

**SUPREME COURT  
OF THE UNITED STATES**

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, )  
                  Petitioner, )  
                  v. ) No. 22-179  
HELAMAN HANSEN, )  
                  Respondent. )  
- - - - -

Pages: 1 through 97  
Place: Washington, D.C.  
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Petitioner, )

v. ) No. 22-179

HELAMAN HANSEN, )

Respondent. )

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Washington, D.C.

Monday, March 27, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:46 a.m.

APPEARANCES:

BRIAN H. FLETCHER, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

ESHA BHANDARI, ESQUIRE, New York, New York; on behalf of the Respondent.

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P R O C E E D I N G S

(11:46 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-179, United States versus Hansen.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER

ON BEHALF OF THE PETITIONER

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

For more than a century, Congress has made it a crime to encourage or induce certain immigration offenses. Mr. Hansen violated that statute by inducing noncitizens to reside in the United States illegally so that he could take their money in a fraudulent citizenship scheme.

No one suggests that that conduct was protected by the First Amendment. But the Ninth Circuit invoked the overbreadth doctrine to facially invalidate this longstanding statute by giving the words "encourage" and "induce" their broadest possible meaning and sweeping in wide swaths of protected speech.

Now we haven't argued that the statute would be constitutional if it swept that

1 broadly. Our position here is that the statute  
2 need not and should not be read that way.

3           Everyone agrees that in criminal law,  
4 the terms "encourage" and "induce" are terms of  
5 art that can refer narrowly to soliciting or  
6 aiding and abetting unlawful activity. And as  
7 nine dissenting judges explained below, text,  
8 context, and history confirm that the words  
9 carry that traditional meaning in the context of  
10 Section 1324.

11           At the very least, that's a plausible  
12 reading of the statute that ought to be adopted  
13 under the canon of constitutional avoidance  
14 because it would eliminate any overbreadth  
15 concern.

16           Prohibitions on soliciting or  
17 facilitating both criminal and civil violations  
18 have long been common and have never been  
19 thought to raise a First Amendment problem  
20 because, as the Court held in *Williams*, the  
21 First Amendment does not protect speech that is  
22 intended to induce or commence specific illegal  
23 activities.

24           Now I acknowledge that it will  
25 sometimes be hard to draw the line between

1 protected advocacy and unprotected solicitation,  
2 but that problem is not unique to Section 1324.  
3 Exactly the same issue can arise under any  
4 solicitation or aiding-and-abetting statute.

5 And, more importantly here, that is  
6 not an overbreadth problem. As with other  
7 solicitation and aiding-and-abetting statutes,  
8 the possibility that some applications of  
9 Section 1324 might raise First Amendment  
10 questions may provide a basis for future  
11 as-applied challenges, but it does not justify  
12 facially invalidating the statute and preventing  
13 its application to plainly unprotected schemes  
14 like Mr. Hansen's.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Are you aware of any  
17 instance in which the -- this section has been  
18 applied in the way that the Ninth Circuit  
19 hypothesized?

20 MR. FLETCHER: I'm not. And I really  
21 do think that's significant, Justice Thomas. We  
22 are, after all, here on an overbreadth case, and  
23 this Court has emphasized, most recently, the  
24 last time it heard this issue in Sineneng-Smith,  
25 that overbreadth is strong medicine that ought

1 to be applied only as a last resort, and it said  
2 you have to vigorously enforce the limits on  
3 that doctrine. One of the limits --

4 JUSTICE SOTOMAYOR: Sorry. There's a  
5 district court case involving the woman who  
6 encouraged her housekeeper that -- or told her,  
7 if you leave, you can't come back, which is --  
8 was an accurate statement of the law, and she  
9 was prosecuted in that case.

10 MR. FLETCHER: Justice Sotomayor,  
11 you're referring to the Henderson case --

12 JUSTICE SOTOMAYOR: Yes.

13 MR. FLETCHER: -- out of the District  
14 of Massachusetts, which is the case that the  
15 amicus briefs focus almost entirely on. I  
16 think, even if you were troubled by that case,  
17 that would be one district court prosecution --

18 JUSTICE SOTOMAYOR: Well, I -- I --

19 MR. FLETCHER: -- we -- we don't think  
20 found for --

21 JUSTICE SOTOMAYOR: What I find  
22 interesting is that the government there also  
23 hypothesized that a lawyer who told his client  
24 that if he -- that -- what the consequences were  
25 of leaving, that you would prosecute the lawyer

1 too. And the lawyer there is earning money for  
2 that statement. He's giving advice.

3 MR. FLETCHER: I'm not sure whether  
4 that's what the government said there. It's  
5 certainly not what we're saying now, as we  
6 explain --

7 JUSTICE SOTOMAYOR: Well, I know you  
8 aren't. But could you tell me exactly how you  
9 want us to rewrite the statute? I think, if  
10 you're going to call it aiding and abetting or  
11 soliciting, that you have to write in a specific  
12 intent, don't you?

13 MR. FLETCHER: I wouldn't -- I'd just  
14 dispute the premise. I don't think we're asking  
15 you to rewrite it. I think we're saying these  
16 are words that connote aiding --

17 JUSTICE SOTOMAYOR: All right.

18 MR. FLETCHER: -- and abetting.  
19 They're terms of art. They bring the old  
20 soil with them.

21 JUSTICE SOTOMAYOR: With it, and  
22 that's an intent requirement?

23 MR. FLETCHER: Correct, which is --

24 JUSTICE SOTOMAYOR: And, here, the  
25 defendant asked for an intent statute to come



1 in.

2 MR. FLETCHER: Not quite. The intent  
3 requirement that's required for aiding and  
4 abetting and the one that we accept here is the  
5 one the Court referred to in Rosemond. That's  
6 the intent of facilitating, making the offense  
7 succeed. What the defendant asked for here --

8 JUSTICE SOTOMAYOR: Well, with aiding  
9 and abetting, you have to intend to make it  
10 succeed. And I'm wondering what you're making  
11 succeed, meaning nothing -- you haven't proven  
12 that these aliens were going to leave anyway.

13 MR. FLETCHER: I actually think we  
14 have here. There was testimony that -- there  
15 are two noncitizens at issue.

16 JUSTICE SOTOMAYOR: I -- well --

17 MR. FLETCHER: Both of them said their  
18 visas were expiring, they would have left, but  
19 Mr. Hansen said --

20 JUSTICE SOTOMAYOR: Yeah. That's --

21 MR. FLETCHER: -- you can stay because  
22 I'm going to make you a citizen.

23 JUSTICE SOTOMAYOR: Right. But -- so  
24 we have to write in an intent. We have to take  
25 the words and define the words "encourage" or

1 "inducing" to mean aiding and abetting or  
2 soliciting.

3           What do we do with our *Elonis* point,  
4 where we said, if we're going to define a  
5 statute, we shouldn't define it to put in words  
6 that Congress took out? And Congress, previous  
7 to this statute, had the words "aiding and  
8 abetting" and "soliciting" and took them out.  
9 So now we're putting back in what Congress took  
10 out?

11           MR. FLETCHER: I disagree, Justice  
12 Sotomayor. I think this is an area of the law  
13 where commentators and the Court have long  
14 recognized there are lots of different words  
15 that have overlapping meanings that legislatures  
16 and courts use to capture these -- these  
17 concepts of "solicitation" and "aiding and  
18 abetting."

19           The *LaFave* treatise cites about a  
20 dozen of each species. "Induce" and "encourage"  
21 are among them both. And I don't think that the  
22 fact that Congress took out "assist" and  
23 "solicit" in 1952 suggests that it intended to  
24 change the meaning of this words. It was, in  
25 fact, adopting the shorthand that this Court had

1 just five years earlier in the Hoy case given to  
2 the predecessor statute. When the other words  
3 were in there, this Court shorthanded it as  
4 "encouraging or inducing."

5 JUSTICE KAVANAUGH: You agree --

6 JUSTICE SOTOMAYOR: And --

7 JUSTICE KAVANAUGH: Go -- go ahead.

8 JUSTICE SOTOMAYOR: Go ahead. No, go  
9 ahead.

10 CHIEF JUSTICE ROBERTS: Justice --

11 JUSTICE KAVANAUGH: You agree, though,  
12 that the intent requirement that's traditionally  
13 associated with aiding and abetting and  
14 solicitation should be part of the statute,  
15 correct?

16 MR. FLETCHER: We do. And we just  
17 don't think that's rewriting. You know, if you  
18 look at 18 U.S.C. 2, the statute at issue in  
19 Rosemond, the traditional aiding-and-abetting  
20 statute, it doesn't have any explicit intent  
21 requirement. Judge Hand and then this Court  
22 found it implicit in words like "induce." And  
23 we're saying the same old soil comes with those  
24 same words where they appear here.

25 JUSTICE KAVANAUGH: And then I think

1 you probably do have a problem on the jury  
2 instructions. Do you want us to remand and let  
3 the Ninth Circuit sort that out, or what's --  
4 what's your suggestion for how to deal with  
5 that?

6 MR. FLETCHER: We do. We think that's  
7 appropriate. You know, we don't think the jury  
8 instructions are before you. What's before you  
9 is an overbreadth challenge, and part of that,  
10 of course, is figuring out what the statute  
11 means. Once you do that, we don't have any  
12 objection at all to sending it back to the Ninth  
13 Circuit.

14 JUSTICE KAGAN: Mr. Fletcher, suppose  
15 we take your view of what "encourage" and  
16 "induce" means here and we take your view of the  
17 correct mens rea requirement, and suppose we say  
18 that's the statute. And is there a world of  
19 cases where -- I mean, what happens to all the  
20 cases where it could be a lawyer, it could be a  
21 doctor, it could be a neighbor, it could be a  
22 friend, it could be a teacher, it could be  
23 anybody says to a noncitizen, I really think you  
24 should stay? What happens to that world of  
25 cases?

1           MR. FLETCHER: So I think our view is  
2 those cases get analyzed the same way that you'd  
3 analyze any other aiding-and-abetting question  
4 or solicitation question under any other  
5 statute. And I'll talk about how we think those  
6 principles cash out as applied to all of the  
7 different hypotheticals that have been bandied  
8 about.

9           But I think, at the end of the day,  
10 the most important thing for this Court's  
11 purposes is, once you go -- you take the two  
12 steps that you just described of saying that the  
13 words mean what we say they mean and that the  
14 intent requirement applies, I think you've taken  
15 care of any arguable overbreadth problem.

16           JUSTICE KAGAN: Well, maybe or maybe  
17 not. I mean, I would think that there are a  
18 world of communications that take place every  
19 day which are something along those lines, with  
20 somebody saying to a noncitizen, I know you're  
21 thinking of what you should do now, I really  
22 think you should stay.

23           MR. FLETCHER: So, just to fight the  
24 premise and then I'll talk about how we think  
25 the principles would apply in those

1 circumstances, you know, the traditional  
2 aiding-and-abetting and solicitation statutes  
3 apply to tax avoidance, to the use of marijuana,  
4 to avoiding the draft back when that was an  
5 issue. In all of those circumstances, you  
6 likewise have to draw the line. There's a lot  
7 of abstract advocacy on those things. People  
8 talk with their friends and acquaintances and  
9 family about those things.

10 JUSTICE KAGAN: So where -- where --  
11 where do we draw the line? You're -- you're not  
12 giving me much.

13 MR. FLETCHER: I -- I -- sorry. I  
14 promised I would get there, and I will.

15 I think you -- you apply the  
16 traditional principles of aiding and abetting.  
17 So one of them is specific intent that the --  
18 the -- the violation occur. We think that's  
19 going to weed out a lot of cases.

20 JUSTICE KAGAN: Yeah. I really think  
21 you should stay, somebody says to a friend.

22 MR. FLETCHER: Right.

23 JUSTICE KAGAN: I mean, that's a  
24 specific intent, I guess.

25 MR. FLETCHER: Right. Another one is

1 sort of full knowledge of the circumstances, and  
2 that in this statute includes additionally some  
3 knowledge of the law, knowledge or reckless  
4 disregard of whether or not staying is going to  
5 violate the law. We think that's going to take  
6 care of another category of cases.

7           There's also a requirement that's  
8 always been understood to be implicit in  
9 solicitation and aiding and abetting that they  
10 don't cover general advocacy, you know, a  
11 newspaper editorial, general advocacy public  
12 speeches. We're talking about specific conduct  
13 with specific people. I think that takes care  
14 of another slice of cases.

