

No. 19-67

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IN THE  
**Supreme Court of the United States**

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

EVELYN SINENENG-SMITH,  
*Respondent.*

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

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BRIEF FOR AMNESTY INTERNATIONAL AS  
*AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

Amnesty International respectfully submits this amicus brief in support of respondent to provide this Court with evidence Amnesty International has collected on the use of 8 U.S.C. § 1324(a)(1)(A)(iv) to criminally investigate and chill a substantial amount of speech protected by the First Amendment.

Founded in 1961, Amnesty International is a non-partisan, non-profit organization that monitors domestic law and practices in countries throughout the world. It is the world's largest grass-roots human rights organization with a global support base of more than seven million members, supporters, and activists in more than 150 countries and territories. Amnesty International engages in advocacy, litigation, and education to prevent and remedy human rights violations, protect the right to free speech and other fundamental human rights, and demand justice for those whose rights have been violated. As part of that work, Amnesty International has appeared both as a party or as *amicus curiae* in a number of recent cases implicating the First Amendment and the rights of migrants and asylum seekers, including *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017); *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013); *Innovation Law Lab v. McAleenan*,

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<sup>1</sup> Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

924 F.3d 503 (9th Cir. 2019); and *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284 (S.D. Cal. 2018).

## SUMMARY OF ARGUMENT

The central premise of the government’s defense of the constitutionality of 8 U.S.C. § 1324(a)(1)(A)(iv) is that the statute cannot and will not be used to target protected views and speech for criminal investigation and prosecution. The government tells the Court that the provision is merely a “conventional criminal prohibition on facilitating or soliciting illegal activity, not a far-reaching prohibition on innocent advocacy.” Pet. Br. 27-28. According to the government, the range of crimes covered by respondent’s “statute of conviction . . . involve only conduct or unprotected speech” and therefore “raise no First Amendment concerns.” *Id.* at 28-29.

The facts on the ground—including the government’s own statements outside of court—demonstrate that the government’s assertion is false. Amnesty International’s investigation has shown that § 1324(a)(1)(A)(iv) can be—and indeed repeatedly is—used to interfere with and chill a substantial amount of protected speech along the southern border.

Amnesty International’s investigation and field work formed the basis of a formal report published in July 2019. Amnesty Int’l, ‘*Saving Lives Is Not a Crime: Politically Motivated Legal Harassment Against Migrant Human Rights Defenders by the USA*’ (July 2,

2019) (“Report”).<sup>2</sup> As the Report explains, the government created a “Watchlist” maintained by the Customs and Border Protection regional office in San Diego. The Watchlist contained the names, pictures, and other identifying information of fifty-nine journalists, lawyers, and other activists at the border. One person on the list, for example, was a pastor from New York: She was apparently included on the list because she had prayed with and provided religious counseling to migrants traveling to the United States.

After the Watchlist’s existence was leaked to the media in March 2019, the government admitted that the Watchlist was designed to help enforce § 1324(a)(1)(A)(iv). In a publicly released letter, Customs and Border Protection acknowledged that its surveillance activities against human rights activists were designed in part to “investigat[e] possible violations under 8 U.S. Code § 1324, which pertains to any person who encourages or induces an alien to enter the United States . . . in violation of law.” Letter from Randy J. Howe, Exec. Director, Office of Field Operations, U.S. Customs and Border Protection, to Mana Azarmi, Center for Democracy & Technology (May 9, 2019), <http://www.documentcloud.org/documents/6009352-CBP-Response-to-DHS-Coalition-Letter.html> (“CBP Letter”).

When individuals on the Watchlist started to experience harassment from border officials, they turned to Amnesty International for help, as early as

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<sup>2</sup> The Report is available on the Internet at <http://www.amnesty.org/en/documents/amr51/0583/2019/en>.

December 2018. Amnesty International launched an investigation into their accounts, as well as accounts from individuals in other regions, interviewing people who believed they had been targeted for their work in support of the human rights of migrants and asylum seekers at the border.

