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P R O C E E D I N G S

(10:23 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 19-67, United States versus Sineneng-Smith.

Mr. Feigin.

ORAL ARGUMENT OF ERIC J. FEIGIN
ON BEHALF OF THE PETITIONER

MR. FEIGIN: Thank you, Mr. Chief Justice, and may it please the Court:

Respondent acknowledges that in the context of a criminal law, the terms "encourage" and "induce" can refer solely to acts that facilitate or solicit unlawful activity. That's the meaning that they have in the context of this criminal law.

There's no reason to reach out and give them a vastly more expansive interpretation simply to strike the statute down. Prohibitions on facilitating or soliciting unlawful activity have existed since before the founding and are perfectly constitutional.

Interpreting this law to be unconstitutionally overbroad would deviate from that tradition and directly contradict the canon

1 of constitutional avoidance.

2 Historical understanding and practice
3 confirm that Congress didn't use these familiar
4 criminal law terms to enact a novel and broad
5 ban on speech. Predecessors to this statute
6 have been on the books since the late 19th
7 Century, and this provision has existed in
8 substantially its current form for decades.

9 Yet, Respondent and her amici have
10 identified no actual instances in which the
11 statute has been applied to protected First
12 Amendment activity or any concrete documented
13 instances of chilling speech.

14 The absence of such evidence isn't
15 just happenstance, and it doesn't just reflect
16 long-standing executive self-restraint. It's
17 because the statute isn't aimed at speech, and
18 it certainly doesn't encompass substantial
19 amounts of it.

20 To the extent that it could be applied
21 to protected speech, that can be handled through
22 the normal mechanism of as-applied First
23 Amendment challenges in those cases. This isn't
24 such a case because Respondent's own activity of
25 fraudulently inducing aliens to pay her for a

1 false path to lawful permanent residence isn't
2 protected by the First Amendment, and she is not
3 entitled to the last resort remedy of
4 overbreadth invalidation that the Ninth Circuit
5 on its own initiative reached out to impose.

6 That's particularly so because she was
7 convicted of an offense that required the jury
8 to find beyond a reasonable doubt that she acted
9 for the purpose of financial gain. Yet, she --

10 CHIEF JUSTICE ROBERTS: You -- you
11 would acknowledge, though, that there are
12 situations in which this would be
13 unconstitutional as applied?

14 MR. FEIGIN: Your Honor, I -- I
15 suppose there might be some circumstances where
16 this could be unconstitutional as -- as applied.
17 I don't know that anyone's identified any actual
18 such applications that the statute would reach
19 --

20 CHIEF JUSTICE ROBERTS: Well, let's
21 suppose --

22 MR. FEIGIN: -- under our reading.

23 CHIEF JUSTICE ROBERTS: -- you know, a
24 grandmother whose granddaughter is in the United
25 States illegally, tells the granddaughter, you

1 know, I hope you will stay because, you know, I
2 will miss you, things will not get better if you
3 go back, so I encourage you to stay. That --

4 MR. FEIGIN: Well --

5 CHIEF JUSTICE ROBERTS: -- that --
6 that would be illegal under the statute, right?

7 MR. FEIGIN: -- it would not be
8 illegal under the statute, Your Honor, and
9 here's why: First of all, the issue of when
10 verbal acts or other acts cross the line into
11 criminal complicity or solicitation is not a --
12 an issue unique to this statute. It's one that
13 the criminal law has dealt with for centuries.
14 And something that abstract and attenuated is
15 not going to be criminal complicity.

16 In particular, this statute, we think,
17 covers a more narrow subset of criminal
18 complicity and solicitation that really requires
19 substantial participation in some unlawful
20 venture or trying to gin up some unlawful
21 venture with the goal that that unlawful venture
22 actually occur. And the --

23 JUSTICE GINSBURG: There was -- there
24 was a decision that Circuit Judge Tashima
25 cited -- I think it was a district court in

1 Massachusetts -- in which he said that that was
2 an instance where this statute was applied to
3 encroach on First Amendment rights.

4 MR. FEIGIN: So, Your Honor, I don't
5 -- I don't think Judge Tashima thought that that
6 particular prosecution, which was not subject to
7 a First Amendment challenge itself, was in
8 violation of the First Amendment. I think what
9 worried Judge Tashima was a colloquy that
10 occurred during that case in which a discussion
11 was had about a hypothetical case in which, for
12 example, the statute could in theory be applied
13 to the actions of a lawyer.

14 Now, again, the actions of a lawyer
15 and when those cross the line into criminal
16 complicity or solicitation is also not a problem
17 that is unique to this statute, but it is an
18 issue that the criminal law has dealt with for
19 quite a long time.

20 JUSTICE KAVANAUGH: What --

21 MR. FEIGIN: In fact --

22 JUSTICE KAVANAUGH: -- what about a --

23 MR. FEIGIN: I'm sorry.

24 JUSTICE KAVANAUGH: What about a
25 charity? So a charity provides food to someone

1 who's in the country unlawfully.

2 MR. FEIGIN: So, first of all, Your
3 Honor, I think that would be conduct rather than
4 speech, so I don't think it would factor into
5 the overbreadth analysis.

6 JUSTICE KAVANAUGH: Is it covered
7 under this statute?

8 MR. FEIGIN: So, if a charity were to
9 give out food to people that the charity knew or
10 recklessly disregarded were in the country
11 unlawfully on the same terms that it gives out
12 food to other needy people, then -- then no,
13 Your Honor.

14 Furthermore, I think, in interpreting
15 the statute, it's important to remember that
16 it's part of the Immigration and Nationality --

17 JUSTICE KAVANAUGH: What if it's not
18 on the same terms; it's designed to provide food
19 for people who can't get it elsewhere and they
20 know that the people taking advantage of that
21 are here unlawfully?

22 MR. FEIGIN: So, Your Honor, there is
23 no explicit exception in the -- in the statute
24 for activities that are denominated as
25 charitable. So, to the extent that a charity

1 were doing something that violated the plain
2 terms of the statute, that amounted to giving --
3 effectively giving money to people to -- or
4 something that is the equivalent of money to
5 people with the purpose that those people reside
6 in the United States unlawfully, that might
7 violate the statute.

8 But I think another important limiting
9 feature of the statute is to recall that it is
10 part of the Immigration and Nationality Act, and
11 that statute has to be interpreted as a whole
12 and not to be at war with itself.

13 And in 8 U.S.C. 1621, the Immigration
14 and Nationality Act expressly contemplates that
15 there are going to be circumstances in which
16 public and private benefits may be given to
17 people who are in the United States unlawfully.

18 The statute has never been used, to my
19 knowledge, and Respondent and her amici have not
20 come up with an instance where it's been used,
21 to prosecute conduct of the type that you're
22 hypothesizing, Justice Kavanaugh.

23 JUSTICE SOTOMAYOR: Mr. Feigin, but it
24 has been used, according to the Amnesty
25 International brief, and DHS admitted that there

1 was a watch list at the border in which these
2 charitable organizations, people who were giving
3 legal advice at the border, all sorts of
4 individuals were being watched because they
5 potentially violated this encouragement
6 provision and inducement provision.

7 So you're saying there's been no
8 absolute -- there's been no prosecution except
9 Henderson, which was a -- a woman who hired a
10 housekeeper who told her the absolute truth: If
11 you go back, you -- you're not -- if you go --
12 if you return to your country, you may not get
13 back. Absolutely true statement, and she was
14 prosecuted for that true statement as an
15 encouragement and inducement for the housekeeper
16 to stay here.

17 But, if you say this has no chilling
18 effect, is that accurate?

19 MR. FEIGIN: Well, Your Honor, let me
20 take those two examples in turn.

21 First of all, the Amnesty
22 International letter, if you look at it, the DHS
23 conduct in that case was focused on
24 investigating instances of violence against
25 border patrol agents and suspicions that people

1 were being counseled to lie to immigration
2 officials. I don't think either of those things
3 is protected by the First Amendment.

