No. 20-_____

In The

Supreme Court of the United States

MICHAEL WOOD AND MARY WOOD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Defendants' conviction for conspiracy to commit immigration offenses is legally invalid pursuant to *Yates v. United States*, 354 U.S. 298 (1957) because at least one of the three "objects" of the conspiracy took place outside the "object's" statute of limitations period.

2. Whether the offense of "encourag[ing] or induc[ing] an alien . . . to reside in the United States," 8 U.S.C. § 1324(a)(1)(A)(iv), is facially overbroad and violates the First Amendment.

3. Whether the Defendants' convictions resulted from a constructive amendment to the indictment, or from a prejudicial variance, when the trial court permitted the government to avoid a statute of limitations problem by arguing that conduct that post-dated the offenses that the grand jury charged was offense conduct, and permitted the jury to consider it as such.

LIST OF PARTIES AND SUP. CT. RULE 14 DISCLOSURES

Petitioners Michael Wood and Mary Wood were charged and convicted in the United States District Court for the District of New Jersey by the Respondent, United States of America.

Six defendants were indicted in the related case *United States v. Murunga*, *et al*., No. 14-cr-175-JRS (E.D. Pa.). Anne Murunga pled guilty to Count One of that indictment, which charged her with harboring an alien for financial gain (8 U.S.C. § 1324(a)(1)(A)(iii), (B)(i)); Count Two, conspiracy to harbor (8 U.S.C. § 1324(a)(1)(A)(v)(i)), was dismissed. She appealed the final judgment and the denial of her motion to withdraw her guilty plea. Her appeal was docketed at No. 18-3554 and summarily dismissed on August 9, 2019.

The remaining five defendants indicted in No. 14-cr-175 entered guilty pleas to an information (for Harold Murunga, a superseding information) filed in 14-cr-453-JRS (E.D. Pa.); the court discontinued No. 14-cr-175 as to them. Each pled guilty to conspiracy to violate federal wage and hour standards, under 18 U.S.C. § 371. One, Newton Adoyo, testified as a cooperating witness in this case. None appealed.

RELATED CASES

United States v. Michael Wood, No. 1:16-cr-271-RBK-1 (D.N.J., November 26, 2018).

United States v. Mary Wood, No. 1:16-cr-271-RBK-2 (D.N.J., November 26, 2018).

United States v. Michael Wood, No. 18-3597 (*cons. with United States v. Mary Wood*, No. 18-3653) (3d Cir., February 6, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Michael Wood and Mary Wood, respectfully petition for a writ of *certiorari* to review the judgment of the United State Court of Appeals for the Third Circuit.

DECISIONS BELOW

The decisions of the United States Court of Appeals for the Third Circuit are reported at 801 Fed. Appx. 833 (3d Cir. 2020), and is reprinted in the Appendix (App.) at App. 1. The decisions of the United States District Court for the District of New Jersey (18-3597 and 18-3653) are at App. 10, 16.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 2020. Petitioners' Petitions for Rehearing *En Banc* were denied on June 1, 2020 (App. 22, 24). Per this Court's COVID-19 Order dated March 19, 2020, and its 150-day filing deadline following a denial of rehearing, this Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

8 U.S.C. § 1324(a)(1) states, in relevant part:

(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).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs –

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section

> 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and
>
> (iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, or both.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

INTRODUCTION

Despite a ten-year statute of limitations, a five year investigation, and the 2014 guilty pleas of six members of the Woods' extended family for harboring the same victim, the Government waited until June 9, 2016 to charge the Woods with offenses that allegedly ended on or about June 28, 2006 – when P.I. was removed from the Woods' home. But that alleged end-date did not hold up in the face of the evidence.

When the Government failed to prove that P.I. remained with the Woods into the limitations period, it attempted to plug the gap by expanding the offenses to include post-departure conduct previously offered only to prove the offense, not as the offense itself. The district court allowed the revision. A cascade of errors

requiring judgment of acquittal, or a new trial at least, resulted.

Because the lower court allowed legally invalid conspiratorial objects to be presented to the jury, and because the First Amendment protects the allegedly enticing statements the Petitioners were convicted of making, and because of the injustice to Petitioners that results when arbitrary events are allowed to artificially extend the statute of limitations, all of which erodes certainty in the law and damages the justice system and all persons under it, *certiorari* should be granted and the Petitioners' convictions reversed.

Granting *certiorari* is exceptionally important in this case, as the overbreadth contained in the definitions of "encourages or induces" in 8 U.S.C. § 1324(a)(1)(A)(iv) renders that poorly-drafted statute facially unconstitutional, and the resulting uncertainty and chilling of free speech cannot be countenanced by this Court, especially as immigration is one of the most significant issues facing this country, and words can easily and unfairly be morphed into conduct in the minds of prosecutors when an overbroad statute allows for it.

Additionally, *certiorari* is important because it allows the Court to reaffirm the holding of *Yates v. United States*, 354 U.S. 298 (1957), namely, that when a general verdict is based on at least one invalid object offense, justice requires the conviction not be allowed to stand, especially when the convictions are based on

prejudicial variances and constructive amendments of the indictment.

STATEMENT OF THE CASE

Defendants Michael Wood, an airline pilot, and Mary Wood, a full-time nurse, were living in New Jersey with their four children in or about 2005. The Government alleged that in July 2005, Mary Wood and her father recruited her distant cousin, "P.I.," who was living in Kenya, to come to the United States to work as the Defendants' nanny.

The Government alleged that through the help of Mary Wood's family in Kenya, P.I. acquired a passport and traveled to Ghana before ultimately traveling to the United States with a passport belonging to Michael Wood's daughter, Annacheal. The Government alleged that on August 13, 2005, P.I. illegally entered the United States with Michael Wood and three of the Defendants' children. Mary Wood, who had traveled and arrived in the United States a day earlier with the youngest Wood child, picked up and transported P.I., Michael Wood, and the remaining children to their residence in Willingboro, New Jersey.

