No. 22-179

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

HELAMAN HANSEN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

ELIZABETH B. PRELOGAR
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

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**REPLY BRIEF FOR THE PETITIONER**

As the petition for a writ of certiorari explains, the Ninth Circuit erred in resurrecting the reasoning and holding of *United States* v. *Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), rev'd on other grounds, 140 S. Ct. 1575 (2020), to once again facially invalidate 8 U.S.C. 1324(a)(1)(A)(iv) on a First Amendment overbreadth rationale. Respondent fails to identify a single relevant difference between the Ninth Circuit's decision in that case and its decision in this one. Instead, every argument that he makes against certiorari would equally have been an argument against certiorari in *Sineneng-Smith*. Those arguments provide no greater justification for allowing the overbreadth invalidation of an important federal criminal law to go unreviewed now than they did then. This case is in fact an even better vehicle for addressing the question presented than *Sineneng-Smith*, because it does not have the party-presentation

issue that forestalled resolution of the merits question there. This Court should again grant certiorari and resolve that question now.

**A. Respondent Provides No Basis For A Different Certiorari Disposition From *Sineneng-Smith***

Respondent does not dispute that this case presents similar facts, the identical statute, indistinguishable reasoning, and the same holding as *Sineneng-Smith*. In declaring Section 1324(a)(1)(A)(iv) facially overbroad, the decision below deemed the *Sineneng-Smith* opinion "persuasive on the overbreadth issue" and "add[ed] [its] thoughts" only to "reinforc[e]" the "conclusion of overbreadth" that *Sineneng-Smith* had previously reached. Pet. App. 5a. In doing so, the Ninth Circuit once again wrongly engineered a "'constitutional collision'" between the First Amendment and Section 1324(a)(1)(A)(iv) by "stretching the law" beyond its actual scope. *Id.* at 48a (Bumatay, J., dissenting from the denial of rehearing en banc) (emphasis omitted). This Court regularly reviews decisions of lower courts that invalidate federal statutes, as it did in *Sineneng-Smith*. See Pet. 21-22. It should do so again here.

1. Respondent principally contends (Br. in Opp. 7-9) that this case would be a "poor vehicle" for further review because the petition references the actual version of the crime underlying the judgment: encouraging or inducing unlawful immigration activity, in violation of Section 1324(a)(1)(A)(iv), with an enhanced penalty under Section 1324(a)(1)(B)(i) for acting with the purpose of financial gain. See Judgment 1; see also Superseding Indictment 13; Verdict Form 5. But the government's petition for a writ of certiorari in *Sineneng-Smith* was framed in similar terms. See Pet. at I, *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67).

And as the Court recognized then, a defendant's conviction and sentence for the enhanced version of the crime is no reason to deny review of a decision that broadly precludes *any* prosecutions for violating Section 1324(a)(1)(A)(iv), enhanced or otherwise. See Pet. App. 2a.

If anything, the Ninth Circuit's repeated failure to consider the financial-gain requirement is an additional reason for, rather than against, further review in this case. Respondent does not dispute that the penalty enhancement makes this case an even stronger one for the government on the merits. See p. 11, *infra*. He fails to identify any sound reason why the broad holding of the decision below should evade further review simply because his case may be weaker than others. Nothing would preclude this Court from reversing the decision below on the ground that Section 1324(a)(1)(A)(iv) is constitutional whether or not the offense involves a financial motive. Alternatively, if the Court concludes that the financial-gain requirement is critical to the constitutionality of the prohibition, it could make that clear. And the case provides the Court with the added opportunity to explain how overbreadth analysis should operate in circumstances where an offense is enhanced by proof of an additional statutory component that the basic offense does not require.

That explanation would have independent value to lower courts and to litigants in cases involving an overbreadth claim. See Arizona Amici Br. 18 (stating that this Court may wish to "clarify" that courts considering an overbreadth challenge "are obligated to consider all—not just some—of the statutory elements of the actual crime"). The government relied on the financial-gain requirement at both the panel and en banc stages

below. Gov't C.A. Br. 75, 90-91; Gov't C.A. Pet. for Reh'g En Banc 12. But the panel decision disregarded it. Judge Gould, who authored the panel decision, explained in an opinion concurring in the denial of rehearing en banc why he deemed the financial-gain showing irrelevant. Pet. App. 32a-33a. Judge Bumatay's dissent from the denial of rehearing en banc, in contrast, incorporated the financial-gain component into the constitutional analysis. *Id.* at 66a-67a. Judge Collins's separate dissent from the denial of rehearing en banc likewise found that facial invalidation was "particularly inappropriate" in light of the financial-gain requirement. *Id.* at 79a. Further review here can provide guidance as to which approach is correct.

