. 105, 109 (1973); *United States v. Poocha*, 259 F.3d 1077, 1080-81 (9th Cir. 2001); *id.* at 1084–85 (Tashima, J., concurring in part and dissenting in part) (agreeing that speech must be likely to incite violence to be proscribed). If Subsection (iv) reaches any speech that is exempted from the First Amendment as incitement, it is an extremely narrow band of speech and does not significantly reduce the scope of the statute.

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statute as evidenced by 18 U.S.C. § 373(a): "Whoever . . . solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in" a violent felony is subject to prosecution. If Congress wanted Subsection (iv) to restrict only solicitation, it could have done so. Finally, as discussed above, we cannot limit "in violation of law" to criminal laws and, like Professor Volokh, we are not aware of any precedent for treating speech soliciting merely civil violations as a crime.

2. Speech Integral to Criminal Conduct

The government's primary argument is that any covered speech is "integral" to a violation of the immigration law. "[S]peech or writing used as an integral part of conduct in violation of a valid criminal statute" does not enjoy First Amendment protection. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *id.* at 498–502 (picketing for "the sole immediate purpose" of compelling a company to stop selling to nonunion peddlers was not protected speech because it was part of "a single and integrated course of conduct" in violation of criminal restraint of trade laws). For this reason, speech that aids and abets criminal activity does not necessarily benefit from First Amendment protection. *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

In *Freeman*, we reviewed "convict[ions] on fourteen counts of aiding and abetting and counseling violations of the tax laws, an offense under 26 U.S.C. § 7206(2)." *Id.* at 551. We held that the defendant was entitled to a jury instruction on a First Amendment defense as to twelve of the counts because, at least arguably, the defendant made statements about the "unfairness of the tax laws generally." *Id.* at 551–52. Conversely, the defendant was not entitled to the First Amendment instruction on the remaining two counts because the defendant actually assisted in the preparation of false tax returns. *Id.* at 552. We reasoned that "[e]ven if the convictions on these [two] counts rested on spoken words alone, the false filing was so proximately tied to the speech that no First Amendment defense was established." *Id.* As *Freeman* illustrates, although some speech that aids or abets a crime is so integral to the crime itself that it is not constitutionally protected, other speech related to criminal activity is not so integral as to be unprotected.

Based on *Freeman*, the government contends that any speech that Subsection (iv) reaches is integral to a violation of the immigration laws.[10] However, there are relevant differences between an aiding and abetting statute and Subsection (iv). For one, as explained above, the statute is not limited only to speech that substantially assists an alien in violating the immigration laws. *Freeman* exposes the relevant distinction. The statute in *Freeman* prohibited "[w]illfully aid[ing] or assist[ing] in, or procur[ing], counsel[ing], or advis[ing] the preparation or presentation" of false tax returns. 26 U.S.C. § 7206(2). On the twelve counts for which the court reversed Freeman's convictions, the court focused on the fact that Freeman may have generally advocated the filing of false returns. *Id.* at 551–52. On the other hand, for the two convictions that the court affirmed, it emphasized that Freeman "not only counseled but also *assisted* in the filing of false returns." *Id.* at 552 (emphasis added). The assistance on the two affirmed counts, even if only words, was more directly related to the completed crime. *Id.* Thus, *Freeman*'s conclusion is that only some speech that the statute restricted was so related to the predicate crime that it was considered "integral."[11] Likewise, here, the statute

[10] The government cites *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), but the holding in that case relies on the since-weakened distinction between commercial and non-commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980). More fundamentally, the defendant in *Pittsburgh Press* violated an ordinance that made it unlawful "to aid" in employment discrimination. 413 U.S. at 389. "Encourage" and "induce" are broader than "aid," and sweep in protected speech.

[11] *Freeman* was an as-applied First Amendment challenge to the false tax returns statute. We note that the string of verbs in the statute involved

criminalizes speech beyond that which is integral to violations of the immigration laws.

Second, as the government recognizes, aiding and abetting convictions require the government to prove certain elements that are not present in Subsection (iv):

> In this circuit, the elements necessary for an aiding and abetting conviction are: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense.

Thum, 749 F.3d at 1148–49 (quoting *United States v. Shorty*, 741 F.3d 961, 969–70 (9th Cir. 2013)). The first obvious difference is that 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. The government asserts that the civil/criminal distinction should not matter in the First Amendment context, but points to no case where a defendant was convicted for aiding and abetting a civil offense. We are not aware of any case that upholds a statute restricting such speech. Therefore, even if certain speech would constitute aiding and abetting when directed toward the commission of a crime, it would be constitutionally protected when aimed at inducing a civil

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in *Freeman* is more similar to the one at issue in *Williams* than the operative verbs in Subsection (iv). *See* pp. 19–21, *supra*.

violation of law. And because unauthorized presence in the country is a civil violation rather than a crime, Subsection (iv) reaches beyond speech integral to a crime.

