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 United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AND THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION AS *AMICI CURIAE* SUPPORTING RESPONDENT

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

JAMES M. DIAZ
DANIEL M. ORTNER
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut Street, Suite 1250
Philadelphia, PA 19106

ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS SCHOOL OF LAW SUPREME COURT CLINIC
727 East Dean Keeton Street
Austin, Texas 78705
(713) 966-0409
ebusby@law.utexas.edu

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INTEREST OF *AMICI CURIAE*[1]

Amicus The Rutherford Institute, a nonprofit civil-liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the fundamental human rights of all people. The Rutherford Institute advocates for protection of civil liberties and human rights through *pro bono* legal representation and public education on a wide spectrum of issues affecting individual freedom in the United States and around the world. In particular, The Rutherford Institute advocates against government infringement of citizens' rights to freely express themselves, seeking redress in cases where citizens have been punished for exercising their First Amendment right to free speech.

Amicus The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended the rights of individuals through public advocacy, strategic litigation, and participation as *amicus curiae* in cases concerning First Amendment expressive rights.

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

To ensure the vitality of the First Amendment, The Rutherford Institute and FIRE believe that the government should not be able to stifle speech by imposing criminal penalties on mere encouragement of unlawful conduct, which is protected advocacy.

SUMMARY OF THE ARGUMENT

Section 1324(a)(1)(A)(iv) (the Encouragement Provision) is a content-based and viewpoint-discriminatory regulation of speech that violates the First Amendment. Its overbroad reach, as respondent argues, sweeps in protected speech, *see* Resp. Br. 14-23, making it a *felony* merely to advocate for, and thereby encourage, certain immigration-law violations that constitute civil offenses or misdemeanors. *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (criminalizing encouragement or inducement of entering or residing in the United States unlawfully).

Expressing disagreement with laws through advocacy of their violation, however, is part of a deeply rooted American tradition. And if the government may criminalize encouraging immigration-law violations, as the statute does on its face, so too may the government criminalize encouraging civil disobedience in other contexts, silencing an irreplaceable form of protest speech. This Court should make clear that the Encouragement Provision is an overbroad, content-based, and viewpoint-discriminatory regulation of speech that fails strict scrutiny. As such, it violates the

First Amendment and therefore offers no viable blueprint for suppressing speech with which the government disagrees.

The Encouragement Provision is a presumptively unconstitutional content-based law because it "applies to particular speech because of the topic discussed or the idea or message expressed." *City of Austin v. Reagan Nat'l Advert. of Austin*, 142 S. Ct. 1464, 1471 (2022) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Here, the topic is immigration, and the targeted message is speech that "encourages or induces" certain immigration-law violations. And even more egregious than the statute's content-based focus is its discrimination against a particular viewpoint. *See Reed*, 576 U.S. at 168 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). The statute "distinguishes between two opposed sets of ideas," *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019): encouraging versus discouraging entering and residing in the United States in violation of immigration laws.

Moreover, the government's interest in enforcing immigration law can be accomplished through existing statutes that do not sweep in protected speech. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (availability of content-neutral alternatives "undercut[s] significantly" defense of content-based restriction (quoting *Boos v. Barry*, 485 U.S. 312, 329 (1988))). The availability of conduct-focused prohibitions, *see, e.g.*, 8 U.S.C.

§ 1324(a)(1)(A)(i)-(iii), and the option to permissibly regulate unprotected speech, such as incitement of immigration-law violations, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), demonstrate that the Encouragement Provision is not narrowly tailored to the government's interest in immigration-law enforcement. Similarly, the statute's imposition of felony liability for encouraging violations that are punishable only as misdemeanors, or even civil offenses, further highlights Congress's failure to narrowly tailor the statute.

Holding Congress accountable for failing to legislate with precision when First Amendment rights are at stake not only helps preserve robust democratic discourse, but also avoids miring this Court in judicial rewriting of an overbroad, content-based, and viewpoint-discriminatory statute that fails strict scrutiny and should not stand. If upheld, the statute's criminalization of encouragement of unlawful action would provide a template for other laws intended to silence a vital and effective form of protest speech: encouragement of civil disobedience. Both historical and contemporary protest movements illustrate the value of advocating civil disobedience in bringing about democratic reform and social change. Abolitionists encouraged enslaved persons to defy anti-literacy laws and flee from bondage in violation of slavery laws. Susan B. Anthony campaigned for women to unlawfully register to vote during the Women's Suffrage Movement. Organizations such as the Student Non-Violent Coordinating Committee

organized sit-ins to protest segregation. And more recently, individuals across the political spectrum advocated for civil disobedience regarding both COVID-19-related restrictions, or the absence thereof, and gun restrictions, or the absence thereof. In all instances, protesters engaged in speech encouraging civil disobedience to highlight their causes and criticize the government. Although those who violate laws may be held liable for their unlawful conduct, it is a very different matter to punish *advocacy* of such conduct, which is protected speech.

This Court has repeatedly emphasized the Constitution's special protection for speech critical of the government. *E.g.*, *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the heirarchy [sic] of First Amendment values,' and is entitled to special protection." (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982))). Permitting the government to criminalize and, indeed, make a felony of abstract encouragement of civil disobedience—as the Encouragement Provision does—would strike at core First Amendment values and risk eliminating a powerful tool for social change.

ARGUMENT

I. THE ENCOURAGEMENT PROVISION IS A CONTENT-BASED AND VIEWPOINT-DISCRIMINATORY REGULATION OF SPEECH THAT IS NOT NARROWLY TAILORED TO A COMPELLING GOVERNMENT INTEREST.

