No. 22-179

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

HELAMAN HANSEN

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

BRIEF OF IMMIGRATION REPRESENTATIVES AND ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit immigration organizations with an interest in opposing the criminalization of speech advising noncitizens about their physical presence in this country. *Amici* are concerned that 8 U.S.C. § 1324(a)(1)(A)(iv) (the Encouragement Provision) criminalizes vast quantities of immigration advice, including competent, accurate, ethical advice by attorneys.

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a national nonprofit organization providing support, referrals, and legal and technical assistance to attorneys, families, and advocates seeking to advance the rights of noncitizens. Since 2003, NIPNLG has provided thousands of instances of direct technical assistance to attorneys nationwide.

Advocates for Basic Legal Equality, Inc. (ABLE) is a nonprofit law firm representing low-income immigrants throughout Ohio. ABLE provides high-quality legal assistance in civil matters to help low-income individuals and groups achieve self-reliance, equal justice, and economic opportunity.

The American Immigration Lawyers Association (AILA) is a national non-profit association with more than 15,000 members throughout the United States and abroad. AILA seeks to advance the administration of law and the administration of justice in immigration and naturalization matters.

The American Friends Service Committee (AFSC) is a Quaker organization whose work is shaped by its spiritual framework. AFSC works to address the

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

economic and political drivers of migration and to support migrants and refugees through legal representation, leadership training, community organizing, and policy advocacy.

American Gateways serves the indigent immigrant population in central Texas. Its mission is to champion the dignity and human rights of immigrants, refugees, and survivors of persecution, torture, conflict and human trafficking through exceptional legal services at no or low cost, education, and advocacy.

The Capital Area Immigrants' Rights Coalition (CAIR Coalition) strives to ensure equal justice for immigrants at risk of detention and deportation in the D.C. metropolitan area and beyond. CAIR Coalition seeks to reduce legal injustices through cutting-edge impact litigation, educating detained immigrants, connecting detained immigrants with pro bono attorneys, and providing direct representation.

Centro de los Derechos del Migrante, Inc. (CDM, or the Center for Migrant Rights) is a binational nonprofit organization in the United States and Mexico that seeks to improve the working conditions of low-wage migrant workers in the United States through strategic litigation, policy advocacy, and education. CDM frequently represents clients who come to the U.S. on temporary work visas and face egregious abuses like labor trafficking.

The Coalition for Humane Immigrant Rights (CHIRLA) is a California-based nonprofit organization that advances the human and civil rights of immigrants and refugees by organizing, educating, and defending them in the streets, the courts, and the halls of power. CHIRLA provides direct legal services and referrals to low-income immigrants seeking immigration benefits.

Families For Freedom (FFF) is a New York-based multi-ethnic human-rights organization by and for families facing deportation. FFF seeks to fight laws that tear apart homes and neighborhoods and to build the power of immigrant communities as communities of color.

The Florence Immigrant & Refugee Rights Project (Florence Project) is a nonprofit providing free legal and social services to noncitizens detained in immigration custody in Arizona. Each year the Florence Project provides community education, legal consultations and orientations, and direct representation to thousands of immigrants facing removal.

Freedom Network USA (FNUSA) is a nonprofit corporation that is the largest alliance of human trafficking advocates in the United States. Its 91 members include survivors of human trafficking and those who provide legal and social services to trafficking survivors across the United States, serving over 2,000 survivors of sex and labor trafficking every year.

Immigrant Defenders Law Center (ImmDef) is a next-generation social justice law firm that defends immigrant communities in the immigration system. ImmDef envisions a future where no immigrant is forced to face an unjust immigration system alone, and has a strong interest in ensuring that the legal advice it provides its clients is not criminalized.

The Immigrant Defense Project (IDP) is a nonprofit legal resource and training center that defends the rights of noncitizens facing prosecution or deportation. IDP supports immigration attorneys by consulting on individual cases, offering trainings and mentorship opportunities, developing legal strategies, and publishing written resources.

Immigration Equality is a national nonprofit organization providing free legal services and advocacy for indigent lesbian, gay, bisexual, transgender, and queer immigrants. Through its in-house attorneys and nationwide network of pro bono partners, Immigration Equality provides over a thousand immigrants with advice and representation each year.

The National Immigrant Justice Center (NIJC) is a national nonprofit organization that provides representation and legal advice to over 10,000 noncitizens and U.S.-citizen family members every year

International Refugee Assistance Project (IRAP) is a global legal aid and advocacy organization working to create a world where refugees and all people seeking safety are empowered to claim their right to freedom of movement and a path to lasting refuge.

Just Futures Law (JFL) is a transformational immigration lawyering project that works to support the immigrant rights movement in partnership with grassroots organizations. JFL staff provide technical assistance, written legal resources, and training for attorneys, advocates, and community groups.

Justice Action Center (JAC) is a nonprofit organization dedicated to advancing the civil and human rights of immigrants through a combination of impact litigation and storytelling. JAC provides legal and communications support to nonprofit organizations that have immigrant members or provide services to immigrant communities.

Justice in Motion (JiM) is a national nonprofit organization dedicated to ensuring that migrants are treated fairly and have equal access to justice across borders. JiM provides lawyers in the United States and human rights defenders in Mexico and Central America with advice, referrals, and case facilitation services.