Next, aiding and abetting requires that the accused "assisted or participated" in the commission of the offense. For the reasons described above, we cannot construe Subsection (iv) as applying only to assistance for or participation in a violation of the immigration law; it is enough to encourage.

Further, aiding and abetting requires that a principal actually commit the underlying offense. *See id.* at 1149. There is no such requirement in Subsection (iv). The government argues that this should not matter for the First Amendment analysis because, citing the Model Penal Code § 2.06(3)(a)(ii), Subsection (iv) resembles an attempted aiding and abetting statute. The government's argument fails, however, because "[t]here is no general federal 'attempt' statute. [A] defendant . . . can only be found guilty of an attempt to commit a federal offense if the statute defining the offense also expressly proscribes an attempt." *United States v. Hopkins*, 703 F.2d 1102, 1104 (9th Cir. 1983). Subsection (iv) does not restrict attempt, unlike the other subsections of the statute.

Most fundamentally, Subsection (iv) looks nothing like an aiding and abetting statute. Just two lines below Subsection (iv)'s text, Congress required that anyone who "aids or abets the commission of any of the preceding acts" shall be punished as a principal. 8 U.S.C. § 1324(a)(1)(A)(v)(II). Further, Congress authored a general aiding and abetting statute, 18 U.S.C. § 2, which states that "[w]hoever commits an offense against the United States or aids, abets, counsels,

commands, induces or procures its commission, is punishable as a principal." Clearly, if Congress wanted Subsection (iv) to be an aiding and abetting statute, it would have included the words aiding and abetting. The statute instead manifests Congress' intent to restrict a broader range of activity, and that activity stretches beyond unprotected speech.

C. Subsection (iv) Restricts A Substantial Amount of Protected Speech in Relation to its Legitimate Sweep

Because we conclude that Subsection (iv) reaches protected speech, we must now analyze whether the amount of protected speech the statute restricts is substantial in relation to its legitimate sweep. In plain terms, are the statute's improper applications too numerous to allow the statute to stand? "The concept of 'substantial overbreadth' is not readily reduced to an exact definition." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). But, "[c]riminal statutes must be scrutinized with particular care" and "those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). Although "substantial" does not have a precise meaning in this context, the Supreme Court has explained that a statute may be struck down if it is "susceptible of regular application to protected expression." *Id.* at 467. In other words, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Taxpayers for Vincent*, 466 U.S. at 801.

It is apparent that Subsection (iv) is susceptible to regular application to constitutionally protected speech and that there is a realistic (and actual) danger that the statute will infringe upon recognized First Amendment protections. Some of the situations raised in the supplemental briefing and at oral argument demonstrate the improper scope of this statute. While we are aware that the Supreme Court is skeptical of "fanciful hypotheticals" in overbreadth cases, we do not think that the scenarios raised here are fanciful. *See Williams*, 553 U.S. at 301. We think that they are part of every-day discussions in this country where citizens live side-by-side with non-citizens. Buttressing our assessment that the following hypotheticals are not overly speculative, the government has already shown a willingness to apply Subsection (iv) to potentially protected speech. *See Henderson*, 857 F. Supp. 2d at 193–94, 203–04.[12]

We begin with an obvious example from one of the *amicus* briefs: "a loving grandmother who urges her grandson

[12] Additionally, the City and County of San Francisco in its *amicus* brief represents that the government has repeatedly threatened its officials with violations of 8 U.S.C. § 1324. For example, "ICE Director Thomas Homan announced that he had asked Attorney General Sessions to determine whether sanctuary cities like San Francisco are 'committing a statutory crime' under section 1324." Further, San Francisco relates that "Director Homan renewed his threat in even starker terms. According to Director Homan, 'when a sanctuary city intentionally or knowingly shields an illegal alien from federal law enforcement, that is a violation of 8 U.S.C. 1324.' Director Homan announced that he was 'putting together a response plan' with 'the highest levels of the Department of Justice,' and ominously declared, 'This is not over.'" True, San Francisco reports that "[t]o the extent these threats have been tied to any specific prong of section 1324, they have been tied to the 'harboring' or 'transporting' prongs of that statute." *Id.* But not all of the threats were tied to a specific subsection, and the government might well turn to Subsection (iv).

to overstay his visa," by telling him "I encourage you to stay." Nothing in Subsection (iv) would prevent the grandmother from facing felony charges for her statement. Again, in *Williams*, the Supreme Court used almost identical language – "I encourage you to obtain child pornography" – to describe abstract advocacy immune from government prohibition. 553 U.S. at 300. The government has not responded persuasively to this point; it simply argues that the grandmother would not be subject to criminal charges because her statement was "not accompanied by assistance or other inducements." However, as we have detailed above, Subsection (iv) does not contain an act or assistance requirement.

