No. 22-179

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HELAMAN HANSEN,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the First Amendment permits criminal punishment of speech that merely encourages a noncitizen to remain in the United States, without any requirement of intent to further illegal conduct, and when remaining in the United States is itself not a crime.

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INTRODUCTION

The statute at issue, 8 U.S.C. § 1324(a)(1)(A)(iv) (the "encouragement provision"), makes it a felony to "encourage[] or induce[] 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." This statute makes it a crime for a grandmother to say she doesn't want her undocumented grandchild to leave her, a doctor to advise her patient with an expiring student visa that the patient needs medical treatment provided in the United States, a priest to inform a noncitizen parishioner whose employment authorization is ending about church child-care and pantry resources that would support her remaining, and a lawyer to counsel an out-of-status noncitizen that she has the ability to become a lawful permanent resident if she does not leave the country. All such speech is a crime, even though the conduct it "encourages" is at most a civil violation of law. And the statute makes such speech a crime without any showing that the speaker intended to encourage the listener to violate the law, or that a violation was likely or imminent.

The statute is unconstitutionally overbroad in violation of the First Amendment. Its ban on mere "encouragement," without any requirement of specific intent by the speaker, sweeps far beyond unprotected speech constituting incitement, solicitation, or aiding and abetting. And while the government invokes the "speech integral to criminal conduct" exception to First Amendment protection, that exception has historically authorized criminal punishment only of speech integral to *criminal* conduct. There is no

historical or doctrinal support for expanding that category to permit criminal punishment of speech that encourages no crime at all.

STATEMENT

1. Statutory Background and Framework

The current iteration of the encouragement provision dates from 1986, and is the result of multiple expansions of the scope of the original version of the law. Congress first imposed criminal sanctions for speech related to immigration-law violations in the Foran Act (also known as the Alien Contract Labor Act) of 1885. That law focused narrowly on contract labor, and made "knowingly assisting, encouraging or soliciting the migration or importation of any alien" into the United States "to perform labor or service of any kind under contract or agreement" subject to a fine of up to $1,000. Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333. Masters of vessels who actually brought such contract laborers into the United States, and the contract laborers themselves who entered the United States, could also be criminally punished. Act of Feb. 26, 1885, ch. 164, § 4, 23 Stat. 333.

In 1917, Congress revised the contract-laborer prohibition, making it a misdemeanor "to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer . . . into the United States." Act of Feb. 5, 1917, ch. 29, § 5, 39 Stat. 879. Congress also separately prohibited "induc[ing], assist[ing], encourag[ing], or solicit[ing], or attempt[ing] to induce, assist, encourage, or solicit[,] any alien to come into the United States by promise of employment through advertisements printed,

published, or distributed in any foreign country." *Id*. § 6.

In 1952, Congress enacted the direct predecessor to Section 1324(a) as part of the Immigration and Nationality Act, ch. 477, 66 Stat. 163 (8 U.S.C. § 1101 *et seq*.). In that act, Congress deleted the references to solicitation and assistance. And it expanded the prohibition to all unlawful entry, not merely for contract labor. As amended, the statute made it a felony to "willfully or knowingly encourage[] or induce[], or attempt[] to encourage or induce, either directly or indirectly, the entry into the United States" of any alien who had not been "duly admitted" or who was not "lawfully entitled to enter or reside within the United States." *Id*. § 274(a)(4), 66 Stat. 229; *see* 8 U.S.C. § 1324(a)(4).

In the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112(a), 100 Stat. 3381–82, Congress expanded Section 1324(a) in two significant respects. For the first time ever, it made it a crime to encourage or induce a noncitizen not merely to enter but to "reside" in the United States unlawfully—even though residing in the United States unlawfully is itself not a crime. And Congress eliminated the *mens rea* requirement that the defendant "willfully or knowingly" encourage or induce another, and instead merely required that the individual do so knowing or recklessly disregarding that the noncitizen's entry or residence would be unlawful.

Most recently, in 1996, Congress enacted a separate enhancement provision that increases the maximum penalty from five to ten years' imprisonment where the defendant acted for the "purpose of commercial advantage or private financial

gain." 8 U.S.C. § 1324(a)(1)(B)(i); *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203(a), 110 Stat. 3009-565. The encouragement provision itself requires no proof of a purpose of commercial advantage or private financial gain, or indeed, proof of any purpose.

The current version of the encouragement provision is situated within a statute titled, "Bringing in and harboring certain aliens." 8 U.S.C. § 1324. Other subsections of Section 1324(a)(1)(A) focus on conduct, and make it a crime to: (i) bring undocumented persons to the country at locations other than designated ports of entry, *see id.* § 1324(a)(1)(A)(i); (ii) transport or move undocumented persons within the country, *see id.* § 1324(a)(1)(A)(ii); and (iii) conceal, harbor, or shield from detection undocumented persons, including in any building or by means of transportation, *see id.* § 1324(a)(1)(A)(iii). Subsections (v)(I) and (II) of Section 1324(a)(1)(A) make it a crime to "engage[] in any conspiracy to commit" or "aid[] or abet[] the commission of" any of the substantive offenses listed in Section 1324(a)(1)(A), including the encouragement provision.

Congress has enacted additional criminal prohibitions relating to immigration that are codified in neighboring sections of Title 8 of the U.S. Code, as well as in the criminal code in Title 18. It is a felony, for example, to "bring[] or attempt[] to bring to the United States in any manner whatsoever" undocumented persons, or to hire more than ten undocumented persons in a year, 8 U.S.C. § 1324(a)(1)(C)(2), (a)(3)(A); to create and disseminate fraudulent immigration documents, 18 U.S.C. § 1546;

8 U.S.C. § 1324c; to hire, recruit, and profitably refer unauthorized workers for employment, 8 U.S.C. § 1324a; to "aid[] or assist[]" the entry of certain inadmissible noncitizens, *id*. § 1327; and to import or attempt to import noncitizens for immoral purposes, *id*. § 1328.

Finally, Congress has enacted explicit prohibitions on aiding and abetting or soliciting certain criminal conduct. 18 U.S.C. § 2 provides that anyone who "aids, abets, counsels, commands, induces or procures" any federal crime, including any of the above crimes, "is punishable as a principal." It is also a crime to "solicit[], command[], induce[], or otherwise endeavor[] to persuade" another person to commit a crime of violence with the intent that they do so. *See* 18 U.S.C. § 373.

2. District Court Proceedings

The government initially indicted Respondent Helaman Hansen on 16 counts of mail and wire fraud, and conspiracy to commit mail and wire fraud, under 18 U.S.C. §§ 1341, 1343, and 1349, in connection with his operation of Americans Helping America Chamber of Commerce ("AHA"). The government charged that Mr. Hansen falsely asserted that through participating in AHA's adult adoption program, undocumented United States residents could gain United States citizenship. *See* Pet. App. 2a–3a.

More than a year later, the government filed a superseding indictment adding two new counts, 17 and 18, charging violations of Section 1324(a)(1)(A)(iv), the encouragement provision, with respect to two individuals who were already named as victims of the fraud counts, Epeli Vosa (Count Two) and Mana Nailati (Count Five). Counts 17 and 18

allege that Mr. Hansen encouraged these individuals to reside in the United States while knowing or recklessly disregarding that they could not lawfully remain once their visas expired, in violation of the encouragement provision. These counts also alleged that Mr. Hansen acted for "the purpose of private financial gain," triggering the separate sentencing enhancement in Section 1324(a)(1)(B)(i). J.A. 20.

At trial, the government presented evidence that Mr. Hansen "encouraged or induced" Mr. Vosa and Mr. Nailati to reside in the United States. Both Mr. Vosa and Mr. Nailati were foreign nationals who entered the United States on six-month visitor visas. While the government's brief in this Court asserts that Mr. Hansen's victims included noncitizens abroad who were induced to enter the United States, U.S. Br. 8, the government did not charge Mr. Hansen with encouraging or inducing anyone to enter the United States. To the contrary, the indictment specifically charged that Mr. Hansen "encourage[d] and induce[d] an alien . . . to *reside* in the United States after that alien's lawful visa expired . . . ." J.A. 20 (emphasis added). The government offered no evidence at trial that Mr. Hansen communicated with either Mr. Vosa or Mr. Nailati before they entered the United States. They testified that after arriving in the United States, Mr. Hansen told them not to worry about leaving the United States when their visas expired because they were participating in the AHA program. J.A. 68–71, 90–92. In fact, their participation in the AHA program did not permit them to remain in the United States after their visas expired.

