No. 19-67

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EVELYN SINENENG-SMITH

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 910 F.3d 461. A memorandum opinion of the court of appeals (J.A. 125-128) is not published in the Federal Reporter but is reprinted at 744 Fed. Appx. 498. The district court's opinion (Pet. App. 40a-67a) is not published in the Federal Supplement but is available at 2013 WL 6776188.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2018. A petition for rehearing was denied on February 12, 2019 (Pet. App. 77a). On April 30, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 12, 2019. On May 31, 2019, Justice Kagan further extended the time to and including July 12, 2019, and the petition was filed on that date. The petition for a writ of certiorari was

granted on October 4, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1324(a)(1) of Title 8 of the United States Code provides in pertinent part:

> (1)(A) Any person who—
>
> (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;
>
> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) 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; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned

for any term of years or for life, fined under title 18, or both.

* * * * *

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, respondent was found guilty of three counts of encouraging or inducing illegal immigration for financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), and three counts of mail fraud, in violation of 18 U.S.C. 1341 (2006). J.A. 118-121. And following a guilty plea, respondent was convicted on two counts of willfully subscribing to a false tax return, in violation of 26 U.S.C. 7206. Pet. App. 78a-79a. The district court granted a judgment of acquittal on one of the Section 1324 counts and one of the Section 1341 counts. *Id.* at 40a-67a. The court sentenced respondent to a total of 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at 81a, 83a. The court of appeals reversed the Section 1324 convictions, vacated the sentence, and remanded for resentencing. *Id.* at 1a-39a.

A. Statutory Background

For more than a century, federal law has prescribed criminal penalties for "encouraging" or "inducing" certain violations of the immigration laws. The current prohibition, codified in 8 U.S.C. 1324(a)(1)(A)(iv), traces its roots to the beginnings of modern immigration law.

1. In 1882, Congress enacted "the first general immigration statute." *Kleindienst* v. *Mandel*, 408 U.S. 753,

761 (1972). Shortly thereafter, Congress made "knowingly assisting, encouraging or soliciting the migration or importation of any alien" into the United States "to perform labor or service of any kind under contract or agreement" a crime punishable by a fine of up to $1000. Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333. This Court upheld the constitutionality of those penalties in *Lees* v. *United States*, 150 U.S. 476 (1893), explaining that, given Congress's "power to exclude" aliens, "it has a right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition." *Id.* at 480.

The prohibition on encouraging or soliciting contract labor remained in force for decades. See Act of Feb. 20, 1907, ch. 1134, § 5, 34 Stat. 900; Act of Mar. 3, 1903, ch. 1012, § 5, 32 Stat. 1214-1215. In 1917, Congress revised the prohibition, making it a misdemeanor "to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer * * * into the United States." Act of Feb. 5, 1917, ch. 29, § 5, 39 Stat. 879. Congress also separately prohibited "induc[ing], assist[ing], encourag[ing], or solicit[ing,] or attempt[ing] to induce, assist, encourage, or solicit[,] any alien to come into the United States by promise of employment through advertisements printed, published, or distributed in any foreign country." § 6, 39 Stat. 879.

2. In 1952, Congress enacted Section 1324(a)—the statute at issue here—as part of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*). Congress included in Section 1324(a) an anti-inducement provision phrased in terms similar to the prior contract-laborer provision, while eliminating any reference to advertising or other speech activity. In

particular, the INA made it a felony to "willfully or knowingly encourage[] or induce[], or attempt[] to encourage or induce, either directly or indirectly, the entry into the United States" of any alien who had not been "duly admitted" or who was not "lawfully entitled to enter or reside within the United States." § 274(a)(4), 66 Stat. 229; see 8 U.S.C. 1324(a)(4) (1952). The INA also prohibited knowingly transporting into the United States, concealing, or harboring such an alien. § 274(a)(1)-(3), 66 Stat. 228-229.

Congress revisited Section 1324(a) in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. During the legislative process, bills were proposed that would have eliminated the prohibition on knowingly encouraging or inducing illegal immigration. See H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 12 (1986) (*House Report*). The Commissioner of the U.S. Immigration and Naturalization Service told Members of Congress that the proposal was "[u]nfortunate[]" and "would seriously hamper enforcement" of the immigration laws. *Immigration Reform and Control Act of 1985: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 447 (1985). The Department of Justice urged legislators to retain the prohibition, explaining that it had "proven to be a useful tool in combatting alien smuggling." *House Report* 112.

Congress ultimately retained the anti-inducement provision in modified form. IRCA § 112(a), 100 Stat. 3381-3382. As since renumbered, the statute now provides, in 8 U.S.C. 1324(a)(1)(A)(iv), that "[a]ny person 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 * * * shall be punished as provided in subparagraph (B)." Section 1324(a)(1)(B), in turn, prescribes a range of penalties that apply "for each alien in respect to whom such a violation occurs." 8 U.S.C. 1324(a)(1)(B). An offense in violation of the elements set forth in Section 1324(a)(1)(A)(iv) carries a sentence of up to five years of imprisonment. 8 U.S.C. 1324(a)(1)(B)(ii). Since 1996, Section 1324(a)(1)(B) has specified that a conviction for an offense containing those elements, plus proof that the conduct was undertaken for the "purpose of commercial advantage or private financial gain," is punishable by up to ten years of imprisonment. 8 U.S.C. 1324(a)(1)(B)(i); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. II, Subtit. A, § 203(a), 110 Stat. 3009-565.

B. Respondent's Offense Conduct

Respondent was an immigration consultant who marketed her services to aliens in the home healthcare industry. J.A. 81-83. Her business centered on a labor-certification program for foreign workers in certain jobs in the United States. J.A. 84-89; see 8 U.S.C. 1182(a)(5)(A). As relevant here, the labor-certification program provides a pathway for certain aliens physically present in the United States to apply to adjust their status to lawful permanent residence, without having to leave the country and apply abroad for an immigrant visa. 8 U.S.C. 1255(i)(1)(B)(ii) and (C). That particular pathway is available, however, only to an alien who was physically present in the United States on December 21, 2000, and for whom a labor-certification application had been filed by April 30, 2001. *Ibid.*

Although respondent knew about the cutoff date, she fraudulently promoted the program to her clients after

that date as a way to obtain lawful permanent residence. Pet. App. 3a-4a; see J.A. 84-85. She entered into hundreds of retainer agreements with clients, whom she knew to be in the country unlawfully, for the ostensible purpose of "assisting [them] to obtain permanent residence through Labor Certification." J.A. 66 (quoting retainer agreement); see J.A. 83-84; C.A. Supp. E.R. 749. She charged each of them $5900 to file an application with the Department of Labor and an additional $900 to file an application with U.S. Citizenship and Immigration Services—collecting more than $3.3 million for labor-certification applications filed after the 2001 cutoff, which she knew to be futile as a basis for the status adjustments she touted. Pet. App. 42a; see J.A. 97.

In doing so, she not only took the aliens' money under false pretenses, but also induced them to remain in the United States. Pet. App. 3a-4a; see *id.* at 4a (noting testimony from two of respondent's clients that they would have left the United States but for respondent's fraud). For example, in 2002, respondent falsely convinced Hermansita Esteban, who was born in the Philippines and came to the United States on a tourist visa, that respondent could file paperwork, for a fee, that would lead to lawful permanent residence and that would allow Esteban to stay and work in the United States in the meantime. J.A. 58-64. Esteban believed respondent, paid respondent's fees, and then took no steps to extend her authorized period of stay because she "thought that [she] had a petition that had been filed and that that was [her] way of being legalized." J.A. 67. For years thereafter, respondent continued to send Esteban periodic letters and other documents falsely suggesting that Esteban was on a pathway to lawful permanent residence.

See J.A. 68-74. Esteban later testified that, had respondent not led her to believe that she could obtain lawful permanent residence through the labor-certification process, she "would not have stayed here." J.A. 77.