2. Respondent separately urges (Br. in Opp. 10) the Court to pass up review of the Ninth Circuit's broad constitutional holding because the jury was not instructed on the specific criminal-law meaning of the terms "encourage" or "induce." See Pet. 13-14; pp. 7-8, *infra*. But the respondent in *Sineneng-Smith* made a similar argument, and the Court did not find it a persuasive reason to deny review. See Br. in Opp. at 15, *Sineneng-Smith*, *supra* (No. 19-67); see also *United States* v. *Sineneng-Smith*, 140 S. Ct. 36 (2019) (granting certiorari). It should be no more persuasive here.

The jury trial in this case occurred before the Ninth Circuit issued its now-vacated decision in *Sineneng-Smith*, and the district court accordingly adopted the government's proposal to use a Ninth Circuit pattern instruction that did not expressly define the terms "encourage" and "induce." See Trial Tr. 1813, 1815-1816, 1919-1920. If this Court grants certiorari and reverses, respondent will be free to raise whatever case-specific claims of error he has preserved regarding the jury

instructions. But as in *Sineneng-Smith*, the panel decision here construed the relevant statutory terms broadly as a *legal* matter, and then relied on that construction to hold that the entire prohibition is categorically overbroad. See Pet. App. 6a-9a; *Sineneng-Smith*, 910 F.3d at 471-479.

The Ninth Circuit's overbreadth holding did not rely on the particular jury instructions in this case, nor could it have. The basic premise of an overbreadth claim is that while the legislature can permissibly outlaw a defendant's own conduct, it has done so through a prohibition that sweeps in too many other potential defendants whose conduct the legislature cannot prohibit. See, *e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003). The proper resolution of an overbreadth claim therefore turns not on the jury instructions in the defendant's own proceedings, which do not necessarily contain any individualized constitutional error in the statute's application, but on the actual scope of the provision. See *United States* v. *Williams*, 553 U.S. 285, 293 (2008) ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.").

Respondent additionally errs in suggesting (Br. in Opp. 13) that a claim of error in his particular jury instructions would prevent this Court's review from "alter[ing] the result in this case." But on remand, a jury-instruction claim would be subject to case-specific prejudice analysis, and even if successful would allow for retrial and conviction. Cf. *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999). The Ninth Circuit, by contrast, vacated respondent's conviction on an overbreadth theory that would altogether preclude convicting respondent—or any other defendant—under Section 1324(a)(1)(A)(iv)

at all. The court's overbreadth holding, like the identical holding of *Sineneng-Smith*, thus has implications both in this case and well beyond.

3. Those implications remain just as problematic now as they were then—if anything, they are more so. This Court has repeatedly granted review of lower court decisions holding federal statutes unconstitutional even in the absence of circuit disagreement. Pet. 21-22. And the decision here involves an important federal statute that has been applied in other circuits.

Respondent does not dispute that the decision below revives inconsistencies with an unpublished decision of the Fourth Circuit, as well as with the Third Circuit's construction of the statute in a decision that did not itself address overbreadth. Compare Pet. 22-23, with Br. in Opp. 15 n.2. Review is all the more warranted now that the rationale of the decision below has spread to a divided panel of the Tenth Circuit. See *United States* v. *Hernandez-Calvillo*, 39 F.4th 1297, 1315 n.2 (2022) (Baldock, J., dissenting). At present, the government cannot enforce Section 1324(a)(1)(A)(iv) in much of the western United States—including in the southwest border States of California, Arizona, and New Mexico, where a large number of criminal immigration violations are likely to occur. See Arizona Amici Br. 1 (brief for 22 States likewise viewing question presented as important).

Respondent errs in suggesting (Br. in Opp. 18) that further review is unnecessary because the government retains other "tools" to prosecute activities that facilitate unlawful immigration. Respondent does not identify any other provision that would cover his own inducement activities. More broadly, the judgment whether Section 1324(a)(1)(A)(iv) is necessary is one for

Congress to make, not respondent or the Ninth Circuit. Respect for the coordinate branches of government thus counsels strongly in favor of reviewing the decision below, which invalidates a statute that Congress has had in place, in some form, for decades, and under which the government continues to bring prosecutions.