Before trial, Mr. Hansen requested a jury instruction on Counts 17 and 18 that would have

required it to find that the government proved he "intended" the noncitizen to reside in the United States in violation of the law, and "substantially" encouraged or induced them to do so. J.A. 99–101, 107–08. The government objected to this proposed instruction, arguing that it added elements not found in the text of the encouragement provision itself. J.A. 101. The district judge sided with the government and denied Mr. Hansen's requested jury instruction. *Id*. As a result, the jury was instructed that to find Mr. Hansen guilty of Counts 17 and 18, it need only find that he "encouraged or induced" the two noncitizens to reside in the United States knowing or in reckless disregard of the fact that their residence would violate the law. J.A. 104. The jury was *not* instructed that the encouragement provision required proof that the defendant intended the noncitizen to violate the law, that the government had to prove solicitation or aiding and abetting, or that "encourage" should be interpreted narrowly as a legal term of art rather than given its broad ordinary meaning. *See* J.A. 103–04.

Nor was the jury instructed that to convict Mr. Hansen on the encouragement counts, it must find that he committed the offense for "commercial advantage or private financial gain." Rather, as directed by the verdict form, the jury first found Mr. Hansen guilty of encouragement or inducement under Section 1324(a)(1)(A)(iv), and separately found that he had committed the offense for private financial gain, triggering the separate penalty enhancement provision in Section 1324(a)(1)(B)(i). J.A. 115–16.

At the close of trial but prior to jury deliberations, the government dismissed one of the fraud counts. The jury found Mr. Hansen guilty of the remaining 15

fraud counts, as well as Counts 17 and 18 under the encouragement provision. J.A. 109–16.

Mr. Hansen timely moved to dismiss Counts 17 and 18, arguing that the encouragement provision is unconstitutional as applied to him and facially vague and overbroad in violation of the First and Fifth Amendments. In response, the government argued for the first time that the encouragement provision should be interpreted not according to its ordinary meaning, but should instead be read as a criminal law term of art limited to facilitation or solicitation—despite the fact that the jury was not so instructed. Resp. App. 9a–13a. The district court denied Mr. Hansen's motion.

The district court sentenced Mr. Hansen to 240 months on each of the mail and wire fraud counts, and 120 months on each of the encouragement provision counts, all to be served concurrently. Pet. App. 83a.

3. Court of Appeals Proceedings

The court of appeals did not disturb Mr. Hansen's convictions on the 15 fraud counts, but unanimously vacated the convictions on Counts 17 and 18 on the ground that the encouragement provision is facially overbroad. Pet. App. 13a–14a. Guided by dictionary definitions and common usage, the court reasoned that the plain meaning of the words "encourage" and "induce" encompasses "inspiring, helping, persuading, or influencing" through either "speech or conduct." *Id.* at 6a–7a, 9a. It concluded that the statute makes it a crime to encourage both civil and criminal law violations, because residing in the United States unlawfully is generally not a crime. *Id.* at 7a–8a. And it noted that neighboring provisions, which focus on conduct and aiding and abetting, reinforce that the

encouragement provision encompasses speech. *Id*. at 8a–9a. The government argued that the encouragement provision criminalizes only the unprotected category of "speech integral to criminal conduct," but the court rejected that interpretation, noting that the statute does not contain the elements of aiding and abetting or solicitation, and criminalizes even speech that encourages conduct that is not a crime at all, but only a civil violation. *Id*. at 7a, 9a. It found that the plain meaning of the statute encompasses a wide range of protected speech, including "everyday statements or conduct that are likely repeated countless times across the country every day." *Id*. at 11a. The court of appeals held that while Section 1324(a)(1)(A)(iv) legitimately prohibits some forms of encouragement, "[i]t is clear that subsection (iv) covers a substantial amount of protected speech," including "knowingly telling an undocumented immigrant 'I encourage you to reside in the United States,'" a statement protected by the First Amendment. Pet. App. 11a. Because the statute's prohibition of protected speech is substantial in relation to the narrow categories of unprotected speech it prohibits, the court concluded that the statute is facially overbroad. *Id*. at 12a, 13a–14a.

This Court granted the government's petition for a writ of certiorari on December 9, 2022.

SUMMARY OF ARGUMENT

The encouragement provision is facially overbroad because it prohibits a substantial amount of speech protected by the First Amendment. By prohibiting all speech "encourag[ing] or induc[ing]" a noncitizen to remain in the country or enter in violation of immigration law, it sweeps in a wide range

of speech plainly protected by the First Amendment. The First Amendment protects speech advocating even criminal conduct so long as it is not "likely to incite or produce" "imminent" criminal conduct, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), or otherwise speech "integral" to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). But outside those narrow categories, speech encouraging unlawful conduct is protected; indeed, the First Amendment protects the right to say "I encourage you to obtain child pornography." *United States v. Williams*, 553 U.S. 285, 294, 298, 299–300 (2008).

The encouragement provision reaches *all* encouragement of immigration violations, whether or not the violations are criminal, and without any requirement of intent, likelihood, or imminence. Its plain meaning prohibits a grandmother's expressed wish that her undocumented grandchild not leave the country, a priest's description of available congregant services to a parishioner who is out of status for failing to maintain the requisite student course load, or an attorney's advice that a noncitizen will forfeit certain statutory or constitutional rights or benefits if she leaves the country. Given the absence of an intent requirement, it reaches speech that does not advocate unlawful conduct at all, but merely provides factual information that has the effect of encouraging someone to violate immigration law, such as a doctor who informs his undocumented patient of the availability of emergency-room medical services if the patient remains here.

The government does not dispute that, if the encouragement provision is interpreted according to its plain meaning, it is unconstitutional. Instead, it

urges the Court to rewrite the statute as a narrow prohibition only of solicitation or facilitation, shorthand for aiding and abetting. U.S. Br. 21–24. But the plain text, history, and context of the encouragement provision refute that reading. The ordinary meaning of "encourage" reaches all efforts to persuade or influence, and is not limited to solicitation or aiding and abetting. Congress uses the terms "solicit" or "aid and abet" when it intends to punish those much narrower offenses, and it did not do so here. In addition, the encouragement provision lacks the elements of traditional solicitation and aiding-and-abetting provisions, most notably intent that the listener commit a specific crime. In fact, Congress expressly *removed* the term "solicit" and a requirement that the defendant act "willfully or knowingly" from an earlier version of the statute. Thus, the constitutional avoidance canon cannot save the encouragement provision; reading it as a narrow solicitation law would require rewriting the statute altogether, and only Congress has that authority.

The independent sentencing enhancement for violations committed for commercial advantage or private financial gain also cannot save the encouragement provision. The encouragement provision is a standalone provision that can be and is charged without the financial-gain enhancement, and a jury need not find a violation of that separate penalty enhancement provision to convict under the encouragement provision. The chilling effect of the freestanding prohibition on encouragement is substantial, regardless of whether any individual's sentence may be enhanced under a distinct provision. And even if the sentencing enhancement is considered, the encouragement provision is still

overbroad because it prohibits speech for financial gain that is constitutionally protected, such as the paid advice of lawyers or medical professionals to noncitizens about the legal or medical benefits of remaining in the country. This Court should accordingly affirm the decision of the court of appeals.

The encouragement provision is also facially overbroad because it makes it a crime to engage in speech that encourages no crime at all. As its name suggests, the categorical exception for "speech integral to criminal conduct" deems speech unprotected, and subject to criminal sanction, only when it is integral to an underlying *crime*. But the encouragement provision makes it a crime to encourage violations of immigration law that are not themselves crimes. In this very case, Mr. Hansen was charged with encouraging two noncitizens to reside here after their visas expired, which is only a civil violation. There is no support in history or tradition for applying the "speech integral to criminal conduct" exception to allow criminal punishment of speech that is not even connected, much less integral, to any crime. Under the common law, both solicitation and aiding and abetting were limited to intentional furthering of *crimes*. Thus, the government effectively seeks a new category of unprotected speech, without any historical support, and this Court has consistently and properly rejected such requests. Granting the request here, moreover, would turn on its head the long line of cases involving speech advocating illegal conduct that culminated in *Brandenburg*'s requirement of an extremely close connection between speech and even violent conduct before the speech itself could be criminally punished. The encouragement provision's criminalization of speech

encouraging only civil law violations underscores its facial overbreadth, because it means it prohibits a vast amount of protected speech. And because Mr. Hansen was convicted of encouraging only civil violations, the result below can be affirmed on the narrower ground that the law is unconstitutional as applied to him.

