No. 22-179

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HELAMAN HANSEN

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

REPLY BRIEF FOR THE UNITED STATES

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The Ninth Circuit invoked the First Amendment overbreadth doctrine to invalidate Congress's longstanding prohibition on inducing or encouraging illegal immigration. Respondent's defense of that extraordinary result rests largely on his assertion that the statutory terms "encourages" and "induces" must be construed to encompass large swaths of protected speech, such as policy advocacy, legal advice, and expressions of personal support. Resp. Br. 1, 16-17. But respondent acknowledges that in criminal law, those words can—and routinely do—refer more narrowly to facilitation and solicitation of illegal activity. That should resolve this case: Statutes must be construed to avoid constitutional problems, not to create them, and giving "encourages" and "induces" their traditional criminal-law meaning would eliminate the overbreadth problem the Ninth Circuit perceived.

The Ninth Circuit did not suggest that 8 U.S.C. 1324(a)(1)(A)(iv) would violate the First Amendment if

it prohibited only soliciting or facilitating illegal activity. But respondent contends that the statute would still be overbroad because it prohibits soliciting and facilitating certain civil immigration violations, not just criminal offenses. That is wrong. This Court has long recognized that the First Amendment does not protect speech that solicits or facilitates civil violations. And there is no basis in precedent or principle for the suggestion that Congress must criminally punish individual noncitizens who remain in the country unlawfully in order to criminally punish those who assist them—especially those who, like respondent, do so for profit.

More fundamentally, none of respondent's arguments supply what this Court has required to justify the overbreadth doctrine's departure from usual principles of constitutional adjudication: A showing of a *realistic* danger that the challenged law will significantly compromise the First Amendment rights of others. Section 1324(a)(1)(A)(iv) has been on the books for decades and traces its roots to 1885. Yet neither respondent nor his amici have identified even a single prosecution based on protected speech. Nor have they offered any evidence that Section 1324(a)(1)(A)(iv) was thought to reach such speech before 2017, when a prior Ninth Circuit panel invited amici to urge a sweeping construction of the statute in order to invalidate it. This Court should reject respondent's effort to use hypothetical constitutional problems to preclude the application of Section 1324(a)(1)(A)(iv) to his own conduct, which was not even arguably protected by the First Amendment.

A. Section 1324(a)(1)(A)(iv) Is A Prohibition On Facilitating Or Soliciting Unlawful Conduct

Section 1324(a)(1)(A)(iv) uses familiar criminal-law terms to prohibit facilitating or soliciting immigration

violations. Gov't Br. 20-28. Respondent fundamentally misreads the statute in insisting that it is instead a sweeping ban on speech.

1. Respondent does not dispute (*e.g.*, Br. 36) that the terms "encourage" and "induce" are commonplace in statutes defining facilitation and solicitation crimes. Gov't Br. 21-24; see Montana et al. Amici Br. 8 & App. A (Montana Br.) (providing examples from "[a]ll 50 States"). The current edition of *Black's*, for example, defines "encourage" as used in "criminal law" to mean "to instigate; to incite to action; to embolden; to help," followed by a cross-reference to "aid and abet." *Black's Law Dictionary* 667 (11th ed. 2019) (capitalization and emphasis omitted). The same cross-reference also appeared in the 1979 edition, in language following the portion respondent quotes (Br. 15). See *Black's Law Dictionary* 473 (5th ed. 1979). If respondent were correct that "encourage" or "induce" must be construed as broadly as the Ninth Circuit construed them here, all of the state and federal laws using those terms would be subject to facial constitutional attack.

Seeking to avoid that implausible result, respondent contends that most facilitation and solicitation statutes use the terms "encourage" and "induce" along with "other terms that support a narrowing construction" under the *noscitur a sociis* canon. Resp. Br. 36 (emphasis omitted). But that canon is merely a tool for choosing among a word's "permissible meaning[s]." Antonin Scalia & Bryan A. Garner, *Reading Law* 195 (2012) (Scalia & Garner); see *United States* v. *Williams*, 553 U.S. 285, 294 (2008). Respondent's embrace of the *noscitur* canon to construe "encourage" and "induce" to refer to facilitation and solicitation in other statutes thus

confirms that those words need not bear the sweeping interpretation he would give them here.

