No. 22-582

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSE FELIPE HERNANDEZ-CALVILLO AND MAURO PAPALOTZI,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the federal criminal prohibition against conspiring to encourage or induce unlawful immigration, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (v)(I), is facially unconstitutional on First Amendment overbreadth grounds.

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BRIEF IN OPPOSITION

INTRODUCTION

The government prosecuted Respondents using the overbroad plain meaning of 8 U.S.C. § 1324(a)(1)(A)(iv), which criminalizes "encourag[ing] or "induc[ing]" noncitizens without lawful status to "come to, enter, or reside in the United States." The government did not tell the district court that the provision was limited to "facilitation" or "solicitation" of immigration violations. To the contrary, the government successfully objected to any jury instruction regarding the meaning of "encourage" or "induce," and the jury was refused clarification even after asking for it. When opposing the motion to dismiss that gave rise to the government's

appeal, the government again never advanced its new "solicitation" and "facilitation" arguments. Only on appeal did the government venture the statutory rewrite it now presses before this Court. While the Tenth Circuit was justified in rejecting the government's argument on the merits, it could just as easily have held it forfeited, as Respondents argued.

The government's position in the district court tracked its position in numerous other prosecutions, where it has argued—usually successfully—that the encouragement provision is not limited by any traditional criminal-law restraints on "solicitation," but rather that "encourages or induces" in Section 1324(a)(1)(A)(iv) takes its ordinary, broad meaning that encompasses protected speech "encouraging" someone to stay in the country. The Court should consider the government's positions in this and other cases when evaluating the government's appellate proposals to confine the statute's meaning in a way it now believes to be more constitutionally defensible.

Although Respondents ultimately do not oppose the government's request that the Court hold its petition pending resolution of *United States* v. *Hansen*, No. 22-179, the government's forfeiture should preclude it from applying any narrowed revision of the statute to salvage the indictments and convictions against Respondents. Moreover, *Hansen* presents a different question, namely whether "encouragement" *for private financial gain* can be constitutionally criminalized. But as the Tenth Circuit recognized and the government does not deny, private financial gain is not an element of Respondents' offenses, Pet. App. 21a n.19, even though it is an important aspect of the government's argument in *Hansen*. *See* U.S. Br. 46-49, *United States* v. *Hansen*, No. 22-179 (U.S. Jan. 18, 2023).

The Court should consider the additional context presented in this brief when deciding the question presented in *Hansen*—including the government's prior inconsistent interpretations of the statute. And the Court should deny the government's petition in this case because the government's failure to request instructions on the narrower reading of the statute it now presses in *Hansen* precludes reinstating the indictments or convictions in Respondents' case. At the very most, the Court should remand the case to the Tenth Circuit for further proceedings, including deciding the consequences of the government's forfeiture.

STATEMENT

A. Statutory Framework

"As a general rule, it is not a crime for a removable alien to remain in the United States." *Arizona* v. *United States*, 567 U.S. 387, 407 (2012). But federal law criminalizes numerous other immigration-related acts. Certain types of fraudulent entry into the United States are criminal, 8 U.S.C. § 1325, as are the creation, dissemination, or use of fraudulent immigration documents, 18 U.S.C. § 1546. Hiring, recruiting, and profitably referring unauthorized workers for employment is criminal. 8 U.S.C. §§ 1324a, 1324c. And it is criminal to bring or attempt to bring noncitizens to the United States without prior authorization, *id.* § 1324(a)(2), to aid or assist the entry of certain inadmissible noncitizens, *id.* § 1327, and to import or attempt to import noncitizens for immoral purposes, *id.* § 1328.

None of those provisions was charged or challenged in this case. Nor were the provisions immediately surrounding Section 1324(a)(1)(A)(iv), which make it a felony (i) to bring undocumented noncitizens to the

country other than at a designated port of entry, (ii) to transport them within the country, and (iii) to "conceal[]," "harbor[], or shield[]" them from detection. 8 U.S.C. § 1324(a)(1)(A)(i)-(iii). A further provision, also unchallenged, criminalizes aiding and abetting any offense listed in § 1324(a)(1)(A). *Id.* § 1324(a)(1)(A)(v)(II).

The encouragement provision at issue here—8 U.S.C. § 1324(a)(1)(A)(iv)—extends beyond these uncontested provisions. It broadly punishes anyone who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." There is no requirement that the conduct that is encouraged or induced be criminal. There is no causation element, meaning that a noncitizen need not do anything (let alone actually violate any law) as a result of the defendant's encouragement. Nor is there any *mens rea* requirement other than knowledge or reckless disregard of the noncitizen's immigration status.

