

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 OF *AMICI CURIAE* THE ELECTRONIC  
FRONTIER FOUNDATION, IMMIGRANTS RISING,  
THE INTERNET ARCHIVE AND DAPHNE KELLER  
IN SUPPORT OF RESPONDENT**

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**STATEMENT OF INTERESTS OF  
*AMICI CURIAE*<sup>1</sup>**

*Amici curiae* represent a variety of stakeholders united in their concern that the federal criminal prohibition in 8 U.S.C. § 1324(a)(1)(A)(iv) silences constitutionally protected speech, and if upheld here, will work a unique and pervasive chilling effect on online speech in particular. *Amici*—a digital rights advocacy organization, an immigrant services organization, an online library seeking to preserve a record of online speech, and an expert on intermediary liability—represent both the speakers themselves as well as the intermediaries that make such speech possible. Because of the statute’s broad and ambiguous scope, *amici*—along with other direct online speakers in support of immigrant rights and the platforms that host such content—face the risk of criminal liability.

The Electronic Frontier Foundation (EFF) is a nonprofit organization that has worked for more than 29 years to protect free speech and civil liberties in the digital world. EFF and its more than 34,000 active donors have a powerful interest in ensuring that the Internet serves as a venue for free speech and the open communication of ideas for all users.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. All parties have consented in writing to the filing of this brief.

All websites cited in this brief were last visited on January 17, 2020.

Immigrants Rising is a fiscally-sponsored project of Community Initiatives, a nonprofit organization. Founded in 2006, Immigrants Rising provides resources and support to undocumented young people to help them obtain an education, pursue careers, and build a brighter future for themselves and their community. Immigrants Rising offers a website aimed at undocumented young people that provides information on financial resources for higher education, income generation, immigration legal assistance, and more.

The Internet Archive is a nonprofit organization that is building an Internet library to prevent online and other “born-digital” materials from disappearing into the past. The Archive collects and displays web materials on behalf of entities such as the Library of Congress, the National Archives, state archives, libraries, universities, and other countries, with the vast majority in its collection consisting of material authored by third parties. Founded in 1997, the Archive is among the 300 most visited websites in the world, with millions of visitors and users daily. Because the Archive hosts billions of web materials, both collected by the Archive and uploaded by users, it is functionally impossible for the Archive to police its contents or respond to all takedown notices.

Daphne Keller is the Director of Intermediary Liability at the Center for Internet and Society, a public interest technology law and policy program at Stanford Law School. Ms. Keller works to promote well-designed platform regulation laws, in order to protect the free exchange of ideas on the Internet. Ms. Keller has published both academically and in popular press, testified and participated in legislative processes, and taught and lectured extensively.



## SUMMARY OF ARGUMENT

The Encouragement Provision, 8 U.S.C. § 1324(a)(1)(A)(iv), uniquely threatens constitutionally protected online speech. As this Court has recognized, the Internet is where people “engage in a wide array of protected First Amendment activity on topics as diverse as human thought.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (citation omitted). Thus, it is of little surprise that immigrant rights advocates and services providers use the Internet to share messages of hope and resources that allow undocumented immigrants to make better lives for themselves—all of which can be seen as “encouragement,” and thus illegal, under the Encouragement Provision.

First, the variety and prevalence of speech online in support of immigrants and the ways in which any Internet user can amplify such speech illustrates the Encouragement Provision’s uncertain and overly broad sweep.

Second, by prohibiting an enormous amount of commonplace speech, the Encouragement Provision also burdens the online platforms that host this type of speech. These platforms may themselves be exposed to liability as the publishers or aiders and abettors of such speech. The Provision thereby incentivizes platforms to censor “encouraging” speech on their websites. And because platforms face great difficulty in enforcing finely drawn distinctions between prohibited and permitted speech, they are likely to censor lawful speech about immigration more broadly.

This Court should affirm the Ninth Circuit, which correctly recognized the sweeping breadth of speech that the Encouragement Provision necessarily affects, from “a loving grandmother who urges her grandson to

overstay his visa” to a post “directed at undocumented individuals on social media” that encourages them to stay in the United States. *United States v. Sineneng-Smith*, 910 F.3d 461, 483-84 (9th Cir. 2018).

