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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.)

- - - - -

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, in 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. And 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 I'll candidly acknowledge are the hardest
17 hypotheticals where somebody says to a family
18 member, I know it would be unlawful for you to
19 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.

2 But "encourage" and "induce" or
3 "incite," whatever it is, "encourage" and
4 "induce," does that -- does that import that
5 actus reus requirement 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 a
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 remain --
6 residing in the United States is or will be
7 unlawful, and I think that suggests that
8 Congress understood that you could violate the
9 statute by encouraging someone to continue
10 residence that 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 enhancement that requires the financial
7 gain, so I just want to be sure that's right.

8 MR. FLETCHER: That's right.

9 JUSTICE BARRETT: That's right?

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

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

25 JUSTICE SOTOMAYOR: Wait a minute.

1 Here, the enhanced offense includes the first
2 part.

3 MR. FLETCHER: That's right.

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

9 MR. FLETCHER: Correct.

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

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

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

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

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

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

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

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

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

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

25 And I can imagine, although I'm not so

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

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

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

24 JUSTICE KAVANAUGH: What do you --

25 MR. FLETCHER: -- that soliciting or

1 facilitating it is deserving of punishment.

2 JUSTICE KAVANAUGH: What -- what --

3 JUSTICE SOTOMAYOR: It's -- I'm sorry.

4 Go ahead.

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

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

23 You know, I understand the concern,
24 though, that goes to both about are these
25 activities being chilled, and I'd say that on

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

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

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

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

18 MR. FLETCHER: Yeah.

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

24 MR. FLETCHER: I don't think so. You
25 know, I think there's a difference between

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

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

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

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

1 these organizations are describing themselves as
2 wanting to provide food and shelter for people
3 who need -- who are in need, who need food and
4 shelter.

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

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

9 JUSTICE JACKSON: Yes. Yes.

10 MR. FLETCHER: Yes.

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

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

23 CHIEF JUSTICE ROBERTS: Are there any
24 --

25 MR. FLETCHER: I think it would be

1 accepting --

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

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

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

1 these organizations, did a lot of investigation
2 as to what was said.

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

9 And I thought there were only certain
10 statutes that were immune to First Amendment
11 challenges, obscenity, fighting words.
12 Otherwise, everything else is subject to the
13 First Amendment and strict scrutiny.

14 So why should we uphold a statute that
15 criminalizes words, makes the punishment five
16 years, which is rather significant? I know of
17 no other statute where aiding-and-abetting
18 punishment or solicitation punishment is greater
19 than the punishment we're giving the person
20 who's going to commit the crime. But that's
21 what we're doing with this statute. It's a
22 first of a kind.

23 MR. FLETCHER: A couple thoughts,
24 Justice Sotomayor. I think one of the
25 traditional categories of speech that is outside

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

4 Our view is that that's --

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

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

15 JUSTICE SOTOMAYOR: So do you believe
16 --

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

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

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

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

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

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

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

24 MR. FLETCHER: I think not, Justice
25 Sotomayor. I think it's very hard to make out

1 --

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

6 MR. FLETCHER: Justice Sotomayor --

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

9 MR. FLETCHER: Justice Sotomayor --

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

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

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

23 JUSTICE SOTOMAYOR: No --

24 MR. FLETCHER: -- the idea --

25 JUSTICE SOTOMAYOR: -- you could

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

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

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

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

19 But, if you have a narrower conception
20 of aiding and abetting, that is only all the
21 more reason to conclude that this is a narrow
22 statute that doesn't trench on the First
23 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 term
7 -- Ciminelli, Percoco, Dubin, now this case --
8 where the government is exceed -- conceding that
9 the statute read by its plain terms is too
10 broad. And you come back to us and say read it
11 more 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 -- we keep -- you keep coming here and admitting
3 that statutes have to be read in a different way
4 when 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: Mr. Fletcher, so,
9 again, I want to assume your version of the
10 statute as to "encourage" and as to the mens
11 rea. Now I want to make two further
12 assumptions, okay? We can come back to those
13 assumptions, 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
16 the wealth of examples of people of various
17 kinds, friends, neighbors, doctors, whatever,
18 saying to people, I really think you should
19 stay, and saying that knowing that they're in
20 the country unlawfully, having all the intent
21 that -- and so my first assumption is that all
22 of those communications are within the statute.

23 My second assumption is that for one
24 or another reason, maybe it's what Justice Alito
25 said about the fact that this is civil conduct,

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

4 And now I want you to tell me how to
5 do the overbreadth analysis on this, because I
6 -- I think I might say to you, I can imagine
7 that there's, like, a whole -- a huge number of
8 such communications taking place every day
9 because, 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 You know, it has to be substantial and it has to
19 be substantial both absolutely and in relation
20 to 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. FLETCHER: No, no, it -- it --

2 JUSTICE KAGAN: You know, how do we
3 even go 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 haven't -- I can't
13 purport to have read every one of the Court's
14 overbreadth cases, but in the vast majority of
15 them, the Court says either, you know, the vast
16 majority 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 your assumptions, I don't think
21 either of those things would be true here.

22 And the other thing that the Court has
23 said is it can't just be theoretical. We want
24 some realistic demonstration of chill because
25 this is ultimately -- overbreadth is sort of a

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

8 And I guess, I think, you have almost
9 a textbook case here for whether we know there
10 is not a chill because this statute was on the
11 books in basically the same form for 70 years,
12 and no -- it was only used --

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

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

23 MR. FLETCHER: Yeah.

24 JUSTICE KAGAN: How is this different
25 from that?

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

11 I understand you might think we're
12 assuming here that that doesn't fully solve the
13 problem and what to do --

14 JUSTICE KAGAN: Right.

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

24 You're saying are we going to do this
25 extraordinary thing and depart from ordinary

1 principles of adjudication. And there I
2 actually do think it's fair to say, yeah, we're
3 going to demand a real showing of chill, and I
4 think, here, this is not some newly passed
5 statute where we're all just sort of guessing
6 about what might happen. We have a lot of
7 history.