C. District Court Proceedings

In 2010, a federal grand jury indicted respondent on charges that included three counts of encouraging or inducing illegal immigration for financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i); three counts of mail fraud, in violation of 18 U.S.C. 1341 (2006); and two counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). Pet. App. 96a-101a; see J.A. 13. Each of the Section 1324 counts identified, by initials, the particular alien that respondent was accused of encouraging or inducing to reside unlawfully in the United States. Pet. App. 97a. Respondent pleaded guilty to the tax-fraud counts, see *id.* at 78a-79a, but proceeded to trial on the remaining charges.

1. Before trial, respondent moved to dismiss the Section 1324(a) counts on constitutional grounds. J.A. 14. Respondent argued that her due process rights had been violated by a lack of fair notice that her conduct was prohibited by the statute, and that she had a First Amendment right to file applications on behalf of her clients, for financial gain, notwithstanding her awareness that the applications could not lead to lawful permanent residence under the program she had fraudulently promoted to her clients. D. Ct. Doc. 46, at 13-18, 20-25 (Aug. 10, 2011). Respondent did not contend that Section 1324(a)(1)(A)(iv) was facially overbroad.

The district court denied her motion. Pet. App. 68a-76a. The court found that the conduct alleged in the indictment "falls within the plain meaning of the statute,"

id. at 75a, observing that "[t]he promise of a path to legal permanent residency that [respondent] held out to the alleged victims of her scheme was plainly powerful encouragement to those aliens to set up a life in the United States," *id.* at 74a. And the court explained that respondent was "not being prosecuted for making applications" to government agencies, but instead for entering into retainer agreements with illegal aliens after fraudulently representing to them that her efforts could lead to legal permanent resident status. *Id.* at 75a.

2. At trial, the government proposed that the district court instruct the jury on the Section 1324(a) counts using a pattern jury instruction, supplemented by definitions of the terms "encouraging" and "inducing" drawn from *Black's Law Dictionary*. J.A. 40-44. Respondent opposed that proposal without offering alternative definitions. J.A. 45-50. The district court elected to use the pattern instruction without defining those terms, reasoning that "encouraging" and "inducing" are "pretty * * * straightforward words." J.A. 100-101; see J.A. 116-117 (jury instructions).

The jury found respondent guilty on all of the Section 1324(a) counts and mail-fraud counts charged in the indictment. J.A. 118-121. After trial, respondent moved for a judgment of acquittal on the Section 1324(a) counts, challenging the sufficiency of the evidence and renewing her previous constitutional arguments. Pet. App. 4a-5a. The district court granted that motion in part and denied it in part. *Id.* at 40a-67a. The court deemed the evidence insufficient on one Section 1324(a) count and its corresponding mail-fraud count, for which the government had not presented the testimony of the vic-

tim. *Id.* at 51a-53a, 61a-64a. The court rejected respondent's constitutional challenges for the same reasons it had given before trial. *Id.* at 65a.

D. Appellate Proceedings

Respondent appealed, reiterating the constitutional arguments that she had made in the district court—namely, that she lacked fair notice and that the First Amendment protected her filings with the government. Resp. C.A. Br. 27-41. Several months after oral argument, the panel *sua sponte* invited the Federal Defender Organizations of the Ninth Circuit, the Immigrant Defense Project, and the National Immigration Project of the National Lawyers Guild to file amicus briefs addressing additional constitutional arguments that respondent herself had not advanced, including "[w]hether the statute of conviction is overbroad." J.A. 123; see J.A. 122-124. The order stated that the parties "may" respond to the amicus briefs that the panel had solicited. J.A. 123.

Following the additional briefing and further oral argument, the court of appeals relied on a First Amendment overbreadth theory to facially invalidate Section 1324(a)(1)(A)(iv) and set aside respondent's Section 1324 convictions. Pet. App. 1a-39a. The court focused exclusively on Section 1324(a)(1)(A)(iv), deeming the financial-gain element in Section 1324(a)(1)(B)(i) "irrelevant." *Id.* at 10a n.5. In the court's view, Section 1324(a)(1)(A)(iv) defines "the predicate criminal act" without which respondent "could not have been convicted," and "the chilling effect of the 'encourage or induce'" language of the statute would "extend[] to anyone who engages in behavior covered by it, whether for financial gain or not." *Ibid.*

The court of appeals then rejected the government's contention that Section 1324(a)(1)(A)(iv) is akin to an aiding-and-abetting or solicitation prohibition and that any speech it covers is not protected because that "speech is integral to assisting others in violating the immigration laws." Pet. App. 28a; see *id.* at 27a-33a. The court accepted that, read in isolation, the statutory terms "'encourage or induce' can mean speech, or conduct, or both." *Id.* at 26a-27a. But it took the view that the statute must be read as "susceptible to regular application to constitutionally protected speech," including "abstract advocacy." *Id.* at 36a; see *id.* at 34a-38a.

The court of appeals relied on that reading of the statute to conclude that the statute "criminalizes a substantial amount of protected expression in relation to [its] * * * legitimate sweep" and is therefore "unconstitutionally overbroad." Pet. App. 39a. Based on hypotheticals posited by the invited amici and the court itself, the court deemed Section 1324(a)(1)(A)(iv)'s "impermissible applications" to be "real and substantial." *Ibid.*; see *id.* at 34a-38a. And based in part on its view that the provision covers "only * * * conduct not criminalized in the other subsections of § 1324(a)(1)(A)," it characterized the statute's "legitimate sweep" as "narrow." *Id.* at 39a. The court therefore held the statute "unconstitutionally overbroad." *Ibid.*

SUMMARY OF ARGUMENT

The Ninth Circuit erred in reaching out to facially invalidate an important federal criminal law. The prohibitions of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i) ensure appropriate punishment for defendants who seek enrichment through knowingly facilitating or soliciting viola-

tions of the immigration laws by aliens who illegally enter or remain in the United States. They are valid on their face and as applied in this case.

A. The Ninth Circuit did not identify any First Amendment principle that would preclude applying the statute to respondent's own for-profit scheme to induce illegal immigration. The court of appeals instead relied on the doctrine of overbreadth, under which a statute that is concededly valid as applied to the defendant may nonetheless be struck down on its face if it would violate the First Amendment in a substantial number of other cases. That doctrine represents a departure both from the traditional rule favoring as-applied constitutional challenges and from the traditional rule against invoking the rights of third parties. Accordingly, this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 553 U.S. 285, 292 (2008).

B. The Ninth Circuit erred in deeming 8 U.S.C. 1324(a)(1)(A)(iv) substantially overbroad. First and foremost, the text, context, and history of respondent's statute of conviction demonstrate that it is a conventional prohibition against the facilitation or solicitation of unlawful conduct. Respondent was charged with the crime of "encourag[ing] or induc[ing] an alien to * * * reside in the United States, knowing or in reckless disregard of the fact that such * * * residence is or will be in violation of law," 8 U.S.C. 1324(a)(1)(A)(iv), "for the purpose of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i). In the criminal-law context, the statutory terms "encourage" and "induce" have an estab-

lished meaning; they require that the defendant actively facilitate or solicit the underlying illegal conduct. They had that established meaning when Congress first incorporated them into the statutory scheme more than a century ago, and they retain that meaning today. The other elements of the crime of conviction, including its multiple mens rea requirements, confirm that it is a commonplace criminal law that targets complicity, not an innovatively broad ban on speech. And even if the statute could be read that expansively, the canon of constitutional avoidance militates in favor of reading it as an unproblematic criminal complicity law. Accordingly, properly construed, the statute does not cover protected speech.

C. At the very least, it is clear that the statute is not substantially overbroad relative to its plainly legitimate sweep. There can be no doubt that, at a minimum, the statute legitimately reaches a substantial amount of nonspeech conduct, such as selling fake passport stamps or leading aliens to the border. To the extent that the statute reaches speech, it prohibits only speech that aids or is "intended to induce * * * illegal activities," *Williams*, 553 U.S. at 298, which this Court has long recognized may be proscribed without offending the First Amendment. On the other side of the ledger, the Ninth Circuit did not identify any realistic danger of chilling protected speech, or even any actual prosecutions of such speech, but instead struck down the statute based on hypothetical scenarios that the statute of conviction here would not in fact encompass. A prohibition on facilitating or soliciting unlawful actions cannot reasonably be understood to criminalize abstract advocacy, and the typical narrowness of this one is further cabined by the requirement that the defendant have the purpose of financial

gain. To the extent that the statute could be, or ever is, applied to protected speech, any concerns could be addressed through the normal constitutional mechanism of an as-applied challenge.