Furthermore, as respondent acknowledges (Br. 2-3), an earlier statute *did* include additional terms in a longer list. See Act of Feb. 5, 1917 (1917 Act), ch. 29, § 5, 39 Stat. 879 (prohibition against "induc[ing], assist[ing], encourag[ing], or solicit[ing]" noncitizens for contract labor). In 1952, Congress drew on that earlier statute to enact Section 1324(a)(1)(A)(iv)'s direct predecessor, a prohibition on "encourag[ing] or induc[ing]" a noncitizen to enter the United States unlawfully. Immigration and Nationality Act, ch. 477, § 274(a)(4), 66 Stat. 229.

Respondent would treat that history as evidence that Congress repudiated the narrow interpretation of "encourage" and "induce" that the *noscitur* canon would have supported for the pre-1952 language. Resp. Br. 24-25. But respondent fails to rebut two historical points from the government's opening brief (at 26). First, when Congress pared back the list of overlapping verbs, it was merely repeating this Court's more succinct description of the pre-1952 prohibition. See *United States* v. *Hoy*, 330 U.S. 724, 727 (1947). Second, the 1952 amendments deleted a provision that had specifically focused on speech by imposing a ban on "induc[ing], assist[ing], encourag[ing], or solicit[ing]" a noncitizen to come to the United States "by promise of employment through advertisements." 1917 Act § 6, 39 Stat. 879.

By adopting a more succinct formulation and omitting the separate provision focused on speech, Congress made clear that it was carrying forward into what is now Section 1324(a)(1)(A)(iv) the traditional criminal-law meanings of "encourage" and "induce," not enacting a novel ban on abstract advocacy. "When a statutory

term is obviously transplanted from another legal source, it brings the old soil with it." *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation and internal quotation marks omitted). "Here, we have buckets of soil to understand Congress's meaning." Pet. App. 64a (Bumatay, J., dissenting from the denial of rehearing en banc). And respondent is wrong to suggest (Br. 25-26) that later amendments warrant disregarding those established meanings. Congress has in some respects expanded the *conduct* that the prohibition covers (Gov't Br. 5-7), but it has never transformed it into a ban on everyday speech.

The inference that Section 1324(a)(1)(A)(iv) incorporates the traditional criminal-law meanings of "encourage" and "induce" is bolstered by the pairing of those cognate terms. See Scalia & Garner 197-198 (approvingly citing decision that applied *noscitur a sociis* to a pair of disjunctive terms). Respondent's interpretation, by contrast, cannot make sense of the inclusion of both words. A prohibition against "inspir[ing]" a noncitizen with the "courage, spirit, or hope" to enter or remain in the United States unlawfully, Resp. Br. 15 (citation omitted), would leave no real work for "induce."

2. Section 1324(a)(1)(A)(iv)'s additional text and context further confirm that it is aimed at solicitation and facilitation, not abstract advocacy.

a. Section 1324(a)(1)(A)(iv)'s reference to "an alien" requires that a defendant's activity be directed to a particular noncitizen or noncitizens. Pet. App. 7a; see Gov't Br. 26-27. Thus, although the unlawful inducement need not occur "one-on-one" (Resp. Br. 17), respondent errs in asserting (*ibid.*) that the statute could encompass an "op-ed or public speech."

In addition, Section 1324(a)(1)(A)(iv) is best read to require proof that the defendant acted with the mens rea traditionally required for accomplice liability: He must "'participate in [the violation] as in something that he wishes to bring about' and 'seek by his action to make it succeed,'" a standard that is "satisfied when a person actively participates in [the] criminal venture with full knowledge of the circumstances." *Rosemond* v. *United States*, 572 U.S. 65, 76-77 (2014) (citation omitted); see Gov't Br. 27-28. That requirement follows from the terms Congress chose. One would not naturally say that a person "encourages" or "induces" conduct he does not intend to occur. And where, as here, those terms are used in their criminal-law sense to connote solicitation or facilitation, they carry the associated mens rea requirement. The federal aiding-and-abetting statute, for example, does not include an express mens rea element; instead, the traditional requirement is inherent in the statute's list of verbs, including "induce[]." 18 U.S.C. 2(a); see *Rosemond*, 572 U.S. at 76-77. The parallel language in Section 1324(a)(1)(A)(iv) should be interpreted the same way, and the statute thus does not forbid conduct that merely has the inadvertent effect of encouraging or inducing a noncitizen to remain in the United States unlawfully. Contra Resp. Br. 10, 16, 19.[1]

Finally, the statute also requires proof that the defendant acted "knowing or in reckless disregard" that the noncitizen's conduct would be "in violation of law." 8 U.S.C. 1324(a)(1)(A)(iv). That additional requirement distinguishes Section 1324(a)(1)(A)(iv) from typical criminal statutes, which require only "factual knowledge as