Finally, the interpretation of the statute that the government now advances to defend the statute on appeal bears no resemblance to the one it advocated at trial to convict Mr. Hansen. Then, it argued that the statute should be applied according to its plain terms, and opposed any narrowing construction, including the adoption of an intent requirement central to solicitation and aiding-and-abetting crimes. Now, it defends the statute only as a narrow prohibition on solicitation or aiding and abetting, and makes no attempt to defend its constitutionality if it prohibits all "encouragement." Accordingly, even if the Court were to adopt the government's narrowing construction, Mr. Hansen's conviction could not stand. The Court should accordingly vacate Mr. Hansen's convictions under the encouragement provision, or remand to the court of appeals for it to assess the consequences of the government's shifting position.

ARGUMENT

I. The Encouragement Provision is Overbroad Because It Prohibits a Substantial Amount of Protected Speech Well Beyond Solicitation or Aiding and Abetting.

The statute Mr. Hansen was convicted of violating makes it a crime to encourage noncitizens to reside in the country in violation of law. It

criminalizes such speech whether or not the speaker intends a law violation to occur, and whether or not the violation is even a crime. As the court of appeals held, it prohibits "knowingly telling an undocumented immigrant 'I encourage you to reside in the United States.'" Pet. App. 11a. Yet "such a statement is protected by the First Amendment." *Id.* (citing *Williams*, 553 U.S. at 300).

The government does not dispute that if the encouragement provision is interpreted according to its ordinary meaning, it is unconstitutional. Instead, it argues that the statute can be saved by construing "encourage" as a term of art in criminal law that narrowly prohibits only solicitation or aiding and abetting. But the statute uses none of those terms; to the contrary, Congress deleted the terms "solicit" and "assist" that were present in a previous version of the statute. And the government itself rejected any narrowing construction when this very case was tried to the jury. *See* J.A. 99–101; *infra* Part III.

A. The Statute's Plain Meaning Reaches Any Speech That Persuades or Encourages a Noncitizen to Remain In Violation of Law, and Therefore Prohibits a Substantial Amount of Protected Speech.

The ordinary meaning of the encouragement provision prohibits mere encouragement of violations of immigration law. The statute requires no proof of intent to solicit, of the likelihood of an imminent violation, or of conduct constituting aiding and abetting. It proscribes encouragement, full stop, and therefore includes a substantial amount of protected speech.

The ordinary meaning of the statutory text prohibits "encourag[ing]," without limitation. The primary dictionary definition of "encourage" is "to inspire with courage, spirit, or hope . . . to spur on . . . to give help or patronage to." Merriam-Webster's Collegiate Dictionary 380 (10th ed. 2001); *see also* Oxford English Dictionary 216 (2d ed. 1989) ("[t]o inspire with courage, animate, inspirit"); Webster's Third New International Dictionary 747 (15th ed. 1966) ("[to] inspire with courage, spirit, or hope"). Even Black's Law Dictionary, which the government cites, defines "encourage" in the first instance as "[t]o instigate; to incite to action; to embolden; to help." Black's Law Dictionary 620 (11th ed. 2019). The edition in force when Congress in 1986 enacted the provision in its current state used additional expansive verbs to define "encourage": "to instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident; to help; to forward; to advise." Black's Law Dictionary 473 (5th ed. 1979).

The disjunctive prohibition on "induce[ment]" likewise reaches beyond criminal solicitation. "Induce" means "[t]o lead on, to influence, to prevail on, to move by persuasion or influence." Webster's New International Dictionary 1269 (2d ed. 1954); *see also* Webster's Third New International Dictionary 1154 (15th ed. 1966) ("to move and lead (as by persuasion or influence)"); Webster's New World College Dictionary 742 (5th ed. 2014) ("to lead on to some action, condition, belief, etc.; prevail on; persuade"); Oxford English Dictionary 216 (2d ed. 1989) ("to lead on, move, influence, prevail upon (any one) to do something"). Black's Law Dictionary similarly defines inducement as "[t]he act or process

of enticing or persuading another person to take a certain course of action." Black's Law Dictionary 926 (11th ed. 2019). Thus, the plain meaning of the encouragement provision encompasses speech that merely persuades, influences, or even inspires with hope.

The words "encourage" and "induce" are not limited in any way. Under the statute's plain meaning, all of the following are prohibited:

- A priest telling a noncitizen congregant who has overstayed her visa that the church will provide charitable assistance, which might have the effect of encouraging her to remain;
- A U.S. citizen telling her undocumented spouse that he is needed in the country to provide financial support for the family;
- A public safety official advising undocumented members of the community to shelter in place during a natural disaster;
- A coach advising an undocumented student athlete that if she travels with her team for an international competition she will likely not be able to return to the United States;
- A college counselor advising an undocumented student that they can obtain a private scholarship to pay for dormitory fees and other expenses to fund their life as a college student in the United States;
- A doctor providing medical advice to a noncitizen with a visa that will shortly expire that a particular medical treatment is more readily available in the United States than elsewhere, leading that noncitizen to overstay the visa to wait for treatment;

- A lawyer providing advice to a client that overstaying his visa is not a bar to adjusting his status to that of a lawful permanent resident if he marries a U.S. citizen.[1]

And that's not all. While the government and the court of appeals below interpreted the statute to apply only to encouragement or inducement directed to a specific "alien," U.S. Br. 26; Pet. App. 7a, the statute does not limit its prohibition to one-on-one conversations, and so could also reach an op-ed or public speech criticizing the immigration system and

[1] Immigration law and constitutional law often provide distinct advantages to those who remain physically in the country, even when out of status, and thus it would be unethical for an attorney *not* to advise her client of those advantages. All of the following benefits, for example, require presence in the United States, even if it is unlawful presence. *See, e.g.*, 8 U.S.C. § 1255(c)(2) (adjustment of status for immediate relative of U.S. citizen); 8 U.S.C. § 1101(a)(15)(T) (visas for trafficking victims in the U.S.); 8 U.S.C. § 1229b(b)(1) (cancellation of removal); 8 U.S.C. § 1229b(b)(2) (cancellation of removal under Violence Against Women Act); 8 U.S.C. §§ 1101(a)(42)(A), 1158(b) (asylum); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(a) (Special Immigrant Juvenile Status). In addition, the Due Process Clause applies when the government acts to remove a noncitizen who is, even unlawfully, in the United States, but when the government acts to exclude noncitizens who are outside the United States, only procedural rights granted by Congress apply. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Yet the encouragement provision would prohibit providing truthful advice about such rights and benefits if it would "encourage" the individual to remain. The government argues that in one particular setting, namely where a noncitizen has been "paroled" into the United States pending removal proceedings, the individual's status is not unlawful while proceedings are ongoing. U.S. Br. 34. But in all of the other above settings, noncitizens have advantages if they remain unlawfully rather than if they leave, yet lawyers risk criminal punishment if they tell their clients as much.

supporting the rights of long-term undocumented noncitizens to remain, at least where the author or speaker knows that, or recklessly disregards whether, any of her readers or listeners are undocumented.

B. Speech Encouraging Violations of Law is Protected by the First Amendment Except in Very Narrow Circumstances.

This Court has long held that encouraging lawless action is constitutionally protected except in exceedingly narrow circumstances. *See Brandenburg*, 395 U.S. at 447 ("advocacy of the use of force or *of law violation*" is protected by the First Amendment) (emphasis added); *Williams*, 553 U.S. at 298–99 (noting "an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality"). Indeed, in its canonical First Amendment precedent, *Brandenburg,* 395 U.S. 444, the Court held that even speech that directly advocates violent crime is protected unless it is (1) intended to and (2) likely to produce (3) imminent lawless action. *Id*. at 447. The encouragement provision contains none of these elements.