The Government alleged P.I. was paid $200.00/month, sent directly to P.I.'s family in Kenya, with which P.I.'s family built a home, funded P.I.'s brothers' education, and paid for P.I.'s mother's medication. The Government alleged P.I. cared for Defendants' children, woke them up in the morning, fed them,

transported them to and from school, fed them dinner, and put them to bed.

While P.I. was alleged to have lived in the Woods' home, Michael Wood was only occasionally present in the United States. According to P.I., Michael Wood traveled "most of the time," particularly because he was working as an airline pilot and was stationed and living in Japan.

Eventually, as P.I. became frustrated with her living situation, she contacted Mary Wood's brother, Douglas Murunga, in Pennsylvania. Douglas Murunga and Mary Wood's other brother, Harold, hatched a plan, unbeknownst to Michael and Mary Wood, to remove P.I. from the Defendants' home. In or about June 2006, Harold Murunga picked P.I. up from the Defendants' residence, and dropped her off at the home of Mary's sister, Anne Murunga, who was living with Newton Adoyo, her then-husband. Harold told Mary Wood he would be taking P.I. and Mary's children to an amusement park and they would be staying over.

After moving out of the Woods' home, P.I. never saw Michael Wood again. A few days after moving out, however, Mary Wood traveled to Anne Murunga's Pennsylvania home to pick up her children and allegedly talked with P.I. while she was there. The conversation was not referenced or described in the indictment, but it became a crucial part of the Government's trial presentation, as P.I. testified that Mary came to Pennsylvania two days later only to pick up her kids from Ann's house. Otherwise, Mary only said

she was upset P.I. was not coming back with her to take care of her kids.

When Mary was leaving her sister's house, P.I. asked for her belongings and Mary responded that "she can have them anytime [she] want[s]." P.I. lived with Anne Murunga and other family members illegally for the next several years.

PROCEDURAL HISTORY

The Indictment in this matter was returned on June 9, 2016 and alleged that Michael and Mary Wood conspired to commit Alien Harboring from August 2005 to June 28, 2006.

On September 23, 2016, Defendants moved to dismiss the indictment returned after the ten-year statute of limitations period set forth in 18 U.S.C. § 3291. Defendants argued that there was no evidence that any criminal conduct occurred after June 9, 2006.

The Government opposed the motion to dismiss, arguing that the alien harboring conspiracy continued until P.I. moved out of the Wood household unbeknownst to Michael and Mary Wood.

At all times pretrial and during trial, the Government maintained that the conspiracy terminated when P.I. left Defendants' home. In opposition to Defendants' Motions *in limine* to bar certain testimony about an alleged sexual assault, the Government repeatedly confirmed that position, such as when it wrote:

- "the evidence of the sexual assault is direct proof concerning the circumstances in which the criminal conspiracy ended, as the assault was the impetus that put the plan to remove P.I. from the house into action."

At oral argument on said motion, the Government reaffirmed the conspiracy end date:

> GOVERNMENT: [T]he issue is completing the story . . . And the date in question is in June of 2006. That's – *this was the impetus that ended both the criminal conspiracy in Count One, and in Count Two the harboring* (emphasis added).

At trial, the Government solicited testimony from three witnesses who offered vague and contradicting statements as to the date P.I. was removed from the Woods' home. One witness, Laura Esese, testified she was not sure when P.I. left. Another witness, Newton Adoyo, testified P.I. left in "approximately June 2006." P.I. testified that she moved in "2006 June." No witness provided a date certain.

After the Government rested, Defendants moved for a Rule 29 Judgment of Acquittal because the Government failed to meet its burden to prove that the conspiracy continued during the statute of limitations period – *i.e.* after June 9, 2006. The Government recognized the obvious inadequacy in its proofs, and moved to reopen its case in chief and recall fact witnesses to establish the date the conspiracy concluded, which was denied.

Defendants renewed their motion for Judgment of Acquittal after the close of evidence. The Government again confirmed that the conspiracy ended when P.I. left the Woods' home:

> THE COURT: Counsel's making the point that there's no testimony in this case as to when in June this conspiracy actually ended. You agree that the conspiracy ended when she was moved to the Murunga house?
>
> MR. PATEL: We do.

However, once the implications of its position became clear, the Government shifted its definition of the conspiracy to encompass the conversation between Mary Wood and P.I. at the Murunga's Pennsylvania home.

The trial court was surprised by the Government's new theory, because the testimony regarding the timing and substance of this event was not only scant, but it also contradicted the Government's position during trial, pretrial, and to the grand jury. Nevertheless, the changed position was allowed, and the jury convicted the Petitioners on the two subject Counts.

On February 6, 2020, a panel of the Third Circuit affirmed. 801 Fed. Appx. 833 (3d Cir. 2020). App. 1. Petitioners moved for rehearing (panel or *en banc*), but the requests were denied on June 1, 2020. App. 22-24.

REASONS FOR GRANTING THE PETITION

I. THE CONSPIRACY CONVICTION MUST BE REVERSED BECAUSE AT LEAST ONE OF ITS OBJECTS IS LEGALLY INVALID.

A. The Conspiratorial Objects Were Legally Invalid Because They Cannot Encompass Post-Departure Conduct.

Even if Count I charged a conspiracy that included a post-departure attempt to return P.I. to New Jersey, the convictions must be reversed because the conspiratorial objectives are legally invalid, since they cannot encompass such conduct. Constitutional errors require reversal of the affected counts unless the error "was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The errors below were not harmless, and without them a different result would have occurred.

The Indictment alleged a multi-object conspiracy with three distinct conspiratorial objectives in violation of the Immigration and Nationality Act:

- to encourage and induce P.I. to enter and reside in the United States in violation of law (8 U.S.C. § 1324(a)(1)(A)(iv) and 1324(a)(1)(B)(i));
- to transport her within the United States in furtherance of "such violation of law" (*id*. 1324(a)(1)(A)(ii) and 1324(a)(1)(B)(i)); and
- to "conceal, harbor, and shield [her] from detection" (*id*. 1324(a)(1)(A)(iii) and

> 1324(a)(1)(B)(i)); all committed "for the purpose of private financial gain," and in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(i);

all in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(i).