Legal Aid at Work (LAAW) is a San Francisco-based nonprofit legal services organization. For decades, LAAW has advocated for the rights of low-wage immigrant workers, including those who are undocumented, to be free from forms of exploitation that would leverage their unique vulnerabilities as immigrants against them.

The Legal Aid Justice Center (LAJC) is a Virginia-based nonprofit organization that provides legal and advocacy services to low-income communities. LAJC represents immigrants, promotes systemic reforms to reduce the abuse and exploitation of immigrants, and advocates for policies that promote immigrants' wellbeing and prevent aggressive immigration enforcement.

The National Immigration Law Center (NILC) is the primary national organization exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. NILC offers trainings and resources to attorneys and other advocates.

The Northwest Immigrant Rights Project (NWIRP) is a nonprofit legal organization dedicated to the defense and advancement of noncitizens' legal rights. NWIRP provides community education, legal consultations, and direct representation to low-income immigrants in removal proceedings, as well as other noncitizens seeking immigration benefits.

The Oregon Justice Resource Center (OJRC) works to promote civil rights and improve legal representation to traditionally underserved communities, including noncitizens. The OJRC's Immigrant Rights Project advises public defense providers regarding the immigration consequences of pleas and convictions.

Rocky Mountain Immigrant Advocacy Network (RMIAN) is a nonprofit legal organization providing le-

gal and social service support to children, families, and adults in immigration detention in the Mountain West. RMIAN empowers low-income noncitizens pursuing immigration benefits by sharing information, providing technical assistance, and offering direct representation services.

The Advocates for Human Rights (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion of international human rights standards and the rule of law. The Advocates provides pro bono legal services to people seeking asylum, survivors of trafficking, unaccompanied minors, and people in immigration detention; trains lawyers on immigration representation; and advocates for changes to immigration, detention, and trafficking policies.

The UC Immigrant Legal Services Center (UCIMM) supports the well-being of the University of California Community through free immigration legal representation, outreach, and education. UCIMM has provided thousands of instances of free immigration legal services to undocumented and immigrant UC students and their immediate family members, as well as mixed-status families. This brief reflects UCIMM's own views, not those of its affiliate institution.

The Washington Defender Association (WDA) is a non-profit organization whose membership includes defense attorneys throughout Washington state. WDA's Immigration Project works closely with defense attorneys representing noncitizens to provide advice and resources regarding the immigration consequences of criminal convictions.

SUMMARY OF THE ARGUMENT

The plain text of the Encouragement Provision purports to criminalize vast quantities of constitutionally protected immigration advice. By its terms, the statute

prohibits speech that "encourages or induces" a noncitizen to "come to, enter, or reside in the United States, knowing or in reckless disregard" that the noncitizen's presence "is or will be in violation of law." The statute purports to apply across the board, even if the defendant's speech is truthful and non-misleading, and even if the noncitizen's physical presence violates only the civil immigration laws.

As a result, the Encouragement Provision on its face criminalizes enormous amounts of accurate, competent, ethical legal advice by attorneys. There are many immigration benefits noncitizens may obtain only if they are physically present in the United States, whether lawfully or unlawfully. Noncitizens inside the United States also have greater constitutional rights than noncitizens abroad. A noncitizen's physical presence also may affect how immigration officials exercise their discretion. And even if remaining in the United States is unlawful, leaving may carry risks—legal and otherwise—that responsible attorneys should advise about. For all these reasons, attorneys may often provide legal advice that encourages or induces unlawful presence in apparent violation of the Encouragement Provision.

In addition to attorneys, pastors, doctors, social service providers, and other professionals who counsel noncitizens also risk potential prosecution. Even law enforcement officers and prosecutors who encourage or induce noncitizen witnesses to remain in this country to answer questions or testify in court face potential criminal liability under the Encouragement Provision.

The advice purportedly criminalized by the Encouragement Provision is constitutionally protected and critical to the U.S. immigration system. Immigration advice does not fall within any category of speech this Court has excluded from First Amendment protection. Accurate, competent, ethical immigration advice is crucial for

noncitizens themselves and for the proper functioning of our immigration system as a whole.

The government offers several limiting constructions, but none eliminates the statutory text's expansive criminalization of immigration advice. Even under the government's reading, the Encouragement Provision chills vast quantities of immigration advice by attorneys and others. For that reason alone, the statute is overbroad and invalid under the First Amendment.

ARGUMENT

I. The Encouragement Provision Purports To Criminalize Vast Quantities of Immigration Advice

The Encouragement Provision is broad. On its face, the statute criminalizes legal advice from attorneys, as well as advice from pastors, doctors, community leaders, social workers, police officers, and others. Whatever the Encouragement Provision's legitimate scope may be, it pales in comparison to the vast quantities of accurate, ethical, constitutionally protected speech the statute chills.

A. The Statutory Text Is Broad

The Encouragement Provision prohibits any person from "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). As the jury instructions in this case explain, the statute defines a crime with three basic elements:

> First, [the listeners were] each an alien. Second, the defendant encouraged or induced [the listeners] to [come to, enter, or] reside in the United States in violation of law. Third, that the defendant knew or acted in reckless disregard of the fact that [the listeners'] [com-

> ing, entry, or] residence of the United States would be in violation of the law.