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

17 JUSTICE KAGAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: You've reassured
22 us with your narrowing construction just take
23 aiding and abetting law, solicitation law, and
24 bring that old soil here. And that is a good
25 answer, but I think it still raises questions

1 because the underlying offense is so different
2 from bank robbery or carjacking or securities
3 fraud. It's just existing here as the
4 underlying offense, and I don't know if that
5 should affect how we think about it and just
6 wanted to get your response to that because that
7 makes it seem a lot broader.

8 You wouldn't say providing food to the
9 bank robber necessarily is, you know, a meal, is
10 -- is aiding and assisting the -- aiding and
11 abetting the bank robbery, but, if the
12 underlying offense is just being here, that --
13 that seems a little different.

14 Should that affect how we think about
15 it, or how do you just answer that concern?

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

24 The law is capable of dealing with
25 this, you know, aiding-and-abetting minor

1 offenses that happen a fair amount. So I think
2 that helps with one set of concerns.

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

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

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

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: Mr. Fletcher, so
2 you've pointed out, and I agree with you that
3 it's interesting, kind of odd, it strikes me as
4 unusual, but I haven't done a study to see, to
5 have an overbreadth challenge to a statute
6 that's older, because all of these overbreadth
7 challenges invite a string of hypotheticals,
8 but, as you say, we have a track record.

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

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

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

25 You know, not only is it old, but also

1 we have such a strong empirical track record
2 against the very broad interpretation. And, you
3 know, I think that's relevant not just to
4 overbreadth but also to what the statute means
5 because Congress has been coming back and
6 amending the statute and revisiting it against
7 the backdrop of that narrow application of the
8 statute.

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

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

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

24 JUSTICE BARRETT: Prostitution.

25 MR. FLETCHER: A very similar statute.

1 You know, it's induce, encourage, or persuade,
2 coerce to -- to --

3 JUSTICE BARRETT: Yeah.

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

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

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

1 But I am struggling, especially, for
2 example, with the part of 1324 here that is, you
3 know, small division (v)(II) that itself has an
4 aiding-or-abetting piece to it. So it sounds
5 like Congress was covering aiding and abetting
6 to some extent in another part of this same
7 statute. So, if we read this one to be aiding
8 and abetting too, what are we really -- what is
9 it really covering?

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

12 JUSTICE JACKSON: Yes.

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

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

24 MR. FLETCHER: So the aiding and
25 abetting that is covered in (iv) is assisting

1 someone to enter or remain in the country
2 unlawfully. That's the core constitutional
3 application of (iv). That's what it does. And
4 if you -- the way you would violate (v) is if
5 you aided and abetted someone who was soliciting
6 or facilitating people to enter into the country
7 unlawfully --

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

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

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

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

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

1 violation of the law also a violation of this?

2 MR. FLETCHER: So, yes, providing
3 tools, you know, a gun, a mask to a bank robber
4 knowing that he's going to use them to rob the
5 bank and intending that he use them to rob the
6 bank, that's aiding and abetting the bank
7 robbery.

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

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

18 MR. FLETCHER: That -- that's not
19 aiding and abetting at all.

20 JUSTICE JACKSON: I see.

21 MR. FLETCHER: That's accessory after
22 the fact at best.

23 JUSTICE JACKSON: Okay.

24 MR. FLETCHER: And 18 U.S.C. 2 covers
25 only accessory before the fact and aid during

1 the crime but not aid after the crime.

2 JUSTICE JACKSON: Not aid after. All
3 right. One more.

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

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

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

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

1 question, you know, you could decline to do it,
2 say that the Ninth Circuit's reasoning was
3 wrong, that there may be alternative arguments
4 for overbreadth, and send it back for that
5 purpose. I guess I view this more as a sub-
6 issue of the overbreadth argument on which the
7 Court granted cert and not as the sort of really
8 distinct issue that the Court usually remands
9 for consideration of.

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

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

25 Now I'm sensitive to the idea that

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

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Ms. Bhandari.

13 ORAL ARGUMENT OF ESHA BHANDARI
14 ON BEHALF OF THE RESPONDENT

15 MS. BHANDARI: Mr. Chief Justice, and
16 may it please the Court:

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

23 But that is Congress's job, and
24 Congress in 1952 took out the very words the
25 government now asks this Court to write in:

1 "solicit" and "assist." And in 1986, Congress
2 took out the required intent. The government
3 has cited no case in which Congress has used the
4 terms "encourage" and "induce" alone to stand
5 for solicitation or aiding and abetting.

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

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

1 mandates to parking ordinances.

2 To deny the government's requested
3 expansion would only mean that it would have to
4 satisfy ordinary First Amendment scrutiny when
5 it regulates such speech.

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

13 I welcome the Court's questions.

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Counsel, you
2 focused on the amendment, what was it, '52 or
3 '56?

4 MS. BHANDARI: 1952.

5 CHIEF JUSTICE ROBERTS: '52.
6 Suggesting there was a purpose to take out the
7 two provisions that were -- the two words that
8 were taken out and the two left in.

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

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

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

1 It required specific intent to solicit a
2 particular felony, and it required circumstances
3 strongly corroborative of that intent.

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

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

14 MS. BHANDARI: "Encourage" and
15 "induce" are narrower -- are broader terms.
16 "Solicit" and "assist" are the narrower terms.