## ARGUMENT

Shortly after this Court heard oral arguments in *Department of Homeland Security v. Regents of the University of California*,<sup>2</sup> thousands of Twitter users weighed in on the case using the hashtags #HereToStay and #HomeIsHere. People from across the country tweeted out in support of undocumented youth, emphasizing that immigrants make the country stronger, that the United States is their home, and that undocumented immigrants should continue to reside here. Among them was Julián Castro, former Secretary of Housing and Urban Development and, at the time, a presidential candidate, who shared:

*Home is here.  
Roots have been planted here.  
Families have been created here.  
Degrees have been earned here.  
Dreams have been built here.  
Futures are here.*

*#HomeIsHere.*

*And dreamers<sup>3</sup> are #HereToStay*

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2. Supreme Court Case No. 18-587 (argued Nov. 12, 2019).

3. Recipients of Deferred Action for Childhood Arrivals (DACA) are often referred to as “Dreamers.”

@JulianCastro, Twitter (Nov. 12, 2019, 3:06 PM).<sup>4</sup>

The Encouragement Provision calls the legality of this act of tweeting, and the others like it from less prominent individuals, into question. And given the inherent nature of social media, the Encouragement Provision poses a risk of criminal liability to a wide range of speakers beyond Secretary Castro himself, including anyone who liked or retweeted it or posted a supportive reply, and Twitter itself, which provided the platform for this encouragement.

Given its interactive nature, international reach, and the capacity for both one-to-one and mass real-time communications, the Internet is an especially effective medium for the protected speech that the Encouragement Provision chills. As this Court has recognized, the “vast democratic forums of the Internet” have become one of the “most important places . . . for the exchange of views” today. *Packingham*, 137 S. Ct. at 1735 (citation omitted).

“Encouraging” speech directed to noncitizens seeking to enter or remain in the United States without legal authorization is found across the Internet, not merely on social media platforms. Websites, applications, cloud-based document-sharing systems, and messaging services abound with such speech. And the speakers represent a wide range of interests, from concerned private individuals to governmental officials, from advocacy organizations to “aliens” themselves.

The overbreadth and ambiguity of the Encouragement Provision thus poses special threats to online speech.

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4. <https://twitter.com/JulianCastro/status/1194391098606665730>.

## **I. THE ENCOURAGEMENT PROVISION’S BROAD SWEEP THREATENS THE SPEECH OF IMMIGRATION ADVOCACY AND SERVICES ORGANIZATIONS ONLINE.**

Advocacy and services organizations use a wide variety of online tools to provide information to both the general public and noncitizens specifically.

Hundreds of community-based organizations utilize websites to provide undocumented immigrants with resources on how to obtain healthcare, housing, and other services. *Amicus* Immigrants Rising, a nonprofit organization whose mission is to “empower undocumented young people to achieve educational and career goals through personal, institutional, and policy transformation,” provides a number of online resources for undocumented people, including:

- Information about undergraduate and graduate scholarships;
- In-State Tuition Tool, a survey that helps determine whether a student qualifies for in-state tuition in California and advises on how to achieve future eligibility;
- Resources on entrepreneurship opportunities and how immigrant entrepreneurs can protect their assets;
- Mental Health Connector, a questionnaire that connects young people with psychological support; and

- Legal Intake, a survey to learn about possible immigration options.<sup>5</sup>

\* \* \*

Several websites allow users to solicit advice from other users regarding immigration matters. Reddit, a social news aggregation and discussion website, is the sixth-most visited website in the United States.<sup>6</sup> Users can submit posts to boards arranged by topic, known as “subreddits.” The Immigration subreddit has 21,000 members, and users submit and respond to posts seeking advice on immigration matters.<sup>7</sup> On any given day, several of the top threads include questions about whether and how an undocumented immigrant can remain in the United States. For example, in one post, a user asked whether her undocumented friend would be able to fly within the United States.<sup>8</sup> Other users responded with statements such as “I’d risk it” and “I have friends that fly often. Is safe.” Through these threads, users often receive advice about their immigration options, including coming into or remaining in the United States without authorization.

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5. Immigrants Rising, *Resources*, <https://immigrantsrising.org/resources/>.

6. Alexa, *Reddit.com Competitive Analysis, Marketing Mix and Traffic*, [https://www.alexa.com/siteinfo/reddit.com#section\\_traffic](https://www.alexa.com/siteinfo/reddit.com#section_traffic).