Just last term, this Court reaffirmed that statutes regulating speech based on topic or message are content-based laws. *City of Austin*, 142 S. Ct. at 1471. The Encouragement Provision irrefutably targets speech on a defined topic—entry or residence in violation of immigration law—and regulates such speech only on one side of that topic, making it unmistakably viewpoint discriminatory. The many alternative means, both within this statute and beyond, that further the government's interest in immigration enforcement without targeting protected speech confirm that the Encouragement Provision fails strict scrutiny and violates fundamental First Amendment freedoms essential to robust democratic discourse.

A. The Encouragement Provision Regulates Speech Based On Its Content And Viewpoint.

The Encouragement Provision is a content-based regulation of speech that discriminates in a particularly pernicious way: It allows the federal government to suppress and penalize protected speech on *one side* of a topic of enduring public interest

and controversy—United States immigration law—through the threat of criminal prosecution. *See Reed*, 576 U.S. at 174 (Alito, J., concurring) ("Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo."). The chilling effect of that content-based and viewpoint-discriminatory restriction is damaging to public discourse and the democratic policymaking process.

The Encouragement Provision imposes felony punishment on anyone who "encourages or induces an alien to come to, enter, or reside in the United States" unlawfully. 8 U.S.C. § 1324(a)(i)(A)(iv). While this provision regulates some conduct, the plain meanings of "encourage" and "induce" also "encompass[] speech that merely persuades, influences, or even inspires with hope." Resp. Br. 15-16 (discussing definitions of "encourage" and "induce" from multiple dictionaries, including Black's Law Dictionary, the Oxford English Dictionary, and several Webster's dictionaries).[2] And, as respondent shows, speech that merely encourages unlawful action does not fall within traditional categories of unprotected speech. Resp. Br. 18-20, 31. To the contrary, the Encouragement Provision is precisely the type of content-based

[2] The Court should reject the government's attempt to minimize the statute's impact on protected speech by arguing that respondent's violation included engaging in speech for financial gain. Pet. Br. 20, 27, 46-47. As respondent's brief explains, the financial-gain provision, 8 U.S.C. § 1324(a)(1)(B)(i), does not create a separate speech-related offense but instead is a sentencing enhancement for the primary speech-based felony created in the Encouragement Provision. *See* Resp. Br. 11, 32-33.

and viewpoint-discriminatory regulation of protected speech that the First Amendment prohibits.

This Court has long held that absent a narrowly tailored law that furthers a compelling interest, the government cannot "target[] speech based on its communicative content" or restrict speech "because of the topic discussed or the idea or message expressed." *City of Austin*, 142 S. Ct. at 1471 (quoting *Reed*, 576 U.S. at 163); *see also Iancu*, 139 S. Ct. at 2299. When a law restricts speech based on its content—or, even more "egregious[ly]," based on its viewpoint—the law is presumptively unconstitutional. *See Reed*, 576 U.S. at 163, 168-69 (citing, *inter alia*, *R.A.V.*, 505 U.S. at 395); *Rosenberger*, 515 U.S. at 829-30; *see also Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment). Because "[v]iewpoint discrimination is poison to a free society," *Iancu*, 139 S. Ct. at 2302 (Alito, J., concurring), it is a "core postulate of free speech law" that "[t]he government may not discriminate against speech based on the ideas or opinions it conveys." *Id.* at 2299 (majority opinion) (citing *Rosenberger*, 515 U.S. at 829-30). Content-based and viewpoint-discriminatory regulations of speech can stand only if narrowly tailored to achieve a compelling state interest. *Citizens United*, 558 U.S. at 340. The Encouragement Provision fails that test. *See infra* Part I.B.

Determining whether a statute is a content-based regulation of speech is straightforward. "A regulation of speech is facially content based under the First Amendment" when it "'applies to particular speech

because of the topic discussed or the idea or message expressed.'" *City of Austin*, 142 S. Ct. at 1471 (quoting *Reed*, 576 U.S. at 163). The Encouragement Provision easily qualifies because it targets speech on the topic of immigration-law violations—whether civil or criminal—and it does so based on the speech's message: encouragement of conduct the federal government has formally disapproved. The subject matter of the Encouragement Provision thus demonstrates that it was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *See Reed*, 576 U.S. at 164 (alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). And even a benign motive cannot save a law like the Encouragement Provision that is content based on its face. *See Reed*, 576 U.S. at 165 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993))).

Even more "egregious" than the Encouragement Provision's content-based focus is its discrimination against a specific viewpoint. *See Reed*, 576 U.S. at 168 (quoting *Rosenberger*, 515 U.S. at 829). It "distinguishes between two opposed sets of ideas," *Iancu*, 139 S. Ct. at 2300, prohibiting *encouragement* but not *discouragement* of specified unlawful immigration conduct. As such, the Encouragement Provision targets "a specific premise, a perspective,

[or] a standpoint from which a variety of subjects may be discussed and considered," rendering it viewpoint discriminatory and therefore presumptively unconstitutional. *See Rosenberger*, 515 U.S. at 831.

