No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HELAMAN HANSEN

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal criminal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional on First Amendment overbreadth grounds.

RELATED PROCEEDINGS

United States District Court (E.D. Cal.):

United States v. *Hansen*, No. 16-cr-24 (Dec. 14, 2017)

United States Court of Appeals (9th Cir.):

United States v. *Hansen*, No. 17-10548 (Feb. 10, 2022)

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 25 F.4th 1103. An accompanying memorandum disposition (App., *infra*, 15a-19a) is not published in the Federal Reporter but is available at 2022 WL 424827. The order of the en banc court denying rehearing and opinions respecting that order (App., *infra*, 28a-80a) are reported at 40 F.4th 1049. The oral order of the district court (App., *infra*, 27a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2022. A petition for rehearing was denied

on July 25, 2022 (App., *infra*, 28a-29a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1324(a)(1) of Title 8 of the United States Code provides in pertinent part:

> (A) Any person who—
>
> (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;
>
> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

* * * * *

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 103a-109a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, respondent was convicted on two counts of encouraging or inducing unlawful immigration for private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i); 12 counts of mail fraud, in violation of 18 U.S.C. 1341; and three counts of wire fraud, in violation of 18 U.S.C. 1343. App., *infra*, 21a, 81a. The district court sentenced respondent to 240 months of imprisonment, to be followed by two years of supervised release. *Id.* at 83a, 85a. The court of appeals vacated respondent's inducement convictions, affirmed in all other respects, and remanded for resentencing. *Id.* at 1a-14a.

1. From 2012 to 2016, respondent deceptively promised hundreds of noncitizens a false pathway to citizenship, in which they would unlawfully come to or remain in the United States and pay him extensive fees. App., *infra*, 2a-3a.[*] Specifically, respondent operated a program that "purported to help undocumented immigrants become U.S. citizens through adult adoption," which he persuaded at least 471 noncitizen victims to join. *Id.* at 2a.

Although respondent knew that the adult adoptions that he touted would not lead to U.S. citizenship and that "no one had achieved U.S. citizenship" through his program, he charged his victims up to $10,000 to pursue the false hope of that outcome. App., *infra*, 2a-3a; see Gov't C.A. Br. 5. Respondent's victims included both noncitizens already in the United States on visas, whom he induced to remain in the country unlawfully, and

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[*] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

noncitizens abroad, whom he induced to travel to and reside in the United States unlawfully to participate in his adoption scheme. Gov't C.A. Br. 17. For example, he falsely led two noncitizens to believe that remaining in the United States beyond their authorized period of stay was not a problem so long as they continued to participate in his program—and continued to pay him fees—telling one that "[i]mmigration cannot touch you." *Id.* at 19 (citation omitted).

2. In 2017, a grand jury in the Eastern District of California charged respondent with two counts of encouraging or inducing unlawful immigration for private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i)—one for each of the two noncitizens described above, who were identified by name in the indictment—as well as 12 counts of mail fraud, in violation of 18 U.S.C. 1341, and three counts of wire fraud, in violation of 18 U.S.C. 1343. Superseding Indictment 1-13; see Gov't C.A. Br. 37 n.4 (noting government's dismissal of one mail-fraud count during trial).

Section 1324(a)(1)(A)(iv) makes it unlawful to "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." 8 U.S.C. 1324(a)(1)(A)(iv). A violation of Section 1324(a)(1)(A)(iv) carries a maximum term of imprisonment of five years "for each alien in respect to whom such a violation occurs." 8 U.S.C. 1324(a)(1)(B); see 8 U.S.C. 1324(a)(1)(B)(ii). If the violation is committed "for the purpose of commercial advantage or private financial gain," however, the statute specifies an enhanced penalty of up to ten years of imprisonment. 8 U.S.C. 1324(a)(1)(B)(i).

Respondent's case proceeded to trial, and a jury found respondent guilty on all of the counts submitted to it, including the two charges of violating 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i). App., *infra*, 81a-82a. The jury's verdict included a specific finding that each of respondent's Section 1324(a) violations "was done for the purpose of private financial gain." Verdict Form 5 (Counts 17 and 18).

3. Respondent's prosecution in district court was contemporaneous with appellate proceedings in a separate but analogous case, *United States* v. *Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018). Like respondent here, the defendant in *Sineneng-Smith* had been convicted of violating Sections 1324(a)(1)(A)(iv) and (B)(i) for inducing noncitizens to remain in the United States unlawfully based on false promises of services that would lead to citizenship. See *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1577 (2020). She had appealed those convictions, raising (*inter alia*) a limited set of constitutional claims. See *id.* at 1580.

While respondent here was awaiting sentencing, the court of appeals issued an order in *Sineneng-Smith* inviting selected amici to brief and argue various constitutional challenges to Section 1324(a)(1)(A)(iv) that the defendant in that case had not raised, including an argument that the statute is facially invalid under the First Amendment overbreadth doctrine. See *Sineneng-Smith*, 140 S. Ct. at 1580-1581 (procedural history). The court of appeals' *sua sponte* amicus invitation in *Sineneng-Smith* prompted respondent to file a post-trial motion in this case seeking to dismiss his own Section 1324(a) convictions on various constitutional theories, including that "Subsection (iv) is unconstitutionally

overbroad." D. Ct. Doc. 165, at 3 (Nov. 9, 2017) (capitalization altered; emphasis omitted); see *id.* at 2.

At sentencing, the district court orally denied respondent's motion to dismiss. App., *infra*, 27a. The court then sentenced respondent to 240 months of imprisonment, to be followed by two years of supervised release. *Id.* at 83a, 85a.

4. In his opening brief on appeal, respondent reasserted the overbreadth challenge to Section 1324(a)(1)(A)(iv) that he had raised following the court of appeals' solicitation of briefing on that issue in *Sineneng-Smith*. Resp. C.A. Br. 44-46. On the government's motion, the court stayed respondent's appeal pending the resolution of *Sineneng-Smith*. C.A. Order 1 (Nov. 20, 2018); see C.A. Order 1 (June 12, 2019); Gov't C.A. Stay Mot. 1-2 (Nov. 9, 2018).

The court of appeals subsequently issued a published opinion in *Sineneng-Smith* in which it adopted the overbreadth argument that it had solicited amici to present, holding that Section 1324(a)(1)(A)(iv) is "unconstitutionally overbroad in violation of the First Amendment." 910 F.3d at 467-468. This Court then granted the government's petition for a writ of certiorari to review whether the statute is "unconstitutionally overbroad." 140 S. Ct. at 1578. The Court did not, however, ultimately reach that issue in *Sineneng-Smith*. See *ibid.* The Court instead vacated and remanded on the alternative ground that, in reaching out to invalidate a federal statute on the basis of constitutional arguments that the defendant had not herself initially pursued, the *Sineneng-Smith* "appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion." *Ibid.*

The Court emphasized in *Sineneng-Smith* that "invalidation for First Amendment overbreadth is 'strong medicine' that is not to be 'casually employed.'" 140 S. Ct. at 1581 (brackets and citations omitted). And the Court remanded for the appeal to be reconsidered "shorn of the overbreadth inquiry interjected by the appellate panel." *Id.* at 1582. The remand resulted in affirmance of Sineneng-Smith's convictions. See *United States* v. *Sineneng-Smith*, 982 F.3d 766, 770 (9th Cir. 2020), cert. denied, 142 S. Ct. 117 (2021).

5. After its decision on remand in *Sineneng-Smith*, the court of appeals lifted the stay in this case and subsequently issued a published opinion, in which it again held that Section 1324(a)(1)(A)(iv) is facially "overbroad and unconstitutional." App., *infra*, 13a-14a. Thus, although it affirmed in all other respects, the panel vacated respondent's Section 1324(a) convictions and remanded for resentencing. *Id.* at 1a-19a.

In once again invalidating Section 1324(a)(1)(A)(iv), the court of appeals acknowledged that this Court had vacated the first *Sineneng-Smith* panel opinion, but it nonetheless "conclude[d] that much of [the *Sineneng-Smith* panel opinion's] thorough analysis" remained "persuasive on the overbreadth issue." App., *infra*, 5a. The panel here therefore largely adopted the reasoning of the vacated *Sineneng-Smith* opinion, while "add[ing] [its] thoughts" endorsing the same "conclusion of overbreadth." *Ibid.*

The court of appeals declined to interpret Section 1324(a)(1)(A)(iv) as a conventional prohibition on the facilitation or solicitation of unlawful conduct that would implicate only speech categorically not protected by the First Amendment. See App., *infra*, 9a-10a; see also Gov't C.A. Br. 63-91; cf. *Sineneng-Smith*, 140 S. Ct. at

1581 n.6. The panel considered such an interpretation to be "not supported by the statutory text," App., *infra*, 9a, and instead construed Section 1324(a)(1)(A)(iv) to criminalize a broad swath of "protected speech," citing many of the hypothetical scenarios on which the vacated *Sineneng-Smith* decision had relied, *id.* at 11a.

The panel acknowledged that Section 1324(a)(1)(A)(iv) has been applied in prior prosecutions to conduct that Congress may proscribe—such as "procuring and providing fraudulent documents and identification information to unlawfully present aliens, assisting in unlawful entry, [and] misleadingly luring aliens into the country for unlawful work." App., *infra*, 10a. But based largely on the view that the provision criminalizes such activities as "telling an undocumented immigrant 'I encourage you to reside in the United States,'" or "encouraging an undocumented immigrant to take shelter during a natural disaster," the panel deemed Section 1324(a)(1)(A)(iv)'s "plainly legitimate sweep" to be "narrow" and to "pale[] in comparison to the amount of protected expression" that it purportedly encompasses. *Id.* at 11a-12a. The panel did not, however, suggest that respondent's own case had resulted in a conviction based on protected speech, nor did it identify any example of an actual prosecution that had.