J.A. 104. Three features of the Encouragement Provision bear special emphasis.

First, falsity is not an element of the offense defined in the Encouragement Provision, nor is truth a defense. The statute prohibits encouragement and inducement even in the form of truthful, non-misleading speech about the legal or other consequences of coming to, entering, or residing in the United States.

To put it concretely, to obtain a conviction under the Encouragement Provision in this case, the government was not required to prove that respondent misled or defrauded his clients. Nor would it have been a defense had he genuinely believed that an adult adoption of a noncitizen could lead to citizenship. Indeed, even if respondent's advice about the adoption program had been *correct*, he *still* fits within the plain text of the Encouragement Provision. So long as advising a noncitizen about applying for a government program encourages or induces the noncitizen to be present in this country unlawfully, it does not matter under the Encouragement Provision if the program is valid and lawful. While the government repeatedly emphasizes that respondent's statements here were false, U.S. Br. at 8-10, 17, 38, 49, that fact was *not* necessary to respondent's conviction under the Encouragement Provision.

Second, the Encouragement Provision covers encouraging or inducing any "violation of law," criminal or civil. 8 U.S.C. § 1324(a)(1)(A)(iv). The inclusion of civil violations substantially broadens the scope of what the provision criminalizes. "As a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona* v. *United States*, 567 U.S. 387, 407 (2012). Yet by statute, a noncitizen is "unlawfully present in the United States" so long as he or she is here

(1) after the expiration of the period of stay authorized by the Secretary of Homeland Security or (2) without having been admitted or paroled. 8 U.S.C. § 1182(a)(9)(B)(ii). So if a noncitizen overstays a tourist visa, for example, which is not a crime, the text of the Encouragement Provision makes it a federal felony to encourage or induce the tourist to remain here—even if doing so is necessary for the tourist to seek lawful immigration status.

The Encouragement Provision's extension to civil violations is particularly important for attorneys. "[A] lawyer acts appropriately for purposes of professional discipline so long as the lawyer reasonably believes that the client can assert a nonfrivolous argument that the client's intended action will not constitute a crime or fraud or violate a court order." Restatement (Third) of the Law Governing Lawyers § 94 (2000). And when a proposed course of conduct is *not* criminal, fraudulent, or contumacious, attorneys are ethically *obligated* to "render candid advice" that "explain[s] [the] matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Model Rules of Prof'l Conduct 1.4(b), 2.1 (2019). Attorneys accordingly may and sometimes *must* advise clients on conduct that is civilly unlawful. See, e.g., *Los Angeles Airways, Inc.* v. *Davis*, 687 F.2d 321, 326 (9th Cir. 1982) ("An attorney can claim the protection of the privilege to induce breach of contract …."). The Encouragement Provision thus purports to criminalize attorney advice that is not just ethically permissible, but obligatory.

Third, the text of the Encouragement Provision admits of no relevant exceptions. "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *Int'l Bhd. of Elec. Workers* v. *NLRB*, 341 U.S. 694, 701-02 (1951). The statute on its face contains no exemption for truthful, non-

misleading immigration advice or any other category of speech with recognized social value. Nor does the statutory text exempt advice that takes a particular form, such as discussing the potential legal benefits of remaining in the United States. The Encouragement Provision also applies to "[a]ny person," 8 U.S.C. § 1324(a)(1)(A), with no exception for attorneys or anyone else who might speak to noncitizens about coming to, entering, or residing in this country.

The Encouragement Provision's *only* exception allows a religious denomination to encourage or induce a noncitizen minister to reside in the United States by paying their "basic living expenses." *Id.* § 1324(a)(1)(C). By negative inference, that narrow carve-out implies that the statute applies in all *other* circumstances.

B. The Statute Purports To Criminalize Common Immigration Advice by Attorneys

In prohibiting *truthful* speech that encourages or induces noncitizens to be present in the United States, in violation of the *civil* immigration laws, *without exception*, the Encouragement Provision purports to criminalize vast amounts of competent, ethical advice by attorneys. There are numerous circumstances where responsible attorneys might well offer advice that encourages or induces a noncitizen to be present in the United States unlawfully.

To begin with, Congress and the Executive Branch have authorized an array of *lawful* mechanisms for noncitizens to come to, enter, or reside in the United States. Many of these mechanisms, however, contemplate a prior period of physical presence that may well have been *unlawful*. Examples abound:

- **Non-LPR Cancellation of Removal**. Under 8 U.S.C. § 1229b(b)(1), the Attorney General may "cancel removal of, and adjust to the status of an

alien admitted for permanent residence," certain noncitizens who are not already lawful permanent residents (LPRs). To be eligible, however, a non-LPR noncitizen must have "been physically present in the United States for a continuous period of not less than 10 years." *Id.* § 1229b(b)(1)(A). A responsible immigration attorney therefore might advise a client who has lived in the United States for, say, nine years that another year of *unlawful* residence could enable the client to seek *lawful* status. And cancellation of removal is available only in removal proceedings, see *Matters of Jaso & Ayala*, 27 I. & N. Dec. 557, 558 (BIA 2019), which generally presuppose an allegation of unlawful presence.