It is true, of course, that laws prohibiting certain types of unprotected speech, such as incitement and speech integral to criminal conduct, proscribe speech encouraging lawless action and not speech urging adherence to the law. But, unlike the viewpoint-discriminatory crime created by the Encouragement Provision, those speech-related crimes are defined not merely by encouraging illegal conduct, but by additional requirements that place the speech involved beyond the protection of the First Amendment. *See Brandenburg*, 395 U.S. at 447 (incitement requires that speech be "directed to inciting or producing imminent lawless action" and also be "likely" to do so); *United States v. Williams*, 553 U.S. 285, 298-99 (2008) (solicitation requires a concrete "proposal to engage in illegal activity"); Resp. Br. 18-20, 28-32; *infra* at 12-15.

Despite the government's argument that this Court should read an additional requirement of "criminal complicity" into the statute where the plain language indicates none, Pet. Br. 21-24; *see also id.* 35 (arguing for the canon of constitutional avoidance), liability under the Encouragement Provision turns only on the viewpoint of the speaker—whether that speaker is "encourag[ing] or induc[ing]" actions that would violate immigration laws. And this Court has made clear that when constitutional avoidance

"requires rewriting, not just reinterpretation," that canon cannot cure a First Amendment problem. *United States v. Stevens*, 559 U.S. 460, 481 (2010).

B. The Encouragement Provision Fails Strict Scrutiny.

Because the Encouragement Provision is a content-based and viewpoint-discriminatory law, it is presumptively unconstitutional and can continue to be enforced only if it survives strict scrutiny. *See Reed*, 576 U.S. at 163 (citing *R.A.V.*, 505 U.S. at 395). Thus, it may be upheld only if narrowly tailored to further a compelling interest—a high bar requiring the government to show that the curtailment of speech is "actually necessary to the solution." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (citing *R.A.V.*, 505 U.S. at 395); *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). And the existence of content-neutral alternatives to the government's approach "undercut[s] significantly" any defense of a content-based restriction. *R.A.V.*, 505 U.S. at 395 (alteration in original) (quoting *Boos*, 485 U.S. at 329).

Even if the government has a compelling interest in enforcing its immigration laws, the Encouragement Provision is anything but narrowly tailored to achieve

that interest.[3] Instead of precisely targeting conduct or unprotected speech to avoid infringing First Amendment freedoms, Congress expansively targeted mere encouragement of immigration-law violations—including civil violations.

Indeed, § 1324(a)(1)(A) already includes a number of separate provisions prohibiting specific conduct without targeting speech. Subsection (i) criminalizes smuggling an undocumented noncitizen into the United States; subsection (ii) criminalizes transporting an undocumented noncitizen within the United States "in furtherance" of violating immigration laws; and subsection (iii) criminalizes concealing, harboring, or shielding an undocumented noncitizen from detection. *See* 8 U.S.C. § 1324(a)(1)(A)(i)-(iii). In addition, subsection (v) makes it a crime to conspire to commit any of the acts listed in the first four subsections or to aid or abet any of those acts. *Id.* § 1324(a)(1)(A)(v). Those options demonstrate that criminalizing the mere encouragement of immigration violations is not the least restrictive means of enforcing immigration law. *See Boos*, 485 U.S. at 329.

The government contends that the Encouragement Provision is "a conventional prohibition on facilitating

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[3] Any interest the government has in silencing speech contrary to its policies is not constitutionally cognizable, let alone compelling. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."); *Texas v. Johnson*, 491 U.S. 397, 416 (1989) ("[T]he government may not prohibit expression simply because it disagrees with its message.").

or soliciting illegal conduct" that does not otherwise exist as a freestanding provision. Pet. Br. 15; *see also id.* 20-28, 38. But general criminal statutes already cover this ground, authorizing federal prosecutions for the facilitation of crimes through proposals to engage in criminal activity or through engaging in conduct to further criminal ends. *See, e.g.*, 18 U.S.C. § 2 (aiding and abetting an offense against the United States); *id.* § 3 (accessory after the fact); *id.* § 4 (misprision of felony).

Moreover, on its face, the Encouragement Provision is not limited to regulating the facilitation of crime. It encompasses abstract advocacy of unlawful conduct, which—provided it does not rise to the level of imminence required for incitement, *Brandenburg*, 395 U.S. at 447, or involve the concrete proposal and *mens rea* required for solicitation—is shielded by the First Amendment as protected speech. *See Williams*, 553 U.S. at 298-99 (distinguishing "a proposal to engage in illegal activity and the abstract advocacy of illegality"); MODEL PENAL CODE § 5.02 & explanatory note to subsection (1) (AM. L. INST., Official Draft and Revised Comments 1985) (requiring a "purpose to promote or facilitate the commission of a crime" in addition to a concrete proposal to "engage in specific conduct that would constitute such crime"); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful

acts is not a sufficient reason for banning it.");[4] Resp. Br. 18-20, 28-32.

As this Court has made clear, while "the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,'" it "has never 'include[d] a freedom to disregard these traditional limitations.'" *Stevens*, 559 U.S. at 468 (alteration in original) (quoting *R.A.V.*, 505 U.S. at 383). Yet "disregard these traditional limitations," *id.*, is precisely what the Encouragement Provision does. Even if the government believes harm will ensue from encouragement of immigration violations, that belief is insufficient to justify creating a new category of speech excluded from First Amendment protection. *See Stevens*, 559 U.S. at 470, 472 (cautioning that there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment" based on "an ad hoc balancing of relative social costs and benefits").