The panel rejected any application of the canon of constitutional avoidance, asserting that "the plain meaning of subsection (iv) does not permit [its] application." App., *infra*, 12a. In addition, although respondent was convicted of the enhanced version of the offense, with a specific jury finding that he acted "for the purpose of * * * private financial gain," 8 U.S.C. 1324(a)(1)(B)(i), the panel did not discuss either that

element or any of the other mental-state elements of the offense.

6. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 28a-29a. Judge Gould filed a concurrence in the order denying rehearing, defending the reasoning of the panel opinion that he had authored. *Id.* at 29a-44a.

Judge Bumatay, joined in whole or part by seven other judges, dissented from the denial of rehearing. App., *infra*, 44a-78a. Those dissenting judges found Section 1324(a)(1)(A)(iv) "perfectly consistent with the First Amendment," because its "text, history, and structure" illustrate that it "prohibits only criminal solicitation and aiding and abetting" of unlawful immigration activity. *Id.* at 44a, 46a. The dissenting opinion observed that "[f]or centuries, the terms 'encouraging' and 'inducing' have been recognized in criminal law as referring to complicity in the commission of a crime," *id.* at 47a, and that Congress had "enacted the provision against the backdrop of those words having settled meanings," *id.* at 53a; see *id.* at 54a-63a (reviewing history). And the dissenting opinion explained that the statute, properly understood as targeting the solicitation and facilitation of unlawful immigration, does not criminalize "any—let alone a substantial amount of—protected speech." *Id.* at 77a. The dissenting opinion criticized the court of appeals for triggering the "nuclear option" of facial overbreadth invalidation, *id.* at 45a, failing "to respect the constitutional avoidance canon," *id.* at 48a, and "seemingly invent[ing] the opposite principle—let's call it the 'constitutional collision canon'—*stretching* the law to ensure that it violates the Constitution," *ibid.*

Judge Collins wrote separately to dissent for "reasons similar to those recounted in Judge Bumatay's dissent," which he did not formally join. App., *infra*, 78a; see *id.* at 78a-80a. Judge Collins's dissent emphasized, *inter alia*, that facial invalidation is particularly inappropriate in this case because respondent "was convicted of [the] *aggravated* version of the § 1324(a)(1)(A)(iv) offense," requiring an additional mens rea element that "substantially narrows the reach" of the crime. *Id.* at 79a-80a.

REASONS FOR GRANTING THE PETITION

This case presents the same issue of facial statutory constitutionality on which this Court previously granted certiorari in *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020). While the Ninth Circuit's decision here avoids the procedural misstep that obviated review of the issue in *Sineneng-Smith* itself—because the court of appeals' *sua sponte* briefing order there indirectly prompted respondent to himself raise an overbreadth claim here—the decision below readopts *Sineneng-Smith*'s rationales to reach the same result. Again, a panel of the Ninth Circuit has facially invalidated 8 U.S.C. 1324(a)(1)(A)(iv) on overbreadth grounds by giving the statute unwarranted breadth, refusing to accept the narrower and better construction, and disregarding the canon of constitutional avoidance. In doing so, the Ninth Circuit has once again struck down an important Act of Congress on which the government regularly relies to prosecute smuggling and other activities that facilitate unlawful immigration. This Court should again grant the government's petition for a writ of certiorari, resolve the merits issue that the Court did not have occasion to reach in *Sineneng-*

Smith, and allow the government to continue to enforce the statute that Congress enacted.

A. The Ninth Circuit Wrongly Invalidated 8 U.S.C. 1324(a)(1)(A)(iv) In All Its Applications

Like the prior panel in *Sineneng-Smith*, the panel here relied on the overbreadth doctrine—an extraordinary exception to the normal rules favoring as-applied challenges and case-specific standing, see, *e.g.*, *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999)—to declare Section 1324(a)(1)(A)(iv) unconstitutional in all its applications. But that doctrine classifies a law as facially overbroad only if "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quoting *New York* v. *Ferber*, 458 U.S. 747, 770-771 (1982)). That standard is not satisfied here. To the contrary, the statutory text, context, and history all demonstrate that Congress's longstanding prohibition on "encourag[ing]" or "induc[ing]" unlawful immigration activity, 8 U.S.C. 1324(a)(1)(A)(iv), is a conventional prohibition on soliciting or facilitating illegality, a type of prohibition that has never raised First Amendment concerns.

1. Section 1324(a)(1)(A)(iv) is a conventional prohibition on soliciting or facilitating unlawful activity

Because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers," the "first step in overbreadth analysis is to construe the challenged statute." *United States* v. *Williams*, 553 U.S. 285, 293 (2008). Here, respondent was convicted of two violations of the offense defined by Sections 1324(a)(1)(A)(iv) and (B)(i). The statutory text

requires such a conviction to rest on proof that the defendant knowingly "encourage[d] or induce[d]" a particular noncitizen "to come to, enter, or reside in the United States"; knew or acted in reckless disregard that the noncitizen's "coming to, entry, or residence is or will be in violation of law"; and acted "for the purpose of commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i). The statute thus sets forth an "ordinary criminal solicitation and aiding-and-abetting provision," with roots in centuries of established legal usage. App., *infra*, 47a (Bumatay, J., dissenting from the denial of rehearing en banc).

In criminal law, the term "encourage" means to "[t]o instigate; to incite to action; to embolden; [or] to help." *Black's Law Dictionary* 667 (11th ed. 2019) (*Black's*). The term has long been closely associated with the concept of criminal complicity. See *ibid.* (cross-referencing the definition of "aid and abet") (capitalization omitted). For example, the general federal ban on acting as an accomplice forbids a person to "abet[]" the commission of a crime, 18 U.S.C. 2(a), and that term is commonly defined to include "encourag[ing]" the crime's commission, see, *e.g.*, *Black's* 5 (defining "abet" as "[t]o aid, *encourage*, or assist (someone), esp. in the commission of a crime") (emphasis added).

The term "induce" carries a similar contextual connotation. To induce a crime is to "entic[e] or persuad[e] another person" to commit it. *Black's* 926; see *Webster's New World College Dictionary* 742 (5th ed. 2014) (defining "induce" to mean "to lead on to some action" or "to bring on; bring about"). And the term "induce" appears alongside the terms "aid" and "abet" in the federal accomplice-liability statute. See 18 U.S.C. 2(a); see also Gov't Br. at 19-22, *Sineneng-Smith*, *supra* (No. 19-67)

(Gov't *Sineneng-Smith* Br.) (collecting additional examples, including in state statutory definitions of solicitation and accomplice liability).

By using the terms "encourage" and "induce" to define the actus reus of the crime at issue here, Congress carried forward the established criminal-law meanings of those terms. See, *e.g.*, *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'") (citation omitted); cf. App., *infra*, 53a (Bumatay, J., dissenting from the denial of rehearing en banc) (stating that, based on "hundreds of years" of historical usage, "it's clear Congress was targeting" solicitation and facilitation in enacting Section 1324(a)(1)(A)(iv)). The terms were understood to refer to accomplice and solicitation liability when Congress first enacted Section 1324(a)(1)(A)(iv)'s statutory predecessor in the late 1800s, and the statutory history confirms that the terms as used in the statute carried—and continue to carry—their ordinary criminal-law meaning. See Gov't *Sineneng-Smith* Br. 22-24.

The provision's narrow focus on assisting or procuring unlawful immigration is reinforced by its strict mental-state requirements. Although no mens rea language modifies the phrase "encourages or induces," 8 U.S.C. 1324(a)(1)(A)(iv), those words are not naturally read to encompass accidental conduct, and courts have held that proof of general criminal intent is required for the offenses listed in Section 1324(a)(1)(A). See, *e.g.*, *United States* v. *Nguyen*, 73 F.3d 887, 890-893 (9th Cir. 1995); *United States* v. *Zayas-Morales*, 685 F.2d 1272, 1276 (11th Cir. 1982). A conviction under the statute also requires proof that the defendant knew that the particular noncitizen's entry or residence in the United

States would be unlawful or acted "in reckless disregard of [that] fact." 8 U.S.C. 1324(a)(1)(A)(iv). And the enhanced version of the offense for which respondent was convicted requires additional proof that the defendant acted "for the purpose of commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(B)(i).

2. The statute's plainly legitimate sweep far exceeds any hypothetical applications to protected speech

Section 1324(a)(1)(A)(iv)'s "plainly legitimate sweep," *Washington State Grange*, 552 U.S. at 449 n.6 (citation omitted), encompasses a variety of real-world conduct that stimulates unlawful immigration. As the court of appeals acknowledged, Section 1324(a)(1)(A)(iv) "surely * * * encompasses some criminal conduct." App., *infra*, 10a. The provision has been the basis for prosecuting a wide range of activities that have no claim to First Amendment protection, including transportation activities, see, *e.g.*, *United States* v. *Okatan*, 728 F.3d 111, 113-114 (2d Cir. 2013); procuring and supplying fraudulent documents and identification to noncitizens who lack lawful status, see, *e.g.*, *United States* v. *Oloyede*, 982 F.2d 133, 136 (4th Cir. 1993) (per curiam); and providing assistance for unlawful entry, see, *e.g.*, *United States* v. *Castillo-Felix*, 539 F.2d 9, 11 (9th Cir. 1976).

Those prosecutions, along with other actual prosecutions carried out under the statute, see App., *infra*, 75a-76a (Bumatay, J., dissenting from the denial or rehearing en banc) (listing examples), form the core of Section 1324(a)(1)(A)(iv)'s plainly legitimate sweep. All of them—like respondent's own prosecution—are valid under the First Amendment. They illustrate that many Section 1324(a)(1)(A)(iv) prosecutions, such as prosecutions for transportation-related activities, involve only

nonexpressive conduct. And to the extent that Section 1324(a)(1)(A)(iv) prohibits facilitation and solicitation accomplished partially or entirely through speech, it covers only speech that the Court has recognized to be "undeserving of First Amendment protection." *Williams*, 553 U.S. at 298.