These individuals' stories, as detailed in the Report, belie the government's claim that § 1324(a)(1)(A)(iv) has not been and will not be used to deter, threaten, and punish protected speech. As the Report recounts, the government has repeatedly detained journalists, attorneys, and activists who were engaging in protected expression. Moreover, many individuals on the Watchlist are professionals whose very responsibilities require them to engage in protected expression—*e.g.*, immigration lawyers who provide “know your rights” advice to asylum seekers and other immigrants. It is thus no answer for the government to contend, as it does, that § 1324(a)(1)(A)(iv) is constitutional to the extent it covers expression that could be characterized in some sense as being undertaken for “commercial advantage or private financial gain.”

In sum, § 1324(a)(1)(A)(iv)'s overbreadth is no “fanciful hypothetical,” as the government contends. The government has repeatedly applied the statute to discourage disfavored but protected expression, in numerous areas. This Court should affirm the judgment below and hold the provision unconstitutional.

## ARGUMENT

### I. The Government Has Repeatedly and Systematically Used § 1324(a)(1)(A)(iv) to Target Journalists, Lawyers, and Others for Their Protected Speech.

The centerpiece of the government’s argument is that § 1324(a)(1)(A)(iv) does not reach protected speech. Pet. Br. 29. According to the government, the provision is merely a conventional prohibition on soliciting or facilitating illegal acts that does not criminalize “abstract advocacy.” *Id.* at 16, 24. And the government argues that even if § 1324(a)(1)(A)(iv) did reach some protected speech, these scenarios are insubstantial relative to the statute’s “plainly legitimate sweep.” Pet. Br. 28.

On that latter point, the government tells the Court that there have not been any “actual assertedly unconstitutional prosecutions,” under § 1324(a)(1)(A)(iv), and that concerns about misuse of the statute amount to nothing more than “fanciful hypotheticals.” Pet. Br. 32 (quoting *United States v. Williams*, 553 U.S. 285, 301 (2008)). The government claims that these mere “hypotheticals” do not outweigh the statute’s legitimate sweep because they pose no “realistic danger” of chilling third parties’ speech. *Id.* at 33-34 (citing *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). As a result, the government concludes, the provision is not overbroad.

But what the government dismisses as mere hypothetical is all too real. The government’s own stated policy, as set out below, is that § 1324(a)(1)(A)(iv)

broadly reaches inducement and encouragement. And individuals who have engaged in exactly the type of speech that the government now contends is outside the scope of the statute have been targeted through a government watchlist that Customs and Border Protection officials explicitly justified by reference to that statute. The interference with these individuals' protected expression and the chilling effect resulting from such targeting—even in the absence of actual prosecution—is neither fanciful nor minimal. Indeed, it is both dangerous and substantial.

Customs and Border Protection's use of the Watchlist reveals how broadly the government believes this provision reaches—for example, to individuals simply providing comfort or legal advice to migrants. Because Customs and Border Protection has admitted to taking that view of the law, it is hardly “fanciful” for speakers to believe that the Department of Justice will do the same, further chilling protected speech.

**A. The Government Created a Watchlist to Investigate Journalists, Lawyers, and Activists for Possible Violations of § 1324(a)(1)(A)(iv).**

In anticipation of a caravan of Central American migrants, refugees, and asylum seekers arriving at the U.S. border, the Department of Homeland Security (“DHS”) launched “Operation Secure Line” in November 2018. In March 2019, a government whistleblower revealed that as part of Operation Secure Line the Customs and Border Protection office for the San Diego region was maintaining a database that included journalists, lawyers, and activists (referred to

here as the Watchlist). See Tom Jones, Mari Payton, & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC 7 (Mar. 6, 2019, updated Jan. 10, 2020), <https://www.nbcسان迭哥.com/news/local/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html> (“*Watchlist Exposé*”).

