No. 22-179

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

HELAMAN HANSEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the 9th Circuit

BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF RESPONDENT

Bruce D. Brown
Counsel of Record
Katie Townsend
Gabe Rottman
Grayson Clary
Emily Hockett
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW,
Suite 1020
Washington, D.C. 20005
bruce.brown@rcfp.org
(202) 795-9300

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Amicus the Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect the newsgathering and publication rights of journalists around the country.

Amicus has a pressing interest in ensuring that reporters with a good-faith intent to inform discussion on matters of public concern can report on unlawful activities without fear of liability. That interest is only sharpened by the government's past misuse of the statute under review here to justify the surveillance of journalists covering the border.

---

[1] Pursuant to Supreme Court Rule 37, counsel for amicus curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the amicus curiae, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Journalists covering issues of public concern routinely document conduct that is—or might be—unlawful. They do so not, of course, with the intent to encourage violations of the law, but instead to "inform citizens about the public business." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975). That the Constitution protects that core function of a free press should be self-evident. Still, as NBC 7 San Diego revealed in 2019, the federal government has invoked the bar on "encourag[ing] or induc[ing]" unlawful immigration to justify the surveillance of reporters who bring the public the news from the border. 8 U.S.C. § 1324(a)(1)(A)(iv) (the "Encouragement Provision"); *see* Tom Jones et al., *Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC 7 (Mar. 6, 2019), https://perma.cc/6WF7-38CJ. A statute that stretches that far is patently overbroad, as the decision under review rightly concluded. This Court should affirm.

Amicus writes to highlight two issues for the Court's consideration. First, any discussion of the Encouragement Provision's breadth should be informed not just by the prosecutions ultimately brought under the statute—as the government insists—but also by its role in the maintenance of the border watchlist, the subject of an ongoing Freedom of Information Act lawsuit brought by amicus and NBC 7. *See NBC 7 San Diego v. U.S. Dep't of Homeland Sec.*, No. 19-CV-1146, 2022 WL 17820557 (D.D.C. Dec. 20, 2022). That monitoring extended well beyond idle curiosity; as the documents produced make clear,

federal officials hoped their surveillance of the media would make "a good start toward a case against them" under the statute. U.S. Border Patrol Email Exchange re: Making a Case at 1 (Dec. 9, 2018), https://perma.cc/YC6R-RDPX. That experience of overreach highlights the threat the statute poses to First Amendment freedoms, and it belies the government's insistence that the law is a garden-variety prohibition on solicitation, or aiding and abetting.

Second, the strict enforcement of traditional limits on solicitation or aiding-and-abetting liability plays an integral role in safeguarding the exercise of First Amendment rights, including the freedom of the press to report on newsworthy unlawful activity. Under this Court's precedent, speech can be deemed integral to those classic inchoate offenses—and therefore beyond the reach of the First Amendment—only where it is specifically "*intended* to induce or commence illegal activities." *United States v. Williams*, 553 U.S. 285, 298 (2008) (emphasis added). That rule protects reporters acting with a good-faith intent to inform the public against allegations "that an article discussing a dangerous [or illegal] idea negligently helped bring about a real injury." *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987). And that principle is consistent with the emphasis this Court places throughout its First Amendment precedent on the importance of "*mens rea* requirements that provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability." *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring in the judgment).

The Encouragement Provision cannot be squared with those guardrails. It does not require that a speaker intend to induce commission of a crime and cannot plausibly be construed as a prohibition on solicitation alone. To uphold it would threaten the freedom of the press in any number of contexts where the public cannot count itself fully informed without the benefit of reporting that captures the ground truth about unlawful activity. *Cf.* Br. for Resp't at 17 (noting the risk that the Encouragement Provision "could also reach an op-ed . . . criticizing the immigration system"). The government's expansive use of the statute to justify the monitoring of journalists covering migration at the southern border underlines as much. Recognizing those infirmities, the decision below rightly concluded that the statute violates the First Amendment. Amicus respectfully urges that that judgment be affirmed.

ARGUMENT

I. The government has invoked the bar on encouraging unlawful immigration to justify monitoring reporters at the border.

Few areas of news coverage have drawn as much public interest in recent years as immigration policy, "one of the country's most contentious political issues." Aline Barros, *Ahead of US Midterms, How Has US Immigration Policy Changed?*, VOA News (Sept. 21, 2022), https://perma.cc/E7BH-MTZ4. No surprise, then, that reporters have worked to give the public a richer portrait of the reality of migration, to better inform urgent and ongoing public discussion and debate over asylum policy, border enforcement,

and other issues of obvious public concern. *See, e.g.*, Kirsten Luce & Eileen Sullivan, *How Asylum Seekers Cross the Border*, N.Y. Times (June 10, 2022), https://perma.cc/GJC5-DCQ2.