This Court has long recognized that speech that constitutes "solicitation to commit a crime," or that is "intended to induce * * * illegal activities," is speech that a legislature may permissibly proscribe. *Williams*, 553 U.S. at 298; see *Fox* v. *Washington*, 236 U.S. 273, 277-278 (1915) (Holmes, J.) (recognizing that legislature could proscribe "encouragements" that amount to accomplice liability); Gov't *Sineneng-Smith* Br. 30-32. More generally, it "has never been deemed an abridgment of freedom of speech * * * to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

As the Court has explained, "the constitutional freedom for speech" does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney*, 336 U.S. at 498. "Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities." *Williams*, 553 U.S. at 298. Such "'prevention and punishment'" of "speech integral to criminal conduct" has "'never been thought to raise any Constitutional problem.'" *United States* v. *Stevens*, 559 U.S. 460, 468-469 (2010) (citation omitted).

Laws against incentivizing or procuring civil immigration violations have a particularly long pedigree. This Court recognized more than a century ago, without discussing the First Amendment, that Congress's power to define the immigration laws goes hand-in-hand with its ability to prohibit encouraging someone to violate those laws. In *Lees* v. *United States*, 150 U.S. 476 (1893), which involved the conviction of two men under a predecessor of Section 1324(a)(1)(A)(iv), the Court explained that because Congress had "the power to exclude" certain noncitizen contract laborers under the civil immigration laws, it had "a right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition." *Id.* at 480; see Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333. That is exactly what the modern Section 1324(a)(1)(A)(iv) does with respect to the modern immigration laws.

***3. The decision below repeats the same statutory and constitutional errors as the vacated panel opinion in* Sineneng-Smith**

The court of appeals' reasons for reading Section 1324(a)(1)(A)(iv) to reach broad swaths of protected speech are just as unsound now as they were in the vacated panel opinion in *Sineneng-Smith*. Here, as there, the Ninth Circuit's overbreadth holding was the product of multiple errors of statutory interpretation and constitutional law.

a. The decision below reflects an unduly expansive construction of Section 1324(a)(1)(A)(iv). Among other flaws, the Ninth Circuit's opinion failed to acknowledge the established criminal-law meanings of the terms "encourage" and "induce," let alone provide any well-founded rationale for concluding that Congress

deviated from those established meanings in Section 1324(a)(1)(A)(iv). See App., *infra*, 6a-7a, 11a. Instead, by "blindly relying on lay-dictionary definitions to reach an overly broad interpretation of the law," *id.* at 47a (Bumatay, J., dissenting from the denial of rehearing en banc), the court of appeals disregarded important contextual and historical evidence demonstrating the statute's more limited reach.

The court of appeals compounded its erroneous reading of the crime's actus reus by disregarding the statute's mens rea requirements. Had the court taken account of those requirements, it would have recognized that many of the fanciful hypotheticals that it deemed to fall within Section 1324(a)(1)(A)(iv), and on which its overbreadth holding relied, are not in fact covered by the provision. For example, someone who "encourag[es] an undocumented immigrant to take shelter during a natural disaster," App., *infra*, 11a, presumably does not first stop to inquire about the person's immigration status, nor would such a hypothetical Good Samaritan be acting for the purpose of "private financial gain," 8 U.S.C. 1324(a)(1)(B)(i).

The court of appeals further erred in refusing to interpret Section 1324(a)(1)(A)(iv) as a prohibition on solicitation or facilitation on the ground that Section 1324(a) contains a separate aiding-and-abetting provision. App., *infra*, 9a-10a. That provision, 8 U.S.C. 1324(a)(1)(A)(v)(II), does not cover solicitation at all, and it only criminalizes "aid[ing] or abet[ting] the commission" of a violation of Section 1324(a) *itself*. Section 1324(a)(1)(A)(v)(II) would therefore, for example, make it a crime to assist another person who in turn induces a noncitizen to enter the United States in violation of Section 1324(a)(1)(A)(iv). Section 1324(a)(1)(A)(iv)

itself does not do that; it is instead a direct prohibition on aiding or abetting—or soliciting—an underlying violation of the immigration laws. As a result, "there is no surplusage problem," App., *infra*, 69a (Bumatay, J., dissenting from the denial of rehearing en banc), and invalidating Section 1324(a)(1)(A)(iv) creates a significant gap in the statutory scheme. Indeed, no other provision of Section 1324(a) would cover respondent's own actions facilitating and soliciting unlawful immigration.

b. The court of appeals' constitutional analysis was likewise flawed. As this Court emphasized in *Sineneng-Smith*, invalidation of a statute on grounds of First Amendment overbreadth is a "'strong medicine' that is not to be 'casually employed.'" 140 S. Ct. at 1581 (quoting *Williams*, 553 U.S. at 293). But the court of appeals did just that in its subsequent decision here.

This Court has "insisted" that a law not be classified as overbroad, and facially struck down on that basis, unless its "application to protected speech [is] 'substantial,'" both in "an absolute sense" and "relative to the scope of the law's plainly legitimate applications." *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003) (citation omitted); see *Williams*, 553 U.S. at 292. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Instead, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* at 801.

The court of appeals did not identify any such realistic danger here. The panel did not identify a single instance in which Section 1324(a)(1)(A)(iv) has been

applied to protected speech in the many decades since Congress first enacted it. The one case that the panel characterized as "troubling," App., *infra*, 13a, involved a federal immigration official "coaching" a household employee "on how to evade immigration authorities while residing in the country"—and was, in any event, dismissed by the district court. *Id.* at 76a-77a (Bumatay, J., dissenting from the denial of rehearing en banc). Thus, like the vacated panel opinion in *Sineneng-Smith*, the panel opinion here relied solely on hypotheticals, which it drew from the submissions of respondent and his amici rather than actual cases. See *id.* at 11a.

Properly construed, Section 1324(a)(1)(A)(iv) does not reach the kinds of innocent expressions of support for noncitizens that those hypotheticals are designed to implicate. See App., *infra*, 47a (Bumatay, J., dissenting from the denial of rehearing en banc) (observing that "[r]eading the law in its proper light" would "eliminate[] the parade of horribles created by" the panel). And even if the statute could be construed to cover some protected speech, any such applications could be addressed on an as-applied basis, and would not be so absolutely and relatively disproportionate as to warrant invalidating the statute in its entirety—including in its plainly constitutional application to respondent.

c. Finally, the Ninth Circuit erred in refusing to apply the canon of constitutional avoidance to assuage any substantial constitutional concerns that it had. That canon "comes into play" if, after the "application of ordinary textual analysis," a statute is "susceptible of more than one construction." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005). Under the canon, a court is "obligated to construe [a] statute to avoid [constitutional] problems" so long as it is "'fairly possible'" to do so.

INS v. *St. Cyr*, 533 U.S. 289, 300 (2001) (citation omitted).

Here, "[n]ot only is it 'fairly possible' to construe § 1324(a)(1)(A)(iv) as a solicitation and facilitation provision, it's the best reading" in light of "[h]undreds of years of authorities us[ing] 'encourage,' 'induce,' and other near synonyms to define solicitation and facilitation"; the "structure of § 1324(a)(1)(A)"; and "[t]he provision's mens rea requirement, the financial-gain element, and specificity." App., *infra*, 71a (Bumatay, J., dissenting from the denial of rehearing en banc). The court of appeals disregarded those considerations and created a "'constitutional collision'" by "*stretching* the law to ensure that it violate[d] the Constitution." *Id.* at 48a. That is the very "opposite" of what the constitutional-avoidance canon demands. *Ibid.*

B. The Constitutional Validity Of The Statute Is Important And Warrants Review For The Same Reasons As In *Sineneng-Smith*

The Ninth Circuit's renewed facial invalidation of this Act of Congress, which effectively reinstates the vacated panel opinion in *Sineneng-Smith*, once again warrants this Court's review.

This Court has recognized that judging the constitutionality of a federal statute is "the gravest and most delicate duty that th[e] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Accordingly, "when a lower court has invalidated a federal statute," the Court's "usual" approach is to "grant[] certiorari." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019); see, *e.g.*, *United States* v. *Kebodeaux*, 570 U.S. 387, 391 (2013) (certiorari granted "in light of the fact that a Federal Court of Appeals has held

a federal statute unconstitutional"); *United States* v. *Morrison*, 529 U.S. 598, 605 (2000) (similar).

The Court's grant of certiorari in *Sineneng-Smith* was of a piece with numerous recent grants of certiorari to review decisions of lower courts holding federal statutes unconstitutional. See, *e.g.*, *United States* v. *Vaello-Madero*, 141 S. Ct. 1462, 1462 (2021); *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2345-2346 (2020); *Allen* v. *Cooper*, 140 S. Ct. 994, 1000 (2020); *Matal* v. *Tam*, 137 S. Ct. 1744, 1755 (2017); *Zivotofsky* v. *Kerry*, 576 U.S. 1, 9 (2015); *Department of Transp.* v. *Association of Am. R.Rs.*, 575 U.S. 43, 46 (2015). And such review is all the more warranted when a circuit's decision is out of step with the approaches of other circuits, as is the case here. See App., *infra*, 49a (Bumatay, J., dissenting from the denial of rehearing en banc) (stating the Ninth Circuit "now lead[s] a circuit split").