D. The reasons identified by the Ninth Circuit do not support the extraordinary remedy of facial invalidation. The Ninth Circuit's belief that the statute is unconstitutionally overbroad reflects errors of statutory construction, overbreadth doctrine, and general First Amendment law. Its conclusion that Section 1324(a)(1)(A)(iv) plays no role in the statutory scheme unless it criminalizes abstract advocacy failed even to account for this very case, which could not be prosecuted under any other provision of Section 1324(a)(1)(A). Its overbreadth analysis wrongly ignored the financial-gain requirement of respondent's crime of conviction. And its apparent view that the First Amendment categorically protects speech that facilitates or solicits a civil violation of the law was mistaken. Its erroneous decision should be reversed.

ARGUMENT

RESPONDENT'S CONVICTIONS UNDER 8 U.S.C. 1324(a)(1)(A)(iv) AND (B)(i) ARE CONSTITUTIONALLY VALID

The Ninth Circuit did not identify any First Amendment principle that would shield respondent's own conduct—causing illegally present aliens to remain in the country indefinitely so that they could pay her to file futile immigration applications—from criminal prosecution. It instead invoked an exception to the normal rules favoring as-applied challenges and case-specific standing, see, *e.g.*, *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999), to declare 8 U.S.C. 1324(a)(1)(A)(iv) substantially overbroad. But

the text, context, and history of Section 1324(a)(1)(A)(iv) demonstrate that the longstanding prohibition on "encourag[ing]" or "induc[ing]" unlawful immigration activity, *ibid.*, is a conventional proscription of soliciting or facilitating illegality, of the sort that has never raised First Amendment concerns. And respondent's particular conviction here depended on proof that she instigated unlawful activity for financial gain. The Ninth Circuit's concerns about criminalizing "abstract advocacy," Pet. App. 36a, are therefore misplaced and in no way justify First Amendment protection for defendants like respondent, who seek to profit by causing violations of the immigration laws.

A. Respondent's Convictions Are Invalid Only If The Statute Of Conviction Is Substantially Overbroad In Its Potential Application In Other Cases

In the First Amendment context, as in others, "[f]acial challenges are disfavored." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008). Among other things, such challenges "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process." *Id.* at 450-451.

Facial overbreadth challenges—in which a defendant asserts that a statute, constitutionally applied to her, is nevertheless invalid because it would be unconstitutional in a "substantial number" of *other* cases, *Washington State Grange*, 552 U.S. at 449 n.6 (citation omitted)—are even more exceptional. "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U.S. 747, 767 (1982); see *United*

States v. *Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases."). That normal third-party standing rule, to which overbreadth claims are a "limited" exception, reflects "two cardinal principles of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudication." *Los Angeles Police Dep't*, 528 U.S. at 39-40 (citations and internal quotation marks omitted).

Accordingly, the Court has taken care to ensure that the overbreadth exception does not "swallow" the traditional rule favoring as-applied challenges. *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment," the Court has recognized that overbreadth is "'strong medicine'" to be employed "'only as a last resort.'" *Los Angeles Police Dep't*, 528 U.S. at 39 (quoting *Ferber*, 458 U.S. at 769); cf. *Hicks*, 539 U.S. at 119 (noting the "substantial social costs created by the overbreadth doctrine when it blocks application of a law to * * * constitutionally unprotected conduct") (emphasis omitted).

The Court has therefore "vigorously enforced the requirement that a statute's overbreadth be *substantial* * * * relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 553 U.S. 285, 292 (2008). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, "there must be a real-

istic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* at 801. And laws that are "not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)" are far less likely to present such a danger. *Hicks*, 539 U.S. at 124; see *ibid.* (observing that "an overbreadth challenge" to such a law will "[r]arely, if ever, * * * succeed").

B. The Text, Context, And History Of Section 1324(a)(1)(A)(iv) Illustrate That It Is A Conventional Prohibition On Soliciting Or Facilitating Illegality

Because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers," the "first step in overbreadth analysis is to construe the challenged statute." *Williams*, 553 U.S. at 293. Respondent here was charged with the crime of "encourag[ing] or induc[ing] 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," 8 U.S.C. 1324(a)(1)(A)(iv), "for the purpose of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i). See Pet. App. 94a-107a; J.A. 116-117. The statutory text, context, and history demonstrate that the terms "encourage[]" and "induce[]" refer—as they usually do in such contexts—to facilitating or soliciting another person's illegal activity. 8 U.S.C. 1324(a)(1)(A)(iv). The court of appeals erred in nevertheless reading the statute to encompass large swaths of constitutionally protected speech—a reading at odds with the established criminal-law meaning of the terms "encourage" and "induce." At a minimum, the statute can fairly be construed to avoid constitutional concerns.

1. The terms "encourage" and "induce" in a criminal law refer to facilitation and solicitation

The terms "encourage[]" and "induce[]"in Section 1324(a)(1)(A)(iv) are familiar criminal-law terms of art that refer to the facilitation or solicitation of illegal conduct. A person "encourages or induces an alien" to violate the immigration laws only if the person aids, abets, or solicits the violation.

a. In criminal law, the term "encourage" means to "[t]o instigate; to incite to action; to embolden; [or] to help." *Black's Law Dictionary* 667 (11th ed. 2019) (*2019 Black's*). The term has long been closely associated with the concept of criminal complicity. See *ibid.* (cross-referencing the definition of "aid and abet") (capitalization omitted). For example, the general federal ban on acting as an accomplice forbids a person to "abet[]" the commission of a crime, 18 U.S.C. 2(a), and that term is commonly defined to include "encourag[ing]" the crime's commission, see, *e.g.*, *2019 Black's* 5 (defining "abet" as "[t]o aid, *encourage*, or assist (someone), esp. in the commission of a crime") (emphasis added); *Webster's Third New International Dictionary* 3 (2002) (defining "abet" as to "incite, *encourage*, instigate, or countenance," as in "the commission of a crime") (emphasis added); *Webster's New International Dictionary* 4 (2d ed. 1958) (same).

The term "induce" carries a similar connotation in this context. To induce a crime is to "entic[e] or persuad[e] another person" to commit it. *2019 Black's* 926; see *Webster's New World College Dictionary* 742 (5th ed. 2014) (defining "induce" to mean "to lead on to some action" or "to bring on; bring about"). And the term "induce" appears alongside the terms "aid" and "abet" in the federal accomplice-liability statute. See 18 U.S.C. 2(a)

("Whoever commits an offense against the United States or aids, abets, counsels, commands, *induces* or procures its commission, is punishable as a principal.") (emphasis added).

Many States likewise use the terms "encourage" or "induce" to describe criminal complicity. Colorado, for example, defines criminal complicity as "aid[ing], abet[ting], advis[ing], or *encourag[ing]*" the commission of a crime, Colo. Rev. Stat. § 18-1-603 (2018) (emphasis added), while Indiana provides for liability as a principal when someone "knowingly or intentionally aids, *induces*, or causes another person" to commit a crime, Ind. Code Ann. § 35-41-2-4 (LexisNexis 2009) (emphasis added). See Ala. Code § 32-8-11 (LexisNexis 2010) ("induces"); Ark. Code Ann. § 5-2-403(a)(1) and (b)(1) (2013) ("encourages"); Ga. Code Ann. § 16-2-20(b)(4) (2019) ("encourages"); Idaho Code Ann. § 18-204 (2016) ("encouraged"); Nev. Rev. Stat. Ann. § 195.020 (LexisNexis 2012) ("encourages * * * [or] induces"); Tex. Penal Code Ann. § 7.02(a)(2) (West 2011) ("encourages"); Utah Code Ann. § 76-2-202 (LexisNexis 2017) ("encourages"); Wash. Rev. Code Ann. § 9A.08.020(3)(a)(i) (West 2015) ("encourages"); Wyo. Stat. Ann. § 6-1-201(a) (2019) ("encourages").

b. The terms "encourage" and "induce" are also commonly used to describe the crime of soliciting illegal activity. Under the Model Penal Code, for example, a person commits the offense of solicitation if, with the requisite mental state, the person "commands, *encourages*, or requests another person to engage in specific conduct" that would violate the law. Model Penal Code § 5.02(1) (1985) (emphasis added). The accompanying commentary explains that analogous formulations use

the term "induce" in place of "encourage." *Id.* § 5.02 cmt. 3, at 372 n.25 (listing examples).