- **Trafficking Visas**. Under 8 U.S.C. § 1101(a)(15)(T), "victim[s] of a severe form of trafficking in persons" may be eligible for so-called "T Visas" allowing them to remain in the United States legally. To apply, however, a trafficking victim "must be physically present in the United States[ ] … on account of [human] trafficking." 8 C.F.R. § 214.11(g). Faced with a client present in the United States unlawfully because she was trafficked, an attorney therefore might—indeed, should—advise that continued presence is required to apply for a T Visa, even if that presence is unlawful.
- **Temporary Protected Status**. Under 8 U.S.C. § 1254a, the Attorney General may "designate" certain foreign states where there is an "armed conflict," "environmental disaster," or "extraordinary and temporary conditions … that prevent aliens who are nationals of the state from returning to the state in safety." *Id.* § 1254a(b)(1).

Nationals of a designated state may receive "temporary protected status" (TPS), whereby they are not removable and may obtain authorization to work in the United States and travel outside it. See *id.* § 1254a(a), (f). To be eligible, however, a foreign national must have been "continuously physically present in the United States since the effective date" of the designation and must have "continuously resided in the United States" since a date specified by the Department of Homeland Security. *Id.* § 1254a(c)(1)(A). A responsible attorney therefore should advise a noncitizen client who is a national of a designated state—or of a state that could soon be designated—that remaining here, even unlawfully, could enable the client to apply for TPS.

- **VAWA Cancellation of Removal**. Noncitizens who have been battered or subjected to extreme cruelty by a U.S.-citizen or LPR spouse or parent are eligible for cancellation of removal under the Violence Against Women Act (VAWA). See 8 U.S.C. § 1229b(b)(2). To be eligible for VAWA cancellation of removal, however, a noncitizen must have "been physically present in the United States for a continuous period of not less than 3 years." *Id.* § 1229b(b)(2)(A)(ii). An attorney whose noncitizen client is a victim of spousal or parental abuse therefore should advise that remaining in the United States could satisfy this physical presence requirement.
- **Asylum**. Certain noncitizens who have a "well-founded fear of persecution" in their country of nationality or habitual residence may seek asylum. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b). With certain exceptions, however, asylum is available

only to noncitizens who are "physically present" or "arrive[ ] in the United States." *Id.* § 1158(a). An attorney therefore might well advise that physical presence here would enable a noncitizen client to apply for asylum.

- **Special Immigrant Juvenile Status**. Certain juvenile immigrants who are wards of state courts because they have been abused, abandoned, or neglected by a parent may apply for LPR status, but only from within the United States. See 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(a). An attorney therefore might well advise noncitizen juveniles that remaining in the United States is required to apply for special immigrant juvenile status.
- **DACA**. Under the Deferred Action for Childhood Arrivals (DACA) program, certain noncitizens who came to the United States before the age of sixteen may apply for deferred action, whereby the government forbears from seeking removal. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901-02 (2020). But noncitizens may apply for DACA only if they are present in the United States and have "continuously resided" here for a certain period. *Id.* at 1902. An attorney therefore might well advise an eligible client that remaining here, while unlawful, is necessary to apply for or renew deferred action under DACA.

All of these immigration benefits reflect congressional or regulatory judgments that some noncitizens present in this country unlawfully should be allowed to seek authorization to stay. And these are just *some* of the circumstances where competent, ethical attorneys might advise noncitizen clients about coming to, enter-

ing, or residing in the United States in violation of the law.

The number of noncitizens who apply for these benefits, moreover, is enormous. During fiscal year 2020, for example, more than 280,000 noncitizens applied for asylum. See U.S. Dep't of Homeland Sec., *Fiscal Year 2020 Refugees and Asylees Annual Flow Report* at 16 (Mar. 2022).[2] During the same fiscal year, almost 40,000 petitions for Special Immigrant Juvenile status were granted, see U.S. Citizenship and Immigration Servs., *Number of I 360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ)* (2021),[3] and nearly 3,000 noncitizens applied for T Visas, see U.S. Citizenship and Immigration Servs., *Characteristics of T Nonimmigrant Status (T Visa) Applicants* (Jan. 2022).[4] During fiscal year 2018, nearly 4,000 non-LPRs obtained cancellation of removal. See U.S. Dep't of Justice, Executive Office for Immigration Review, *Statistical Yearbook: Fiscal Year 2018* at 32.[5] These figures are "*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). Indeed, they are likely orders of magnitude greater than the total number of actual prosecutions ever brought under the Encouragement Provision.

There are other circumstances where responsible attorneys might provide advice that runs afoul of the Encouragement Provision. For example, "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to al-

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[2] Available at bit.ly/3YcXZ5h.

[3] Available at bit.ly/3wwycsD.

[4] Available at bit.ly/3kEhkh1.

[5] Available at http://bit.ly/2QTVt2r.

iens outside of our geographic borders." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (citing cases). "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause," for example, "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Ibid.* An attorney therefore might well convey that it would be in a noncitizen client's interest to assert a constitutional claim from inside the United States, rather than from abroad.

Similarly, a noncitizen's physical presence in the United States may affect immigration officials' discretionary decisions about whether and how to apply the immigration laws in a given case. "Discretion in the enforcement of immigration law embraces immediate human concerns," and "[t]he equities of an individual case may turn on many factors, including whether the alien has … long ties to the community." *Arizona*, 567 U.S. at 396.

