

No. 22-179

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

HELAMAN HANSEN,
Respondent.

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

BRIEF OF *AMICI CURIAE* RELIGIOUS
ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*¹

Amici are religious and religiously affiliated organizations that provide charitable services to undocumented immigrants as a core part of their faith. In accordance with their deeply held religious beliefs, *amici* engage in public advocacy, provide legal representation and advice, and operate charitable organizations that serve immigrant populations.

Amici's efforts are protected by the First Amendment's guarantees of freedom of speech, petition, assembly, and religious exercise. Yet much of this work is threatened by the criminal prohibition of statements or expressive acts that "encourage" or "induce" noncitizens to reside in the United States unlawfully. *See* 8 U.S.C. § 1324(a)(1)(A)(iv). This overbroad criminal statute threatens to chill *amici*'s constitutionally protected speech and activity. *Amici* thus have a substantial interest in the resolution of the question presented in this case.

A full list of *amici* is below:

- Catholic Charities of New York
- Central Conference of American Rabbis
- Church World Service
- Counsel on American-Islamic Relations (CAIR)

¹ Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

- Council on American-Islamic Relations, California (CAIR-CA)
- Esperanza Immigrant Rights Project (Esperanza)
- HIAS (formerly Hebrew Immigrant Aid Society)
- Immigration Law & Justice Network
- Lutheran Social Services of New York (LSSNY)
- Men of Reform Judaism
- Religious Action Center of Reform Judaism
- Union for Reform Judaism
- United Methodist Committee on Relief of Global Ministries (UMCOR)
- Women of Reform Judaism

INTRODUCTION AND SUMMARY OF ARGUMENT

Central to the faith of the *amici* organizations is a commitment to religiously motivated advocacy and activity in support of the dignity of all human beings, irrespective of immigration status. For *amici*, this is a matter of moral duty and conscience. Yet the statute at issue here requires *amici* to either turn away those in need based on immigration status, cease to perform certain charity and advocacy work entirely, or face the realistic possibility of criminal prosecution. The Constitution does not permit the Government to force *amici* to choose between protected expression and avoiding prosecution.

Many faith traditions share the message of welcoming and loving the stranger, which appears in multiple religious texts, including the Bible, *see, e.g.*, Leviticus 19:33–34; Deuteronomy 10:19; Matthew 25:35–40;

Colossians 3:11; Hebrews 13:1, and the Qur'an, Al-Baqarah 2:177; An-Nisa 4:36; Al-Anfal 8:41; At-Tawbah 9:60. *Amici's* commitment to this message informs and drives their work on behalf of immigrants, including impact litigation and legislative advocacy; religious, spiritual, and legal counseling and services; and charitable activities directed toward immigrant communities and other vulnerable populations. This work enjoys ample constitutional protection, particularly under the Free Speech and Free Exercise clauses of the First Amendment.

Federal law makes it a felony to “encourage[] or induce[] 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). Under this provision (the “Encouragement Provision”), anyone who “encourages or induces” an undocumented person to remain in the United States faces up to a five-year prison sentence.

By its plain terms, the Encouragement Provision prohibits advocacy for undocumented immigrants, including in support of laws that would make it easier for undocumented immigrants to remain in the United States. The Provision also limits what immigration attorneys can advise their clients, particularly when remaining in the United States without status could improve the client's chances of obtaining legal status.

There is also a serious risk that the Provision could be read to prohibit providing services or sanctuary to unaccompanied children, victims of abuse, and those at

risk of removal. This would sweep in much of *amici*'s charitable work, including running soup kitchens and homeless shelters in communities with a high percentage of undocumented immigrants. Nothing in the text indicates congressional intent to exclude from the Provision's reach such religiously motivated speech and activity. On the contrary, the only textual clues that do exist, beyond the sweeping nature of the "encourage[] or induce[]" language itself, further underscore the Provision's breadth. The statute's broad language creates a realistic danger that *amici* will be prosecuted for their religiously motivated humanitarian efforts.

The Government's interpretation—that the Provision reaches only the solicitation or facilitation of a specific immigration offense—is incompatible with the statute's text and fails to solve the constitutional problem. The Government's critical concessions in its brief and below mean that the Provision would still capture a vast array of speech and conduct even on the Government's view—potentially criminalizing many of *amici*'s protected statements and activities. Some *amici*, for instance, regularly advise clients of immigration benefits that are available only if they continue to reside in the country without status for a certain period of time; or describe, accurately, what actions increase the risk of family separation or removal. Even though such advice enjoys First Amendment protection, under the Government's expansive reading of the Encouragement Provision, this advice potentially "facilitates" a civil infraction—and therefore could, on the Government's view, result in a felony conviction.

Amici believe they are obligated by their faith to both (1) help those in need and (2) do so regardless of immigration status. The Encouragement Provision forces *amici* into a Hobson’s choice: provide their services only to those with lawful immigration status or give up their work altogether. Either option requires *amici* to compromise their faith commitments, thereby chilling protected expression.

ARGUMENT

I. **AMICI ENGAGE IN CONSTITUTIONALLY PROTECTED SPEECH AND ACTIVITY IN SUPPORT OF UNDOCUMENTED IMMIGRANTS**

A. ***Amici* Advocate for, Advise, and Support Undocumented Immigrants**

Amici support immigrants, including those residing in the United States without legal status, by engaging in advocacy, offering religious and legal counseling, and providing humanitarian and charitable services to individuals regardless of immigration status. These activities are driven by, and are in full accord with, the deeply felt religious beliefs of *amici*.