4 As to the Henderson case, I think
5 there are more facts and context in that case.
6 That was the prosecution -- and I -- I -- I will
7 acknowledge that that case is very close to the
8 line of what we think the statute could
9 permissibly cover.

10 JUSTICE SOTOMAYOR: Could I ask one
11 question? If this lawyer had sincerely
12 believed, because, in fact, it was true or close
13 to the truth, if she just got it wrong, that
14 there was a lawful program that these
15 individuals could have accessed to keep them
16 here, would you have been able to prosecute her?

17 MR. FEIGIN: No, Your Honor, we
18 couldn't have. And I think that goes back to
19 what I was saying to Justice --

20 JUSTICE SOTOMAYOR: May I just
21 interrupt you one second?

22 MR. FEIGIN: Sure.

23 JUSTICE SOTOMAYOR: You could -- you
24 did prosecute her for fraud, for fraudulently
25 telling her clients that they were eligible for

1 this, correct?

2 MR. FEIGIN: Your Honor, to be -- to
3 be clear, the defendant in Henderson was not a
4 lawyer and not someone counseling clients.

5 JUSTICE SOTOMAYOR: I'm not talking
6 about him. I'm talking about this case.

7 MR. FEIGIN: Oh, we prosecuted -- oh,
8 I'm sorry. In this particular case?

9 JUSTICE SOTOMAYOR: Yes.

10 MR. FEIGIN: Yes, we -- we -- she was
11 not acting as a lawyer, although she is a
12 lawyer. We prosecuted her for lying to her
13 clients, and the jury found that she knew that
14 she was lying to her clients. She lied to her
15 clients that by applying for a particular
16 government program, she was putting them on a
17 path to lawful permanent residence.

18 She charged each of her clients about
19 \$6,000 for that. She kept sending them letters
20 to tell them that --

21 JUSTICE SOTOMAYOR: So please tell me
22 what the different penalty is for those fraud
23 convictions as opposed to a conviction under
24 this statute.

25 MR. FEIGIN: You -- you -- do you mean

1 a conviction under the mail fraud statute, Your
2 Honor?

3 JUSTICE SOTOMAYOR: Under the mail
4 fraud statute versus a conviction under this
5 immigration statute. Is there a difference in
6 the penalties?

7 MR. FEIGIN: So the mail fraud
8 statute, I believe, has a statutory range of
9 zero to 20 years of imprisonment, and under this
10 statute, it was zero to 10, I believe, because
11 of the financial gain element.

12 I would emphasize that the fact that
13 this particular conduct may be covered by two
14 different provisions is, first of all,
15 happenstance. She could have easily given the
16 clients the same advice verbally and then it
17 wouldn't be covered by mail fraud.

18 JUSTICE SOTOMAYOR: But let's go back
19 to my original question, which let's say this
20 program was a path, but they were still here
21 unlawfully.

22 Can you read the words of the statute
23 to me that tell me that she wouldn't be
24 prosecuted for encouraging or inducing them to
25 stay while they went for the lawful path?

1 MR. FEIGIN: So, Your Honor, we don't
2 think it is encouragement or inducement knowing
3 or in reckless disregard of the alien's unlawful
4 status to either advise them of the existence of
5 or help someone to apply for a lawful government
6 program.

7 And let me explain why. The -- first
8 of all, an issue like this came up in United
9 States against Williams in which it was -- the
10 argument was put forth to the court that a
11 statute that criminalized "presenting child
12 pornography" might in theory be applied to
13 handing child pornography over to the police.
14 And the court was skeptical of such a novel and
15 "self-defeating interpretation" of the statute.

16 I think that reflects a broader
17 principle that a statute like this should not
18 lightly be interpreted to apply to conduct that
19 simply participates in a government program.
20 That's particularly true because this statute is
21 part of the Immigration and Nationality Act.

22 JUSTICE BREYER: Isn't --

23 MR. FEIGIN: The Immigration and
24 Nationality Act -- I'm sorry, Justice Breyer.

25 JUSTICE BREYER: You said that point,

1 which is a good point. I want to be sure I get
2 an answer to this question, though, slightly.

3 You've read the briefs, obviously, and
4 they have a long, long list of horrors, of
5 which this is just a few, you know, that you've
6 heard this morning. But Professor Volokh's
7 brief gets rid of most of these horrors in a
8 simple way. He lists the conditions under which
9 the Court traditionally has said a solicitation
10 of a crime statute is constitutional, but the
11 first condition and most important is that what
12 you are soliciting is a crime.

13 And it's easy to read this, when they
14 use the word "law," you mean read it violation
15 of criminal law. Okay? And that would get rid
16 of most of them and -- and I think maybe all of
17 them, I don't know, but I can -- I know that
18 sometimes an alien who enters the United States
19 is committing a crime. All right?

20 But I can't think of any instance in
21 which residing in the United States is a crime.
22 But, if you could think of one, and you might
23 not like this, but, I mean, I could see saying,
24 well, this is restricted to the prosecution of
25 that one, but, if there's zero, I don't see how

1 we narrow it to -- to solicitation. Do you
2 follow that?

3 MR. FEIGIN: Well, Your Honor, it is a
4 crime to be found in the United States following
5 removal, for example. So someone who's residing
6 in the United States after having previously
7 been removed who is not entitled to be here
8 would be violating the statute.

9 JUSTICE BREYER: Okay. So, suppose,
10 what do you think of that? Are you willing to
11 accept that or not?

12 MR. FEIGIN: Well --

13 JUSTICE BREYER: What we do is we take
14 Professor Volokh's brief and we say that the
15 statute under constitutional pressure is limited
16 to instances with all the qualifications you've
17 given, there are several there, but the main one
18 is it is -- it is limited to solicitation of a
19 crime.

20 So it is only in the instance that
21 there is a repeat, and the person has to know it
22 and the person who's doing it, a repeat of
23 coming several times or twice to the United
24 States and then, what you just said, and
25 entering several times, you know, and we put

1 that into it, and does that -- does the
2 government accept that?

3 MR. FEIGIN: Well, Your Honor, we
4 would certainly --

5 JUSTICE BREYER: It would be an
6 alternative in my mind possibly that all the
7 horribles apply and forget the statute part of
8 it.

9 MR. FEIGIN: Well, Your Honor, we
10 would certainly prefer that to the alternative
11 of the Ninth Circuit's kind of novel overbreadth
12 invalidation, but I don't think that's -- I
13 don't think that remedy is necessary. And let
14 me make two points, one about your parade of
15 horribles and then another one about First
16 Amendment law.

17 As to the parade of horribles, I think
18 what's actually ginned up the parade of
19 horribles here is the Ninth Circuit's novel
20 interpretation of the statute. No one had
21 interpreted it that way before. And if you look
22 at the amicus briefs, the activities that they
23 are complaining about being chilled are ones in
24 which they openly, publicly, historically, and
25 currently continue to engage.

1 As a matter of First Amendment law, on
2 the other hand, I don't think there's any reason
3 to restrict this to criminal activity. If you
4 look at the underlying law review article that
5 Professor Volokh cites in his brief, he makes
6 quite clear -- I think this is on the first page
7 of his article -- that this Court's description
8 of the unprotected category of statute -- sorry,
9 the unprotected speech category of speech that
10 is intended to induce and commence illegal
11 activity, which is how Williams describes it,
12 applies to activity that's either civilly or
13 criminally illegal.

14 JUSTICE KAGAN: But what -- what this
15 --

16 JUSTICE BREYER: He doesn't say that.
17 He -- he -- he really -- I mean, we couldn't
18 even find one, a case, where -- where of course
19 that makes a huge difference. We can't find a
20 case where solicitation of X is held to be
21 lawful rather than unconstitutional, where X is
22 not a crime.

