No. 22-179

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

HELAMAN HANSEN,

Respondent.

On Writ of Certiorari
to the U.S. Court of Appeals for the Ninth Circuit

Brief of *Amicus Curiae*
Professor Eugene Volokh
in Support of Respondent

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Interest of *Amicus Curiae*[1]

Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law. He has taught First Amendment law for more than twenty-five years, and has written a textbook and over fifty law review articles on the First Amendment, including one that discusses in detail the criminal solicitation exception. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 989-97 (2016).

Summary of Argument

Solicitation of merely civilly punishable conduct—such as solicitation of remaining in the country unlawfully, U.S. Br. at 38—cannot be made criminal, though this Court's recent cases suggest that it can be punished civilly.

The "speech integral to criminal conduct" exception is a tremendously important feature of First Amendment law. It is the basis for criminalizing solicitation of crime. Volokh, 101 Cornell L. Rev., *supra*, at 991-93. It has also historically influenced the incitement exception, *id.* at 993-97, the fighting words exception, *id.* at 997, the child pornography exception, *id.* at 999, and the true threats exception, *id.* at 1003. It could in theory apply to a wide range of speech that is in some way connected to crime.

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus*'s employer (UCLA School of Law), make a monetary contribution to the preparation or submission of this brief.

It is therefore important that the boundaries of the doctrine be defined precisely, and not unduly broadly. In particular, because the premise of the doctrine is that speech should be legally tantamount to the crime to which it is integral, only solicitation of criminal conduct can be made criminal consistently with the First Amendment. Solicitation of civilly actionable conduct is integral only to that civilly actionable conduct, not to criminal conduct, and can thus at most be made civilly actionable.

Argument

I. Solicitation may be *criminally* punished as "integral to criminal conduct" only if it consists of solicitation of *crime*

Who cut Samson's hair? Many would quickly answer, "Delilah." But the Bible actually says (Judges 16:19 (King James)),

> And she [Delilah] made him [Samson] sleep upon her knees; and she called for a man, and she caused him to shave off the seven locks of his head . . . .

The hair was not cut by Delilah herself, yet we not only treat Delilah as culpable for the conduct she ordered—many of us actually *remember* the story as involving Delilah's actions. This reflects the deeply held moral intuition that ordering a thing done is tantamount to doing it oneself.

The criminal law likewise often treats ordering an act done, or soliciting its doing, or aiding and abetting its doing, as simply other ways of committing the act. The Model Penal Code, for instance, states that "A person is guilty of an offense if it is committed by his own

conduct or by the conduct of another person for which he is legally accountable," including through purposefully "solicit[ing]" or "aid[ing]" the commission of the crime. Model Penal Code §§ 2.06(1), (3). (The Code also includes a separate offense of solicitation, *id.* § 5.02(1), for situations where the solicited crime is not committed; but it provides that solicitation is generally a "crime[] of the same grade and degree as the most serious offense that is . . . solicited," *id.* § 5.05(1).) And this reflects longstanding American criminal law principles: "every man whose intent contributes to the act, in any degree which the law can notice, is in law a partaker of the crime." Joel Prentiss Bishop, Commentaries on the Criminal Law § 264, at 233 (1856).

This Court's decision in *United States* v. *Williams*, 553 U.S. 285 (2008), builds on this principle: "Offers to engage in illegal transactions are categorically excluded from First Amendment protection," *id.* at 297 (citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949))—as is solicitation of illegal transactions, *id.* at 298. And *Giboney* did indeed punish speech that in effect solicited the crime of restraint of trade, because the First Amendment does not protect "speech or writing used as an integral part of conduct in violation of a valid criminal statute." 336 U.S. at 498; *see* Volokh, *supra*, 101 Cornell L. Rev. at 989-97. When a statute validly criminalizes conduct—whether murder, distribution of child pornography (such as in *Williams*), restraint of trade (such as in *Giboney*), or criminal immigration violations—then soliciting violations of such a statute can generally be criminalized, too.

But while this longstanding traditional approach can justify criminalizing speech that is integral to the

commission of a crime, that is so precisely because the speech is related to *a crime*. *Giboney*, which is often cited as authority for this exception, expressly stated, "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid *criminal* statute." 336 U.S. at 498 (emphasis added).