In March 2019, NBC 7 San Diego broke the news that journalists doing that important work had drawn the attention of the Department of Homeland Security. *See* Jones et al., *supra*. As leaked documents showed, federal officials compiled a watchlist of "Suspected Organizers, Coordinators, Instigators and Media" in connection with the Department's monitoring of a large migrant caravan. That list included "ten journalists" alongside a number of attorneys and immigration activists. *Id.* Not only did the agency compile "dossiers" on those reporters, but the database was also used to pick out members of the press "as targets for secondary screenings." *Id.* Missing from the government's files, though, was any indication that the journalists surveilled had done anything to justify government scrutiny other than gather and report news about the caravan—a subject of legitimate public interest. And, as NBC 7 reported, the border watchlist was consistent with a broader, troubling rise in the misuse of border authorities to investigate members of the news media. *See, e.g.*, Comm. to Protect Journalists, Nothing to Declare: Why U.S. Border Agency's Vast Stop and Search Powers Undermine Press Freedom (Oct. 2018), https://perma.cc/99WH-DYBN; *see also* Mark Sherman, *Watchdog: Federal Anti-Terror Unit Investigated Journalists*, AP (Dec. 11, 2021), https://perma.cc/GXT8-LNHY.

In response to a letter from a coalition of civil liberties groups, U.S. Customs and Border Protection ("CBP") justified the watchlist with the assertion that the agency was "investigating possible violations under 8 U.S. Code § 1324"—the same statute under review here—"which pertains to any person who encourages or induces an alien to enter the United States, knowing or in reckless disregard that they are doing so in violation of law." Ltr. from U.S. Customs & Border Prot. to Ctr. for Democracy & Tech. (May 9, 2019), https://perma.cc/QL9J-2C9C. CBP further claimed that "[a] number of journalists and photographers were identified by Mexican Federal Police as possibly assisting migrants in crossing the border illegally and/or as having some level of participation in the violent incursion events," but produced no evidence to substantiate the claim. *Id.*

In April 2019, amicus filed a Freedom of Information Act lawsuit alongside NBC 7 and its reporter Tom Jones, seeking further insight into the Department's surveillance of journalists. *See* Complaint at 1, *NBC 7 San Diego v. U.S. Dep't of Homeland Sec.*, No. 1:19-cv-01146 (D.D.C. Apr. 22, 2019). As a result of the lawsuit, the Department and its components began producing records that make clear the extent and gravity of the inappropriate government scrutiny that journalists working at the border received.

For one, the documents illustrate an agency whose hair-trigger suspicions were activated by the bare fact that members of the press were sometimes present "capturing images and documenting the event" during attempted border crossings, U.S.

Border Patrol Incident Reports at 6 (Dec. 2, 2018), https://perma.cc/A36N-MLU4—conduct that the First Amendment unquestionably protects, *see Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1038 (9th Cir. 2018). Indeed, border officials appear to have leapt from the banal observation that photojournalists could be seen using "professional photography equipment" to document border crossing attempts to the inappropriate inference that the events were "staged." U.S. Border Patrol Email Exchange re: Professional Photography Equipment at 4 (Dec. 6, 2018), https://perma.cc/E34P-FC2W.

But most troublingly, the documents make clear that the agency's ambitions stretched beyond keeping a close eye on reporters. Instead, CBP officials believed their monitoring of the media would make a "good start toward a case against them hopefully," aiming to uncover evidence of "criminal aiding and abetting by members of the media." U.S. Border Patrol Email Exchange re: Making a Case, *supra*, at 1. In light of those disclosures, the government's dismissive characterization of concerns that the Encouragement Provision will be abused to target protected speech as "fanciful" rings hollow. Br. for the United States at 46. The statute has *already* been abused to chill lawful and valuable newsgathering at the southern border. This Court's analysis of the statute's constitutionality should reflect as much.

II. The First Amendment protects reporters from the threat of inchoate liability when they report on or depict unlawful activity.