15           And then you're left with the cases  
16 that the law candidly acknowledge are the  
17 hardest hypotheticals where somebody says to a  
18 family member, I know it would be unlawful for  
19 you to stay, but I think you should stay.

20           Those are a hard problem under  
21 aiding-and-abetting statutes. There's not a lot  
22 of law on how you end up cashing out  
23 aiding-and-abetting principles there. The  
24 closest we find is in Footnote 55 of Section  
25 13.2 of the LaFave treatise which we cite in our

1 opening brief.

2           And, there, the Court has said, look,  
3 when you're talking about aid and the form takes  
4 material -- of aiding and abetting takes  
5 material aid, as you said for the Court in  
6 Rosemond, any amount of aid is enough, you've  
7 associated with a venture, you've sought to  
8 facilitate it, and that's good enough.

9           When what you're talking about is just  
10 sort of moral suasion or a request, that can  
11 sometimes be aiding and abetting. Recruiting  
12 someone to commit a murder is a classic case of  
13 aiding and abetting, but we want to demand a  
14 little bit more to make sure that you really did  
15 associate yourself with the venture, you really  
16 did seek to facilitate it with your request.

17           JUSTICE KAGAN: So do -- do I  
18 understand you to be drawing a line between a  
19 friend who says, I know exactly what the law is  
20 on this and I really think you should stay,  
21 which would be in violation of the law, that's  
22 on one side of the line, and saying that exact  
23 same thing and saying also, I'm going to provide  
24 you support when you stay? Is that -- is that  
25 the line you're drawing? And --



1           MR. FLETCHER: Not -- not precisely.  
2 I think saying, you know, I'm going to provide  
3 you support, I'm going to tell you how to do it,  
4 you know, here's how to -- to work without being  
5 on the books, I think those things start to move  
6 you much more into assistance.

7           JUSTICE KAGAN: But -- but -- but, on  
8 the first one, where there's not that, do I take  
9 you to be saying, well, this is very hard, but,  
10 in the end, we don't think that that's covered  
11 by the statute --

12           MR. FLETCHER: So I think --

13           JUSTICE KAGAN: -- or we do think that  
14 that's covered by the statute?

15           MR. FLETCHER: -- I think it's hard to  
16 say that that's covered. I've read a lot of  
17 aiding-and-abetting cases to get ready for this  
18 argument. I haven't seen one that looks like  
19 that, you know, the mother who says to the son,  
20 gee, I don't want you to go to war.

21           JUSTICE GORSUCH: Mr. Fletcher, that's  
22 because I think that in aiding and abetting, you  
23 not only need a mens rea purpose, you know, we  
24 talked about that, you conceded that, but you  
25 also have to have an actus reus of some step to

1 associate yourself with a venture. But  
2 "encourage" and "induce" or "incite," whatever  
3 it is, "encourage" and "induce," does that --  
4 does that import that actus reus requirement  
5 too?

6 MR. FLETCHER: I think it does. And  
7 I -- I -- I think the actus reus for aiding and  
8 abetting can be speech, it can be a request, you  
9 know, would you rob this bank and I'll give  
10 you -- we'll split the proceeds or, you know, I  
11 really would like you to kill this business  
12 associate of mine and I'll pay you if you do it.  
13 All of those things are speech in some sense.

14 JUSTICE GORSUCH: Well, but it's  
15 commitment to do something in the world, and --  
16 and, you know, it's obviously an inchoate  
17 offense, but it's still I'm going to take some  
18 step to associate myself with the completion of  
19 this venture.

20 MR. FLETCHER: Right.

21 JUSTICE GORSUCH: And are you saying  
22 that comes along -- that soil comes along too?

23 MR. FLETCHER: We're saying the soil  
24 of aiding and abetting comes along, Your Honor.

25 JUSTICE GORSUCH: The full soil, all

1 of it?

2 MR. FLETCHER: Yes.

3 JUSTICE JACKSON: And I'm sorry,  
4 why -- why does the full soil come along? I --  
5 I'd like to go back to Justice Sotomayor's  
6 point. If we have evidence, or we think we do,  
7 in the amendment history of the statute that  
8 Congress actually took out of the statute  
9 similar concepts, the idea of, you know, aiding,  
10 the idea -- I -- I don't have the exact language  
11 in front of me -- but soliciting.

12 MR. FLETCHER: Right.

13 JUSTICE JACKSON: Soliciting was  
14 there.

15 MR. FLETCHER: Right.

16 JUSTICE JACKSON: And Congress took it  
17 out. So I think you have -- are struggling at  
18 least in my mind a little bit to have us read  
19 what remains to include the kinds of things that  
20 Congress actually excluded.

21 MR. FLETCHER: So let me give you two  
22 answers, one that's about this area of law in  
23 general and one that's specific to the 1952  
24 amendment that you're talking about.

25 As to this area of the law in general,

1 this is a space where courts and legislatures  
2 have often used different words as synonyms for  
3 the same basic concept. In 18 U.S.C. 2, it's  
4 not just aids and abets. It's aids, abets,  
5 induces, commands. There's about seven  
6 different words. No one parses them out and  
7 asks which exactly is it. We all understand  
8 them to bring along the concept, the general  
9 category.

10 JUSTICE JACKSON: Right, but what  
11 about -- what about the fact that someone in  
12 Congress thought that they needed to take out  
13 those other words? So you might be right that  
14 there are all kinds of synonyms floating out  
15 there, and if this statute had all of them, I  
16 might be persuaded, I think, to agree with you.

17 But I guess I'm worried about an  
18 active, conscious effort on Congress's part to  
19 exclude certain words that I now hear you  
20 wanting us to read back into this statute.

21 MR. FLETCHER: So I think maybe if  
22 there was any reason to think in the legislative  
23 history in the context that Congress intended to  
24 do that, that the reason why they wanted to do  
25 that was that they wanted to not make it a

1 solicitation or aiding-and-abetting statute,  
2 which I think we all basically agree it was  
3 before, and they wanted to turn it into  
4 something else --

5 JUSTICE JACKSON: So do you have a  
6 theory of why they took out "solicits"?

7 MR. FLETCHER: Yeah, I do. I think  
8 one of them is just economy. As I said earlier,  
9 this Court just five years earlier in Hoy had  
10 described the prior statute as "induces" or  
11 "encourages." So Congress was just using a more  
12 concise formulation that mirrored what this  
13 Court had used for the prior statute.

14 And I guess the other thing I'd say  
15 is, you know, I think the -- the context I think  
16 matters here too. This is the -- the -- what  
17 Respondents and the Ninth Circuit are positing  
18 Congress did in 1952 was really something  
19 extraordinary. They took the statute that had  
20 always been focused on soliciting and -- and  
21 aiding and abetting and transformed it into a  
22 really very broad ban on speech that would be  
23 obviously unconstitutional in many of its  
24 applications.

25 And I don't think the Court should

1     lightly attribute that intent to Congress.  And  
2     I think also it's significant that after 1952 we  
3     have decades more of history.  Congress  
4     revisited the statute again in 1986 and kept the  
5     "induces" or "encourages" language but otherwise  
6     tweaked the statute and then revisited it again  
7     in 1996 and changed the penalty provisions.

8             JUSTICE JACKSON:  What about the --

9             JUSTICE BARRETT:  Mr. Fletcher --

10            JUSTICE JACKSON:  Go ahead.

11            JUSTICE BARRETT:  -- I have two  
12     questions.  One is kind of focusing on a  
13     different part of the statutory language.  Is  
14     there a difference between "resides" and  
15     "remains?"  Because they appear in different  
16     sections, and it seems to me like "resides"  
17     could mean take up residence in, which might be  
18     different than "remains."

19            MR. FLETCHER:  So I think -- I puzzled  
20     over this too.  You know, I think I'm not sure  
21     if there's any difference in them.  I think, if  
22     by "take up residence in" you're referring to  
23     the interpretation that Judge Collins floated in  
24     his dissent, where it suggested encouraging  
25     someone to reside in might mean take up

1 residence for the first time and not continue  
2 unlawful residence, the reason why I don't think  
3 that works is because of the description the  
4 statute has of the mens rea. It says knowing  
5 that the person's coming to or residing in the  
6 United States is or will be unlawful, and I  
7 think that suggests that Congress understood  
8 that you could violate the statute by  
9 encouraging someone to continue residence that  
10 is already unlawful.

11 JUSTICE SOTOMAYOR: And that's the --

12 JUSTICE BARRETT: Okay.

13 JUSTICE SOTOMAYOR: I'm sorry. Go  
14 ahead. No, no, no. I'm sorry.

15 JUSTICE BARRETT: And my second  
16 question is about the effect of the enhancement.  
17 So a jury has to find the elements of the  
18 enhancement.

19 MR. FLETCHER: Correct.

20 JUSTICE BARRETT: Okay. So, in  
21 thinking about this as an overbreadth challenge,  
22 I mean, obviously, the substance of offense  
23 itself could, standing alone, in a situation  
24 where the penalty or the enhancement wasn't  
25 applicable, let's just posit that maybe that

1 violates the First Amendment and fails in an  
2 overbreadth challenge.

3           You say there's no evidence for  
4 someone bringing an overbreadth challenge in a  
5 situation like this where you can combine it  
6 with the the enhancement that requires the  
7 financial gain, so I just want to be sure that's  
8 right.

9           MR. FLETCHER: That's right.

10          JUSTICE BARRETT: That's right?

11          MR. FLETCHER: Right. We don't  
12 have -- we haven't seen any precedent for an  
13 overbreadth challenge like that, and we don't  
14 think allowing the extension of overbreadth to  
15 that sort of challenge is consistent with the  
16 principles of overbreadth, which include that if  
17 there's a way to sever invalid parts of the  
18 statute and leave the rest, courts ought to do  
19 that.

20           And we think that's exactly what's  
21 true here. Even if you thought, as your  
22 question posits, that the general offense is  
23 potentially overbroad, I don't think that would  
24 mean that the enhanced offense is overbroad.  
25 It's a severable class of offenses.



1 JUSTICE SOTOMAYOR: Wait a minute.  
2 Here, the enhanced offense includes the first  
3 part.

4 MR. FLETCHER: That's right.

5 JUSTICE SOTOMAYOR: How can you say  
6 the first part is invalid and still keep a  
7 second part? The second part says you did  
8 the -- the second part says you did the first  
9 part for money.

10 MR. FLETCHER: Correct.

11 JUSTICE SOTOMAYOR: So you have to  
12 define what the first part permits or doesn't  
13 permit, correct? You always have to go to the  
14 first part and define it.

15 MR. FLETCHER: Correct. And what I'm  
16 positing is that even if you thought -- and we  
17 obviously disagree, but even if you thought that  
18 the general offense is unconstitutionally  
19 overbroad and therefore potentially invalid, the  
20 subset of that offense that is defined by the  
21 enhanced offense, you could invalidate other  
22 applications of the general provision, but there  
23 would be no reason to invalidate the subset of  
24 applications of the general provision that also  
25 carry this enhancement, which has to be found by

1 the jury.

2 JUSTICE SOTOMAYOR: Well, you still  
3 have to prove that what the lawyer did was  
4 aiding and abetting or solicitation, correct?

5 MR. FLETCHER: That's our view of what  
6 we would have to prove under any of the  
7 provisions we have.

8 JUSTICE ALITO: Mr. Fletcher, an  
9 unusual feature of this statute is that the  
10 underlying conduct, remaining in the  
11 United States, is not itself a crime.

12 And I can certainly understand that  
13 there are situations in which urging someone to  
14 engage in certain conduct is more blameworthy  
15 than engaging in the conduct itself because the  
16 person who engages in the conduct may be in a  
17 particularly vulnerable position or may be less  
18 blameworthy for some other purpose.

19 But is there some limitation on --  
20 that provide -- does the First Amendment in any  
21 way limit the ability of Congress to criminalize  
22 the solicitation of conduct that is not itself  
23 criminal? We could think of conduct that --  
24 regulatory violations, for example, of speech  
25 requirements, speech requirements -- regulatory

1 provisions that limit speech in some way. Would  
2 the First Amendment allow Congress to make all  
3 of -- urging somebody to engage in that conduct  
4 a crime under all circumstances?