Additionally, the Encouragement Provision imposes felony punishment not only on someone who encourages an actual crime, such as entering the United States without inspection or through fraud, *see*

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[4] Although a specific request that someone enter or reside in the United States in violation of immigration law might be described as encouragement or inducement, it is not true that such encouragement or inducement always amounts to solicitation. As respondent and numerous *amici* establish, the far broader sweep of encouragement and inducement is what unconstitutionally brings protected speech within the Encouragement Provision's ambit and renders the statute facially overbroad. *See*, *e.g.*, Resp. Br. 23-32.

8 U.S.C. § 1325(a), but also on someone who merely encourages unauthorized entry or residence in this country, which can be a ground for deportation or, in limited circumstances, a civil penalty, but not a criminal offense. *See, e.g.*, *id.* § 1227(a)(1) (setting out classes of "deportable" noncitizens); *id.* § 1324d(a) (authorizing a civil penalty if the government issues a final order of removal with which the recipient refuses to comply).

As discussed in Professor Volokh's *amicus* brief, the Encouragement Provision's imposition of felony punishment in connection with non-criminal violations of immigration laws exceeds the permissible reach of a solicitation statute. *See* Brief of *Amicus Curiae* Professor Eugene Volokh in Support of Respondent, at 5-6; *see also* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 989-97 (2016). As Professor Volokh explains, "[t]he First Amendment often justifies protecting speech more than related action, as when abstract advocacy of crime is protected." Volokh Br. at 6. And even if limited circumstances exist that "treat[] speech as equally punishable with action," the First Amendment "cannot allow treating speech as *more* punishable than the action that it encourages." *Id.* Similarly, if the government's compelling interest in enforcing residence requirements results in at most potential civil exposure, it is difficult to see how the Encouragement Provision's felonization of encouraging such residence could be *narrowly tailored* to that interest. Congress must draft with greater

precision and greater respect for the First Amendment's protections.

II. CRIMINALIZING MERE ENCOURAGEMENT OF UNLAWFUL CONDUCT WOULD CHILL SPEECH ESSENTIAL TO MOVEMENTS ADVOCATING POLITICAL AND SOCIAL CHANGE.

The Encouragement Provision is not only content based and viewpoint discriminatory but also, as respondent shows, impermissibly overbroad. Resp. Br. 14-23. Overbroad statutes threaten robust democratic discourse through their potential chilling effect—the risk that people "choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted); *see also Reno v. ACLU*, 521 U.S. 844, 872 (1997) (explaining the heightened chilling effect of criminal sanctions against speech). Overbroad statutes also create opportunities for discriminatory enforcement against speakers who challenge the status quo, providing "an excessively capacious cloak of administrative or prosecutorial discretion." Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 884-85 (1991). Invalidating such speech-stifling statutes on overbreadth grounds helps ensure the vitality of America's "uninhibited marketplace of ideas," *Hicks*, 539 U.S. at 119, and this nation's venerable history of protecting protest speech that urges defiance of laws perceived as unjust.

Civil disobedience—the intentional defiance of laws as a form of protest—has played a central part in some of this country's most important struggles for equality, from the pre-Founding Boston Tea Party to the Abolitionist, Women's Suffrage, and Civil Rights Movements. And encouraging civil disobedience remains central to protests today, spanning the political spectrum. If the government were free to criminalize encouragement of civil disobedience, that power would threaten this critically important form of protest, chilling historically protected advocacy and impeding national debate on pressing issues of public concern.

To be sure, protesters who violate valid laws can be held liable for those violations regardless of the protesters' motivations, political or otherwise. But it is a very different matter for the government to punish someone solely for *speech* encouraging unlawful conduct. That type of advocacy implicates core values of this nation that the Framers celebrated, the First Amendment enshrines, and this Court's jurisprudence squarely protects. And that type of speech—separate and apart from the unlawful conduct it advocates—is vital because it has the potential to elevate individual acts of defiance, forming cohesive political or social movements with messages that can lead to democratic reform and social change.

A. Protest Speech, Including Speech Encouraging Civil Disobedience, Furthers Public Discourse And Protects Democracy.

If the First Amendment permits the government to make it a felony to encourage, for example, residing in the United States in violation of the conditions for admission (a ground for deportability but not a crime, *see, e.g.*, § 1227(a)(1)) or unlawful entry into the United States (a misdemeanor under 8 U.S.C. § 1325 but not a felony, *see* § 1324(a)(1)(A)(iv)), the government would be equally free to criminalize encouragement of other forms of unlawful conduct, whether criminal or civil. It thus could criminalize speech that has played a vital role in American history: advocacy of civil disobedience as a means of challenging laws that the speaker considers unjust. That result would be not only unconstitutional, but also dangerously undemocratic.

A robust application of the First Amendment is needed most when a statute targets speech that criticizes the government or challenges its rules. Indeed, there is a long history of protecting protest speech as vital to American democracy. As early as 1737, Benjamin Franklin urged that "[r]epublics and limited monarchies derive their strength and vigour from a popular examination into the action of the magistrates." BENJAMIN FRANKLIN, *On Freedom of Speech and the Press*, PA. GAZETTE (Nov. 1737), *reprinted in* 2 MEMOIRS OF BENJAMIN FRANKLIN 431, 431 (1840). And James Madison argued that the popular sovereignty underlying the American

government meant that the validity of government actions ultimately depended on the "temperate consideration and candid judgment of the American public." James Madison, *Virginia Report of 1799*, *reprinted in* THE VIRGINIA REPORT OF 1799–1800, 189, 196 (Leonard W. Levy ed., Da Capo Press 1970) (1850).

