No. 22-179

In the Supreme Court of the United States

UNITED STATES, PETITIONER

v.

HELAMAN HANSEN

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

BRIEF FOR PFIZER INC. AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS[1]

Although Pfizer Inc. (Pfizer) takes no position on the ultimate question of respondent's liability for unlawfully inducing a violation of the immigration laws in contravention of 8 U.S.C. 1324, Pfizer has a considerable interest in how this Court approaches the construction of similar criminal statutes to avoid the prohibition of innocent, socially desirable conduct and charitable efforts protected by the First Amendment. More specifically, Pfizer has a direct interest in whether the word "induce" when used in criminal statutes is properly construed to

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

encompass mere "influence" or should be read more narrowly, consistent with prior precedent and canons of statutory interpretation, to mean something akin to soliciting or aiding and abetting another's criminal act. Pfizer recently challenged a similarly overbroad construction of the phrase "to induce" in the context of the Anti-Kickback Statute, 42 U.S.C. 1320a-7b(b)(2). See *Pfizer Inc.* v. *Dep't of Health & Hum. Servs.*, cert. denied, No. 22-339 (Jan. 9, 2023).

SUMMARY OF THE ARGUMENT

The question presented to the Court in this case is whether the federal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), is unconstitutionally overbroad. The posture of this appeal is quite unusual for a criminal case. Here, the criminal defendant is not advocating for a narrower reading of a criminal statute, but instead urges a broader one. And, the United States, rather than defending the statute's breadth, cites the canon of "constitutional avoidance" in support of a narrowing construction of the phrase "encourage[] or induce[]." U.S. Br. 35. Due to the unusual posture of the case, the Court lacks the benefit of a traditional defendant's explanation of why the phrase in question should be given a more constrained reading.

This Court repeatedly has recognized additional principles of construction, beyond the constitutional avoidance canon emphasized by the United States, that support a narrow reading of ambiguous terms in a criminal statute. These include the principle that criminal statutes should be construed narrowly to avoid improperly criminalizing innocent conduct; that courts will not

embrace an unduly broad construction of a criminal statute on the government's promise to use its enforcement discretion only to prosecute truly bad conduct; and, ultimately, the rule of lenity. All of these principles, in the context of potential criminal liability, are informed by the Due Process Clause, which requires that an individual only be held criminally liable for acts that Congress expressly and clearly has prohibited.

Outside the criminal law, the phrase "to induce" may, when viewed in isolation, be susceptible to the expansive definition adopted by the Ninth Circuit—"to move by persuasion or influence." Pet. App. 7a (citation omitted). But that is not a plausible construction of the phrase in the context of a criminal statute. As the United States argues in its merits brief in this case, so expansive a reach would be inconsistent with the established meaning of the word "induce" throughout the criminal law, as something akin to criminal solicitation, such as "conduct that 'leads or tempts' individuals to commit crimes." U.S. Br. 21-25 (citation omitted). Moreover, the broader reading is contrary to this Court's repeated practice of adopting narrowing constructions of ambiguous terms in criminal statutes, so as to avoid criminalizing innocent and desirable behavior—including, in the case of the statute at issue here, the mere provision of truthful information. The Court must be wary of a criminal statute that would sweep so broadly.

These concerns are not merely hypothetical. The same phrase, "to induce," is also employed by the federal Anti-Kickback Statute (AKS), which prohibits offering "remuneration (including any kickback, bribe, or rebate) * * * to induce" the purchase or recommendation of a federally reimbursed healthcare product or service, 42

U.S.C. 1320a-7b(b)(2). As the Ninth Circuit did in this case, the U.S. Department of Justice (DOJ) has construed "to induce," as used in the AKS, to mean "[t]o lead or move, as to a course of action, by influence or persuasion."[2] The U.S. Department of Health and Human Services, Office of Inspector General (HHS OIG) has construed the phrase even more broadly, to mean mere "influence."[3] As a consequence, the AKS has been applied by these enforcement bodies to encompass such activities as offering transportation or housing to a patient and her family in order to obtain cutting-edge treatment only available at a distant hospital, or a charity offering a patient assistance to cover the co-pay without which they cannot afford their prescription for essential medications (even when the assistance covers the only approved medication, or would cover *any* approved treatment prescribed by the patient's doctor).

In the instant case, however, the United States contends that "induce" has an "established criminal-law meaning[]" appearing in aiding and abetting law, and in a wide range of offenses involving criminal solicitation. See U.S. Br. 22-24, 29 (enumerating federal and state offenses that use the word "induce" and "equate" "inducing * * * with criminal solicitation"); see also 18 U.S.C. 2(a). In fact, the United States asserts, "the ubiquity of

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[2] Br. in Opp. at 12, *Pfizer Inc.* v. *Dep't of Health & Hum. Servs.*, No. 22-339 (Dec. 14, 2022) (citation omitted) (brackets in original).