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[1] That interpretation of Section 1324(a)(1)(A)(iv) is also consistent with the "presumption of scienter" in criminal statutes. *Ruan* v. *United States*, 142 S. Ct. 2370, 2377 (2022); see Gov't Br. 27-28.

distinguished from knowledge of the law." *Bryan* v. *United States*, 524 U.S. 184, 192 (1998) (citation omitted).

b. Respondent objects (Br. 19-20) that a noncitizen's immigration status can be difficult to determine. But the burden is on the government to prove knowledge or reckless disregard of illegality. And in the criminal context, recklessness requires a showing that the defendant was subjectively aware of and "'consciously disregard[ed]' a substantial risk." *Voisine* v. *United States*, 579 U.S. 686, 691 (2016) (citation omitted); see *Farmer* v. *Brennan*, 511 U.S. 825, 836-837 (1994).

Respondent also asserts (Br. 29-30) that Section 1324(a)(1)(A)(iv)'s requirement that the defendant acted with knowledge or reckless disregard of the illegal nature of the noncitizen's conduct precludes interpreting the statute to require that the defendant intentionally facilitated or solicited that conduct. But as shown above, that requirement is inherent in the terms "encourage" and "induce" and the complicity principles they incorporate. Respondent thus errs in invoking (Br. 30) *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010), which rejected a party's attempt to replace an express "knowledge" requirement with a "specific intent" requirement directed at the same element. *Id.* at 16-17.

Respondent emphasizes (Br. 30) that the pre-1986 statute prohibited "willfully or knowingly" encouraging or inducing a noncitizen to enter the United States unlawfully, and Congress omitted those modifiers in its 1986 amendments. See 8 U.S.C. 1324(a)(4) (1982). As explained above, however, the words "encourages or induces" themselves connote intentional conduct when used in defining facilitation and solicitation offenses. Congress may well have viewed the omitted language as

unnecessary. The adjacent provisions similarly lack an express mental-state requirement for the actus reus and yet have been construed to have one. Gov't Br. 28.

c. The broader statutory context also cuts against respondent's maximally speech-restrictive reading of Section 1324(a)(1)(A)(iv). As respondent acknowledges (Br. 4), the "[o]ther subsections of Section 1324(a)(1)(A) focus on conduct." In fact, Section 1324(a)(1)(A) is a single sentence prohibiting multiple criminal acts. Each of the other clauses targets conduct in which the defendant directly or indirectly participates in specific activity involving noncitizens entering or remaining in the United States illegally, such as "transport[ing]" or "conceal[ing]" them. 8 U.S.C. 1324(a)(1)(A)(ii) and (iii). Section 1324(a)(1)(A)(iv) is most naturally understood as having a similar focus.

Respondent therefore gets things backwards in asserting (Br. 26-27) that the adjacent provisions' focus on conduct suggests that Congress radically changed course in Subparagraph (iv) to focus there (and only there) on speech. And respondent does not defend the Ninth Circuit's mistaken view that construing Section 1324(a)(1)(A)(iv) to focus on conduct would render it superfluous. Pet. App. 8a-9a; cf. Resp. Br. 27. Section 1324(a)(1)(A)(iv) plays an important role in federal efforts to combat illegal immigration and is the only provision in Section 1324(a) that would cover respondent's own scheme to profit by deceiving noncitizens into remaining in the country unlawfully. Gov't Br. 38-39.

Respondent contends that, if Congress had sought to enact a "ban [on] solicitation or aiding and abetting" in Section 1324(a)(1)(A)(iv), it would have used the terms "'solicit,'" "'aid,'" or "'abet,'" as it has elsewhere. Resp. Br. 27-28 (citations omitted). But respondent's own

principal example of such usage (*ibid.*) only confirms that the terms Congress instead employed here are close cousins, and that these related words have long been used in various combinations to define facilitation and solicitation. See 18 U.S.C. 373(a) ("solicits, commands, *induces*, or otherwise endeavors to persuade") (emphasis added); see also 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(a), at 457 (3d ed. 2018) (LaFave).