The Court submitted all three objectives to the jury, over the Petitioners' objection. Yet all three object offenses were legally time-barred, and thus invalid conspiratorial objects. Further, each requires a nexus to facilitating an alien's presence in the United States, and the intent to do so. None encompasses bringing to New Jersey an alien who would otherwise live in Pennsylvania.

Statutes of limitations have been described as a Defendant's primary safeguard against the possibility of prejudice from prosecutorial delay. *See United States v. Lovasco*, 431 U.S. 783, 789 (1977). The Government bears the burden of proving it indicted the defendant within the appropriate limitations period. *See Grunewald v. United States*, 353 U.S. 391, 396 (1957). "Federal statutes of limitations should be applied strictly in order to further the congressional policy favoring repose." *United States v. Hare*, 618 F.2d 1085, 1087 (4th Cir. 1980).

Therefore, because at least one of the three objects of the conspiracy was barred by the applicable statute of limitations at the time of the offense, and because the jury returned a "general" verdict, reversal is required pursuant to *Yates v. United States*, 354 U.S. 298 (1957).

1. The Inducement Offense Was Legally Invalid.

The Third Circuit's authoritative construction of the offense of "encourag[ing] or induc[ing] an alien . . . to reside in the United States," 8 U.S.C. § 1324(a)(1)(A)(iv), demonstrates that the statute does not apply to a post-departure attempt to bring P.I. to New Jersey from Pennsylvania. The offense requires proof of "some affirmative assistance that makes an alien lacking immigration status more likely to enter or remain in the United States than she *otherwise might have been*." *DelRio-Mocci v. Connolly Properties, Inc.*, 672 F.3d 241, 248 (3d Cir. 2012) (emphasis added); *accord*, *e.g.*, *United States v. Ndiaye*, 434 F.3d 1270, 1298 (11th Cir. 2006) (upholding conviction where defendant helped alien obtain social security card he otherwise lacked); *United States v. Oluwole*, 982 F.2d 133, 137 (4th Cir. 1997) (defendant helped aliens obtain immigration documents they otherwise lacked).

Yet moving P.I. back to New Jersey would make her no "more likely to . . . remain in the United States than she otherwise might have been" – (*DelRio-Mocci*, 672 F.3d at 248). She was residing, declared that she would continue residing, and in fact did continue residing, with Anne Murunga in the Poconos – in Pennsylvania. No conflict existed between Mrs. Wood and her sister over whose house P.I. would live in that would have affected P.I.'s presence in the United States; her presence was already long-established.

Given this judicial construction of the statutory language, the inducement offense ended at the latest when P.I. left the Woods' home.

2. The Transporting Offense Was Legally Invalid.

Similarly, "transport[ing] and mov[ing]" an alien "in furtherance of" the alien's illegal presence, 8 U.S.C. § 1324(a)(1)(A)(ii), requires "a direct and substantial relationship between the defendant's act of transportation and the furtherance of the alien's illegal presence in the United States." *See, e.g.*, *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977). Yet no attempt to transport P.I. from Pennsylvania to New Jersey would "further . . . [her] illegal presence" in the United States, because she intended to remain in Pennsylvania. Indeed, the only "transport" of P.I. that meets the legal standard was her transport from the airport to the Woods' home – which was completed in August 2005.

The August 2005 date actually makes the transport object doubly untimely. It was governed by a five-year limitations period because it was completed before January 2006, which is when Congress extended the period from five years to ten. *See* 18 U.S.C. § 3298; Pub. L. 109-162, Title XI, § 1182(a), 119 Stat. 3126 (Jan. 5, 2006). That amendment applied prospectively only, so an offense completed before its enactment is subject to the five-year statute of limitations. *See id.*; *see also Toussie v. United States*, 397 U.S. 112,

115 (1970) (criminal statute of limitations to be interpreted in favor of repose); *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (*per curiam*) ("a law is presumed, in the absence of clear expression to the contrary, to operate prospectively").

Here, the Defendant was charged with "Transporting" P.I. within the United States, an offense that occurred on August 13, 2005 when Mary Wood transported P.I. from the airport to the Woods' home. It was completed on the same date. *See, e.g.*, *Moreno*, 561 F.2d at 1323 ("A broader interpretation of the transportation section would render the ['in furtherance of such violation of law'] qualification placed there by Congress a nullity").

Because the statute of limitations for the "Transporting" object expired in 2011, long before the Indictment was returned on June 9, 2016, it is legally invalid. Thus, the transport object was legally invalid, both because the statute does not reach an attempt to transport to New Jersey a person who will otherwise reside in Pennsylvania, and because it was not charged within the five-year statute of limitations that applied to it. Even assuming *arguendo* that a ten-year statute of limitations is applied, the "transporting" object expired approximately ten months prior to the Indictment.

3. The Harboring Offense Was Legally Invalid.

The Third Circuit interpreted the harboring offense, 8 U.S.C. § 1324(a)(1)(A)(iii), consistently with the other subsections of 1324(a)(1)(A): "conceal[ing], harbor[ing], and shielding [an alien] from detection" requires conduct "tending to substantially facilitate an alien's remaining in the United States illegally," *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008). Bringing P.I. to New Jersey from Pennsylvania would not "facilitate" her "remaining" in the United States, because she could otherwise "remain" in Pennsylvania. Therefore, as a matter of statutory construction, the "harboring" offense also ended with P.I.'s departure from the Woods' home. *See United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) (course of conduct ends when the victim is freed).

B. Because All Of The Conspiratorial Objectives Are Legally Invalid, Retrial Is Barred And Judgment Of Acquittal Is Required.