7. Reddit, Immigration Subreddit, <https://www.reddit.com/r/immigration/>. Visa Journey, a website that bills itself “America’s Largest Immigration Community,” also provides similar functionality. See Visa Journey, *US Immigration Forums*, <https://www.visajourney.com/forums>.

8. Reddit, *Is it safe to fly* (posted Apr. 27, 2019), [https://www.reddit.com/r/immigration/comments/bi1mbg/is\\_it\\_safe\\_to\\_fly/](https://www.reddit.com/r/immigration/comments/bi1mbg/is_it_safe_to_fly/).

\* \* \*

Many legal organizations provide materials on their websites to inform undocumented immigrants about their legal rights. The American Civil Liberties Union, for example, provides an in-depth “know your rights” page with resources available in 14 languages to counsel undocumented immigrants on their rights if immigration agents come to their home or if they are stopped at the border.<sup>9</sup> Such materials accurately inform immigrants that they need not answer questions if law enforcement asks about their immigration status and should not open their door if immigration officers come to their home without a search or arrest warrant.

\* \* \*

Tweets assuring undocumented youth that their #HomeIsHere and that they are #HereToStay are intended to inspire, inspire, embolden, and give hope or courage to those youth facing revocation of the DACA policy. Speech informing undocumented immigrants about their legal rights when conversing with immigration agents similarly embolden those immigrants to remain within the country. And speakers who direct undocumented immigrants to resources that will allow them to build meaningful and productive lives within the United States

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9. Am. Civil Liberties Union, *Know Your Rights: Immigrants' Rights*, <https://www.aclu.org/know-your-rights/immigrants-rights/>. See also, e.g., Informed Immigrant, *Know Your Rights*, <https://www.informedimmigrant.com/guides/know-your-rights/>; Nat'l Immigration Law Ctr., *Know Your Rights*, <https://www.nilc.org/get-involved/community-education-resources/know-your-rights/>; NAKASEC, *Know Your Rights!*, <https://nakasec.org/rights>.

inspirit and enable immigrants to remain unlawfully in the country, and give immigrants hope that this country wants them here.

The Encouragement Provision, on its face, prohibits all these examples of speech found across the Internet. As set forth in the constitutional and legal analysis in Respondent's brief, the Encouragement Provision bans exactly what it says: any speech that tends to inspire, inspirit, embolden, or give hope or courage to noncitizens regarding the prospect of residing unlawfully in the United States. *See* Resp. Br. at 17-34. And, regardless of the government's late-hour assurances about what it will and will not prosecute, the existence of the Provision will inhibit reasonable speakers from engaging in this constitutionally protected speech for fear of criminal punishment.<sup>10</sup> Our nation's profound commitment to uninhibited, robust, and wide-open debate on public issues cannot permit such a result. *See New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

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10. A speaker may legitimately fear that the Department of Justice will prosecute immigration laws to the fullest extent their plain language indicates. *See, e.g.*, Associated Press, *Arizona Border Activist Acquitted of Harboring Immigrants*, Nov. 20, 2019, <https://ktar.com/story/2849078/prosecutor-arizona-border-activist-tried-to-hide-migrants/>; Rafael Carranza, *Aid Volunteers Found Guilty of Dropping Off Water, Food for Migrants in Protected Part of Arizona Desert*, Arizona Republic, Jan. 18, 2019, <https://www.azcentral.com/story/news/2019/01/18/no-more-deaths-volunteers-found-guilty-dropping-water-food-migrants-cabeza-prieta-refuge-arizona/2617961002/>.

## II. THE ENCOURAGEMENT PROVISION WILL CHILL ONLINE PLATFORMS FROM HOSTING CONSTITUTIONALLY PROTECTED SPEECH

It is not only the speakers themselves who may face criminal liability for their “encouraging” statements online. Internet speech typically requires several layers of intermediaries: web hosts, social media platforms, domain name registers, security-service providers, and numerous others. If only one of these intermediaries is chilled by the law—either for fear of direct liability as a publisher of “encouraging” speech, or for fear of liability as an aider and abettor of such speech<sup>11</sup>—the online speaker will lose their ability to reach their audience.<sup>12</sup>

To avoid the risk of criminal penalties, intermediaries would need to moderate speech about immigration on their platforms, censoring users’ speech that crosses the line—or that risk-averse platforms fear may cross the line—into “encouragement” in violation of the statute. Thus, even if a speaker is, in fact, willing to risk the threat of criminal prosecution and engage in speech encouraging noncitizens to reside in the United States regardless of the Encouragement Provision’s prohibition, they may well find themselves stifled by the online platforms on which they rely.