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

21 Initially, it was tied to prohibiting
22 the entry of -- of -- assisting the entry of
23 contract laborers. Then Congress took away the
24 limitation on contract labor. It was assisting
25 anyone's entry. But still, in 1952, it used the

1 verbs "solicit" and "assist" and it required the
2 willfully or knowingly standard.

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

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

15 JUSTICE BARRETT: Counsel,
16 let's assume --

17 JUSTICE ALITO: May I --

18 JUSTICE BARRETT: Oh, sorry.

19 JUSTICE ALITO: Go ahead.

20 JUSTICE BARRETT: I just wanted to
21 follow up on that quickly, and let's just assume
22 that you're wrong about Congress's intent.
23 Would you concede that if we accept the
24 government's narrowing construction, let's
25 assume the underlying offense is criminal, not

1 civil, would you concede that you would lose
2 your overbreadth challenge if the government is
3 right about the narrower solicitation?

4 MS. BHANDARI: If you were limiting it
5 just to crimes and only to solicitation and
6 aiding and abetting with the requisite intent,
7 then, yes. But I don't understand the
8 government to be limiting its argument only to
9 crimes. And --

10 JUSTICE ALITO: Well, what -- oh, go
11 ahead.

12 JUSTICE BARRETT: Yeah. No, my
13 hypothetical changed that.

14 MS. BHANDARI: Yes, yes.

15 JUSTICE BARRETT: Thank you.

16 JUSTICE ALITO: Well, that's what I
17 wanted to ask you about. I understood your
18 second point to be that the First Amendment
19 prohibits the criminalization of the
20 solicitation of conduct that is unlawful but not
21 criminal. Is that your second point?

22 MS. BHANDARI: That is correct, that
23 --

24 JUSTICE ALITO: And -- and you think
25 that's true across the board in all

1 circumstances?

2 MS. BHANDARI: Yes, Justice Alito,
3 because we're talking about whether speech is
4 categorically beyond the protection of the First
5 Amendment. So anytime you have a law targeting
6 speech, which would cover a solicitation law,
7 the first step is, of course, it's a law
8 targeting speech, you, you know, trigger First
9 Amendment scrutiny.

10 Now, if the law fits within a narrow
11 category of historical exception, like obscenity
12 and so forth, then it doesn't have to
13 satisfy scrutiny.

14 JUSTICE ALITO: Yeah, okay. So
15 solicitation -- soliciting someone to engage in
16 prostitution, that's unconstitutional.
17 Criminalizing the solicitation of someone to
18 engage in prostitution, that's -- that's
19 unconstitutional.

20 MS. BHANDARI: No, Justice Alito.
21 That can be regulated as a transaction. And
22 this Court in Williams made clear that you
23 can -- you can render certain transactions
24 illegal. So speech that effectuates those
25 transactions, for example, if I say to you, I

1 want to buy drugs, that is proposing an illegal
2 transaction. That speech can be regulated. And
3 that was the case with Williams where it was
4 speech about a transaction involving child
5 pornography.

6 JUSTICE ALITO: All right. Not
7 soliciting a prostitute but encouraging someone
8 to engage in prostitution, that cannot be
9 criminalized?

10 MS. BHANDARI: If prostitution is not
11 a crime --

12 JUSTICE ALITO: Yes.

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

22 JUSTICE ALITO: So encouraging someone
23 to engage in prostitution is not necessarily --
24 criminalizing that is not necessarily
25 unconstitutional, it just has to satisfy strict

1 scrutiny, and you would apply the same thing
2 here?

3 MS. BHANDARI: That is correct,
4 Justice Alito. Any law burdening speech where
5 it makes the speech a crime and it's soliciting
6 underlying civil violations would be subject
7 to -- if it's content-based, it would be
8 subject to strict scrutiny.

9 JUSTICE ALITO: Encouraging someone to
10 commit suicide?

11 MS. BHANDARI: I think --

12 JUSTICE ALITO: Same thing?

13 MS. BHANDARI: Same thing. If it's
14 not a crime, you just subject it to ordinary
15 First Amendment scrutiny, which the Minnesota
16 Supreme Court did in Melchert-Dinkel. It
17 applied strict scrutiny to a law encouraging
18 suicide. In that case, the law did not satisfy
19 strict scrutiny, but a narrowly tailored law
20 very well might.

21 JUSTICE ALITO: What if the person who
22 is encouraged to commit suicide is
23 intellectually disabled, particularly vulnerable
24 to that encouragement?

25 MS. BHANDARI: Again, I think, if a

1 state or Congress passed a law that was directed
2 specifically at encouraging someone in that
3 vulnerable state and narrowly tailored it, it
4 very well might pass strict scrutiny, but on --

5 JUSTICE ALITO: And why would that be?
6 Because that's an important interest?
7 Protecting those people is an important
8 interest?

9 MS. BHANDARI: That's correct. I
10 think the strict scrutiny analysis builds into
11 it the interest that the government has in
12 criminalizing speech. And so --

13 JUSTICE ALITO: Then why wouldn't that
14 be satisfied here?

15 MS. BHANDARI: In this case, there
16 are --

17 JUSTICE ALITO: The government has
18 a -- now people disagree about this, but the law
19 expresses a strong interest in regulating who is
20 allowed to remain in the United States.

21 MS. BHANDARI: I think that that
22 standard would not be satisfied here even if you
23 read this as a narrow solicitation law because
24 it would reach solicitation of civil law
25 violations that Congress itself has incentivized

1 people to engage in.