In *DelRio-Mocci* v. *Connolly Properties Inc.*, 672 F.3d 241, cert. denied, 568 U.S. 821 (2012), the Third Circuit interpreted Section 1324(a)(1)(A)(iv) to exclude "general advice" and to require "some affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise might have been," *id.* at 248. In addition, the Fourth Circuit has rejected an overbreadth challenge to Section 1324(a)(1)(A)(iv), albeit in an unpublished decision. See *United States* v. *Tracy*, 456 Fed. Appx. 267, 272 (2011) (per curiam), cert. denied, 566 U.S. 980 (2012). Those decisions are inconsistent with the Ninth Circuit's decision here, as well as with a subsequent decision by a divided panel of the Tenth Circuit, which relied heavily on both the Ninth Circuit's decision here and the vacated decision in

Sineneng-Smith to support a similar overbreadth holding. See *United States* v. *Hernandez-Calvillo*, 39 F.4th 1297, 1303-1307 (10th Cir. 2022); see also *id.* at 1315 n.2 (Baldock, J., dissenting) (observing that the "root of [the majority's] errors" was its reliance "on two questionable cases from the Ninth Circuit").

Unless this Court intervenes now and resolves the question presented, the decision below will continue to be a substantial impediment to the nationwide administration of the immigration laws. As this case itself well illustrates, because overbreadth operates as an exception to the normal rules of standing, *any* defendant can raise an overbreadth challenge in *any* prosecution under Section 1324(a)(1)(A)(iv), even if the defendant's own misconduct is not even arguably protected by the First Amendment. The issue has significant practical importance for federal law enforcement, as Section 1324(a)(1)(A)(iv) is an important tool for combating activities that exacerbate unlawful immigration—including conduct, like respondent's false adoption scheme, that involves victimizing noncitizens who are induced or encouraged to violate federal law for the defendant's financial benefit. And the high volume of immigration-related litigation, including criminal prosecutions, in the Ninth Circuit makes it all the more imperative to review a decision of this magnitude from that court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2022

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-10548
D.C. No. 2:16-cr-00024-MCE-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HELAMAN HANSEN, DEFENDANT-APPELLANT

Argued and Submitted: Nov. 15, 2021
San Francisco, California
Filed: Feb. 10, 2022

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

OPINION

Before: M. MARGARET MCKEOWN and RONALD M. GOULD, Circuit Judges, and JANE A. RESTANI,[*] Judge.

Opinion by Judge GOULD

GOULD, Circuit Judge:

Helaman Hansen ("Hansen") appeals his conviction and 240-month sentence for twelve counts of mail fraud,

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[*] The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

three counts of wire fraud, and two counts of encouraging or inducing illegal immigration for private financial gain. On appeal, he argues that the district court improperly denied his motion to dismiss his convictions for the two counts of encouraging or inducing an alien to reside in the United States for financial gain (Counts 17 and 18) because 8 U.S.C. § 1324(a)(1)(A)(iv) is unconstitutional. We have jurisdiction under 28 U.S.C. § 1291 and hold that § 1324(a)(1)(A)(iv) is facially overbroad.[1]

FACTS AND PROCEDURAL HISTORY

Between at least October 2012 and September 2016, Hansen operated an organization called Americans Helping America Chamber of Commerce ("AHA"). AHA ran a program that purported to help undocumented immigrants become U.S. citizens through adult adoption (the "Program"). Hansen falsely told victims that many immigrants had become U.S. citizens through the Program. However, Hansen admitted to federal agents that no one had achieved U.S. citizenship through the Program, and it is not possible to become a U.S. citizen through adult adoption. Counts 17 and 18 were based on Hansen twice encouraging or inducing victims to overstay their visas.

In Spring 2017, a jury found Hansen guilty of twelve counts of mail fraud, three counts of wire fraud, and two counts of encouraging or inducing unlawful immigration for private financial gain. The trial lasted eleven days and thirty-seven witnesses testified; witnesses included victims, former employees, investigators, and Hansen (who testified twice). At least 471 victims participated

[1] In a separate memorandum disposition filed simultaneously with this opinion, we affirm all other counts of conviction.

in the Program and each paid between $550 and $10,000. An FBI analyst testified that Hansen and AHA had more than $1.8 million in revenue.

On November 9, 2017, Hansen moved to dismiss Counts 17 and 18 on constitutional grounds. He argued that § 1324(a)(1)(A)(iv) is facially overbroad, void for vagueness, and unconstitutional as applied to him. The district court denied his motion. The district court sentenced Hansen to 240 months for each of the mail and wire fraud counts, and 120 months for each of the encouraging unlawful immigration for private financial gain counts, all to be served concurrently.

Hansen timely appealed. On appeal, Hansen and *amici* argue that § 1324(a)(1)(A)(iv) ("subsection (iv)") is unconstitutional for four reasons: it is (1) facially overbroad, (2) overbroad as applied to Hansen, (3) void for vagueness, and (4) a content- and viewpoint-based criminal prohibition of speech that cannot survive strict scrutiny.

STANDARD OF REVIEW

"We review de novo the constitutionality of a statute." *United States v. Mohamud*, 843 F.3d 420, 432 (9th Cir. 2016).

DISCUSSION

Because we hold that subsection (iv) is facially overbroad, we do not reach Hansen and *amici's* other arguments. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002).

1. Overbreadth Challenge

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

U.S. CONST. amend. I. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Free Speech Coal.*, 535 U.S. at 244. "The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989). Facial overbreadth challenges are permitted because an overly broad statute may chill the speech of individuals, including those not before the court. *Id.* There are two situations in which a facial overbreadth challenge can succeed: (1) when a party establishes that there is "no set of circumstances under which [the statute] would be valid or that the statute lacks any plainly legitimate sweep;" and (2) where "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472-73 (2010) (internal quotations and citations omitted). It is clear from previous convictions under the statute cited by the government,[2] and likely from Hansen's conduct here, that subsection (iv) has at least some "plainly legitimate sweep," so we focus our analysis on the second situation.

Hansen and *amici* argue that subsection (iv) encompasses a vast amount of protected speech related to immigration, including general immigration advocacy. By contrast, the government interprets subsection (iv)

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[2] *See, e.g.*, *United States v. Ndiaye*, 434 F.3d 1270 (11th Cir. 2006); *United States v. Yoshida*, 303 F.3d 1145 (9th Cir. 2002); *United States v. Castillo-Felix*, 539 F.2d 9 (9th Cir. 1976).

as a narrow prohibition on speech integral to criminal conduct, specifically solicitation and aiding and abetting.

As an initial matter, two courts of appeals, both in non-precedential decisions, have examined whether subsection (iv) is overbroad. In an unpublished decision, the Fourth Circuit held that subsection (iv) is not overbroad because it does not prohibit a substantial amount of protected speech, interpreting the provision as largely prohibiting criminal aiding and abetting. *See United States v. Tracy*, 456 F. App'x 267, 272 (4th Cir. 2011). A separate panel of this Court reached the opposite conclusion, recently holding that "[s]ubsection (iv) criminalizes a substantial amount of protected expression in relation to the statute's narrow legitimate sweep; thus, we hold that it is unconstitutionally overbroad in violation of the First Amendment." *United States v. Sineneng-Smith*, 910 F.3d 461, 485 (9th Cir. 2018) ("*Sineneng-Smith I*"). However, the Supreme Court vacated and remanded *Sineneng-Smith I* because "the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion" by deciding the case on arguments originally raised by *amici*. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020). On remand, the panel affirmed the defendant's conviction under subsection (iv) without analyzing the overbreadth challenge. *See United States v. Sineneng-Smith*, 982 F.3d 766, 776 n.3 (9th Cir. 2020), *cert. denied*, 142 S. Ct 117 (2021). Although *Sineneng-Smith I* was vacated on other grounds, we conclude that much of its thorough analysis is persuasive on the overbreadth issue. We add our thoughts reinforcing that conclusion of overbreadth.

2. Statutory Construction

When analyzing an overbreadth challenge, courts first construe the statute. *United States v. Williams*, 553 U.S. 285, 293 (2008). Section 1324 states:

> (a) Criminal penalties
>
> (1)(A) Any person who—
>
> . . .
>
> (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law
>
> . . .
>
> shall be punished as provided in subparagraph (B).
>
> (B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—
>
> (i) in the case of . . . violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both. . . .

To ascertain the meaning of the operative words in subsection (iv), we begin with the meanings of "encourage" and "induce." In subsection (iv) "'to encourage' means 'to inspire with courage, spirit, or hope . . . to spur on . . . to give help or patronage to,'" and we have "equated 'encouraged' with 'helped.'" *United*

States v. Thum, 749 F.3d 1143, 1147 (9th Cir. 2014). In a similar statutory provision, we defined "induce" as "to move by persuasion or influence." *United States v. Rashkovski*, 301 F.3d 1133, 1136 (9th Cir. 2002). These definitions accord with the plain meanings of encourage and induce. *See Thum*, 749 F.3d at 1147 (quoting Merriam Webster's Collegiate Dictionary); *Rashkovski*, 301 F.3d at 1136-37 (same). Encourage and induce are not part of a series of words that shed additional light on their meaning in subsection (iv). The doctrine of *noscitur a sociis* does not apply. *Cf. Williams*, 553 U.S. at 294-95 (applying *noscitur a sociis* to help determine the meaning of two words in a series of five words). As used in subsection (iv), encourage and induce can apply to both speech and conduct, a conclusion both parties acknowledge.

Next, we analyze the meaning of "alien." The parties disagree about whether subsection (iv) requires the object of encouragement or inducement to be a specific alien, or whether it applies to actions directed at the general public. Subsection (iv) requires the encouragement or inducement of "an alien," so we agree with the government that the subsection requires the encouragement or inducement of a specific alien or aliens.