Pope Francis has written that “[o]ur response to the arrival of migrating persons can be summarized by four words: welcome, protect, promote and integrate.” *Pope Francis, Fratelli Tutti*, ¶ 129 (Oct. 3, 2020), <http://bit.ly/3ke9ScR>. “Ours must be a personal and collective commitment.... A commitment that makes no distinction between natives and foreigners....” Pope Francis, *Message for the 2021 World Day of Migrants*

and Refugees (May 3, 2021), <http://bit.ly/3InpmmH>. Similarly, Cardinal Dolan of New York has explained that “[o]ur perspective is to help” asylum-seekers with “a sense of honor that we are able to help these people in whom we see the face of God.” Catholic News Service, *Cardinal Dolan Meets with Migrants Bused by Gov. Abbott from Texas, Offers Scholarships to Attend NYC’s Catholic Schools*, Am.: The Jesuit Rev. (Aug. 16, 2022), <http://bit.ly/3IQDV3N>.

These sentiments are mirrored by our Catholic *amici*. Monsignor Kevin Sullivan, Executive Director of Catholic Charities of New York, has said “Catholic Charities is following the mandate of Jesus to make sure that basic necessities of food, of shelter, are available to everybody.... If a person is in our country without the right documents, we still believe they have basic human rights.” Sr. Barb Kane, *Who is the Stranger at the Gate?*, Dominican Sisters of Peace (Jan. 21, 2020), <http://bit.ly/3IYOpoE>. *Amicus* Esperanza is an arm of Catholic Charities of Los Angeles, which similarly describes itself as “committed to manifesting Christ’s spirit by collaborating with diverse communities, providing services to the poor and vulnerable, promoting human dignity, and advocating for social justice.” *About*, Catholic Charities of Los Angeles, Inc., <http://bit.ly/3koNVru> (last visited Feb. 21, 2023).

Our Jewish *amici* are likewise deeply motivated by the strictures of their faith. “No less than 36 times, the Torah instructs us on how to treat the *ger*, the foreigner among us. God commands, “The stranger who resides with you shall be to you as one of your citizens; you shall

love them as yourself, for you were strangers in the land of Egypt’ (Leviticus 19:34).” Press Release, Religious Action Center of Reform Judaism, *Reform Jewish Movement Lauds Administration’s Swift Action on Immigration* (Jan. 20, 2021), <http://bit.ly/3lOPUpC>.

Similarly, the Central Conference of American Rabbis passed a resolution stating that “[w]e are instructed in the Holiness Code to treat the strangers in our midst with justice and compassion.... This teaching permeates Jewish tradition and is echoed 35 times in the Torah—the most repeated of any commandment.” *CCAR Resolution on Protecting Individuals at Risk of Deportation from the United States*, CCAR (adopted Apr. 12, 2017), <http://bit.ly/3ERS5iL>. See also *NCJW Condemns Court’s Decision to Partially End DACA*, NCJW (Jul. 19, 2021), <http://bit.ly/3lZnZTN>.

Mark Hetfield, President and CEO of HIAS (formerly the Hebrew Immigrant Aid Society), described it “[a]s an organization rooted in the Jewish imperative of welcoming the stranger.” Press Release, HIAS, *HIAS Welcomes Introduction of Stateless Protection Act* (Dec. 22, 2022), <https://bit.ly/3Iv7p5U>. And on the Jewish holiday of Tisha B’Av, HIAS said that “we will rise up from Tisha B’Av with renewed resolve to fight for justice, and to grant refugees and asylum seekers welcome, safety, and opportunity.” *May Our Lamentations Open Our Hearts to Welcome*, HIAS (July 14, 2021), <https://bit.ly/3IILoGA>.

The United Methodist Church likewise upholds practicing hospitality to migrants, immigrants, refugees, asylees and others without regard to race, status,

nationality, or religion. A resolution titled *Global Migration and the Quest for Justice* affirms, “Christians do not approach the issue of migration from the perspective of tribe or nation, but from within a faith community of love and welcome, a community that teaches and expects hospitality to the poor, the homeless, and the oppressed,” an echo of Jesus’ parable of the sheep and goats (Matthew 25:31–46). *Book of Resolutions: Global Migration and the Quest for Justice*, United Methodist Church (2016), <http://bit.ly/3YWN6Fq>. Another resolution, titled *Welcoming the Migrant to the U.S.* reads, “Welcoming the migrant is not only an act of mission; it is an opportunity to receive God’s grace.” *Book of Resolutions: Welcoming the Migrant to the U.S.*, United Methodist Church (2016), <http://bit.ly/3SpYZRy>. This reflects what the book of Hebrews teaches, “Don’t neglect to open up your homes to guests, because by doing this some have been hosts to angels without knowing it (Hebrews 13:2 CEB).” *Ways United Methodists Can Stand with Migrants*, United Methodist Church (Dec. 1, 2018), <http://bit.ly/3ZjvqUc>.