5 MR. FLETCHER: I think there'd be a  
6 couple of principles that would come into play.  
7 I'll tell you first candidly I don't think the  
8 Court has ever spoken to that. To the extent  
9 the Court has spoken to this issue, it's done it  
10 in cases like Williams and Pittsburgh Press,  
11 where it said that offers to engage in or  
12 attempts to solicit or induce illegal  
13 transactions, even if they're only civilly  
14 prohibited, are just outside the protection of  
15 the First Amendment. And I think -- so to say  
16 anything beyond that would be new.

17 I think the things that -- principles  
18 that might come into play, you know, I can  
19 conceive of, if you had a law that targeted just  
20 speech that didn't target assistive or  
21 soliciting conduct, there might be different  
22 issues that would come into play. That's not a  
23 concern here because everyone agrees that the  
24 statute gets at encouraging and inducing,  
25 whether that happens through speech or conduct.

1           And I can imagine, although I'm not so  
2           sure so much that this is in the First Amendment  
3           that this limitation inheres, but you can posit  
4           really absurd hypotheticals about very, very  
5           draconian penalties for soliciting things that  
6           aren't criminal or are perfectly lawful. I  
7           think, if that happened, you'd have some sort of  
8           rationality limit.

9           But I just want to underscore I don't  
10          think that's what's going on here because this  
11          is, as you said, a circumstance where  
12          legislatures might decide that the people being  
13          solicited to do the underlying conduct are less  
14          blameworthy and more vulnerable, as I think this  
15          case well illustrates.

16          And, also, this is a very special  
17          circumstance. It's true that remaining in the  
18          country unlawfully is only a civil violation,  
19          absent sort of special circumstances. But it's  
20          a civil violation that's subject to a very, very  
21          serious civil penalty, deportation and removal.  
22          And I think that indicates that this really is  
23          conduct that Congress has taken seriously and  
24          has made an appropriate determination --

25                    JUSTICE KAVANAUGH: What do you --

1                   MR. FLETCHER: -- that soliciting or  
2                   facilitating it is deserving of punishment.

3                   JUSTICE KAVANAUGH: What -- what --

4                   JUSTICE SOTOMAYOR: It's -- I'm sorry.  
5                   Go ahead.

6                   JUSTICE KAVANAUGH: What do you say to  
7                   the charitable organizations that say, even  
8                   under your narrowing construction, there's still  
9                   going to be a chill or a threat of prosecution  
10                  for them for providing food and shelter and aid  
11                  and recommending people for scholarships and --  
12                  and all the rest? You're familiar with all the  
13                  hypotheticals. But they seem to have a sincere  
14                  concern about that and that it will deter their  
15                  kind of everyday activities. That's what a lot  
16                  of charities do as part of their day-to-day  
17                  activities with noncitizens who are not in the  
18                  in the country lawfully.

19                  MR. FLETCHER: I think a couple  
20                  observations. One is a lot of what they talk  
21                  about and you just recited isn't speech at all.  
22                  It's definitely conduct. So it doesn't raise  
23                  First Amendment questions at all.

24                  You know, I understand the concern,  
25                  though, that goes to both about are these

1 activities being chilled, and I'd say that on  
2 our view of the statute, you know, the vast --  
3 that activity is not going to be covered because  
4 we think it has to meet the sort of very high  
5 bar of aiding and abetting liability as  
6 traditionally understood with all of the old  
7 soil. And it's --

8 JUSTICE KAVANAUGH: And explain that.  
9 Why wouldn't it be covered?

10 MR. FLETCHER: Yeah, because I think  
11 there are -- there are a bunch of different  
12 examples, and I think there are sort of  
13 different requirements that would weed out  
14 different versions of them. I think the one  
15 that's most relevant to --

16 JUSTICE KAVANAUGH: Well, I gave you  
17 the food and shelter one. You know, I want to  
18 --

19 MR. FLETCHER: Yeah.

20 JUSTICE KAVANAUGH: -- I want you to  
21 stay here and I'm going to help you, and  
22 here's -- which I think is a pretty common part  
23 of the conversations and -- and happens all the  
24 time. So is that enough?

25 MR. FLETCHER: I don't think so. You

1 know, I think there's a difference between  
2 assuming, taking for granted that people are  
3 going to be in the country unlawfully and  
4 providing some assistance to them while they are  
5 here and taking steps that -- where you  
6 associate yourself with the venture and seek by  
7 your action to make it succeed. That's the  
8 canonical formulation of aiding and abetting  
9 liability.

10 And I just think it's hard to say that  
11 a charity that provides assistance to people,  
12 including people who are in the country  
13 unlawfully, is meeting the requisites of aiding  
14 and abetting liability.

15 JUSTICE JACKSON: But I don't know why  
16 you say that. I mean, if the venture is -- if  
17 the civil violation or the criminal violation is  
18 to have the person stay here and remaining here  
19 is unlawful, why wouldn't giving them food and  
20 shelter that facilitates their ability to stay  
21 here violate the statute?

22 MR. FLETCHER: Because, Justice  
23 Jackson, I don't think -- a couple of different  
24 reasons. You know, one is I don't think it's  
25 going to have the requisite intent at least in

1 the vast majority of the cases. I think all of  
2 these organizations are describing themselves as  
3 wanting to provide food and shelter for people  
4 who need -- who are in need, who need food and  
5 shelter.

6 JUSTICE JACKSON: What if they -- what  
7 if they limited their mission? If they limit --

8 MR. FLETCHER: To just people who are  
9 here unlawfully?

10 JUSTICE JACKSON: Yes. Yes.

11 MR. FLETCHER: Yes.

12 JUSTICE JACKSON: We are limiting our  
13 mission. We see a bunch of people in our  
14 community who are here -- we know they're here  
15 unlawfully, but they're also starving, and what  
16 we've decided to do is make sure that they're  
17 not on the streets, they're not exposed to the  
18 elements. We're giving them food and shelter.

19 MR. FLETCHER: Yeah. I think I'd give  
20 the same -- a version of the same answer but  
21 just to say that even then, I don't think that's  
22 acting with the purpose of keeping those people  
23 in the country when they would otherwise leave.

24 CHIEF JUSTICE ROBERTS: Are there any  
25 --



1                   MR. FLETCHER: I think it would be  
2 accepting --

3                   CHIEF JUSTICE ROBERTS: -- any  
4 examples of prosecutions in those cases?

5                   MR. FLETCHER: No, absolutely not, Mr.  
6 Chief Justice. And, you know, likewise, you  
7 could imagine, I think, as I -- one of the  
8 things I said earlier is that we would take  
9 cases under this statute the same way you take  
10 cases under other aiding-and-abetting statutes.  
11 You know, you can imagine there are a lot of  
12 social services organizations that provide  
13 services and counseling to people who are  
14 engaged in unlawful activity, and I'm not aware  
15 of cases that suggest that the provision of  
16 those services to someone who happens to be  
17 engaged in unlawful activity aids and abets  
18 those activities.

19                   JUSTICE SOTOMAYOR: Well, we do know  
20 that the Customs Department made a list of all  
21 of the people, religious entities, the lawyers,  
22 and others who were providing services to  
23 immigrants at the border and was saying that  
24 they intended to rely on this statute to  
25 prosecute them. You're saying to me it didn't

1     happen. Congress issued a subpoena to many of  
2     these organizations, did a lot of investigation  
3     as to what was said.

4                 So how do we tell all those people not  
5     to chill speech because the only thing being  
6     punished under this statute, unless you want me  
7     to add that it has to say that the statute  
8     requires something more than just words, we're  
9     criminalizing words related to immigration.

10                And I thought there were only certain  
11     statutes that were immune to First Amendment  
12     challenges, obscenity, fighting words.  
13     Otherwise, everything else is subject to the  
14     First Amendment and strict scrutiny. So why  
15     should we uphold a statute that criminalizes  
16     words, makes the punishment five years, which is  
17     rather significant? I know of no other statute  
18     where aiding-and-abetting punishment or  
19     solicitation punishment is greater than the  
20     punishment we're giving the person who's going  
21     to commit the crime. But that's what we're  
22     doing with this statute. It's a first of a  
23     kind.

24                MR. FLETCHER: A couple thoughts,  
25     Justice Sotomayor. I think one of the

1 traditional categories of speech that is outside  
2 the First Amendment is speech that -- this is  
3 straight from Williams -- is speech that seeks  
4 to induce or commence illegal activities.

5 Our view is that that's --

6 JUSTICE SOTOMAYOR: If something -- if  
7 something is going to be illegal, but people  
8 enter the United States illegally all of the  
9 time and they're here, they're remaining, but  
10 you would have to prove that they're remaining  
11 because of those words? Are you -- are you  
12 willing to take that part of the element?  
13 Because that would make sense to me.

14 MR. FLETCHER: We're willing to take  
15 all of the soil that comes with the idea of --

16 JUSTICE SOTOMAYOR: So do you believe  
17 --

18 MR. FLETCHER: -- aiding and abetting  
19 and solicitation.

20 JUSTICE SOTOMAYOR: -- that the soil  
21 includes that the government has to prove that  
22 the words actually is what caused that person to  
23 remain?

24 MR. FLETCHER: No, I don't think  
25 that's a requirement of traditional aiding and

1 abetting.

2 JUSTICE SOTOMAYOR: So why not?  
3 Because that's what I think words that have to  
4 do with inducing a crime is, that you want the  
5 crime to succeed and that you have to make  
6 yourself a part of the principle of succeeding  
7 in that crime.

8 MR. FLETCHER: So, if that's what you  
9 think aiding and abetting connotes, then  
10 we're -- that's actually a further reason not to  
11 hold this statute invalid as overbroad. It  
12 means the statute has an even narrower reach.

13 JUSTICE SOTOMAYOR: Well, no, no, you  
14 tell me because I think we're going to talk to  
15 the grandmother who lives with her family who's  
16 illegal or who are noncitizens. The grandmother  
17 tells her son she's worried about the burden  
18 she's putting on the family, and the son says,  
19 Abuelita, you are never a burden to us. If you  
20 want to live here -- continue living here with  
21 us, your grandchildren love having you.

22 Are you -- can you prosecute this?  
23 And, if not, why not? So what do you tell the  
24 grandmother?

25 MR. FLETCHER: I think not, Justice

1 Sotomayor. I think it's very hard to make out

2 --

3 JUSTICE SOTOMAYOR: Don't -- stop  
4 qualifying with "think," because the minute you  
5 start qualifying with "think," then you're  
6 rendering asunder the First Amendment.

7 MR. FLETCHER: Justice Sotomayor --

8 JUSTICE SOTOMAYOR: People have to  
9 know what they can talk about.

10 MR. FLETCHER: Justice Sotomayor --

11 JUSTICE SOTOMAYOR: Once you create a  
12 lack of clarity in the law, then we're not  
13 writing to clarify it.

14 MR. FLETCHER: Justice Sotomayor, I  
15 don't think it's possible for me or for this  
16 Court to define how these principles will apply  
17 in all of the different factual circumstances  
18 that we can imagine, and I think the fact that  
19 we're trying to engage in that exercise is one  
20 of the problems with overbreadth analysis.

21 What we would do is have this Court  
22 say, not the government say but this Court say,  
23 and write into law --

24 JUSTICE SOTOMAYOR: No --

25 MR. FLETCHER: -- the idea --

1 JUSTICE SOTOMAYOR: -- you could  
2 ask -- you could ask to criminalize actions, not  
3 words. You've chosen to read a statute that  
4 criminalizes words. Shouldn't we be careful  
5 before we uphold that kind of statute?

6 MR. FLETCHER: We're asking you to go  
7 only so far as every aiding-and-abetting and  
8 solicitation statute goes. And to criminalize  
9 words --

10 JUSTICE SOTOMAYOR: Well, generally  
11 with aiding and abetting, the person has to do  
12 something to make that act come about?

13 MR. FLETCHER: I think generally yes.  
14 I think there are some circumstances where  
15 soliciting someone to commit a crime with words  
16 would count, and I'm not willing to give that up  
17 here because our position is the same aiding and  
18 abetting principles ought to apply in both  
19 contexts.

20 But if you have a narrower conception  
21 of aiding and abetting that is all the more  
22 reason to conclude that this is a narrow statute  
23 that doesn't trench on the First Amendment.