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11. *See* 8 U.S.C. § 1324(a)(1)(A)(v).

12. In some circumstances, federal law protects online intermediaries from legal responsibility for users’ speech that the intermediaries host, but the statute contains an exception allowing for federal criminal enforcement. 47 U.S.C. § 230(e)(1). Platforms would thus receive no immunity from intermediary liability under the Encouragement Provision.



Moreover, even users engaging in perfectly lawful speech about immigration may find themselves censored, because intermediaries are ill-equipped to accurately moderate the content of their users' speech. When faced with the risk that the speech they are transmitting may be illegal, intermediaries commonly choose to broadly restrict all speech about a topic rather than take on the expensive and unmanageable burden of distinguishing lawful from unlawful speech—a task that becomes even more unmanageable when the bounds of lawfulness are ill-defined. When Congress banned online advertisements for sex work, for example, platforms including Facebook, Tumblr, Craigslist, and others responded by adopting sweeping prohibitions on content that reached far beyond the specific category of speech that the law targeted.<sup>13</sup>

Imposing broad restrictions on wide swaths of speech may be a platform's only practical way of enforcing a narrower legal prohibition, in light of both the enormous volume of speech that platforms host, and the difficulty of parsing prohibited and permissible speech. *See Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007) (citing cases).

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13. *See, e.g.*, Craigslist, *FOSTA*, <https://www.craigslist.org/about/FOSTA>; Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet As We Know It*, Vox, July 2, 2018, <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>; Elliot Harmon, *Facebook's Sexual Solicitation Policy is a Honey-pot for Trolls*, Electronic Frontier Foundation, Dec. 7, 2018, <https://www.eff.org/deeplinks/2018/12/facebooks-sexual-solicitation-policy-honey-pot-trolls>.

First, online intermediaries deal with a staggering volume of expression. Although these companies are quite clearly aware that debate over immigration is occurring through their services—at times even provoking and participating in that debate themselves on their own platforms<sup>14</sup>—it would require a monumental dedication of resources to monitor how each of their thousands, millions, and sometimes billions of users<sup>15</sup> engage on the topic. Already, to enforce internal standards for user speech, platforms must necessarily rely on their users to flag content that violates the platforms’ standards.<sup>16</sup> At large

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14. See, e.g., Alexis Ohanian, *An Open Letter to the Reddit Community*, Reddit, Jan. 30, 2017, [https://www.reddit.com/r/blog/comments/5r43td/an\\_open\\_letter\\_to\\_the\\_reddit\\_community/](https://www.reddit.com/r/blog/comments/5r43td/an_open_letter_to_the_reddit_community/) (Reddit founder and executive chairman stating that “Reddit, Inc. will continue to welcome all citizens of the world to our digital community and our office,” and inviting Reddit users to share their own immigration stories and receiving 30,900 responses); @Twitter, Twitter (Jan. 28, 2017, 5:20 PM), <https://twitter.com/twitter/status/825513865794293761> (Twitter’s official company account stating: “Twitter is built by immigrants of all religions. We stand for and with them, always.”; and receiving 10,000 responses); Taylor Lorenz, *Zuckerberg Debates Immigration with Facebook Commenters*, The Hill, Sept. 1, 2017, <https://thehill.com/blogs/ballot-box/348865-mark-zuckerberg-debates-immigration-with-facebook-commenters> (reporting that Facebook founder and CEO Mark Zuckerberg publicly expressed support for DACA and debated immigration with members of the public on Facebook).

15. See, e.g., J. Clement, *Number of Monthly Active Facebook Users Worldwide*, Statista, Nov. 19, 2019, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (noting that Facebook has 2.45 billion active users each month).

16. See, e.g., Kate Crawford & Tarleton Gillespie, *What Is a Flag For?: Social Media Reporting Tools and the Vocabulary of*

platforms, thousands of staff and contractors then review the flagged material, often making snap judgments about each item in order to get through the enormous volume of material awaiting review.<sup>17</sup> At smaller ones, where such staffing is impossible, employees may simply honor any takedown demand, no matter how legally unfounded.<sup>18</sup> It is simply not conceivable that intermediaries would, or could, dedicate the human labor that would be needed to sift through the enormous volume of speech shared on their platforms to remove speech that encourages noncitizens to reside in the United States unlawfully.