Social and Political Advocacy. *Amici* are compelled by their faith to speak out on behalf of immigrants and their families, including individuals without lawful immigration status. They agree that those who enter or remain in the United States (with or without proper documentation) deserve to be treated like human beings, entitled to dignity, compassion, and access to basic services. *Amici* use their positions as major religious organizations to seek changes in immigration law. *Amici* put out statements to raise awareness. *See, e.g.*, Press Release, Religious Action Center of Reform Judaism,

Reform Movement Decries National Emergency Declaration to Build Border Wall (Feb. 15, 2019), <http://bit.ly/3KA5qjn> (“We call on the President to revoke his declaration of emergency powers and instead work together with Congress to pass comprehensive immigration reform....”); Press Release, CAIR, *Pathway for Undocumented Persons* (DACA/Dreamers) (July 17, 2021), <https://bit.ly/3XRnEj9> (“CAIR and immigration advocates are ... demanding the Senate adopt the House passed Dream and Promise Act.”). Our *amici* also advocate for immigrants’ interests with government officials. See, e.g., *Advocate for Refugee Rights*, HIAS, <https://bit.ly/3Z8PWax> (last visited Feb. 21, 2023) (“111,816 letters were sent by HIAS supporters to government representatives in 2021, advocating for humane refugee and asylum policies”); Natalie Finstad, *Write to Your Reps: Itin Bill*, Episcopal City Mission (June 11, 2020), <http://bit.ly/3kkT>.

Some *amici* engage in dialogue with governmental authorities directly. This can mean participating in litigation on behalf of undocumented people as a party or *amicus curiae*. See, e.g., Brief of the Anti-Defamation League, Jewish Council for Public Affairs, T’ruah, Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

Amici provide resources for worshippers, community members, and immigrants to advocate for treating immigrants humanely. For example, the Union for Reform Judaism and Central Conference of American

Rabbis has published a list of ways for individuals, congregations, and clergy to support undocumented immigrants. *Ways to Support Undocumented Immigrants*, Religious Action Center of Reform Judaism, <http://bit.ly/3ILvC93> (last visited Feb. 21, 2023). They also suggest that the holiday of Sukkot can serve as an opportunity to help immigrants and learn from them. *Pursuing Immigrant Justice this Sukkot*, Religious Action Center of Reform Judaism, <http://bit.ly/3ZbDar5> (last visited Feb. 21, 2023).

Amici have organized broader public campaigns aimed at welcoming immigrants. Esperanza promoted a social media campaign around the message “#WeAreHome” in support of asylum seekers and immigrant workers. The Religious Action Center of Reform Judaism has put together a “Social Media Toolkit” that provides a variety of images and logos that can be used to raise attention on social media. *RAC Immigrant Justice Social Media Toolkit*, Religious Action Center of Reform Judaism, <http://bit.ly/3YUZxBo> (last visited Feb. 21, 2023).

Religious Advice and Legal Counseling. *Amici* regularly advise undocumented individuals on matters both legal and spiritual. Religious advice may come from the pulpit or the confessional, as a statement to multitudes or advice to an individual. Religious leaders may announce their houses of worship as places of refuge for undocumented immigrants, thereby advising these populations to seek religious and material support at these locations. *See, e.g.*, Episcopal Diocese of Chicago, Resolution F-182 (2019), <https://bit.ly/3KAeHIId> (declaring

the Diocese of Chicago a sanctuary for undocumented immigrants); Rev. Mike Morran, *Sermon about Sanctuary*, First Unitarian Soc. of Denver, <http://bit.ly/3IMhTPu> (last visited Feb. 21, 2023) (announcing a press conference to publicize the housing of undocumented immigrants at his church). In the course of providing private religious counseling and pastoral care to a specific undocumented individual, a religious leader may provide advice about whether remaining in the United States is the best option for that person or that person's family.

Guided by a moral imperative to welcome immigrants, many *amici* also provide free or low-cost legal services to immigrants, including individuals without legal status. These services can include offering representation and legal advice to applicants seeking asylum, family-based immigration status, citizenship, and other forms of immigration relief. In addition to direct representation, many amici regularly consult with noncitizens about immigration law through legal clinics and “know your rights” presentations. Several amici maintain free drop-in legal clinics where individuals can meet with a lawyer and obtain advice about their rights and legal options or obtain resources enabling immigrants to represent themselves pro se. They also conduct presentations informing immigrants about their legal rights and provide similar services in one-on-one meetings with individuals recently released from detention. Many congregations provide counseling through referral arrangements with local legal assistance organizations and social services.

Amici also provide other ancillary services to help immigrants as they navigate the legal terrain. These include offering free translation services, preparing country condition reports, providing group orientations and pro se workshops at detention centers, operating hotlines for immigrants in need, providing transportation to and from hearings and detention centers, coordinating pro bono counsel to assist with legal proceedings, and contacting detainees' families to collect documents in support of a request for relief.

To benefit from most of these services, noncitizens must reside in the United States. Therefore, offering these legal services to noncitizens often involves encouraging those individuals to maintain presence in the forum where those rights are adjudicated. Indeed, *amici* frequently help noncitizens pursue forms of immigration relief that are either expressly or implicitly conditioned on continuing to reside in the United States.

For instance, victims of human trafficking or other crimes who are candidates for U or T visas—which can eventually lead to permanent residence status—as a practical matter must remain in the United States while the underlying crime is investigated or prosecuted. *See* Alien Victims of Certain Qualifying Criminal Activity, 8 C.F.R. § 214.14(c)(1) (providing for U visa petitions for persons in “pending immigration proceedings” or with “final orders of removal, deportation, or exclusion”); Alien Victims of Severe Forms of Trafficking in Persons, 8 C.F.R. § 214.11(b)(2) (requiring that a T visa applicant be “physically present in the United States or at a port-of-entry thereto”). Undocumented young persons who

are eligible for Special Immigrant Juvenile (“SIJ”) status must remain in the United States during the pendency of family court proceedings. *See* 8 U.S.C. § 1101(a)(27)(J) (defining SIJ as “an immigrant who is present in the United States” who meets certain criteria). In the vast majority of these cases, the applicants are in the United States without lawful status until these applications are adjudicated.