State solicitation laws are in accord with the Model Penal Code. It is commonplace for States to equate either "inducing" or "encouraging" a crime with criminal solicitation. See Ariz. Rev. Stat. Ann. § 13-1002(A) (2010) ("encourages"); Colo. Rev. Stat. § 18-2-301(1) (2018) ("induces"); Fla. Stat. Ann. § 777.04(2) (West 2017) ("encourages"); Haw. Rev. Stat. Ann. § 705-510(1) (LexisNexis 2016) ("encourages"); Idaho Code Ann. § 18-2001 (2016) ("encourages"); 720 Ill. Comp. Stat. Ann. 5/8-1(a) (West 2016) ("encourages"); Kan. Stat. Ann. § 21-5303(a) (West Supp. 2017) ("encouraging"); Ky. Rev. Stat. Ann. § 506.030(1) (LexisNexis 2014) ("encourages"); Me. Rev. Stat. Ann. tit. 17-A, § 153(1) (2006) ("attempts to induce") Mont. Code Ann. § 45-4-101(1) (2017) ("encourages"); N.M. Stat. Ann. § 30-28-3(A) (2018) ("induces"); N.D. Cent. Code § 12.1-06-03(1) (2012) ("induces"); 18 Pa. Cons. Stat. Ann. § 902(a) (West 2015) ("encourages"); Tex. Penal Code Ann. § 15.03(a) (West 2019) ("attempts to induce"); W. Va. Code Ann. § 61-11-8a(b)(1) (LexisNexis 2014) ("inducement"); Wyo. Stat. Ann. § 6-1-302(a) (2019) ("encourages").

Federal law follows a similar pattern. Although Congress has not enacted a general federal solicitation statute, the federal prohibition on soliciting the commission of a crime of violence punishes "[w]hoever," with the requisite intent, "solicits, commands, *induces*, or otherwise endeavors to persuade" another person "to engage in [the covered] conduct." 18 U.S.C. 373(a) (emphasis added); cf. National Commission on Reform of Federal Criminal Laws, *Final Report* § 1003(1), at 69 (1971) (proposing a general federal solicitation offense under

which "[a] person is guilty * * * if he commands, induces, entreats, or otherwise attempts to persuade another person to commit a particular felony").

2. Context and history confirm that Section 1324(a)(1)(A)(iv) targets facilitation and solicitation

Both the historical and the current context of the statute at issue here refute any suggestion that Congress used the terms "encourage" and "induce" in an unusually broad, speech-restrictive manner. The statute was developed as, and remains today, a prohibition on facilitation and solicitation.

a. Congress first prohibited "encouraging" certain immigration violations in 1885. See p. 5, *supra*. At the time, that term was already linked to aiding-and-abetting liability. See *Black's Law Dictionary* 419 (1st ed. 1891) (*1891 Black's*) (defining "encourage" to mean "[t]o instigate; to incite to action," and cross-referencing the definition of "aid") (capitalization omitted). Similarly, the word "induce," which appeared in the forerunner to Section 1324(a) as early as 1917, see p. 5, *supra*, had by then long been associated with conduct that "leads or tempts" individuals to commit crimes. *1891 Black's* 617 (defining "inducement," "[i]n criminal evidence," as "[m]otive; that which leads or tempts to the commission of crime") (capitalization and emphasis omitted); see J. Kendrick Kinney, *A Law Dictionary and Glossary* 385 (1893) ("[i]nducement" includes "that which leads to the commission of crime"). Indeed, Congress itself had recently used the term "induce[]" to define accomplice liability. See Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 ("Whoever * * * aids, abets, counsels, commands, *induces*, or procures [the commission of an offense], is a principal.") (emphasis added).

The words that accompanied the terms "encouraging" or "inducing" in the early statutes reinforced their ordinary criminal-law meaning. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) (Scalia & Garner) (explaining that, under the associated-words canon, "words grouped in a list should be given related meanings") (citation omitted); see also *Williams*, 553 U.S. at 294 (invoking that canon). As the federal and state statutes cited above illustrate, see pp. 19-22, *supra*, it is common for a facilitation or solicitation statute to use various terms, including words like "encourage" or "induce," in a list of others that similarly describe facilitation or solicitation. See *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 385 (2013) (recognizing that redundancy is "hardly unusual" in certain contexts). The early immigration laws followed that same pattern. The statute at issue in *Lees* v. *United States*, 150 U.S. 476 (1893), for example, made it unlawful to "assist[], encourag[e] or solicit[] the migration or importation" of contract laborers in specified circumstances. Act of Feb. 26, 1885, § 3, 23 Stat. 333. In upholding that prohibition against a constitutional challenge, this Court stressed Congress's power to punish those who "assist" in the violation, *Lees*, 150 U.S. at 480, without suggesting that the term "encouraging" was different in kind from the surrounding statutory terms. The 1917 iteration of the contract-laborer statute similarly made it unlawful "to induce, assist, encourage, or solicit" a violation. Act of Feb. 5, 1917, § 5, 39 Stat. 879.

When Congress enacted Section 1324(a) in the INA in 1952, it reduced the linguistic overlap by simply forbidding a person to "encourage[] or induce[]" a violation, § 274(a)(4), 66 Stat. 229, without using all of the terms that previously appeared. But that drafting

choice plainly did not transform the statute from a prohibition on acts of assistance and solicitation into a novel and expansive prohibition of speech. Indeed, the remaining, more compact, formulation of the crime echoed this Court's then-recent description of the substance of the 1917 statute. See *United States* v. *Hoy*, 330 U.S. 724, 727 (1947) (describing "contract laborers" covered by the statute "as persons *induced* or *encouraged* to come to this country by offers or promises of employment") (emphases added). And, at the same time that Congress pared down the verbs, it eliminated the separate prohibition on "induc[ing], assist[ing], encourag[ing], or solicit[ing]" an alien's migration "through advertisements printed, published, or distributed in any foreign country." 8 U.S.C. 142 (1946).

b. The other elements of the current statute confirm that it is a standard criminal solicitation and facilitation prohibition, not a sweeping prohibition of innocuous speech. For example, as the court of appeals acknowledged (Pet. App. 25a-26a), Section 1324(a)(1)(A)(iv) prohibits only acts of encouragement or inducement directed at a specific alien or aliens, not the general public. The object of the encouragement or inducement must be "an alien," and the statutory penalties apply with respect to "each alien." 8 U.S.C. 1324(a)(1)(A)(iv) and (B); see *Grant Bros. Constr. Co.* v. *United States*, 232 U.S. 647, 664 (1914) (explaining that, under a predecessor statute, "a separate penalty shall be assessed in respect of each alien whose migration or importation is knowingly assisted, encouraged or solicited"). The statute's focus on the defendant's interactions with an individual alien are consistent with a ban on facilitation or solicitation—not with a ban on "abstract advocacy," Pet. App. 36a.

The actus reus of the offense is also paired with multiple scienter requirements. See *Williams*, 553 U.S. at 294 (focusing on scienter requirement in determining that statute was not overbroad). For example, the statute requires proof that the defendant knew that the particular alien's entry or residence in the United States would be unlawful, or acted "in reckless disregard of [that] fact." 8 U.S.C. 1324(a)(1)(A)(iv). That element demands more than mere negligence; evidence that the defendant "should have known" is insufficient. *United States* v. *Kalu*, 791 F.3d 1194, 1208 (10th Cir. 2015). And the aggravated offense at issue here further requires proof that the defendant acted with the specific intent to obtain "commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(B)(i). Those requirements reinforce that the type of conduct Congress had in mind was direct facilitation or solicitation of unlawful conduct by an identifiable alien.