Subsection (iv) applies to situations where a defendant encouraged or induced an alien to "enter, or reside in the United States . . . in violation of law." It does not explicitly state whether it encompasses violations of criminal and or civil law. As it is generally not a violation of criminal law for an alien to remain in the United States, we are satisfied that subsection (iv) covers both criminal and civil violations. *See Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general

rule, it is not a crime for a removable alien to remain present in the United States.").

We also examine subsection (iv)'s surrounding provisions for textual indicators that may provide additional clues to its meaning. *See Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1073 (9th Cir. 2016). Two textual indicators stand out. First, the other subsections criminalize a series of actions: "bring[ing]," "transport[ing]," "mov[ing]," "conceal[ing]," "harbor[ing]," or "shield[ing] from detection." *See* §§ 1324(a)(1)(A)(i)-(iii). As we noted above, subsection (iv) encompasses both speech and actions. The actions covered in the rest of § 1324(a)(1)(A) include such a wide range of conduct, though, that they leave little room for subsection (iv) to cover additional actions. "It is axiomatic that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Thum*, 749 F.3d at 1147 (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). Therefore, the most natural meaning of subsection (iv) is that it encompasses speech, which is not already covered by the other provisions.

The second textual indicator from the surrounding provisions is that § 1324(a)(1)(A) already includes an aiding and abetting provision. *See* § 1324(a)(1)(A)(v)(II). As the Supreme Court observed, "when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Subsection 1324(a)(1)(A)(v)(II),

then, strongly suggests that subsection (iv) should not also be read as an aiding and abetting provision.

We therefore interpret subsection (iv) as prohibiting someone from (1) inspiring, helping, persuading, or influencing, (2) through speech or conduct, (3) one or more specified aliens (4) to come to or reside in the United States in violation of civil or criminal law.

3. Subsection (iv)'s Plainly Legitimate Sweep

The next question for us is whether subsection (iv) "criminalizes a substantial amount of protected expressive activity." *Williams*, 553 U.S. at 297. The government may restrict speech "in a few limited areas," including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Stevens*, 559 U.S. at 468 (internal citations omitted). Here, the government argues that subsection (iv) is limited to speech integral to criminal conduct, specifically solicitation and aiding and abetting.

This reading of subsection (iv), though, is not supported by the statutory text. As noted above, § 1324(a)(1)(A)(v)(II) includes a separate provision for aiding and abetting, implying that Congress intended for the provisions to have different meanings. *See Loughrin*, 573 U.S. at 358. Interpreting subsection (iv) as different from aiding and abetting also avoids any related concerns that either it or § 1324(a)(1)(A)(v)(II) is superfluous. *See Corley*, 556 U.S. at 314. Further, the elements necessary for an aiding and abetting conviction in this Circuit require that the government prove elements not contained in subsection (iv), making subsection (iv) a poor aiding and abetting statute. Specifi-

cally, aiding and abetting requires someone to have committed an underlying criminal offense and for the accused to have assisted or participated in the commission of that offense. *Thum*, 749 F.3d at 1148-49.

Despite its flawed reading of subsection (iv), the government is surely correct that subsection (iv) encompasses some criminal conduct. The government states that prosecutions for procuring and providing fraudulent documents and identification information to unlawfully present aliens, assisting in unlawful entry, misleadingly luring aliens into the country for unlawful work, and smuggling activities "form the core" of subsection (iv)'s plainly legitimate sweep. The government provides a few examples of such successful prosecutions. Accepting the government's position that these prosecutions "form the core" of subsection (iv)'s plainly legitimate sweep, it is apparent that subsection (iv) has a relatively narrow legitimate sweep. Further, many of these crimes seem also to be encompassed by the other subsections of 1324(a)(1)(A), leaving subsection (iv)'s plainly legitimate sweep little independent work to do.

4. Protected Speech in Relation to Subsection (iv)'s Plainly Legitimate Sweep

On its own "[t]he prospect of crime . . . by itself does not justify laws suppressing protected speech." *Free Speech Coal.*, 535 U.S. at 245. An overbroad statute infringes on a substantial amount of constitutionally protected speech when there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801

(1984), or the statute is "susceptible of regular application to protected expression," *City of Houston v. Hill*, 482 U.S. 451, 467 (1987).

It is clear that subsection (iv) covers a substantial amount of protected speech. Many commonplace statements and actions could be construed as encouraging or inducing an undocumented immigrant to come to or reside in the United States. For example, the plain language of subsection (iv) covers knowingly telling an undocumented immigrant "I encourage you to reside in the United States." Such a statement is protected by the First Amendment. *See Williams*, 553 U.S. at 300 (explaining that the statement "I encourage you to obtain child pornography" is protected speech); *cf. United States v. Rundo*, 990 F.3d 709, 717 (9th Cir. 2021) ("[L]ike the Fourth Circuit, we conclude that the First Amendment protects speech tending to 'encourage' or 'promote' a riot."). Hansen and *amici* provide numerous other examples of protected speech prosecutable according to the plain text of the statute, including encouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants.

Examples of protected speech encompassed by subsection (iv) include everyday statements or conduct that are likely repeated countless times across the country every day. Subsection (iv) "create[s] a criminal prohibition of alarming breadth" comparable to other statutory provisions the Supreme Court has held are facially overbroad. *See Stevens*, 599 U.S. at 474. For example,

in *Stevens* the Court held that a statute prohibiting animal cruelty which encompassed depictions of hunting was facially overbroad, *see id.* at 474-76, while in *Free Speech Coalition* the Court held that a statute prohibiting the depiction of child pornography which encompassed movie adaptions of Romeo and Juliet and the movie "American Beauty" was facially overbroad, *see* 535 U.S. at 247-48.

By contrast, subsection (iv)'s plainly legitimate sweep, according to the government, is narrow and pales in comparison to the amount of protected expression that is encompassed by subsection (iv).

Nor are the examples of protected speech encompassed by subsection (iv) a mere hypothetical parade of horribles. The government has previously argued "that giving illegal aliens advice to remain in the United States while their status is disputed constitutes felonious conduct under § 1324(a)(1)(A)(iv) because it constitutes encouragement or inducement under the statute." *See United States v. Henderson*, 857 F. Supp. 2d 191, 203 (D. Mass. 2012). The chilling effect of subsection (iv) is substantial.

The government's other arguments to save subsection (iv) are unpersuasive. The canon of constitutional avoidance does not salvage the government's position. While it is true that courts "construe[] [statutes] to avoid serious constitutional doubts," this canon only applies when a statute "is readily susceptible to such a construction." *Stevens*, 559 U.S. at 481 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997)) (internal quotation omitted). Here, the plain meaning of subsection (iv) does not permit the application of the constitutional avoidance canon. *See id.* ("[W]e will not

rewrite a law to conform it to constitutional requirements for doing so would constitute a serious invasion of the legislative domain and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place.") (simplified and internal citations omitted).

The government's argument that actual prosecutions show its narrow interpretation of subsection (iv) is unconvincing. Previous prosecutions do not change the plain meaning of a statute. Also, the government's interpretation of subsection (iv)'s reach is subject to change and is irrelevant: "the First Amendment protects against the government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the government promised to use it responsibly." *See Stevens*, 559 U.S at 480. Moreover, the government has actually carried out at least one troubling prosecution under subsection (iv): in *Henderson*, the government prosecuted a government employee under subsection (iv) for "advis[ing her undocumented] cleaning lady generally about immigration law practices and consequences." 857 F. Supp. 2d at 193. *Henderson* makes plain the ability of subsection (iv) to chill speech. We apply the overbreadth doctrine so that legitimate speech relating to immigration law shall not be chilled and foreclosed.

CONCLUSION

We are mindful that invalidating subsection (iv) for overbreadth is "'strong medicine' that is not to be 'casually employed.'" *Williams*, 553 U.S. at 293 (quoting *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999)). However, for the reasons we have set forth above, subsection (iv) is over-

broad and unconstitutional. We vacate Hansen's convictions on Counts 17 and 18 and remand to the district court for resentencing.

VACATED AND REMANDED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-10548
D.C. No. 2:16-cr-00024-MCE-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HELAMAN HANSEN, DEFENDANT-APPELLANT

Argued and Submitted: Nov. 15, 2021
San Francisco, California
Filed: Feb. 10, 2022

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

MEMORANDUM[*]

Before: MCKEOWN and GOULD, Circuit Judges, and RESTANI,[**] Judge.

Helaman Hansen ("Hansen") appeals his conviction and 240-month sentence for twelve counts of mail fraud,

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

three counts of wire fraud, and two-counts of encouraging or inducing illegal immigration for private financial gain. Hansen argues that the district court (1) abused its discretion by excluding additional portions of several recordings admitted by the government at trial; (2) erred in refusing to allow him to introduce audiotape evidence of a tour he gave investigators; (3) provided an erroneous jury instruction on good faith that negated his defense that he honestly believed adult adoption would lead to citizenship; (4) improperly applied three sentencing enhancements; (5) imposed a substantively unreasonable sentence; and (6) improperly denied his motion to dismiss convictions for the two counts of encouraging or inducing an alien to reside in the United States for financial gain because the underlying statute is unconstitutional (Counts 17 and 18). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291 and affirm on the first four issues.[1]

Challenges to evidentiary rulings, including the Rule of Completeness, are reviewed for abuse of discretion. *United States v. Lopez*, 4 F.4th 706, 714 (9th Cir. 2021). "Evidentiary errors do not require reversal unless they more probably than not tainted the verdict." *United States v. Fontenot*, 14 F.3d 1364, 1371 (9th Cir. 1994). We conduct a *de novo* review of "whether the jury instructions accurately define the elements of a statutory

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[1] In a separate opinion, filed simultaneously with this memorandum disposition, we discuss the facts of this case, vacate the conviction on Counts 17 and 18, and remand for resentencing on all affirmed counts of conviction. Because we remand for resentencing, we do not reach Hansen's argument regarding the substantive reasonableness of his sentence.

offense." *United States v. Rivero*, 889 F.3d 618, 620 (9th Cir. 2018) (citation omitted). "We review the district court's interpretation of the Sentencing Guidelines *de novo,* its application of the Guidelines to the facts of the case for an abuse of discretion, and its factual findings for clear error." *United States v. Vallejos*, 742 F.3d 902, 905 (9th Cir. 2014). The government must at trial establish a sentencing "enhancement by a preponderance of the evidence." *United States v. Walter-Eze*, 869 F.3d 891, 914 (9th Cir. 2017).