Other cases have done the same. *See, e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 761-62 (1982); *Osborne* v. *Ohio*, 495 U.S. 103, 110 (1990); *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (citing *Giboney* and using "speech integral to criminal conduct" as a generic name for the exception); *United States* v. *Alvarez*, 567 U.S. 709, 717 (2012) (plurality opin.) (likewise). Indeed, this Court's earliest endorsement of criminal punishment of encouragement of crime, in *Fox* v. *Washington*, stressed that "encouragements . . . directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the *crime* encouraged." 236 U.S. 273, 277 (1915) (emphasis added).

To be sure, in *Rumsfeld* v. *FAIR*, this Court extended this principle to civil regulation of speech that is an integral part of civilly regulated conduct:

> The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

> *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949).

547 U.S. 47, 62 (2006). And the opinion likewise noted that, under the same logic,

> Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct").

Id. See also Pittsburgh Press Co. v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting) ("There comes a time, of course, when speech and action are so closely brigaded that they are really one.") (citing *Giboney* as an example); *IBEW* v. *NLRB*, 341 U.S. 694, 705 (1951) (upholding, with little discussion, civil prohibition on inducement of civilly actionable secondary pressure); *Int'l Bhd. of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 293 (1957) (likewise approving of courts civilly "enjoin[ing]" picketing that was connected to violation of "civil law").

But this reasoning focuses on *equating* conduct and speech that is integral to the conduct, and thus allowing civil remedies for civilly actionable conduct. The regulation of speech is seen as incidental to the conduct. Posting a sign threatening civilly actionable discrimination is viewed as itself a form of civilly actionable discrimination. The reasoning does not suggest that the speech can be punished *more severely* than the conduct.

The First Amendment often justifies protecting speech more than related action, as when abstract advocacy of crime is protected. It may sometimes tolerate treating speech as equally punishable with action. But it cannot allow treating speech as *more* punishable than the action that it encourages.

Thus, for instance, the government cannot "afford[] a greater degree of protection to commercial than to noncommercial speech," *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 513 (1981) (plurality op.), because that would "invert[the] judgment" that "noncommercial speech [is accorded] a greater degree of protection than commercial speech," *id.* Likewise, the government cannot afford a greater degree of protection to conduct than to noncommercial speech that is supposedly "integral" to that conduct: that would invert the constitutional judgment that speech is accorded a greater degree of protection than other conduct.

More broadly, when the government "attempts the extraordinary measure" of punishing speech, "it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly." *Florida Star* v. *B.J.F.*, 491 U.S. 524, 540 (1989). This Court held so with regard to a ban on publishing the names of rape victims, which covered only the media and not "the smalltime disseminator." *Id.*; *see also id.* at 541-42 (Scalia, J., concurring in the judgment). But the same logic applies here: When the government attempts the extraordinary measure of punishing speech urging certain action, it must demonstrate its commitment to advancing its interests by generally applying its prohibition evenhandedly to the action and not just to the speech.

To be sure, the solicited actors may in some situations escape broadly imposed criminal liability based on the specific facts of the case. The solicitor, for instance, may know of the circumstances that make an act criminal, but the direct actor might not know and thus lack the required *mens rea*—e.g., if Susan solicits Agnes to transport something, and only Susan (not Agnes) knows that it is contraband. *Cf.* Model Penal Code § 2.06(2)(a) (holding people accountable as accomplices when they cause "an innocent or irresponsible person to engage in [prohibited] conduct"). Or the direct actor may be insane or underage, while the solicitor is fully competent. *Id.*

But that does not change the broader principle: Solicitation of conduct can be treated as criminal, on the theory that it is integral to the underlying conduct, only when the underlying conduct is itself generally treated as criminal—whether or not the particular solicited person is, under the peculiar circumstances of the case, legally culpable for the crime.

II. Solicitation of suicide, if it can be punished, can only be punished under strict scrutiny

In the *Sineneng-Smith* oral argument, a question from the bench asked whether speech soliciting suicide fits within the "speech integral to criminal conduct" exception. Oral Arg. Tr. at 34-35, *United States* v. *Sineneng-Smith*, No. 19-67 (2020). The answer is no; any restriction on such speech must be judged under strict scrutiny, though it is possible that it might pass muster under that test.