In addition, although no specific mens rea language modifies the phrase "encourages or induces," 8 U.S.C. 1324(a)(1)(A)(iv), those words cannot reasonably be read to encompass accidental or even undirected conduct. To the contrary, courts have held that proof of general criminal intent is required for *all* of the offenses in Section 1324(a)(1)(A). See *United States* v. *He*, 245 F.3d 954, 957-959 (7th Cir.), cert. denied, 534 U.S. 966 (2001); *United States* v. *Nguyen*, 73 F.3d 887, 891-893 (9th Cir. 1995); *United States* v. *Zayas-Morales*, 685 F.2d 1272, 1276-1277 (11th Cir. 1982); cf. *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015) ("Although there are exceptions," the Court "generally interpret[s] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.") (citation and internal quotation marks omitted).

And application of a knowledge requirement is consistent with the standard mens rea requirement for accomplice liability. See *Rosemond* v. *United States*, 572 U.S. 65, 76-77 (2014).[*]

3. The canon of constitutional avoidance would come into play if the statute could be read to create doubts about its constitutional validity

At a minimum, the canon of constitutional avoidance would foreclose reading Section 1324(a)(1)(A)(iv) so expansively as to create doubts about its constitutionality. That canon "comes into play" if a statute is "susceptible of more than one construction," even after the "application of ordinary textual analysis." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005). Under it, a court is "obligated to construe [a] statute to avoid [constitutional] problems" if it is "'fairly possible'" to do so. *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001). The canon should apply with equal, if not greater, force in the exceptional context of an overbreadth claim. See *Ferber*, 458 U.S. at 769 n. 24 ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.").

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[*] The jury instructions in this particular case did not provide a specific mens rea modifying the phrase "encouraged or induced." J.A. 117. But it would be inappropriate to rely on that case-specific fact as controlling the interpretation of the statute for purposes of a facial overbreadth challenge that rests on the hypothetical application of the statute to others, particularly since, as applied to the facts of this case, the statute raised no colorable First Amendment issue at all. See *Williams*, 553 U.S. at 293 (noting requirement of correct construction); see also Pet. App. 12a-14a (considering construction of mens rea element without regard to jury instructions).

This Court's decision in *United States* v. *Williams*, *supra*, is highly instructive in this regard. There, the Court did not even need to explicitly invoke the canon to reject an overbreadth argument that, like the one here, was predicated on misreading statutory language to ban as much speech as possible. In particular, the Court upheld the constitutionality of a federal law that made it unlawful to "advertise[], promote[], present[], distribute[], or solicit[]" child pornography. 18 U.S.C. 2252A(a)(3)(B) (2006). As Justice Scalia noted in his opinion for the Court, the verbs "'present[]'" and "'promote[]'" could "in isolation" be understood capaciously, to include mere "advocacy of child pornography." *Williams*, 553 U.S. at 294, 299. But the Court rejected that construction based on textual indicators, including the statute's scienter requirement, and the history of similar child pornography laws upheld by the Court. See *id.* at 294-297. The Court thus reasoned that the statute did not reach statements like "I believe that child pornography should be legal" or "I encourage you to obtain child pornography." *Id.* at 300; cf. *id.* at 307 (Stevens, J., concurring) (observing that the Court's construction would be "compelled by the principle that 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality'") (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)).

The Court should likewise reject a reading that would render Section 1324(a)(1)(A)(iv) unconstitutionally overbroad. The Ninth Circuit itself recognized that the terms "'encourage' or 'induce' can mean speech, or conduct, or both." Pet. App. 26a-27a. For the reasons set forth above, the best interpretation of that provision, based on its text, context, and history, is as a con-

ventional criminal prohibition on facilitating or soliciting illegal activity, not a far-reaching prohibition on innocent advocacy. But regardless, to the extent that the terms "encourage" and "induce" could, in this context, have the uncommonly broad meaning ascribed to them by the Ninth Circuit, the canon of constitutional avoidance "militates against" a reading that would "raise serious questions of constitutionality." Scalia & Garner 247-248.

C. Respondent's Crime Of Conviction Has A Plainly Legitimate Sweep And Is Not Substantially Overbroad

At the very least, respondent cannot show that she was convicted of a crime that is "substantial[ly]" overbroad relative to its "plainly legitimate sweep," *Washington State Grange*, 552 U.S. at 449 n.6 (citations omitted). Respondent's own prosecution is illustrative of the numerous constitutionally legitimate applications of the statute to conduct and unprotected speech. And far from showing a "realistic danger" of constitutionally problematic applications in other cases, *Taxpayers for Vincent*, 466 U.S. at 801, respondent has yet to identify a single actual example of a prosecution based on protected speech. The limitations inherent in the crime of conviction, moreover, render the possibility of any such prosecutions marginal at best, and any such case could be the subject of an as-applied challenge. Nothing at all calls for the "strong medicine," *Los Angeles Police Dep't*, 528 U.S. at 39 (citation omitted), of overbreadth invalidation.

1. The plainly legitimate sweep of the statute encompasses significant real-world criminal activity

Actual prosecuted cases, under the current and former versions of the statute, illustrate the range of crimes

that respondent's statute of conviction legitimately covers. Those crimes, which involve only conduct or unprotected speech, raise no First Amendment concerns.

a. Respondent's own criminal conduct is an illustrative example of the type of activity that the statute of conviction proscribes. Respondent deceived aliens into paying her to file labor-certification applications that she knew could not be the basis for invoking the pathway to lawful permanent residence that she touted to her clients. See pp. 7-9, *supra*. Respondent nonetheless led her clients to believe that they were on the "way [to] being legalized," J.A. 67, thus inducing them to remain and work in the country unlawfully while paying respondent thousands of dollars in fees, J.A. 77; see Pet. App. 4a, 42a.

The statute has similarly been applied to acts of procuring and providing fraudulent documents and identification information to unlawfully present aliens. In *United States* v. *Oloyede*, 982 F.2d 133 (4th Cir. 1993) (per curiam), for example, the defendants sold false citizenship papers to aliens. See *id.* at 135-137. And in *United States* v. *Ndiaye*, 434 F.3d 1270 (11th Cir.), cert. denied, 549 U.S. 855 (2006), the defendant paid a government employee to fraudulently issue a Social Security number to an alien. See *id.* at 1277-1278, 1297-1298; see also, *e.g.*, *United States* v. *Martinez*, 900 F.3d 721, 725-726, 730-731 (5th Cir. 2018) (defendants arranged for aliens to fraudulently use the identification information of former employees).

The statute has also provided the basis for prosecuting schemes to provide assistance for unlawful entry, or to misleadingly lure aliens into the country for unlawful work. In *United States* v. *Tracy*, 456 Fed. Appx. 267 (4th Cir. 2011) (per curiam), cert. denied, 566 U.S. 980

(2012), for example, the defendant sold aliens fraudulent papers to travel from Kenya to Cuba and provided instructions for unlawfully entering the United States from Cuba. See *id.* at 269. In *United States* v. *Castillo-Felix*, 539 F.2d 9 (9th Cir. 1976), the defendant sold an alien counterfeit papers to work in the United States and led the alien to a hole in the border fence to enter unlawfully from Mexico. See *id.* at 11. And in *United States* v. *Kalu*, *supra*, the defendant solicited foreign workers to come to the United States under false pretenses and later employed them unlawfully. See 791 F.3d at 1198-1199.