24 CHIEF JUSTICE ROBERTS: Justice --

25 JUSTICE SOTOMAYOR: Can I ask -- I'm

1       sorry.  Go ahead.

2                   CHIEF JUSTICE ROBERTS:  Go ahead.

3                   JUSTICE SOTOMAYOR:  There was an  
4       intent requirement asked for here.  You say it  
5       was broader than you think it should have been  
6       given, but we've had a number of cases this  
7       term, Ciminelli, Percoco, Dubin, now this case,  
8       where the government is conceding that the  
9       statute read by its plain terms is too broad.  
10      And you come back to us and say read it more  
11      narrowly, but you won at a jury trial on a  
12      broader charge.

13                   If we keep doing, as you ask us to,  
14      which is to rewriting statutes, are we  
15      encouraging the government to continue this  
16      practice?

17                   MR. FLETCHER:  I don't think so,  
18      Justice Sotomayor.  And, again, we're not asking  
19      you to rewrite the statute.  We're asking you to  
20      give these words the same meaning they have --

21                   JUSTICE SOTOMAYOR:  Well, you said the  
22      jury instruction wasn't consistent with this.

23                   MR. FLETCHER:  So that -- that's  
24      right, Justice Sotomayor.  This, in fairness --

25                   JUSTICE SOTOMAYOR:  And in those other

1 four cases it wasn't consistent with this. We  
2 keep -- you keep coming here and admitting that  
3 statutes have to be read in a different way when  
4 you argue the opposite below.

5 MR. FLETCHER: So let me put this case  
6 in context, Justice Sotomayor. This case was  
7 tried before Sineneng-Smith came up, before the  
8 Ninth Circuit called for supplemental briefing  
9 on overbreadth, and it really injected this  
10 whole constellation of issues and concerns about  
11 a broad reading of the statute that didn't  
12 really exist before.

13 And at the time I think it was  
14 reasonable for the government to support the  
15 model jury instruction, especially because no  
16 one seriously argues that the speech at issue,  
17 the conduct really at issue here was protected  
18 by the First Amendment.

19 So I acknowledge we didn't write the  
20 instructions at the time of the trial the way  
21 that we would write them now with the benefit of  
22 five or six years of experience and a lot more  
23 airing out of the arguments --

24 JUSTICE SOTOMAYOR: Well --

25 MR. FLETCHER: -- and I acknowledge



1 you should send the case back to the Ninth  
2 Circuit and let the Ninth Circuit decide what's  
3 appropriate in light of that.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Thomas, anything further?

6 Justice Alito? Anything further?

7 Justice Kagan?

8 JUSTICE KAGAN: So, Mr. Fletcher, so,  
9 again, I want to assume your version of the  
10 statute as to encourage and as to the mens rea.  
11 Now I want to make two further assumptions,  
12 okay. We can come back to those assumptions,  
13 but I just want you to assume them.

14 The first is that the statute, even as  
15 interpreted by you would, in fact, encompass the  
16 wealth of examples of people of various kinds,  
17 friends, neighbors, doctors, whatever, saying to  
18 people, I really think you should stay, and  
19 saying that knowing that they are in the country  
20 unlawfully, having all the intent that --

21 So my first assumption is that all of  
22 those communications are within the statute. My  
23 second assumption is that for one or another  
24 reason, maybe it's what Justice Alito said about  
25 the fact that this is civil conduct, maybe it's

1 for another reason, my second assumption is that  
2 this statute as applied to those people would be  
3 unconstitutional.

4 And now I want you to tell me how to  
5 do the overbreadth analysis on this, because I  
6 think I might say to you, I can imagine that  
7 there's like a whole -- a huge number of such  
8 communications taking place every day, because  
9 for every person who's in this country  
10 unlawfully, there are probably some number of  
11 people who want that person to stay, family  
12 members, you know, whatever.

13 So how do we think about the  
14 overbreadth on those two assumptions?

15 MR. FLETCHER: So taking those  
16 assumptions, you know, the Court has never said  
17 explicitly you can't reduce overbreadth to math,  
18 it has to be substantial and it has to be  
19 substantial both absolutely and in relation to  
20 the statute's plainly legitimate sweep.

21 I take it based on those assumptions  
22 that you would say that's substantial. That's a  
23 substantial number of --

24 JUSTICE KAGAN: Well, I'm asking you  
25 sort of.

1 MR. FLETHCER: No, no --

2 JUSTICE KAGAN: How do we even go  
3 about thinking about that question?

4 MR. FLETCHER: So I guess I'd say  
5 maybe that's substantial in the absolute sense.  
6 I guess I would say, though, that the Court has  
7 also emphasized the real costs of overbreadth in  
8 terms of invalidating permissible applications  
9 of the statute, and that that's something that  
10 has to be borne in line in the relative  
11 analysis.

12 And at least -- I can't purport to  
13 have read every one of the Court's overbreadth  
14 cases, but in the vast majority of them the  
15 Court says over -- you know, the vast majority  
16 of the applications of the statute are  
17 unconstitutional or there's just no core of  
18 constitutional applications.

19 I don't think either of those things  
20 -- even granting you're assumptions, I don't  
21 think either of those would be true here. And  
22 the other thing that the Court has said is it  
23 can't just be theoretical. We want some  
24 realistic demonstration of chill.

25 Because this is ultimately --

1 overbreadth is sort of a prudential, judicial  
2 decision that we're concerned about chilling in  
3 the real world, understandably, and so we're  
4 going to depart from traditional principles by  
5 letting people whose conduct isn't protected  
6 assert the rights of others, in essence, and  
7 there may be reason to do that, but we should do  
8 it very carefully.

9           And I guess, I think, you have almost  
10 a textbook case here for whether we know there  
11 is not a chill because this statute was on the  
12 books in basically the same form for 70 years  
13 and it was only used --

14           JUSTICE KAGAN: And how is that  
15 argument -- because it's a strong argument --  
16 how is it different -- sometimes the government  
17 comes in and says, essentially, don't worry,  
18 we're never going to apply the statute in these  
19 circumstances.

20           And we always say back, it's like,  
21 well, that's very nice, you can stand up there  
22 and say it, but we're not taking your word from  
23 it.

24           How is this different from that?

25           MR. FLETCHER: So in a couple of ways.

1 I mean, one is that to the extent that we're  
2 saying that here, mostly what we're saying, and  
3 I guess this is maybe fighting your premise a  
4 little bit, but we're not just saying take our  
5 word for it. We're asking you to write into the  
6 -- your decision that the statute has the limits  
7 that we say it has in ways that we won't be able  
8 to get around in the future.

9 I understand you might think we're  
10 pushing it here, that that doesn't fully solve  
11 the problem and what to do --

12 JUSTICE KAGAN: Right.

13 MR. FLETCHER: -- about it then. And  
14 then I guess I would say then we're in this  
15 special world of overbreadth, right, which is a  
16 departure from usual standards. You're not just  
17 interpreting the statute. You're not just  
18 asking is it constitutional as applied in a  
19 particular case where you sometimes say we're  
20 not willing to take the government's word for  
21 it.

22 You're saying are we going to do this  
23 extraordinary thing and depart from ordinary  
24 principles of adjudication. And there I  
25 actually do think it's fair to say, yeah, we're

1 going to demand a real showing of chill, and I  
2 think here this is not some newly-passed statute  
3 where we're all just sort of guessing about what  
4 might happen. We have a lot of history.

5           And the thing that raised concerns,  
6 the thing that got the amici to write the briefs  
7 and to raise all the hypotheticals that we have  
8 spent all this time debating, was the Ninth  
9 Circuit's invitation to imagine broad  
10 interpretations of the statute in order to  
11 strike it down. There really wasn't a concern  
12 about it during all of the many decades it was  
13 on the books before that.

14           JUSTICE KAGAN: Thank you.

15           CHIEF JUSTICE ROBERTS: Justice  
16 Gorsuch?

17           Justice Kavanaugh?

18           JUSTICE KAVANAUGH: You've reassured  
19 us with your narrowing construction, just take  
20 aiding and abetting law, solicitation law and  
21 bring that old soil here. And that is a good  
22 answer, but I think it still raises questions,  
23 because the underlying offense is so different  
24 from bank robbery or carjacking or securities  
25 fraud.

1                   It's just existing here as the  
2 underlying offense. And I don't know if that  
3 should affect how we think about it. I just  
4 wanted to get your response to that, because  
5 that makes it seem a lot broader. You wouldn't  
6 say providing food to the bank robber  
7 necessarily is, you know, a meal, is -- is  
8 aiding and assisting the -- aiding and abetting  
9 the bank robbery, but if the underlying offense  
10 is just being here, that -- that seems a little  
11 different.

12                   Should that affect how we think about  
13 it or how do you just answer that concern?

14                   MR. FLETCHER: Yeah, so it's a fair  
15 concern. I'd say a couple things. You know,  
16 one is there are other offenses that may not get  
17 the just being here concept, but there are  
18 aiding and abetting concerns about other  
19 relatively minor offenses, you know, the tax  
20 things, the sort of draft evasion, drug use,  
21 things like that.

22                   The law is capable of dealing with  
23 this, you know, aiding and abetting minor  
24 offenses that happen a fair amount. So I think  
25 that helps with one set of concerns.

1                   The -- the being here concern, I guess  
2                   I do think you could take into account the  
3                   nature of the offense in deciding sort of are  
4                   the requisites of aiding and abetting liability  
5                   met? One part of that answer might be what I  
6                   said to Justice Jackson, that having the intent  
7                   to help someone, assuming they are going to be  
8                   here, isn't necessarily the intent that they  
9                   remain here.

10                   Another thing might be, you know, the  
11                   -- the aiding and abetting doctrine demands that  
12                   you associate yourself with a venture and seek  
13                   by your action to make it succeed. And I  
14                   suppose you could take account of what the  
15                   venture here is in deciding sort of what level  
16                   of words or action are necessary to constitute  
17                   facilitation in that context.

18                   So I guess I do think that traditional  
19                   aiding and abetting principles would allow those  
20                   sorts of things to be taken into account.

21                   JUSTICE KAVANAUGH: Thank you.

22                   CHIEF JUSTICE ROBERTS: Justice  
23                   Barrett?

24                   JUSTICE BARRETT: Mr. Fletcher, so  
25                   you've pointed out, and I agree with you that



1 it's interesting, kind of odd, it strikes me as  
2 unusual, but I haven't done a study to see, to  
3 have an overbreadth challenge to a statute  
4 that's older, because all of these overbreadth  
5 challenges invite a string of hypotheticals,  
6 but, as you say, we have a track record.

7           Can you think, have you looked at it?  
8 Are there overbreadth challenges that have  
9 succeeded in the past where we have this much  
10 data?

11           MR. FLETCHER: So I don't know,  
12 candidly. I can't -- I'm not aware of one of  
13 the Court's recent cases where this has come up,  
14 Stevens, Alvarez, those sorts of cases are  
15 relatively newer laws.

16           But the reason I don't want to say  
17 definitively that there isn't one is that I  
18 think some of the earlier laws involved state  
19 statutes. And I just haven't traced back  
20 exactly how old they are. But I'm -- I'm  
21 certainly not aware of anything where you have  
22 sort of the track record going the other way.

23           Not only is it old but also we have  
24 such a strong empirical track record against the  
25 very broad interpretation. And, you know, I

1 think that's relevant not just to overbreadth,  
2 but also to what the statute means because  
3 Congress has been coming back and amending the  
4 statute and revisiting it against the backdrop  
5 of that narrow application of the statute.

6 JUSTICE BARRETT: Well, and speaking  
7 of state statutes, so we have some amicus briefs  
8 saying that lots of states have language like  
9 this. It's possible that lots of statutes would  
10 then succumb to First Amendment challenges of  
11 this sort.

12 Have there been similar  
13 overbreadth-type concerns litigated, especially  
14 since Sineneng-Smith, about other solicitation  
15 statutes or other induce-and-encourage statutes?

16 MR. FLETCHER: It comes up  
17 occasionally. They don't get a lot of traction.  
18 You know, one example that we cite in our brief  
19 is the Ford versus State case out of Nevada,  
20 which is about solicitation of prostitution.