The First Amendment also does not protect "speech . . . integral [to] conduct in violation of a valid criminal statute." *Giboney*, 336 U.S. at 498; *United States v. Stevens*, 559 U.S. 460, 471 (2010) (explaining that speech loses its constitutional protection only when "used as an *integral* part of conduct in violation of a valid criminal statute") (emphasis added). But the encouragement provision extends far beyond speech "integral" to criminal conduct because it reaches *all* encouragement. In *Williams*, this Court stated that the First Amendment protects the statement, "I encourage you to obtain child pornography," absent

proof of intentional solicitation of a specific crime. 553 U.S. at 294, 298, 299–300. Yet the encouragement provision criminalizes the statement "I encourage you to reside in the United States," *see* Pet. App. 11a, without proof of intent to solicit an unlawful act; the law requires merely that the defendant know or recklessly disregard the unlawful status of the noncitizen.

In fact, the statute encompasses not just *advocacy*, but merely conveying factual information that might *have the effect* of encouraging someone to reside here unlawfully—even if the speaker does not intend to advocate that result. But the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

The overbreadth of the encouragement provision is exacerbated by the difficulty of knowing whether one's words will have the effect of encouraging another to remain unlawfully. A minister who welcomes undocumented people into the congregation and expresses the community's love and support might "encourage" a particular undocumented person to remain, but might have no effect on another undocumented person's choices. In this sense, the encouragement provision does not sufficiently "specif[y]" any "standard of conduct." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), and exacerbates the statute's chilling effect on protected speech.

It can also be difficult to know whether a noncitizen is here unlawfully or not, including in circumstances where someone has failed to meet administrative requirements, such as filing the right paperwork to maintain status. Is a priest who decides

as a matter of conscience not to ask to see the paperwork of his newly-arrived immigrant parishioners "recklessly disregarding" their status when he speaks to them about the availability of congregant care services?

The government objects that it has rarely prosecuted the type of speech cited in the examples above. U.S. Br. 36, 45–46. But the First Amendment "does not leave us at the mercy of *noblesse oblige*," so an unconstitutional statute cannot be upheld "merely because the Government promise[s] to use it responsibly." *Stevens*, 559 U.S. at 480. In *Stevens*, the Court invalidated as overbroad a statute prohibiting depictions of "animal cruelty" because its plain terms reached a wide range of protected speech, including hunting videos, even though there was no evidence the government had actually prosecuted any such cases.[2]

The overbreadth of the encouragement provision is further exacerbated by the fact that it discriminates on the basis of content and viewpoint: Those who encourage noncitizens to remain are made criminals, while those who encourage them to leave are not. As this Court held in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), even where a statute reaches only unprotected speech (in that case, fighting words), it cannot discriminate on the basis of viewpoint. *Id.* at

[2] In addition, even if prosecutors exercise restraint in charging violations of 8 U.S.C. § 1324(a)(1)(A)(iv), prosecutors do not control private parties who can allege violations of the statute as predicates to support a civil suit under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–1968. *See, e.g.*, *DelRio-Mocci v. Connolly Props. Inc.*, 672 F.3d 241 (3d Cir. 2012), *cert. denied*, 568 U.S. 821 (2012); *Edwards v. Prime, Inc.*, 602 F.3d 1276 (11th Cir. 2010).

392–94. If viewpoint discrimination within the category of otherwise unprotected fighting words is impermissible, it is *a fortiori* impermissible to engage in such discrimination with respect to the expansive range of protected speech that the encouragement provision reaches.

C. The Statute Criminalizes a Substantial Amount of Protected Speech as Compared to Its Legitimate Scope.

In view of the above, it is plain that with respect to the encouragement provision, "a substantial number of [its] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 472–73 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The vast majority of speech encouraging noncitizens to commit a violation of immigration law is constitutionally protected, yet it is all prohibited by this statute. By contrast, the instances of incitement, solicitation, or aiding and abetting encompassed are but a small fraction of the statute's reach.

When conducting the overbreadth assessment, "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 609 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)); *see also Younger v. Harris*, 401 U.S. 37, 51 (1971) ("[I]t is well settled that [a] statute can be upheld if the effect on speech is minor *in relation to the need for control of the conduct and the lack of alternative means for doing so*.") (emphasis added). Thus, a law making it a felony to criticize the President would not

be saved by the fact that it encompasses true threats, because the government could enact a statute specifically targeted at true threats. *See*, *e.g.*, *Watts v. United States*, 394 U.S. 705 (1969).

The Court applied this principle in *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021), in which it considered the "dramatic mismatch" between the California Attorney General's asserted interests in policing fraud by charities and a requirement that all charities disclose their top donors. *Id.* at 2386–88. Declaring the law facially overbroad, the Court noted the availability of "alternatives to the current disclosure requirement" that would enable the state to obtain the information it needed, as compared to the challenged law's "lack of tailoring." *Id.* at 2386–87.

So, too, here. If Congress seeks only to reach solicitation or aiding and abetting, as the government now insists, it can enact a statute limited to those narrow categories, rather than prohibiting all encouragement, without any of the limits those crimes entail. Indeed, Congress already has a general "aiding and abetting" statute, 18 U.S.C. § 2, and has specifically prohibited aiding and abetting of several immigration crimes. 8 U.S.C. § 1324(a)(1)(A)(v)(I), (v)(II). And it is free to enact a statute narrowly proscribing solicitation. Prohibiting all encouragement and inducement is by no means necessary to further the government's stated ends.

In addition, there are already statutes that cover the harms the government seeks to address without infringing on the First Amendment. In the present case, Mr. Hansen's conduct was covered by fraud statutes. Mr. Vosa and Mr. Nailati are named victims in the fraud counts, and those counts of conviction will

remain in place regardless of whether the convictions under Counts 17 and 18 are sustained. While the government asserts that the encouragement provision allows it to prosecute selling fake passport stamps or leading noncitizens to the border, U.S. Br. 16–17, other federal statutes directly criminalize this conduct without infringing on protected speech.[3] If any other gaps exist in prosecutors' ability to reach immigration-related misconduct, Congress can pass laws that target that misconduct without criminalizing enormous amounts of protected speech.

D. The Encouragement Provision Cannot Be Narrowly Construed as a Criminal Solicitation or Aiding-and-Abetting Law.

The government does not dispute that if the provision is interpreted according to its ordinary meaning, it is unconstitutional. Instead, it urges the Court to avoid this result by reading the statute narrowly as prohibiting only solicitation or aiding and

[3] A person who sells a fake passport stamp (*i.e.*, a fake visa stamp or proof of inspection at a port of entry) could be prosecuted as a principal or aider and abettor under 18 U.S.C. § 1546 (forging, counterfeiting, altering any visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States); *see also* 18 U.S.C. § 2 (federal aiding-and-abetting liability); 18 U.S.C. § 1543 (falsely making, forging, counterfeiting, mutilating, or altering any passport); 18 U.S.C. § 1544 (using any passport in violation of the conditions or restrictions or rules regulating issuance of passports). As to leading noncitizens to the United States border, the government may prosecute under the encouragement provision's neighbor, 8 U.S.C. § 1324(a)(1)(A)(i).

abetting (or, in the government's shorthand, facilitation). U.S. Br. 21–24.

But "[t]his Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction," *Stevens*, 559 U.S. at 481 (quoting *Reno v. ACLU*, 521 U.S. 844, 884) (1997)). The Court "will not rewrite a . . . law to conform it to constitutional requirements." *Stevens*, 559 U.S. at 481 (alteration in original). Courts may not "add to, remodel, update, or detract from old statutory terms," lest they "risk amending" the statute "outside the legislative process reserved for the people's representatives." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020); *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) ("[C]onstitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.") (cleaned up).

The encouragement provision is not susceptible to the government's proposed saving construction. Its plain meaning, history, and context refute that construction. And the statute lacks essential elements of solicitation and aiding-and-abetting laws, including the requirement of an intent to further criminal conduct.

1. The Statute's Text, History, and Context Confirm that It Cannot be Read Narrowly As a Prohibition on Solicitation or Aiding and Abetting.

As noted above, the plain meaning of the statute reaches encouragement and inducement *simpliciter*, not the far narrower categories of solicitation or aiding

and abetting criminal conduct. *See supra* Part I.A. The government ignores the broad reach of the principal definitions in Black's Law Dictionary. Instead, it selectively picks language from that dictionary's primary definition of "inducement" to narrow the definition's scope, and emphasizes only a secondary cross-reference in the definition of "encouragement" to the entry for aiding and abetting. U.S. Br. 21. But the fact that encouragement can *include* aiding and abetting does not mean it is *restricted* to aiding and abetting, and neither Black's Law Dictionary nor any other dictionary in the English language suggests otherwise.