Charitable Services. In addition to advocating on topics related to immigration, amici provide other services to undocumented individuals and their families. Through its International Center, Catholic Charities makes available free English language and citizenship preparation classes to anyone, irrespective of legal status, in New York City. *Who We Are*, The International Center of Catholic Charities Community Services, <http://bit.ly/3lXIbp4> (last visited Feb. 21, 2023). The Hebrew Immigrant Aid Society provides resettlement services, including initial housing and basic needs, financial support, educational and employment services, and mental health resources. *United States*, Hebrew Immigrant Aid Society, <https://bit.ly/3KtsIHK> (last visited Feb. 21, 2023).

Finally, many *amici* are affiliated with the New Sanctuary Movement. These houses of worship hold themselves out as places where immigrants at risk of apprehension are welcome, thereby expressing support for individuals who are undocumented. Importantly, *amici* do this work openly and in a manner that does not impede immigration enforcement. *See, e.g.*, Press Release, Religious Action Center of Reform Judaism, *Rabbi*

Jonah Pesner's Response to ICE's Planned Mass Deportation Raids (July 10, 2019), <http://bit.ly/3EwNzpo> (“We encourage member congregations to explore providing physical sanctuary to individuals at risk of deportation or supporting local institutions that do so....”).

In many cases, sanctuary is offered to individuals who have been in the United States for long periods and have U.S. citizen children, but do not have an open immigration case. By providing sanctuary and publicly adopting policies that welcome all persons, regardless of immigration or citizenship status, and that respect privacy by not inquiring about status, sanctuary congregations advocate for greater social acceptance and inclusion of undocumented persons and their families.

B. *Amici's* Work is Protected by the Constitution

All of this work is protected by the Constitution for multiple reasons.

First, *amici's* social and political advocacy is protected by both the Free Exercise and Free Speech Clauses of the First Amendment. As this Court has explained, “oral and written dissemination of ... religious views and doctrines is protected by the First Amendment.” *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); see also *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990).²

² *Smith* recognized that laws may be unconstitutional when they implicate rights protected by the Free Exercise Clause along with

Second, for substantially the same reasons that *amici*'s advocacy work is constitutionally protected, the religious advice that *amici* provide to particular individuals is also constitutionally protected. By regulating the content of *amici*'s communications with individuals, the Encouragement Provision violates the free speech, free exercise, and free assembly rights of *amici* and the individuals who they advise. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927–28 (1982); see also *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 553 (1986) (emphasis removed) (Burger, C.J., dissenting) (“[I]ndividual participation and advocacy of religion ... is affirmatively protected by the Free Exercise and Free Speech Clauses of the First Amendment.”).

Third, *amici*'s provision of legal advice is also protected by the Constitution because what an attorney advises a client is “constitutionally protected expression.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001); *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (explaining that “strict scrutiny [applies] to content-based laws that regulate the non-commercial speech of lawyers”); see also *NAACP v. Button*, 371 U.S. 415, 428–29 (1963). In addition, *amici*'s provision of legal services to noncitizens is also protected by the Constitution’s guarantees of freedom of assembly, freedom of petition, and due process. *Button*, 371 U.S. at 428–29; *Maness v. Meyers*, 419 U.S. 449, 471–72 (1975)

other provisions of the Constitution. *Smith*, 494 U.S. at 881. The Encouragement Provision also violates the Free Speech Clause of the First Amendment.

(Stewart, J., concurring) (explaining that the “due process right to retained counsel in civil proceedings” does not permit a court to “arbitrarily prohibit or punish good-faith advice given by retained counsel”); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5–8 (1964) (holding that the First and Fourteenth Amendments protect the right of workers to form a legal referral organization).

Fourth, the First Amendment also protects *amici*’s provision of religiously motivated and expressive humanitarian services to immigrant populations. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002) (“[C]haritable activities may constitute religious exercise if performed by religious believers for religious reasons....”), *aff’d*, 333 F.3d 156 (D.C. Cir. 2003); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) (“[T]he solicitation of charitable contributions is protected speech....”); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (“Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities.”). In addition to their religious motivation, many *amici* provide services to undocumented individuals out of a desire to express a message of welcome to those individuals particularly. These expressive acts are also entitled to First Amendment protections.

II. THE ENCOURAGEMENT PROVISION CRIMINALIZES SUBSTANTIAL AMOUNTS OF PROTECTED ACTIVITY AND IS THUS UNCONSTITUTIONALLY OVERBROAD

The Encouragement Provision is overbroad and therefore void. *See* Resp’t Br. 21–23 (describing and applying the First Amendment overbreadth doctrine). It criminalizes a “substantial” amount of protected speech “in relation to [its] plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). In particular, the Provision chills *amici*’s religious advice, charitable giving, and political advocacy.

A. The Encouragement Provision Chills *Amici*’s Speech Under the Plain Language of the Statute

1. The plain text of the Encouragement Provision demonstrates its overbreadth and concomitant chilling effect. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.”). The Provision imposes criminal penalties on anyone who “encourages or induces” someone to reside in the United States in reckless disregard of the immigrant’s lawful status. 8 U.S.C. § 1324(a)(1)(A)(iv). “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 chilling effect of that language is obvious: *Amici*’s protected speech involves influence and persuasion and therefore risks prosecution.