That the border watchlist was inconsistent with the First Amendment's safeguards for a free press should have been obvious. Traditional limits on solicitation and aiding-and-abetting liability have long played an important role in protecting the exercise of First Amendment rights, including those of journalists who cover illegal activity with the intent to inform the public. Without those guardrails, journalists could face the chilling threat of prosecution whenever their work discloses facts arguably useful to a third party intent on breaking the law—no matter the public interest in hearing that information or the reporter's good faith in sharing it.[2] *Cf.* Br. for Resp't at 17 (noting that the statute "could also reach an op-ed . . . criticizing the immigration system"). Exceptionally valuable journalism would be at risk as a result.

Reporting on illegal activity—in the immigration sphere and beyond—can uncover underground networks perpetrating harm, tell the stories of ordinary and vulnerable people caught up in challenging circumstances, and promote "public discussion of the stewardship of public officials" charged with enforcing the law. *N.Y. Times Co. v.*

---

[2] In principle, the fact that the statute is addressed only to communications to a "specific alien" should also—independent of the First Amendment's commands—prohibit its application to statements directed at the general public, as news articles are. *United States v. Hansen*, 25 F.4th 1103, 1108 (9th Cir. 2022). But because the government has stretched the statute farther, as discussed above, and because the question of the *scienter* required by the First Amendment has important stakes for press freedom beyond the context of this particular statute, amicus addresses the broader danger for the benefit of the Court. *See* Br. for Resp't at 17 (same).

Sullivan, 376 U.S. 254, 275 (1964). Often, that reporting cannot meaningfully inform public debate without granular attention to the mechanics of the activity depicted. Reporting from the border, for instance, will often identify particular "crossing points," Luce & Sullivan, *supra*, so that the public can understand "exactly how it's done," Vice, *Illegal Border Crossing in Mexico*, YouTube (May 31, 2012), https://perma.cc/7VJF-6SNP. The public's ability to evaluate the performance of CBP officials is likewise informed by reporting on the tactics that smugglers use to avoid them. *See* Daniel González & Gustavo Solis, *A Human Smuggler, and the Wall That Will Make Him Rich*, Desert Sun (Sept. 27, 2017), https://perma.cc/ME7E-729W. It may be foreseeable in a thin sense that such journalism could be of use in illicit activity, but it should be clear that its greater contribution is to "the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

The same is true in any number of policy contexts. Reporting that identifies areas in which illegal substances can be obtained, *see* John Ringer & Meghna Chakrabarti, *The Reality of the Drug Trade in San Francisco*, WBUR (Nov. 2, 2022), https://perma.cc/XN5T-CP5H, is indispensable to the public's supervision of the officials charged with protecting public health and safety, *see* Betty Yu, *Candidates Weigh in on San Francisco's Fentanyl Crisis Ahead of Election*, CBS News (Oct. 16, 2022), https://perma.cc/J6GQ-HL3J. Journalism that documents the failure of online platforms to remove illegal imagery, *see* Michael H. Keller & Kate Conger, *Musk Pledged to Cleanse Twitter of Child Abuse Content. It's Been Rough Going*, N.Y. Times (Feb. 6,

2023), https://perma.cc/PL9E-YUX9, is central to the robust public debate over the adequacy of social media firms' content moderation policies. And documenting the means by which laws are broken may empower the public to take steps to protect themselves. *See* Will Kerr, *Thieves Are Using Apple AirTags to Steal Cars. Here's How to Stop Them*, By Miles (June 10, 2022), https://perma.cc/M8AL-3S7M.

The First Amendment protects those publications, even if they may foreseeably—but incidentally—also provide information of use to individuals hoping to break the law. This Court has permitted a limited range of restrictions on speech that has historically fallen outside the First Amendment's purview, including "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). But these "historic and traditional categories" are "well-defined and narrowly limited." *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (citations omitted). As relevant here, speech is integral to classic inchoate offenses like aiding-and-abetting and criminal solicitation—the defense the government offers of the Encouragement Provision—*only* where specifically *"intended* to induce or commence illegal activities." *Williams*, 553 U.S. at 298 (emphasis added).

Courts often have reaffirmed, in that light, that the mere foreseeability that information might be misused in connection with illegal conduct is not enough to justify liability for publishing it. The government itself has previously explained as much, noting that "courts have held that the First

Amendment prohibits imposing tort liability on publishers, producers and broadcasters for the foreseeable consequences of their speech where viewers or readers mimicked unlawful or dangerous conduct that had been depicted or described." U.S. Dep't of Justice, Report on the Availability of Bombmaking Information (Apr. 1997), https://perma.cc/JNJ9-MGP7 (collecting cases). Those cases reflect a broad consensus that "[n]ews reporting . . . no matter how explicit it is in its description or depiction of criminal activity, could never serve as a basis for aiding and abetting liability" where the reporter's intent is "merely to report on the particular event, and thereby to inform the public." *Rice v. Paladin Enters.*, 128 F.3d 233, 266 (4th Cir. 1997).