23 MR. FEIGIN: Well, let -- let me give
24 you a few examples, Your Honor. So this Court
25 has recently used the example of a business that

1 has out in front of it a White Applicants Only
2 sign, which is facilitating or soliciting the
3 violation of a civil prohibition against racial
4 discrimination in hiring.

5 There are also the cases cited in our
6 briefs, the Gazon case and the Pittsburgh Press
7 case, both of which uphold civil --

8 JUSTICE BREYER: Okay. Okay. If you
9 take that approach, I see the approach, then all
10 the questions that have been asked become
11 relevant. And, indeed, it is -- it is the
12 landlady who says to the person, you always have
13 a place here, knowing that that person is
14 illegally in the United States.

15 Or, you know, we can list
16 universities, church groups, I mean, you name
17 it, sanctuary cities, where they're trying to
18 perhaps, whatever they're trying to do, but it
19 wouldn't be tough for -- turn it over to the
20 prosecutors, and they can use it as threats, you
21 turn it -- I mean, all these things that are in
22 the briefs as horribles, okay, your
23 interpretation would introduce them in reality
24 because you've had to make a lot of
25 distinctions, and if I write all these

1 distinctions into an opinion, I won't be certain
2 I haven't left out some.

3 MR. FEIGIN: Well, Your Honor, I think
4 there's a reason that we haven't seen that in
5 the many decades, indeed, about 150 years that a
6 statute like this has been on the books.

7 And the reason why they can't document
8 any instances of it and the reason why their
9 amici are all advocacy groups that engage daily
10 in the very activities they claim are chilled.

11 JUSTICE ALITO: What exactly --

12 JUSTICE GORSUCH: Mister --

13 JUSTICE ALITO: -- do you think
14 "encourage" means? Are -- are there -- is it
15 your position that speech alone can never
16 constitute a violation of this statute, that
17 there always has to be conduct in addition to
18 the speech?

19 MR. FEIGIN: No, Your Honor. There
20 are, under -- we think "encourage" has a meaning
21 that's drawn from traditional criminal
22 complicity law. "Encourage" is a very common
23 word that is used in criminal complicity
24 statutes.

25 JUSTICE ALITO: And what does it mean,

1 specifically what does it mean in this statute?

2 MR. FEIGIN: So, in this statute, we
3 think it -- it's not entirely clear whether
4 "encourage" is the one that covers solicitation
5 or it's the one that covers complicity. So I
6 would actually, if I could, prefer to take the
7 two --

8 JUSTICE ALITO: Take them together.

9 MR. FEIGIN: -- as kind of a package
10 deal.

11 JUSTICE ALITO: Fine. What -- what
12 does it mean?

13 MR. FEIGIN: We think that it means
14 that you have to substantially participate in
15 the activity as something that the defendant
16 wishes to bring about or to succeed.

17 JUSTICE ALITO: Well, that's aiding
18 and abetting.

19 MR. FEIGIN: It's -- it's different
20 from aiding and abetting in, I think, three
21 distinct ways. As the current LaFave treatise
22 that's cited in our brief makes clear -- this is
23 on page 457 -- the specific words that a
24 criminal complicity statute uses can have some
25 effect on how it's interpreted, the particular

1 subset of conduct that it covers.

2 And I think here Congress's focus on
3 the words "encourage" and "induce" mean three
4 things. First of all, it has to be something
5 that the defendant actually wants to bring about
6 or wants to succeed. I don't think you can be
7 indifferent about encouraging or inducing.

8 Second, it has to be something that
9 the alien is aware of. Under normal aiding and
10 abetting law, you could aid and abet -- if it
11 uses the words
12 "aid and abet," you can aid and abet without the
13 principal knowing about it. If a murderer is
14 about to go shoot somebody and I unload the
15 victim's gun without -- before the murderer gets
16 there and the murderer never knows I did it, I'm
17 still an aider and an abetter.

18 And then the third thing is we think
19 it requires some substantial amount of
20 participation. And the reason for that is that
21 you can't really encourage -- we've been very
22 consistent about this in the proceedings below
23 too, that you can't really encourage or induce
24 someone in -- in a de minimis way. It has to be
25 something that really does make the activity

1 more likely to succeed or more likely to occur.

2 JUSTICE ALITO: So, if the -- if the
3 defendant just says, well, I encourage you to
4 stay here, that might not be enough, but, if the
5 defendant says it 10 times in a forceful voice,
6 that would be a violation?

7 MR. FEIGIN: I don't think that kind
8 of more abstract attenuated exhortation is
9 really going to satisfy this particular statute.

10 One additional reason why -- one
11 additional reason why we think some substantial
12 participation is required is because this is
13 coming in clause iv of a five-clause statute.
14 And if you look at clauses i through iii, which
15 cover the other kinds of substantive conduct
16 here, all of them require some sort of
17 substantial participation --

18 JUSTICE KAGAN: But what do you mean
19 by "substantial participation"? Because I
20 didn't really take that from your brief, so I'm
21 a little bit confused as to where that's coming
22 from.

23 And, again, what Justice Alito said, I
24 mean, if somebody says I really think you should
25 stay here, here are the 10 reasons why, and

1 repeats that and repeats that, and it's -- it's
2 very definitely encouraging and inducing a
3 person to stay in this country, does that count
4 as substantial participation, or is there some
5 non-speech conduct that has to be added to the
6 mix?

7 MR. FEIGIN: Well, Your Honor, I think
8 there are occasions in the criminal law where
9 words can constitute aiding and abetting, and I
10 think that the same is true under this statute.

11 If the Court were to have a problem
12 with that, it could either be addressed through
13 as-applied challenges, as the Chief Justice has
14 mentioned, or, again, we would prefer, to the
15 Ninth Circuit's remedy, something that says that
16 it has to be accompanied -- an interpretation
17 that says that it has to be accompanied by some
18 conduct. But I don't --

19 JUSTICE GORSUCH: Mr. Feigin --

20 MR. FEIGIN: Yes.

21 JUSTICE GORSUCH: -- Mr. Feigin, I --
22 I -- I just want to give you a shot before your
23 time is up, and -- and I -- I -- I take your
24 point there, such as it is, but two -- two
25 things. Normally, in the criminal law when we

1 -- in secondary liability, to avoid the First
2 Amendment, we, as Justice Breyer suggested,
3 don't allow punishment for speech greater than
4 the underlying conduct itself. That would seem
5 to be a basic First Amendment value.

6 So what do we do about the fact that
7 most applications, maybe not all, but most
8 applications here of the underlying conduct
9 would be civilly punished? And here you wish to
10 criminally punish the speech, number one.

11 And, number two, normally we require
12 the aider and abetter or secondary liable person
13 to have a purpose shared with the defendant, the
14 same purpose. And, here, the government, as I
15 understand it, argued that there's no mens rea
16 required to prove this violation or a very
17 minimal one.

18 MR. FEIGIN: Well, Your Honor, below
19 we resisted a mens rea of willfully, which would
20 require some specific --

21 JUSTICE GORSUCH: Yeah, purpose.

22 MR. FEIGIN: No, some specific --
23 having specifically in mind the -- a specific
24 purpose to violate the law.

25 JUSTICE GORSUCH: The violation of

1 law, yeah. Purpose.

2 MR. FEIGIN: We do think this requires
3 the same mens rea that this Court described in
4 Rosemond, where the Court said that
5 participation in a crime with knowledge of the
6 attendant circumstances, although this would
7 extend to reckless disregard of the attendant
8 circumstances, would satisfy the normal --

9 JUSTICE GORSUCH: And that's what I
10 guess I'm --

11 MR. FEIGIN: -- criminal complicity --

12 JUSTICE GORSUCH: -- I'm getting at,
13 is that if you -- if recklessness is good
14 enough, so I could be in my speech -- and this
15 gets even beyond the specific versus how -- the
16 conduct and how specific the exhortation has to
17 be, but I could be reckless in my speech in
18 encouraging somebody and -- and wind up a
19 federal criminal even though the underlying
20 violation is merely civil. Is -- is that the
21 gist of the government's position here?