The Government accuses the Ninth Circuit of “cherry-picking” dictionary definitions to support this interpretation. U.S. Br. 29. But it does not cite to any narrower definitions of “encourage” or “induce.” None exist. Instead, “encourage” is typically defined using words like “inspire” and “help,” covering all forms of influence, while “induce” is broadly equated with persuasion. *See* U.S. Br. 15–16 (listing examples). And jury instructions for the Provision have generally tracked these definitions. In *United States v. He*, 245 F.3d 954 (7th Cir. 2001), for example, the jury was instructed according to Black’s Law Dictionary *at the Government’s suggestion*. *See id.* at 957 (defining “encourage” as to “instigate, help, or advise” and clarifying that “[t]he concept of aiding and abetting is not before” the jury).

Though the Government contends that the Provision has “strict mental-state requirements” including “general criminal intent,” Petition for Writ of Certiorari at 14, in this very case the Government opposed a jury instruction requiring intent, arguing that the Encouragement Provision’s text contains no such limit. J.A. 101. As the Government acknowledges, this resulted in a conviction under the Encouragement Provision with no mens rea requirement at all. *See* U.S. Br. 28 n.2. The Government now argues that at least a knowing mens rea is required, U.S. Br. 27-28, but the Government’s theory that the Encouragement Provision is congruent with a solicitation offense would require a purposeful mens rea, not merely knowledge or reckless disregard. *See* Model Penal Code § 5.02(1). Because “encourages or induces” covers every form of influence and persuasion, there can be little doubt that the Provision creates a realistic

danger of chilling *amici*'s protected expression.

To illustrate the chilling effect, consider how the law could apply to some examples of *amici*'s religious advice and charitable giving.

- *Amici*'s counsel congregants on how to deal with challenging life events in a manner consistent with their faith. There is a real danger that the Encouragement Provision could be applied, for example, to a priest's advice to his parishioner that it would be better to remain in the United States to stay close to her family when the priest knows or recklessly disregards that she is undocumented. And the statute threatens to sweep in other, similar advice and counseling, like connecting an undocumented congregant with those who could provide temporary housing or pro bono immigration legal advice.
- *Amici* and countless other religious groups engage in expressive charitable activities aimed at aiding individuals irrespective of immigration status. Many *amici* provide food, toys, diapers, clothing, school items, and hygiene products to those in need, without regard to immigration status.
- Religious organizations including *amici* also provide services specifically aimed at immigrants, such as English-as-a-second-language classes. For undocumented persons in the greatest need, such charitable assistance can help make their life in this country possible. As such, there is a

reasonable risk that these and other examples of direct support could be deemed violations of the Encouragement Provision.

Along with their religious advice and humanitarian aid, *amici* risk prosecution for political advocacy, which may influence noncitizens to remain in the United States. For example, Catholic Charities' advocacy in favor of New York's "green light law," which permits individuals to obtain New York driver's licenses irrespective of immigration status, was aimed at ensuring undocumented immigrants can travel to and from work and otherwise move freely without fear of facing deportation due to traffic stops. *Charity in Action: Bi-weekly Roundup*, Archdiocese of N.Y. (July 8, 2019), <http://bit.ly/3EuaVfx>. The group's work on this legislation was explicitly premised on supporting "all parents, families, and workers who are newcomers and who contribute time, energy, faith, and skills to their communities...." *Id.* The policy facilitates the integration of undocumented individuals into American society and reduces the legal risk of remaining. Public advocacy in its support could have influenced some noncitizens to remain in the United States. And prosecutors might argue that Catholic Charities recklessly disregarded this possibility.

Such examples capture only a handful of *amici*'s advocacy, counseling, and charitable efforts that risk prosecution under the plain reading of the Encouragement Provision. Facing this threat, *amici* face pressure to "remain silent" and curtail their important and religiously motivated activities (including those that benefit

immigrants with legal status). *See Reno v. ACLU*, 521 U.S. 844, 872 (1997). While constitutional protections for *amici*'s work are not absolute, they undoubtedly prevent the Government from enacting wholesale proscriptions against religious charities providing food, clothing, and medical supplies to people in need, simply because those people lack immigration status. To do so would require *amici* to violate a core tenet of their faith and undermine the message of welcome that motivates their work.

2. The breadth of the Encouragement Provision is further highlighted by its narrow “minister or missionary” exception. “It is not a violation of” the Provision for a religious organization to “encourage[] ... an alien who is present in the United States to perform the vocation of a minister or missionary ... as a volunteer who is not compensated,” except for room and board, so long as “the minister or missionary has been a member of the denomination for at least one year.” 8 U.S.C. § 1324(a)(1)(C).

The existence of this narrow exception underscores the Provision's breadth. Without it, the Provision would criminalize a church inviting a volunteer missionary to remain in the United States. And the exception's narrow application suggests that the Provision covers all religiously motivated activity that is not expressly exempted, including the conduct highlighted above. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary

legislative intent.”). As such, it potentially runs afoul of the long-understood autonomy afforded to religious institutions to determine their own affairs. *See, e.g., Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (noting that the Court’s Free Exercise jurisprudence “radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”); *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

The Encouragement Prohibition thus threatens to chill a substantial amount of *amici*’s protected speech. To avoid prosecution, *amici* would have to close their doors to those seeking assistance upon learning, or even strongly suspecting, that the individuals lack lawful status. That is antithetical to *amici*’s religious missions. The Government cannot force religious humanitarian organizations to discriminate against the undocumented in violation of their personal and religious beliefs, just as it cannot “forc[e] a student to pledge allegiance, or forc[e] a Jehovah’s Witness to display the motto ‘Live Free or Die.’” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“An individual’s freedom to speak, to worship, and to petition the government ... could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.”).