2 So, for example, when Congress has
3 provided under the Violence Against Women Act a
4 pathway to lawful status for women who have been
5 battered or a pathway to lawful status for
6 victims of trafficking or a pathway to lawful
7 status to people who overstayed their visas but
8 married a U.S. citizen, in all of those cases,
9 lawyers, community members who provide Know Your
10 Rights training and materials are entitled to
11 tell people about those paths to lawful status
12 if they remain even unlawfully. And I don't
13 think --

14 JUSTICE GORSUCH: Counsel, I'm --

15 MS. BHANDARI: -- the government could
16 claim a compelling interest. I apologize.

17 JUSTICE GORSUCH: -- I'm -- I'm sorry
18 to interrupt. Are you finished?

19 MS. BHANDARI: Yes.

20 JUSTICE GORSUCH: So I -- I just want
21 to follow up on Justice Alito's line of
22 questioning with you because I think I heard you
23 say there could be some examples where you could
24 criminalize the act of soliciting or aiding and
25 abetting an underlying civil offense, whether

1 it's prostitution or assisting a suicide of a
2 vulnerable person. And once -- once -- you said
3 there could be circumstances at least possibly
4 where such a law would be narrowly tailored and
5 would survive.

6 How does that affect our overbreadth
7 analysis? Because now we're saying the
8 civil/criminal distinction isn't what matters,
9 there are some categories of cases, even -- even
10 with respect to underlying civil offenses, where
11 the government can regulate aiding and abetting
12 or soliciting more -- more specifically and
13 dramatically than the underlying offense.

14 So now we've -- we've narrowed the
15 category dispute. How does that affect the
16 overbreadth analysis?

17 MS. BHANDARI: I think, if you are
18 talking about a world in which you've narrowed
19 the statute to solicitation only, so leaving
20 aside the just pure encouragement and inducement
21 --

22 JUSTICE GORSUCH: Yeah.

23 MS. BHANDARI: -- and you've narrowed
24 it in that way, I think the statute would still
25 be substantially overbroad because it reaches

1 solicitation of civil violations that I don't
2 think even the government would claim an
3 interest in criminalizing.

4 And, again, I point to the example of
5 lawyers advising people about a pathway to
6 lawful status that Congress itself has
7 incentivized. And I think it would raise major
8 First Amendment concerns for the government to
9 be able to criminalize lawyers and others
10 providing truthful information about legal
11 options.

12 JUSTICE GORSUCH: I would certainly
13 imagine that there would be a -- a very strong
14 as-applied challenge in those kinds of cases,
15 but an overbreadth analysis, we're supposed to
16 ask -- I -- I don't know what we're supposed to
17 ask, but something like, is it impossible to
18 apply the statute constitutionally or is it
19 really, really almost unlikely it'll ever be
20 applied constitutionally.

21 And you're -- you're positing a narrow
22 set of cases in which it would be a good First
23 Amendment challenge might exist, but, again, how
24 does -- how do we -- how do we struggle with
25 this overbreadth? What -- when is enough

1 enough?

2 MS. BHANDARI: I would point you to
3 the -- the approach the Court took in Free
4 Speech Coalition and in Stevens, where the
5 inquiry is simply does the statute -- even if
6 you narrowly construe it, does the statute reach
7 protected speech that people engage in? Is it
8 realistic speech that they engage in every day
9 frequently?

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

18 Similarly, in Free Speech Coalition,
19 this Court looked at the fact that mainstream
20 movies such as "Romeo and Juliet" or "American
21 Beauty" might fall within the terms of the
22 statute, and it didn't attempt to quantify
23 examples of mainstream movies vis-à-vis actual
24 --

25 JUSTICE KAGAN: Mr. --

1 MS. BHANDARI: -- child pornography.

2 JUSTICE KAGAN: -- Mr. Fletcher points
3 out that this statute has been with us a long
4 time and we've just never seen such prosecutions
5 or, at most, just a handful of cases.

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

9 MS. BHANDARI: Two responses, Justice
10 Kagan. First, prosecutions are not necessary.
11 In Stevens and in Free Speech Coalition, this
12 Court didn't require actual prosecutions of
13 protected speech.

14 And in Stevens, this Court invalidated
15 that law 11 years after it had been passed. So
16 that law had been on the books for a while. In
17 Free Speech Coalition, it had been at least five
18 years. In Virginia v. Black, the plurality
19 opinion holding that statute overbroad, that law
20 had been on the books for 35 years.

21 So the length of time and the lack of
22 prosecutions isn't the inquiry because, on a
23 facial challenge, the facial validity of a law
24 does not depend on the government's
25 prosecutorial choices.

1 JUSTICE KAGAN: Well, doesn't the
2 prosecutorial choice have something to do with
3 what kinds of activity the law chills?

4 MS. BHANDARI: Even if you look at the
5 prosecutorial activities relevant to that, I
6 think there's realistic danger of chill here
7 just from the fact that the government in recent
8 years has invoked Section 1324 in investigative
9 activities, as the amicus brief from the
10 Reporters Committee for Freedom of the Press
11 noted. The government doesn't treat Section
12 1324 as a dead letter. It's still available to
13 open investigations even if they never charge
14 someone. The City and States' amicus brief
15 notes that they have to certify compliance with
16 1324 to receive funding in certain instances.

17 But, finally, I would just point to
18 the government's ever-changing positions on what
19 the statute means as presenting a chilling
20 effect to the public.

21 JUSTICE BARRETT: But -- but, in
22 addition, just to follow up on Justice Kagan's
23 point, in addition to prosecutions, we also have
24 a record of activity not being chilled. I mean,
25 no one's pointed out that there are charitable

1 organizations, to use Justice Kavanaugh's
2 hypothetical, that are not giving food and
3 shelter and resources or that lawyers are afraid
4 to give advice. I mean, the statute's been on
5 the books for a long time, and there might --
6 there's an absence of prosecutions. There is
7 also an absence of demonstrated chilling effect.