Respondents were charged with conspiracy to encourage undocumented noncitizens to remain in this country. 8 U.S.C. § 1324(a)(1)(A)(v)(I). Contrary to the government's proposed question presented, however, this case does not implicate the constitutionality of the conspiracy provision itself. Rather, Respondents challenged only the substantive encouragement provision of Section 1324(a)(1)(A)(iv), which was the alleged object of their conspiracy charge. The government nowhere denies that Respondents have standing to challenge the constitutionality of the alleged statutory object of their conspiracy charge. *Accord United States* v. *Miselis*, 972 F.3d 518, 529 (4th Cir. 2020) ("'[T]he statutory requirement of conspiring to commit 'an offense against the United States,' 18 U.S.C. § 371, is not

fulfilled by an offense which fails to meet constitutional muster.'" (quoting *United States* v. *Baranski*, 484 F.2d 556, 561 (7th Cir. 1973))), *cert. denied*, 141 S. Ct. 2756 (2021).

B. District Court Proceedings

The government appeals the dismissal of Respondents' indictment. Accordingly, the facts adduced at trial are irrelevant, as the indictment "must be tested by its sufficiency to charge an offense." *United States* v. *Sampson*, 371 U.S. 75, 79 (1962); Pet. App. 3a n.2; *see also* Fed. R. Crim. P. 12(b)(1) (limiting Rule 12 motions to issues "the court can determine without a trial on the merits"). Nonetheless, Respondents provide the following background to correct several misleading omissions in the government's petition.

1. Background and trial proceedings

From 2011 to 2014, three individuals who are not parties here—Marcus Stubbs, Isaac Gallegos, and Jose Torres-Garcia—operated a company called "Jose R. Torres Drywall" in Olathe, Kansas. Pet. App. 3a. "Jose R. Torres Drywall" was not, in fact, in the drywalling industry. *Id.* Rather, it processed payments from actual construction companies to subcontracted construction crews; it also provided subcontracted construction crews with insurance documentation. *Id.* Thus, a construction company that subcontracted a crew of workers would pay those workers by making out a check to "Jose R. Torres Drywall," which would then process the check and pay out cash to the workers who performed the actual work. *Id.* For this process, Stubbs, Gallegos, and Torres-Garcia retained a percentage of the workers' wages. *Id.*

This case involved a construction company called Plaster Masters, operated by Keith Countess, who is also not a party to this appeal. Pet. App. 3a. Countess retained approximately five employees on his payroll, but used subcontracted crews for his drywall work because (in his words) they worked harder and more cheaply. Resp. C.A. Br. 6. Countess paid subcontractors with checks to "Jose R. Torres Drywall," which (as explained above) retained a portion of the workers' wages and paid the remainder in cash. Pet. App. 3a. Countess also accepted the insurance documentation that "Jose R. Torres Drywall" provided to the subcontracted crews. *Id.*

In November 2016, a federal grand jury indicted Countess, his company Plaster Masters, Gallegos, and Stubbs. Pet. App. 3a. The indictment charged a single count of conspiracy to encourage undocumented noncitizens to reside here, and eight substantive counts of encouragement alone (or, in the alternative, aiding and abetting encouragement). Pet. App. 3a-4a. Each of these individuals ultimately pleaded guilty and testified in this case in exchange for favorable sentencing recommendations.[1]

Respondents—Jose Felipe Hernandez-Calvillo and Mauro Papalotzi—were not involved with running Plaster Masters or operating "Jose R. Torres Drywall."

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[1] Torres-Garcia, the third person associated with "Jose R. Torres Drywall," was separately charged, pleaded guilty, and testified against Respondents in exchange for a favorable sentencing recommendation. Pet. App. 4a. Another defendant, a leader of one of Countess's subcontracted drywall crews named Luis Felipe Guerrero-Guerrero, pleaded guilty to engaging in a pattern or practice of employing unauthorized workers. 8 U.S.C. § 1324a; Pet. App. 4a. The government dismissed the case against the Plaster Masters company. Pet. App. 4a.