To the extent respondent continues to rely (Br. 28) on the separate aiding-and-abetting provision in Section 1324(a)(1)(A)(v)(II), his reliance is misplaced. That provision forbids "aid[ing] or abet[ting]" violations of Section 1324(a)(1)(A) *itself*, rather than the underlying immigration violations. 8 U.S.C. 1324(a)(1)(A)(v)(II). When Congress enacted the aiding-and-abetting provision in 1996, it had no reason to revise the decades-old language of Section 1324(a)(1)(A)(iv), which—unlike the new provision—covers solicitation as well.

Finally, respondent objects (Br. 31) that Section 1324(a)(1)(A)(iv) cannot be construed as a prohibition on facilitation because "aiding-and-abetting requires that the principal actually commit a criminal act," whereas Section 1324(a)(1)(A)(iv) does not require a completed immigration violation. But that aspect of the statute is consistent with the traditional understanding of solicitation, which does not require a completed offense. 2 LaFave § 11.1, at 264; see Pet. App. 51a, 53a (Bumatay, J., dissenting from the denial of rehearing en banc).

3. To the extent Section 1324(a)(1)(A)(iv) is amenable to multiple interpretations, respondent fails to justify the Ninth Circuit's adoption of a constitutionally deficient one. Courts construe statutes to avoid, not invite, constitutional problems. Gov't Br. 35. Particularly

in the context of a First Amendment overbreadth challenge like this one, where the challenged provision has many legitimate applications, federal courts have not only "the power to adopt narrowing constructions," but "the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos* v. *Barry*, 485 U.S. 312, 330-331 (1988); see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

Respondent observes that constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." Resp. Br. 24 (citation omitted). But respondent's own discussion of the *noscitur* canon (Br. 36) makes clear that the terms "encourage" and "induce" are susceptible to being read to refer narrowly to facilitation and solicitation. See pp. 3-4, *supra*. It is thus at least plausible to construe those terms to carry that traditional criminal-law meaning in Section 1324(a)(1)(A)(iv). And where, as here, there is a "plausible statutory construction[]" that would avoid "a multitude of constitutional problems," courts have a duty to adopt it even if they might otherwise interpret the statute differently. *Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005).

B. Section 1324(a)(1)(A)(iv) Is Not Unconstitutionally Overbroad

When properly construed as a prohibition on facilitation and solicitation, Section 1324(a)(1)(A)(iv) is not overbroad. The statute is plainly valid as applied to the conduct it has traditionally been used to prosecute. And respondent has failed to supply the essential prerequisite for an overbreadth challenge: "[A] realistic danger

that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Instead, the submissions of respondent and his supporting amici—who have long engaged in the very activities they claim the statute chills—demonstrate just how unrealistic any danger is here.

1. The government's opening brief illustrated (at 36-37) the breadth of Section 1324(a)(1)(A)(iv)'s "plainly legitimate sweep," *Williams*, 553 U.S. at 292. In particular, it cataloged many prosecutions for conduct that, like respondent's own, enjoys no First Amendment protection. In contrast, respondent—who bears the burden to show overbreadth that is "*substantial*, not only in an absolute sense, but also relative" to the statute's legitimate applications, *ibid.*—cannot identify even a single Section 1324(a)(1)(A)(iv) prosecution that has violated a defendant's First Amendment rights.

Respondent's amici (though not respondent himself) invoke the same prior case that the Ninth Circuit identified as "troubling." Pet. App. 13a; see, *e.g.*, Religious Orgs. Amici Br. 32-33. But that case, *United States* v. *Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012), was not a prosecution based on protected speech, see Gov't Br. 46. In *Henderson*, a federal official induced a noncitizen to remain in the United States unlawfully so that the official could continue to employ the noncitizen as a housekeeper. 857 F. Supp. 2d at 194-197. In a colloquy at a post-trial hearing, a prosecutor allowed for the hypothetical possibility that an attorney's advice could violate Section 1324(a)(1)(A)(iv). *Id.* at 203-204. The defendant in *Henderson* was not an attorney, and the case did not involve legal advice to a client. As discussed

below, Section 1324(a)(1)(A)(iv)'s potential application to attorneys is both limited and consistent with the criminal law's potential application to lawyers more generally. See pp. 14-15, *infra*. In any event, a decade-old colloquy before a single district court hardly shows a realistic danger of chilling protected speech.

The Ninth Circuit also erred in suggesting that, for overbreadth purposes, Section 1324(a)(1)(A)(iv) should be evaluated by ignoring any conduct that might also be prosecuted under other statutes and assessing the provision's "independent work." Pet. App. 10a. This Court's overbreadth precedents require considering a challenged statute's "legitimate sweep," *Williams*, 553 U.S. at 292, not its unique applications. Gov't Br. 40.