8 MS. BHANDARI: This Court has never
9 required a demonstrated chilling effect. Again,
10 in Stevens and Free Speech Coalition, this Court
11 didn't say the fact that mainstream movies were
12 out there, the fact that hunting videos were out
13 there was proof that nobody was chilled because
14 the -- the overbreadth doctrine is concerned
15 with two main things: one, the chill on people
16 who would conform their behavior to the letter
17 of the law, and that behavior isn't visible to
18 this Court, the people who are not speaking.

19 And, second, it gives an incentive to
20 Congress to craft narrow laws. So, for example,
21 if Congress made it a felony to criticize the
22 president and only ever prosecuted people who
23 engaged in constitutionally unprotected true
24 threats, that law could then be immunized from
25 challenge if -- if the government could come in

1 and say, no, no, no, this person engaged in true
2 threats, even though all the jury had to find
3 was did you criticize the president --

4 JUSTICE GORSUCH: Well --

5 MS. BHANDARI: -- yes or no.

6 JUSTICE GORSUCH: -- it is a little
7 awkward, though, that this case comes up in a
8 posture with Mr. Hansen, who I don't think
9 anybody could say he's been chilled from
10 speaking. I mean, he's had no problem
11 soliciting people here in this country and --
12 and defrauding them to the tune of lots and lots
13 of money.

14 I mean -- I mean, he is -- he has
15 victimized these people and may be a poster
16 child for a situation in which the underlying
17 offense might be modest, but you might want to
18 criminalize it because he's taking advantage of
19 very vulnerable people. And -- and it just
20 seems awkward that we're in -- in a posture
21 where we're asserting third-party rights of
22 really hypothetical situations without an
23 example.

24 MS. BHANDARI: In this case, Mr.
25 Hansen is asserting his own legal rights. I

1 want to be very clear.

2 JUSTICE GORSUCH: Is he -- is -- how
3 is he being affected? How are his speech rights
4 being affected?

5 MS. BHANDARI: Mr. Hansen, as a
6 defendant, he is entitled to have the government
7 prove facts or elements that would make out
8 speech that is constitutionally unprotected, and
9 that did not happen here.

10 So we -- we don't disagree that he
11 victimized many people and, for that, he was
12 convicted under fraud counts and -- and received
13 20 years, and none of those will be disturbed
14 here.

15 But, under the encouragement
16 provision, the government did not have to prove
17 that he lied to anyone, that he deceived anyone,
18 that he engaged in any false speech. All they
19 had to show was that he encouraged or induced
20 people. No mens rea requirement. No intent.

21 JUSTICE GORSUCH: Well, that's going
22 to be -- the government concedes that that has
23 to be resolved on remand, and it seems highly
24 unlikely that he's going to prevail under that
25 standard on remand. I think we'd agree on that.

1 I mean, he -- he had every intent in the world
2 to keep these people here to -- to -- to -- to
3 take their money with no prospect they'd ever
4 actually seek -- obtain any kind of relief. And
5 that's what -- those are the facts.

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

10 MS. BHANDARI: I would argue that if
11 you were reconsidering overbreadth doctrine,
12 this wouldn't be the case in which to do this
13 because the government secures convictions under
14 the broad terms of the statute. That goes to
15 the chilling effect.

16 The broad terms of the statute that
17 are on the books, which the government uses to
18 secure convictions, that in and of itself is
19 enough to tell the public that if I engage in
20 any conduct that the government doesn't like,
21 even if it doesn't amount to solicitation or
22 aiding and abetting with all of the many
23 requirements that the government says should be
24 read in, it won't matter because I could be
25 convicted by this jury.

1 JUSTICE JACKSON: And, in fact, that
2 happened in this very case, right? I mean,
3 didn't the government object to narrow
4 instructions that would have tailored this to
5 the kinds of things the government is saying
6 right now?

7 MS. BHANDARI: That is correct. The
8 government --

9 JUSTICE JACKSON: So, in open court,
10 with respect to this particular defendant, the
11 government said, no, no, the statute is really
12 broad and it covers all this kind of conduct,
13 did they not?

14 MS. BHANDARI: That is correct. The
15 government objected to those very elements in
16 this case, in Sineneng-Smith in the district
17 court, and in the Tenth Circuit case of --

18 CHIEF JUSTICE ROBERTS: Do you
19 disagree -- do you disagree with Mr. Fletcher
20 that they never brought such a prosecution?

21 MS. BHANDARI: I don't disagree that
22 they haven't brought such a prosecution. What I
23 submit is that that's not relevant to the
24 overbreadth analysis because the government, you
25 know, has many other tools to threaten

1 invocation of Section 1324 as it has done, as
2 the amici have pointed out, and mainly because
3 in a facial challenge, the government's choice
4 not to prosecute to the full extent is not
5 relevant, just as in Stevens it was not relevant
6 that the -- the government essentially had
7 promised never use -- to use the statute that
8 way.

9 I do want to go back to, Justice
10 Gorsuch, your question about this particular
11 defendant and his conduct.

12 In R.A.V. v. St. Paul, the -- the
13 opinion for the Court noted that just because
14 someone engages in conduct that could be
15 regulated in one way doesn't mean that the
16 government can regulate it in another way that
17 violates the First Amendment.

18 So there you had a defendant who
19 burned a cross in a family's yard, and Justice
20 Scalia's opinion for the Court noted that arson
21 laws, property damage laws could have gotten
22 that defendant's behavior, but that didn't mean
23 the application of a viewpoint discriminatory
24 law was permissible with respect to him.

25 JUSTICE GORSUCH: I -- I -- I totally

1 accept that, and I totally accept as well your
2 -- your point, your good point, that -- that if
3 -- even under the government's view a remand is
4 going to be required, and you'll have an
5 opportunity to make arguments. How successful
6 they will be is an interesting question.