22 MR. FEIGIN: No, Your Honor. The --
23 the reckless disregard has to be in relation to
24 the alien's status --

25 JUSTICE GORSUCH: No, I'm recklessly

1 --

2 MR. FEIGIN: -- about the law.

3 JUSTICE GORSUCH: -- I'm recklessly
4 indifferent to my granddaughter's status and I'm
5 recklessly encouraging, exhorting her, in
6 whatever level of specificity you require, but I
7 have no intention of -- of violating the -- the
8 immigration laws. And the underlying conduct
9 that -- for which she can be punished is merely
10 civil.

11 MR. FEIGIN: So --

12 JUSTICE GORSUCH: Then what?

13 MR. FEIGIN: -- Your Honor, two -- two
14 parts of that. First of all, reckless -- we
15 don't think there's such a thing as reckless
16 encouragement or inducement. As I was
17 explaining in my colloquy with Justice Alito, we
18 think the words "encouragement" and "inducement"
19 in themselves are -- carry a meaning that you
20 have to want the unlawful venture to occur or to
21 succeed. As to the --

22 JUSTICE GORSUCH: I guess what I'm --
23 I'm wondering here, Mr. Feigin, at the end of it
24 all and just to cut to the chase is, does the
25 government think that -- that the common law

1 principles of secondary liability that normally
2 try and prevent the dragnet effect of secondary
3 liability from extending too far inform the
4 First Amendment analysis here, or would you just
5 have us blow past all of those guideposts?

6 MR. FEIGIN: Well, Your Honor, we do
7 think the statute should be interpreted in
8 conformity with the normal criminal law
9 principles of accomplice liability and
10 solicitation that the Court has long recognized
11 apply to these as a matter --

12 JUSTICE KAGAN: But the problem is --
13 and this is --

14 JUSTICE BREYER: Do you agree with
15 Professor Volokh or do you not?

16 MR. FEIGIN: Your Honor, I do not
17 agree, or we do not agree, with Professor
18 Volokh's suggestion in his brief that this needs
19 to be limited to criminal activity. Again, if
20 you -- if you look at the article that he cites
21 in his brief, it has some of the same examples
22 that I was just using --

23 JUSTICE SOTOMAYOR: Mr. Feigin --

24 MR. FEIGIN: -- with the Court of --

25 JUSTICE ALITO: I don't know where --

1 I don't know where Professor Volokh got this
2 idea, but there are situations in which a person
3 -- in which the -- the commission of the -- of
4 the offense that is encouraged is not made
5 criminal because of the vulnerable position of
6 the person who is engaging in that act, but it
7 doesn't necessarily follow that encouraging that
8 person to do the thing cannot be made criminal.

9 MR. FEIGIN: I think that's exactly
10 right. If I could just quickly answer and then
11 reserve the balance --

12 CHIEF JUSTICE ROBERTS: Very briefly.

13 MR. FEIGIN: Yeah. I -- for example,
14 you could decide to make prostitution a civil
15 offense and still criminally punish recruiting
16 prostitutes.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Fleming.

21 ORAL ARGUMENT OF MARK C. FLEMING

22 ON BEHALF OF THE RESPONDENT

23 MR. FLEMING: Mr. Chief Justice, and
24 may it please the Court:

25 I'd begin with two points. First,

1 Congress means what it says. This provision
2 doesn't mention solicitation. It doesn't
3 mention aiding and abetting. Congress knows how
4 to use those words when it wants to. The words
5 it did use are much broader. "Encourage" or
6 "induce," used together, cover every form of
7 influence and persuasion, as this Court said in
8 the Electrical Workers case.

9 In this statute, falsity is not an
10 element, nor is truth a defense. Even accurate
11 advice encouraging someone to stay is banned.
12 And as a result, this law makes a felon of a
13 teacher who says to an undocumented student that
14 she should stay and pursue her education, it
15 makes a felon of a pastor who says to
16 undocumented worshippers that they can stay and
17 freely exercise their religion, it makes a felon
18 of a doctor who encourages an undocumented
19 patient to stay here for medical treatment, and
20 as the government has still never denied, it
21 makes a felon of a lawyer who advises an
22 undocumented client that her best route to
23 lawful status is to remain physically present in
24 the United States. So, if the statute is read
25 as written, which we think it should be, it is

1 substantially overbroad.

2 The second point, however -- and I
3 think this was pointed up effectively in Justice
4 Gorsuch's question -- is that even were this
5 Court to rewrite this law as a solicitation
6 provision -- and we don't think it can -- it
7 would still be overbroad. And that is because
8 there is no historical tradition, going back to
9 1791 or since, supporting a categorical
10 exclusion from the First Amendment for
11 solicitation of non-criminal conduct.

12 All of the government's common law
13 examples, going back to Sir Edward Coke and Sir
14 Matthew Hale, all involve solicitation of crime,
15 per Justice Breyer's question. Professor Volokh
16 explains this, and he explains why that's the
17 case, because solicitation offenses fall within
18 the traditional exception of speech integral to
19 a crime.

20 There is no dispute, however, that
21 nothing my client did encouraged or even
22 solicited anyone to commit a crime. So, Justice
23 Breyer, were the Court to read the statute in
24 the way that Your Honor suggested -- although I
25 don't think that's a fair reading of what

1 Congress did -- but, if the Court were to
2 rewrite it that way, the judgment of acquittal
3 would still have to be affirmed because there is
4 no suggestion that any of my client's -- the
5 people that she encouraged were ever encouraged
6 to commit a crime or did commit a crime.

7 JUSTICE ALITO: Well, on -- on this
8 point --

9 JUSTICE GINSBURG: Mr. Feigin, was
10 there anything in this statute -- this is little
11 iv, and the earlier parts of the statute, i, ii,
12 and iii. Is there anything that she could have
13 been convicted of when she was taking people's
14 money and doing nothing for them?

15 MR. FLEMING: So, to answer the
16 question, Justice Ginsburg, and then I'll
17 address the premise. But, to answer the
18 question, no. Provisions i, ii, and iii of
19 1324(a)(1) -- (a)(1)(A) do not prohibit my
20 client's conduct.

21 However, the falsity aspect built into
22 your question was the basis of the government's
23 mail fraud prosecution. And one thing I'd like
24 to correct in what Mr. Feigin said is a mail
25 fraud prosecution doesn't require that a mailing

1 be fraudulent. It just requires a fraudulent
2 scheme where there is a use of the mail that is
3 incident to the scheme.

4 And that's how this case was charged.
5 She wasn't accused of putting something in the
6 mail that was fraudulent. The
7 misrepresentations that were accused were oral
8 misrepresentations.

9 So whether the fraud is supposedly
10 written or oral, as long as there is a mailing,
11 which, in connection with immigration, there
12 will almost always be because applications are
13 filed with the government, either by mail or
14 there will be a use of the wires if someone uses
15 a telephone or the Internet, any actual
16 fraudulent scheme can be readily prosecuted and
17 is readily prosecuted by the Federal Government.

18 JUSTICE GINSBURG: There was one count
19 -- there were five counts. Two were knocked out
20 by the Ninth Circuit judgment. So the two --
21 the three remaining counts, two were mail fraud.
22 What was the other one?

23 MR. FLEMING: There were -- so there
24 were three people who were -- three non-citizens
25 who were offered as potential victims. One did

1 not testify at trial. And so, as to that one
2 person, both the mail fraud and the immigration
3 encouragement count were thrown out. She was
4 convicted of two counts of mail fraud and two
5 counts of encouragement for the other two.
6 There are also two tax-related counts to which
7 she pled.

8 JUSTICE ALITO: On Professor Volokh's
9 point, it's an interesting point. I want to
10 give you this example and get your reaction to
11 it.