The statute's history underscores its broad reach. At every point in the development of the provision, Congress has expanded its reach and eliminated the sort of narrowing language the government belatedly tries to insert here. As the government points out, the earliest predecessors of Section 1324 were narrow prohibitions on the importation of immigrant laborers into the United States for purposes of contract labor or employment. For example, Congress prohibited "induc[ing], assist[ing], encourag[ing], or solicit[ing] . . . any alien to come into the United States by promise of employment through advertisements printed, published, or distributed in any foreign country." Act of Feb. 5, 1917, ch. 29, § 6, 39 Stat. 879. To the extent those laws reached speech, it was only commercial speech, which did not receive any First Amendment protection until the 1970s. *See Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

In 1952, Congress eliminated the focus on contract labor, and extended the prohibition to

bringing in noncitizens unlawfully for any purpose. At the same time, it also removed references to "solicit" and "assist," instead prohibiting "encouragement" and "inducement" standing alone. And in 1986, Congress expanded the prohibition still further, for the first time making it a crime to encourage a noncitizen to "reside" unlawfully in the United States, conduct that is not itself a crime. *See Arizona v. United States*, 567 U.S. 387, 407 (2012). Thus, the current version of the prohibition is the first to make it a crime to persuade others to engage in merely civil violations, and the first to cover speech to and about any of the millions of noncitizens living in the country who are, or might become, out of status.

In sum, Congress expanded the prohibition from a narrow prohibition on solicitation of illegal entry for contract labor, to a broader prohibition on mere "encouragement" of illegal entry, to a still broader prohibition on "encouragement" of the civil violation of unlawful residence. And whereas the statute once included potentially limiting terms under *noscitur a sociis*, such as "solicit" or "assist," Congress eliminated those terms in the current version. *See supra* Statement at 5–7. This history of consistent expansion refutes any suggestion that Congress intended to prohibit only solicitation or aiding and abetting.

The adjacent provisions reinforce this conclusion. The prohibitions on "encouragement" and "inducement" are not paired with any other verbs, and so are not susceptible to being narrowly construed on those grounds. And the encouragement provision contrasts markedly with all the immediately adjoining subsections of Section 1324, which are directed at *conduct*, not speech: namely "bring[ing],"

"transport[ing]," "mov[ing]," "conceal[ing]," "harbor[ing]," or "shield[ing] from detection" noncitizens to or within the country. *See* § 1324(a)(1)(A)(i)–(iii). The encouragement provision, by contrast, expressly covers *speech* merely "encourag[ing]" or "inducing" a noncitizen to remain or enter unlawfully. *Cf. Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."). The encouragement provision's juxtaposition against its neighboring subsections thus shows that Congress meant what it said: It made protected speech, not conduct, a crime.

Moreover, where Congress has sought to ban solicitation or aiding and abetting, it has used those very words and not "encouraging" and "inducing" standing alone. In no other context has it used the broad terms "encourage or induce" without more to mean solicitation or aiding and abetting. Congress enacted the federal prohibition on soliciting a crime of violence, 18 U.S.C. § 373, just two years before the current iteration of the encouragement provision, and used the verb "solicit." *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1003, 98 Stat 2138. Numerous federal statutes prohibit "solicit[ing]" criminal behavior; all use the term "solicit," not "encourage" or "induce" standing alone.[4]

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[4] *See*, *e.g.*, 18 U.S.C. § 373 (solicitation to commit a crime of violence); 10 U.S.C. § 882 (soliciting commission of offenses under the Uniform Code of Military Justice); 18 U.S.C. § 1716(h) (advertising "which solicits or induces the mailing" of unmailable articles); 18 U.S.C. § 1505 (solicitation of obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. § 2192 (soliciting or inciting seamen to disobey orders or mutiny); 18 U.S.C. § 177(a)(2) ("The United States may obtain in

Congress also uses the words "aid or abet" when it seeks to ban such conduct, including in a provision that directly neighbors the encouragement provision. *See* 8 U.S.C. § 1324(a)(1)(A)(v)(I), (v)(II); *see also* 18 U.S.C. § 2. But as noted above, in devising the current version of the encouragement provision, Congress expressly *removed* the words "solicit" and "assist," eliminating the statute's narrowing terms and retaining only the broader terms used today. This Court cannot add what Congress intentionally took away.

2. The Encouragement Provision Does Not Include the Elements Required in a Solicitation or Aiding-and-Abetting Statute.

The encouragement provision also cannot be construed as a solicitation or aiding-and-abetting statute because it does not include the essential elements of those crimes, and this Court lacks the power to write in those requirements.

First, solicitation and aiding-and-abetting laws generally require proof that the defendant *intended* that the person to whom the defendant communicates commit a crime. "[I]n solicitation the actor generally intends that the solicitee carry out the crime. . . . If the defendant utters some words but does not subjectively

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a civil action an injunction against . . . the preparation, solicitation, attempt, threat, or conspiracy to engage in conduct prohibited under section 175 of this title [prohibitions with respect to biological weapons]"); 18 U.S.C. § 229D(2) ("The United States may obtain in a civil action an injunction against . . . the preparation or solicitation to engage in conduct prohibited under section 229 or 229D of this title [prohibited activities related to chemical weapons].").

intend for the crime to be committed . . . then the actor is not guilty of the crime of solicitation." 1 Wharton's Criminal Law § 9:3 (Mental element for solicitation) (16th ed. 2022). Thus, the federal statute that prohibits soliciting a crime of violence requires that the defendant *intend* for the solicitee to commit a *crime*, "under circumstances strongly corroborative of that intent." 18 U.S.C. § 373. This intent requirement was no accident; Congress was aware of First Amendment problems that could arise with respect to a solicitation statute and deliberately sought to avoid them.[5] Aiding and abetting similarly requires that the defendant specifically intend that the crime she is assisting be carried out. *See*, *e.g.*, *Rosemond v. United States*, 572 U.S. 65, 76 (2014).

The encouragement provision lacks this intent requirement. The only *mens rea* requirement in the statute addresses the speaker's knowledge or reckless

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[5] In the Senate Report on 18 U.S.C. § 373, the Senate Judiciary Committee stated: "While [Section 373] rests primarily on words of instigation to crime, the Committee wishes to make it clear that what is involved is legitimately proscribable criminal activity, not advocacy of ideas that is protected by the First Amendment right of Free Speech." S. Rep. No. 98-225, at 309 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3488. Similarly, in 1971 when a federal commission made a failed proposal for a general federal solicitation offense, it specified:

> Instigation is required; *mere encouragement is not enough.* A 'particular' felony must be solicited because to prohibit general exhortations would raise free speech problems. The circumstances under which the solicitation is made must strongly corroborate that the solicitor is serious about having the person solicited act upon the solicitation.

Final Report of the Nat'l Comm'n on Reform of Fed. Crim. Laws § 1003(1), at 70 (1971) (emphasis added).

disregard of the noncitizen's immigration status—not his intent in speaking. The government suggests that this Court can read the statute to require "knowingly" encouraging. U.S. Br. 27–28. But the statute does not permit that construction. Congress specifically required "knowing or . . . reckless disregard *of the fact* that [the alien's] coming to, entry, or residence [in the United States] is or will be in violation of law," 8 U.S.C. § 1324(a)(1)(A)(iv) (emphasis added). If Congress meant what the government suggests, it would have written "knowingly encourage or induce." But it did not; indeed, in 1986, when it adopted the current version of the statute, Congress *deleted* a "willfully or knowingly" requirement as a modifier for "encourage" or "induce." This provides "some indication of congressional intent, express or implied," to dispense with a requirement that the defendant act "knowingly." *Staples v. United States*, 511 U.S. 600, 606 (1994).