The Minnesota Supreme Court dealt with this very question in *State* v. *Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014). It reasoned,

> [T]he major challenge with applying the "speech integral to criminal conduct" exception is that suicide is not illegal in any of the jurisdictions at issue. The holding in *Giboney* specifically stated that the exception was for speech integral to conduct "in violation of a *valid criminal statute*," and there is no valid statute criminalizing suicide here. It is true, as the court of appeals noted, that "suicide, despite no longer being illegal in Minnesota, remains harmful conduct that the state opposes as a matter of public policy." But the Supreme Court has never recognized an exception to the First Amendment for speech that is integral to merely harmful conduct, as opposed to illegal conduct.
>
> Applying the "speech integral to criminal conduct" exception to harmful conduct would be an expansion of the exception, and following the guidance of the Supreme Court, we are wary of declaring any new categories of speech that fall outside of the First Amendment's umbrella protections.

Id. at 19-20 (citations omitted, emphasis in original). And this analysis is correct. Broadening the integral-to-criminal-conduct exception to cover solicitation of merely harmful conduct would unmoor the exception from its rationale—speech would be criminalized not just as part of the criminalization of the conduct, but even when the conduct is noncriminal. And such broadening would yield an exception with no discernable boundaries: The government would have a free hand to bar a wide range of speech so long as it counsels behavior that the government views as "harmful."

After all, the speech-integral-to-criminal-conduct exception is not limited to speech integral to deadly criminal conduct. It is not limited to speech integral to violent conduct—consider *Williams* itself, which involved solicitation of a nonviolent crime. It is not even limited to speech integral to extremely serious criminal conduct. Solicitation of restraint of trade, for instance, is punishable, as *Giboney* illustrates. Solicitation of criminal public nudity was given, in *Fox* v. *Washington*, as an early example of criminally punishable solicitation. Solicitation of vandalism would likely be criminally punishable, too.

If solicitation of merely harmful but legal conduct were treated as punishable, then that would likewise extend far beyond solicitation of suicide, and cover solicitation of any conduct that the government declared to be harmful. This Court has rightly rejected such uncabined extensions of historically recognized exceptions. *See, e.g.*, *Stevens*, 559 U.S. at 468-70 (declining to extend the integral-to-criminal-conduct exception to distribution of visual images depicting harm to animals, when that harm was not criminal).

Instead, if this Court concludes that certain kinds of speech soliciting or aiding suicide should be criminalizable, it should do so by recognizing that the speech does not fall within a First Amendment exception, and that restrictions on the speech must be judged under strict scrutiny. The Minnesota Supreme Court in *Melchert-Dinkel* did precisely that in upholding a ban on speech that assists suicide, 844 N.W.2d at 22-23, after concluding that "the State has a compelling interest in preserving human life," *id.* at 22. And the *Melchert-Dinkel* court likewise applied strict scrutiny in evaluating a ban on speech that advises or

encourages suicide, but held that the particular Minnesota statute in that case was overinclusive with regard to the government's interest. 844 N.W.2d at 23-24. *See also Commonwealth* v. *Carter*, 52 N.E.3d 1054, 1064 n.17 (Mass. 2016) (upholding a prosecution for encouraging a particular person to commit suicide "because the Commonwealth has a compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide").

III. Speech seeking to engage in a criminal transaction can be criminalized even when the transaction is criminal only for one side

In the *Sineneng-Smith* oral argument, counsel for the United States suggested that the government "could decide to make prostitution a civil offense and still criminally punish recruiting prostitutes." Oral Arg. Tr. at 29, *United States* v. *Sineneng-Smith*, No. 19-67 (2020). This responded to a question from the bench noting that sometimes a person's participation in an offense "is not made criminal because of the vulnerable position of the person who is engaging in that act." *Id.* at 29. *See also* U.S. Br. at 44 (arguing that "A legislature's choice to, say, make prostitution a civil rather than criminal offense should not come at the price of constitutionally invalidating criminal sanctions against facilitating or soliciting prostitution.").

Indeed, acting as a pimp or as a brothel owner can be criminalized as profiting from another's prostitution, even if the prostitution is merely a civil offense—such moneymaking behavior is not itself speech. "[R]ecruiting prostitutes" into participating in this behavior could also be criminalized, as integral to the crime of profiting from another's prostitution.

Likewise, say the law makes it merely a civil offense—or no offense to all—to sell sex (in order to diminish the "vulnerable position" of prostitutes), but a crime to buy sex. Whether or not such an approach is sound, it would not violate the First Amendment. And criminalizing speech that seeks to buy sex would thus also be constitutionally permissible, because speech that seeks to buy sex would simply be an attempt to commit the crime of buying sex.

But the government could not make prostitution a civil offense and then still criminally punish merely urging someone to become a prostitute. Once the government concludes that prostitution should not be a crime, speech related to such noncriminal conduct must be noncriminal as well.