Responsible attorneys also may counsel clients about the *risks*, legal and otherwise, of physical presence *outside* the United States. Voluntarily departing the United States after a period of unlawful presence, for example, can render a noncitizen inadmissible for three or ten years, depending on the duration of that unlawful presence. See 8 U.S.C. § 1182(a)(9)(B). Leaving the United States with a child who habitually resides here could expose a noncitizen parent to liability under the Hague Convention on the Civil Aspects of International Child Abduction. See 22 U.S.C. § 9003. And remaining in or returning to another country may entail any number of horrors: forced marriage, physical abuse, discrimination, and persecution in myriad forms. Regardless of whether these risks could form the basis for a successful asylum claim, competent attorneys can—and should—help their clients weigh the real-world consequences of

their actions. See Restatement (Third) of the Law Governing Lawyers § 94 (2000) ("In counseling a client, a lawyer may address nonlegal aspects of a proposed course of conduct, including moral, reputational, economic, social, political, and business aspects."). The Encouragement Provision nevertheless threatens such attorney advice.

C. The Statute Also Purports To Criminalize Lay Immigration Advice

The Encouragement Provision's criminalization of immigration advice is not limited to advice by attorneys. Noncitizens may seek guidance from non-legal sources, and those individuals, too, may be subject to prosecution under the Encouragement Provision.

A pastor, for example, could face federal felony charges if he advises a trafficking victim unlawfully present in the United States to remain here to contact an attorney about applying for a T Visa. A priest runs a similar risk if he counsels a noncitizen parishioner to stay in the United States to avoid persecution in her home country, or to fulfill a religious obligation to care for her family here. The same goes for a doctor advising a noncitizen to remain in this country for treatment, or a social service provider who offers guidance to noncitizens fleeing domestic abuse or trafficking. Any of these individuals could face prosecution, either under the Encouragement Provision or under the accompanying conspiracy and aiding-and-abetting prohibitions in 8 U.S.C. § 1324(a)(1)(A)(v).

Conceivably, law enforcement officers and prosecutors could face criminal liability under the Encouragement Provision for encouraging or inducing a noncitizen to remain in the United States unlawfully to answer questions or testify at trial. Indeed, Congress has authorized certain noncitizen crime victims, witnesses, and informants to apply for so-called "U" or "S Visas." See 8

U.S.C. § 1101(a)(15)(U), (S). Yet noncitizens who remain here to help law enforcement nevertheless may be "unlawfully present in the United States" up until their stay has been formally authorized. *Id.* § 1182(a)(9)(B)(ii).

It is no answer that the government might hesitate before prosecuting a pastor, doctor, social service provider, law enforcement officer, or prosecutor. This Court has refused to "uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010).[6]

II. The Advice Threatened by the Encouragement Provision Is Constitutionally Protected and Practically Significant

The immigration advice the Encouragement Provision purports to prohibit is not only vast in scope, but also critical, both constitutionally and practically.

A. Immigration Advice Is Constitutionally Protected

Like other speech, immigration advice is presumptively protected by the First Amendment unless it falls within one of the "well-defined and narrowly limited classes of speech" excluded from constitutional protection. *Stevens*, 559 U.S. at 468-469 (quotation marks omitted).

Advice by attorneys in particular has a special place in our constitutional system. This Court has "upheld the commonsense proposition" that "attorneys" offering "advice or counsel" are "protected by the First Amendment." *United Transp. Union* v. *State Bar of Mich.*, 401

[6] To the extent non-lawyers offer *legal* advice, *amici* do not condone the unauthorized practice of immigration law. The government adequately combats unauthorized practice, however, by restricting legal representation to authorized individuals. See 8 C.F.R. § 1292.1.

U.S. 576, 580 (1971). Indeed, this Court has afforded "speech by attorneys," on "matters of legal representation," the "strongest protection our Constitution has to offer." *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 634 (1995). The Court has taken care to confirm that restrictions on attorney advice do not "chill attorney speech or inhibit the attorney-client relationship." *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 247 (2010). The Court has even invalidated restrictions on the permissible range of government-funded attorney advice and advocacy because they "distort[ed] the legal system by altering the traditional role of … attorneys." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 544 (2001).

The Encouragement Provision threatens other constitutional values, too. Any "serious and fundamental restriction on advocacy of attorneys" necessarily undermines "the functioning of the judiciary" and any agency before whom the attorneys practice. *Ibid.* And "[a]n attorney's duties do not begin inside the courtroom door"—nor at the door to U.S. immigration agencies. *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1043 (1991) (plurality op.). "[B]lanket rules" that, like the Encouragement Provision, "restrict[ ] speech of … attorneys" accordingly "should not be accepted without careful First Amendment scrutiny." *Id.* at 1056.

The government asserts that the Encouragement Provision targets unprotected speech because it prohibits only "speech integral to illegal conduct." U.S. Br. 36. But this Court has never held that all speech integral to illegal conduct is unprotected. The Court has held only that "the constitutional freedom for speech and press" does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid *criminal* statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (emphasis added). The Court

has never held that the same is true of a mere *civil* violation. Here, the Encouragement Provision criminalizes the encouragement or inducement of *civil* violations. See *supra*, p. 7.