12 There's a teenager who's -- who has
13 been very seriously bullied and is very
14 depressed and is thinking of committing suicide.
15 The teenager has a gun in his hand. He calls up
16 the one person he thinks is his friend and he
17 says, I'm thinking of killing myself. And the
18 person on the other end of the line says, you've
19 said this before, I'm tired of hearing this from
20 you, you never follow through, you're a coward,
21 why don't you just do it, I encourage you to
22 pull the trigger.

23 Now is that protected by the First
24 Amendment? Is that speech protected by the
25 First Amendment? Attempting to commit suicide

1 is not a crime.

2 MR. FLEMING: So I -- I don't think
3 that it would be protected, Justice Alito.

4 JUSTICE ALITO: Why?

5 MR. FLEMING: I think that --

6 JUSTICE ALITO: What is -- why -- why
7 would that be? So doesn't that defeat the
8 argument that you can never -- someone can never
9 be convicted of speech that encourages an
10 activity that is not criminal?

11 MR. FLEMING: No, I think -- I think
12 incitement to suicide would fall within the
13 Brandenburg exception. You're talking about
14 inciting imminent harm and imminent lawlessness.
15 Also, let's remember, at Common Law, suicide was
16 a crime. And so the framers may well have
17 considered that speech soliciting or aiding and
18 abetting suicide was, in fact, not something
19 that was being protected --

20 JUSTICE ALITO: Well, it's not --

21 MR. FLEMING: -- by the First
22 Amendment.

23 JUSTICE ALITO: -- it's not a crime
24 today.

25 MR. FLEMING: No, not today.

1 JUSTICE ALITO: And why would this --
2 why does this not qualify under Brandenburg?

3 MR. FLEMING: Why does it not qualify?

4 JUSTICE ALITO: Why would encouraging
5 someone to remain in the country illegally not
6 qualify under Brandenburg?

7 MR. FLEMING: I -- first of all, I
8 don't think that's an argument the government is
9 making, and I think for good reason.
10 Brandenburg generally applies -- only allows
11 regulation of incitement to immediate lawless
12 activity and arguably violent lawless activity
13 --

14 JUSTICE ALITO: Well, okay, if it's
15 limited to --

16 MR. FLEMING: -- which in this
17 instance is not going to cause harm.

18 JUSTICE ALITO: -- if it's limited to
19 violent activity, that would be -- that would be
20 a limitation. But, certainly, the unlawfulness
21 here is imminent. In fact, the unlawfulness
22 exists prior to the speech and exists a
23 nanosecond after the speech ended, so it is
24 imminent.

25 MR. FLEMING: I -- and I think that's

1 a -- that's another distinction from the suicide
2 case that I was going to get to, is most state
3 laws that prohibit the solicitation of suicide
4 have a causation requirement. So there has to
5 actually be some connection between the speech
6 and what's going to happen.

7 Here, if you have someone who's
8 already here, this statute has no causation
9 requirement. It also has no mens rea
10 requirement. I was astonished that Mr. Feigin
11 stood up and said that they're willing to import
12 one now, that there have to be some requirement
13 that the defendant share the goal of this
14 actually happening --

15 JUSTICE ALITO: Isn't it --

16 MR. FLEMING: -- because that's not
17 how this jury was instructed.

18 JUSTICE ALITO: -- isn't it odd to
19 think of somebody encouraging somebody to do
20 something if the person who's doing the
21 encouraging does not intend for the person to do
22 that thing? Isn't that built into the concept
23 of encouragement?

24 MR. FLEMING: If it were, Justice
25 Alito, then the jury should have been

1 accordingly instructed. But the government
2 consistently rejected any kind of mens rea
3 instruction in this case, other than the one
4 expressly called out in the statute, which is
5 that the defendant know or recklessly disregard
6 the immigration status of the individual.

7 JUSTICE ALITO: Well --

8 MR. FLEMING: But on page 50 --

9 JUSTICE ALITO: -- and that might be a
10 reason for reversing the conviction for improper
11 instructions to the jury, but I don't know that
12 it's a ground for holding that the statute is
13 unconstitutional.

14 MR. FLEMING: Well, I -- I would say
15 at the very least, if the Court were to rewrite
16 the statute either in the way the government put
17 forward in its brief or in the way that Mr.
18 Feigin is now suggesting for the first time now,
19 there would at the very least need to be a
20 remand for a new trial under the new statute
21 asserted by the government.

22 JUSTICE BREYER: Before you leave
23 this, I don't know if this can be done, honestly
24 don't, but, I mean, in thinking of the -- of the
25 Volokh brief and the rewriting, you -- you --

1 all you -- one thing you do is it says violation
2 of law. You would say violation of criminal
3 law. All right? You'd to have do that.

4 MR. FLEMING: You would.

5 JUSTICE BREYER: And you imply
6 criminal law in order to avoid the
7 constitutional thing. Then you have the other
8 -- the other restrictions, such as Mr. Feigin
9 gave and such as Volokh gives and so forth, and
10 say the reason we rewrite it this way, because
11 it may be that sometimes Justice Alito's
12 examples are all right, it may well be, I don't
13 know all -- all the possibilities there, but the
14 reason we write it this way is we assume that
15 what Congress would have preferred to the
16 unconstitutionality of the statute is the common
17 definition, the common definition and use of the
18 word "solicitation."

19 See, in other words, we take the heart
20 of solicitation, read that into Congress's mind,
21 and put in the word "criminal." Now how far --
22 I mean, you might not have thought of this and I
23 don't know, but I am curious to know what your
24 reaction to it is.

25 MR. FLEMING: So my reaction, Justice

1 Breyer, is, first of all, if Your Honor were to
2 do that, my client gets acquitted. Judgment
3 affirmed. I want to be very clear about that.

4 As a matter of statutory
5 interpretation, I'm not sure that that's -- I
6 think that's a bridge too far. It would be
7 permissible if Congress had written solicit, but
8 it didn't. It wrote encourage or induce.

9 And Congress knows how to say solicit
10 when it wants to. It says it in 18 U.S.C. 373,
11 and, as this Court said in Clark versus
12 Martinez, constitutional avoidance only kicks in
13 after all the ordinary textual analysis of the
14 statute as a whole has been exhausted.

15 And in this circumstance, I think
16 every textual indicator whatsoever shows that
17 Congress meant to do what it said, which was to
18 ban encouragement, which is speech. It isn't a
19 narrow solicitation provision. It isn't an
20 aiding and abetting provision.

21 We know that not just because that's
22 what the words say but because Congress wrote an
23 aiding and abetting provision just two
24 subparagraphs later using those words
25 specifically.

1 We know that the aiding and abetting
2 provision, that one two subparagraphs down,
3 applies to subsection (4), which would mean, if
4 rewritten to mean solicitation, you could be
5 convicted of aiding and abetting solicitation or
6 aiding and abetting aiding and abetting, which
7 is at the very least counterintuitive, if not
8 absurd.

9 And we also know that if you limit it
10 to a conduct-based provision, it is now
11 completely redundant of the three provisions
12 that come immediately before.

13 The government has not pointed to any
14 actual conduct that it would be able to
15 prosecute under a narrowed encouragement
16 provision that it can't already prosecute under
17 other provisions. Similarly, it has not
18 explained what work this encouragement provision
19 would do if narrowed that way because every
20 example it has of actual wrongdoing that it
21 would want to be able to punish, it can punish
22 under Sections 1 through 3 or under the document
23 fraud statute, Section 1546, or as in this case
24 under mail fraud.

25 JUSTICE GORSUCH: Counsel --

1 JUSTICE KAVANAUGH: If the statute,
2 just to be clear, if the statute said aid, abet
3 or solicit, that would be constitutional?

4 MR. FLEMING: It would not, Justice
5 Kavanaugh, because of the civil/criminal issue
6 we've been discussing. It would say aid, abet
7 or solicit conduct that in itself is not
8 criminal. Let's make no mistake about what the
9 government --

10 JUSTICE KAVANAUGH: If we didn't -- if
11 we didn't agree with you on that point, would --
12 and it said aid, abet or solicit, would it then
13 be constitutional?