B. The Government’s Reading of the Encouragement Provision is Implausible and Still Chills *Amici*’s Protected Expression

The Government attempts to narrow the reach of the Encouragement Provision to assure the Court that it would never prosecute *amici*. But the Government’s reading of the statute is less an alternative interpretation than it is a wholesale rewrite of the statute that is both textually implausible and inconsistent with the Government’s past practice, *see infra* Section II.B.3, and in any case *still* would be chilling to *amici* even if adopted.

1. The Government’s Construction of the Statute is Implausible

The Court “must presume that [the] legislature says in a statute what it means and means in a statute what it says.” *Dodd v. United States*, 545 U.S. 353, 357 (2005) (alteration in original) (quotation marks omitted). The Encouragement Provision, by its own terms, means that anyone who inspires, emboldens, or helps noncitizens remain in the country without lawful status faces a potential felony prosecution. *Amici*’s constitutionally protected activity falls within that plain text reading. Yet the Government takes great pains to sculpt the statute as it sees fit—to convince the Court that “encourage” doesn’t mean “encourage.”

On the Government’s view, the Encouragement Provision’s terms must be read as “terms of art.” U.S. Br. 21. Thus, “encourage” really means something like “aid or abet,” *see id.* at 21–24, no matter that Congress used

those very terms in the provision immediately following to describe an independent violation, *see* 8 U.S.C. § 1324(a)(1)(A)(v). As discussed above and by Respondent, *see* Resp’t Br. 23–32, the Government’s reading is out of step with traditional statutory interpretation and simply wrong.

2. The Government’s Reading of the Statute Chills Protected Religious Expression

The Encouragement Provision still chills *amici*’s protected expression under the Government’s implausible reading.

The Government argues that the statute’s criminalization of “assistance,” “instigation,” or “persuasion” prohibits only “acts of encouragement or inducement directed at a *specific noncitizen or noncitizens*, not the general public.” U.S. Br. 26 (emphasis added). As the Ninth Circuit has recognized, “it is easy to foresee arguments about what constitutes a group of particular aliens versus the ‘general public.’” *United States v. Sineneng-Smith*, 910 F.3d 461, 479 (9th Cir. 2018), *vacated*, 140 S. Ct. 1575 (2020). Thus, a “speech addressed to a gathered crowd” or a message “directed at undocumented individuals on social media” may trigger the Encouragement Provision. *Id.* at 484.

Even viewed most narrowly, many of *amici*’s constitutionally protected activities could still fall within the Government’s proposed definition.

a. The Government's Reading Extends to Services Provided by *Amici*

Amici provide a broad range of services to undocumented immigrants as part of their religious mission. Many of these would be chilled by fear of prosecution under the encouragement provision.

Consider that as part of their religious and humanitarian mission, many *amici* offer consultations to individuals with and without lawful status, and that such consultations sometimes include descriptions or assessments of immigration benefits that flow from continuing to reside in the United States without status. For example:

- For non-lawful permanent residents to become eligible for cancellation of removal (non-LPR cancellation) they must maintain continuous physical presence in the country for at least ten years. *See* 8 U.S.C. § 1229b(b)(1)(A); *see generally Akwasi Agyei v. Holder*, 729 F.3d 6, 15 (1st Cir. 2013) (describing non-LPR cancellation). If someone who has resided in the country without status for nine and a half years were to seek counsel through one of *amici's* programs, the attorney may advise the individual that, if they remain a few more months, they would potentially become eligible for non-LPR cancellation.
- In a similar vein, *amici* might advise someone without status that her U.S. citizen child could sponsor her permanent residency should she remain until the child reaches a certain age. Or more

simply, *amici* might inform an individual with a removal order of the risks involved with providing DHS an updated change of address form, or other actions and behavior that may increase the chance of imminent removal.

- Individuals eligible for U or T visas, as a practical matter, must remain in the United States during the pendency of related criminal proceedings to be eligible to seek lawful immigration status. Likewise, those eligible for SIJ status must stay in the country until the conclusion of family court proceedings. In counseling such individuals, *amici* would likely advise them of those requirements, which in the vast majority of cases means the applicant must remain without status in the United States in order to remain eligible for acquiring status.
- And even where someone has an existing order of removal, legal avenues to lawful status may be available. For instance, Esperanza has successfully challenged *in absentia* removal orders issued to clients that had valid claims for immigration relief, including asylum and permanent residency. This representation has included counseling clients to remain in the United States while their old removal orders were reopened to preserve their pathway to immigration relief.