Respondent likewise errs in contending that the Court should consider whether the government has "less drastic means for achieving the same basic purposes." Resp. Br. 21 (citation omitted). The Court often incorporates such means-end scrutiny into the substantive First Amendment standards that define permissible and impermissible limits on speech. See, *e.g.*, *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373, 2385-2386 (2021) (applying "exacting scrutiny"). But overbreadth doctrine takes those substantive standards as given and asks a different question: Whether the statute's impermissible applications are "*substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292. If the challenger fails to make that showing, the statute is not overbroad, even if the challenger can hypothesize narrower laws that might serve the same purpose. See, *e.g.*, *Taxpayers for Vincent*, 466 U.S. at 800; *Broadrick*, 413 U.S. at 618.

Respondent's account (Br. 22-23 & n.3) of the available alternatives is also unsound. That respondent's own

conduct happened to violate the prohibitions on mail and wire fraud, see 18 U.S.C. 1341, 1343, does not undermine Congress's reasons for banning soliciting and facilitating unlawful immigration activity. The different prohibitions vindicate different interests—one in preventing fraud, the other in enforcing the immigration laws. Respondent also disregards the significant gaps that Section 1324(a)(1)(A)(iv) fills. For example, acts that facilitate a noncitizen's entry but do not involve physically accompanying the noncitizen to the border (or arranging to have the noncitizen accompanied) may not qualify as "bring[ing]" a noncitizen to the United States. 18 U.S.C. 1324(a)(1)(A)(i); see *United States* v. *Garcia-Paulin*, 627 F.3d 127, 133-134 (5th Cir. 2010); see also, *e.g.*, *United States* v. *Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012) (limiting Section 1324(a)(1)(A)(iii)'s prohibition of "harboring").

2. To the extent Section 1324(a)(1)(A)(iv) reaches speech, it applies only to speech that solicits or facilitates illegal activity, which this Court has recognized to be one of the historically grounded categories of speech "undeserving of First Amendment protection." *Williams*, 553 U.S. at 298; see Gov't Br. 40-44. Respondent's contrary arguments lack merit, and certainly do not establish substantial overbreadth.

a. At the outset, respondent errs in suggesting (Br. 18-19) that Section 1324(a)(1)(A)(iv) violates the First Amendment unless it satisfies the test set forth in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (per curiam). That decision defines the traditional First Amendment exception for incitement, or "advocacy" that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. This case involves a distinct and equally well-established

exception for speech "intended to induce or commence illegal activities." *Williams*, 553 U.S. at 298; see, *e.g.*, *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (separately listing "incitement" and "speech integral to criminal conduct").

b. Respondent is also wrong to insist that Section 1324(a)(1)(A)(iv) prohibits merely saying to a noncitizen, "I encourage you to reside in the United States." Resp. Br. 14 (quoting Pet. App. 11a). Even personalized statements encouraging a noncitizen's unlawful immigration activity do not necessarily violate Section 1324(a)(1)(A)(iv). The government would have to satisfy the other statutory requirements, including those drawn from traditional aiding-and-abetting principles (which require more than mere abstract or de minimis exhortations). Gov't Br. 33. Courts have long declined to read facilitation and solicitation statutes with wooden literalism, in part to avoid First Amendment concerns. See, *e.g.*, 2 LaFave § 11.1(c), at 275 ("[T]he crime of solicitation should not be extended to persons who merely express general approval of criminal acts."). This Court took a similar approach in *Williams*, which held that a prohibition on "promot[ing]" child pornography should not be interpreted to "refer to abstract advocacy," and therefore did not reach merely making the statement, "'I encourage you to obtain child pornography.'" 553 U.S. at 300.

c. Finally, Section 1324(a)(1)(A)(iv), like other facilitation and solicitation laws, does not apply to good-faith legal advice. Gov't Br. 34. Respondent's contrary contentions (*e.g.*, Br. 1, 17) disregard the "critical distinction," reflected in the rules of professional ethics, "between presenting an analysis of legal aspects of questionable conduct" and "knowingly counseling or

assisting a client" to break the law. Model Rules of Prof'l Conduct R. 1.2(d) cmt. 9 (2018). The issue of potential application of the criminal law to a lawyer is not unique to Section 1324(a)(1)(A)(iv) and is no reason to invalidate that provision. Rather, courts should follow the usual course, under which "[t]he traditional and appropriate activities of a lawyer in representing a client in accordance with the requirements of the applicable lawyer code are relevant factors for the tribunal in assessing the propriety of the lawyer's conduct under the criminal law." Restatement (Third) of the Law Governing Lawyers § 8 (2000).