IV. The "speech integral to criminal conduct" exception needs to be properly cabined

More generally, the "speech integral to criminal conduct" exception needs to be defined clearly and not unduly broadly. Such an exception could potentially covers a wide range of activity, far beyond just solicitation, and thus potentially open the door to the government punishing any behavior that seems in some way connected to some behavior that is criminal, or civilly actionable, or just dangerous.

Indeed, lower courts have already overread the exception. To give just one example, the Ninth Circuit upheld a ban on sexual orientation conversion therapy of minors on the theory that:

> "Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is

> incidental to the conduct of the profession." . . . . [A]n application of the First Amendment [to restrictions on medical and mental health treatments that involve speech] would restrict unduly the states' power to regulate licensed professions and would be inconsistent with the principle that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney*, 336 U.S. at 502.

Pickup v. *Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013) (citation omitted).

But that cannot be the right analysis. When a psychotherapist counsels a patient about how the patient might try to suppress his same-sex sexual attraction, the psychotherapist is not promoting or threatening any separate crime or tort. He is just conveying advice, or teaching a patient how to avoid some legal behavior and to engage in other legal behavior instead.

He may be doing this over an extended set of interactions (a "course of conduct" in that sense of the phrase), but that does not make the speech restrictable. A constitutionally protected lecture does not become unprotected when it becomes a lecture series. Advocacy of a political boycott does not become unprotected just because it consists of a "course of conduct" that includes speaking, gathering names of people who are not complying with the boycott, and publicizing those names. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 909-10 (1982).

In all these cases, including in the professional-client speech case, there is no "course of conduct" to which the speech is "integral" or "incidental" apart from a course of speech. We can call the speech "professional consultation" or "psychotherapy," but speech is all that it is. Just as the proposed offering of advice to terrorist groups about their international legal options was treated as speech in *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010), so the proposed offering of advice to a patient should be treated as speech as well. Perhaps, as in *Holder*, the speech could still be regulated, whether because the restriction passes strict scrutiny or because there is some special rule for professional-client speech (or such speech to minors). But the "speech integral to criminal conduct" exception sheds no light on the situation, precisely because there is no criminal conduct to which the speech is integral.

As the Third Circuit pointed out in dealing with such a ban in *King* v. *Governor*,

> Given that the Supreme Court had no difficulty characterizing legal counseling as "speech," we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are "conduct." Defendants' citation to *Giboney* v. *Empire Storage & Ice Co.* does not alter our conclusion.

767 F.3d 216, 225 (3d Cir. 2014); *see* Volokh, *supra*, 101 Cornell L. Rev. at 1043-49 (discussing the misapplication of the "speech integral to criminal conduct" exception in *Pickup*, and the criticism of that misapplication in *King*). *See also Otto* v. *City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020) (likewise rejecting the argument that regulations of sexual orientation change

efforts were merely "incidental [regulations of speech] swept up in the regulation of professional conduct"; "the ordinances are direct, not incidental, regulations of speech" and "are not connected to any regulation of separately identifiable conduct").

Other courts have misapplied the speech integral to criminal conduct exception to "criminal harassment" cases, on the theory that even pure speech can be punishable as criminal harassment because it is integral to the crime of harassment itself. *See* Eugene Volokh, *Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases*, 45 Harv. J. L. & Pub. Pol. 147, 184-89 (2022) (noting such cases, and other cases that have criticized such misapplications). Yet "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.). And the combination of a criminal harassment statute and the "speech integral to criminal conduct" exception cannot create such an exception: Such a justification for a criminal harassment statute "is circular—the speech covered by the statute is integral to criminal conduct because the statute itself makes the conduct illegal. That is not the test for speech integral to criminal conduct." *Matter of Welfare of A.J.B.*, 929 N.W.2d 840, 859 (Minn. 2019).

To be sure, lower courts sometimes do err in applying even settled First Amendment law. But the speech integral to criminal conduct exception is in particular need of careful and suitably narrow definition. This Court should reaffirm that speech can be criminalized as integral to criminal conduct only if it is closely linked to *other* conduct (besides the assertedly

criminal speech itself), and in particular to other *criminal* conduct (and not just civilly actionable conduct).

Conclusion

Speech integral to criminal conduct, such as solicitation of crime, can be criminalized, because the speech is closely linked to the conduct itself and can thus be treated similarly. But the speech-integral-to-criminal-conduct exception cannot justify punishing speech more severely than the conduct to which it is integral.

Respectfully submitted,

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