Such advice is unquestionably protected by the First Amendment. *See supra* Section I.B. Yet it is not difficult to see how any of the hundreds of religious organizations

and groups that offer such free advice and consultation face a realistic danger of prosecution under the Government's reading of the Encouragement Provision. Whether or not the attorney explicitly advises the immigrant to remain, accurately describing the immigrant's legal options would undoubtedly have the same effect. Because the purported solicitation offense lacks any purpose requirement, and the underlying offense need not be criminal, the Government could plausibly argue that *amici's* accurate legal advice facilitates the commission of a civil offense (*e.g.*, continuing to "reside" unlawfully). Indeed, the Government explicitly notes in its brief that "legal...advice also does not violate the statute *when it does not involve 'residence...in violation of the law.'*" U.S. Br. at 34 (emphasis added) (citation omitted). The cases described above involve some period of unlawful residency and so would presumably be covered under the Government's reading of the law by its own admission. Thus, the Government's proposed re-writing of the Encouragement Provision would still threaten significant amounts of constitutionally protected activity and is therefore similarly overbroad.

More than just legal services are threatened by the enforcement of this law. It also risks criminalizing *amici's* religious advocacy, counseling, and humanitarian services. For instance:

- If a religious leader directly encourages an undocumented immigrant to "stay" in the United States to be close to her U.S. citizen children or grandchildren for whom she may be the sole caregiver, or to continue working

here as the primary breadwinner for her family, this would still be prohibited under the Government's reading of the statute.

- Providing an undocumented immigrant with food, clothing, and physical shelter. For many *amici*, providing material support to all immigrants, regardless of documentation status, is a core part of their faith and how they understand their religious teachings. In the Government's view, such humanitarian aid still "assists" the immigrant with committing the civil offense of remaining in the United States without documentation by providing for their basic needs.
- Driving a congregant to a medical appointment or a legal client to an asylum interview would still help the individual remain in the United States.
- Helping undocumented students obtain religious scholarships for college would undoubtedly "induce" or "encourage" those students to remain in the United States.

Risk of criminal prosecution is more than enough to chill these expressive and religious activities. Violation of the Encouragement Provision also carries a hefty penalty—a felony conviction, a fine, and up to five years imprisonment for the baseline offense. 8 U.S.C. § 1324(a)(1)(B)(ii). For those providing legal services, a conviction would almost certainly lead to disbarment. The "opprobrium and stigma of a [potential] criminal

conviction” combined with “[t]he severity of criminal sanctions” is practically certain to cause *amici* “to remain silent rather than communicate even *arguably* unlawful words[or] ideas.” *Reno*, 521 U.S. at 872 (emphasis added).

b. The Government’s Attempts to Limit Its Reading of the Statute Provides No Comfort to *Amici*

In its contortions to insist that “encourage” does not mean “encourage” in the Provision, the Government offers no clear guidance to *amici* who wish to conduct constitutionally protected charitable advocacy work to noncitizens.

The Government argues that the Encouragement Provision reaches only direct facilitation or solicitation of another’s illegal activity. U.S. Br. 20–24, 26. Yet even it concedes that the Provision is broader than an ordinary facilitation or solicitation statute. Whereas ordinary facilitation or solicitation offenses criminalize only encouraging a specific *criminal* offense with the *intent* to facilitate its commission, *see* 2 Wayne R. LaFare, *Substantive Criminal Law* § 11.1 (3d ed. 2018) (solicitation); *id.* § 13.2 (accomplice liability), the Encouragement Provision would, on the Government’s view, criminalize encouraging a *civil* infraction with *reckless disregard* for whether the offense results. The severe criminal consequences attending such a sweeping solicitation offense is all but certain to chill *amici*’s protected speech and activity.

The Government does not gainsay the risk of prosecution under any of the scenarios described above. In response to the Ninth Circuit’s legitimate concerns about the statute’s broad sweep, the Government offers the threadbare assurance that merely encouraging another to unlawfully reside in the United States does not fall within the statute—*e.g.*, “[j]ust as a teenager does not ... solicit marijuana possession merely by saying to a friend ‘I encourage you to try smoking pot,’ a person does not violate [the Encouragement Provision] merely by saying to a noncitizen, ‘I encourage you to reside in the United States.’” U.S. Br. at 33.

But the Government offers inapposite legal citations to support this declaration. For instance, it latches on to the exclusion from solicitation of “general approval of criminal acts,” failing to appreciate the difference between one who says “I encourage you to break more laws” and one who says “I encourage you to break this specific law.” It also points to examples where *courts* provide additional safeguards to prevent solicitation from sweeping in “at best, [] encouragement,”—but fails to note that in those cases, the relevant *statutes* explicitly provide these safeguards. *Compare* U.S. Br. at 33 with 2 LaFave § 13.2(a), at 464 n.55. Notably, the Encouragement Provision contains no such safeguard. Ultimately, the Government fails to explain why such speech (and other, similar speech) cannot possibly fall within the Encouragement Provision, as the Government has construed it.

Instead, the Government simply insists that its reading would not reach abstract advocacy, and that

solicitation offenses must be directed at *specific* noncitizens. *See* U.S. Br. at 32–33 (contending that “[s]olicitation and complicity laws are ordinarily understood not to prohibit abstract or generalized advocacy,” and that the Provision requires “that any inducement or encouragement be directed to a particular identifiable noncitizen or noncitizens”). But that does not solve the constitutional problem. The grandmother who encourages her grandson to stay in the United States in violation of the law is not engaged in “abstract advocacy”; she is encouraging a *specific* individual to break *specific* laws. Thus, even if generalized advocacy is not covered under the Government’s construction, *amici*’s one-on-one religious advice and legal counsel would be—it involves specific advice offered to particular undocumented individuals. The same goes for many of the services that *amici* offer, which are provided to *specific* immigrants that *amici* know are, or are likely to be, undocumented.