21 JUSTICE BARRETT: Prostitution.

22 MR. FLETCHER: A Very similar statute.  
23 You know, it's induce, encourage, or persuade,  
24 coerce to -- to --

25 JUSTICE BARRETT: Yeah.

1           MR. FLETCHER: -- enter into  
2 prosecution, and the defendant tried an  
3 overbreadth challenge there. I think we also  
4 cite a Minnesota case. So there are examples  
5 out there, but, frankly, courts have not had  
6 much difficulty dismissing them, either because  
7 you can't imagine circumstances where the aiding  
8 and abetting or solicitation would actually be  
9 protected, or because, even if you could, that's  
10 such a sort of edge case that it doesn't call  
11 for the application of overbreadth.

12           JUSTICE BARRETT: Thank you.

13           CHIEF JUSTICE ROBERTS: Justice  
14 Jackson?

15           JUSTICE JACKSON: So I guess I'm  
16 trying to figure out, looking at all the other  
17 provisions in this statute, what -- what is the  
18 core constitutional application of this? I  
19 mean, you sort of responded to Justice Kagan's  
20 question in saying that if we can identify that  
21 and we understand that it's there, that would be  
22 a reason not to strike it down.

23           But I am struggling, especially, for  
24 example, with the part of 1324 here that is, you  
25 know, small division (v)(II) that itself has an

1 aiding-or-abetting piece to it. So it sounds  
2 like Congress was covering aiding and abetting  
3 to some extent in another part of this same  
4 statute. So, if we read this one to be aiding  
5 and abetting too, what are we really -- what is  
6 it really covering?

7 MR. FLETCHER: It's a different kind  
8 of aiding and abetting. So the Romanette (v) --

9 JUSTICE JACKSON: Yes.

10 MR. FLETCHER: -- aiding and abetting  
11 is aiding and abetting violations of the  
12 preceding clauses of 1324(a)(1)(A). So aiding  
13 and abetting, bringing someone to the border in  
14 violation of clause (i) or harboring or  
15 transporting someone within the country in  
16 violation of clauses (ii) or (iii), that sort of  
17 aiding and abetting is covered by (v).

18 JUSTICE JACKSON: All right. And what  
19 -- what is the aiding and abetting in (iv) that  
20 could be aided and abetted per (v)?

21 MR. FLETCHER: So the aiding and  
22 abetting that is covered in (iv) is assisting  
23 someone to enter or remain in the country  
24 unlawfully. That's the core constitutional  
25 application of (iv). That's what it does. And

1 if you -- the way you would violate (v) is if  
2 you aided and abetted someone who was soliciting  
3 or facilitating people to enter into the country  
4 unlawfully --

5 JUSTICE JACKSON: I see. So you're --  
6 you're helping the person who's doing it --

7 MR. FLETCHER: Mr. Hansen's helpers --

8 JUSTICE JACKSON: -- in (v). Okay.

9 MR. FLETCHER: -- for instance. Yeah.

10 JUSTICE JACKSON: All right. So, in  
11 the (iv), you say it's aiding and abetting or  
12 soliciting is the -- is the constitutional  
13 application of (iv), and we're to look at aiding  
14 and abetting and the old soil that comes with  
15 it. And Justice Kavanaugh raises an interesting  
16 point, which is, wouldn't providing provisions  
17 to a bank robber who you knew to have committed  
18 this crime and is here, wouldn't that be  
19 considered aiding and abetting? And, if so, why  
20 isn't the nonprofits who are providing these  
21 kinds of provisions to people who are remaining  
22 in this case -- in the United States in  
23 violation of the law also a violation of this?

24 MR. FLETCHER: So, yes, providing  
25 tools, you know, a gun, a mask to a bank robber

1 knowing that he's going to use them to rob the  
2 bank and intending that he use them to rob the  
3 bank, that's aiding and abetting the bank  
4 robbery.

5 I think the reason why I don't think  
6 the provision of food or something like that to  
7 a noncitizen who happens to be here unlawfully  
8 qualifies as aiding and abetting --

9 JUSTICE JACKSON: What about aiding  
10 and abetting after the fact? He bank -- he's  
11 robbed the bank already and he comes and he  
12 knocks on the door and you know he's a bank  
13 robber and you let him in, you let him stay.  
14 And maybe that's harboring, I don't know, but --

15 MR. FLETCHER: That -- that's not  
16 aiding and abetting at all.

17 JUSTICE JACKSON: I see.

18 MR. FLETCHER: That's accessory after  
19 the fact at best.

20 JUSTICE JACKSON: Okay.

21 MR. FLETCHER: And 18 U.S.C. 2 covers  
22 only accessory before the fact and aid during  
23 the crime but not aid after the crime.

24 JUSTICE JACKSON: Not aid after. All  
25 right. One more.

1           The point that Justice Alito brought  
2 up with the civil violation, are you asking us  
3 to decide that here, or could the Ninth Circuit  
4 be tasked with looking into that when we return  
5 the case, if we return the case?

6           MR. FLETCHER: I guess I have  
7 understood Respondent, Mr. Hansen, to be  
8 making -- relying on the civil/criminal  
9 distinction in service of his overbreadth  
10 argument and to suggest that to the extent that  
11 section -- clause (iv) would reach aiding and  
12 abetting or soliciting conduct that is only a  
13 civil violation, that's a First Amendment  
14 problem and that that is part of his overbreadth  
15 argument.

16           JUSTICE JACKSON: But the Ninth  
17 Circuit didn't rule on that, right? The Ninth  
18 Circuit didn't reach the question of how civil  
19 liability interacts with any of this.

20           MR. FLETCHER: That's correct because  
21 the Ninth Circuit held it overbroad, you know,  
22 on a much broader theory. So I suppose you  
23 could -- if you didn't want to reach that  
24 question, you know, you could decline to do it,  
25 say that the Ninth Circuit's reasoning was

1 wrong, that there may be alternative arguments  
2 for overbreadth, and send it back for that  
3 purpose. I guess I view this more as a sub-  
4 issue of the overbreadth argument on which the  
5 Court granted cert and not as the sort of really  
6 distinct issue that the Court usually remands  
7 for consideration of.

8 JUSTICE JACKSON: Well, we would have  
9 to sort of sort it out. Isn't it complicated to  
10 sort of determine the extent to which the speech  
11 incident to criminal conduct scenario, which is  
12 what I understand you to be relying on, reaches  
13 civil conduct as well?

14 MR. FLETCHER: I don't think so. I  
15 think the Court crossed that bridge in *Gazzam*  
16 the year after *Giboney*, which we cite in our  
17 reply brief. It did it again in *Pittsburgh*  
18 *Paper*. And then, in *Williams*, it described,  
19 relying on *Pittsburgh Paper*, a civil case, the  
20 unprotected category of speech that seeks to  
21 induce or commence illegal transactions. So we  
22 think you've crossed that bridge already.

23 Now I'm sensitive to the idea that  
24 these are hard questions of aiding-and-abetting  
25 law and First Amendment law, and this is an



1       awkward posture to try to nail all of them down  
2       in. And so I do want to emphasize that all we  
3       think you have to decide today is that the  
4       statute is not overbroad. And if you want to  
5       reserve questions that might arise in an  
6       as-applied posture, I think it's perfectly fine  
7       to do that.

8                   CHIEF JUSTICE ROBERTS: Thank you,  
9       counsel.

10                   Ms. Bhandari.

11                               ORAL ARGUMENT OF ESHA BHANDARI  
12                               ON BEHALF OF THE RESPONDENT

13                   MS. BHANDARI: Mr. Chief Justice, and  
14       may it please the Court:

15                   Mr. Hansen should prevail here for  
16       three reasons. The government concedes that the  
17       statute is unconstitutional under its plain  
18       meaning. Instead, it asks this Court to rewrite  
19       the statute to prohibit only solicitation and  
20       aiding and abetting.

21                   But that is Congress's job, and  
22       Congress in 1952 took out the very words the  
23       government now asks this Court to write in:  
24       "solicit" and "assist." And in 1986, Congress  
25       took out the required intent. The government

1 has cited no case in which Congress has used the  
2 terms "encourage" and "induce" alone to stand  
3 for solicitation or aiding and abetting.

4           Second, even if you construe the  
5 statute as limited to solicitation or aiding and  
6 abetting, this Court should not create a new  
7 category of unprotected speech, namely, criminal  
8 solicitation of civil law violations. The  
9 historical roots of that exception are limited  
10 to solicitation of crimes and for good reason.  
11 If the justification for treating speech as  
12 categorically unprotected is that it is integral  
13 to conduct that the government can punish, then  
14 the speech cannot be punished more harshly than  
15 that conduct.

16           This Court has consistently resisted  
17 prior invitations to expand categories of  
18 unprotected speech and should do the same here.  
19 Otherwise, Congress and the states will be free,  
20 without any First Amendment scrutiny, to  
21 criminalize speech soliciting violations of the  
22 vast range of administrative and regulatory laws  
23 that govern us today, from mask and vaccine  
24 mandates to parking ordinances.

25           To deny the government's requested

1 expansion would only mean that it would have to  
2 satisfy ordinary First Amendment scrutiny when  
3 it regulates such speech.

4 And, finally, even if the Court were  
5 to adopt the government's narrowing  
6 construction, Mr. Hansen's convictions must be  
7 vacated because the jury was not instructed to  
8 apply the government's narrowing construction,  
9 and the government argued that the plain meaning  
10 of the statute should control.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Is speech the only  
13 component of the First Amendment subject to  
14 overbreadth?

15 MS. BHANDARI: Justice Thomas, I -- I  
16 think that speech is the realm in which this  
17 Court has applied overbreadth analysis.

18 JUSTICE THOMAS: Has it ever applied  
19 it in any other aspect of the First Amendment?

20 MS. BHANDARI: I'm not aware of any  
21 context in which it has applied overbreadth to  
22 other aspects of the First Amendment, no,  
23 Justice Thomas.

24 CHIEF JUSTICE ROBERTS: Counsel, you  
25 focused on the amendment, what was it, '52 or

1 '56?

2 MS. BHANDARI: 1952.

3 CHIEF JUSTICE ROBERTS: '52.

4 Suggesting there was a purpose to take out the  
5 two provisions that were -- the two words that  
6 were taken out and the two left in.

7 What -- what was that purpose? What  
8 is -- in other words, what is the distinction  
9 you see between the words that were left in and  
10 the words that were taken out?

11 MS. BHANDARI: I think we can go by  
12 what Congress actually did. Congress removed  
13 the narrower verbs, "solicit" and "assist," and  
14 left in the broader verbs, "encourage" and  
15 "induce." That was a deliberate choice. If  
16 Congress wanted to write a solicitation law, it  
17 could have left in the verb "solicit."

18 And I note that in 1984, which was two  
19 years prior to the 1986 amendment to the  
20 statute, Congress drafted 18 U.S.C. 373, which  
21 is the general prohibition on soliciting a crime  
22 of violence, and Congress took a very different  
23 approach in writing that solicitation statute.  
24 It required specific intent to solicit a  
25 particular felony, and it required circumstances

1 strongly corroborative of that intent.

2           And the Senate committee report noted  
3 that mere encouragement is not enough and that  
4 the specific intent requirement was especially  
5 important not to trench on First Amendment  
6 concerns.

7           CHIEF JUSTICE ROBERTS: So we would  
8 have to see a distinction along the lines you  
9 suggest between "solicit" and "assist" and  
10 "encourage" and "induce" to the extent that the  
11 -- the former are broader or narrower?

12           MS. BHANDARI: Encourage and induce  
13 are narrower -- are broader terms. Solicit and  
14 assist are the narrower terms.

15           And I also think that you can look at  
16 the pattern of amendment to see that Congress  
17 over time has broadened the statute from its  
18 initial roots.

19           Initially it was tied to prohibiting  
20 the entry of -- of -- assisting the entry of  
21 contract laborers. Then Congress took away the  
22 limitation on contract labor. It was assisting  
23 anyone's entry. But still in 1952 it used the  
24 verb solicit and assist and it required the  
25 willful or knowingly standard.

1                   Then Congress removed the mens rea  
2 requirement and required only knowledge or  
3 reckless disregard, again, an expansion. And  
4 Congress removed the verb solicit and assist to  
5 leave only the broader terms encourage and  
6 induce, and expanded to remaining in the country  
7 unlawfully in 1986. That was its final  
8 expansion.