This Court, too, has repeatedly emphasized that "[t]he First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). That is because free speech is "essential to our democratic form of government, and it furthers the search for truth." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (citations omitted). Accordingly, debate on "public issues occupies the 'highest rung of the heirarchy [sic] of First Amendment values,' and is entitled to special protection." *Connick*, 461 U.S. at 145 (quoting *Claiborne Hardware*, 458 U.S. at 913).

Facial overbreadth challenges, like respondent's, preserve the First Amendment's "special protection," *id.*, of public debate because they provide individual and societal benefits that as-applied challenges lack. Facial adjudication can halt chilling effects and discriminatory enforcement against speakers beyond a single litigant, removing impediments to robust democratic discourse. *Hicks*, 539 U.S. at 119 ("Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces the[]

societal costs caused by the withholding of protected speech."); *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (overbreadth adjudication "avoid[s] making vindication of freedom of expression await the outcome of protracted litigation").[5]

Overbreadth holdings also compel legislatures to "write narrow statutes when regulating free speech." David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1344-45 (2005). "The overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post*, that is, after the offending statute is enacted, but also *ex ante*, that is, when the legislature is contemplating what sort of statute to enact." *Massachusetts v. Oakes*, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in the judgment in part and dissenting in part). And it keeps courts from having to "perform radical surgery on the statute," which "threatens to enmesh the court in policy choices that legislatures are better suited to make." Gans, *supra*, at 1345.

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[5] Due to the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application," this Court "ha[s] consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski*, 380 U.S. at 486-87 (quoting in part *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *see also* Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (1982) (explaining how overbreadth doctrine aligns with "conventional standing concepts" because "a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law").

These First Amendment protections have been vital to the evolution of American democracy. At critical junctures in this nation's history, leaders of protest movements have sparked debate on public issues and exposed societal injustices by advocating defiance of laws perceived as depriving individuals of equal rights and fundamental dignity. Henry David Thoreau lectured and wrote about the importance of civil disobedience after being jailed in 1846 for refusing to pay taxes, an act of protest against slavery and America's war with Mexico. Stephen R. Alton, *In the Wake of Thoreau: Four Modern Legal Philosophers and the Theory of Nonviolent Civil Disobedience*, 24 LOY. U. CHI. L.J. 39, 40-41 & n.9 (1992). Thoreau urged citizens to "break the law" and "[l]et your life be a counter friction to stop the machine" to avoid becoming agents of the government's injustice to others. *Id.* at 43 & n.24 (alteration in original) (quoting HENRY DAVID THOREAU, *On the Duty of Civil Disobedience* (1849), *reprinted in* WALDEN 85, 92 (Bantam Classic 1981)).

A century later, advocacy of civil disobedience would become essential to the modern Civil Rights Movement. As Dr. Martin Luther King, Jr., explained:

> One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would

> agree with Saint Augustine that "an unjust law is no law at all."

MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, *in* WHY WE CAN'T WAIT 76, 82 (1964). Indeed, it is difficult to imagine the Civil Rights Movement without encouragement of civil disobedience in defiance of the unjust laws that were protested as "no law at all." *Id.* at 82.

If merely encouraging unlawful conduct can be punished as a crime—indeed if, as under the Encouragement Provision, the government can make even advocacy of violating *civil* laws into a felony—dissenting voices will be silenced, making it easier for injustices to become entrenched. Although the government disclaims any interest in using the Encouragement Provision to criminalize "abstract or generalized advocacy of illegality," Pet. Br. 32, that assurance cannot cure the statute's constitutional infirmity. The government's position runs contrary to the plain language of the statute, which would have to be rewritten to exempt protected speech from its ambit in the manner the government suggests. *See* Resp. Br. 23-28. Moreover, government assurances of "prosecutorial restraint" tend to signal "implicit acknowledgment of the potential constitutional problems with a more natural reading." *See Stevens*, 559 U.S. at 480.

If upheld, the Encouragement Provision would offer a model for future governmental efforts to impede protest movements by criminalizing speech that

encourages unlawful conduct as a form of protest. And, even if the government were to refrain from exercising its power to silence calls for civil disobedience by prosecuting vocal proponents, leaders of protest movements may nonetheless "hedge and trim" their speech, *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (per curiam) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)), blunting a traditional tool for stirring debate and facilitating change. That result is antithetical to the core values the First Amendment protects. The Court therefore should reaffirm the First Amendment's protection of advocacy of unlawful conduct, preserving America's long history of activism rooted in encouraging civil disobedience as a force to drive democratic reform and social change.

B. Historical And Contemporary Protest Movements Demonstrate The Importance Of Protecting Speech That Encourages Civil Disobedience As A Means For Effecting Societal Change.

Countless critics of the status quo continue to advocate and practice civil disobedience as a way of protesting laws with which they disagree. A brief review of some examples shows that allowing the government to criminalize encouraging a violation of law would cut deeply into the political freedoms central to the American democratic tradition.

1. Encouragement of Unlawful Conduct in the Abolitionist Movement

"[B]lack abolitionists stand among the originators of civil disobedience," demonstrating "an insistent and distinctive commitment to law breaking, if need be, in the name of justice, liberation, and reform." LEWIS PERRY, CIVIL DISOBEDIENCE: AN AMERICAN TRADITION 78 (2013). Abolitionist leaders gave speeches and disseminated writings encouraging enslaved people to flee, which "certainly was a form of law breaking, as the slave who 'absconded' was described as stealing himself." *Id.* at 73 (footnote omitted).