Smuggling activities, too, are within the plainly legitimate sweep of the statute. In *United States* v. *Yoshida*, 303 F.3d 1145 (9th Cir. 2002), for example, the defendant led aliens through an airport to their flight to the United States, "timed their arrival at the boarding gate so that they could enter the aircraft without having to wait or be questioned extensively by airline employees," and sat behind them on the plane. *Id.* at 1150-1151; see also, *e.g.*, *United States* v. *Fujii*, 301 F.3d 535, 540 (7th Cir. 2002) (similar); *He*, 245 F.3d at 955-956 (similar). And in *United States* v. *Okatan*, 728 F.3d 111 (2d Cir. 2013), the defendant picked an alien up at a Canadian airport, drove the alien to the vicinity of the U.S. border, and arranged to meet the alien on the U.S. side of the border after the alien crossed on foot. See *id.* at 113-114.

b. These sorts of prosecutions form the core of Section 1324(a)(1)(A)(iv)'s plainly legitimate sweep, and all, like respondent's prosecution, are wholly valid under the First Amendment. Many prosecutions under Section 1324(a)(1)(A)(iv), such as the prosecutions for smuggling-related activities, involve only nonexpressive conduct.

And to the extent that Section 1324(a)(1)(A)(iv) prohibits facilitation and solicitation accomplished partially or entirely through speech, it covers only speech that the Court has recognized to be "undeserving of First Amendment protection," *Williams*, 553 U.S. at 298.

This Court has long recognized that speech that constitutes "solicitation to commit a crime," or that is "intended to induce * * * illegal activities," is speech that a legislature may permissibly proscribe. *Williams*, 553 U.S. at 298; cf. *Fox* v. *Washington*, 236 U.S. 273, 277-278 (1915) (Holmes, J.) (recognizing that legislature could proscribe "encouragements" that amount to accomplice liability). The pre-Framing common law treated "persons counselling, abetting, * * * and encouraging" the commission of a completed felony as either accessories before the fact or principals, depending on whether they were present for the commission of the crime. 2 Edward Coke, *Institutes of the Laws of England* 182 (6th ed. 1681); see 4 William Blackstone, *Commentaries on the Laws of England* 36-37 (1769); 1 Matthew Hale, *The History of the Pleas of the Crown* 615 (1736); see also Kent Greenawalt, *Speech and Crime*, 1980 Am. B. Found. Res. J. 645, 656 (explaining that those "who successfully incited misdemeanors were guilty as principals," regardless of whether they were present for the solicited crime) (footnote omitted). The First Amendment has accordingly never been thought to forbid such liability or to prohibit statutes "that penalize encouragements to specific crimes." Greenawalt 690.

More generally, it "has never been deemed an abridgment of freedom of speech * * * to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v.

Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). As the Court has explained, "the constitutional freedom for speech" does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* at 498. "Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities." *Williams*, 553 U.S. at 298. Such "'prevention and punishment'" of "speech integral to criminal conduct" has "'never been thought to raise any Constitutional problem.'" *United States* v. *Stevens*, 559 U.S. 460, 468-469 (2010) (citation omitted).

2. The court of appeals' parade of hypotheticals does not justify facially invalidating the statute

In contrast to the statute's many plainly legitimate applications, neither respondent nor the Ninth Circuit has identified any "substantial" number—in either an "absolute" or a "relative" sense—of unconstitutional ones. *Williams*, 553 U.S. at 292. Indeed, rather than cite any actual assertedly unconstitutional prosecutions, the Ninth Circuit succumbed to the unfortunate "tendency of [the] overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals," *id.* at 301. The court of appeals posited that Section 1324(a)(1)(A)(iv) would reach, for example, a grandmother urging a grandson to overstay a visa, a political speech encouraging civil disobedience of the immigration laws, or an attorney's advice that a client remain in the country while contesting removal. Pet. App. 35a-38a. Those hypotheticals—which the Ninth Circuit did not tie to any actual prosecutions and which involve conduct that the statute does not criminalize—cannot justify striking down Section 1324(a)(1)(A)(iv) on its face.

a. This Court has emphasized that facial invalidation on overbreadth grounds is warranted only when a statute poses "a realistic danger" of chilling the speech of third parties. *Taxpayers for Vincent*, 466 U.S. at 801. In *Williams*, for example, the defendant argued that the word "present[ing]" in a statute prohibiting the pandering of child pornography could be understood to criminalize even the act of turning suspected images of child pornography over to the police. 553 U.S. at 302 (brackets in original). This Court pointed out, however, that a state ban on child pornography upheld in a prior decision had included the same word and that other state laws did as well. *Ibid.* And it observed that notwithstanding such laws, it was "aware of no prosecution for giving child pornography to the police." *Ibid.* The Court could "hardly say, therefore, that there is a 'realistic danger' that" the statute at issue would "deter such activity." *Ibid.* (citation omitted).

A "realistic danger" is similarly absent here. The Ninth Circuit did not rely on any "actual" prosecutions to support its hypotheticals, *Hicks*, 539 U.S. at 122 (citation omitted). The only case that the court identified—*United States* v. *Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012) (cited at Pet. App. 24a)—was a prosecution of an official at the Department of Homeland Security who induced her housekeeper to reside in the country illegally. *Id.* at 193, 203-204. Although a colloquy with the district court in that case included a suggestion by the prosecutor that an immigration lawyer's advice to a client could violate Section 1324(a)(1)(A)(iv), *Henderson* itself was not such a case. And the colloquy in *Henderson* does not even begin to satisfy respondent's

burden of showing a "realistic danger" that prosecutions under Section 1324(a)(1)(A)(iv) substantially chill protected speech.

b. The hypothetical scenarios that the Ninth Circuit invented are particularly misplaced because Section 1324(a)(1)(A)(iv), properly construed, does not criminalize the speech that the hypotheticals describe. Facilitation and solicitation laws like Section 1324(a)(1)(A)(iv) are ordinarily understood not to prohibit abstract or generalized advocacy of illegality, even when the literal language of those prohibitions might in other contexts encompass such advocacy. See, *e.g.*, *Ford* v. *State*, 262 P.3d 1123, 1130-1131 (Nev. 2011) (construing prohibition on soliciting prostitution not to reach "abstract advocacy"); *State* v. *Ferguson*, 264 P.3d 575, 578 (Wash. Ct. App. 2011) (construing aiding-and-abetting statute not to "forbid the mere advocacy of law violation," and rejecting overbreadth challenge); cf. *Williams*, 553 U.S. at 298-299.

Nothing in the text or context of Section 1324(a)(1)(A)(iv) even remotely suggests that it is intended to break from that mold and prohibit mere advocacy, notwithstanding the constitutional questions that doing so would invite. To the contrary, the operative language, "encourages or induces," uses the same verbs that this Court in *Williams* and other decisions has itself used to describe prohibitions that are constitutional. See 553 U.S. at 298 (describing restriction on speech "intended to *induce* or commence illegal activities" as constitutional) (emphasis added); *Cox* v. *Louisiana*, 379 U.S. 559, 563 (1965) ("A man may be punished for *encouraging* the commission of a crime.") (emphasis added); *International Bhd. of Elec. Workers* v. *NLRB*, 341 U.S. 694, 705 (1951) (upholding "prohibition

of *inducement or encouragement* of secondary pressure") (emphasis added). And the statutory requirement that any inducement or encouragement be directed to a particular identifiable alien or aliens, see p. 24, *supra*, reinforces that the statute cannot sensibly be read to reach "general advocacy" in the public sphere about immigration law. Pet. App. 37a.

Just as a teenager does not aid, abet, or solicit marijuana possession merely by saying to a friend, "I encourage you to try smoking pot," a grandmother does not violate Section 1324(a)(1)(A)(iv) merely by saying to her grandson whose visa has expired, "I encourage you to stay," Pet. App. 35a. Similarly, just as a community organizer does not aid, abet, or solicit drug crimes merely by making a speech supporting changes in the drug laws and saying, "I encourage all you folks out there to smoke marijuana," a community organizer does not violate Section 1324(a)(1)(A)(iv) merely by making "[a] speech addressed to a gathered crowd" or posts on social media supporting changes in immigration law and saying, "'I encourage all you folks out there without legal status to stay in the U.S.,'" *id.* at 37a. And just as a lawyer does not aid, abet, or solicit a crime if she tells a client in good faith that a particular type of illegal conduct is rarely prosecuted, a lawyer similarly does not violate Section 1324(a)(1)(A)(iv) if she tells a client who is present unlawfully that she is unlikely to be removed. Cf. Model Rules of Prof'l Conduct 1.2(d) (2018) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client.").

c. The Ninth Circuit's hypotheticals are particularly misconceived in the context of this case, where respondent was convicted of a crime that required not only proof beyond a reasonable doubt that respondent encouraged or induced illegal conduct, but also that she did so for "commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(B)(i). That financial-gain requirement was charged in the indictment, found by the jury at trial, and necessary to the maximum sentence that respondent faced. Pet. App. 96a-97a; J.A. 119-120; see 8 U.S.C. 1324(a)(1)(B)(i) and (ii); *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). And it alone excludes many of the Ninth Circuit's fanciful scenarios.