9                   So over time, Congress has  
10 consistently shown its intent as evidenced by  
11 the plain text to cover much more than  
12 solicitation or aiding and abetting.

13                   JUSTICE BARRETT: Counsel let's assume  
14 --

15                   JUSTICE ALITO: May I -- go ahead.

16                   JUSTICE BARRETT: I just want to  
17 follow up on mine quickly, and let's just assume  
18 that you're wrong about Congress's intent.  
19 Would you concede that if we accept the  
20 government's narrowing construction, let's  
21 assume the underlying offense is criminal, not  
22 civil, would you concede that you would lose --  
23 your overbreadth challenge if the government is  
24 right about the narrower solicitation?

25                   MS. BHANDARI: If you are limiting it

1 just to crimes and only to solicitation and  
2 aiding and abetting with the requisite intent,  
3 then, yes, but I don't understand the government  
4 to be limiting its argument only to crimes. And  
5 --

6 JUSTICE ALITO: Well what -- go ahead.

7 JUSTICE BARRETT: No, my hypothetical  
8 changed that.

9 MS. BHANDARI: Yes, yes.

10 JUSTICE ALITO: Well, that's what I  
11 wanted to ask you about. I understood your  
12 second point to be that the First Amendment  
13 prohibits the criminalization of the  
14 solicitation of conduct that is unlawful but not  
15 criminal.

16 Is that your second point?

17 MS. BHANDARI: That is correct.

18 JUSTICE ALITO: And -- and that you  
19 think that's true across the board in all  
20 circumstances?

21 MS. BHANDARI: Yes, Justice Alito,  
22 because we're talking about whether speech is  
23 categorically beyond the protection of the First  
24 Amendment.

25 So anytime you have a law-targeting

1 speech, which would cover a solicitation law,  
2 the first step is, of course, it's a law  
3 targeting speech, you, you know, trigger First  
4 Amendment scrutiny.

5 Now, if the law fits within a narrow  
6 category of historical exception, like obscenity  
7 and so forth, then it doesn't have to  
8 satisfy scrutiny.

9 JUSTICE ALITO: Yeah, okay. So  
10 solicitation -- soliciting someone to engage in  
11 prostitution, that's unconstitutional,  
12 criminalizing the solicitation of someone to  
13 engage in prostitution, that's -- that's  
14 unconstitutional.

15 MS. BHANDARI: No, Justice Alito.  
16 That can be regulated as a transaction. And  
17 this Court in Williams made clear that you  
18 can -- you can render certain transactions  
19 illegal. So speech that effectuates those  
20 transactions, for example, if I say to you I  
21 want to buy drugs, that is proposing an illegal  
22 transaction. That speech can be regulated. And  
23 that was the case with Williams where it was  
24 speech about a transaction involving child  
25 pornography.



1 JUSTICE ALITO: All right. Not  
2 soliciting a prostitute but encouraging someone  
3 to engage in prostitution, that cannot be  
4 criminalized?

5 MS. BHANDARI: If prostitution is not  
6 a crime --

7 JUSTICE ALITO: Yes.

8 MS. BHANDARI: -- then such speech is  
9 not categorically unprotected. It would just be  
10 subject to First Amendment scrutiny, which means  
11 that if the government had a compelling interest  
12 and narrowly tailored that law, they could do  
13 so. But -- but that is the key difference,  
14 Justice Alito, between solicitation as used in  
15 the sense of transactions versus solicitation of  
16 a third person to do something.

17 JUSTICE ALITO: So encouraging someone  
18 to engage in prostitution is not necessarily  
19 criminalizing, that is not necessarily  
20 unconstitutional, it just has to satisfy strict  
21 scrutiny, and you would apply the same thing  
22 here?

23 MS. BHANDARI: That is correct,  
24 Justice Alito. Any law burdening speech where  
25 it makes the speech a crime and it's soliciting

1 underlying civil violations would be subject  
2 to -- if it's content based, it would be  
3 subject to strict scrutiny.

4 JUSTICE ALITO: Encouraging someone to  
5 commit suicide?

6 MS. BHANDARI: I think --

7 JUSTICE ALITO: Same thing?

8 MS. BHANDARI: Same thing. If it's  
9 not a crime, you just subject it to ordinary  
10 First Amendment scrutiny, which the Minnesota  
11 Supreme Court did in Melchert-Dinkel it applied  
12 strict scrutiny to a law encouraging suicide.

13 In that case, the law did not satisfy  
14 strict scrutiny but a narrowly tailored law very  
15 well might.

16 JUSTICE ALITO: What if the person who  
17 is encouraged to commit suicide is  
18 intellectually disabled, particularly vulnerable  
19 to that encouragement?

20 MS. BHANDARI: Again, I think if a  
21 state or Congress passed a law that was directed  
22 specifically at encouraging someone in that  
23 vulnerable state and narrowly tailored it, it  
24 very well might pass strict scrutiny, but --

25 JUSTICE ALITO: And why would that be,

1 because that's an important interest, protecting  
2 those people is an important interest?

3 MS. BHANDARI: That's correct. I  
4 think the strict scrutiny analysis builds into  
5 it the interest that the government has in  
6 criminalizing speech.

7 JUSTICE ALITO: And then why wouldn't  
8 that be satisfied here?

9 MS. BHANDARI: In this case, there --

10 JUSTICE ALITO: The government has  
11 a -- now, people disagree about this, but the  
12 law expresses a strong interest in regulating  
13 who is allowed to remain in the United States.

14 MS. BHANDARI: I think that that  
15 standard would not be satisfied here even if you  
16 read this as a narrow solicitation law, because  
17 it would reach solicitation of civil law  
18 violations that Congress itself has incentivized  
19 people to engage in.

20 So, for example, when Congress has  
21 provided under the Violence Against Women Act, a  
22 pathway to lawful status for women who have been  
23 battered or a pathway to lawful status for  
24 victims of trafficking or a pathway to lawful  
25 status to people who overstayed their visas but

1 married a U.S. citizen.

2 In all of those cases, lawyers,  
3 community members who provide know your rights  
4 training and materials are entitled to tell  
5 people about those paths to lawful status if  
6 they remain even unlawfully.

7 JUSTICE GORSUCH: Counsel, I'm --

8 MS. BHANDARI: And I don't think the  
9 government could claim a compelling interest.

10 JUSTICE GORSUCH: I'm -- I'm sorry to  
11 interrupt. Are you finished?

12 MS. BHANDARI: Yes.

13 JUSTICE GORSUCH: So I -- I just want  
14 to follow up on Justice Alito's line of  
15 questioning with you because I think I heard you  
16 say there could be some examples where you could  
17 criminalize the act of soliciting or aiding and  
18 abetting an underlying civil offense, whether  
19 it's prostitution or assisting a suicide of a  
20 vulnerable person.

21 And once -- once -- you said there  
22 could be circumstances at least possibly where  
23 such a law would be narrowly tailored and would  
24 survive. How does that affect our overbreadth  
25 analysis?

1           Because now we're saying that  
2           civil/criminal distinction isn't what matters,  
3           there are some categories of cases, even -- even  
4           with respect to underlying civil offenses where  
5           the government can regulate aiding and abetting  
6           or soliciting more -- more specifically and  
7           dramatically than the underlying offense.

8           So now we've -- we've narrowed the  
9           category dispute. How does that affect the  
10          overbreadth analysis?

11          MS. BHANDARI: I think if you are  
12          talking about a world in which you've narrowed  
13          the statute to solicitation only, so leaving  
14          aside the -- just pure encouragement and  
15          inducement --

16          JUSTICE GORSUCH: Yeah.

17          MS. BHANDARI: -- and you've narrowed  
18          it in that way, I think the statute would still  
19          be substantially overbroad because it reaches  
20          solicitation of civil violations that I don't  
21          think even the government would claim an  
22          interest in criminalizing.

23          And, again, I point to the example of  
24          lawyers advising people about a pathway to  
25          lawful status that Congress itself has

1 incentivized. And I think it would raise major  
2 First Amendment concerns for the government to  
3 be able to criminalize lawyers and others  
4 providing truthful information about legal  
5 options.

6 JUSTICE GORSUCH: I would certainly  
7 imagine that there would be a -- a very strong  
8 as-applied challenge in those kinds of cases,  
9 but an overbreadth analysis, we're supposed to  
10 ask -- I -- I don't know what we're supposed to  
11 ask, but something like, is it impossible to  
12 apply the statute constitutionally or is it  
13 really, really almost unlikely it will ever be  
14 applied constitutionally.

15 And you're -- you're positing a narrow  
16 set of cases in which it would be a good First  
17 Amendment challenge, might exist, but, again,  
18 how does -- how do we -- how do we struggle with  
19 this overbreadth? What -- when is enough  
20 enough?

21 MS. BHANDARI: I would point you to  
22 the -- the approach the Court took in Free  
23 Speech Coalition and in Stevens where the  
24 inquiry is simply does the statute -- even if  
25 you narrowly construe it, does the statute reach

1 protective speech that people engage in. Is it  
2 realistic speech that they engage in every day  
3 frequently?

4 In *Stevens*, the Court didn't do an  
5 empirical analysis. It looked at the fact that  
6 many people engaged in hunting videos actually  
7 as a strength of the overbreadth challenge,  
8 because it said, you don't need to look at who's  
9 not speaking. The fact that people do violate  
10 the statute, as the government construes it, is  
11 a reason for us to apply the overbreadth remedy.

12 Similarly, in *Free Speech Coalition*,  
13 the Court looked at the fact that mainstream  
14 movies such as *Romeo and Juliet* or *American*  
15 *Beauty* might fall within the terms of the  
16 statute. And it didn't attempt to quantify  
17 examples of mainstream movies vis-à-vis actual  
18 child pornography.

19 JUSTICE KAGAN: Mr. Fletcher points  
20 out that this statute has been with us a long  
21 time and we've just never seen such prosecutions  
22 or at most just a handful of cases.

23 So in that circumstance, isn't our  
24 task made easier with respect to overbreadth, if  
25 you can just say look at the history?

1 MS. BHANDARI: Two responses, Justice  
2 Kagan. First, prosecutions are not necessary,  
3 and Stevens and in Free Speech Coalition this  
4 Court didn't require actual prosecutions of  
5 protected speech.

6 And in Stevens, this Court invalidated  
7 that law eleven years after it had been passed.  
8 So that law had been on the books for a while  
9 and Free Speech Coalition, it had been at least  
10 five years. In Virginia v. Black, the plurality  
11 opinion holding that statute overbroad, that law  
12 had been on the books for 35 years.

13 So the length of time and the lack of  
14 prosecutions isn't the inquiry, because on a  
15 facial challenge, the facial validity of a law  
16 does not depend on the government's  
17 prosecutorial choices.

18 JUSTICE KAGAN: Well, doesn't the  
19 prosecutorial choice have something to do with  
20 what kinds of activity the law chose?

21 MS. BHANDARI: Even if you look at the  
22 prosecutorial activities relevant to that, I  
23 think there's realistic danger of chill here,  
24 just from the fact that the government in recent  
25 years has invoked Section 1324 in investigative



1 activities, as the amicus brief from the  
2 Reporters Committee for Freedom of the Press  
3 noted. The government doesn't treat Section  
4 1324 as a dead letter. It's still available to  
5 open investigations even if they never charge  
6 someone. The City and States' amicus brief  
7 notes that they have to certify compliance with  
8 1324 to receive funding in certain instances.

9 But, finally, I would just point to  
10 the government's ever-changing positions on what  
11 the statute means as presenting a chilling  
12 effect to the public.

13 JUSTICE BARRETT: But -- but, in  
14 addition, just to follow up on Justice Kagan's  
15 point, in addition to prosecutions we also have  
16 a record of activity not being chilled. I mean,  
17 no one's pointed out there are charitable  
18 organizations, to use Justice Kavanaugh's  
19 hypothetical, that are not giving food and  
20 shelter and resources or that lawyers are afraid  
21 to give advice. I mean, the statute's been on  
22 the books for a long time. And there might --  
23 there's an absence of prosecutions. There is  
24 also an absence of demonstrated chilling effect.