Southern states attempted to thwart the Abolitionist Movement by passing laws criminalizing speech encouraging enslaved people to escape. *See, e.g.*, An Act to Suppress the Circulation of Incendiary Publications, and for Other Purposes, ch. 66, 1836 VA. ACTS 44 (criminalizing circulation of writings "with intent of advising, enticing, or persuading persons of colour within this commonwealth to make insurrection, or to rebel, or denying the right of masters to property in their slaves"); An Act to Prohibit the Publication, Circulation, or Promulgation of the Abolition Doctrines, 1837 MO. LAWS 3 (making it a crime to intentionally "utter by writing, speaking, or printing, any facts, arguments, reasoning, or opinions, tending directly to excite any slave or slaves, or other persons of color, in this State, to rebellion"). Similar legislation was proposed at the federal level but did not pass in Congress due, at least in part, to First Amendment concerns. LOUIS FILLER, THE CRUSADE

AGAINST SLAVERY 1830-1860, at 98 (Harper & Row 1963) (1960).

Efforts to punish abolitionist advocacy did not deter the movement's leaders from continuing to speak out. Frederick Douglass, who escaped slavery to become one of America's greatest social reformers, orators, writers, and statesmen, was among the courageous abolitionists who encouraged enslaved people to flee, thereby violating the laws that stripped them of liberty and personhood. *See* FREDERICK DOUGLASS, THE HEROIC SLAVE: A CULTURAL AND CRITICAL EDITION 133-35 (Robert S. Levine, John Stauffer & John R. McKivigan eds., 2015). In an 1857 speech, Douglass proclaimed that "so long as they submit to those devilish outrages, and make no resistance," enslaved Americans "will be hunted at the North, and held and flogged at the South." *Id.* at 134.

Gerrit Smith, a wealthy New York landowner who became a prominent abolitionist activist and orator, encouraged enslaved persons to break laws prohibiting their literacy and to disobey all laws perpetuating their enslavement: "Have no conscience against violating the inexpressibly wicked law which forbids you to read it;—nor indeed against violating any other slaveholding law. Slaveholders are but pirates; and the laws, which piracy enacts, whether upon land or sea, are not entitled to trammel the consciences of its victims." STANLEY HARROLD, THE RISE OF AGGRESSIVE ABOLITIONISM: ADDRESSES TO THE SLAVES 159 (2004); Norman K. Dann, *Gerrit Smith*, NAT'L ABOLITION HALL OF FAME & MUSEUM,

https://www.nationalabolitionhalloffameandmuseum.org/gerrit-smith.html [http://perma.cc/Q44W-BSNS].

Encouragement of civil disobedience through both flight from enslavement and defiance of anti-literacy laws was vital to the Abolitionist Movement and helped end slavery, exemplifying the power of speech to bring transformative change to American democracy.

2. Encouragement of Unlawful Conduct in the Women's Suffrage Movement

Protest speech encouraging defiance of gender-discriminatory voting laws was central to the success of the Women's Suffrage Movement. As of 1911, most states restricted the full political franchise to men. *See generally* BERTHA REMBAUGH, THE POLITICAL STATUS OF WOMEN IN THE UNITED STATES: A DIGEST OF THE LAWS CONCERNING WOMEN IN THE VARIOUS STATES AND TERRITORIES (1911) (collecting state statutes and constitutional provisions allowing only men to vote); *see also, e.g.*, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (holding that it is "within the power of a State to withhold" the vote from women), *superseded by constitutional amendment*, U.S. CONST. amend. XIX. And federal law made it a crime to vote without a legal right to do so. Enforcement Act of 1870, ch. 114, § 19, 16 Stat. 140, 144-45.

Although women's disenfranchisement was enshrined in the law, leaders of the suffrage movement actively encouraged women to attempt to

vote unlawfully—a strategy that benefited the movement beyond each protester's moment of defiance at the polls. Encouraging women to attempt to vote helped ensure that at least some women would have standing to litigate the issue, having been prevented from casting their vote. *See* Susan C. Del Pesco, *Quieting the Sentiments*, 37 DEL. LAW., Winter 2019, at 8, 9. Attempts to vote also helped mobilize supporters, as women banded together in large groups at the polls, both to draw attention to the issue and to force change through collective action. *See* 2 HISTORY OF WOMAN SUFFRAGE 587 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881) (recounting that, in 1871, 72 women marched to the polls in Washington, D.C., and attempted to vote). Susan B. Anthony, in particular, "preached militancy to women throughout the presidential campaign of 1872, urging them to claim their rights under the Fourteenth and Fifteenth Amendments by registering and voting in every state in the Union." ALMA LUTZ, SUSAN B. ANTHONY: REBEL, CRUSADER, HUMANITARIAN 198 (1959). Encouragement of voting in violation of state and federal laws was a crucial component of the Women's Suffrage Movement. And it is precisely that type of provocative protest speech that stirs debate on public issues and implicates the core values the First Amendment protects.

3. Encouragement of Unlawful Conduct in the Civil Rights Movement

Advocacy of civil disobedience was an iconic aspect of the twentieth-century Civil Rights Movement, which relied on organized protests, marches, and sit-ins—often in violation of state and local laws—to expose the injustice of racial inequality and segregation. Many of those laws had been enacted during Reconstruction, when states and localities began mandating racial segregation. *See generally* FRANKLIN JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO (1918) (surveying state laws mandating segregation of schools, marriage, transportation, public places, and troops).