7 But, in an overbreadth challenge,
8 isn't it surely relevant that your client's not
9 likely to benefit from whatever we do? And, as
10 the Chief Justice just pointed out, there's
11 never been a prosecution of some of these
12 hypotheticals we've been discussing, and the
13 book -- the -- the law has been on the books for
14 70 years.

15 I mean, it is an extraordinary thing
16 for this Court to grant third-party standing,
17 which is effectively what we're being asked to
18 do here. Why would we do it in this -- under --
19 under those circumstances, when an as-applied
20 challenge would always be available should the
21 government -- because I don't take them at their
22 word either, okay? But should they ever go
23 after somebody who actually meets one of these
24 hypotheticals that have been very interesting
25 this morning, they would have a good First

1 Amendment defense.

2 MS. BHANDARI: Justice Gorsuch, I -- I
3 would note the law in its current form has only
4 been on the books since 1986, absent the mens
5 rea requirement. And the government secures
6 convictions, as it did in this case, without
7 showing any of the elements that would make
8 someone's speech unprotected.

9 So I understand that, you know, Mr.
10 Hansen's behavior was not commendable here, but
11 the government didn't have to prove any of the
12 narrowing elements that would make the statute
13 permissible. And so I think that is one reason
14 that this Court should make sure that this law
15 doesn't in the future chill those, you know, who
16 have engaged in the type of speech that Justice
17 Kagan mentioned.

18 JUSTICE JACKSON: And isn't it
19 possible to really figure out how many people
20 have been chilled? I mean, I guess I'm trying
21 to understand how it would work if we didn't
22 have some sort of an overbreadth argument,
23 because, on the one hand, you can look at the
24 situation and you can say the government has
25 never charged any of these people who are

1 actually doing this, but we don't know -- by
2 "this," I mean, for example, Justice Kavanaugh's
3 example of, you know, helping -- helping
4 noncitizens by giving them food and water.
5 Fine. The government has never charged any, but
6 we don't know how many other people would have
7 engaged in that kind of, you know, speech and --
8 and action if it weren't for this law.

9 So it's really hard to know, I think,
10 by looking only at what the government has done,
11 who is being prevented from engaging in First
12 Amendment activity.

13 MS. BHANDARI: That is correct. And
14 that is one of the overriding concerns of
15 overbreadth doctrine, again, is the concern with
16 people who are silent and whose silence is not
17 visible to the Court. But --

18 JUSTICE GORSUCH: And we --

19 MS. BHANDARI: -- I'll --

20 JUSTICE GORSUCH: -- and we have no
21 record of that here either. We're just -- we're
22 just coming up with hypotheticals, right?

23 MS. BHANDARI: Well, what we have
24 is --

25 JUSTICE GORSUCH: There's no record of

1 -- of people coming into court and a factual
2 finding in district court on -- on who has been
3 chilled and how. I mean, that could have
4 happened, but we don't have that here.

5 MS. BHANDARI: Justice Gorsuch, I
6 don't think that would be likely to happen in a
7 criminal case like this. Perhaps in a
8 pre-enforcement challenge. But I also note that
9 the amici -- the AL amicus brief noting lawyers
10 have said that lawyers, immigration lawyers, are
11 watching this case very closely and already
12 starting to advise each other on how they may
13 have to curtail the advice that they give to
14 their clients.

15 I also want to emphasize that the
16 government hasn't made very clear the
17 distinction between solicitation and aiding and
18 abetting. It seemed to conflate those points.

19 Aiding and abetting requires that the
20 principle complete the underlying act. I'm not
21 sure if the government is saying that that is
22 required here, because solicitation does not
23 require that.

24 The government's also not explained
25 whether "encourage" means solicitation and

1 "induce" means aiding and abetting or vice
2 versa, which of these words apply to which
3 concept.

4 "Solicitation" and "aiding and
5 abetting" aren't the same. They have different
6 elements. And the government hasn't explained
7 how this Court could clearly write in those
8 elements in a way that would tell the lawyer or
9 the community activists advising people what
10 their rights are under the law, whether they can
11 remain in the country.

12 And when the stakes of getting it
13 wrong are felony prosecution and five years'
14 imprisonment, people are not going to go
15 anywhere close to the line --

16 JUSTICE KAVANAUGH: I thought the --

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

18 JUSTICE KAVANAUGH: -- I thought the
19 government was saying that both solicitation and
20 aiding and abetting were coming in and that the
21 elements of the two offenses would be the
22 traditional elements, both of which require
23 intent.

24 MS. BHANDARI: I agree that both of
25 them require intent, but the government has at

1 various times suggested that you need an act,
2 which I agree is true for aiding and abetting
3 but for solicitation isn't necessarily true.

4 So you're reaching pure speech on the
5 hypothetical of someone simply saying come to my
6 food pantry. Not engaging in the conduct of
7 actually giving food, just saying come to my
8 food pantry, it's open to anyone who's
9 undocumented, would that constitute solicitation
10 to remain in the country, or someone who runs a
11 domestic violence shelter, for example, telling
12 people who come, knowing that they're
13 undocumented, stay here, it's a safe place,
14 you're welcome here, and we don't want you to
15 leave here where you're safe.

16 It -- it's critical that a statute
17 that hits on speech draw clear lines when felony
18 prosecution is at stake. Congress did not do
19 that here. And Congress could do so if this
20 Court were to hold that this law simply doesn't
21 say what the government says, and Congress then
22 remains free to draft the narrow
23 aiding-and-abetting or solicitation law if it
24 wishes to.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito, anything further?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: Yes. I -- I think
6 you maybe gave up a little bit too much when you
7 were talking about answering Justice Alito's
8 questions and Justice Gorsuch, that there might
9 be cases where Congress could criminalize a
10 civil violation.