Further, implying a *mens rea* requirement into the statute, and applying it only to speech to a particular person does not cure the statute's impermissible scope. Just because the grandmother wanted her words to encourage her grandson and said them directly to him does not render those words less protected under the First Amendment. We think that situations like this one, where a family member encourages another to stay in the country, or come to the country, are surely the most common form of encouragement or inducement within Subsection (iv)'s ambit.

The government similarly dismisses "marches, speeches, publications, and public debate expressing support for immigrants," as being subject to Subsection (iv)'s restrictions. Again, however, the government relies on its faulty construction of the statute to argue that such speech does not "assist" or "incentivize" an immigrant to come to, enter, or reside in the United States in violation of law. The statute, however, does not criminalize assistance or incentivizing; it makes it a felony to "encourage" or "induce."

A speech addressed to a gathered crowd,[13] or directed at undocumented individuals on social media,[14] in which the speaker said something along the lines of "I encourage all you folks out there without legal status to stay in the U.S.! We are in the process of trying to change the immigration laws, and the more we can show the potential hardship on people who have been in the country a long time, the better we can convince American citizens to fight for us and grant us a path to legalization," could constitute inducement or encouragement under the statute. But, this general advocacy could not be considered incitement because there is no imminent breach of the peace. It would not be aiding and abetting or solicitation because it is general and is not advocating a crime. Instead, it is pure advocacy on a hotly-debated issue in our society. Such "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). Criminalizing expression like this threatens almost anyone willing to weigh in on the debate. *Cf. Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996) ("Cities, counties, and states have a long tradition of issuing pronouncements, proclamations, and statements of principle on a wide range of matters of public interest, including . . . immigration.").

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[13] Speaking directly to a particular group of aliens, as opposed to the public at large, is within the scope of Subsection (iv) as we have construed it.

[14] The Supreme Court has made clear that "cyberspace . . . . and social media in particular" is "the most important place[] . . . for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

Additionally, *amici* present several examples of professionals who work with immigrants whose speech might be chilled on account of Subsection (iv)'s breadth. The most common example cited is an attorney who tells her client that she should remain in the country while contesting removal – because, for example, non-citizens within the United States have greater due process rights than non-citizens outside the United States, or because, as a practical matter, the government may not physically remove her until removal proceedings are completed. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Under the statute's clear scope, the attorney's accurate advice could subject her to a felony charge. The government's arguments to the contrary are unavailing. First, undoubtedly, the attorney would *know* that telling an immigrant she would have greater rights if she remained here or that she may not be removed while in removal proceedings would encourage the immigrant to stay. And, we do not think construing Subsection (iv) to reach advice from attorneys endangers statutes like 18 U.S.C. § 2(a), the general aiding and abetting statute. An attorney can knowingly encourage a course of action without aiding or abetting it. Moreover, as we have explained, remaining in the country while undocumented, without more, is not a crime. More fundamentally, though, the government has already shown its intent to prosecute those citizens (attorneys or sympathetic lay persons) who give even general immigration advice. *See Henderson*, 857 F. Supp. 2d at 193.

The foregoing examples are not some parade of fanciful horribles. Instead, they represent real and constitutionally-protected conversations and advice that happen daily. They demonstrate that Subsection (iv)'s impermissible applications are real and substantial. Because Subsection (iv)'s legitimate sweep – which only reaches conduct not criminalized in the

other subsections of § 1324(a)(1)(A), and unprotected speech – is narrow, we hold that Subsection (iv) is overbroad under the First Amendment.[15]

CONCLUSION

Subsection (iv) criminalizes a substantial amount of protected expression in relation to the statute's narrow legitimate sweep; thus, we hold that it is unconstitutionally overbroad in violation of the First Amendment. The judgment of the district court is **REVERSED** with respect to the "encourage or induce" counts, Counts 2 and 3 of the First Superseding Indictment. In accordance with the Memorandum disposition filed concurrently herewith, with respect to the mail fraud counts, Counts 5 and 6, the judgment of the district court is **AFFIRMED**.