Many of respondent's hypotheticals involving attorneys would not violate Section 1324(a)(1)(A)(iv) for an additional reason: As the government's opening brief explained (Br. 34), a noncitizen's continued residence in the United States is not "in violation of law" within the meaning of the statute if the noncitizen is in removal proceedings or pursuing other bona fide efforts to obtain relief from the government. Cf. Resp. Br. 17 n.1.

3. Not only do respondent and his supporting amici fail to identify any actual Section 1324(a)(1)(A)(iv) prosecutions of protected speech, but their own examples of ongoing advocacy and outreach on immigration issues confirm that a speech-chilling interpretation is a strawman of the Ninth Circuit's invention. Notwithstanding that Section 1324(a)(1)(A)(iv) has been on the books in substantially its current form for more than 30 years, the activities that amici claim that the provision chills are ones in which they openly engage. See, *e.g.*, Religious Orgs. Amici Br. 5-14 (public advocacy, legal clinics, distribution of "know your rights" materials); AAJC Amici Br. 9-29 (similar). Amici's evident belief that they have been and remain free to do so presumably reflects

the absence of any substantial concern that Section 1324(a)(1)(A)(iv) actually prohibits those activities. And amici identify no demonstrated instance in which the government has sought to prosecute such activities under Section 1324(a)(1)(A)(iv).[2]

That state of affairs cannot be attributed to "*noblesse oblige*," Resp. Br. 20 (citation omitted). It is instead a result of the limitations inherent in Section 1324(a)(1)(A)(iv), to which the government must adhere. And this Court can remove any doubt by holding, in the course of rejecting respondent's overbreadth challenge, that Section 1324(a)(1)(A)(iv) is a traditional prohibition on soliciting or facilitating illegal activity. Such a holding would make clear that the statute focuses on unlawful conduct and reaches only speech that has long been understood to be "categorically excluded from First Amendment protection." *Williams*, 553 U.S. at 297. And it would foreclose any future attempt to apply the statute to the sorts of speech that respondent and his amici posit.

C. Section 1324(a)(1)(A)(iv)'s Coverage Of Civil Immigration Violations Does Not Establish Overbreadth

The Ninth Circuit did not suggest that Section 1324(a)(1)(A)(iv) would violate the First Amendment if

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[2] Several amici claim that the government has "[w]eaponized" Section 1324(a)(1)(A)(iv) to chill speech by journalists. First Amend. Coalition et al. Amici Br. 13 (emphasis omitted). But their sole evidence is a 2019 letter in which the Department of Homeland Security cited that provision in describing an investigation for "possibly assisting migrants in crossing the border illegally and/or as having some level of participation in" attacks on Border Patrol agents. Letter from Randy J. Howe, Exec. Dir., Office of Field Operations, U.S. Customs & Border Prot., to Mana Azarmi, Ctr. for Democracy & Tech. 1 (May 9, 2019), perma.cc/G9GM-SRX3.

it were interpreted to prohibit only facilitation and solicitation. Respondent asserts, however, that Section 1324(a)(1)(A)(iv) would be overbroad even if so interpreted on the theory that Congress may not prohibit speech that facilitates or solicits "*civil* immigration violations." Resp. Br. 38. Respondent and his amici advance two versions of that argument, but neither has merit. And even if those fallback arguments were correct, they would at most support invalidating certain applications of Section 1324(a)(1)(A)(iv); they would not justify the Ninth Circuit's facial overbreadth holding.

1. Respondent principally asserts (Br. 41-44) that speech soliciting or facilitating civil violations enjoys full First Amendment protection. That is wrong. This Court has sometimes described the relevant First Amendment exception using the shorthand "speech integral to criminal conduct." *Stevens*, 559 U.S. at 468 (citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). But the Court has also repeatedly recognized that similar principles apply to speech integral to civil violations.