11 Did I understand you to say, once you
12 give that up, then this is okay because they can
13 criminalize all civil violations?

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

16 JUSTICE SOTOMAYOR: I -- I would like
17 to know where to draw that line.

18 MS. BHANDARI: It --

19 JUSTICE SOTOMAYOR: I -- I find it
20 hard to borrow concepts of "aiding and abetting"
21 or "solicitation" because, by definition, both
22 of those concepts, as we have traditionally had
23 them in the criminal law, require a criminal act
24 by the perpetrator. There has to be an act done
25 by the perpetrator. You have to solicit a

1 crime.

2 We've never had a crime defining
3 solicitation of a civil violation, correct?

4 MS. BHANDARI: That is correct. This
5 Court has never upheld a criminal solicitation
6 law directed at a civil crime.

7 JUSTICE SOTOMAYOR: Now too much,
8 never done it, and, in fact, all of the
9 solicitation and aiding-and-abetting crimes,
10 generally, the punishment is less than the
11 completed act, correct?

12 MS. BHANDARI: That's correct.

13 JUSTICE SOTOMAYOR: Perpetrators are
14 treated more -- the perpetrators of the crime
15 are treated more harshly, and solicitation, it's
16 still not -- the punishment has never been as
17 great as the completed crime. You don't get
18 punished for soliciting -- soliciting arson
19 and get treated as harshly as the arsonist.

20 MS. BHANDARI: I -- I think -- yes. I
21 want to be very clear about our position, which
22 is that solicitation, criminal solicitation
23 laws, when they are directed at civil conduct,
24 are not categorically unprotected under the
25 First Amendment.

1 JUSTICE SOTOMAYOR: All right. So
2 let's go, because -- let's go there, because
3 when are they not categorically protected? When
4 are they categorically protected? I want to
5 know what the difference is, why this one is not
6 protected and others might be.

7 MS. BHANDARI: I think that if you had
8 a law criminalizing solicitation of certain
9 civil violations, you would subject it to strict
10 scrutiny and it would then be a case-by-case
11 analysis.

12 I don't think the government has even
13 attempted to argue in this case that this law
14 would satisfy strict scrutiny with respect to
15 civil violations. That -- that argument has not
16 been on the table.

17 But I -- I say that only to show that
18 when it comes --

19 JUSTICE SOTOMAYOR: But what would
20 qualify? What -- you -- you admitted that a --
21 inducing a person of lesser mental ability to
22 prostitution would probably fall into it.

23 MS. BHANDARI: Yes. I think you could
24 see a spectrum of laws. Again, it's the normal
25 First Amendment scrutiny. So where the

1 government has a compelling interest and, of
2 course, narrowly tailors its law and has no
3 alternative to get at that conduct other than
4 criminalizing speech, it might satisfy it.

5 But, on the other end of the spectrum,
6 if a municipality decided to make it a crime to
7 solicit parking violations because everyone in
8 town is just violating the parking violations
9 and paying the fee and so it's decided to make
10 it a crime to solicit that, I don't think that
11 that speech is categorically unprotected under
12 the First Amendment and probably wouldn't
13 satisfy heightened First Amendment scrutiny.

14 JUSTICE SOTOMAYOR: So now let's go to
15 why not having an example of a generalized --
16 more examples of prosecutions, the Henderson
17 everybody keeps forgetting, but there's at least
18 one prosecution in -- under the 1986 statute.

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

21 MS. BHANDARI: It's not relevant that
22 the government has chosen not to file actual
23 prosecutions of protected speech. That's never
24 been required by this Court for First Amendment
25 overbreadth analysis, again, for good reason,

1 because a law, if it's facially reaching
2 protected speech, does not become more or less
3 constitutional depending on the government's
4 prosecutorial choices.

5 It's also relevant, however, that the
6 government has ways of chilling speech simply by
7 having the law on the books without filing
8 actual prosecutions.

9 So, for example, when it opens
10 investigations into people and invokes Section
11 1324, as has happened with journalists, perhaps
12 it might be --

13 JUSTICE SOTOMAYOR: What happened with
14 Customs patrol.

15 MS. BHANDARI: With -- with the U.S.
16 Customs and Border Protection, yes. And --

17 JUSTICE SOTOMAYOR: And Congress did
18 subpoenas too.

19 MS. BHANDARI: That is correct. And
20 also when it asks cities and states to certify
21 compliance with Section 1324 to receive federal
22 funding, which, of course, could chill those
23 city and state officials from even coming close
24 to the line of violating the encouragement
25 provision for fear of losing that funding.

1 So there are many aspects beyond
2 simple prosecutions that can chill speech, and
3 -- and the government has certainly used some of
4 those tools in the last five years even.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 Justice Gorsuch?

8 Justice Barrett?

9 Justice Jackson?

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

23 MS. BHANDARI: That is correct,
24 Justice Jackson. The government hasn't
25 specifically delineated which one would apply in

1 any particular case. It simply says both. But
2 there are different elements to them.

3 That's why Congress has two separate
4 provisions, 18 U.S.C. 373, which is a
5 solicitation provision, and 18 U.S.C.,
6 subsection 2, which is an aiding-and-abetting
7 provision.

8 In this --

9 JUSTICE JACKSON: This is not a First
10 Amendment argument, but it still could -- it's
11 something problematic, I think, perhaps about
12 the government's intention of importing both of
13 those concepts wordlessly, silently, into this
14 statute.

15 MS. BHANDARI: It goes to
16 congressional intent and what the text says.

17 So Congress has at various times used
18 "induce" along with "solicit," as it did in 373.
19 At other times, it used "induce" along with "aid
20 and abet," as it did in subsection 2.