Moreover, the fact that Congress added a knowing or reckless disregard requirement only to the fact of a noncitizen's status precludes this Court adding an intent requirement to the verbs "encourage" or "induce"—even if Congress had not already specifically deleted those requirements. In *Holder v. Humanitarian Law Project*, the Court declined to read in a requirement of intent to further an organization's illegal activities where the statutory language specified that the defendant need only have knowledge about an organization's connection to terrorism. 561 U.S. 1, 16 (2010). Similarly, here, Congress spoke to *mens rea* and required only knowledge or reckless disregard of the listener's immigration status, and neither knowing nor intentional encouragement. And the plain meaning of

the words "encourage" or "induce" includes speech that has the effect of encouraging someone to act, regardless of the speaker's intent. *See supra* Part I.A. Without an intent requirement, the statute cannot be read as limited to either solicitation or aiding and abetting.

Second, the encouragement provision makes no attempt to distinguish between general advocacy of unlawful conduct and targeted solicitation of a specific crime. This Court has made clear that the First Amendment demands that line. As noted above, the First Amendment protects the statement, "I encourage you to obtain child pornography," even as it permits the government to prohibit "the recommendation of a *particular piece of purported child pornography* with the intent of initiating a transfer." *Williams*, 553 U.S. at 300 (emphasis added); *see also Brandenburg,* 395 U.S. at 447 (speech directly advocating criminal conduct is protected unless the speech is intended to and likely to produce imminent criminal conduct). But the encouragement provision makes it a crime to "encourage" or "induce" unlawful conduct without any of these elements.

Third, aiding-and-abetting requires that the principal actually commit a criminal act, while the encouragement provision does not. Under the "centuries-old view of culpability [for aiding and abetting] . . . a person may be responsible for a crime he has not personally carried out if he helps another to *complete its commission*." *Rosemond*, 572 U.S. at 70 (emphasis added). The encouragement provision, by contrast, does not require that any crime actually occur.

In short, the encouragement provision lacks critical elements required for the crimes of solicitation or aiding and abetting. This Court cannot rewrite the statute to add elements that Congress chose not to include.[6]

E. The Sentencing Enhancement Does Not Save The Encouragement Provision.

The government maintains that the encouragement provision is constitutional because, in this instance, it also charged Mr. Hansen with violating a separate penalty enhancement provision. That argument is doubly flawed.

First, Section 1324(a)(1)(A)(iv) is a standalone provision and can be and is charged without the financial-gain enhancement in 8 U.S.C. § 1324(a)(1)(B)(i). A jury does not need to make any

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[6] The government cites cases where state courts construed state statutes to avoid a conclusion that they barred abstract advocacy, but none involved a statute like the encouragement provision. In *Ford v. State*, 127 Nev. 608, 620 (Nev. 2011), the Nevada Supreme Court construed a pandering statute that had more narrowing verbs than the encouragement provision, and read in a specific intent requirement because of the provision's particular legislative history and statutory context. In *State v. Ferguson*, the statute at issue provided for accomplice liability where "[w]ith knowledge that it will promote or facilitate the commission of the crime," the defendant "[s]olicits, commands, encourages, or requests [another] person to commit [the crime] or aids and abets crime." 264 P.3d 575, 578 (Wash. Ct. App. 2011) (alterations in original). In addition to containing narrowing verbs missing from the encouragement provision, that statute requires knowledge that the speech will promote or facilitate commission of a crime. The encouragement provision, by contrast, does not require that the speaker know his speech will actually encourage any unlawful conduct.

finding about acting for commercial advantage or private financial gain to find a violation of the encouragement provision. Pet. App. 33a. The financial gain element is contained in a wholly distinct penalty enhancement provision. In this case, for example, the jury found that Mr. Hansen violated the encouragement provision, without reference to financial gain, and then *separately* found that he acted for private financial gain, subjecting him to an enhanced penalty. J.A. 115–16; Resp. App. 34a, 72a. His conviction under the encouragement provision stands or falls on its own. Indeed, had the jury not found that Mr. Hansen acted for private financial gain, he would still be subject to the five-year maximum penalty for an encouragement provision violation.

If a criminal statute forbade "annoying" conduct, its facial validity would not be saved by a separate provision authorizing an enhanced penalty if the crime was committed "by brandishing an illegal weapon." And the defendant could challenge the provision criminalizing "annoying" conduct as facially overbroad even if he was also found to have violated the "enhancement provision." Absent the violation of the "annoyance" statute, there would be no conviction, so its invalidity would be sufficient to reverse the conviction. The same is true here. Mr. Hansen's violation of the encouragement provision is necessary to his conviction, so if that statute is invalid, his conviction must fall.

The overbreadth doctrine protects against laws whose "continued existence . . . in unnarrowed form would tend to suppress constitutionally protected rights." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). Adopting the government's position would defeat that

purpose altogether, by allowing Congress or the states to criminalize—and thereby chill—vast amounts of protected speech, as long as they added a narrower separate sentencing enhancement provision.

Contrary to the government's argument, U.S. Br. 47–48, *United States v. Alvarez*, 567 U.S. 709 (2012), does not suggest otherwise. There, the defendant was convicted for violating the Stolen Valor Act, 18 U.S.C. § 704, which generally forbids lying about military honors. His sentence was enhanced under a subclause within the statute, 567 U.S. at 715, because he lied about the Congressional Medal of Honor in particular. But the Court's analysis focused only on whether lying about military honors, without more, could be criminally prohibited, and in no way turned on the difference between lying about the Medal of Honor and lying about other military honors. The plurality, concurrences, and dissents all approached the question as whether the statute's prohibition on lying about military honors, standing alone, violated the First Amendment. *See id.* at 715 (plurality opinion); *id.* at 730 (Breyer, J. concurring); *id.* at 739 (Alito, J. dissenting).

Second, even if this Court were to consider only the constitutionality of prohibiting encouragement for commercial advantage or private financial gain, the statute is still substantially overbroad. Because the First Amendment precludes categorically punishing advocacy of illegality that is not "incitement" or otherwise "integral to criminal conduct," *see supra* Part I.B., or criminally punishing speech that does not encourage any crime, *see infra* Part II, it does not matter if the speech is uttered for financial gain. The fact that a doctor might get paid for her services if her undocumented patient accepts her advice to remain in

the country for treatment does not alter the First Amendment analysis. The First Amendment protects speech whether engaged in for profit or not. *See, e.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (holding that First Amendment protects speech by *The New York Times,* a for-profit corporation). "Some of our most valued forms of fully protected speech are uttered for a profit." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989). Indeed, "the pamphlets of Thomas Paine were not distributed free of charge." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). Accordingly, even though "tutoring, legal advice, and medical consultation provided (for a fee) . . . consist of speech for [] profit," they enjoy full First Amendment protection. *Fox*, 492 U.S. at 482; *cf. Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (providing that speech is not unprotected "merely because it is uttered by 'professionals'").

Even if the statute prohibited only encouragement for financial gain, it would impermissibly ensnare lawyers, social workers, teachers, medical providers, and even religious ministers who are paid for their advice. As noted above, all of these professionals might encourage noncitizens to stay in the country in the broad terms used by the statute. Their speech is protected even when they are paid for it. *See Stevens*, 559 U.S. at 469 (invalidating as overbroad a statute prohibiting depictions of animal cruelty "made, sold, or possessed for commercial gain").

F. Holding that the Encouragement Provision is Overbroad Will Not Threaten Solicitation or Aiding-and-Abetting Statutes Simply Because They Also Include the Terms "Encourage" or "Induce."

The government and *amici* State of Montana *et al.* warn that if this Court invalidates the encouragement provision, it will call into question scores of criminal statutes that use the terms "encourage" or "induce." U.S. Br. 30; Br. of *Amici Curiae* State of Montana *et al.* 3–9. But almost all the statutes the government and *amici* cite involve encouraging a crime and use those terms *along with other terms that support a narrowing construction*, such as "soliciting," "aiding," "abetting," or similar terms. *See, e.g.*, Tex. Penal Code Ann. § 7.02(a)(2) (listing "aid[]" and "solicit[]" alongside "encourage"). Under *noscitur a sociis*, the terms "encourage" and "induce" in such statutes are to be read in context to "avoid [giving] . . . one word a meaning so broad that it is inconsistent with its accompanying words." *Yates v. United States*, 574 U.S. 528, 543 (2015). Here, of course, there are no limiting terms, because Congress eliminated them when it amended the prior version of the statute. *See supra* Part I.D.1.