All told, the Watchlist contained information on fifty-nine individuals, including journalists, attorneys, activists, and a clergy member. The information listed for each individual typically included a photo, full name, date of birth, “country of commencement,” and alleged connection to the migrant caravan. *Id.* It also noted whether each individual—after having been placed on the Watchlist—had been arrested, stopped for secondary screening at the border, or had his or her U.S. immigration documents revoked, including visas and preferred traveler documents. *Id.* Individuals who had already been subjected to such treatment had X’s over their photographs. *Id.* According to the whistleblower, Customs and Border Protection also maintained additional dossiers on some individuals on the Watchlist. In one case, the supplemental intelligence dossier assembled by the government on a prominent U.S. immigration lawyer active on the border included information such as her car registration, mother’s name, recent travel, and her past employment as a federal public defender. *Id.*

After the Watchlist was revealed, a coalition of 103 nongovernmental organizations (“NGOs”) reached out

to Customs and Border Protection for an explanation. Letter from the Center for Democracy and Technology to DHS (May 1, 2019), <https://cdt.org/insights/coalition-letter-to-dhs-opposing-surveillance-of-activists-journalists-and-lawyers>. The San Diego Customs and Border Protection office initially told a television reporter that it was tracking individuals who participated in or witnessed a violent confrontation between Customs and Border Protection agents and migrants and asylum seekers at the border on November 25, 2018. *Watchlist Exposé*. (As Amnesty International’s interviews revealed, this could not have been the only reason for the Watchlist, as many individuals on the list had no connection to that event.)

In its response to the Coalition Letter, however, the government expanded upon that explanation, and referred specifically to § 1324(a)(1)(A)(iv) as a legal basis for its criminal investigation of those included on the Watchlist. It stated that Operation Secure Line was a response to “developing threats” from the migrant caravan. CBP Letter. It then stated that the “CBP was also investigating possible violations under 8 U.S Code §1324, which pertains to any person who encourages or induces an alien to enter the United States, knowing or in reckless disregard that they are doing so in violation of law.” *Id.*

**B. Individuals on the Watchlist Were Targeted Based on Their Political Opinions and Protected Speech.**

Beginning in December 2018, Amnesty International interviewed twenty-three individuals who claimed they were targeted for interrogation and harassment based

on their political opinions, protected views, and speech—ten of whom were later revealed to be on the Watchlist. All of those ten individuals on the Watchlist, whom the government targeted for their protected speech, are U.S. citizens. Many of these individuals were not present during the violent events of November 25, nor were they personally involved with the caravan. Instead, the reason for their inclusion on the Watchlist, as reflected in the files exposed by the whistleblower and in the questions asked of them during interrogations, is that they were suspected of violating § 1324(a)(1)(A)(iv) based on their conversations—including prayer, reporting, and legal communications—with migrants and asylum seekers. The experiences of seven of those individuals, detailed below, show that the government has repeatedly used § 1324(a)(1)(A)(iv) to unlawfully target and chill the protected expression of journalists, lawyers, and activists, and not for any legitimate law enforcement goal.

In each of these accounts, the pattern is the same. The individuals engaged in protected expression—prayer, photography, legal counseling—with migrants and asylum seekers at the border. The individuals were then detained and harassed when crossing the U.S.–Mexico border. They were interrogated about their interactions with and any advice they might have offered to migrants and asylum seekers. None of these individuals are known to have ever been charged with violating the law, be it § 1324(a)(1)(A)(iv) or any other related criminal provision. But as the Report explains, their detention and questioning by the government about their protected speech and related activities has

had a material chilling effect on their willingness to engage in future expression. As a result of their inclusion on the government’s Watchlist, U.S. lawyers and human rights advocates have had to reduce their travel across the U.S.-Mexico border and their support for people in need. Moreover, these individuals’ treatment reveals the government’s troublingly expansive interpretation of § 1324(a)(1)(A)(iv) and sends a message to other lawyers, journalists, and religious leaders who want to engage in similar speech activities.