Because two of the five counts of conviction are reversed, the sentence must be vacated and the case remanded for resentencing. *See United States v. Carter*, 2018 WL 5726694, at *8 (9th Cir. Nov. 2, 2018); *United States v.Davis*, 854 F.3d 601, 606 (9th Cir. 2017).

REVERSED in part, AFFIRMED in part, sentence VACATED and REMANDED for resentencing.

[15] Because we strike down Subsection (iv) as overbroad, we need not reach the separate issue of whether the statute is void for vagueness.

MEMORANDUM OF THE NINTH CIRCUT COURT OF APPEALS DATED DECEMBER 4, 2018 [APP. 89-92]

NOT FOR PUBLICATION

FILED

DEC 4 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EVELYN SINENENG-SMITH, Defendant-Appellant.	No. 15-10614 DC No. CR 10-414 RMW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted April 18, 2017
San Francisco, California
Reargued and Resubmitted February 15, 2018
Pasadena, California

Before: TASHIMA, BERZON, and HURWITZ**, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** Judge Reinhardt, who was originally a member of this panel, died after this case was reargued and resubmitted for decision. Judge Hurwitz was randomly drawn to replace him. Judge Hurwitz has read the briefs, reviewed the record, and watched video recordings of the oral arguments.

Evelyn Sineneng-Smith appeals her conviction on two counts of mail fraud in violation of 18 U.S.C. § 1341.[1] She contends that the evidence was insufficient to uphold the verdict. We affirm.

Sineneng-Smith operated an immigration consulting firm in San Jose, California. Her clients were mostly natives of the Philippines, unlawfully employed in the home health care industry in the United States, who sought authorization to work and adjustment of status to obtain legal permanent residence (green cards). One of Sineneng-Smith's main "services" was to assist clients with applying for a "Labor Certification," and then for a green card. The problem was that Sineneng-Smith's clients, Amelia Guillermo and Hermansita Esteban, were not eligible to adjust their statuses to legal permanent residents through the Labor Certification program. Sineneng-Smith told investigators that she knew that her clients were ineligible to adjust their status through Labor Certification. Sineneng-Smith's mail fraud convictions stem from her sending through the U.S. mail retainer agreements to Guillermo and Esteban, stating that Sineneng-Smith would help them obtain legal permanent residence.

[1] Sineneng-Smith was also convicted of violating of 8 U.S.C. § 1324(a)(1)(A)(iv). We address those convictions in a concurrently-filed opinion.

"To allege a violation of mail fraud under [18 U.S.C.] § 1341, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (9th Cir. 2004) (internal quotation marks omitted). Sineneng-Smith only contests the sufficiency of the evidence as to the first and third elements.

To satisfy the first element, the government must offer "[p]roof of an affirmative, material misrepresentation," *United States v. Benny*, 786 F.2d 1410, 1418 (9th Cir. 1986), or proof of "deceitful statements of half truths or the concealment of material facts," *United States v. Woods*, 335 F.3d 993, 998 (9th Cir. 2003). The retainer agreements that Sineneng-Smith signed with Esteban and Guillermo demonstrate her misrepresentations. The agreements stated that Sineneng-Smith's clients hired her "for purposes of assisting [them] to obtain permanent residence through Labor Certification." Because Guillermo and Esteban had no chance of obtaining permanent residence through Labor Certification, these statements were at least deceitful half truths that concealed material facts. The facts were material because Esteban and Guillermo testified

that they would have left the country if Sineneng-Smith had told them that they were not eligible for green cards.

As to the third element, Sineneng-Smith admitted that she knew that her clients could not adjust their status through Labor Certification. She further admitted that if she informed her clients of that fact, they would not have hired her. This evidence is sufficient to support a finding that Sineneng-Smith intended to defraud her clients.

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With respect to the mail fraud convictions, Counts 5 and 6, the judgment of the district court is **AFFIRMED.**

ORDER OF THE NINTH CIRCUIT COURT OF APPEALS DATED JANUARY 25, 2021 [APP. 93]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EVELYN SINENENG-SMITH, Defendant-Appellant.	No. 15-10614 DC No. 5:10 CR-0414 RMW ND Cal., San Jose ORDER

Before: TASHIMA, BERZON, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Berzon and Hurwitz vote to deny the petition for rehearing en banc, and Judge Tashima so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for panel rehearing and the petition for rehearing en banc are **DENIED.**