Resp. C.A. Br. 7. Rather, they led two construction crews that performed actual drywall work and were subcontracted by Countess and Plaster Masters. *Id.* The government alleged that Respondents and their crews performed drywall work for a number of Countess's projects, received checks from Countess made out to "Jose R. Torres Drywall," and took those checks to Torres-Garcia—who cashed the checks, retained a percentage, and paid the crews the remaining amount in cash. *Id.*; Pet. App. 3a. Contrary to the petition's insinuation, Pet. 3, no evidence at trial suggested that Respondents misled or deceived anyone. Resp. C.A. Br. 7. The evidence suggested only that Respondents made a living by working for Countess and were paid by him (and paid their crews) in the manner that Countess generally paid his subcontracted workers—via "Jose R. Torres Drywall." *Id.*

The government dismissed several counts against Respondents on its own motion. Pet. App. 4a n.4. Four counts ultimately went to the jury: one count for conspiring to encourage undocumented workers to remain in the country, and three counts of encouragement itself (or, in the alternative, aiding or abetting encouragement). Pet. App. 3a-4a. None of the three allegedly "encouraged" noncitizens worked on Respondents' crews, and only one testified at trial. Pet. App. 4a; Resp. C.A. Br. 8 n.5.

The government's petition tellingly omits that, over Respondents' objection and at the government's request, the jury was given no definition of "encourage" or "induce." Pet. App. 4a-5a. During the charge conference, Respondents requested that the district court expressly define those terms for the jury. Pet. App. 4a; Resp. C.A. Br. 8. "The government opposed the instruction, arguing that the jury could give those terms

their ordinary meaning based on its own understanding." Pet. App. 4a-5a. "The district court agreed, rejecting the instruction." Pet. App. 5a. During deliberations, the jury returned a note requesting "a different/further definition or clarification of 'intentionally induced or encouraged.'" *Id.* The district court again refused, "instead instructing the jury to 'use [its] collective judgment and experience to decide the issues.'" *Id.*

The jury acquitted Respondents on all three counts of "encourage[ment]" under 8 U.S.C. § 1324(a)(1)(A)(iv), but convicted them on the single count of conspiracy to encourage, *id.* § 1324(a)(1)(A)(iv), (v)(I).

2. Post-trial proceedings

Following the verdict but before judgment or sentencing, Respondents moved *inter alia* to dismiss the indictment under Fed. R. Crim. P. 12(b)(3) because the charged object of the alleged conspiracy (the encouragement provision) is facially unconstitutional. Pet. App. 5a. Respondents had twice before moved to dismiss the encouragement-related charges on this ground—once in a prior related case that was dismissed for violation of the Speedy Trial Act, and again before trial in this case. Pet. App. 5a n.5, 49a; Resp. C.A. Br. 9. The government stated that it had no objection to Respondents moving to dismiss post-trial, and the district court found good cause to hear the motion. Pet. App. 5a n.5, 49a-50a; Resp. C.A. Br. 9; *see also* Fed. R. Crim. P. 12(c)(2).

The government's opposition to the motion to dismiss focused exclusively on the correctness of *United States* v. *Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), *vacated and remanded*, 140 S. Ct. 1575 (2020), which

held the encouragement provision to be unconstitutionally overbroad. Pet. App. 50a-53a; Resp. C.A. Br. 9-10. The government argued that the Ninth Circuit erred by, *inter alia*, not applying a "straightforward limiting construction" that "is readily available." Resp. C.A. Br. 10. However, the government did not explain what "limiting construction" it had in mind. Resp. C.A. Br. 9-10. Although the government referenced the Third Circuit's decision in *DelRio-Mocci* v. *Connolly Props., Inc.*, 672 F.3d 241, 249 (3d Cir. 2012), it did not endorse that court's reasoning, nor did it preserve the Third Circuit's approach as an argument before the Tenth Circuit, which held that the government waived reliance on it. Resp. C.A. Br. 10; Pet. App. 16a-17a & n.15. Notably, the government did not argue that the encouragement provision should be narrowly construed as it does now (for example, as a solicitation statute)—and as the government had urged, the jury was never so instructed.

The district court granted Respondents' motion and dismissed the indictment. Pet. App. 5a. It concluded that "Congress's chosen language in [the encouragement provision] does not lend itself" to a limiting construction. Pet. App. 52a. The court observed that the encouragement provision does not "plainly exclude speech" but rather "simply requires encouragement or inducement." *Id.* Nor, the court explained, does it "require that the encouragement or inducement actually cause an alien to come to, enter or reside in the United States. To use the statute's own terms, the statute focuses solely on the … person who encourages or induces[.] And its terms plainly criminalize encouragement or inducement offered to an alien in any form," including "speech," "so long as it relates to [the] coming to, entering, or residing in the United States." *Id.*

Accordingly, the district court held the encouragement provision unconstitutional and dismissed the indictment. Pet. App. 53a.