Where platforms face the threat of criminal penalties, community policing inevitably results in the heckler's veto, whereby an intermediary will choose to delete content that is subject to a complaint rather than taking on the time and expense to investigate the legitimacy of the complaint. *See Reno v. Am. Civil Liberties Union*, 521 U.S.

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*Complaint*, New Media & Society (2014), <https://pdfs.semanticscholar.org/96e8/d4d6f325b9173fba4d17aadf1c5c6f48edbe.pdf> (describing user flags as “a ubiquitous mechanism of governance” online that serves “as a solution to the problem of curating massive collections of user-generated content”).

17. *See* Casey Newton, *The Trauma Floor*, The Verge, Feb. 25, 2019, <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona>; Sarah T. Roberts, *Meet the People Who Scar Themselves to Clean Up Our Social Media Networks*, Macleans, June 15, 2018, <https://www.macleans.ca/opinion/meet-the-people-who-scar-themselves-to-clean-up-our-social-media-networks/>.

18. *See* Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice*, Univ. of Cal.–Berkeley Public Law Research Paper No. 2755628 (Mar. 22, 2017), at 41 (noting that some platforms honor all requests).

844, 880 (1997) (explaining that law prohibiting indecent messages to minors online “would confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech”). Here the heckler’s veto is of special concern because of the Encouragement Provision’s broad and uncertain scope.

Artificial intelligence and algorithms do little to help. Such tools have consistently proved faulty, and remove content with little to no transparency or public oversight.<sup>19</sup> Drawing the inherently contextual line between speech that lawfully discusses immigration issues from speech that, under the Encouragement Provision, unlawfully expresses encouragement for noncitizens to reside in the country is a daunting enough task for a human being. It is an even more difficult one for a machine, even if it were clear what the Encouragement provision criminalized. Again, this difficulty is only exacerbated by the uncertainty in the Encouragement Provision’s reach.

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19. See generally Abdul Rahman Al Jaloud, Hadi Al Khatib, Jeff Deutch, Dia Kayyali, and Jillian C. York, *Caught in the Net: The Impact of “Extremist” Speech Regulations on Human Rights Content*, Electronic Frontier Foundation et al. (May 2019), [https://www.eff.org/files/2019/05/30/caught\\_in\\_the\\_net\\_whitepaper\\_2019.pdf](https://www.eff.org/files/2019/05/30/caught_in_the_net_whitepaper_2019.pdf) (explaining that automated take-down systems are inaccurate and opaque, and describing effect on marginalized speakers). See also Bijan Stephen, *Porn: You Know It When You See It, But Can A Computer?*, The Verge, Jan. 30, 2019, <https://www.theverge.com/2019/1/30/18202474/tumblr-porn-ai-nudity-artificial-intelligence-machine-learning> (explaining difficulty in training artificial intelligence to parse content).

Internet platforms have little incentive to expend enormous effort and resources in a Sisyphean battle to sift through a massive volume of speech in order to precisely identify user speech that the Encouragement Provision prohibits. Instead, platforms seeking to minimize their own criminal exposure under the statute are likely to simply censor all expression about immigration wholesale, or—perhaps even more troublingly—remove all expression favoring an immigration policy based on principles of inclusion and decriminalization because such expression is likeliest to violate the statute, while allowing speech favoring more restrictive and punitive immigration policies to remain online.<sup>20</sup>

As a result, even users seeking to engage in lawful speech about immigration may find themselves refused entry to the modern public square. Such a result would stifle debate over one of the most important public issues confronting the nation today.

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20. The Provision’s “intent or effect of favoring some ideas over others . . . raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring in the judgment) (citation omitted). Such laws are constitutionally suspect and subject to the most exacting form of scrutiny. *Id.* See also Resp. Br. at 43-47.

**CONCLUSION**

The Encouragement Provision threatens to stifle the free exchange of ideas online about one of the most contentious and important political questions of our time. *See United States v. Williams*, 553 U.S. 285, 293 (2008). Such a result is antithetical to our nation's unique and profound commitment to the protection of speech. *See New York Times v. Sullivan*, 376 U.S. at 270. In light of the foregoing, the judgment of the Ninth Circuit should be affirmed.

January 22, 2020

Respectfully submitted,

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