Of the handful of statutes lacking additional narrowing verbs, several do not actually make encouragement a crime, but instead criminalize a non-speech act when done *for the purpose* of encouraging or inducing another to act. For example, Texas Penal Code § 20.05(a)(2) prohibits the *acts* of concealing, harboring, or shielding a person from detection for the purpose of encouraging or inducing that person to enter or remain in the country in violation of federal

law; mere encouragement is not criminalized. *See also* Kan. Stat. Ann. § 21-5607(b) (prohibits act of buying or distributing alcohol to a minor); Ohio Rev. Code Ann. § 2913.44(A) (prohibits act of impersonating an officer); Wash. Rev. Code Ann. § 9.04.010 (prohibits act of making or disseminating false advertising); Wyo. Stat. Ann. § 6-3-609(b)(i)(A) (prohibits act of bribery).

One state statute cited by *amici* addresses encouraging suicide, but unlike the encouragement provision, it requires proof both that the defendant acted purposefully and that the listener in fact acted on the encouragement. *See* Ark. Code Ann. § 5-10-107(b). Such a content-based restriction on speech might well satisfy strict scrutiny as a narrowly tailored means to a compelling state interest. *See infra* Part II. But it is plainly different from this statute, as it contains the narrowing elements of intent and a completed act.

That leaves no more than three state laws that prohibit encouragement or inducement *simpliciter*, *see* N.Y. Penal Law § 215.10 (witness tampering); Or. Rev. Stat. Ann. § 162.285 (witness tampering); Mich. Comp. Laws Ann. § 750.141 (encouraging minor to enter a bar), on which this Court's decision might *potentially* bear—hardly the sweeping effect on state laws that *amici* contend. And, of course, nothing stops the federal government or states from passing laws that focus on solicitation or aiding and abetting, the only conduct the government even asserts an interest in prohibiting.

II. The Encouragement Provision is Also Overbroad Because It Criminalizes Speech Encouraging Civil Immigration Violations.

The encouragement provision is also overbroad for a second, independent reason—even if it could be narrowly construed along the lines the government proposes. The government rests its defense entirely on the historical exception to First Amendment protection for "speech integral to criminal conduct." U.S. Br. 35–36, 41–43. But as its name suggests, that exception applies only if the criminal statute targets solicitation of *criminal* conduct. There is no support in history, tradition, or this Court's precedent for expanding that exception beyond its specifically criminal contours. Yet remaining in the country unlawfully is not generally a crime, and therefore the encouragement provision, both on its face and as applied here, impermissibly reaches encouragement of merely *civil* immigration violations.

It is a crime to enter the United States unlawfully. 8 U.S.C. § 1325. But it is generally *not* a crime, only a civil violation, for a noncitizen to remain in the United States without lawful status, as when someone here on a visitor or student visa overstays that visa, fails to take sufficient credits in school, moves without informing the Department of Homeland Security of their change of address, or works without proper authorization. *See Arizona*, 567 U.S. at 407 ("As a general rule, it is not a crime for a removable alien to remain present in the United States."). Mr. Hansen was charged with violating the encouragement provision for encouraging two noncitizens to overstay their visas, J.A. 20, which is not a crime.

The "speech integral to criminal conduct" exception does not permit the *criminal* punishment of speech encouraging only a *civil* law violation. That exception has been historically applied only to speech integral to *crimes*, not civil infractions. *See Giboney*, 336 U.S. at 498 ("[T]he constitutional freedom for speech and press" does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a *valid criminal statute*.") (emphasis added); *Stevens,* 559 U.S. at 460 (noting that "speech integral to criminal conduct" is unprotected). The justification for placing speech integral to criminal conduct categorically outside constitutional protection is that it is part and parcel of the underlying criminal conduct. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 989–97 (2016). There is simply no precedent, historical or doctrinal, for criminally punishing speech as a constitutionally unprotected category where it is not integral to a crime.

In fact, the limitation of the "speech integral to criminal conduct" exception to *criminal* conduct is deeply rooted in our history and tradition. At common law, criminal solicitation laws prohibited solicitation only of crimes. *See*, *e.g.*, *State v. Avery*, 7 Conn. 266, 270 (Conn. 1828); *Rex v. Higgins*, 102 Eng. Rep. 269 (K.B. 1801). While there was some debate over whether solicitation was limited to inciting felonies, or could also extend to misdemeanors, *see*, *e.g.*, *State v. Sullivan*, 84 S.W. 105, 108–09 (Mo. App. 1904), there was no tradition whatsoever of making it a crime to solicit conduct that was not a crime at all. *See also* Wayne R. LaFave, 2 Subst. Crim. L. § 11.1(a) (3d ed.

2022) (describing solicitation as asking that another commit a criminal offense).[7]

The government is unable to identify a single instance in which this Court has upheld a criminal penalty on speech on the ground that it was "integral" to non-criminal conduct. It cites only *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S. 376 (1973), and two cases about labor picketing, *Int'l Brotherhood of Elec. Workers, Loc. 501, A.F. of L. v. N.L.R.B.*, 341 U.S. 694 (1951), and *Int'l Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284, 293 (1957). *See* U.S. Br. 42–43. But none of these cases involve criminal penalties at all. *Pittsburgh Press* holds that the state can civilly prohibit employment discrimination effectuated through words, but nowhere suggests that the government can make it a crime to encourage a mere civil law violation. Likewise, the two labor cases involve civil injunctions against picketing, not criminal sanctions.[8]

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[7] The crime of "aiding and abetting" also traditionally pertains only to aiding or abetting *crimes*. *See* Wayne R. LaFave, 2 Subst. Crim. L. § 13.2(b) (3d ed. 2022) (accomplice must have intent "to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state"). The Department of Justice's own Criminal Resource Manual states that an element of aiding and abetting is a "specific intent to facilitate the commission of a crime by another." U.S. Dept. of Just., 2474. Elements of Aiding and Abetting, Criminal Resource Manual, https://perma.cc/H4XN-KR9C.

[8] In addition, *Pittsburgh Press* involved speech constituting commercial activity. 413 U.S. at 385. The picketing cases are distinguishable because the Court has treated picketing as a combination of conduct and expression, not pure speech. In *International Brotherhood of Teamsters*, this Court explained that picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of

In effect, then, the government asks this Court to expand the "speech integral to criminal conduct" exception beyond its historical contours, or to create a new exception altogether. But the Court has regularly refused to do precisely that. Unprotected speech consists of certain "well-defined and narrowly limited classes of speech, the prevention and punishment of which *have never been thought* to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (emphasis added); *see Stevens,* 559 U.S. at 468–472 (emphasis added) (declining to create a new category of unprotected speech). Yet to uphold the encouragement provision on the basis of the "speech integral to criminal conduct" exception would require just such an expansion—despite a lack of any history or tradition of criminal prohibitions on speech soliciting non-criminal conduct. And this Court has declined to effectuate such an expansion "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Brown v. Entertainment Media*, 564 U.S. 786, 792 (2011); *see also Stevens*, 559 U.S. at 469 (noting no "tradition excluding *depictions* of animal cruelty" from First Amendment protection as a categorical matter).

The request to expand the circumstances under which speech can be criminalized because of its connection to unlawful conduct, moreover, goes directly against the grain of this Court's First Amendment jurisprudence. From the prescient dissent of Justices Holmes and Brandeis in *Abrams v.*

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the nature of the ideas which are being disseminated." 354 U.S. at 289. But the encouragement provision reaches pure speech.

United States, 250 U.S. 616, 624–31 (1919), to their concurrence in *Whitney v. California*, 274 U.S. 357, 372–80 (1927), to the Court's decision in *Brandenburg*, the Court has grappled with when the government could make speech a crime based on its advocacy of unlawful conduct. Over time, informed by the excesses of the Red Scare and the McCarthy era, the Court ultimately adopted increasingly more stringent requirements, culminating in the *Brandenburg* test. By asking this Court to expand the government's authority to punish speech based on mere encouragement of civil law violations, the government in effect asks the Court to close its eyes to the hard-earned lessons of our history, and to free up state authorities once again to criminalize speech of which it disapproves, without the close nexus to criminal conduct that the Court has long demanded.

Extending the speech-integral-to-criminal-conduct exception to advocacy of civil law violations would have profound negative consequences for freedom of speech. States could make it a crime to encourage a violation of public health orders requiring masking during the pandemic, even if actually violating those orders triggered only a civil penalty. Municipalities could make it a crime to encourage business owners to violate public accommodations laws, even where the violations themselves are not a crime.