25 MS. BHANDARI: This Court has never

1 required a demonstrated chilling effect. Again,  
2 in Stevens and Free Speech Coalition, this Court  
3 didn't say the fact that mainstream movies were  
4 out there, the fact that hunting videos were out  
5 there was proof that nobody was chilled, because  
6 the -- the overbreadth doctrine is concerned  
7 with two main things. One, the chill on people  
8 who would conform their behavior to the letter  
9 of the law, and that behavior isn't visible to  
10 this Court, the people who are not speaking.

11 And, second, it gives an incentive to  
12 Congress to craft narrow laws. So, for example,  
13 if Congress made it a felony to criticize the  
14 president and only ever prosecuted people who  
15 engaged in constitutionally unprotected true  
16 threats, that law could then be immunized from  
17 challenge if -- if the government could come in  
18 and say, no, no, no, this person engaged in true  
19 threats, even though all the jury had to find  
20 was did you criticize the president --

21 JUSTICE GORSUCH: Well --

22 MS. BHANDARI: -- yes or no.

23 JUSTICE GORSUCH: -- it is a little  
24 awkward, tough, that this case comes up in a  
25 posture with Mr. Hansen, who I don't think

1 anybody could say he's been chilled from  
2 speaking. I mean, he's had no problem  
3 soliciting people here in this country and --  
4 and defrauding them to the tune of lots and lots  
5 of money. I mean -- I mean, he is -- he has  
6 victimized these people, and it may be a poster  
7 child for a situation in which the underlying  
8 offense might be modest, but you might want to  
9 criminalize it because he's taking advantage of  
10 very vulnerable people. And -- and it just  
11 seems awkward that we're in -- in a posture  
12 where we're asserting third-party rights of  
13 really hypothetical situations without an  
14 example.

15 MS. BHANDARI: In this case,  
16 Mr. Hansen is asserting his own legal rights. I  
17 want to be very clear.

18 JUSTICE GORSUCH: Is he -- how is he  
19 being affected? How are his speech rights being  
20 affected?

21 MS. BHANDARI: Mr. Hansen, as a  
22 defendant, he is entitled to have the government  
23 prove facts or elements that would make out  
24 speech that is constitutionally unprotected, and  
25 that did not happen here.

1                   So we -- we don't disagree that he  
2                   victimized many people and, for that, he was  
3                   convicted under fraud counts and -- and received  
4                   20 years. And none of those will be disturbed  
5                   here.

6                   But under the encouragement provision,  
7                   the government did not have to prove that he  
8                   lied to anyone, that he deceived anyone, that he  
9                   engaged in any false speech. All they had to  
10                  show was that he encouraged or induced people.  
11                  No mens rea requirement. No intent.

12                  JUSTICE GORSUCH: Well, that's going  
13                  to be -- the government concedes that that has  
14                  to be resolved on remand, and it seems highly  
15                  unlikely that he's going to prevail under that  
16                  standard on remand. I think we'd agree on that.  
17                  I mean, he -- he had every intent in the world  
18                  to keep these people here to -- to -- to take  
19                  their money with no prospect they'd ever  
20                  actually see -- obtain any kind of relief. And  
21                  that's what -- those are the facts.

22                  And I guess, again, it's just a little  
23                  awkward that we're worried about chilling other  
24                  people's speech and it has nothing to do with  
25                  the case before us.

1                   MS. BHANDARI: I would argue that if  
2 you were reconsidering overbreadth doctrine,  
3 this wouldn't be the case in which to do this  
4 because the government secures convictions under  
5 the broad terms of the statute. That goes to  
6 the chilling effect.

7                   The broad terms of the statute that  
8 are on the books, which the government uses to  
9 secure convictions, that, in and of itself, is  
10 enough to tell the public that, if I engage in  
11 any conduct that the government doesn't like,  
12 even if it doesn't amount to solicitation or  
13 aiding and abetting with all of the many  
14 requirements that the government says should be  
15 read in, it won't matter, because I could be  
16 convicted by this jury.

17                  JUSTICE JACKSON: And in fact, that  
18 happened in this very case, right? I mean,  
19 didn't the government object to narrow  
20 instructions that would have tailored this to  
21 the kinds of things the government is saying  
22 right now?

23                  MS. BHANDARI: That is correct. The  
24 government --

25                  JUSTICE JACKSON: So, in open court,

1 with respect to this particular defendant, the  
2 government said no, no, the statute is really  
3 broad and it covers all this kind of conduct,  
4 did they not?

5 MS. BHANDARI: That is correct. The  
6 government objected to those very elements in  
7 this case, in Sineneng-Smith in the district  
8 court, and the Tenth Circuit case of --

9 CHIEF JUSTICE ROBERTS: Do you  
10 disagree -- do you disagree with Mr. Fletcher  
11 that they have never brought such a prosecution?

12 MS. BHANDARI: I don't disagree that  
13 they haven't brought such a prosecution. What I  
14 submit is that that's not relevant to the  
15 overbreadth analysis because the government, you  
16 know, has many other tools to threaten  
17 invocation of Section 1324 as it has done, as  
18 the amici have pointed out. And mainly because  
19 in a facial challenge, the government's choice  
20 not to prosecute to the full extent is not  
21 relevant. Just as in Stevens, it was not  
22 relevant that the government essentially had  
23 promised never use -- to use the statute that  
24 way.

25 I do want to go back to Justice

1 Gorsuch, your question about this particular  
2 defendant and his conduct.

3 In R.A.V. v. St. Paul, the -- the  
4 opinion for the Court noted that, just because  
5 someone engages in conduct that could be  
6 regulated in one way doesn't mean that the  
7 government can regulate it in another way that  
8 violates the First Amendment.

9 So there you had a defendant who  
10 burned a cross in a family's yard, and Justice  
11 Scalia's opinion for the Court noted that arson  
12 laws, property damage laws could have gotten  
13 that defendant's behavior, but that didn't mean  
14 the application of a viewpoint discriminatory  
15 law was permissible with respect to him.

16 JUSTICE GORSUCH: I -- I -- I totally  
17 accept that, and I totally accept as well your  
18 -- your point, your good point, that if -- even  
19 under the government's view remand is going to  
20 be required, and you'll have an opportunity to  
21 make arguments. How successful they will be is  
22 an interesting question. But in an overbreadth  
23 challenge, isn't it surely relevant that your  
24 client is not likely to benefit from whatever we  
25 do? And, as the Chief Justice just pointed out,

1 there has never been a prosecution of some of  
2 these hypotheticals we've been discussing, and  
3 the book -- the -- the law has been on the books  
4 for 70 years.

5 I mean, it is an extraordinary thing  
6 for this Court to grant third-party standing,  
7 which is effectively what we're being asked to  
8 do here. Why would we do it in this -- under --  
9 under those circumstances, when an as-applied  
10 challenge would always be available should the  
11 government -- because I don't take them at their  
12 word either, okay? But should they ever go  
13 after somebody who actually meets one of these  
14 hypotheticals that have been very interesting  
15 this morning, they would have a good First  
16 Amendment defense.

17 MS. BHANDARI: Justice Gorsuch, I -- I  
18 would note the law in its current form has only  
19 been on the books since 1986, absent the mens  
20 rea requirement. And the government secures  
21 convictions, as it did in this case, without  
22 showing any of the elements that would make  
23 someone's speech unprotected.

24 So I understand that, you know,  
25 Mr. Hansen's behavior was not commendable here,



1 but the government didn't have to prove any of  
2 the narrowing elements that would make the  
3 statute permissible.

4 And so I think that is one reason that  
5 this Court should make sure that this law  
6 doesn't in the future chill those, you know, who  
7 have engaged in the type of speech that Justice  
8 Kagan --

9 JUSTICE JACKSON: Isn't it possible to  
10 really figure out how many people have been  
11 chilled? I mean, I guess I'm trying to  
12 understand how it would work if we didn't have  
13 some sort of an overbreadth argument, because on  
14 the one hand, you can look at the situation and  
15 you can say the government has never charged any  
16 of these people who are actually doing this, but  
17 we don't know -- by "this," I mean, for example,  
18 Justice Kavanaugh's example of, you know,  
19 helping -- helping noncitizens by giving them  
20 food and water. Fine. The government has never  
21 charged any, but we don't know how many other  
22 people would have engaged in that kind of, you  
23 know, speech and -- and action if it weren't for  
24 this law.

25 So it's really hard to know, I think,

1 by looking only at what the government has done,  
2 who is being prevented from engaging in First  
3 Amendment activity.

4 MS. BHANDARI: That is correct. And  
5 that is one of the overriding concerns of  
6 overbreadth doctrine. Again, is the concern  
7 with people who are silent and whose silence is  
8 not visible to the Court. But I --

9 JUSTICE GORSUCH: And we --

10 MS. BHANDARI: -- don't --

11 JUSTICE GORSUCH: And we have no  
12 record of that here either. We're just -- we  
13 just coming up with hypotheticals, right?

14 MS. BHANDARI: Well, what we have  
15 is --

16 JUSTICE GORSUCH: There's no record of  
17 people coming into court and a factual finding  
18 in district court on -- on who has been chilled  
19 and how. I mean, that could have happened, but  
20 we don't have that here.

21 MS. BHANDARI: Justice Gorsuch, I  
22 don't think that would be likely to happen in a  
23 criminal case like this. Perhaps in a  
24 pre-enforcement challenge. But I also note the  
25 amici -- the AL amicus brief noting lawyers have

1 said that lawyers, immigration lawyers, are  
2 watching this case very closely and already  
3 starting to advise each other on how they may  
4 have to curtail the advice that they give to  
5 their clients.

6 I also want to emphasize that the  
7 government hasn't made very clear the  
8 distinction between solicitation and aiding and  
9 abetting. It seemed to conflate those points.

10 Aiding and abetting requires that the  
11 principal complete the underlying act. I'm not  
12 sure if the government is saying that that is  
13 required here, because solicitation does not  
14 require that.

15 The government's also has not  
16 explained whether "encourage" means solicitation  
17 and "induce" means aiding and abetting, or  
18 vice versa, which of these words apply to which  
19 concept.

20 Solicitation and aiding and abetting  
21 aren't the same. They have different elements.  
22 And the government hasn't explained how this  
23 Court could clearly write in those elements in a  
24 way that would tell the lawyer or the community  
25 activists advising people what their rights are

1 under the law whether they can remain in the  
2 country.

3 And when the stakes of getting it  
4 wrong are felony prosecution and five years  
5 imprisonment, people are not going to go  
6 anywhere close to the line --

7 JUSTICE KAVANAUGH: I thought the --

8 MS. BHANDARI: -- if they can help it.

9 JUSTICE KAVANAUGH: -- I thought the  
10 government was saying that both solicitation and  
11 aiding and abetting were coming in and that the  
12 elements of the two offenses would be the  
13 traditional elements, both of which require  
14 intent.

15 MS. BHANDARI: I agree that both of  
16 them require intent, but the government has at  
17 various times suggested that you need an act,  
18 which I agree is true for aiding and abetting  
19 but for solicitation isn't necessarily true.

20 So you're reaching pure speech on the  
21 hypothetical of someone simply saying come to my  
22 food pantry. Not engaging in the conduct of  
23 actually giving food, just saying come to my  
24 food pantry, it's open to anyone who's  
25 undocumented, would that constitute solicitation

1 to remain in the country, or someone who runs a  
2 domestic violence shelter, for example, telling  
3 people who come, knowing that they're  
4 undocumented, stay here, it's a safe place,  
5 you're welcome here, and we don't want you to  
6 leave here where you're safe.

7           It -- it's critical that a statute  
8 that hits on speech draw clear lines when felony  
9 prosecution is at stake. Congress did not do  
10 that here. And Congress could do so if this  
11 Court were to hold that this law simply doesn't  
12 say what the government says, and Congress then  
13 remains free to draft the narrow  
14 aiding-and-abetting or solicitation law if it  
15 wishes to.

16           CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18           Justice Thomas?

19           Justice Alito, anything further?

20           Justice Sotomayor?

21           JUSTICE SOTOMAYOR: Yes. I -- I think  
22 you maybe gave up a little bit too much when you  
23 were talking about answering Justice Alito's  
24 questions and Justice Gorsuch, that there might  
25 be cases where Congress could criminalize a

1 civil violation.

2 Did I understand you to say, once you  
3 give that up, then this is okay because they can  
4 criminalize all civil violations?