1. Hansen sought the admission of additional recordings related to a jail phone call, internet videos, and interviews with law enforcement. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Fed. R. Evid. 106. Courts only admit additional portions of the writing or statement to correct a misleading impression. *Vallejos*, 742 F.3d at 905. Even assuming *arguendo* that the district court abused its discretion by not permitting additional portions of these recordings to be played, any error did not more probably than not impact the verdict: Hansen testified twice at the trial so could explain his beliefs, the jury was presented with a plethora of evidence regarding his culpability, and the probative value of the evidence he sought to admit was low. *See Lopez*, 4 F.4th at 717.

2. Hansen next contends that the district court erred when it refused to permit the introduction of audio clips of a tour he gave to immigration officials. The dis-

trict court erred in refusing to admit this evidence because it showed Hansen's then-existing state of mind. *See* Fed. R. Evid. 803(3). However, the exclusion of this evidence did not more likely than not taint the jury's verdict as Hansen had ample opportunity to present his defense theory to the jury and there was significant evidence of Hansen's guilt presented at the trial.

3. Hansen also argues that the jury instruction on intent to defraud was erroneous because it suggested that a good faith belief does not always negate specific intent. Read as a whole, the jury instruction did not mislead the jury. The additional instruction mentioning good faith simply stated that good faith did not apply where a defendant intentionally made a false or fraudulent representation.

4. Hansen faults the district court for applying sentencing enhancements for using sophisticated means, being a leader/organizer, and abusing a position of trust. The district court did not abuse its discretion in applying these enhancements, as in our view these enhancements fit this case like a glove. First, Hansen shrewdly used multiple government agencies in furtherance of his scheme and employed sophisticated techniques when producing promotional materials, such as green screens, mock interviews and panels, and photos of victims with judges in promotional materials. Second, there was sufficient evidence in the record for the district court to have reasonably determined that other individuals were participants in Hansen's criminal scheme; it was not necessary for those other participants to have been convicted. U.S.S.G. § 3B1.1, cmt. 1. Third, Hansen claimed to be an expert in immigration law, targeted undocu-

mented immigrants with limited knowledge of immigration law, and oversaw a sophisticated program falsely purporting to assist hundreds of undocumented immigrants become citizens. He had significant managerial discretion, and the district court could have reasonably determined he occupied a position of trust. *See United States v. Laurienti*, 731 F.3d 967, 973 (9th Cir. 2013).

AFFIRMED IN PART.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. 2:14-CR-024 MCE

UNITED STATES OF AMERICA, PLAINTIFF

v.

HELAMAN HANSEN, DEFENDANT

Date: Thurs., Dec. 14, 2017, 10:00 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTION TO DISMISS COUNTS 17 & 18,
JUDGMENT AND SENTENCING

APPEARANCES:

FOR THE GOVERNMENT:
Office of the United States Attorney
501 I Street, Suite 10-100
Sacramento, California 95814
BY: ANDRE ESPINOSA, AUSA
BY: KATHERINE LYDON, AUSA

FOR THE DEFENDANT:
Office of the Federal Defender
801 I Street, 3rd Floor
Sacramento, California 95814
BY: TIMOTHY ZINDE, AFD
BY: SEAN RIORDAN, AFD

[2]

THE CLERK: Calling Case 16-24, United States versus Helaman Hansen. On for defendant's motion to dismiss Counts 17 and 18 and judgment and sentencing, Your Honor.

MR. ESPINOSA: Good morning, Your Honor. Andre Espinosa and Kate Lydon for the United States.

THE COURT: Good morning.

MR. ZINDEL: Good morning, Your Honor. Tim Zindel and Sean Reardon from the Federal Defender's Office on behalf of Mr. Hansen who is present.

THE COURT: Thank you. Good morning.

This is the time and place for pronouncement of judgment and sentence.

On May 9th, 2017, this defendant was found guilty after a jury trial of 12 counts of mail fraud in violation of 18 United States Code Section 1341, three counts of wire fraud in violation of 18 United States Code Section 1342, and two counts of encouraging and inducing illegal immigration for private financial gain in violation of 8 United States Code Section 1324(a)(1)(A)(i) and (B)(i).

The matter was referred to the probation office which has prepared a presentence report dated November 22nd, 2017.

Counsel, have you all received and read a copy of that report?

[3]

MS. LYDON: We have.

MR. ZINDEL: Yes, Your Honor.

THE COURT: Thank you.

And counsel for Mr. Hansen, have you had a chance to discuss that report with your client?

MR. ZINDEL: Yes, Your Honor.

THE COURT: Mr. Hansen, have you had a chance to review that report?

THE DEFENDANT: I did, Your Honor.

THE COURT: All right. You've had sufficient time to discuss it with your attorneys; is that correct?

THE DEFENDANT: That's right, Your Honor.

THE COURT: All right. And I will get to this in just a minute, but just for the purposes of today, is there any legal reason why judgment and sentencing should not proceed today?

MS. LYDON: No, Your Honor.

MR. ZINDEL: No.

THE COURT: All right. There were objections to the report. I've reviewed that, but I'm going to adopt the statements of material fact, sentencing classifications and advisory ranges and policy statements set forth in the PSR and determine them to be true and correct.

Now, I understand that there are some issues that we have here that need to be dealt with, especially with Counts 17 and [4] 18, I believe.

Before we get going—so who's going to be arguing that portion?

MR. ZINDEL: I will give that to Mr. Riordan.

THE COURT: Mr. Riordan.

MR. RIORDAN: Good morning, Your Honor.

(Court Reporter requests counsel use the microphone.)

MR. RIORDAN: Your Honor, I don't want to belabor any of the points we made in our moving papers. There have been a number of filings by the parties on this issue, including filings just yesterday, addressing discrete issues. Unless the court has any questions, I would submit based on the papers.

THE COURT: Understood.

I have read those, and I do understand what the issues are that are being raised here and the distinctions that we're dealing with.

Government?

MR. ESPINOSA: Your Honor, unless—like Mr. Riordan, the government acknowledges that there has been substantial briefing in this case on the subject of the defendant's motion to dismiss Counts 17 and 18. The government is prepared to submit on those papers unless the court has specific questions.

THE COURT: But what's the—from a practical standpoint, what is this going to do?

If I grant the motion and dismiss Counts 17 and 18 as to [5] sentencing, what will that do here in this case?

MR. RIORDAN: Your Honor, I don't believe that it would have an effect on sentencing because of the way the counts group, but Mr. Zindel can correct me if that's incorrect.

MR. ZINDEL: I think that's correct. You wouldn't enter judgment on those two counts. The assessments would be $200 less, 100 per count.

THE COURT: Correct. That's the bottom line. Because with everything being put concurrently, the sentence would be the same. It would just be two less counts.

MR. ZINDEL: Right. There are no levels added for grouping in any event. So if they were dismissed, it wouldn't have any effect, no matter what the court determines the guidelines to be.

THE COURT: Government, what is your position on this?

I mean, that's the real bottom line. On the other hand, you're raising a potential appellate issue, which has not been determined yet. It might be. It may not be. Because there is always—if that particular decision by the circuit stays or if it is going to be called en banc or what is going to happen to it, I mean we're—

MR. ESPINOSA: Your Honor, the government's perspective is this: While it is correct that dismissal of the counts would not impact sentencing because the guideline [6] calculation is driven by the guidelines that apply to the mail and wire fraud counts, the only way to dismiss the counts would be to grant the defendant's motion and find that the statute is unconstitutional, and it is not.

Because it is not unconstitutional, for the reasons set forth in the United States' papers, including the fact that this claim as a threshold matter is simply waived because it is untimely, the court has no basis to dismiss Counts 17 and 18 and we ask the court not to do so.

There will inevitably be an appeal in this matter. The panel considering the Northern District case will reach its conclusion about the statute. Our position is that it is constitutional. That panel may reach the same conclusion or a different one.

I note the Fourth Circuit has already considered this argument six years ago, raised in a case there, and denied the precise argument. And because there is no basis to dismiss the counts, the court shouldn't, even though the practical effect is minimal or zero on the sentencing.

MR. RIORDAN: Well, Your Honor, I would only point out that not only is there a facial challenge before the court, but there is an as applied challenge.

You know, Mr. Hansen has no party disputes, only encouraged or induced these noncitizens to remain in the United States, if at all, in a manner that was noncriminal in terms of what their [7] own actions were.

They overstayed their visas. That is not a criminal issue. Under the immigration laws, it is purely civil. So just—those are issues that the circuit may not get at in the case that it is considering because those issues are somewhat unique to this case and the facts before the court.

And of course, the encouraging criminal versus noncriminal behavior distinction goes to the heart of our concerns about the overbreadth of the statute.

If I encourage Mr. Zindel to do something that is not criminal, then my conduct could not be criminalized, constitutionally speaking.

THE COURT: But as of this point there is no authority to—that justifies what you are saying.

MR. RIORDAN: There is no Ninth Circuit case to address this precise question. But there is—we believe there is ample authority going back to when the Supreme Court first drew—carved out this exception under the First Amendment for speech that is integral to criminal conduct.

In this case, the speech was not integral to criminal conduct. The speech was integral, if at all, to illegal conduct, to a violation of noncriminal provisions of the immigration law.