Indeed, just a year after deciding *Giboney*—the canonical case in this area—the Court specifically rejected the very distinction respondent proposes. In *Giboney*, the Court had upheld an injunction barring a union's picketing activity because that picketing was "an integral part of conduct in violation of a valid criminal statute" prohibiting restraints of trade. 336 U.S. at 498. In *Building Service Employees International Union* v. *Gazzam*, 339 U.S. 532 (1950), a union challenging a similar injunction sought to distinguish *Giboney* on the ground that the statute in *Giboney* "had criminal sanctions" whereas the law in *Gazzam* did not. *Id.* at 540. This Court squarely rejected that distinction,

explaining that "[m]uch public policy does not readily lend itself to accompanying criminal sanctions." *Ibid.*[3]

The Court's decision in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), further confirms that the government may proscribe speech integral to civil violations—in that case, discriminatory employment advertisements. *Id.* at 387-388. The government may thus "prohibit employers from discriminating in hiring on the basis of race," even when the discrimination is accomplished partly or entirely through speech, such as a sign advertising a position as open to "'White Applicants Only.'" *Rumsfeld* v. *FAIR, Inc.*, 547 U.S. 47, 62 (2006).

Respondent objects (Br. 40 n.8) that *Pittsburgh Press* involved commercial speech. But this Court rejected that distinction in *Williams*, emphasizing that the "categorical exclusion" from First Amendment protection recognized in *Pittsburgh Press* "is based not on the less privileged First Amendment status of commercial speech," but rather on the recognition that offers to engage in illegal transactions "have no social value." 553 U.S. at 298.

This Court's decisions in *Gazzam* and *Pittsburgh Press* reflect longstanding principles. The common law, for example, recognized that one who provides "[a]dvice or encouragement" to tortious action may be liable for the resulting harm. Restatement (Second) of Torts § 876 cmt. d (1979); see 1 Thomas M. Cooley & D. Avery Haggard, *A Treatise on the Law of Torts* § 75, at 239

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[3] Although the government's opening brief relied (at 43-44) on *Gazzam*, respondent does not address it. And respondent's more general suggestion (Br. 40 n.8) that "picketing cases" are irrelevant overlooks that *Giboney* itself was such a case. See *Giboney*, 336 U.S. at 491; see also *Williams*, 553 U.S. at 297 (citing *Giboney*).

(4th ed. 1932) (describing liability for "advising or procuring" tortious action); see also *Halberstam* v. *Welch*, 705 F.2d 472, 481-482 (D.C. Cir. 1983) (collecting examples). Similarly, any person who "actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. 271(b). And a person who "intentionally induc[es] or encourag[es]" copyright infringement is likewise secondarily liable for the infringement. *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930 (2005). Those examples refute respondent's assertion that the First Amendment protects speech integral to civil violations.

2. Respondent at times appears to suggest (Br. 40) a narrower argument that even if Congress can impose *civil* sanctions on speech that solicits or facilitates civil violations, it cannot impose criminal prohibitions. Professor Volokh advances a similar argument, approving (Br. 4-5) "civil regulation of speech that is an integral part of civilly regulated conduct" while opposing criminal regulation of such speech. But respondent and his amici cite no precedent for that "mismatch" theory of the First Amendment. Instead, this Court has recognized that solicitations or encouragements of illegal activity are "categorically excluded from First Amendment protection." *Williams*, 553 U.S. at 297.

Nor is there any principled reason to adopt a novel all-or-nothing approach in which the conduct of all parties to a transaction must be labeled criminal in order for any party's to be criminally punished. Professor Volokh posits (Br. 5-6) that the First Amendment exception for speech integral to unlawful conduct rests on "*equating* conduct and speech," and he maintains that speech cannot "be punished *more severely*" than corresponding "conduct." But even if that principle were

sound, it would not assist respondent because it relies on the wrong comparison: The conduct that corresponds to speech covered by Section 1324(a)(1)(A)(iv) is not the noncitizen's underlying immigration violation, but rather the facilitation of such violations through conduct. Section 1324(a)(1)(A)(iv) reflects a permissible legislative judgment that those who facilitate immigration violations are more culpable than the noncitizens they assist—who, as this case shows, may themselves be unwitting victims. And Section 1324(a)(1)(A)(iv) subjects such facilitation to the same punishment whether it takes the form of speech or conduct.

3. Even if respondent's novel distinction between civil and criminal prohibitions had merit, it would not justify facially invalidating Section 1324(a)(1)(A)(iv). The statute would still raise no First Amendment concerns in its many applications to conduct, as well as to speech that facilitates or solicits immigration crimes—such as entering the United States unlawfully, see 18 U.S.C. 1325(a), or remaining in the United States unlawfully after receiving a final order of removal, see 8 U.S.C. 1253(a). Nor would the statute be "unconstitutional as applied" to respondent. Resp. Br. 44. Respondent's inducements constituted fraud, and fraud is its own recognized category of unprotected speech. See, *e.g.*, *Stevens*, 559 U.S. at 468.