At first, the NAACP led efforts to challenge those laws and fight segregation using lobbying and litigation. David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 647-48 (1995). But then new strategies focused on individual resistance began to take shape, exemplified by Rosa Parks's 1955 refusal to give up her seat on a bus to accommodate white passengers. *See id.* at 648-49. Her act of defiance—one of the most storied examples of nonviolent civil disobedience in modern memory—prompted widespread encouragement of that type of unlawful conduct as a defining strategy of the Civil Rights Movement. *See* Jonathan C. Augustine & John K. Pierre, *The Substance of Things Hoped For: Faith,*

Social Action and Passage of the Voting Rights Act of 1965, 46 CUMB. L. REV. 425, 427 n.4, 444 n.110 (2015).

Inspired by Rosa Parks and other individuals' acts of defiance, groups like the Student Non-Violent Coordinating Committee (SNCC), the Southern Christian Leadership Conference, and the Alabama Christian Movement for Human Rights urged citizens to violate segregation mandates as a means of protesting the laws' injustice while forcing citizens and politicians to "confront[] the immorality of segregation." *See* Oppenheimer, *supra*, at 648-54 (discussing organized sit-ins to desegregate lunch counters, "swim-ins to desegregate swimming pools and public parks, read-ins to desegregate libraries, and pray-ins (or kneel-ins) to desegregate churches"). Indeed, SNCC's reliance on encouragement of unlawful conduct in organizing lunch-counter sit-ins is credited with desegregating restaurants in 27 Southern cities within the first 6 months of those protests. Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 L. & HIST. REV. 93, 100-01 (2015) (noting that both owners of private establishments and city governments desegregated restaurants in response to sit-ins). And, on an even broader scale, the "sit-in movement transformed the agenda of the national civil rights debate." *Id.* at 101.

Encouragement of civil disobedience helped change public opinion regarding the injustice of racial segregation, and that change in public opinion led to changes in the law. *See* Oppenheimer, *supra*, at 678.

But a statute criminalizing the encouragement of unlawful conduct would have threatened that form of civil-rights advocacy, jeopardizing the First Amendment's core protection of the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

4. Encouragement of Unlawful Conduct in Contemporary Protest Movements

Encouragement of civil disobedience is just as essential for protest movements today. Governments at the state, local, and federal levels continue to grapple with significant societal issues, and proponents of legal change often rely on the same time-tested advocacy tools—including encouragement of civil disobedience—to publicize perceived injustices and spur public debate.

Advocacy of civil disobedience played a central role in grassroots responses to governmental actions during the COVID-19 pandemic, including protests against government overreach, as well as demands for more protective measures. For example, when California promulgated rules requiring "places of worship" in specified counties to "close all indoor operations," CAL. DEP'T OF PUB. HEALTH, *Statewide Public Health Officer Order* (2020), some clergy reached out to their congregants to say, "We will be having church" and "we want you to come to church." *See, e.g.*, Greg Fairrington, *To Our Community and*

Church: We Will Not Allow Fear to Influence Us., FACEBOOK (July 13, 2020), https://www.facebook.com/watch/?v=569036540670239 [http://perma.cc/MB6T-3NDQ]. Religious leaders in other states advocated similar faith-based civil disobedience. *See, e.g.*, Daniel Burke, *A Louisiana Pastor Defies a State Order and Holds a Church Service with Hundreds of People*, CNN (Mar. 18, 2020), https://www.cnn.com/2020/03/18/us/louisiana-pastor-coronavirus/index.html [http://perma.cc/G5MX-XSGY] (reporting pastor's urging congregants to "[k]eep going to church" despite a state order limiting large gatherings).

At the other end of the spectrum, students concerned about the lack of protective measures in response to rising COVID-19 cases turned to an oft-used form of youth protest: encouraging classmates to accompany them in school walkouts. *See, e.g.*, Rachel Tillman & David Mendez, *Students Across U.S. Lead Waves of COVID Policy Walkouts*, SPECTRUM NEWS (Jan. 19, 2022, 5:50 AM), https://spectrumnews1.com/ca/la-west/coronavirus/2022/01/19/students-across-u-s--lead-waves-of-walkouts-over-covid-policies [http://perma.cc/7RYT-F3RG] (discussing student walkouts in New York, California, Massachusetts, and Illinois). Student walkouts can violate not only school attendance policies but also truancy laws, which have been enacted in every state. *See* Jason Scronic, *Take Your Seats: A Student's Ability to Protest Immigration Reform at Odds with State Truancy and Compulsory Education Laws*, 2 FLA. A&M U. L. REV. 185, 188 &

n.23 (2007) (citing each state's truancy or compulsory-attendance law).

In Maryland, for example, students from at least 21 schools in one district staged walkouts over rising COVID-19 cases, demanding more protective measures and increased virtual learning opportunities. John Gonzalez, *'A COVID Breeding Ground': Maryland Students Stage Walkout, Demand Virtual Learning*, ABC7 NEWS (Jan. 22, 2022), https://katv.com/news/coronavirus/a-covid-breeding-ground-maryland-students-stage-walkout-demand-virtual-learning [http://perma.cc/AS9P-AAQV]. And, in New York, student activists similarly encouraged other students to "[j]oin students in a walkout," disregarding New York's compulsory attendance law. NYC Student Walkout for COVID Safety (@NYCSW4COVSafety), TWITTER (Jan. 9, 2022, 4:10 PM), https://twitter.com/NYCSW4COVSafety/status/1480300917975048192 [http://perma.cc/AJ8Q-J5GJ]; N.Y. EDUC. § 3205(1)(a).