The government noticed an interlocutory appeal pursuant to 18 U.S.C. § 3731.[2]

C. Court Of Appeals Proceedings

The government largely ignores the opinion below and asserts that the Tenth Circuit merely parroted the Ninth Circuit's decisions in *Hansen* and *Sineneng-Smith*. Pet. 6-7. On the contrary, the Tenth Circuit issued a careful 29-page published opinion that thoroughly refuted the government's arguments.

1. The meaning of "encourage or induce"

The Tenth Circuit began, as appropriate, with the plain text of the statute and the ordinary meaning of its words. Pet. App. 10a; *see Sebelius* v. *Cloer*, 569 U.S. 369, 376 (2013) ("We start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." (quotation marks and citation omitted)). Consulting several dictionary definitions of "encourage" and "induce," as well as this Court's own interpretation of those words in *International Brotherhood of Electrical Workers, Local 501* v. *NLRB*, 341 U.S. 694, 701-702 (1951), the court of appeals noted that those terms

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[2] No appealable judgment or sentence was entered against Respondents. Pet. App. 5a; Resp. C.A. Br. 2 n.2. Respondents reserve their right to appeal any future judgment and sentence against them, including based on arguments made in their post-trial motions for judgment of acquittal and for a new trial. Resp. C.A. Br. 2 n.2.

necessarily cover "not only conduct, but also speech"—a fact the government did not "meaningfully dispute." Pet. App. 11a & n.11. Rather, as the court explained, the government's attempt to treat those terms as "synonyms for the criminal-law concepts of facilitation (also known as aiding or abetting) and solicitation"—"puts the cart before the horse." Pet. App. 9a-10a. Specifically, to arrive at its preferred definition, the government "avoids citing definitions of *encourage* from non-legal dictionaries, instead noting that such dictionaries use *encourage* when defining *abet* (a word found nowhere in subsection (A)(iv))." Pet. App. 11a n.11. "But as [Respondents] note, 'the mere fact that 'abet' can be defined as 'encourage' does not mean that 'encourage' *only* means 'abet.'" *Id.*

The panel next confirmed that, based on the text of the statute, Congress "used *encourage* and *induce* in their ordinary sense." Pet. App. 12a. First, the panel reviewed Section 1324 itself and noted that Congress used the words "aid" and "abet" in the "very next subsection," which "shows that Congress knows how to draft a facilitation provision." *Id.* Moreover, the panel explained that construing "encourage" as the government requests would introduce "redundancy"—both with respect to clause (A)(iii) (which already prohibits "conceal[ing], harbor[ing], or shield[ing] from detection" a noncitizen), and with the aiding-and-abetting statute that Congress actually passed, 8 U.S.C. § 1324(a)(1)(A)(v)(II), which (if the government were right) would become a prohibition against aiding-and-abetting aiding-and-abetting. Pet. App. 12a-13a & n.12. The panel declined that "absurd" result. Pet. App. 13a n.12.

Next, the panel surveyed "each of the government's examples" of aiding-and-abetting and solicita-

tion statutes and concluded that the encouragement provision "bears no resemblance" to any of them. Pet. App. 13a-14a. Each of the statutes the government cited "include[d] *encourage* or *induce* among a string of other facilitation-or-solicitation verbs," triggering the canon of *noscitur a sociis*, as explained by this Court in *United States* v. *Williams*, 553 U.S. 285, 294 (2008). Pet. App. 14a. "But[,]" the panel explained, "that canon doesn't apply here because there are no neighboring verbs in subsection (A)(iv) that narrow the meaning of *encourage* or *induce*." *Id.* In the end, "the government cites no statute—and [the panel's] research reveals none—in which the words *encourage* or *induce* appear by themselves (or together) as substitutes for facilitation or solicitation, casting further doubt on the government's interpretation." Pet. App. 15a.