14 MR. FLEMING: I -- I still don't think
15 it would be because --

16 JUSTICE KAVANAUGH: Why not?

17 MR. FLEMING: Well, because you are
18 talking about a statute that singles out one
19 particular category of civil violations for --
20 for criminal solicitation liability. Why this
21 one in particular and not any other civil
22 violations, many of which could be -- are -- are
23 subject to solicitation or encouragement without
24 any criminal consequence. Many actual federal
25 crimes, there's no general federal solicitation

1 statute. There's only 373, which deals with
2 crimes of violence.

3 JUSTICE SOTOMAYOR: Mr. Fleming --

4 JUSTICE GORSUCH: Counsel -- sorry.

5 JUSTICE SOTOMAYOR: -- I -- I -- I go
6 back to an example that was given earlier by
7 Justice Breyer, but there is a statute which has
8 to do with employers hiring illegal aliens. And
9 there is no statute that makes it illegal for
10 the employee to -- for an alien to be employed.

11 So what do you do with that example?
12 There's a statute that makes it illegal not to
13 use the federal, whatever, system, verification
14 system, but there's no actual law that makes it
15 illegal for an alien to work in the United
16 States.

17 MR. FLEMING: So the --

18 JUSTICE SOTOMAYOR: They can't -- you
19 know, they have to provide a Social Security
20 card and all of this other stuff, and those acts
21 are going to make them criminally liable, but
22 certainly not the act of being employed.

23 MR. FLEMING: I -- I think those fall
24 under the -- the also recognized prohibition on
25 offers to engage in transactions that are

1 themselves banned. Right? I mean, hiring
2 someone is not protected speech. So Congress
3 can obviously ban hiring someone who is not
4 lawfully authorized to be in this country.

5 JUSTICE SOTOMAYOR: Is that your
6 answer to the prostitution case? Why the --

7 MR. FLEMING: I mean, in -- in some
8 ways, yes, I mean, I think -- because you can
9 decriminalize prostitution, but you can still
10 criminalize paying someone to engage in -- in --
11 in sex. That's not speech; that's --

12 JUSTICE ALITO: There are --

13 MR. FLEMING: -- conduct.

14 JUSTICE ALITO: -- there are a lot of
15 examples of instances where states have made
16 things illegal -- make it -- makes it illegal to
17 encourage somebody to do something that is not
18 itself illegal involving minors, encouraging a
19 minor to purchase alcohol -- to -- to -- to
20 purchase alcohol or to consume alcohol, or
21 encourage a person of diminished capacity to
22 engage in some kind of dangerous activity.

23 I mean, you're going to do a lot of
24 damage if you accept this distinction that you
25 can never criminalize encouraging a vulnerable

1 person to do something that is not itself
2 illegal on the part of the -- criminal on the
3 part of the person who's encouraged.

4 MR. FLEMING: So I don't know of any
5 statute that sweeps as broadly as this one. The
6 -- the -- the liquor laws that the government
7 cites actually are not framed in terms of aiding
8 and abetting the minor's conduct. There's a
9 separate prohibition on furnishing alcohol to a
10 minor. That is an act. That is conduct. That
11 is not speech. Of course, a state can make that
12 illegal.

13 It can also make illegal aiding and
14 abetting the furnishing of the conduct -- of the
15 alcohol. So a 23-year-old buys alcohol for a
16 minor, the liquor store attendant who sells the
17 alcohol knowing that it's going to the minor is
18 aiding and abetting that conduct. But no one --
19 no statute that I know of is framed in terms of
20 aiding and abetting the non-criminal conduct of
21 the minor.

22 JUSTICE ALITO: Well, let me ask you
23 --

24 CHIEF JUSTICE ROBERTS: But you have
25 to --

1 JUSTICE ALITO: -- one more -- one
2 more question that -- about something that seems
3 unusual about your overbreadth argument.
4 Usually, in a free speech overbreadth case, the
5 defendant has engaged in speech, and the
6 defendant says even if my speech is not
7 protected, I can assert free speech claims of
8 other people.

9 But, here, your client was not
10 prosecuted for engaging in speech. She was
11 prosecuted for encouragement through conduct.
12 And so you have somebody who didn't engage in
13 speech at all making free speech case -- free
14 speech claims that could be asserted by other
15 people.

16 Now free speech -- overbreadth is a --
17 is a strong doctrine, but are there other -- are
18 there other cases where this has happened? And
19 if not, why should we extend it into this new
20 area?

21 MR. FLEMING: I think the best example
22 is Coates versus Cincinnati. That -- that was
23 an -- an overbreadth challenge. That was the
24 one where the -- where the ordinance prohibited
25 being on the streets of Cincinnati engaging in

1 -- in -- in annoying conduct. And it was not
2 clear what Mr. Coates had actually done. The
3 record before the court didn't even show what it
4 was.

5 And this Court recognized that the
6 ordinance could have prohibited all manner of
7 prohibitable conduct, like blocking traffic or
8 littering the streets, but it nonetheless found
9 the ordinance to be unconstitutionally overbroad
10 because it was directed to a substantial amount
11 of protected speech.

12 And this is the same case. We do not
13 need to show that the conduct that
14 Ms. Sineneng-Smith engaged in was protected
15 speech if the statute, as it plainly does,
16 sweeps within its ambit a substantial amount of
17 -- of protected speech when compared to the --
18 the legitimate sweep of the statute.

19 JUSTICE KAGAN: Mr. Fleming, what do
20 we --

21 JUSTICE BREYER: Can -- can --

22 JUSTICE KAGAN: -- what do we do about
23 the fact that there haven't been prosecutions
24 brought of the kind that you talk about? I
25 mean, there's obviously no requirement that that

1 be the case, but there is a view that there has
2 to be a realistic risk of a statute that's
3 overbroad being applied to protected activity.

4 So where does the realistic risk come
5 from in the absence of actual prosecutions that
6 you can point to and say, ah, that went wrong?

7 MR. FLEMING: I'd like to point to the
8 Henderson case and I'd like to clarify a
9 statement that -- that Mr. Feigin made about it.
10 One of -- this is the case in Boston, where
11 Ms. Henderson was prosecuted, and one of the
12 theories, an independent theory of liability,
13 was that she gave advice to her undocumented
14 housekeeper: If you stay here, they won't let
15 you back. And the district court's opinion on
16 page 200 makes very clear that is an alternative
17 theory of criminal liability. It's not just
18 hiring the person; it was also the advice that
19 was given. And that's why the district judge
20 engaged in the colloquy with the hypothetical
21 about the lawyer, is because it was a
22 prosecution of advice.

23 JUSTICE KAGAN: Okay, I'll take the
24 point, but broaden it out a little bit in terms
25 of your answers. You just said, okay, there's

1 not zero; there's one.

2 MR. FLEMING: There's at least one
3 that we -- we know of.

4 JUSTICE KAGAN: Okay.

5 MR. FLEMING: Yes, that's right. And
6 in -- and in terms of the others, I mean, I
7 think Your Honor said this, but I'll -- I'll
8 reinforce it to the extent I might, which is I
9 don't think this Court has ever required a
10 certain number of actual prosecutions. The
11 overbreadth doctrine there is -- the overbreadth
12 doctrine is triggered by the substantial sweep
13 of the statute carrying within its ambit a ban
14 on protected speech. The fact that the
15 government is careful enough usually not to
16 charge it in those cases does not take away the
17 fact that it risks chilling the speech
18 substantially.

19 Now Mr. Feigin makes the point in his
20 brief and again this morning that, well, lots of
21 people are actually making this speech already
22 within the ban. That's not relevant either.

23 When this Court decided the Stevens
24 case, it pointed to hundreds of hunting websites
25 and hunting magazines that contained depictions

1 of animal cruelty that fell within the ban.
2 That was not a weakness of the challenge. That
3 was a strength of the challenge because it
4 showed that the speech was not fanciful or
5 hypothetical but actually was happening.