[3] See U.S. Dep't of Health & Hum .Servs, OIG Advisory Op. No. 20-05, at 15 n.36 (Sept. 23, 2020) (concluding that "[i]f, as Requestor's formulation indicates, the principal reason a beneficiary would not fill a prescription is inability to pay the out-of-pocket expenses, then remuneration that would address that inability to pay would, without question, influence the patient's purchasing decision").

the terms 'encourage' and 'induce' in criminal laws defining facilitation and solicitation would subject any number of those laws to constitutional attack" if the Ninth Circuit's broader interpretation were adopted. U.S. Br. 30.

The Court should adopt the narrower construction of "induce" for which the United States advocates in this case. See U.S. Br. 25 (noting that the word has "long been associated with conduct that 'leads or tempts' individuals to commit crimes") (citation omitted). So holding would ensure that the statutory term "induce" has consistent meaning across the federal criminal code and that federal criminal statutes target the kind of bad behavior that Congress intended, without chilling socially desirable conduct that would be swept up if the statute reached anything and everything that might merely "influence" or "persuade" another to take a particular action.

ARGUMENT

I. Well-Established Principles, Beyond The Constitutional Avoidance Canon, Support Narrow Construction Of Criminal Statutes

The Ninth Circuit's ruling in this case has put the United States in the rather unusual position of advocating for a narrower construction of a criminal statute than the respondent, a defendant charged with violating that statute. As a consequence, the United States' primary reliance on the principle of constitutional avoidance to urge a narrowing construction of the statute at issue fails to employ the full array of statutory construction principles that this Court has identified when rejecting the government's over-reading of criminal statutes.

Foremost among these principles is that statutes should not be interpreted so broadly as to criminalize conduct that Congress did not clearly intend to forbid. This precept is critical to "diminish[ing] the risk of 'overdeterrence,' *i.e.*, punishing acceptable and beneficial conduct." *Ruan* v. *United States*, 142 S. Ct. 2370, 2378 (2022). So, for example, although it is unclear from the face of the Controlled Substances Act whether its "knowing[] or intentional[]" scienter requirement applies to the element of the statute prohibiting doctors from distributing opioids "except as authorized," this Court last Term held that it must. *Id.* at 2379. Otherwise, "[t]he conduct prohibited * * * (issuing invalid prescriptions) [would be] 'often difficult to distinguish from the gray zone of socially acceptable * * * conduct' (issuing valid prescriptions)." *Id.* at 2377-2378. See also *Skilling* v. *United States*, 561 U.S. 358, 408 (2010) (limiting the scope of the statute prohibiting honest services fraud, 18 U.S.C. 1346, to prevent "proscrib[ing] a wider range of offensive conduct" than Congress intended); *McDonnell* v. *United States*, 579 U.S. 550, 572-577 (2016) (declining to construe a bribery theory of liability under the same statute to reach commonplace acts of constituent service).

This Court's decisions likewise make clear that it is inadequate to rely on prosecutorial restraint to cabin the reach of otherwise overbroad criminal statutes. It is not enough that "Congress *could* have intended that th[e] broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such hard results"—especially when faced with a "paucity of material suggesting that Congress did so intend." *Liparota* v. *United States*, 471 U.S. 419, 427 (1985).

Although the United States here urges a more modest reading of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i) that would limit its own prosecutorial authority, generally criminal statutes cannot be interpreted broadly "on the assumption that the Government will 'use [them] responsibly.' " *McDonnell*, 579 U.S. at 576. Indeed, as this Court has repeatedly cautioned, construing a criminal statute to cover routine and ordinary conduct "merely because the Government promised to use it responsibly" would "leave us at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010). See *Marinello* v. *United States*, 138 S. Ct. 1101, 1108-1109 (2018) (noting that the Court cannot "rely upon prosecutorial discretion to narrow [a tax obstruction statute's] scope"); *United States* v. *Sun-Diamond Growers of Cal.*, 526 U.S. 398, 408 (1999) (rejecting an interpretation of a statute where "nothing but the Government's discretion prevents [benign] examples from being prosecuted"); see also *United States* v. *Taylor*, 142 S. Ct. 2015, 2023 (2022) (rejecting "the government's * * * interpretation [because, in relevant part, it] would vastly expand the statute's reach by sweeping in conduct that poses an abstract risk").

Likewise, to the extent there is ambiguity in a criminal statute, this Court applies the rule of lenity to constrain its reach. See, *e.g.*, *Yates* v. *United States*, 574 U.S. 528, 547-549 (2015) (plurality opinion) (invoking the rule of lenity to reject reading the obstruction of justice statute "expansively to create a coverall spoliation of evidence statute"); *Skilling*, 561 U.S. at 410 (noting that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity") (citations omitted).

The Court utilizes all of these principles in construing criminal statutes in light of the fundamental principles, rooted in the Due Process Clause, that criminal statutes only extend so far as Congress expressly provides and that a person must have fair notice before he can be convicted of committing a crime. See *McDonnell*, 579 U.S. at 574-575 ("[E]xpansive interpretation[s]" of criminal statutes that sweep up "commonplace" conduct "raise significant constitutional concerns."); *Wooden* v. *United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring) (" '[P]enal laws are to be construed strictly' because of 'the tenderness of the law for the rights of individuals'—and, more specifically, the right of every person to suffer only those punishments dictated by 'the plain meaning of words.' " (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820))).