The pattern of abuse documented by Amnesty International, in these and other cases<sup>3</sup> featured in Amnesty’s research, fits into a broader trend of government intimidation and harassment of civil society actors—sometimes with threats of criminal prosecution—in reaction to their protected speech and

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<sup>3</sup> Amnesty International also interviewed several people who are not known to be on the Watchlist but who have apparently been targeted for engaging in protected speech as part of their personal and professional activities. Two examples are clinical social worker Emily Saunders and journalist and activist Ana Adlerstein. Customs and Border Protection has accused Saunders of “coaching” and “getting people to lie,” in her words. Report 25. During a secondary inspection, one agent told her she was being criminally investigated under § 1324, but did not specify which provision. *Id.* Adlerstein, who provides “know your rights” trainings to asylum seekers, was detained while accompanying a migrant who wanted to present at Lukeville Port of Entry. *Id.* at 26. She was placed in a narrow concrete cell for several hours, and subjected to an invasive body search by a female officer. *Id.* Although initially told that she was “under arrest,” Adlerstein was informed upon her release that it was only “secondary inspection.” *Id.*

activities in defense of migrants and asylum seekers' human rights.

For example, in April 2018, as the U.S. government prepared to unlawfully deny entry to a group of approximately 150 asylum seekers at the San Ysidro Port of Entry in San Diego, the Secretary of DHS issued a public statement threatening prosecution against those who might "assist or coach" those individuals in asylum claims that were "false." See U.S. Dep't of Homeland Security, *Secretary Nielsen Statement on Arrival of Central American 'Caravan'* (Apr. 25, 2018), <https://www.dhs.gov/news/2018/04/25/secretary-nielsen-statement-arrival-central-american-caravan>. The U.S. immigration lawyer who was coordinating the pro bono legal representation of those asylum seekers was Nicole Ramos, discussed below, who was subsequently included on the government's Watchlist. Neither she nor any of the other lawyers supporting that group of asylum seekers were ever alleged to have provided inappropriate counsel. In fact, they have been at the forefront of legal challenges against DHS policies intended to deter refugees from seeking safety in the United States and to deny them access to asylum procedures. See Amnesty Int'l, USA: 'You Don't Have Any Rights Here': *Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States* (Oct. 2018), <https://www.amnesty.org/en/documents/amr51/9101/2018/en>.

### **1. Kaji Dousa**

Senior Pastor Kaji Dousa of Park Avenue Christian Church in New York is one of the co-chairs of the New Sanctuary Coalition, an immigration advocacy group.

Kaji Dousa, *Opinion: I Prayed with Migrants. Now the Government is Tracking Me*, BuzzFeed News (Mar. 24, 2019), <https://www.buzzfeednews.com/article/kajidousa/opinion-i-prayed-with-migrants-now-the-government-is> (“*Opinion: I Prayed with Migrants*”); see New Sanctuary Coalition, *Welcome to New Sanctuary Coalition*, <https://www.newsanctuarynyc.org>. As part of her work with the New Sanctuary Coalition, Dousa participated in a “Sanctuary Caravan,” a faith-based mobilization of US citizens who felt morally compelled to meet, witness, and accompany these migrants.” *Opinion: I Prayed with Migrants*. Dousa traveled across the border from San Diego to Tijuana, Mexico twice in 2018 with the Sanctuary Caravan, where she and other clergy members met and prayed with migrants, asylum seekers, and activists providing them with humanitarian assistance at the border. *Id.* Dousa also solemnized marriage ceremonies for couples who had not been able to have church weddings in their countries of origin. *Id.* She was not in Tijuana on November 25, but flew in from New York the following day. *Id.*

Because of the Watchlist alert, Pastor Dousa was stopped for secondary interrogation on January 2, 2019, while crossing back into the United States after “providing spiritual counselling to migrants and asylum seekers in Mexico.” Report 23. The Watchlist documents also show that her Secure Electronic Network for Travelers Rapid Inspection (“SENTRI”) pass—which allowed her to cross the southern border efficiently—was revoked due to her inclusion on the Watchlist. *Id.* Dousa was forced to wait for hours at the

border, and then was subjected to extensive questioning before ultimately being permitted to enter the United States. *Id.*