For example, even under the Ninth Circuit's erroneously broad reading of "encourage," a defendant could not be convicted of for-profit encouragement based merely on "the simple words—spoken to a son, a wife, a parent, a friend, a neighbor, a coworker, a student, a client—'I encourage you to stay here.'" Pet. App. 3a. Words of encouragement between family members and social acquaintances are not ordinarily "for the purpose of commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(B)(i). Nor would they become so even if—as respondent has posited (Br. in Opp. 24)—the speaker happens to receive some ancillary financial benefit, as long as that was not the speaker's purpose.

It is therefore highly unlikely that a defendant could, let alone would, be prosecuted and convicted for the financial-gain crime defined by Section 1324(a)(1)(A)(iv) and (B)(i) based on protected speech. At a minimum, the number of such cases cannot be viewed as so "substantial" as to require invalidating all of the statute's numerous legitimate applications.

3. As-applied challenges, not facial overbreadth claims, are the appropriate way to address any constitutional concerns with the prohibition

Finally, to the extent that Section 1324(a)(1)(A)(iv) and (B)(i) could be read to cover some protected speech, any prosecution for such speech, were it to occur, "could of course be the subject of an as-applied challenge," *Williams*, 553 U.S. at 302. Invalidation on overbreadth grounds would be justified only if respondent could show that the normal course of constitutional adjudication is insufficient to address chilling concerns. Respondent has failed to do so.

And prosecuting respondent's own conduct—profiting from deceiving aliens unlawfully in the United States into believing that they could obtain permanent-resident status—raises no First Amendment concerns. Not only speech integral to illegal conduct, but also speech constituting "fraud," falls outside the scope of the First Amendment. *Stevens*, 559 U.S. at 468. Sections 1324(a)(1)(A)(iv) and (B)(i) cover many such deceptive schemes—*e.g.*, defrauding an alien by selling him false entry papers. No sound reason exists to permit a defendant who has engaged in such a scheme to escape prosecution under the statute by hypothesizing that it might unconstitutionally be applied to others.

D. The Court Of Appeals Erred In Reaching Out To Facially Invalidate Section 1324(a)(1)(A)(iv)

None of the reasons cited by the Ninth Circuit justified its facial invalidation of Section 1324(a)(1)(A)(iv). In reaching out to address this issue, the Ninth Circuit not only deviated from the normal course of as-applied constitutional adjudication, but also the normal course of party-driven litigation, by inviting argument on—and ultimately invoking—the overbreadth doctrine. Its sharp

departure from adjudicatory norms was premised on a combination of errors—of statutory construction, overbreadth doctrine, and general First Amendment law—that led the Ninth Circuit to misconstrue the plainly legitimate sweep of the crime for which respondent was convicted.

1. As a textual matter, the Ninth Circuit appeared to believe that unless it construed Section 1324(a)(1)(A)(iv) so broadly as to encompass "abstract advocacy," Pet. App. 36a, the provision would serve no purpose. See *id.* at 18a-19a. But the canon against surplusage applies only when an interpretation would render a provision "wholly superfluous." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). And this very case illustrates that Section 1324(a)(1)(A)(iv) is not "wholly superfluous." None of the neighboring substantive prohibitions—which apply to transportation, concealment, and harboring crimes, see 8 U.S.C. 1324(a)(1)(A)(i)-(iii)—would encompass respondent's conduct.

Nor would the accomplice-liability provision in Section 1324(a)(1)(A)(v)(II) do so. See Pet. App. 18a. Its application is limited to aiding and abetting violations of Section 1324(a)(1)(A) *itself*, rather than the types of illegal activity that respondent here induced. And although respondent's course of conduct also violated the very different and separately codified federal prohibition against mail fraud, see 18 U.S.C. 1341, "[i]t is not unusual for a particular act to violate more than one criminal statute." *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) (explaining that, "in such situations the Government may proceed under any statute that applies") (citation omitted). As the Court has recognized, "overlap * * * is

not uncommon in criminal statutes," and even "substantial" overlap provides no reason to give abnormal meanings to statutory terms. *Loughrin* v. *United States*, 573 U.S. 351, 358 n.4 (2014).

2. As a matter of overbreadth doctrine, the Ninth Circuit believed that it was entitled to dismiss the statute's financial-gain requirement as "irrelevant," because "Subsection (A)(iv) is the predicate criminal act" and "does not vary depending upon whether the financial gain enhancement also applies." Pet. App. 10a n.5. For the reasons explained above, even if Section 1324(a)(1)(A)(iv) is construed in isolation, it is not substantially overbroad because it only reaches activity that facilitates or solicits an underlying violation of law. But regardless, the court of appeals further erred in concluding that Section 1324(a)(1)(B)(i) was irrelevant to the analysis.

Indeed, this Court's precedent cuts the other way. In *United States* v. *Alvarez*, 567 U.S. 709 (2012), the Court addressed an overbreadth challenge to a statute that criminalized false statements about winning a variety of federal medals, with enhanced penalties for the particular false statements that the defendant had made about winning the Medal of Honor. See *id.* at 713-715 (plurality opinion); see also 18 U.S.C. 704(b) and (c) (2006). But rather than ignoring the enhancement applicable to false statements about the Medal of Honor and instead looking solely at the more general offense, the Court treated the relevant offense as lying *about the Medal of Honor*. See *Alvarez*, 567 U.S. at 724-726 (plurality opinion); see also *id.* at 737-739 (Breyer, J., concurring in the judgment).

Disregarding a requirement of the actual crime of conviction was an unwarranted extension of overbreadth

doctrine—asking, in effect, whether applying a different statute to different defendants would pose any constitutional problem. The overbreadth doctrine's "obvious harmful effect[]" of "invalidating a law that in some of its applications is perfectly constitutional," *Williams*, 553 U.S. at 292, would be greatly magnified if the courts had license to ignore limiting features of a crime. The Ninth Circuit was not empowered to expand overbreadth doctrine simply by describing the statute here as containing a base offense with a for-profit "enhancement," Pet. App. 10a n.5. Although Section 1324(a)(1)(A)(iv) defines a complete criminal offense in the sense that no additional elements are necessary for conviction, a specific penalty is a prerequisite to enforcement. See *United States* v. *Evans*, 333 U.S. 483, 495 (1948). And the separate penalty provision here, 8 U.S.C. 1324(a)(1)(B), differentiates between a crime consisting only of the elements specified in Section 1324(a)(1)(A)(iv) (which is punishable by a maximum of five years of imprisonment, see 8 U.S.C. 1324(a)(1)(B)(ii)), and one that includes the further requirement of a "purpose of commercial advantage or private financial gain" (which is punishable by ten years of imprisonment, see 8 U.S.C. 1324(a)(1)(B)(i)).

This Court has cautioned against ascribing any constitutional significance to "the label 'sentence enhancement'" in the Sixth Amendment context. *United States* v. *Booker*, 543 U.S. 220, 231 (2005) (citing *Apprendi*, 530 U.S. at 476). The same substance-over-form logic applies here. Congress could have structured the criminal offenses defined in Section 1324(a)(1)(A)(iv) and (B)(i) as two distinct subparagraphs, each setting forth a complete and self-contained crime. That alternative version of the statute would be substantively identical to the existing one, yet it would plainly foreclose the

"enhancement" rationale that the court of appeals employed to dismiss the financial-gain element as irrelevant. A court should not take the extraordinary step of facially invalidating a federal criminal statute based on such a cosmetic drafting choice.