### B. The Ninth Circuit's Overbreadth Invalidation Of 8 U.S.C. 1324(a)(1)(A)(iv) Remains Unjustified

Respondent's merits-based arguments for allowing the overbreadth invalidation of Section 1324(a)(1)(A)(iv) to stand are likewise a reprise of *Sineneng-Smith*. Compare Br. in Opp. 20-29, with Resp. Br. at 16-34, *Sineneng-Smith*, *supra* (No. 19-67). Those arguments remain unsound and, at all events, provide no basis for allowing the final word on the constitutionality of a federal statute to come from a lower court instead of this Court.

1. Like the Ninth Circuit, respondent asserts (Br. in Opp. 21) that the terms "encouraging" and "inducing" as used in Section 1324(a)(1)(A)(iv) necessarily "cover[] an extraordinarily broad range of protected speech." See Pet. App. 6a-9a, 11a-12a. As the petition explains (Pet. 10-11), however, those terms correspond to wording that is commonly used to define offenses involving accomplice liability and solicitation. See, *e.g.*, 18 U.S.C. 2(a) (specifying that someone who "induces" the commission of a federal crime "is punishable as a principal"); *Black's Law Dictionary* 644 (10th ed. 2014) (defining "encourage" in the criminal-law sense to mean "[t]o instigate; to incite to action; to embolden; to help. See *aid and abet*.") (capitalization altered; emphasis added). Similar terminology appears in many state criminal codes and has never been thought to create any First Amendment overbreadth problem. See Arizona Amici Br. 4 (explaining that "all 50 states utilize the

terms 'encourage' or 'induce' to define various crimes" and collecting examples).

Respondent contends (Br. in Opp. 22) that Section 1324(a)(1)(A)(iv) cannot be read as a conventional prohibition on facilitation and solicitation because a separate provision in Section 1324(a) expressly uses the terms "aids" and "abets." 8 U.S.C. 1324(a)(1)(A)(v)(II). But that provision is limited to aiding and abetting violations of Section 1324(a)(1)(A) *itself*—rather than the types of illegal immigration activity that respondent here induced—and does not cover solicitation. See Pet. 18-19. Moreover, that provision sheds little light on the meaning of the language at issue in this case because Congress enacted it only in 1996, many decades after first prohibiting encouraging or inducing unlawful immigration activities. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. II, Subtit. A, § 203(b)(1)(C), 110 Stat. 3009-565; see also Gov't Br. at 22-23, *Sineneng-Smith*, *supra* (No. 19-67) (Gov't *Sineneng-Smith* Br.).

Respondent separately contends (Br. in Opp. 23-24) that Section 1324(a)(1)(A)(iv) cannot be read to invoke traditional concepts of aiding-and-abetting and solicitation because the statute proscribes encouraging or inducing some immigration violations that are not themselves crimes. Yet that is precisely why the statute fills an important gap in federal law. If a defendant assists in the commission of a criminal violation of the immigration laws, the defendant may be prosecuted under the general federal prohibition on aiding and abetting. 18 U.S.C. 2(a). But no other federal criminal law prohibits facilitating the kind of civil violations that occurred in this case, when respondent induced noncitizens to

remain in the United States beyond their period of authorized stay. See Pet. 4-5.

To the extent that respondent contends that Congress must prescribe criminal punishment for the noncitizens themselves as a prerequisite to prescribing it for him, he is mistaken. Congress long ago determined that those who induce certain forms of illegal immigration may be more culpable than the noncitizens whom they induce, and States have made similar judgments in a wide variety of contexts. See Gov't *Sineneng-Smith* Br. 42-43; Arizona Amici Br. 14-15. This Court's First Amendment precedent recognizes the permissibility of those legislative choices and does not require an all-or-nothing approach in which everyone's conduct must be labeled criminal for anyone's to be. See, *e.g.*, *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 387-389 (1973); *Building Serv. Emps. Int'l Union* v. *Gazzam*, 339 U.S. 532, 540 (1950).