In a phone interview with Amnesty International on June 4, 2019, Pastor Dousa said her detention has caused her to doubt whether she can continue to provide religious services to migrants and asylum seekers. She said she has “lots of questions about my ability to travel after praying with migrants. . . . At what point does freedom of religion end at the border?” *Id.* And in a lawsuit she subsequently filed against DHS, Dousa stated that after her Watchlist-based January 2 detention, she cancelled a planned return trip on January 3 “out of fear of another hours-long detention and interrogation of her ministry.” See Compl. for Declaratory and Injunctive Relief ¶ 81, *Dousa v. U.S. Dep’t of Homeland Security (“DHS”)*, No. 3:19-cv-01255-LAB-KSC (S.D. Cal. July 8, 2019), ECF No. 1. Dousa has found that the risk of interrogation “interferes with [her] assurance of privacy, the trust between pastor and parishioner, and the ability [of migrants] to freely seek her pastoral care.” *Id.* ¶ 86. Dousa has only visited Tijuana once since then, and only because she was accompanied by her lawyer on that occasion. *Id.* ¶ 81.

## **2. Ariana Drehsler**

Ariana Drehsler, a freelance photojournalist whose work has appeared in such media outlets as *The Wall Street Journal* and *The New York Times*, spent November and December of 2018 photographing migrants and asylum seekers in Tijuana waiting to cross into the United States. Compl. for Injunctive and

Declaratory Relief (Violation of First Amendment)  
¶¶ 129-39, *Guan v. Wolf*, No. 1:19-cv-6570 (E.D.N.Y.  
Nov. 20, 2019), ECF No. 1.

As detailed in the Report, Drehsler was placed on the Watchlist and an alert was placed on her passport. Report 15. As a result, beginning in December 2018, she was pulled into secondary interrogation every time she crossed into the United States from Mexico. See Max Rivlin-Nadler, *Journalists, Lawyers, Volunteers Face Increased Scrutiny by Border Agents*, NPR (Feb. 15, 2019), <http://www.npr.org/2019/02/15/695164916/journalists-lawyers-volunteers-face-increased-scrutiny-by-border-agents>.

In an interview, Drehsler stated that the officers appeared to be using her to collect information. “They wanted to know who I was working for and what I was seeing.” *Id.* On one occasion, Customs and Border Protection agents separated Drehsler from her camera—she does not know whether they looked through its photos. *Id.* Twice, she was questioned in relation to incidents when Customs and Border Protection officers fired tear gas at migrants and asylum seekers, despite the fact that she was not even in the country during either incident. Report 16. Indeed, the government’s later admission that the Watchlist was designed to investigate violations of § 1324(a)(1)(A)(iv) further suggests that it was Drehsler’s work as a journalist that led to her interrogations and illuminates the government’s broad interpretation of the statute.

### **3. Nicole Ramos, Nora Phillips, and Erika Pinheiro**

Among the targets on the Watchlist were three attorneys—Nicole Ramos, Nora Phillips, and Erika Pinheiro—who serve as co-directors of the NGO Al Otro Lado, the principal legal services provider for asylum seekers on California’s southern border, with offices in Los Angeles, San Diego, and Tijuana. Its Border Rights Project, based in Tijuana, hosts know-your-rights trainings and legal workshops in migrant shelters and provides direct legal representation to asylum seekers. *See Al Otro Lado, What We Do: Border Rights Project* (2019), <https://alotrolado.org/programs/border-rights-project>.