Some of *amici*’s efforts to assist undocumented individuals not only evince an intent to knowingly assist such persons to remain in the country illegally, but an intent to do so on a very personalized basis. Providing food, water, housing, social services, and religious guidance are all “interactions with an individual noncitizen” that would encourage remaining in the United States—something the Government expressly states is covered under the statute’s prohibitions. *See* U.S. Br. at 27. This is not “abstract advocacy,” and thus the Government’s assurances provide no comfort to *amici*.

c. The Harsh Criminal Penalties Imposed by the Statute are Made More Problematic by the Breadth of the Government's Reading

Both the plain text reading of the statute and the Government's narrower definition leaves large swaths of *amici's* activity vulnerable to criminal prosecution. And that prosecution attends *severe* consequences—from five years imprisonment to a maximum of life. *See* 8 U.S.C. § 1324(a)(1)(B). The provision's dramatic consequences coupled with the Government's expansive and porous interpretation leave *amici* to navigate a precarious gray area when their charitable activity approaches the edges of the Provision's scope. The harsh criminal penalties exacerbate the chilling effect of the Encouragement Provision.

3. The Government Has a Proven Track Record of Encroaching on Religious Activity in the Name of Border Security

Religious organizations are not merely theorizing when they say they fear retaliation for following their beliefs and assisting migrants. The Government seeks to get out from under the weight of these possibilities by arguing that there are no real-world examples of these types of prosecutions. U.S. Br. 45. This is simply not true.

The Government has acknowledged that it *could* prosecute an attorney for providing accurate legal advice to an immigrant that would encourage or induce the immigrant to remain in the United States. In *United*

States v. Henderson, 857 F. Supp. 2d 191, 203 (D. Mass. 2012), “[t]he government [took] the position that giving illegal aliens advice to remain in the United States while their status is disputed constitutes felonious conduct under § 1324(a)(1)(A)(iv) because it constitutes encouragement or inducement under the statute.” It has also stressed that “there is no explicit exception in the statute ... for activities that are denominated as charitable.” Transcript of Oral Argument at 8–9, *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67).

Those seeking to help undocumented immigrants at the border have been threatened with government action, charged, and convicted of various offenses, all of which imperils *amici*’s humanitarian missions. No More Deaths, a religious organization based in Tucson, sent members out to leave food and water for those crossing the desert into the United States illegally. They were ultimately convicted of misdemeanor offenses and initially some had been criminally charged. Maria Cramer, *Judge Reverses Convictions of Activists Who Left Water for Migrants*, N.Y. Times (Feb. 5, 2020), <http://bit.ly/41jsxUZ>. Similarly, a New York pastor was added to a “Watchlist” maintained by Customs and Border Protection after she met and prayed with migrants, asylum seekers, and activists at the border. See Kaji Dousa, *Opinion: I Prayed with Migrants. Now the Government is Tracking Me*, BuzzFeed News (Mar. 24, 2019), <http://bit.ly/3SiMkPz>. Although they were not charged under § 1324, this type of border enforcement indicates a hostility toward aid provided to undocumented people, even when it comes from a desire to practice one’s religion.

The federal government has continued to express hostility towards faith-based organizations that minister to undocumented immigrants. A group of Representatives is considering investigating three religious organizations that help undocumented immigrants. Catholic Charities USA, Lutheran Immigration and Refugee Services, and Jewish Family Service of San Diego have all been told to preserve documents and communications related to their work. Adam Shaw, *House Republicans, eyeing Probes, Tell NGOs Working with Migrants at Southern Border to Preserve Docs*, Fox News (Dec. 15, 2022) (posted on Congressman Tom Tiffany site on Editorials, Letters, and Articles page), <http://bit.ly/3m3OXcY>. This potential investigation is based on allegations that NGOs are “harbor[ing], transport[ing], and encourage[ing] unauthorized aliens to resettle in the United States,” language which mirrors Section 1324(a)(1)(A)(iv). Representative Gooden, the leader of the proposed investigation, has publicly stated that the tax-exempt status of these groups and their “ability to operate” is on notice. *Id.* This is in spite of the fact that many of these organizations explicitly work within the law and encourage others to do the same. *See, e.g., FAQs about Our Service to Immigrants*, Catholic Charities USA, <http://bit.ly/3IMdrQM> (last visited Feb. 21, 2023).

And whatever this Administration may profess, the prior Administration made it known that it viewed the Enforcement Provision as key to its overall immigration enforcement scheme. *See Memorandum from the Attorney General for All Federal Prosecutors 1* (Apr. 11, 2017), <https://bit.ly/41gH2Jp>. Constitutional guarantees

cannot be left to the shifting political winds of the day. First Amendment jurisprudence recognizes that “a clear and firm rule ... is an essential means of protecting the freedom of speech.” *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). It is antithetical to the design of the First Amendment to shift the complexity in navigating its protections to the very people it is designed to protect so that the government can more easily prosecute in gray areas.

At bottom, the Government does not seriously attempt to persuade this Court that no “realistic danger” of prosecution exists under its newly crafted solicitation crime. Rather, the Government’s position boils down to a single belated plea to trust that it will not abuse its discretion and pursue protected speech and religious expression that plainly falls within the statute. But the Government’s eleventh-hour commitment to *noblesse oblige* is irrelevant; it cannot defeat the real danger created by the Encouragement Provision itself, even accepting the Government’s own implausible interpretation. The statute simply sweeps too broadly to be allowed to stand.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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