21 Now the government doesn't explain
22 here why Congress would not have used "aiding
23 and abetting" and "solicitation" along with
24 "induce" when it previously has used "induce"
25 with those other verbs, and it also doesn't

1 explain why Congress would have mashed up both
2 concepts of "solicitation" and "aiding and
3 abetting" in one statute when they have
4 different elements.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Rebuttal, Mr. Fletcher?

9 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

10 ON BEHALF OF THE PETITIONER

11 MR. FLETCHER: Thank you, Mr. Chief
12 Justice.

13 I'd just like to say a word about what
14 the statute means, a word about the
15 criminal/civil distinction, and then close with
16 a word or two about overbreadth.

17 So, first of all, about what the
18 statute means. I understand their position to
19 be that until 1952, this was a permissible
20 statute because it had other words in it, but in
21 1952, Congress turned it into a prohibition on
22 speech. And I think that's a pretty
23 extraordinary thing for Congress to have done,
24 and the Court should demand a pretty
25 extraordinary showing before assuming that

1 Congress did it, and I just haven't heard such a
2 showing made.

3 What I've heard is Congress took out
4 some words. And that's true, but the words it
5 left in had the same meaning and the words it
6 left in were the words this Court had just used
7 to summarize the previous statute.

8 I heard that it took out the mens rea
9 requirement in 1986. But that's not quite
10 right. It tailored the mens rea that the
11 offender has to know about the noncitizen's
12 status, knowing or in reckless disregard, but it
13 left in the words "induce" or "encourage." And
14 those are words that we think inherently carry a
15 mens rea requirement.

16 That's what Judge Hand said in Peoni
17 when he was interpreting the words of 18 U.S.C.
18 2, words like "induce," "aid and abet" carry an
19 implication of purpose. We think they still
20 carry that implication here.

21 And, finally, I heard that there's no
22 other statute that looks like this. And that's
23 just not quite right. You know, the -- the
24 provision of the National Labor Relations Act
25 that was at issue in the electrical workers case

1 that we cite at page 32 of our brief prohibited
2 inducing and encouraging a secondary boycott.
3 And this Court upheld that against a
4 constitutional challenge.

5 The Mann Act, 18 U.S.C. 2422(a)
6 prohibits persuading, inducing, enticing, or
7 coercing an individual to travel in interstate
8 commerce to engage in prostitution. These are
9 -- this is not an unusual way to convey these
10 ideas.

11 Now I'd like to turn to the civil or
12 criminal distinction, which I understand to be
13 their fallback argument, essentially, to say
14 that even if you construe the statute the way we
15 construe it, they still think it's overbroad
16 because it covers soliciting or facilitating
17 civil violations.

18 As Justice Gorsuch said, I think
19 there's a real question whether even if they're
20 right that there's constitutional questions
21 about soliciting or facilitating civil conduct,
22 whether that meets the high threshold for
23 overbreadth.

24 But I think more fundamentally they're
25 not right about that. This Court has said in

1 cases like Pittsburgh Press and Gazzam and
2 Williams that soliciting or inducing illegal
3 activities, even if they're only civilly
4 illegal, are not protected by the First
5 Amendment.

6 And I don't really hear them to be
7 contesting that. Instead, they want a special
8 rule. They want to say it's okay to civilly
9 regulate that kind of solicitation and
10 facilitation, but you can't criminally punish
11 it.

12 And that sort of mismatch is just not
13 something that I know of any analog in this
14 Court's First Amendment jurisprudence. What
15 this Court has always said before is that there
16 are certain categories of speech that are
17 unprotected, and we think this is one of them.

18 Now I take the point that it's unusual
19 to punish the speech or the conduct that
20 solicits or facilitates a underlying activity
21 more stiffly than the activity, but that's not a
22 First Amendment rule. That's a legislative
23 judgment about culpability.

24 Usually, we think that people who
25 solicit or facilitate unlawful activity share

1 the same culpability as the person who commits
2 that activity, but not always, as Justice Alito
3 and I discussed, and not here.

4 And the judgment that Congress made
5 here is that when someone solicits or
6 facilitates immigration violations, they are
7 deserving of more punishment than the
8 noncitizens, who are already subject to removal.

9 We think that's a reasonable judgment.
10 And within the contours of that judgment, I
11 think it's important to emphasize that Congress
12 treated speech and conduct exactly the same.
13 Whether solicitation or facilitation takes the
14 form of speech or takes the form of conduct,
15 this statute treats it identically, and so I
16 don't think it has the effect of treating speech
17 worse than conduct that my colleague describes.

18 Finally, just to say a word about
19 overbreadth. You know, we've talked about the
20 difficulties of overbreadth analysis, what an
21 extraordinary thing it is, how cautious the
22 Court has been about it. And I think it's just
23 worth underscoring all of the different ways in
24 which Respondent and the Ninth Circuit are
25 trying to stretch overbreadth doctrine.

1 This Court has said that limiting
2 constructions are especially important in
3 overbreadth cases, but they ask you to bypass a
4 limiting construction.

5 The Court has said that we are in
6 realistic danger of prosecution, but they're
7 asking you to find the statute overbroad, even
8 though we don't have any history of either
9 prosecution or of chilling.

10 And the Court said in Hicks that
11 rarely if ever will a statute be overbroad when
12 it aims at conduct and not primarily at speech
13 or at inherently expressive conduct. But this
14 is a statute that we know from 70 years aims
15 primarily at conduct, even if you thought it
16 also may sweep in some speech.

17 It would really be extraordinary, I
18 think, to say that the statute can't be used to
19 prosecute schemes like Mr. Hansen's and all of
20 the other schemes that it has been used to
21 prosecute over the last 70 years.

22 We'd ask the Court to reverse.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

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