Ramos is the director of the Border Rights Project. Her work requires her to cross the U.S.–Mexico border regularly. On January 10, 2019, while traveling from Mexico to the United States, Ramos was stopped and sent to secondary inspection because she was on the Watchlist. Report 31; Al Otro Lado et al., Emergency Request for Precautionary Measures Against Mexico Under Article 25 of the Inter-American Commission on Human Rights 12, [https://alotrolado.org/wp-content/uploads/2019/02/Request-for-Precautionary-Measures\\_AOL-Directors-FINAL\\_12Feb2019-1-1.pdf](https://alotrolado.org/wp-content/uploads/2019/02/Request-for-Precautionary-Measures_AOL-Directors-FINAL_12Feb2019-1-1.pdf) (“Emergency Request”). Customs and Border Protection then confiscated and suspended her SENTRI pass. Report 31; Emergency Request 12. The officers informed Ramos that “[t]he system” told them that they had to take her pass from her. Report 31.

As later revealed by the NBC 7 investigation, a government dossier on Ramos included such details as

the car she drives and her work and travel history, as well as her mother’s name. *Watchlist Exposé*. According to Ramos, the leak confirmed something that she and the other directors of Al Otro Lado had “assumed for some time, which is that [they were] on a law enforcement list designed to retaliate against human rights defenders who work with asylum seekers and who are critical of CBP practices that violate the rights of asylum seekers.” *Id.*

The other two attorneys, Phillips and Pinheiro, were both denied entry into Mexico as a result of the alerts placed on their passports. Report 31. Phillips is the Legal Director for Al Otro Lado, and Pinheiro serves on the organization’s Board.

Pinheiro was stopped while trying to enter Tijuana on foot to pick up her ten-month-old son, a dual citizen of Mexico and the United States. See Kate Linthicum, Cindy Carcamo, & Molly O’Toole, *Immigrant Rights Attorneys and Journalists Denied Entry into Mexico*, L.A. Times (Feb. 1, 2019), <https://www.latimes.com/nation/immigration/la-me-immigration-attorneys-detained-20190202-story.html> (“L.A. Times Article”). While she was in custody, Mexican officials told her that the U.S. government had placed an alert on her passport. Report 31.

A few days later, Phillips and her seven-year-old daughter were detained by Mexican immigration officials in Guadalajara, where they had flown for vacation with Phillips’ husband. L.A. Times Article; Report 31. Phillips messaged Amnesty International while in “secondary inspection” at the Guadalajara airport: “I am so scared. Nine hours so far, detained with

my seven-year-old in a cold room with no food or water. Although they promised us food from 2 a.m. I have a very serious illness that requires medication, and I had to beg for a glass of water to take my medication, and then an officer shouted at me. They asked me lots of questions about guns, and where I have lived, and how much cash I had on me, where was I going to stay, have I ever lived abroad, any ongoing criminal proceedings in the US.” Report 31. Mexican officials confirmed that the U.S. government was responsible for the alert on her passport, telling her that “[her] country placed the alert on” her. *Id.*

In a May interview with NBC 7 after the revelation that she and her colleagues were on the Watchlist, Phillips reflected on the burdens her denial of entry placed on her work as a legal advocate. “I feel like I can’t do my job. There are so many people that need help.” Mari Payton & Tom Jones, *As Quest for Information Continues, Targets of Secret Government Surveillance Effort Confront its Consequences*, NBC 7 (May 24, 2019), <https://www.nbcbsandiego.com/news/local/another-deadline-passes-for-answers-on-secret-database/159217>. The only way she can speak to Al Otro Lado’s Mexico-based staff in person is through a metal bar barrier at Friendship Park on the San Diego-Tijuana border. *Id.*

#### **4. David Abud and Jeff Valenzuela**

In the course of its investigation, Amnesty International interviewed four of the nine members of the humanitarian NGO, Pueblo Sin Fronteras, who were included by Customs and Border Protection on the Watchlist. Report 20. Two of those individuals—David

Abud and Jeff Valenzuela—detailed how they were specifically stopped and interrogated by Customs and Border Protection agents in relation to their protected speech activities while crossing from Tijuana to San Diego through the San Ysidro Port of Entry.