5 MS. BHANDARI: Not at all. In the  
6 circumstances in which there is a --

7 JUSTICE SOTOMAYOR: I -- I would like  
8 to know where to draw that line.

9 MS. BHANDARI: It --

10 JUSTICE SOTOMAYOR: I -- I find it  
11 hard to borrow concepts of aiding and abetting  
12 or solicitation because, by definition, both of  
13 those concepts, as we have traditionally had  
14 them in the criminal law, require a criminal act  
15 by the perpetrator. There has to be an act done  
16 by the perpetrator. You have to solicit a  
17 crime.

18 We've never had a crime defining  
19 solicitation of a civil violation, correct?

20 MS. BHANDARI: That's correct. This  
21 Court has never upheld a criminal solicitation  
22 law directed at a civil crime.

23 JUSTICE SOTOMAYOR: Now too much,  
24 never done it, and, in fact, all of the  
25 solicitation and aiding-and-abetting crimes,

1 generally, the punishment is less than the  
2 completed act, correct?

3 MS. BHANDARI: That's correct.

4 JUSTICE SOTOMAYOR: Perpetrators are  
5 treated more -- the perpetrators of the crime  
6 are treated more harshly, and solicitation, it's  
7 still not -- the punishment has never been as  
8 great as the completed crime. You don't get  
9 punished for soliciting -- soliciting arson  
10 and get treated as harshly as the arsonist.

11 MS. BHANDARI: I -- I think -- yes. I  
12 want to be very clear about our position, which  
13 is that solicitation, criminal solicitation  
14 laws, when they are directed at civil conduct,  
15 are not categorically unprotected under the  
16 First Amendment.

17 JUSTICE SOTOMAYOR: All right. So  
18 let's go, because -- let's go there, because  
19 when are they not categorically protected? When  
20 are they categorically protected? I want to  
21 know what the difference is, why this one is not  
22 protected and others might be.

23 MS. BHANDARI: I think that if you had  
24 a law criminalizing solicitation of certain  
25 civil violations, you would subject it to strict

1 scrutiny and it would then be a case-by-case  
2 analysis.

3 I don't think the government has even  
4 attempted to argue in this case that this law  
5 would satisfy strict scrutiny with respect to  
6 civil violations. That -- that argument has not  
7 been on the table.

8 But I -- I say that only to show that  
9 when it comes --

10 JUSTICE SOTOMAYOR: But what would  
11 qualify? What -- you -- you admitted that a --  
12 inducing a person of lesser mental ability to  
13 prostitution would probably fall into it.

14 MS. BHANDARI: Yes. I think you could  
15 see a spectrum of laws. Again, it's the normal  
16 First Amendment scrutiny. So where the  
17 government has a compelling interest and, of  
18 course, narrowly tailors its law and has no  
19 alternative to get at that conduct other than  
20 criminalizing speech, it might satisfy it.

21 But, on the other end of the spectrum,  
22 if a municipality decided to make it a crime to  
23 solicit parking violations because everyone in  
24 town is just violating the parking violations  
25 and paying the fee and so it's decided to make



1 it a crime to solicit that, I don't think that  
2 that speech is categorically unprotected under  
3 the First Amendment and probably wouldn't  
4 satisfy heightened First Amendment scrutiny.

5 JUSTICE SOTOMAYOR: So now let's go to  
6 why not having an example of a generalized --  
7 more examples of prosecutions, the Henderson  
8 everybody keeps forgetting, but there's at least  
9 one prosecution in -- under the 1986 statute.

10 Why do you think the history from '86  
11 to currently shouldn't be viewed as important?

12 MS. BHANDARI: It's not relevant that  
13 the government has chosen not to file actual  
14 prosecutions of protected speech. That's never  
15 been required by this Court for First Amendment  
16 overbreadth analysis, again, for good reason,  
17 because a law, if it's facially reaching  
18 protected speech, does not become more or less  
19 constitutional depending on the government's  
20 prosecutorial choices.

21 It's also relevant, however, that the  
22 government has ways of chilling speech simply by  
23 having the law on the books without filing  
24 actual prosecutions.

25 So, for example, when it opens

1 investigations into people and invokes Section  
2 1324, as has happened with journalists, perhaps  
3 it might be --

4 JUSTICE SOTOMAYOR: What happened with  
5 Customs patrol.

6 MS. BHANDARI: With -- with the U.S.  
7 Customs and Border Protection, yes.

8 JUSTICE SOTOMAYOR: And Congress did  
9 subpoenas too.

10 MS. BHANDARI: That is correct. And  
11 also when it asks cities and states to certify  
12 compliance with Section 1324 to receive federal  
13 funding, which, of course, could chill those  
14 city and state officials from even coming close  
15 to the line of violating the encouragement  
16 provision for fear of losing that funding.

17 So there are many aspects beyond  
18 simple prosecutions that can chill speech, and  
19 -- and the government has certainly used some of  
20 those tools in the last five years even.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 Justice Gorsuch?

24 Justice Barrett?

25 Justice Jackson?

1                   JUSTICE JACKSON:  If I can just ask  
2     you, one thing you said was curious to me, that  
3     aid and abet and solicitation have different  
4     elements, and so what is then the implication of  
5     the government saying, we look at the statute,  
6     it says encourage or induce, you should read  
7     that to mean aid or abet -- aid and abet or  
8     solicitation, I guess that carries with it the  
9     elements, but is your point that the person who  
10    is being convicted or prosecuted under this  
11    statute is not going to really know what it is  
12    that the government needs to prove in order to  
13    establish their liability?

14                   MS. BHANDARI:  That is correct,  
15    Justice Jackson.  The government hasn't  
16    specifically delineated which one would apply in  
17    any particular case.  It simply says both.  But  
18    there are different elements to them.

19                   That's why Congress has two separate  
20    provisions, 18 U.S.C. 373, which is a  
21    solicitation provision, and 18 U.S.C.,  
22    subsection 2, which is an aiding-and-abetting  
23    provision.

24                   In this --

25                   JUSTICE JACKSON:  This is not a First

1 Amendment argument, but it still could -- it's  
2 something problematic, I think, perhaps about  
3 the government's intention of importing both of  
4 those concepts wordlessly, silently, into this  
5 statute.

6 MS. BHANDARI: It goes to  
7 congressional intent and what the text says.

8 So Congress has at various times used  
9 induce along with solicit, as it did in 373. At  
10 other times, it used induce along with aid and  
11 abet, as it did in subsection 2.

12 Now the government doesn't explain  
13 here why Congress would not have used aiding and  
14 abetting and solicitation along with induce when  
15 it previously has used induce with those other  
16 verbs, and it also doesn't explain why Congress  
17 would have mashed up both concepts of  
18 solicitation and aiding and abetting in one  
19 statute when they have different elements.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Rebuttal, Mr. Fletcher?

24

25

1 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

2 ON BEHALF OF THE PETITIONER

3 MR. FLETCHER: Thank you, Mr. Chief  
4 Justice.

5 I'd just like to say a word about what  
6 the statute means, a word about the  
7 criminal/civil distinction, and then close with  
8 a word or two about overbreadth.

9 So, first of all, about what the  
10 statute means. I understand their position to  
11 be that until 1952, this was a permissible  
12 statute because it had other words in it, but in  
13 1952, Congress turned it into a prohibition on  
14 speech. And I think that's a pretty  
15 extraordinary thing for Congress to have done,  
16 and the Court should demand a pretty  
17 extraordinary showing before assuming that  
18 Congress did it, and I just haven't heard such a  
19 showing made.

20 What I've heard is Congress took out  
21 some words. And that's true, but the words it  
22 left in had the same meaning and the words it  
23 left in were the words this Court had just used  
24 to summarize the previous statute.

25 I heard that it took out the mens rea

1 requirement in 1986. But that's not quite  
2 right. It tailored the mens rea that the  
3 offender has to know about the noncitizen's  
4 status, knowing or in reckless disregard, but it  
5 left in the words induce or encourage. And  
6 those are words that we think inherently carry a  
7 mens rea requirement.

8           That's what Judge Hand said in Peoni  
9 when he was interpreting the words of 18 U.S.C.  
10 2, words like induce, aid, and abet carry an  
11 implication of purpose. We think they still  
12 carry that implication here.

13           And, finally, I heard that there's no  
14 other statute that looks like this. And that's  
15 just not quite right. You know, the provision  
16 of the National Labor Relations Act that was at  
17 issue in the electrical workers case that we  
18 cite at page 32 of our brief prohibited inducing  
19 and encouraging a secondary boycott. And this  
20 Court upheld that against a constitutional  
21 challenge.

22           The Mann Act, 18 U.S.C. 2422(a)  
23 prohibits persuading, inducing, enticing or  
24 coercing an individual to travel in interstate  
25 commerce to engage in prostitution. These

1 are -- this is not an unusual way to convey  
2 these ideas.

3 Now, I'd like to turn to the civil or  
4 criminal distinction, which I understand to be  
5 their fallback argument, essentially to say that  
6 even if you construe the statute the way we  
7 construe it, they still think it's overbroad  
8 because it covers soliciting or facilitating  
9 civil violations.

10 As Justice Gorsuch said, I think  
11 there's a real question whether even if they're  
12 right that there's constitutional questions  
13 about soliciting or facilitating civil conduct,  
14 whether that meets the high threshold for  
15 overbreadth.

16 But I think more fundamentally they're  
17 not right about that. This Court has said in  
18 cases like Pittsburgh Press, and Gazzam, and  
19 Williams that soliciting or inducing illegal  
20 activities, even if they are only civilly  
21 illegal, are not protected by the First  
22 Amendment.

23 And I don't really hear them to be  
24 contesting that. Instead, they don't want a  
25 special rule. They want to say it's okay to

1 civilly regulate that kind of solicitation but  
2 facilitation but you can't criminally punish it.

3 And that sort of mish-mash is just not  
4 something that I know of any analog in this  
5 Court's First Amendment jurisprudence, but what  
6 this Court has always said before is that there  
7 are certain categories of speech that are  
8 unprotected. And we think this is one of them.

9 Now, I take the point that it's  
10 unusual to punish the speech or the conduct that  
11 solicitates or facilitates underlying actively  
12 more stiffly than the activity, but that's not a  
13 First Amendment rule. That's a legislative  
14 judgment about culpability.

15 Usually we think people that who  
16 solicit or facilitate unlawful activity share  
17 the same culpability as the person who commits  
18 that activity. But not always, as Justice Alito  
19 and I discussed, and not here.

20 And the judgment that Congress made  
21 here is that, when someone solicits or  
22 facilitates immigration violations, they are  
23 deserving of more punishment than the  
24 noncitizens who are already subject to removal.

25 We think that's a reasonable judgment.



1 And within the contours of that judgment, I  
2 think it's important to emphasize that Congress  
3 treated speech and conduct exactly the same.  
4 Whether solicitation or facilitation takes the  
5 form of speech or takes the form of conduct,  
6 this statute treats it identically, and so I  
7 don't think it has the effect of treating speech  
8 worse than conduct that my colleague describes.

9 Finally, just to say a word about  
10 overbreadth. You know, we've talked about the  
11 difficulties of overbreadth analysis, what an  
12 extraordinary thing it is, how cautious the  
13 Court has been about it. And I think it's just  
14 worth underscoring all of the different ways in  
15 which Respondent and the Ninth Circuit are  
16 trying to stretch overbreadth doctrine.

17 This Court has said that limiting  
18 constructions are especially important in  
19 overbreadth cases, but they ask you to bypass a  
20 limiting construction.

21 The Court has said that we are in  
22 realistic danger of prosecution, but they are  
23 asking you to find the statute overbroad, even  
24 though we don't have any history of either  
25 prosecution or of chilling.

1                   And the Court said in Hicks, that  
2 rarely if ever will a statute be overbroad, when  
3 it aims at conduct and not primarily at speech  
4 or at inherently expressive conduct. But this  
5 is a statute that we know from 70 years aims  
6 primarily at conduct, even if you thought it  
7 also may sweep in some speech.

8                   It would really be extraordinary, I  
9 think, to say that the statute can't be used to  
10 prosecute schemes, like Mr. Hansen's and all of  
11 the other schemes that it has been used to  
12 prosecute over the last 70 years.

13                   We'd ask the Court to reverse.

14                   CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel. The case is submitted.

16                   (Whereupon, at 1:08 p.m., the case was  
17 submitted.)

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## Official - Subject to Final Review

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## Official - Subject to Final Review

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