As described above, none of the object offenses could encompass post-departure conduct, because, as a matter of law, each ended at the latest when P.I. left. The "transport" offense is "a point-in-time" offense that ends "as soon as every element in the crime occurs." *Toussie*, 397 U.S. at 124. Here, it ended with P.I.'s initial transport to the Woods' home in August 2005.

Petitioners assume *arguendo* that the inducement and/or harboring offenses are "continuing offenses." *See, e.g.*, *United States v. Lopez*, 484 F.3d 1186, 1194, fn10 (9th Cir. 2009). However, "even continuing offenses are completed at some point." *Id.* (quoting *United States v. Hernandez*, 189 F.3d 785, 791 (9th Cir. 1999)). Thus, they ended when "the proscribed course of conduct" did. *Toussie*, 397 U.S. at 124. And that occurred, as a matter of law, when P.I. was removed from the Woods' home. No new "attempt to induce [or] harbor" offense was charged as a conspiratorial object – nor could one have been, given that moving P.I. to New Jersey from Pennsylvania would not encourage or facilitate her remaining in the United States.

Therefore, because there is no legal basis to support the conspiracy verdict, as all the object offenses were time-barred, reversal and judgment of acquittal is required.

C. The Legal Invalidity Of Even One Objective Requires, At A Minimum, A New Trial Because *Yates v. United States* Applies.

Generally, a conspiracy may involve multiple object offenses, *Braverman v. United States*, 317 U.S. 49, 52 (1942), and proof the defendants conspired to commit only one object is sufficient to convict. If one or more of the objects was disqualified as unconstitutional or not legally sufficient (for example, due to a statute of limitations), the verdict must be set aside.

Yates v. United States, 354 U.S. 298 (1957). *See also Stromberg v. California*, 283 U.S. 359 (1931); *Williams v. North Carolina*, 317 U.S. 287 (1942); *Bachellar v. Maryland*, 397 U.S. 564 (1970).

Because the jury returned a general verdict, this Court cannot tell which theory it predicated the conspiracy verdict upon. This is exactly the scenario that this Court held requires *vacatur* in *Yates*. *Yates* held that a general verdict must be reversed when any of the grounds on which it rests is legally invalid. *Id.* at 312; *see Griffin v. United States*, 502 U.S. 46, 58-59 (1991) (distinguishing *Yates* "legal error" from insufficiency of the evidence).

Yates controls this case, and the lower courts erred in not so holding. In *Yates*, the indictment charged a conspiracy with two objects, one of which was "organiz[ing] . . . the Communist Party of the United States," in violation of the Smith Act. *Yates*, 354 U.S. at 302. The lower courts had held that "organizing" is a process that continues throughout the life of an organization, and thus rejected a statute of limitations challenge to the "organizing" object. *Id.* at 309. The Supreme Court held instead that "organize" refers to the initial establishment of an organization. *Id.* at 310. That interpretation made the "organize" objective time-barred, because the Communist Party unit had been "organized" outside the limitations period. *Id.* at 312. This Court then held that this legal invalidity of one of the alleged objects of the conspiracy required *vacatur* of the conspiracy conviction even though a valid objective remained. *Id.*

Yates would have had a different outcome had the issue been the government's mere failure to prove the date that the Communist Party unit was organized. *See Griffin*, 502 U.S. at 59. Instead, the issue in *Yates* was how the statutory object offense applied to the facts proven. This issue is identical. As a matter of statutory interpretation, none of the object offenses encompassed the post-departure conduct. This is a legal question – just as the duration of the "organize" offense was a legal question in *Yates*.

In making this determination, the Government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. "The question 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.' " *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Stated differently, the issue is not "whether the evidence was sufficient to convict despite the error," but "whether there was a reasonable possibility that the error contributed to the jury verdict." *Id*. Thus, the Conspiracy conviction must be reversed unless the Government establishes no "reasonable possibility" that the lower courts' error in sustaining the "transportation" object "contributed to the jury verdict." *See Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988).

Here, as to Michael there exists more than just a reasonable possibility that the "transportation" object contributed to the jury verdict. Following P.I.'s illegal

entry – an event that also occurred on August 13, 2005 and is time-barred as a matter of law – Michael Wood was only occasionally present in the United States to engage in "harboring." P.I. even testified that Mr. Wood was rarely home and traveled "most of the time." This was confirmed by United States Customs and Border Protection's records demonstrating that Michael Wood was working in Japan for months at a time while P.I. was allegedly harbored in the Woods' home.

Furthermore, as set forth *infra*, even while indulging in the fiction that Mary Wood solicited P.I.'s return to the Woods' home when she visited her sister's Pennsylvania house, there is a total lack of evidence that Michael Wood continued to harbor P.I. during the applicable statute of limitations period. Indeed, P.I. admitted she had never seen nor spoken to Michael Wood again after she had left his home. No jury could infer that Michael Wood continued to participate in harboring when there exists no evidence to support that allegation.

Because the "Transporting" object was invalid and barred by the statute of limitation, the district court erred by permitting the jury to convict Defendants based on that legally defective object. And since the Government could not demonstrate beyond a reasonable doubt that the error did not contribute to the verdict, reversal is required. *See Skilling v. United States*, 561 U.S. 358, 414 (2010); *Neder v. United States*, 527 U.S. 1, 19 (1999) ("If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent

the error – for example, where the defendant . . . raised evidence sufficient to support a contrary finding – it should not find the error harmless.").

In the alternative, even if the Court finds that one or two of the conspiratorial objectives was still valid, a new trial is required.

II. THE OFFENSE OF "ENCOURAG[ING] OR INDUC[ING] AN ALIEN . . . TO RESIDE IN THE UNITED STATES," 8 U.S.C. § 1324(a)(1)(A)(iv), IS FACIALLY OVERBROAD AND VIOLATES THE FIRST AMENDMENT.

There exists a separate reason why the conspiracy's first object is legally invalid. Specifically, this Court should strike down § 1324(a)(1)(A)(iv) of the Immigration and Nationality Act, further invalidating the "encourage" and "induce" conspiratorial objective (hereinafter collectively referred to as the "encouragement" object).