The government cites three cases supposedly holding that speech integral to a civil violation is unprotected, but all are inapposite. The government relies principally on *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), but that case involved employment advertisements—"classic examples of commercial speech," which at the time was "unprotected by the First Amendment." 413 U.S. at 384-385. Moreover, the speech in *Pittsburgh Press* was part and parcel of the civil illegality at issue: A newspaper published discriminatory help-wanted ads under separate columns for male and female job-seekers, thereby directly "aid[ing]" and participating in the employer's unlawful hiring practices. *Id.* at 388-89. Immigration advice, by contrast, is not merely commercial. And attorneys and other advisors provide information and counsel, which noncitizens may follow or disregard. Immigration advice thus is at least one step removed from noncitizens' civil violations.

The government also cites two cases involving "picketing." U.S. Br. at 42-43 (quotation marks omitted). But picketing "is a mixture of conduct and communication" where the "conduct element" often is "most persuasive." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 580 (1988) (quotation marks omitted). Immigration advice, by contrast, is pure speech.

B. Advice About Physical Presence Is Crucial to the U.S. Immigration System

Our legal system depends on competent advice and advocacy by trained professionals. Even outside the criminal context, this Court has long recognized "the ne-

cessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice." *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). "[S]ound legal advice or advocacy serves public ends," the Court has explained, by "promot[ing] broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). This Court accordingly has taken care to "encourage full and frank communication between attorneys and their clients." *Ibid.*

The need for "full and frank legal advice," *id.* at 392, is particularly urgent in immigration law. To begin with, "[t]here are significant complexities involved in … federal immigration law, including the determination whether a person is removable." *Arizona*, 567 U.S. at 409. "Immigration law … is a legal specialty of its own," *Padilla* v. *Kentucky*, 559 U.S. 356, 369 (2010), and the Immigration and Nationality Act and its accompanying regulations are "notoriously complicated"—"second only to the Internal Revenue Code." *Singh* v. *Gonzales*, 499 F.3d 969, 980 (9th Cir. 2007) (quotation marks omitted). The Federal Reporter is replete with expressions of frustration by *sitting federal judges* who have noted the "Byzantine," *Carranza* v. *I.N.S.*, 277 F.3d 65, 68 (1st Cir. 2002), "maze of immigration laws," *J.E.F.M.* v. *Lynch*, 837 F.3d 1026, 1040 (9th Cir. 2016) (McKeown, J., concurring), which have "aptly been compared to the labyrinth of ancient Crete," *Sang Seup Shin* v. *I.N.S.*, 750 F.2d 122, 130 (D.C. Cir. 1984) (Starr, J., dissenting). The contemporary U.S. immigration system contains intricacies "that only a lawyer could navigate." *Biwot* v. *Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005).

Furthermore, the ultimate consequence of violating U.S. immigration law—deportation—is "particularly severe." *Lee v. United States*, 137 S. Ct. 1958, 1968 (2017). The "right to remain in the United States may be more

important … than any potential jail sentence." *Padilla*, 559 U.S. at 368 (quotation marks omitted). Deportation is "the equivalent of banishment," *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948), and "may result … in loss of both property and life, or of all that makes life worth living," *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). At a minimum, deportation "visits a great hardship on [an] individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945).

These considerations apply with full force to the immigration advice threatened by the Encouragement Provision. The circumstances where U.S. immigration law provides benefits to noncitizens unlawfully physically present in the United States are neither obvious nor intuitive. To identify those benefits and attempt to obtain them, most noncitizens will require assistance from an attorney. Applicants for immigration benefits must "weave together a complex tapestry of evidence and then juxtapose and reconcile that picture with the voluminous, and not always consistent, administrative and court precedent." *Baltazar-Alcazar* v. *I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004). That task can be challenging even for seasoned immigration attorneys, let alone for noncitizens untrained in the law, many of whom may have limited proficiency in English. Enabling attorneys to provide advice in this area freely, without the looming possibility of a felony prosecution, is a constitutional and practical imperative.

III. The Government's Arguments Cannot Save the Encouragement Provision from Overbreadth

The government makes three basic arguments to try to rescue the Encouragement Provision from overbreadth—it offers various limiting constructions; it argues that as-applied challenges are sufficient; and it

downplays the possibility of problematic prosecutions. Those arguments all fail.

A. The government offers four relevant limiting constructions, but under all four, the Encouragement Provision still chills vast swaths of protected immigration advice.

First, the government argues that the Encouragement Provision is a "criminal complicity" statute that prohibits only "direct facilitation or solicitation of an identifiable noncitizen's unlawful conduct." U.S. Br. 21, 27; see *id.* at 20-31. That does not solve the Encouragement Provision's overbreadth problem for immigration advice. The government simply never explains how "facilitation" and "solicitation" are relevantly different from the plain meaning of "encourage[ment]" and "induce[ment]." If it would constitute "encourage[ment]" or "induce[ment]" to advise a noncitizen that staying in this country could enable her to obtain legal immigration status or would otherwise best serve her interests, then doing so presumably would constitute "facilitation" or "solicitation" as well.

The government asserts that "[f]acilitation and solicitation laws are ordinarily understood not to prohibit abstract or generalized advocacy of illegality," and thus the Encouragement Provision "prohibits only acts … directed at a specific noncitizen or noncitizens, not the general public." U.S. Br. 26, 32. But that limitation also would not remove immigration advice from the statute's scope. By its nature, such advice is given to a specific person.