Encouragement of student walkouts in violation of compulsory-attendance and truancy laws also played a role in increasingly prevalent protests over gun control. Following the murder of 17 students during the 2018 school shooting at Marjory Stoneman Douglas High School in Parkland, Florida, a youth-outreach organization encouraged students to protest, "calling on 'students, teachers, school administrators, parents and allies' to participate in a nationwide 17-minute walkout." William Cummings, *Gun Control Demonstrations Planned Around the U.S. After Florida*

School Shooting, USA TODAY (Feb. 19, 2018), https://www.usatoday.com/story/news/nation/2018/02/19/gun-control-rallies-scheduled/352423002/ [http://perma.cc/LRA6-TZFA] (quoting event organizers).

Similarly, following the 2022 shooting at an elementary school in Uvalde, Texas, individuals flooded social media to express viewpoints on gun control and encourage students to walk out of class in protest. *See, e.g.*, Corky Siemaszko, *Students Stage Walkouts Across U.S. to Protest Texas School Massacre*, NBC NEWS (May 26, 2022, 4:15 PM), https://www.nbcnews.com/news/us-news/students-stage-walkouts-us-protest-texas-school-massacre-rcna30735 [http://perma.cc/ZZA3-Y6LT] ("Thousands of students staged walkouts at schools and college campuses across the country Thursday to demand stricter gun control in the wake of the Texas school massacre that left 19 students and two teachers dead."). Some even urged ongoing truancy until gun-control legislation is in place. *See, e.g.*, Sheryl Recinos (@MdSheryl), TWITTER (May 26, 2022, 2:21 PM), https://twitter.com/MdSheryl/status/1529905592470368256 [http://perma.cc/J5CL-GSG4] ("I strongly encourage every kid and every teacher to walk out and stay out until we pass real gun reform legislation."); Classy Crustatio (@ClassyCrustatio), TWITTER (May 27, 2022, 12:17 PM), https://twitter.com/ClassyCrustatio/status/1530236764022898688 [http://perma.cc/V3SM-69LR] ("I encourage every student to walk out. . . . Until [politicians] reform gun law don't go back to school.").

Students often participated in these walkouts knowing the consequences that may result. *See, e.g.*, Denise Lavoie, *Schools Brace for Massive Student Walkouts over Gun Violence*, PBS (Mar. 11, 2018, 1:54 PM), https://www.pbs.org/newshour/nation/schools-brace-for-massive-student-walkouts-over-gun-violence [http://perma.cc/2CGJ-Z2GF] (interviewing eighth-grade student who planned to participate in a nationwide walkout "even [if] it means getting suspended"); *see also* Scronic, *supra*, at 186-88 & n.23 (describing truancy laws and walkout-related violations). For students under 18 who lack the right to express their beliefs at the ballot box, walkouts have long served as a critical form of civil disobedience and a vital platform for youth protest speech.

Encouragement of gun-related civil disobedience also has played a role at the other end of the political spectrum for those who believe gun laws are already too restrictive in violation of Second Amendment rights. As an act of defiance, some gun owners have refused to register their guns under applicable statutes and have encouraged others to join them. As the chairman of a California gun-owners group advocating noncompliance with a registration law put it: "I'm encouraging all gun owners to stand up for their rights now before they have to fight for their rights later." Seth Mydans, *California Gun Control Law Runs into Rebellion*, N.Y. TIMES (Dec. 24, 1990), https://www.nytimes.com/1990/12/24/us/california-gun-control-law-runs-into-rebellion.html [http://perma.cc/3PL8-YAPQ].

Similarly, in Boulder, Colorado, the Second Amendment group Rally for Our Rights distributed T-shirts and stickers reading "We Will Not Comply" to encourage noncompliance with a gun-registration law, while a local columnist and television host encouraged others by publicizing his own refusal to comply. Valerie Richardson, *Boulder 'Assault Weapons' Ban Met with Mass Noncompliance*, WASH. TIMES (Jan. 3, 2019), https://www.washingtontimes.com/news/2019/jan/3/boulder-colorado-assault-weapons-ban-met-mass-non-/ [http://perma.cc/RR74-66KX].

Those who refuse to comply with registration requirements know that their actions may result in punishment but characterize their advocacy of resistance as part of the United States's longstanding tradition of using civil disobedience as a tool to advocate for change. A California field representative for the National Rifle Association called it "civil disobedience in the finest traditional sense." *See* Mydans, *supra*. Opinions may differ as to whether those protests or any of the contemporary acts of civil disobedience discussed above are justified. But allowing the government to criminalize the encouragement of those actions would impede debate on issues of constitutional importance.

As historical and present-day protest movements confirm, encouragement of civil disobedience is a powerful tool for unifying citizens to push for social reform, calling attention to perceived societal injustices and promoting the public exchange of differing viewpoints. Criminalizing the mere

encouragement of law breaking would unnecessarily chill protest speech that transforms individual acts into cohesive, national movements capable of forcing society at large to confront injustices within American democracy. The Court should reaffirm that the First Amendment protects abstract advocacy—or "encouragement"—of unlawful conduct, preserving America's long history of activism rooted in encouraging civil disobedience as a force to drive social and political change.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton Street
Austin, Texas 78705
(713) 966-0409
ebusby@law.utexas.edu

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

JAMES M. DIAZ
DANIEL M. ORTNER
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
510 Walnut Street, Suite 1250
Philadelphia, PA 19106

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