2. In exhuming its prior interpretation of Section 1324(a)(1)(A)(iv) as a direct ban on "everyday statements," Pet. App. 11a, the Ninth Circuit once again disregarded how the statute has been understood and applied in real-world cases. Historically, the statute has been an important tool for prosecuting numerous smuggling activities that facilitate unlawful immigration—conduct that, like respondent's own sham adoption scheme, has no claim to protection under the First Amendment. See Pet. 15-17.

Respondent fails to identify a single instance in the decades-long history of Section 1324(a)(1)(A)(iv) in which the statute has been used to prosecute abstract advocacy or any other speech protected by the First Amendment. Section 1324(a)(1)(A)(iv) is unlike the provisions that this Court found to be overbroad in *United*

*States* v. *Stevens*, 559 U.S. 460 (2010), and *Americans for Prosperity Foundation* v. *Bonta*, 141 S. Ct. 2373 (2021) (cited at Br. in Opp. 25). Those provisions specifically regulated expressive or associational activities—visual depictions of animal cruelty in *Stevens*, 559 U.S. at 464, and charitable donations in *Americans for Prosperity Foundation*, 141 S. Ct. at 2380. The core conduct that Section 1324(a)(1)(A)(iv) targets, by contrast, is conduct that facilitates unlawful immigration, such as providing transportation from the border. See Pet. 12 (collecting examples).

Lacking any real-world examples of how the statute could be used to prosecute advocacy, respondent instead defends (Br. in Opp. 26-27) the court of appeals' reliance on hypotheticals supplied by respondent and his amici. See Pet. App. 11a; see also *Sineneng-Smith*, 910 F.3d at 483-484 (similar). This Court has previously noted "the tendency of * * * overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals," *Williams*, 553 U.S. at 301, and the decision below is a case in point. Respondent asserts (Br. in Opp. 27) that the court of appeals relied on "everyday scenarios," such as encouraging a noncitizen to apply for social services, but nothing shows that Section 1324(a)(1)(A)(iv) would cover any of them. And contrary to respondent's suggestion (*id.* at 28), Section 1324(a)(1)(A)(iv) does not apply to bona fide legal advice about the consequences of remaining in the country unlawfully—just as prohibitions on aiding and abetting a crime generally do not cover a lawyer counseling her client about the possible consequences of a proposed course of conduct. Gov't *Sineneng-Smith* Br. 35.

Instead, "[r]eading the law in its proper light * * * eliminates" concerns that any of the hypothesized

prosecutions could occur. Pet. App. 47a (Bumatay, J., dissenting from the denial of rehearing en banc); see Pet. 20. That is especially true of the enhanced version of the offense, in which the inducement occurs "for the purpose of * * * private financial gain." 8 U.S.C. 1324(a)(1)(B)(i). Respondent asserts (Br. in Opp. 27) that Section 1324(a)(1)(A)(iv) "must stand or fall on its own" for First Amendment purposes, without the financial-gain component, because the inducement provision "imposes criminal sanctions on its own." But Section 1324(a)(1)(A)(iv) does not in fact prescribe any criminal sanctions on its own. The penalties for a violation are specified only in Subparagraph (B), which distinguishes between a crime consisting only of the elements specified in Section 1324(a)(1)(A)(iv) and one that includes additional proof that the defendant sought financial gain. See 8 U.S.C. 1324(a)(1)(B)(i) and (ii). The jury here found proof beyond a reasonable doubt that respondent acted for the purpose of private financial gain, Pet. 6, rendering the Ninth Circuit's reliance on hypothetical prosecutions for non-financially motivated conduct particularly inappropriate.

3. At a minimum, a constitutionally valid construction of the Section 1324(a)(1)(A)(iv) offense, with or without an additional financial-gain component, is "fairly possible," and the canon of constitutional avoidance thus compels adopting that construction. Pet. 20-21 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001)). Under the narrowing construction, the statute neither targets nor indirectly threatens abstract advocacy. Although some acts of facilitation or solicitation may be committed through speech, "long established criminal proscriptions" on "speech * * * that is intended to induce or commence illegal activities"—like Section

1324(a)(1)(A)(iv)'s proscription on inducing illegal immigration activities—"enjoy no First Amendment protection." *Williams*, 553 U.S. at 298. The Ninth Circuit accordingly erred in applying the extraordinary doctrine of overbreadth to nonetheless invalidate the statute. This Court should grant certiorari and reverse.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*

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