The government also asserts that "facilitation" and "solicitation" require more than "abstract or de minimis encouragements." U.S. Br. 33. But again, accurate, competent, ethical advice about the legal and other consequences of physical presence here goes far beyond a casual statement like, "I encourage you to reside in the

United States." *Ibid.* Rather, such advice is intended to persuade the client to take the recommended course of action, and it will often be the deciding factor for a noncitizen assessing whether to stay in the United States.

Second, the government asserts that, "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 [the Encouragement Provision] if she tells a client who is present unlawfully that she is unlikely to be removed." U.S. Br. 34. To begin with, the textual basis for that supposed limitation on the statute is unclear. The government's only cited authority is an oblique "Cf." citation to Model Rule 1.2, which provides that a lawyer "shall not counsel a client to engage … in conduct that the lawyer knows is criminal or fraudulent, but … may discuss the legal consequences of any proposed course of conduct with a client." Model Rule of Prof'l Conduct 1.2(d) (2019). The government never explains how the Model Rules illuminate the statutory phrase "encourage or induces."

Regardless, this limitation removes little from the statute's sweep. Beyond advice telling a client she is unlikely to be removed, the government says nothing about myriad *other* guidance attorneys may provide. U.S. Br. 34. The government provides no assurance that it could not prosecute an immigration attorney for advising a client that staying in the country unlawfully would be necessary to apply for a T Visa, for example, or for DACA.

Furthermore, the First Amendment protects "the opportunity to persuade to action, not merely to describe facts." *In re Primus*, 436 U.S. 412, 432 (1978). And "[a] client is entitled to straightforward advice expressing the lawyer's honest assessment." Model Rule of Prof'l Conduct 2.1 cmt. (2019). An attorney who (outside the

context of crime, fraud, or contempt) speaks only in conditional probabilities—declining ever to say what course of action best fits the client's stated objectives—is a poor attorney indeed.

Elliptical counseling is particularly ill-suited to the immigration context, which is high-stakes and complex. Clients in this area need straightforward advice about what to do. And it would be especially strange to fault attorneys for advising noncitizen clients about remaining in the United States in violation of the civil immigration laws, when *those laws themselves* condition numerous benefits on physical presence in the United States.

Third, the government asserts that "[g]ood faith" legal advice does not violate the Encouragement Provision "when it does not involve 'residence … in violation of law," which supposedly will "often be the case." U.S. Br. 34. But the government offers just one example—a noncitizen in removal proceedings who is released on bond under 8 U.S.C. 1226(a). *Id.* The government provides no other example where good-faith legal advice purportedly would not involve residence in violation of the law.

Indeed, the government's narrow example underscores the Encouragement Provision's breadth, as the government strongly suggests that legal advice given to a noncitizen who has *not* been released on bond would amount to a felony. Vast swaths of protected immigration advice occurs outside the context of removal proceedings and is given to noncitizens whom the government has *not* "allowed … to remain in the United States." U.S. Br. 34.

Fourth, the government contends that the Encouragement Provision is limited by the "financial-gain requirement" necessary for the enhanced maximum penalty respondent faced in this case. U.S. Br. 46. As an initial matter, that limitation on enhanced punishment does

nothing to narrow the scope of the Encouragement Provision itself: providing immigration advice could still be a felony, punishable by up to five years of imprisonment, even if the motive for that advice were non-financial. See 8 U.S.C. § 1324(a)(1)(B)(ii).

Regardless, the financial-gain requirement leaves large quantities of immigration advice within the statute's reach. Private immigration attorneys routinely receive payment for their services—often on a per-hour or per-matter basis—and thus can be said to act "for the purpose of commercial advantage or private financial gain," 8 U.S.C. § 1324(a)(1)(B)(i). Even lawyers working with nonprofits like *amici* sometimes charge a small fee. At one point, the government suggests that the fees attorneys receive are an "ancillary financial benefit" and therefore would not count, U.S. Br. 47, but that is dubious. Immigration attorneys whose business is providing legal advice cannot be said to receive only "ancillary financial benefit" for their efforts. Indeed, while the *quality* of advice respondent gave here may have been deficient, there is no reason to think that his *motivation* was different from that of an immigration attorney.

B. The government also contends that "[a]s-applied challenges" are "[ ]sufficient to address concerns about chilling effects." U.S. Br. 49. Not so. Even under the government's limiting constructions, the statute's plain terms criminalize vast swaths of everyday immigration advice, affecting many thousands of cases per year. Any immigration attorney who advises a client falling into one of the categories described above could face a choice between her legal obligation to avoid committing a federal crime and her ethical duty to provide competent advice.

"[R]ather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation," many immigration attorneys

and other advisors may "choose simply to abstain from protected speech, harming not only themselves but society as a whole." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (internal citation omitted). That is precisely what the overbreadth doctrine is designed to prevent. See *ibid.* The government's plea to adjudicate the constitutionality of the Encouragement Provision through case-by-case as-applied challenges amounts to an invitation to abdicate this Court's role in upholding the First Amendment.