Section 1324(a)(1)(A)(iv) makes it a felony to "encourage" or "induce" a noncitizen "to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact" that such action is or will be in violation of law. 8 U.S.C. § 1324(a)(1)(A)(iv). Because the provision is a content-based, criminal prohibition of protected speech that is fatally overbroad under the First Amendment, it is unconstitutional.

The Ninth Circuit considered this issue in *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018).

Though this Court reversed that decision, it was not on the merits, but due to the Ninth Circuit violating the principle of "party presentation" by inserting the overbreadth issue into the case, and engaging in a "radical transformation of [the] case" that went "well beyond the pale." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578-79 (2020). Though ultimately this Court decided the issue was not properly before it, here the issue is squarely raised, and the Ninth Circuit's reasoning in *Sineneng-Smith* is sound.

In *Sineneng-Smith*, the defendant was convicted of "encouraging" an alien to reside in the country, knowing and in reckless disregard of the fact that such residence is in violation of the law, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and § 1324(a)(1)(B)(i), and appealed to the Ninth Circuit. The court determined to address the issue of "[w]hether the statute of conviction is overbroad or likely overbroad under the First Amendment." *Sineneng-Smith*, 910 F.3d at 469.

In a comprehensive decision, the Ninth Circuit held:

> 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.

Sineneng-Smith, 910 F.3d at 485. For the reasons set forth herein, and the reasons expressed by the Ninth Circuit in *Sineneng-Smith*, Defendants' conspiracy conviction should be reversed because the

"encouragement" objective that was submitted to the jury is invalid.

A. The Statute of Conviction is Overbroad Under the First Amendment.

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

The Supreme Court has consistently affirmed "the most basic of [First Amendment] principles" – that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entertainment Merch. Ass'n*, 564 U.S. 786, 790-91 (2011) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). 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," *Sineneng-Smith*, 910 F.3d at 470 (citing *Free Speech Coal.*, 535 U.S. at 244).

Section 1324(a)(1)(A)(iv)'s encouragement provision does just that.

The statute is not only facially overbroad, but it also targets a particular category of speech, namely,

speech concerning whether undocumented noncitizens should be welcome or protected in this country.

B. The Encouragement Provision Unconstitutionally Prohibits Protected Speech.

Under the First Amendment, "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.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 fn6 (2008)). The overbreadth doctrine guards against criminal laws that may have the chilling effect of preventing speakers from expressing themselves. *See Ferber*, 458 U.S. at 768-69 citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980)). Even a person whose activity is clearly not protected may challenge a law as overbroad under the First Amendment. *Id.*

1. Section 1324(a)(1)(A)(iv) Fails to Define "Encourages" or "Induces."

The first step in any overbreadth analysis "is to construe the challenged statute," for "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 559 U.S. at 474.

The term "encourages" in § 1324(a)(1)(A)(iv) is undefined. When a statutory term is undefined, courts

"give it its ordinary meaning." *United States v. Santos*, 553 U.S. 507, 511 (2008). The most generally accepted definition of "encourage" means "to instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident." *DelRio-Mocci*, 672 F.3d at 248 (quoting *Black's Law Dictionary* 620 (4th ed. 1968)); *see also International Bhd. Of Elec. Workers v. NLRB*, 341 U.S. 694, 702 fn7 (1951) (defining "[i]nduce" to mean " '[t]o lead on; to influence; to prevail on; to move by persuasion or influence," and "[e]ncourage" to mean, inter alia, " '[t]o give courage to; to inspire with courage, spirit, or hope; to raise the confidence of; to animate; hearten' "); *see also Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 760 (2011) (definitions of "induce"). Other Circuits have 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, 1147 (9th Cir. 2014) (quoting *United States v. He*, 245 F.3d 954, 960 (7th Cir. 2001) (quoting *Merriam Webster's Collegiate Dictionary* 381 (10th ed. 1996))); *see also* Encourage, *Oxford English Dictionary Online* (3d ed. 2018) ("to inspire with courage, animate, inspirit . . . [t]o incite, induce, instigate").

The plain language of the "encouragement" provision is incredibly broad, and criminalizes almost every form of guidance, advice, comfort, or reassurance given to an alien. *Sineneng-Smith*, 910 F.3d at 483 ("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.").

For example, a loving grandmother who urges her grandson to overstay his visa, by telling him "I encourage you to stay," could be subject to prosecution. *Sineneng-Smith*, 910 F.3d at 483. An attorney who advised an undocumented immigrant to remain in the United States because the chance of deportation was slim could be subject to prosecution. Even Senator Kamala Harris could be prosecuted for sending the following tweet on October 14, 2018:

> "If you need to seek shelter from the wildfires, please do so regardless of your immigration status." Kamala Harris (@SenKamalaHarris), Twitter (Oct. 14, 2017, 9:40 AM), https://twitter.com/SenKamalaHarris/status/919241499182804992.

Along the same lines, sanctuary cities and their respective mayors could be prosecuted for welcoming and protecting illegal aliens within city limits:

- "If [illegal aliens] want to live here, they'll live here. They can use my office. They can use any office in this building. Any place they want to use." (Mayor Marty Walsh, Boston, Massachusetts), Shannon Dooling, *Mayor Walsh Vows To Keep Boston A Safe Place For Immigrants Following Trump's Orders* (Jan. 26, 2017), https://www.wbur.org/news/2017/01/26/walsh-fights-trump-immigration-orders

- "Newark will continue to protect undocumented immigrants despite whatever executive order is issued." (Mayor Ras Baraka, Newark, New Jersey), Jessica Mazzola, *Some N.J. sanctuary cities plan to ignore Trump's executive order* (Jan. 25, 2017), https://www.nj.com/essex/2017/01/sanctuary_cities_react_to_trump_order.html