Speech advocating disregard or disobedience of laws with which the speaker disagrees is a regular part of our political discourse. *See*, *e.g.*, Charles Murray, *By the People: Rebuilding Liberty Without Permission* 129 (2016) ("identifying laws and regulations that may be ignored in general" in the name of liberty, including environmental, workplace,

and zoning regulations); Todd Starnes, *'We Will Not Obey': Christian Leaders Threaten Civil Disobedience if Supreme Court Legalizes Gay Marriage*, Fox News (May 6, 2015), https://perma.cc/GFR4-3V8N ("I'm calling for people to not recognize the legitimacy of that ruling [on same-sex marriage] because it's not grounded in the Rule of Law . . . . They need to resist that ruling in every way possible."). Given the almost inexhaustible scope of conduct subject to civil regulation, expanding the exception to permit criminal prohibition of speech encouraging a civil law violation would be a huge expansion of the exception.

Affirming the decision of the court of appeals on the ground that the statute is overbroad for reaching encouragement of civil law violations would not mean that every statute that criminalizes speech encouraging non-criminal conduct would be invalid; it would merely mean that such speech is not *categorically unprotected*. Other such laws would simply have to satisfy strict scrutiny as content-based regulations of protected speech. *See Brown*, 564 U.S. at 799.

That's precisely the route the Minnesota Supreme Court took in reviewing a statute barring encouragement of suicide. In *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014), the Minnesota Supreme Court held that where suicide was not a crime under Minnesota law, a statute that forbade encouraging suicide could not survive a First Amendment challenge on the ground that it regulated the unprotected categories of incitement or speech integral to a crime. *Id.* at 19–21. But the court went on to consider whether, as a content-based restriction on protected speech, the statute could survive strict scrutiny. *Id.* at 22–24. The court concluded that the

particular law at issue was not sufficiently narrowly drawn. *Id.* at 24. But a properly tailored law criminally proscribing speech that encourages suicide, or illegal transactions by minors, could well survive strict scrutiny, given the compelling interests in preventing those particular harms. The fact that speech is not categorically unprotected does not mean it is immune from regulation, but only that ordinary First Amendment scrutiny would apply.

Here, by contrast, the encouragement provision (which as noted above, discriminates on the basis of content and viewpoint), could not possibly satisfy strict scrutiny. The government asserts only an interest in proscribing solicitation or aiding and abetting, yet it has readily available alternatives for prohibiting such crimes without proscribing all encouragement whatsoever. And given the fact that the government itself forgives many immigration law violations in granting subsequent lawful status, such as when undocumented victims of trafficking are granted T visas, or out-of-status spouses of U.S. citizens adjust their status to become lawful permanent residents, *see supra* n.1, it cannot claim a compelling interest in forbidding all speech that might encourage such conduct.

The fact that the encouragement provision makes it a crime to encourage merely civil law violations thus provides an independent basis for affirming the decision below, as it means the statute is substantially overbroad for reaching a vast amount of protected speech. In addition, because Mr. Hansen was convicted only for encouraging such civil law violations, the Court could also affirm on the narrower ground that the law is unconstitutional as applied to him.

III. If the Court Upholds the Encouragement Provision Under the Narrow Construction the Government Now Proposes, Respondent's Conviction Should Still be Vacated Because The Jury Did Not Find that Respondent Engaged in Solicitation or Aiding and Abetting.

Even if this Court upholds the statute by construing it as the government now urges, Mr. Hansen's convictions under the encouragement provision still could not stand, because the jury did not convict him under the narrow interpretation the government now advances. At trial, the government opposed any narrowing instruction, and successfully urged that the jury be instructed to apply the ordinary meaning of the "encouragement" provision. At the very least, this Court should remand for the court of appeals to determine the consequences of this Court's decision on Mr. Hansen's encouragement provision convictions.

A conviction under a broad reading of a law cannot be sustained if a court later determines that only a narrow reading of the law is constitutional. *See Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 92 (1965). In *Shuttlesworth*, the Court vacated a conviction under an overbroad statute, even though the statute had subsequently been more narrowly construed, because it was not clear that the trier of fact applied the narrowing construction, but may have applied instead "the literal—and unconstitutional—terms of the ordinance." *Id.* And in *Yates v. United States*, 354 U.S. 298 (1957), this Court vacated the convictions of the defendants where the trial court had proceeded on the "theory that advocacy of abstract doctrine was enough to offend" the statute in question.

Id. at 329; *see also McDonnell v. United States*, 579 U.S. 550, 579–80 (2016) (vacating conviction where jury instruction gave an overly broad definition of term "official act" in criminal statute).

The jury in this case was not instructed to apply the statute as the government now urges the Court to construe it. The government *now* argues that "encourage" and "induce" should be construed according to their "established criminal-law meanings," which the government variously describes as "accomplice" and "solicitation" liability, U.S. Br. 29, 22, 23, 26, and as "speech 'intended to induce . . . illegal activities.'" U.S. Br. 40, 41, 42 (quoting *Williams*, 553 U.S. at 298). The government argued in this Court in *United States v. Sineneng-Smith*, that the encouragement provision was constitutional because it should be narrowly construed to "require[] substantial participation in some unlawful venture or trying to gin up some unlawful venture with the goal that that unlawful venture actually occur." Transcript of Oral Argument at 6, *Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67).

At trial in this case, however, the government offered none of these limiting instructions. On the contrary, it successfully *resisted* Mr. Hansen's request for limiting instructions that would have required both proof of intent to induce an immigration violation and substantial encouragement.[9] *See* J.A. 99–101.

[9] Similarly, in *Sineneng-Smith*, the government successfully resisted a proposed instruction by the defense that the defendant had to have encouraged or induced "with the intent to violate immigration laws" in order to be found guilty under the encouragement provision. *See* Joint Appendix at 46, 52–55, 117, *Sineneng-Smith*, 140 S. Ct. 1575. The jury instructions also neither contained any additional requirement

The government objected that neither requirement was found in the literal terms of the statute, and that so instructing the jury would be "a dramatic reinterpretation of the statute."[10] J.A. 101. Instead, the government urged the district court to instruct the jury to apply the plain meaning of "encourage" or "induce." *See* J.A. 100–01; 103–04. The jury therefore convicted Mr. Hansen under a literal reading of the terms of the statute.

This Court has long held that it cannot affirm a criminal conviction on the basis of a theory not presented to the jury. *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *Rewis v. United States*, 401 U.S. 808, 814 (1971). Yet that is precisely what the government seeks here. In this Court, it argues that the encouragement provision should be construed as narrowly limited to intentional solicitation or aiding and abetting. But at trial, it argued the opposite, and succeeded in opposing any limiting construction of the statute's literal terms. To uphold Mr. Hansen's conviction in this context would violate not only the First Amendment, because we cannot know whether the jury convicted him for pure encouragement,

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for substantial encouragement nor narrower definitions for the terms "encourage" and "induce." *See id.* at 117. Yet as noted above, in this Court, the government took the position that the provision should be narrowly interpreted as a prohibition of intentional solicitation after the jury had convicted without any such instruction.

[10] Remarkably, the government now cites *DelRio-Mocci v. Connolly Props. Inc.*, 672 F.3d 241, 249 (3d Cir. 2012), *cert. denied*, 568 U.S. 821 (2012), which required "substantial" encouragement for conviction, as support for its narrowing construction of the encouragement provision. But the government successfully opposed that precise instruction when Mr. Hansen proposed it below. J.A. 101.

Shuttlesworth, 382 U.S. at 92, but also the Fifth and Sixth Amendment rights to have a jury determine guilt beyond a reasonable doubt of every element of the charged crime, *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Thus, if the Court accepts the government's invitation to rewrite the statute, Mr. Hansen's convictions under the non-rewritten statute must fall. If nothing else, this Court should remand to the court of appeals to determine the consequences for Mr. Hansen's convictions under the government's new reading of the encouragement provision.

CONCLUSION

Because the encouragement provision is facially overbroad, the Court should affirm. But even if the Court upholds the statute on the basis of the narrowing construction the government now advances, it should vacate Mr. Hansen's convictions under the encouragement provision or remand for the court of appeals to consider whether the conviction can stand given the government's changed position on appeal.

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