MR. ESPINOSA: Your Honor, there is out-of-circuit authority that directly refutes this precise claim that is [8] being made here. In that Fourth Circuit case, which the government cites in its brief, not only—it is United States v. Tracy, 456 Federal Appendix 267, Fourth Circuit, 2011. It is an unpublished case, but it is a case in which the defendant challenges this statute, this Title 8, statute 1324(a)(1)(A) (iv), on the same basis that it is constitutionally overbroad, that it is vague, and makes the argument that the underlying conduct isn't criminal, it is only a civil violation. And the court rejected all of those arguments and found that the statute applied to civil conduct—to the conduct at issue there.

THE COURT: But you have an unpublished case from the Fourth Circuit, which means nothing here, correct?

MR. ESPINOSA: It is not binding on this court. That is for sure. But it is certainly some guidance in the face of zero precedent from this court holding that the opposite outcome is required.

THE COURT: Well, it would seem to me the safest thing to do is to go ahead and dismiss the charges and not have to worry about them from an appellate standpoint.

On the other hand, as I have been known to do, sometimes it is good to create new law and maybe this would be the perfect time to have something like this go on appeal and see what the Ninth Circuit does with it and we'll see what happens.

Motion to dismiss is denied.

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-10548
D.C. No. 2:16-cr-00024-MCE-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HELAMAN HANSEN, DEFENDANT-APPELLANT

Filed: July 25, 2022

ORDER

Before: M. MARGARET MCKEOWN and RONALD M. GOULD, Circuit Judges, and JANE A. RESTANI,[*] Judge.

Order;

Concurrence by Judge GOULD;
Dissent by Judge BUMATAY;
Dissent by Judge COLLINS

Judges McKeown and Gould have voted to deny Appellee's petition for rehearing *en banc*. Judge Restani recommends denying the petition for rehearing *en banc*.

The full court has been advised of the petition for rehearing *en banc*. An active judge requested a vote on whether to rehear the matter *en banc*. The matter

[*] The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

failed to receive a majority of votes of the non-recused active judges in favor of *en banc* consideration. *See* Fed. R. App. P. 35.

The petition for rehearing *en banc* is **DENIED**.

GOULD, Circuit Judge, concurring in the order denying the petition for rehearing *en banc*:

I concur in the order denying rehearing *en banc*.[1]

Judge Bumatay's dissent (the "Judge Bumatay dissent") from the denial of rehearing *en banc* is wrong on the law and incorrect in method. As for Judge Collins's dissent (the "Judge Collins dissent"), it does not appear to challenge the facial overbreadth doctrine generally; rather, it appears to disagree with the *Hansen* opinion's application of this Supreme Court precedent. I address the lengthy Judge Bumatay dissent in depth and the Judge Collins dissent in footnote 2 *infra*.

In arguing for *en banc* rehearing, the Judge Bumatay dissent seeks to rewrite subsection (iv) by conducting a so-called textual analysis that fails to analyze the text of subsection (iv) itself. Rather, the Judge Bumatay dissent analyzes additional words not in that section, such as "aiding," "abetting," and "solicitation," to support the conclusion it advocates. In the course of its argument essentially rewriting subsection (iv), the Judge Bumatay dissent misreads the opinion, the record, § 1324 itself, and precedent; conjures up parades of horribles belied by its own citations; and introduces arguments the Government's Petition for Rehearing did not make. The Judge Bumatay dissent ends by asking us improperly to

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[1] I do not seek joins in this concurrence.

disregard Supreme Court precedent regarding the applicability of the facial overbreadth doctrine.

I. Correcting the Record

As an initial matter, I comment on several issues upon which the Judge Bumatay dissent is confused or mistaken.

A. The Judge Bumatay dissent mischaracterizes the holding of *Sineneng-Smith*, 140 S. Ct. 1575 (2020)

The Judge Bumatay dissent begins by invoking the Supreme Court's unanimous decision vacating and remanding a separate Ninth Circuit panel's decision regarding the constitutionality of subsection (iv). The Judge Bumatay dissent contends that the Supreme Court in its prior decision was only "mostly concerned" with the prior panel's violation of the party-presentation principle, but also expressed views about the merits of subsection (iv). A fair reading of *Sineneng-Smith* shows that the Judge Bumatay dissent's position is incorrect. The Supreme Court's *only* holding in *Sineneng-Smith* was that the panel violated the party-presentation principle. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020) ("[W]e now hold that the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion. We therefore vacate the Ninth Circuit's judgment and remand"). The Supreme Court made no holding concerning the merits of the facial overbreadth challenge to subsection (iv).

The Court in *Sineneng-Smith* was unanimously concerned with the party presentation-principle, the fact that the parties in that case had not even briefed facial

overbreadth, and the fact that the Ninth Circuit had requested amicus briefing on the issue of overbreadth. Even the Government's Petition for Rehearing recognizes that the Supreme Court in *Sineneng-Smith* did not make a decision on the merits. *See* Pet. for Reh'g at 1 ("[T]he Supreme Court ultimately reversed on alternative grounds in [*Sineneng-Smith*], without resolving the merits of the overbreadth issue").

The Judge Bumatay dissent recognizes the weakness of how it frames the issue at the outset with reference to *Sineneng-Smith*, because it soon thereafter excludes the opinion's alleged failure to adhere to *Sineneng-Smith* from the Judge Bumatay dissent's purported list of errors committed in the opinion. If the *Hansen* opinion had violated clear Supreme Court precedent in *Sineneng-Smith*, that violation would be a central thrust of the Judge Bumatay dissent; but, the Judge Bumatay dissent's later silence is a recognition that the opinion violated no such precedent. I note that two separate and unanimous panels of this Circuit have held that subsection (iv) is facially overbroad. *See United States v. Hansen*, 25 F.4th 1103, 1111 (9th Cir. 2022); *United States v. Sineneng-Smith*, 910 F.3d 461, 485 (9th Cir. 2018), *vacated and remanded*, 140 S. Ct. 1575 (2020).

B. The Judge Bumatay dissent misstates Hansen's conviction under subsection (iv)

The Judge Bumatay dissent emphasizes the deplorable conduct that Hansen committed. I agree that the conduct was deplorable and egregiously fraudulent. But although Hansen's conduct was deplorable, such a determination does not bear on the opinion's analysis of a facial overbreadth challenge. The facial overbreadth doctrine is not concerned with the defendant's conduct,

but rather with the amount of legitimate speech that would be chilled or deterred by the provision that the opinion held unconstitutional, in relation to the amount of speech that can constitutionally be prohibited.

Further, the Judge Bumatay dissent is incorrect regarding the facts of Hansen's convictions and sentencing. Contrary to the Judge Bumatay dissent, Hansen was not convicted under subsection (iv) for defrauding approximately 500 aliens. The counts of conviction and sentencing under subsection (iv) related to Hansen encouraging and inducing only two specific aliens to overstay their visas. *See Hansen*, 25 F.4th at 1105-06. Hansen was also convicted of twelve counts of mail fraud and three counts of wire fraud for defrauding the approximately 500 aliens. *Id.* at 1105. The panel affirmed these convictions in a simultaneously-filed memorandum disposition (which memorandum disposition the Judge Bumatay dissent ignores). *See id.* at 1105 n.1; *United States v. Hansen*, No. 17-10548, 2022 WL 424827, at *1 (9th Cir. Feb. 10, 2022). Hansen was sentenced to 240 months for each of the fifteen fraud violations and 120 months for both of the two subsection (iv) violations, all to be served concurrently. *Hansen*, 25 F.4th at 1106. The opinion's reversal of the two subsection (iv) convictions did not negate all of Hansen's other convictions for which he was punished and sentenced.

C. The Judge Bumatay dissent misinterprets the mens rea requirement at issue

The Judge Bumatay dissent is correct that Hansen's subsection (iv) conviction and sentence also "requires proof that the defendant acted to obtain 'commercial advantage or private financial gain'" under 8 U.S.C.

§ 1324(a)(1)(B)(i). However, the Judge Bumatay dissent is incorrect to the extent it suggests that "[a]ny statements prosecuted under this law must be designed to make money off the targeted aliens—fitting solicitation and facilitation." As the *very next* subsection of the statute, ignored by the Judge Bumatay dissent, makes clear, an individual can be convicted under subsection (iv) regardless of whether he acted to obtain commercial advantage or private financial gain. *See* 8 U.S.C. § 1324(a)(1)(B)(ii). Hansen did not challenge the constitutionality of § 1324(a)(1)(B)(i). *See* Resp. to Pet. for Reh'g at 7 n.1. In short, acting for commercial advantage or financial gain is not an element of the criminal offense defined in subsection (iv). Any person can be convicted of that offense without seeking financial gain.[2]

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[2] The Judge Collins dissent, unlike the Judge Bumatay dissent, makes no assault on the Supreme Court's existing doctrine of facial overbreadth. Instead, the Judge Collins dissent urges that we have misapplied that doctrine because in the Judge Collins dissent's view there is little doubt that the legitimate sweep of subsection (iv) "greatly exceeds any possible overbreadth." The Judge Collins dissent does not criticize the Supreme Court's doctrinal statements on facial overbreadth and the First Amendment values that doctrine serves. The application of a rule of law that is agreed upon does not normally warrant *en banc* or other further review. *See* Fed. R. App. P. 35(a); *see also* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Nor, in view of Hansen's fifteen remaining counts of conviction, and the fact that few convictions for deplorable conduct rely only on subsection (iv), *see infra* Part IV, is there "exceptional importance" to further review the two counts of conviction that were reversed under the facial overbreadth doctrine. *Id.*

D. The Judge Bumatay dissent manufactures an imaginary circuit split

The Judge Bumatay dissent errs when it contends that the opinion "lead[s] a circuit split" and cites *United States v. Tracy*, 456 F. App'x 267, 272 (4th Cir. 2011) (unpublished).[3] *Tracy* is an unpublished case. As in the Ninth Circuit, in the Fourth Circuit "[u]npublished opinions are not binding precedent." *See Tracy*, 456 F. App'x at 268. The *Hansen* opinion cannot have created a split with the Fourth Circuit relating to *Tracy* because *Tracy* was not a precedential opinion of that circuit. Simply put, there is no circuit split. *Cf. Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1249 (9th Cir. 2000). Only two other Courts of Appeals panels have analyzed a facial overbreadth challenge to subsection (iv) in precedential opinions. In a briefly precedential opinion (before the opinion was vacated due to the party-presentation principle), a prior panel of this court held that subsection (iv) was facially overbroad. *See Sineneng-Smith*, 910 F.3d at 485. Most recently, the Tenth Circuit reached the same conclusion as the *Hansen* opinion, holding that subsection (iv) is facially overbroad. *See United States v. Hernandez-Calvillo*, No. 19-3210, __ F.4th __, 2022 WL 2709736 (10th Cir. July 13, 2022).[4]

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[3] The Government did not even cite *Tracy* in its Petition for Rehearing.