6 I point out this statute historically
7 was not used very much, but the -- the
8 government has recently made it a focus of
9 enforcement. The religious organizations'
10 amicus makes this point on page 30. And it's
11 also something that, as Justice Sotomayor's
12 question pointed up, they are using as the basis
13 for investigation of U.S. citizens for their
14 prayer, for their speech, and for their legal
15 advice.

16 And so, even though in the past there
17 may not have been that many uses of this
18 statute, one can expect that if this Court
19 upholds the statute, it will continue to be
20 threatened and used. And whether it's
21 ultimately used does not matter because the
22 First Amendment does not require us to rely on
23 the grace of the executive branch.

24 JUSTICE BREYER: What do you --

25 MR. FLEMING: It protects us from

1 these situations.

2 JUSTICE BREYER: Go back for one
3 second, because I -- I'm taking in your answer
4 to what I asked before. But imagine this: One,
5 says the opinion, this -- the -- the government
6 wants this to be interpreted as a solicitation
7 statute. So be it. We insert the word.

8 Now, two, solicitation has some rules
9 around it. One is what Justice Gorsuch said.
10 You don't punish as a criminal that which isn't.
11 But there might be exceptions to that. General
12 rule, general rule, with possible exceptions.
13 Two, it has to be imminent. That's Brandenburg.
14 Three, it has to be very specific. And there
15 could be some others.

16 Now it does require us to add one
17 sentence.

18 MR. FLEMING: Right.

19 JUSTICE BREYER: We interpret it as
20 Congress picking up, in the government's view,
21 solicitation, the common definition of
22 solicitation, not including the exceptions, et
23 cetera, because this is a common kind of thing,
24 you see, something like that.

25 That's it. That's the question,

1 because that's what's floating around in my
2 mind.

3 MR. FLEMING: I think, Your Honor, if
4 you write that opinion, you'd have to add one
5 more sentence --

6 JUSTICE BREYER: Yeah.

7 MR. FLEMING: -- which is the judgment
8 below is affirmed. But, if you add that
9 sentence, we would be fine with it --

10 (Laughter.)

11 MR. FLEMING: -- with one exception or
12 one question, which is the notion that there
13 might be exceptions to the rule that
14 solicitation has to be limited to a solicitation
15 of criminal conduct with specific intent on the
16 part of the defendant that the criminal conduct
17 be committed. If that --

18 CHIEF JUSTICE ROBERTS: Would we --
19 would we --

20 MR. FLEMING: I'm sorry.

21 CHIEF JUSTICE ROBERTS: Would we have
22 to get that passed by the Senate and House --

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: -- and then
25 signed by the President before we could put

1 that -- that many changes to the statute?

2 MR. FLEMING: Absolutely, Mr. Chief
3 Justice. And the fact that you would need to do
4 that in order for it to be constitutional is a
5 good indication that Congress did not mean for
6 the statute to be read that way, which is why we
7 think the easier opinion to write is an opinion
8 that says we look at the text, we look at the
9 context, and there's nothing in this subsection
10 (iv) that suggests that Congress meant the kind
11 of limited statute that Justice Breyer is
12 proposing.

13 JUSTICE KAGAN: Would you talk a
14 little bit about that generally? Because, you
15 know, we obviously like to save statutes rather
16 than to kill statutes. So what can we do,
17 consistent with our own role and consistent with
18 our understanding that Congress's role is
19 different? But when is it possible for us to
20 narrow statutes without being subject to the
21 critique that where we're rewriting them? And
22 is it possible in this case?

23 MR. FLEMING: I -- I don't think it's
24 possible in this case because all of the textual
25 indicators point in terms -- in the direction of

1 the interpretation that I've been advocating and
2 that the court below took.

3 I think, as a general matter, this
4 Court interprets statutes; it doesn't rewrite
5 them. And if there is an interpretation of the
6 statute as a whole -- I don't just mean a single
7 word -- I mean, certainly "encourage" can mean
8 lots of different things, but it is very broad
9 and capacious. And unless there is a suggestion
10 that Congress meant to adopt a narrower
11 interpretation -- here, there is no textual
12 indication of that -- I don't think that's
13 permissible. I was --

14 JUSTICE KAVANAUGH: But then we would
15 never -- then we would never do a narrowing
16 construction because you would always say, well,
17 just go with what the words of the statute mean.

18 MR. FLEMING: No. I think there are
19 -- there are times --

20 JUSTICE KAVANAUGH: When can you do --
21 to pick up on Justice Kagan's point, when can
22 you do a narrowing construction? You have a
23 broad term, if read literally would be broad.
24 When can you narrow?

25 MR. FLEMING: I think, as this Court

1 said in Clark versus Martinez, what the Court
2 does is it applies all the standard rules of
3 textual analysis of statutes, not just
4 interpreting a particular word but looking at
5 how it's used in context, looking at the common
6 law background against which Congress
7 legislates, looking at the overall structure of
8 the statute, looking at legislative history
9 sometimes.

10 When all of that has been exhausted,
11 if the Court still thinks that the statute is
12 ambiguous and reasonably susceptible to two
13 different meanings, then constitutional
14 avoidance has some force, and you pick the one
15 that is going to avoid the constitutional
16 avoidance.

17 JUSTICE KAVANAUGH: Well, when you do
18 all that, you usually have a best interpretation
19 so you don't get to the constitutional
20 avoidance. That's the -- that's the problem.

21 MR. FLEMING: Often, I --

22 JUSTICE KAVANAUGH: I think the
23 problem is can you read the statute to be not
24 the best interpretation but a -- but a second
25 best so as to save the statute, as Justice Kagan

1 says, and -- and not opine too forcefully on the
2 First Amendment limits when you don't have to,
3 to avoid some of Justice Alito's hypotheticals?

4 MR. FLEMING: Often, one can do that.
5 This is not a case in which I think you can, but
6 I'm -- I'm not here to suggest that
7 constitutional avoidance never works. It does.

8 But the first thing one has to do --
9 and the Court has been clear about this -- is
10 read the statute and apply the standard tools.
11 And I think, when you do this here, there isn't
12 -- there isn't much objection to this on the
13 other side, that -- that when you -- when you
14 read the words, when you look at the fact that
15 Congress uses aiding and abetting and soliciting
16 in other provisions, when it means to reference
17 those doctrines, when you look at the fact that
18 the -- the -- the statute under the government's
19 reading would be completely duplicative and
20 redundant of everything else that comes before
21 and swallow it all up, like the Court said in
22 Yates, that is not a plausible reading. And the
23 government has given no persuasive account of
24 what work this provision would be doing if read
25 their way.

1 When you're left with that, you're
2 saying what are we doing if we turn this
3 encouraging and inducing statute into a
4 solicitation statute, other than rewriting and
5 putting in a statute that Congress could have
6 passed if it wished.

7 I'll point out the second problem with
8 constitutional avoidance is the discussion that
9 we've been having this morning, which is it
10 doesn't actually avoid the problem because, if
11 all you're doing is change the verb from
12 encourage and induce to solicit, you are simply
13 creating a brand-new First Amendment exclusion
14 by creating a statute that prohibits encouraging
15 or soliciting non-criminal conduct, which we've
16 never seen a single statute like that before --

17 JUSTICE ALITO: Mister --

18 MR. FLEMING: -- as the point that --

19 JUSTICE KAVANAUGH: Go ahead.

20 JUSTICE ALITO: Well, Mr. Fleming,
21 could I take you back to the question I asked
22 before, when you gave me the answer that Coates
23 is a case that falls within the category that I
24 mentioned, and you said we didn't know what
25 Coates was doing, but, actually, the opinion

1 says Coates was a student involved in a
2 demonstration and the other appellants were
3 pickets involved in a labor dispute.