D. Respondent's Overbreadth Challenge Is Especially Misplaced Because He Was Convicted Of The Aggravated Offense In Section 1324(a)(1)(B)(i)

Even if this Court concluded that some applications of Section 1324(a)(1)(A)(iv) might violate the First Amendment, that possibility would not justify the "last resort" remedy of "striking down a statute on its face at the request of one whose own conduct may be punished

despite the First Amendment." *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (citation omitted). The "mere fact that one can conceive of some impermissible applications of a statute" may provide grounds for future as-applied challenges, but it "is not sufficient to render [the law] susceptible to an overbreadth challenge." *Williams*, 553 U.S. at 303 (citation omitted). And invoking the overbreadth doctrine was "particularly inappropriate here, given that [respondent] was convicted of an *aggravated* version" of the inducement offense that is far narrower than the one he challenges on overbreadth grounds. Pet. App. 79a (Collins, J., dissenting from the denial of rehearing en banc); see Gov't Br. 46-49.

Respondent was not convicted simply of violating Section 1324(a)(1)(A)(iv), but instead of the greater offense of violating that provision "for the purpose of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i). See J.A. 20, 115-116. If respondent is permitted under the overbreadth doctrine to challenge his conviction by hypothesizing nonexistent prosecutions, they should at least be prosecutions whose stylized facts would support all of the findings that the jury made in his case. Gov't Br. 48; cf. Montana Br. 20-22. Respondent is wrong to suggest (Br. 33-34) that rejecting the Ninth Circuit's contrary approach would increase the amount of speech that could be regulated. Declining to extend overbreadth challenges in the way respondent proposes merely limits *who* can invoke the First Amendment rights of others, not *what* those rights are.

Taking account of the financial-gain requirement would eliminate the vast majority of the hypotheticals invoked by the Ninth Circuit (Pet. App. 11a) and respondent (*e.g.*, Br. 16). For example, even if words of

encouragement from a family member, priest, college counselor, or public official could somehow violate Section 1324(a)(1)(A)(iv), such speech is not ordinarily "for the purpose of commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(B)(i). Nor would it become so even if, as respondent posits (Br. 35), the priest, counselor, or official is paid, as long as commercial advantage or private gain is not the speaker's purpose.

If the government were to try to prosecute someone under Section 1324(a)(1)(A)(iv) for protected speech, that defendant could bring an as-applied First Amendment claim. Alternatively, a person or organization whose First Amendment activity is actually chilled might attempt to satisfy the Article III and other requirements necessary to bring a pre-enforcement challenge to the provision. See, *e.g.*, *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 151-152 (2014). But no sound reason exists to uphold the expansive invocation of third-party rights by a criminal defendant who lacks any as-applied claim of his own.

E. Respondent's Alternative Arguments Lack Merit And, In Any Event, Are Best Addressed On Remand

Respondent makes several alternative arguments that the Ninth Circuit did not address. But this Court is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). If the Court rejects the Ninth Circuit's overbreadth rationale—which was that court's exclusive ground for vacating respondent's Section 1324(a)(1)(A)(iv) convictions, Pet. App. 3a, 13a-14a—the Court should reverse and remand, which would allow for the consideration of any alternative arguments that respondent has properly preserved. See, *e.g.*, *United States* v. *Stitt*, 139 S. Ct. 399, 407-408

(2018); *Elonis* v. *United States*, 575 U.S. 723, 741-742 (2015).

In any event, respondent's alternative arguments are unsound. Respondent briefly contends (Br. 20-21) that Section 1324(a)(1)(A)(iv) is impermissibly content- and viewpoint-based. But any prohibition on the solicitation or facilitation of an illegal act could be characterized as a ban on pro-illegality speech but not anti-illegality speech. Such prohibitions are nevertheless commonplace and constitutionally unobjectionable. *Williams*, 553 U.S. at 298. And nothing precludes Congress from prohibiting the solicitation or facilitation of illegal conduct that it deems especially pernicious without applying that prohibition to all illegal conduct. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992).

Respondent also argues (Br. 45-48) that his convictions should be vacated even if this Court rejects the Ninth Circuit's overbreadth holding, on the theory that the jury was not properly instructed on the scope of Section 1324(a)(1)(A)(iv). But any instructional error would be subject to harmless-error analysis, cf. *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999), which would be best undertaken in the first instance below.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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