Abud was stopped for secondary questioning on January 2, 2019, and spoke to Amnesty International by phone six days later. Report 20. “All they asked suggested to me they were trying to build a case that I was coaching immigrants on how to get into the US irregularly,” he said. *Id.* “Anything I did in Tijuana was to advise people about their rights. So they asked, ‘What kind of things do you advise them to do? What do you tell them? What are people’s rights?’” *Id.*

Valenzuela, a photography teacher, was stopped six times in less than one month. *Id.* at 22. The first time, on December 26, 2018, he was crossing on foot at San Ysidro. DHS officers forced him to unlock his phone, supposedly to see if he had any child pornography. *Id.* The true purpose of their search, however, appeared to be to scrutinize photographs that Valenzuela had taken of the November 25 incident when Customs and Border Protection officers fired tear gas into a crowd of asylum seekers on the Mexico side of the border. The officers took special interest in those photographs after unlocking Valenzuela’s phone. *Id.*

The second time Valenzuela was stopped, just two days later, he was crossing by car. DHS officers handcuffed him and escorted him inside the Customs and Border Protection border office. They then shackled him by his ankle to a metal bench for four hours. *Id.* After interrogation, he was forced to submit to an

“advanced search” of his phone without any showing of reasonable suspicion.<sup>4</sup> *Id.* “Essentially,” Valenzuela told Amnesty International, “I’ve been criminalized for doing humanitarian work. And I’ve been paraded in secondary inspections as though I’m a criminal for the humanitarian work that I’ve done.” *Id.* at 23.

## **II. Punishing Inducement or Encouragement for Financial Gain Still Captures a Substantial Amount of Protected Speech.**

As the stories above demonstrate, journalists, lawyers, activists, and other humanitarian workers can—and do—risk punishment under § 1324(a)(1)(A)(iv) for their protected speech. Moreover, while many of those on the Watchlist were volunteers, others were engaging in protected expression as part of their paid work, operating with NGO salaries or under journalistic contracts, for example.

The government argues that respondent was convicted of encouraging or inducing for “commercial

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<sup>4</sup> Customs and Border Protection policy states that an “advanced search” is one in which “an Officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents.” CBP Directive No. 3340-049A, § 5.1.4, U.S. Customs and Border Protection (Jan. 4, 2018), <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf>. The policy also states that such a search is allowed when “there is reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in which there is a national security concern, and with supervisory approval at the Grade 14 level or higher.” *Id.*; accord *Alasaad v. Neilsen*, No. 17-cv-11730, --- F. Supp. 3d ----, 2019 WL 5899371, at \*1, 14-17 (D. Mass. Nov. 12, 2019).

advantage or private financial gain.” 8 U.S.C. § 1324(a)(1)(B)(i). The appropriate overbreadth inquiry, in the government’s view, is whether there are a substantial number of unconstitutional applications of the financial gain version of the crime relative to the provision’s legitimate sweep. Even if the government’s understanding of the inquiry were correct, however, its balancing analysis is not.

Many professionals—including lawyers, journalists, and doctors—interact directly with undocumented immigrants in the course of their paid work and might well engage in protected speech that could be considered by authorities to “encourage” or “induce” a person to come to, enter or reside in the United States illegally. The government says only that such scenarios are unlikely and that “a lawyer . . . 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.” Pet. Br. 35. But there are many occasions where a lawyer’s speech will more clearly fall within the scope of the statute. And, as Nicole Ramos’ experience demonstrates, even providing know-your-rights trainings or legal representation in asylum claims can be interpreted by government officials as speech worthy of punishment and discouragement. The financial gain requirement simply does not provide sufficient protection to cure the statute’s overbreadth.

## CONCLUSION

Amnesty International's investigation demonstrates that § 1324(a)(1)(A)(iv) captures a substantial amount of protected speech relative to the statute's legitimate sweep and is unconstitutionally overbroad. The Court should therefore uphold the opinion below.

Respectfully submitted,

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