- "We're going to defend all of our people regardless of where they come from, regardless of their immigration status." (Mayor Bill de Blasio, New York City, New York), Liz Robbins, *'Sanctuary City' Mayors Vow to Defy Trump's Immigration Order* (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/nyregion/outraged-mayors-vow-to-defy-trumps-immigration-order.html

- "Whether you're from Poland or Pakistan, whether you're from Ireland or India or Israel and whether you're from Mexico or Moldova, where my grandfather came from, you are welcome in Chicago as you pursue the American dream." (Mayor Rahm Emanuel, Chicago, Illinois). *Id.*

- "If asylum seekers find their way to Cambridge, we'll welcome them." (Mayor Marc McGovern, Cambridge, Massachusetts), Orion Rummler, *What they're saying: "Sanctuary city" mayors welcome Trump's latest immigration idea* (Apr. 13, 2019), https://www.axios.com/what-theyre-saying-mayors-sanctuary-cities-welcome-trumps-

latest-immigration-idea-1829d5c7-6577-4644-8f40-bb582003da86.html

- "The city would be prepared to welcome these immigrants just as we have embraced our immigrant communities for decades." (Mayor Jim Kenney, Philadelphia, Pennsylvania). *Id*.

Technically, the statements above violate § 1324(a)(1)(A)(iv) because they "encourage" or "inspire" illegal immigrants to remain in the United States unlawfully. In reality, the statements constitute protected speech because they fall well outside the narrowly demarcated categories of unprotected speech set out by the Supreme Court. *See United States v. Alvarez*, 567 U.S. 709, 717 (2012) (noting unprotected speech is limited to "advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words'; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent").

Because Section 1324(a)(1)(A)(iv) is impermissibly overbroad, and chills free speech in all Americans, it must be struck down.

2. The Overbroad Scope of Section 1324(a)(1)(A)(iv) Invites Arbitrary and Selective Prosecution for Protected Speech.

The overbroad and uncertain reach of the "encouragement" provision creates a substantial risk of arbitrary and discriminatory enforcement. A criminal statute must "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Otherwise, it "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974). The ambiguous standard set forth in the "encouragement" provision creates boundless discretion, permitting "prosecutors[] and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566 (1974); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

The First Amendment prevents Congress from giving prosecutors the power to selectively enforce immigration laws, but that is precisely what the "encouragement" provision does. As an example, although the above sanctuary cities and mayors engaged in constitutionally protected speech, Former Acting Director of Immigration and Customs Enforcement Thomas Horman stated that he believes § 1324(a)(1)(A)(iv) is broad enough to prosecute the politicians for their statements. *See* Jonathan Blitzer, *In Calling for Politicians' Arrest, An ICE Official Embraces His New Extremist Image* (Jan. 4, 2018), https://www.newyorker.com/news/

news-desk/in-calling-for-politicians-arrest-an-ice-official-embraces-his-new-extremist-image ("For these sanctuary cities that knowingly shield and harbor an illegal alien, that is, in my opinion, a violation of 8 U.S.C. 1324, an alien-smuggling statute . . . we've got to start charging some of these politicians with crimes.").

Here, § 1324(a)(1)(A)(iv) invites selective and arbitrary enforcement and must be struck down. As noted, Constitutional errors require reversal of the affected counts unless the error "was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. The result of invalidating the "encouragement" provision requires reversal of the jury's "general" verdict on the conspiracy count.

III. Redefining The Offenses To Include A Post-Departure Attempt To Bring P.I. Back Constructively Amended The Indictment Or Created A Prejudicial Variance.

The Woods have the "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *United States v. Miller*, 471 U.S. 130, 140 (1985). "[A] court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960). Two types of violations occurred here – constructive amendments and variances.

Constructive amendments violate the Fifth Amendment's Grand Jury Clause and are *per se* reversible error. *See United States v. Syme*, 276 F.3d 131, 136 (3d Cir. 2002).

As the Third Circuit explained in *United States v. Somers*, 496 F.2d 723 (3d Cir. 1974) (abrogated on other grounds), the offense of conviction may "differ from the offense charged" even when both would violate the same statute. *Id.* at 744. A "variance" becomes a constructive amendment when it posits a factually different theory for establishing an element of the crime. *Id.* (citing *Stirone*).

And a variance rises to the level of a constructive amendment when there is a "substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense . . . charged." *See, e.g.*, *United States v. Vosburgh*, 602 F.3d 512, 532 (3d Cir. 2012).

A modification to the offense may arise solely out of the facts proven and argued to the jury – as in *Stirone* (when interstate transport of sand was alleged, proof of interstate transport of stone was a constructive amendment). It may also arise out of the argument of counsel, or the jury instructions. *See United States v. McKee*, 506 F.3d 225, 229 (3d Cir. 2007).

Alternatively, variances are grounded in due process, and are reversible if likely to have surprised or otherwise prejudiced the defense. *Vosburgh*, 602 F.3d at 532. The concerns raised by a variance argument are the fairness of the trial and the protection of the defendant's right to notice of the charges against her and her opportunity to be heard. *See, e.g.*, *Kotteakos v. United States*, 328 U.S. 750, 757-58 (1946); *Berger v. United States*, 295 U.S. 78, 81-82 (1935).

A. Counts One And Two Charged Offenses That Ended, At The Latest, With P.I.'s Departure From The Woods' Home.

1. The Government Consistently Maintained That The Offense Conduct Ended With P.I.'s Departure From The Woods' Home.

The district court rejected the constructive amendment argument because it was "no surprise [to the Woods] that there was going to be evidence of events that occurred after [P.I.] moved from the Woods' home." That was inarguable – but also inapposite. The surprise was that the Government offered such evidence as offense conduct, rather than to prove offense conduct that ended with P.I.'s departure.

From the beginning of the prosecution, the Government asserted it would overcome a limitations defense by proving that P.I. left the Woods' home after June 9, 2006. That did not mean that post-offense conduct would be irrelevant or inadmissible. *See, e.g.*, F.R.E. 404(b).