That rule is consistent with the critical role that strict *scienter* requirements play throughout this Court's First Amendment jurisprudence, "provid[ing] 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability." *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring in the judgment). Punishable incitement, for instance, must be "*directed* to inciting or producing imminent lawless action," because a broader framework risks "sweep[ing] within its condemnation speech which our Constitution has immunized from governmental control." *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam) (emphasis added). Liability for defamation of a public official requires "actual malice," because a less stringent rule raises "the possibility that a good-faith critic of government will be penalized for his criticism." *Sullivan*, 376 U.S. at 279–80, 292. And the First

Amendment similarly precludes punishing mere membership in a group that advocates illegal aims in the abstract, absent "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence,'" to avoid impairing "legitimate political expression or association." *Scales v. United States*, 367 U.S. 203, 229 (1961) (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961) (alterations in original)).

This Court should strictly enforce the same line here—a boundary all the more important "when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Routine journalism cannot be labeled aiding and abetting or solicitation on the bare theory that, "after publication[,] an article discussing a dangerous idea negligently helped bring about a real injury." *Herceg*, 814 F.2d at 1024. The First Amendment requires intent to encourage a crime.[3] Otherwise, if the threat of liability shadowed any reporting that depicts unlawful conduct, the press could not fulfill its constitutional role as a "mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry." *Estes v. Texas*, 381 U.S. 532, 539 (1965).

---

[3] Even where intent is shown, the First Amendment may nevertheless protect such a publication absent an *imminent* likelihood that unlawful conduct will in fact result. *See id.* at 1023 (expressing doubt "[w]hether written material might ever be found to create culpable incitement" for lack of imminence).

III. The federal bar on encouraging unlawful immigration exceeds the traditional First Amendment limits on inchoate liability.

The Encouragement Provision cannot be squared with the First Amendment, as the example of the border watchlist highlights, and the statute's plain text confirms. To uphold it in the face of those infirmities would have a chilling effect far beyond this particular context, opening the door to liability for good-faith journalism that intends only "to inform the public" rather than to encourage "repetition of the crime or other conduct reported upon." *Paladin Enters.*, 128 F.3d at 266.

The government's principal line of defense is that the law imposes "a conventional prohibition on facilitating or soliciting illegal conduct," and therefore prohibits only speech that the First Amendment does not protect. Br. for the United States at 15. But that is simply not what the language of the statute says. For one, the statute has an entirely separate provision punishing anyone who "aids or abets the commission" of a relevant immigration offense, a prohibition that would be entirely "redundant" if the Encouragement Provision had the meaning the government proposes. *United States v. Hernandez-Calvillo*, 39 F.4th 1297, 1305 (10th Cir. 2022); *see also Hansen*, 25 F.4th at 1107–08 (same). The Encouragement Provision's lack of an appropriate *scienter* requirement reinforces the point: "Its sole state-of-mind element relates to the defendant's knowledge that a noncitizen's 'coming to, entry, or residence [in the United States]' violates the law." *Hernandez-Calvillo*, 39 F.4th at 1306 (quoting 8 U.S.C. § 1324(a)(1)(A)(iv)). The "hallmarks of

facilitation and solicitation—specific intent and resulting criminal conduct"—are entirely absent. *Id.* at 1307.

Without those constraints, the statute plainly sweeps in "a substantial amount of protected speech," *Williams*, 553 U.S. at 292, reaching beyond traditional solicitation to punish expression that has the effect of encouraging unlawful immigration even if the speaker does not specifically intend that result. To uphold the statute despite those defects would have a chilling effect on a broad range of valuable speech, including public-interest journalism that promotes the deeper understanding of newsworthy but unlawful activity. Amicus urges this Court to reject that result. The Encouragement Provision is unconstitutionally overbroad, and the judgment below should be affirmed.

CONCLUSION

For the foregoing reasons, amicus respectfully urges that the decision below be affirmed.

Respectfully submitted,

Bruce D. Brown
Counsel of Record
Katie Townsend
Gabe Rottman
Grayson Clary
Emily Hockett
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW,

Suite 1020
Washington, D.C. 20005
bruce.brown@rcfp.org
(202) 795-9300

February 23, 2023