Finally, the panel explained that the government's preferred definitions are a poor fit for the encouragement provision, which contains no "hallmarks of facilitation and solicitation." Pet. App. 16a. As the panel explained, "both facilitation and solicitation generally require some underlying *criminal* conduct; facilitating or soliciting *civilly* unlawful activity is not enough." Pet. App. 15a. Yet the encouragement provision does just that: it makes encouraging unlawful "residence" in the country a crime, even though "it is not a crime for a removable [noncitizen] to remain present in the United States." *Id.* (quoting *Arizona*, 567 U.S. at 407). Further, "facilitation and solicitation also typically require a specific intent that the other party commit the underlying offense"; "[n]ot so with" the encouragement provision. Pet. App. 16a. Indeed, "a 1986 amendment to subsection (A)(iv) eliminated a requirement that the offender 'willfully and knowingly' encourage or induce the unlawful conduct." Pet. App. 16a n.14.

Although Judge Baldock dissented, he agreed that the government's suggestion to swap "encourage" with "facilitation" cannot be squared with the text of the encouragement provision. Pet. App. 31a ("To be sure, the Government overplays its hand by suggesting [the encouragement provision] also encompasses facilitation."). Judge Baldock also rejected the government's "solicitation" arguments, and neither disagreed with the panel's description of the typical requirements of a solicitation statute nor with the fact that the encouragement provision does not include those requirements. Instead, Judge Baldock would have read additional limitations into the statute: both (i) that "the perpetrator must specifically intend to 'encourage[]' or 'induce[]' (whether by speech or conduct)," and (ii) that the encouraged conduct must be "a criminal violation of immigration law." Pet. App. 42a. But as the majority explained, Judge Baldock's interpretation (which the government does not defend) and the government's alternative approach both impermissibly "'rewrite' the statute's plain language." Pet. App. 18a (quoting *United States* v. *Stevens*, 559 U.S. 460, 481 (2010)). "The ordinary meanings of *encourage* and *induce* encompass both conduct and speech, and nothing in the statutory language or surrounding context suggests that Congress gave those terms a narrower meaning akin to the criminal-law concepts of facilitation and solicitation." Pet. App. 17a.

2. Protected speech

The panel next turned to whether the encouragement provision, properly construed, criminalizes protected speech. The panel acknowledged this Court's recognition of "several 'narrowly limited' categories of unprotected speech," among them "obscenity, defamation, fraud, incitement, and speech integral to criminal

conduct." Pet. App. 18a (quoting *Stevens*, 559 U.S. at 468-469 (citations omitted)). It explained, however, that the encouragement provision is not confined to any of them. It neither targets "incite[ment]" under *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), nor "[o]ffers to engage in illegal transactions," *Williams*, 553 U.S. at 297 (citing *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Hum. Relations*, 413 U.S. 376, 387-388 (1973))—indeed, no party argued that either category would apply in this case. Pet. App. 19a-20a nn.17-18; *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."). And the panel explained that the sole category advanced by the government—speech "integral to criminal conduct"—cannot save a statute that (by the government's own admission) is designed to target speech that encourages *noncriminal* conduct. Pet. App. 19a; *see* Gov. C.A. Br. 48 (arguing that the encouragement provision criminalizes "soliciting certain civil immigration offenses"); *see* U.S. Br. 38, *United States* v. *Hansen*, No. 22-179 (U.S. Jan. 18, 2023) (arguing that the encouragement provision "extend[s] criminal penalties to those who solicit or facilitate" noncriminal acts). The panel declined the government's implicit invitation to radically expand the narrow category for speech integral to crimes to encompass speech encouraging noncriminal activity. Pet. App. 19a n.17.

3. Overbreadth

Finally, the panel asked whether the encouragement provision criminalizes "a substantial amount of protected speech … not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." Pet. App. 21a (quoting *Williams*, 553 U.S. at 292). It

began by assessing the provision's "constitutionally permissible applications" and explained that, "for each of the government's examples" of such applications, "other statutes independently—and more narrowly—proscribe these activities." Pet. App. 22a (surveying each example and identifying independent statutes that criminalize the targeted conduct). The panel had, in fact, allowed the government the opportunity at oral argument to identify any further "example of unprotected, proscribable speech or conduct that could only be prosecuted under subsection (A)(iv)," but each of the government's three additional examples failed for the same reason: in every one (which included this case), the government "secured convictions" for all proscribable conduct under different statutes, proving the encouragement provision's legitimate scope to be redundant and thus obviating any harm that could be caused by its invalidation. Pet. App. 23a-24a.