The Government invoked Rule 404(b) to justify the admission of an alleged assault that prompted P.I.'s departure, and post-departure events. Acknowledging the departure ended the offense conduct, the Government predicated the admissibility of post-departure events on their relevance to proving pre-departure intent or motive.

When opposing the defense motion *in limine* to exclude evidence of the alleged assault, for example, the

government argued post-departure conduct was "proof of the charged crimes" – not that it was part of the offense. Similarly, at oral argument on the motions the government contended:

> MR. PATEL: . . . what's important is that she alleged that this [alleged assault] occurred, that that put into action the plan . . . to remove her from the house and ended the criminal conduct that's charged.

The court itself acknowledged that the government's position was "[the alleged assault] proves the end of the criminal conspiracy. . . . " The prosecutors did not contradict that.

The government's position never wavered during trial, nor, initially, after it – until the implications set in. After the close of the evidence, when the Petitioners urged the court to enter judgment of acquittal due to the failure to prove that offense conduct occurred within the limitations period, the Government even then insisted that the move to the Muranga house ended the conspiracy.

If the Government intended all along to charge a conspiracy encompassing events post-dating P.I.'s move, it would not have doubled-down and looked for evidence to prove that the move happened after June 9, 2006. When the district court expressed concern that no evidence in the record showed the date of the move, the Government would have immediately asserted the conspiracy did not end with her move. Instead, the Government maintained the conspiracy ended with

P.I.'s move – until it dug itself a hole by citing Mary Wood's N-400 Form (Application for Naturalization).

The defense pointed out why the N-400 did not help the Government:

> MS. CHANNAPATI: [Mary Wood is] asked, all the residences are listed where she lived in the N-400 form, and she indicates that she moved to the new house in New Jersey in July of 2006. And that's in the record, your Honor.
>
> MS. MATHEWSON: It actually says June, your Honor.

There was silence while the Government absorbed its inability to prove that the move happened after June 9th, and then – and only then – the prosecutors changed course on the fly. That this theory was being birthed live is reflected in the fact that the Government had to decide then and there which object of the conspiracy the attempt to re-harbor P.I. allegedly furthered. It went with prongs one and two, then tossed in three for good measure.

The Government was not confident in this brand-new theory, however. Implicitly acknowledging the deficiency in its case, it filed a highly-unusual request to reopen the record after Rule 29 motions had revealed the gap in their proof – to permit them "to ask a clarifying question to P.I. concerning when in June she was removed from the Petitioners' home." Had the Government believed that the grand jury charged an offense that encompassed post-departure conduct, it would not have mounted that effort to reopen the record.

The district court properly denied the Government's belated effort to plug the hole in its proof, but later declined the defense request for a jury instruction that would prevent a constructive amendment, and rejected the constructive amendment and variance arguments. As noted above, it did so because it found that the defense had pretrial notice that post-departure evidence would be admitted. But what surprised the defense was exactly what had surprised the district court: not the relevance of post-departure conduct to prove the offense, but the broadening of the offense to encompass it.

2. The Grand Jury Record and Charging Decisions Corroborate That The Offense Conduct Ended With P.I.'s Departure.

The Government's pre-Indictment strategy, and the Indictment itself, are consistent with an intent to charge offenses that ended with P.I.'s move to the Murunga home at the latest.

The government presented one witness, Special Agent Scott Bishop, to the grand jury. Notably, Agent Bishop did not tell the grand jury anything of the theory that eventually became the linchpin of the prosecution: that Mary Wood traveled to Pennsylvania, confronted P.I., and attempted to bring her back to New Jersey.

The only post-departure conduct by Mrs. Wood that the prosecutors relayed to the grand jury was a

conversation between Mrs. Wood and Anne Murunga at an unspecified time, at an unspecified location, by unspecified means, that Mrs. Wood was unhappy about P.I.'s move. This evidence was clearly offered for the same reason the Government offered this interaction at trial: as an admission by Mrs. Wood of her intent and motive.

The government sought and received an Indictment that set the end date of the offense conduct at June 28, 2006. This is the date Agent Bishop told the grand jury that the Woods purchased the house from which P.I. was removed. This charging decision demonstrates the grand jury charged an offense that ended with, or even shortly before, P.I.'s departure.

That the Government never considered Mrs. Wood's visit to Pennsylvania to be offense conduct is further substantiated by their evident belief that they lacked venue to prosecute the Woods in the Eastern District of Pennsylvania ("E.D. Pa.") – where they were already prosecuting Anne Murunga and five others, all whom had agreed, in 2014, to cooperate against others who harbored P.I. *See United States v. Murunga*, Nos. 14-cr-175-JRS and 14-cr-453-JRS (E.D. Pa.). If the Pennsylvania interaction were offense conduct, venue would have been available in the E.D. Pa. under 18 U.S.C. § 3237(a) (relating to offenses begun in one jurisdiction and completed in another).

The only reason not to take advantage of the related case rule was a belief that venue would be improper in the E.D. Pa. – because the prosecutors asked

the grand jury to charge an offense that ended when P.I. left the Woods' New Jersey home. The decision to charge in New Jersey corroborates that the offenses ended with P.I.'s departure.

B. Broadening The Offenses To Include Post-Departure Conduct Constructively Amended The Indictment.

A variance arises when the trial evidence proves facts materially different from those charged; for example, when the evidence fails to prove the charged offense but may prove a different one. *See, e.g.*, *United States v. Miller*, 527 F.3d 54, 69-70 (3d Cir. 2008) (reviewing sufficiency of the evidence challenge, based on statute of limitations, as variance).

Here, a constructive amendment arose when the district court rejected the defense request that it instruct the jury not to consider the post-departure interaction between Mrs. Wood and P.I. as offense conduct when evaluating the statute of limitations, and the jury instructions permitted the jury to do so. And the Government milked that option in argument, expressly urging the jury to rely on the Pennsylvania visit to establish that the offense occurred within the limitations period.