4 That is expressive conduct at the very
5 least. So I -- I ask you again, do you have a
6 case in which a person who did not engage in
7 speech is able to make a free speech overbreadth
8 argument?

9 MR. FLEMING: I -- I -- I mean, Coates
10 may have been involved, but I'm not sure what
11 the Court knew in that event. I think there's a
12 footnote in the opinion that says it's not clear
13 exactly what he was doing. He was part of the
14 group. So I think that's the best example.

15 That said, the -- one of the
16 cornerstones of the overbreadth doctrine is that
17 as long as you are charged under the provision,
18 which my client clearly was, and she herself, by
19 the way -- the indicted conduct was the sending
20 of a retainer in which she agreed to file
21 non-fraudulent applications with the government.

22 There's no suggestion that anything
23 she did was actually fraudulent in terms of what
24 she was indicted for for these counts. The mail
25 fraud counts had to do with oral statements made

1 earlier.

2 So there was, in fact, an as-applied
3 free speech argument made. It wasn't decided by
4 the Ninth Circuit. It's not covered by the
5 question presented. But she did engage in
6 speech. That's our position.

7 But it doesn't matter for purposes of
8 the question before the Court because this is an
9 overbreadth challenge against the sweep of this
10 statute far beyond any legitimate conduct that
11 the government would need to prohibit because
12 there are many other statutes that prohibit
13 actual conduct-based wrongdoing.

14 Unless -- if I may, I'd just like to
15 point out this is a very unusual statute.

16 JUSTICE KAVANAUGH: If Congress wrote
17 a statute that said it is a crime to aid, abet,
18 or solicit certain serious civil offenses, A, B,
19 C, is that law on its face permissible?

20 MR. FLEMING: I would say not without
21 some proof, because, if we take Stevens
22 seriously, as I think we have to, there would
23 have to be some kind of evidence that the
24 framers, at the time that they wrote the First
25 Amendment, expected that category of speech to

1 be excluded from its ambit.

2 JUSTICE KAVANAUGH: If Congress had
3 rewrote it to say it is a crime to aid or abet
4 or solicit certain offenses and then lists --
5 and makes them crimes, you're okay with that,
6 obviously?

7 MR. FLEMING: I mean, that raises --
8 that's a harder case. Thankfully, we don't have
9 to deal with that here. That raises, I think,
10 the difficult question, which Mr. Feigin I think
11 very wisely stayed away from, which is it's hard
12 to tell sometimes the line between protected
13 speech and unprotected solicitation.

14 Remember, in Williams, this Court said
15 it's perfectly okay to say to someone, I -- I
16 encourage you to obtain child pornography.
17 That's protected. So is it enough? I mean,
18 solicitation of violent offenses, we know that
19 that -- that can be prohibited. Solicitation of
20 minor offenses, I think that's a difficult
21 question. This Court doesn't have a lot of
22 solicitation cases on the books. Maybe one day
23 Your Honors will have to decide it, but that is
24 not today.

25 So I would just like to be very clear.

1 This is a statute that uses very broad words.
2 It uses them in the context in which all they
3 can do is ban free speech. The result is that
4 vast amounts of truthful and accurate and
5 heartfelt speech that's in no way related and
6 much less integral to any actual crime is
7 subject to five years in federal prison.

8 I would submit that the First
9 Amendment is wisely designed to protect us from
10 just this kind of a law, and we would
11 respectfully request that the judgment be
12 affirmed.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Four minutes, Mr. Feigin.

16 REBUTTAL ARGUMENT OF ERIC FEIGIN
17 ON BEHALF OF THE PETITIONER

18 MR. FEIGIN: Thank you, Mr. Chief
19 Justice.

20 I take Respondent's principal
21 submission today to be that you simply can't
22 read these words to mean anything other than the
23 incredibly broad reading that Respondent in the
24 Ninth Circuit attribute to them and that's why
25 you can't do constitutional avoidance, but

1 that's simply not true.

2 As Respondent acknowledges on pages 20
3 to 21 of her brief, these words can, in the
4 context of a criminal complicity provision, at
5 least under the canon of noscitur sociis, have
6 the meaning that we are attributing to them
7 today. And if they can have that meaning in
8 that context, they can have that meaning in this
9 context.

10 These are not unusual or strange words
11 to use in this context to mean what we are
12 saying that they mean. As we point out in our
13 brief, they are commonly used in state statutes,
14 the Model Penal Code, the LaFave treatise, even
15 decisions of this Court have used them in that
16 way.

17 Used in that way, they fill a gap in
18 this statute that includes conduct, for example,
19 under clause 1, the alien -- someone needs to
20 actually bring the alien into the United States,
21 so even aiding and abetting, bringing into the
22 United States, wouldn't cover certain kinds of
23 help for aliens who come into the United States
24 by themselves.

25 Congress was using these words in

1 their normal criminal law meaning because let's
2 not forget, this statute, as I was discussing
3 earlier with Justice Breyer, covers the
4 facilitation, solicitation of a lot of actual
5 criminal conduct, coming to and entering the
6 United States unlawfully.

7 To the extent that it also covers
8 certain civil violations, for reasons I've
9 discussed, I think this Court has recognized in
10 previous cases like Pittsburgh Press and Gazzam
11 and in the white-applicants-only example that
12 Congress or another legislature can civilly
13 proscribe speech that facilitates activities
14 that are civilly prohibited.

15 And if Congress -- and if that were
16 really protected speech, Congress or another
17 legislature couldn't even civilly proscribe it.

18 The reason why it can be civilly
19 proscribed is because it is unprotected speech.
20 And if it's unprotected speech, then it can be
21 subject to a criminal prohibition as well.

22 This -- to the extent that this
23 statute may reach some protected speech, it can
24 be handled as applied. There is no reason to
25 read this statute as broadly as Respondent is

1 contending that it needs to be read here and
2 that the Ninth Circuit read it for the very
3 first time --

4 JUSTICE SOTOMAYOR: Mr. Feigin --

5 MR. FEIGIN: -- in this case.

6 JUSTICE SOTOMAYOR: -- what in reading
7 this statute would give an average person notice
8 of all of the limitations you're suggesting to
9 us? Because I read "encourage or induce an
10 alien to come, enter, or reside in the U.S.,
11 knowing or in reckless disregard of the fact
12 that such coming to, entry, or residence is or
13 will be in violation of law," seems to me that
14 all of the examples that were raised earlier,
15 the hospital that's treating a child with -- an
16 illegally present child with a disease, the
17 church who provides worship to illegal aliens,
18 all of the other examples that were given on
19 their face to the common reader of those words
20 would be a violation of the statute.

21 MR. FEIGIN: Well, Your Honor, I don't
22 think that is the standard -- I don't think
23 that's the standard this Court applies that
24 someone is ignorant of what those words mean in
25 the context of the criminal law.

1 Again, these are not -- these are not
2 words that are unique to this statute. If you
3 look at the LaFave treatise, Section 13.2, the
4 word "encouraging" is used as the title of
5 section headings to describe accomplice
6 liability. This Court used the word --

7 JUSTICE SOTOMAYOR: But accomplice
8 liability --

9 MR. FEIGIN: -- "induce" in Williams.

10 JUSTICE SOTOMAYOR: -- has all sorts
11 of meaning that you're not endorsing. You're
12 saying this is not aiding and abetting. You're
13 saying it's not solicitation. It's something
14 else --

15 MR. FEIGIN: No, Your Honor --

16 JUSTICE SOTOMAYOR: -- altogether?

17 MR. FEIGIN: -- we are using the
18 principles of complicity and solicitation in a
19 statute that is directed at large amounts of
20 criminal activity to inform what these words
21 mean here.

22 I -- I suppose it is possible that
23 someone who does not have any knowledge of how
24 those words are used in the context of
25 facilitation or solicitation statutes might look

1 at it and might have the reaction that they
2 should be given a different meaning, but I don't
3 think that's the standard this Court should
4 apply. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:22 a.m., the case
8 was submitted.)

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