"On the other side of the ledger," the panel explained, "many of subsection (A)(iv)'s potential applications involve protected speech." Pet. App. 25a. "The statute makes it a crime, for example, to tell a family member who has overstayed his or her visa, 'I encourage you to reside in the United States'; to tell a tourist that she is unlikely to face serious consequences if she overstays her tourist visa; or to inform a noncitizen about available social services." Pet. App. 26a (quotation marks and citation omitted). Indeed, "an immigration attorney could face prosecution for providing certain legal advice to noncitizens." *Id.* (quotation marks and citation omitted). Accordingly, the panel explained, the encouragement provision is a "'criminal prohibition of alarming breadth,'" *id.* (quoting *Stevens*, 559 U.S. at 474), and the "comparison of subsection (A)(iv)'s constitutional and unconstitutional applica-

tions is one-sided," Pet. App. 29a. As a result, "invalidating subsection (A)(iv) would [not] deprive the government of a critical enforcement tool or leave wide swaths of criminal conduct unpunished," "[a]nd as much as there are some legitimate applications of subsection (A)(iv), they pale in comparison to the illegitimate ones." Pet. App. 30a.

In reaching this conclusion, the panel rejected the government's final arguments based on a supposed dearth of "actual" prosecutions of protected speech under the encouragement provision, and that advocacy organizations are not chilled from engaging in speech within the statutory prohibition. Pet. App. 26a-29a. The panel explained that "actual" prosecutions of speech are not required to show that the statute impermissibly chills speech, and that the government in fact did prosecute a Massachusetts defendant for giving advice to an undocumented noncitizen. Pet. App. 27a-28a; *see United States* v. *Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012). At bottom, "that some groups and individuals may persist in constitutionally protected speech despite fear of prosecution says nothing about those who do not because of their fear of prosecution." Pet. App. 29a. "The First Amendment 'does not leave us at the mercy of *noblesse oblige*,' and we will not 'uphold an unconstitutional statute merely because the government promises to use it responsibly.'" Pet. App. 27a (quoting *Stevens*, 559 U.S. at 480).

The government did not seek panel rehearing or rehearing en banc on the merits. Rather, it filed a *pro forma* petition for panel rehearing asking the Tenth Circuit to hold the case pending this Court's disposition of *Hansen*. The Tenth Circuit denied the petition without dissent.

ARGUMENT

The government's request that this petition be held pending resolution of *United States* v. *Hansen*, No. 22-179, omits critical context that should be considered both in deciding *Hansen* and in the ultimate disposition of the government's petition in this case.

First, contrary to the government's suggestion in *Hansen* that the encouragement provision is confined by the criminal law guardrails governing, e.g., the crime of solicitation, the government has long sought and obtained convictions under the broad interpretation of the encouragement provision that the Tenth Circuit adopted here. The government urged the Eleventh Circuit, for example, to accept that "the natural and ordinary definitions of 'encouraging' and 'inducing' are broad." U.S. Br. 32-33, *United States* v. *Gonzalez-Rodriguez*, No. 07-10708, 2007 WL 5209821 (11th Cir. Mar. 20, 2008). In *Sineneng-Smith*—before being met with an overbreadth challenge—the government urged the Ninth Circuit to interpret the encouragement provision "broadly" to prohibit "*statements* or actions [that] encourage[] or induce[]," U.S. Br. 30, *United States* v. *Sineneng-Smith*, No. 15-10614 (9th Cir. Sept. 15, 2016), Dkt. 25 ("*Sineneng-Smith* U.S. C.A. Br.") (emphasis added).[3] And even after the overbreadth challenge was raised, the government conceded that the provision is "different than aiding and abetting" because merely "offering to assist someone suffices," and

[3] Indeed, in that case, the government had prosecuted Ms. Sineneng-Smith for her "suggestions." *See United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1580 (2020).

explicitly rejected the suggestion that the provision was a "solicitation" statute.[4]

The government has similarly offered a very different account of the legislative history from the one it now urges on this Court. The government told the Fifth Circuit that the 1952 INA "'*broadened* the coverage of the 1917 immigration legislation by creating the *additional offense* [of] … inducing or encouraging the entry of aliens into the United States.'" U.S. Br. 11-12, *United States* v. *Martinez Ruiz*, No. 98-4117, 1999 WL 33638104 (5th Cir. Apr. 22, 1999) (emphasis added). It repeated that explanation three years later, noting that "'Congress has steadily *broadened*'" restrictions on illegal immigration, including by "'creating the *additional offense*[] of … inducing or encouraging the entry of aliens into the United States.'" U.S. Br. 10-11, *United States* v. *Solis-Compozano*, No. 02-50079, 2002 WL 32104235 (5th Cir. July 3, 2002) (emphasis added). It said the same thing to the Ninth Circuit in *Sineneng-Smith*. *Sineneng-Smith* U.S. C.A. Br. 31-33 (urging that the provision "worked a substantial expansion in the types of activities held criminal under this statute," and noting the 1986 amendment "expanded" the provision's scope).