The sheer volume of immigration advice the Encouragement Provision criminalizes, moreover, "foster[s] arbitrary and discriminatory application." *Buckley* v. *Valeo*, 424 U.S. 1, 41 n. 48 (1976) (quotation marks omitted). Even if individual attorneys and other speakers could ultimately mount as-applied First Amendment defenses, the possibility of a felony prosecution is a powerful tool that "carries with it the opportunity for abuse." *Minn. Voters All.* v. *Mansky*, 138 S. Ct. 1876, 1891 (2018) (brackets and quotation marks omitted). This Court repeatedly has "warn[ed] of the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority." *Ibid.* (quotation marks omitted).

C. Finally, the government argues that prosecution under the Encouragement Provision for giving immigration advice is a "fanciful hypothetical[ ]." U.S. Br. 44, 46 (quotation marks omitted). Far from it. The government itself has argued that the Encouragement Provision criminalizes immigration advice by attorneys. As described by the district court in *United States* v. *Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012):

> In response to my questioning, the government contended that an immigration lawyer would be prosecutable [under the Encouragement Provision] if he advised an illegal alien

> client to remain in the country because if the alien were to leave the alien could not return to seek adjustment of status. The government at argument likened such advice to that of a criminal defense lawyer who advises a client regarding the prospective robbery of a bank.

Id. at 203–204. Of course, the government's analogy was inapt: while "[t]he bank robbery example involves giving advice on how to commit a crime at a future time," "[t]he immigration lawyer" is "advising the client about how to pursue entirely legal processes in seeking to adjust her status." *Id.* at 204. But it is striking that the government has insisted in court that accurate, ethical legal advice about the physical presence required for an immigrant client to adjust status is analogous to advice about how to commit a violent felony.

The government never disavows the argument it made in *Henderson*. Instead, it observes that "*Henderson* itself" did not involve "an immigration lawyer's advice to a client." U.S. Br. 46. True enough—the defendant in *Henderson* was not an attorney. But the government's position means that no immigration attorney can be certain that her next case will not expose her to criminal liability.

Moreover, the facts of *Henderson* should worry immigration attorneys. The defendant in *Henderson* was the "Boston Area Port Director for United States Customs and Border Protection," which gave her "supervisory responsibility for the government in enforcing immigration laws." *Henderson*, 857 F. Supp. 2d at 193–194. The defendant "employed a person she came to learn was an illegal alien to clean her home from time to time and, when asked, advised the cleaning lady generally about immigration law practices and consequences," including by cautioning her that "if you leave[,] they won't let you back." *Id.* at 193, 196. While the district court

described the prosecution as an "improvident invocation of federal criminal felony process" and "overkill," the government pursued it with "dogged consistency." *Id.* at 193. If the government is willing to treat its own official that way, there is little reason to believe it would stay its hand as to immigration attorneys, whose professional position regularly entails opposing federal immigration enforcement efforts.

More fundamentally, the overbreadth doctrine is prospective in nature, preventing an invalid statute from "chill[ing] protected expression *in the future*." *Massachusetts* v. *Oakes*, 491 U.S. 576, 583 (1989) (emphasis added). The government cannot remove that chill by implying—not even clearly representing—that it will not *actually* prosecute conduct that it has previously described, in open court, as criminal. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480.

The Encouragement Provision's chilling effect is not some theoretical possibility; it is happening right now. The immigration bar has taken note of the government's arguments about the Encouragement Provision, and is actively discussing when and how immigration practitioners should self-censor to avoid criminal liability. E.g., Cyrus Mehta & Kaitlyn Box, *United States v. Hansen: Supreme Court Once Again Agrees to Hear Constitutionality of a Smuggling Statute That Could Impact Immigration Lawyers*, The Insightful Immigration Blog, Dec. 20, 2022.[7] *Amici* are involved in these ongoing discussions.

Indeed, this case shows that immigration attorneys' fears about the Encouragement Provision are well

[7] Available at http://bit.ly/3DfU0MY.

founded. It takes only a slight variation to transform respondent's case into precisely the kind of prosecution the government derides as "fanciful." U.S. Br. 44, 46 (quotation marks omitted). Consider, for example, a defendant who engages in the same conduct and speech as respondent here, with just two differences: (1) instead of working as an immigration consultant, the defendant is an attorney; and (2) instead of advising clients about an adoption program for adults, he advises about a program for children. That hypothetical defendant's legal advice would have been accurate, competent, and ethical, yet, even under the government's narrowest interpretation, it would have been just as criminal as what respondent did here. In the language of the statute, the defendant would have, "for the purpose of commercial advantage or private financial gain," "encourage[d] or induce[d] an alien to … reside in the United States, knowing … that such … residence is or will be in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv), (B)(i). The defendant also would satisfy all three elements of the jury instructions in this case. See *supra*, pp. 5-6. Nothing in the government's proffered limitations would shield this attorney's advice from the Encouragement Provision's broad sweep.

* * *

The Encouragement Provision is unusual. *Amici* are aware of no other provision in the U.S. Code that purports to criminalize such vast quantities of truthful, non-misleading advice by attorneys and others. Even under the government's limiting constructions, the statute chills staggering amounts of immigration advice that is constitutionally protected and critical to the functioning of our immigration system. This Court need look no further to find a "realistic danger" that the Encouragement Provision "will significantly compromise recognized First Amendment protections of parties not before

the Court," rendering the statute impermissibly overbroad on its face. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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