II. Applying These Principles To The Word "Induce" Compels Adopting The Narrower, Established Criminal Law Meaning

Even if the term "induce" might be susceptible, in other contexts and in isolation, to the expansive interpretation identified by the Ninth Circuit—"to move by persuasion or influence," Pet. App. 7a (quoting *United States* v. *Rashkovski*, 301 F.3d 1133, 1136 (9th Cir. 2002))—in the context of criminal statutes the term has acquired a narrower, established meaning of "conduct that 'leads or tempts' individuals to commit crimes," U.S. Br. 24-25 (citation omitted). The numerous principles identified above that inform the construction of ambiguous criminal statutes further compel construing the term in criminal statutes to avoid expansive prohibition of commonplace, beneficial, or constitutionally protected conduct.

The ramifications of adopting a broad reading of that term in criminal statutes are far-reaching and doing so is all but certain to criminalize innocent, and even socially desirable, conduct. In the immigration context, as the Ninth Circuit noted, that interpretation would criminalize conduct as benign as an attorney advising her client truthfully about the benefits of remaining in the United States while contesting her removal or a concerned neighbor "encouraging an undocumented immigrant to take shelter during a natural disaster." See Pet. App. 11a. Or perhaps it would put one at risk of prosecution for charitably offering food, water, or shelter that sustains the health or life of persons unlawfully present in this country, such as putting water stations in desert areas where migrants often die of dehydration.

An expansive definition of "induce" risks similar problems in other contexts as well. These concerns are not "fanciful," U.S. Br. 44 (quoting *United States* v. *Williams*, 553 U.S. 285, 301 (2008)), or hypothetical. In the context of AKS, the United States has argued that "to induce" should be construed the same way the Ninth Circuit did here—to "lead or move, as to a course of action, by persuasion or influence." See Br. in Opp. at 12, *Pfizer Inc.* v. *Dep't of Health & Hum. Servs.*, No. 22-339 (citation omitted). And HHS OIG has construed the phrase even more broadly still, to mean mere "influence."[4]

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[4] See U.S. Dep't of Health & Hum. Servs, OIG Advisory Op. No. 20-05, at 15 n.36 (Sept. 23, 2020) ("[R]emuneration that would address that [beneficiary's] inability to pay would, without question, influence the patient's purchasing decision."); U.S. Dep't of Health & Hum. Servs., OIG Advisory Op. No. 22-19, at 13 (Sept. 30, 2022) ("In addition, we have explained that the meaning of the term 'to

By reading "induce" in that a-contextual fashion, these enforcement bodies have determined that the AKS's criminal prohibition reaches such innocent and desirable activities as offering transportation or housing to a patient and her family in order to obtain cutting-edge treatment only available at a distant hospital, or a charitable organization providing cost-sharing assistance to cancer patients for 90% of oncology medications. See U.S. Dep't of Health & Hum. Servs., OIG Advisory Op. No. 22-19 (Sept. 30, 2022) (determining that assisting financially needy cancer patients meet their copay obligations would "induce" patients to fill their doctor's prescription and therefore generate prohibited remuneration under the AKS if requisite intent were present); U.S. Dep't of Health & Hum. Servs., OIG Advisory Op. No. 21-08 (July 8, 2021) (determining that arrangement under which manufacturer of gene therapy for rare disease would offer patient and caregiver financial assistance for transportation, lodging, and meals associated with treatment would generate prohibited remuneration under the AKS if requisite intent were present); see also *United States* v. *Regeneron Pharms., Inc.*, No. 20-cv-11217 (D. Mass. filed June 24, 2020) (False Claims Act suit in which United States alleges that pharmaceutical manufacturer's contributions to charity's copay assistance program violated the AKS); *United States* v. *Teva Pharms. USA, Inc.*, No. 20-cv-11548 (D. Mass. filed Aug. 18, 2020) (same).

Even if the phrase "to induce" were susceptible to that broad construction in other contexts, it is inconsistent with the historical use of that phrase in criminal

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induce' is found in the ordinary dictionary definition: to lead or move by influence or persuasion * * * .") (citation omitted).

statutes and, thus, almost certainly also inconsistent with Congress's intent. As the United States explains in its brief in this case, the term "induce when used in criminal statutes" means something narrower: "criminal solicitation," such as "conduct that 'leads or tempts' individuals to commit crimes." U.S. Br. 24-25 (citation omitted). Adhering to that long-established definition here would ensure that the statute's reach is wide enough to capture nefarious conduct that Congress intended to prohibit, while ensuring that it does not chill—and cannot be used to threaten—the kind of socially desirable behavior that would be swept up if the statute reached anything and everything that might merely "influence" or "persuade" another to take a particular action. The general principles identified above that this Court applies to the interpretation of criminal statutes further compels the adoption of this narrower construction.

CONCLUSION

For the foregoing reasons, Pfizer urges this Court to adopt the narrow construction of the term "induce" advocated by the United States in its brief. Pfizer takes no position on any other issues or the disposition of this appeal.

Respectfully submitted.

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