The government likewise sought to construe the statute as broadly as possible to secure convictions against Respondents. Far from asserting that Respondents "solicited" (or conspired to solicit) anyone to violate any law, the government opposed any limiting definition of the terms "encourage" or "induce," "arguing that the jury could give those terms their ordinary

[4] Oral Arg. Audio 47:45-48:08, 1:08:43-59, *Sineneng-Smith*, No. 15-10614 (9th Cir. Feb. 15, 2018), https://www.ca9.uscourts.gov/media/audio/?20180215/15-10614/.

meaning based on its own understanding." Pet. App. 4a-5a. And as the Tenth Circuit explained, "in *Henderson* … the government relied on speech (the statement 'if you leave, they won't let you back') to support [its] conviction," Pet. App. 28a, just as the government prosecuted Ms. Sineneng-Smith because she "inspired hope in her clients," "influenced their decision to stay in this country," and "reassured" her clients. *Sineneng-Smith* U.S. C.A. Br. 30-33.

The government's litigation practices in this case and others demonstrate that the encouragement provision in fact sweeps as broadly as the Ninth and Tenth Circuits held. The government should not be permitted to defend the provision's constitutionality by advancing an interpretation in this Court that it never advanced at trial in this case or others. *See Marvin M. Brandt Revocable Tr.* v. *United States*, 572 U.S. 93, 110 (2014) ("We decline to endorse such a stark change in [the government's] position[.]"). Indeed, the government's shell game regarding the statute's meaning triggers the very free speech concerns that the overbreadth doctrine guards against.

Second, and relatedly, the indictments and convictions the government secured against Respondents cannot stand even if the government prevails in *Hansen*. The government never advanced its "facilitation" and "solicitation" arguments to the district court in defending the constitutionality of its indictments, and indeed successfully objected to any definition of "encourage" or "induce" in the instructions given to the jury that convicted Respondents. As Respondents explained to the Tenth Circuit, the government accordingly forfeited the ability to advance a narrowed interpretation of the statute on appeal. Resp. C.A. Br. 14. Because the Tenth Circuit ruled for Respondents on

the merits, it did not need to decide the effect of the government's forfeiture. Pet. App. 9a n.9. But if the Court were to accept the government's invitation to save the statute by rewriting it—though it should not—the government's forfeiture means that the rewritten statute cannot be used to reinstate Respondents' indictments or convictions.

Finally, Respondents note that the questions presented by the government's petition in this case and in *Hansen* are not the same. In *Hansen*, this Court granted the government's petition to review whether the encouragement provision, in conjunction with the "financial gain" enhancement of 8 U.S.C. § 1324(a)(1)(B)(i), is unconstitutionally overbroad. U.S. Br. I, *United States* v. *Hansen*, No. 22-179 (U.S. Jan. 18, 2023). But as the Tenth Circuit ruled and the government has not denied, the financial gain "enhancement is … not an element of Appellees' crimes," Pet. App. 21a n.19, and has no bearing on the resolution of this appeal. Accordingly, resolution of the question presented in *Hansen*—to the extent it turns on the financial gain enhancement—would not affect the reasoning of the Tenth Circuit.

These considerations militate against the government's arguments in this case and in *Hansen* and warrant denying the government's petition in this case. Although Respondents ultimately do not oppose the Court holding the government's petition pending disposition of *Hansen*, the Court should take the considerations raised in this brief as further reasons to reject the government's arguments on the merits, and ultimately deny the government's petition in this case because of the government's forfeiture of the opportunity to apply a newly-adopted interpretation of the statute to Respondents. At the very most, the Court should remand

for further proceedings, including consideration of the effect of the government's forfeiture.

CONCLUSION

The Court should consider the context provided in this brief in resolving the constitutional question in *Hansen*, and ultimately deny the petition or, at most, remand to the Tenth Circuit for further proceedings.

Respectfully submitted.

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