3. Finally, as a matter of general First Amendment doctrine, the Ninth Circuit believed that speech soliciting or facilitating illegality is unprotected only when the illegality is a criminal, rather than a civil, offense. Pet. App. 32a. On that view, Congress could criminally proscribe speech integral to the for-profit facilitation or solicitation of unlawful immigration activity only to the extent that it is willing to criminally punish the aliens themselves. This Court's precedents squarely refute such a perverse result.

As the Court's decisions reflect, the principle that speech "intended to induce or commence illegal activities" has "no social value" and should thus "enjoy no First Amendment protection," *Williams*, 553 U.S. at 298, applies irrespective of whether the underlying activity is criminally or civilly proscribed. In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), for example, this Court upheld the application of a civil ban on aiding unlawful employment practices to a newspaper's sex-discriminatory placement of help-wanted advertisements. *Id.* at 378, 388-389. The Court analogized the case to one involving a "want ad proposing a sale of narcotics or soliciting prostitutes," expressed "no doubt that a newspaper constitutionally could be forbidden to publish" such want ads, and saw "no difference in principle" between the case before it and one involving advertisements proposing criminal transactions. *Id.* at 388.

The Ninth Circuit erred in suggesting (Pet. App. 30a n.10) that *Pittsburgh Press* is no longer valid because it "relie[d] on the since-weakened distinction between commercial and non-commercial speech." This Court has rejected the contention that *Pittsburgh Press* rests on such a distinction, and *Williams* reaffirmed the constitutionality of solicitation laws that "criminalize speech (*commercial or not*)." 553 U.S. at 298 (emphasis added); see *id.* at 298 n.2. Nor is *Pittsburgh Press* alone in its recognition that the First Amendment does not protect speech soliciting or facilitating civilly proscribed activity. In *International Brotherhood of Electrical Workers* v. *NLRB*, *supra*, this Court found that a federal "prohibition of inducement or encouragement" of labor-union activity that was only civilly proscribed "carrie[d] no unconstitutional abridgment of free speech," even as applied to activity like "picketing" and a "telephone call." 341 U.S. at 705; see 29 U.S.C. 158(b)(4) (Supp. II 1948); see also *International Bhd. of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 293 (1957) (observing that a State may "constitutionally enjoin peaceful picketing aimed at preventing effectuation" of the State's policy, "whether of its criminal *or its civil* law") (emphasis added).

The similar "prohibition of inducement or encouragement" in Section 1324(a)(1)(A)(iv) likewise "carries no unconstitutional abridgement of free speech," *International Bhd. of Elec. Workers*, 341 U.S. at 705. Its criminal prohibition on facilitating or soliciting certain civil immigration offenses reflects more than a century of congressional recognition that criminal penalties may be appropriate for someone who induces unlawful activity by an alien, even when they are not imposed on the

alien who is induced. See *Lees*, 150 U.S. at 480 (explaining that "the [criminal] penalty" in Section 1324(a)'s predecessor was "visited not upon the alien laborer," who was subject to deportation, "but upon the party assisting in the importation"). Congress's differentiation between the two different types of activities is analogous to policy choices that legislatures make in other contexts. Some States, for example, make a minor's possession of alcohol a civil infraction, but an adult's "aid[ing] or assist[ing]" in furnishing alcohol to the minor a crime. Me. Rev. Stat. Ann. tit. 28-A § 2081(1)(A) (2007); see *id.* § 2051(1)(A) (Supp. 2018); see also, *e.g.*, Mich. Comp. Laws Ann. §§ 436.1701, 436.1703(1)(a) and (2) (West. Supp. 2019).

As the Court has recognized, "[m]uch public policy does not readily lend itself to accompanying criminal sanctions," and "[i]t is not the presence of criminal sanctions which makes a state policy 'important.'" *Building Serv. Emps. Int'l Union* v. *Gazzam*, 339 U.S. 532, 540 (1950). A legislature's choice to, say, make prostitution a civil infraction rather than a criminal offense should not come at the price of constitutionally invalidating criminal sanctions against facilitating or soliciting prostitution. And a constitutional line between civil and criminal illegality in this context would introduce unwarranted complexities into First Amendment law by requiring determinations of whether a potential "civil" penalty might in fact be "criminal" in nature, see, *e.g.*, *Hudson* v. *United States*, 522 U.S. 93, 99-100 (1997), or whether a third party's conduct satisfied all of the elements (including the mens rea element) of a crime, see, *e.g.*, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938) (noting that a legislature "may impose both a criminal and a civil sanction in respect to the same act"); see also, *e.g.*,

15 U.S.C. 78ff(a) (criminal penalty for willful securities-law violation otherwise punishable civilly); 26 U.S.C. 7201 (criminal penalty for willful tax-law violation).

Nothing in this Court's First Amendment jurisprudence foreclosed Congress from criminalizing respondent's conduct here, even if the legal violations that she induced were civil rather than criminal. And nothing in this Court's First Amendment jurisprudence suggests that Congress is facially barred from prohibiting the facilitation or solicitation of such violations. Both respondent's convictions, and the statutes under which she was convicted, are constitutionally valid.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition to Government for a redress of grievances.

2. 8 U.S.C. 1324 provides:

Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who—

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or

shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) 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; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, or both.

(C) It is not a violation of clauses[1] (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs—

(A) be fined in accordance with title 18 or imprisoned not more than one year, or both; or

(B) in the case of—

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[1] So in original. Probably should be "clause".

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who—

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if—

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

2. 18 U.S.C. 2 provides:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

3. 18 U.S.C. 373 provides:

Solicitation to commit a crime of violence

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but

similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

4. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332, provided in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

* * * * *

SEC. 3. That for every violation of any of the provisions of section one of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging or soliciting the migration

or importation of any alien or aliens, foreigner or foreigners, into the United States, its Territories, or the District of Columbia, to perform labor or service of any kind under contract or agreement, express or implied, parol or special, with such alien or aliens, foreigner or foreigners, previous to becoming residents or citizens of the United States, shall forfeit and pay for every such offence the sum of one thousand dollars, which may be sued for and recovered by the United States or by any person who shall first bring his action therefor including any such alien or foreigner who may be a party to any such contract or agreement, as debts of like amount are now recovered in the circuit courts of the United States; the proceeds to be paid into the Treasury of the United States; and separate suits may be brought for each alien or foreigner being a party to such contract or agreement aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit at the expense of the United States.

* * * * *

5. Act of Feb. 5, 1917, ch. 29, §§ 5-6, 39 Stat. 879, provided:

SEC. 5. That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the fifth proviso of section

three of this Act, or have been imported with the permission of the Secretary of Labor in accordance with the fourth proviso of said section, and for every violation of any of the provisions of this section the person, partnership, company, or corporation violating the same shall forfeit and pay for every such offense the sum of $1,000, which may be sued for and recovered by the United States, as debts of like amount are now recovered in the courts of the United States. For every violation of the provisions hereof the person violating the same may be prosecuted in a criminal action for a misdemeanor, and on conviction thereof shall be punished by a fine of $1,000, or by imprisonment for a term of not less than six months nor more than two years; and under either the civil or the criminal procedure mentioned separate suits or prosecutions may be brought for each alien thus offered or promised employment as aforesaid. The Department of Justice, with the approval of the Department of Labor, may from any fines or penalties received pay rewards to persons other than Government employees who may furnish information leading to the recovery of any such penalties, or to the arrest and punishment of any person, as in this section provided.

SEC. 6. That it shall be unlawful and be deemed a violation of section five of this Act to induce, assist, encourage, or solicit or attempt to induce, assist, encourage, or solicit any alien to come into the United States by promise of employment through advertisements printed, published, or distributed in any foreign country, whether such promise is true or false, and either the civil or criminal penalty or both imposed by said section shall be applicable to such a case.

6. Immigration and Nationality Act, ch. 477, § 274, 66 Stat. 228, provided:

SEC. 274. (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not

exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(b) No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.