The scope of the conspiratorial agreement is the heart of a conspiracy offense. *See, e.g.*, *Grunewald*, 353 U.S. at 397 (scope of conspiratorial agreement controls statute of limitations issue); *see also United States v. Kelly*, 892 F.2d 255, 258-59 (3d Cir. 1989). The scope of

the charged conduct defines the boundaries of a substantive offense. *See, e.g.*, *Toussie*, 397 U.S. at 124. The grand jury charged a conspiracy and a substantive offense that both ended with P.I's departure. But the trial jury was permitted to convict Mrs. Wood of a different conspiracy – one that encompassed an agreement to attempt to bring P.I. back – and a different harboring offense – an attempt to re-harbor P.I. That was a constructive amendment, which requires *vacatur* of Counts One and Two. *See, e.g.*, *United States v. Camiel*, 689 F.2d 31, 39-40 (3d Cir. 1982).

C. Even If The Court Finds A Mere Variance, The Variance Unfairly Prejudiced The Defense.

Even if the Court disagrees that a constructive amendment occurred, there was a prejudicial variance.

The clearest example of prejudice from the variance is conviction on the time-barred offenses. Absent the variance of converting post-departure conduct into offense conduct, the record does not support a finding beyond a reasonable doubt that the offenses continued into the limitations period. The Court may not uphold a conviction on an offense that Congress has deemed "unsuited for prosecution" because it is stale. *Smith v. United States*, 568 U.S. 106, 112 (2013).

But the variance also prejudiced Petitioners at trial. Trial counsel's decisions about investigation, trial preparation, and even the questioning of witnesses would have differed had the defense known pretrial

that the Pennsylvania interaction would be offered as offense conduct – because only as offense conduct did the timing of the interaction matter. In its pretrial proffer about the admissibility of post-offense conduct, the Government equated the probative value of the Pennsylvania interaction ("the defendants' reaction to P.I. leaving the house") with that of other events that occurred "years after P.I. moved out." Offered "as evidence of the defendants' intent and motive," the precise timing of the Pennsylvania interaction was immaterial.

Thus the record reflects, for example, that the defense left unchallenged Newton Adoyo's casual statement that the interaction occurred "a few weeks" after P.I. arrived at the home he shared with Anne Murunga – even though that timing made no sense factually: Mary Wood went to Pennsylvania to retrieve her children (aged approximately eight, seven, five and one at the time) after the ruse that resulted in P.I's move. Crediting Adoyo's timing estimate required believing that Mrs. Wood left her young children at her sister's home for "a few weeks" after her sister failed to return them from what Mrs. Wood had believed was a day trip to a park.

Had the defense known that the Government was asserting the Pennsylvania interaction to be offense conduct, and that the timing of the interaction was material, it surely would have challenged Adoyo's testimony about the timing.

P.I. testified, in contrast, that Mrs. Wood came to pick up her children "two days" after the ruse was implemented, and P.I. never saw her again. Having no reason to focus on the timing during trial, the defense made no effort to reinforce before the jury the factual basis bolstering the credibility of P.I.'s recollection of the timing.

Yet with the Pennsylvania interaction treated as offense conduct, the difference between "a few weeks" and "two days" became outcome-determinative. P.I. testified she left the Woods' home "in June." An interaction "a few weeks" after that departure would unquestionably occur after June 9, 2006, but the jury could only speculate whether an interaction "two days" after the departure did. This eleventh-hour change in the allegations against Mrs. Wood resulted in an unfair prejudice that changed the outcome of the trial.

Alerted for the first time shortly before summations that the timing of the interaction mattered, in summation defense counsel attacked the credibility of Adoyo's estimate. The government countered by urging the jury to discredit P.I.'s specific recollection that Mrs. Wood came to the house once, to retrieve her children two days after the ruse, after which P.I. never saw her again – and to substitute unsupported speculation that Mrs. Wood made two trips to the Poconos: one to retrieve her children, and one to attempt to retrieve P.I.

The jurors quickly zeroed in on the discrepancy: during deliberations they requested only transcripts of the testimony of Adoyo and P.I. "specific to Mary's visit

to Anne's home," and returned a verdict quickly upon receiving the transcripts. Plainly, the verdicts turned on the jury's decision to credit Adoyo's testimony over P.I.'s on the timing issue. The defense was prejudiced by lack of notice that the timing would matter, which led counsel to forgo efforts to undermine Adoyo's testimony and bolster P.I's on this point. This prejudicial variance requires reversal and *vacatur*.

D. Judgment Of Acquittal, Not A New Trial, Is The Proper Remedy.

Because the Petitioners put the statute of limitations at issue pretrial, the Government had the burden of proving beyond a reasonable doubt that the charges were timely. *See, e.g.*, *Smith*, 568 U.S. at 113.

The district court recognized that no evidence in the record permitted a finding that P.I. left the Woods' home after June 9, 2006. Properly construing Counts One and Two to end with P.I.'s departure from the Woods' home – as the government construed them until the implications of this failure of proof became clear – renders the evidence insufficient to convict. While the Courts distinguish between variance arguments and evidentiary insufficiency, both analyses apply here. *See Miller*, 527 F.3d at 69-70. *Certioriari* should be granted, and reversal and judgment of acquittal should be ordered.

CONCLUSION

The United States Constitution guarantees criminal defendants that the proceedings will be conducted fairly. By the lower courts allowing a general verdict based on legally invalid object offenses, and through the clear error of an object offense based on a statute which facially violates the First Amendment, and by convicting Petitioners following a constructive amendment or prejudicial variance of the indictment, Petitioners were denied that fundamental fairness.

With immigration such a "hot-button" issue today, it is crucial that the Court ensure people are not subjected to improper statutes which violate constitutional freedoms, and that the laws are otherwise applied fairly to defendants to protect their rights. Doing so protects both the defendants and the integrity of the criminal justice system.

The issues in this matter are important and extremely timely. Petitioners respectfully pray that the Court grant their petition.

Respectfully submitted,

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