[4] Not only is Judge Bumatay's dissent incorrect in stating that we lead a circuit split, as explained above, but also if we were to rehear the case and adopt the legal analysis of Judge Bumatay, that mistaken analysis would create a circuit split between Judge Bumatay's

II. Aiding, Abetting, and Solicitation

The main argument advanced by the Judge Bumatay dissent is that "encourages or induces" should instead be read to mean "aids, abets, or solicits." The Judge Bumatay dissent, while saying that it argues for a textual interpretation, rewrites subsection (iv)'s plain language, changing "encourages or induces" to "aids, abets, or solicits." This is unsound because immediately below subsection (iv), Congress expressly criminalized conduct that "aids or abets," showing beyond doubt that Congress knew how to include "aids or abets" when that is what it meant. *See* § 1324(a)(1)(A)(v)(ii). As explained in the *Hansen* opinion, "when Congress includes particular language in one section of a statute but omits it in another—let alone in the very next provision—this Court presume[s] that Congress intended a difference in meaning." 25 F.4th at 1108 (quoting *Loughrin v. United States*, 573 U.S. 351, 358 (2014)).

The Judge Bumatay dissent disregards the express language of subsection (iv) and the *Hansen* opinion's rationale. The Judge Bumatay dissent stresses authorities that define words not in subsection (iv)—such as "aiding," "abetting," and "solicitation"—instead of authorities that define the words actually used in subsection (iv)—"encourages or induces."[5] Judge Bumatay's

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mistaken reasoning and the Tenth Circuit decision *Hernandez-Calvillo* which adopted reasoning parallel to that of *Hansen* in its current form.

[5] The Judge Bumatay dissent several times cites to *United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007) (en banc), as part of this argument. *Lopez* too defines aiding and abetting, not encouraging or inducing. Further, the Government does not cite to *Lopez* in its briefing or Petition for Rehearing.

analysis is not persuasive: Defining "aiding, abetting, and solicitation" to sometimes include "encouraging or inducing" sheds no light on whether the words "encourages or induces" in subsection (iv) cover a substantial amount of protected conduct. To determine properly whether "encourages or induces" cover a substantial amount of protected conduct, one should take the common-sense approach used in the opinion to define "encourages or induces" itself. The Judge Bumatay dissent does not identify a single statute that uses only the words "encourages or induces" to mean "aids, abets, and solicits."

It is not surprising that some definitions of aiding, abetting, and solicitation cited by the Judge Bumatay dissent contain the words "encourage" or "induce," just as they contain other words that, if substituted for "encourages or induces" in subsection (iv), might also be facially overbroad (such as "requests," "hires," or "otherwise procured"). Further, the Judge Bumatay dissent's frequent references to statutes and authorities referencing "aiding," "abetting," and "solicitation" reinforce the point that when Congress intends to prohibit aiding, abetting, or soliciting, it includes those specific words in the statute.

The Judge Bumatay dissent erroneously claims that the opinion "blindly rel[ied] on lay-dictionary definitions to reach its overbroad interpretation of the law." The Judge Bumatay dissent is off-base for two reasons. First, to determine the meaning of "encourages" and "induces" in subsection (iv), the opinion relied on precedential cases which, in turn, used dictionary definitions to help determine the meaning of "encourages" or "induces" in the same or similar provisions. *See Hansen*,

25 F.4th at 1108 (citing to *United States v. Thum*, 749 F.3d 1143, 1147 (9th Cir. 2014), which defined "encourages" in subsection (iv), and *United States v. Rashkovski*, 301 F.3d 1133, 1136 (9th Cir. 2002), which defined "induce" in 18 U.S.C. § 2422(a)). As discussed above, the Judge Bumatay dissent's proposed alternative methodology is flawed. Second, the Supreme Court has often looked to dictionary definitions and the plain meaning of the text in a statute. *See, e.g.*, *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176-78 (2021) ("Where Congress does not furnish a definition of its own, we generally seek to afford a statutory term its ordinary or natural meaning." (internal quotation marks omitted)). The Supreme Court has also often analyzed dictionary definitions. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140-41 (2018).

In its haste to equate subsection (iv) with an aiding and abetting statute, the Judge Bumatay dissent also overlooks several elements of aiding and abetting that are missing from any conceivably reasonable reading of subsection (iv). As explained in the opinion, subsection (iv) would make a poor aiding and abetting statute because "aiding and abetting requires someone to have committed an underlying criminal offense and for the accused to have assisted or participated in the commission of that offense." *Hansen*, 25 F.4th at 1109 (citing *Thum*, 749 F.3d at 1148-49). The language of subsection (iv) cannot be squared with these requirements.

I agree with the Judge Bumatay dissent that writing a statute is "best left to *elected* officials," not judges who seek to rewrite the plain language of a statute. The legislature's writing of the statute is superior to that of

a judge who may attempt to rewrite the statute *sub silentio*. It is for this reason that the opinion did not attempt, as the Judge Bumatay dissent does, to "rewrite [subsection (iv)] to conform it to constitutional requirements for doing so would constitute a serious invasion of the legislative domain and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place." *Hansen*, 25 F.4th at 1110-11 (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)). The opinion correctly does not try to salvage the flawed language of subsection (iv); Congress, not the judicial branch, has the duty to write statutes.

The Judge Bumatay dissent's lengthy exegesis on early English and colonial law about solicitation and aiding and abetting is interesting but largely irrelevant. Doubtless any of us can benefit in an appropriate case from pondering early nineteenth-century cases and the words and thoughts of William Blackstone, Sir Edward Coke, Lord Matthew Hale, and other treatise authors and legal scholars. But their general comments give little practical guidance here when we deal with the plain meaning of a simply phrased statute. The words "encourages or induces" are better assessed on their own with the traditional standards for statutory interpretation used in the *Hansen* opinion.

The Judge Bumatay dissent's belabored reasoning does, however, highlight two additional points that undermine the Judge Bumatay dissent's persuasive power. First, the Judge Bumatay dissent's approach is in direct conflict with the principle of Occam's razor, that the simpler approach is usually better. The *Hansen* opinion defines the words that are actually in subsection (iv). By contrast, the Judge Bumatay dissent advocates for

discarding the words in subsection (iv) and replacing them with words whose meaning it tries to derive from a scattering of definitions hundreds of years old. This overcomplicates the inquiry, as Judge Bumatay's dissent advocates rewriting subsection (iv). Second, the Judge Bumatay dissent's historical discourse is particularly inapt in the facial overbreadth context. "Facial overbreadth challenges are permitted because an overly broad statute may chill the speech of individuals, including those not before the court." *Hansen*, 25 F.4th at 1106 (citing *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989)). The examples of protected speech covered by subsection (iv) cited in the opinion, *see id.* at 1110, occur between countless individuals lacking the legal acumen or time to sift through dozens of sources hundreds of years old interpreting statutes with different language than subsection (iv). These individuals' speech will be chilled regardless of how a federal appellate judge might personally prefer to parse the words.

III. Surplusage

The Judge Bumatay dissent makes much of one sentence in the opinion which references the canon against surplusage. Contrary to the Judge Bumatay dissent's contention, that sentence merely highlighted that Congress clearly knew how to write "aids and abets"—as it did immediately below subsection (iv)—and instead chose to say "encourages or induces" in subsection (iv).

IV. Parades of Horribles

The Judge Bumatay dissent conjures up two fanciful parades of horribles that undermine its argument. First, the Judge Bumatay dissent opines that the opinion "may lead to the invalidation of other federal and

state laws that use similar 'encourage' or 'induce' language." To support this contention, the Judge Bumatay dissent cites a variety of federal and state laws. But, in fact, many of the cited statutes explicitly criminalize aiding, abetting, or soliciting. This leads to the conclusion that Congress and state legislative bodies know how to criminalize aiding, abetting, and solicitation —by actually criminalizing "aiding, abetting, and soliciting."

Second, the Judge Bumatay dissent suggests that the opinion will prevent the Government from prosecuting deplorable conduct that was previously criminalized under subsection (iv). As an initial matter, the opinion only invalidated subsection (iv) and the two convictions under it, while leaving intact the rest of the substantial criminal provisions in § 1324. In support of its contention, the Judge Bumatay dissent cites seven cases. These cases show just how hypothetical the Judge Bumatay dissent's alleged harm is: In all seven cases (as in *Hansen*), the defendants could also be convicted under other criminal statutes. *See United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002) (defendant also convicted under 8 U.S.C. § 1324(a)(2)(B)(ii)); *United States v. Lozada*, 742 F. App'x 451, 452 (11th Cir. 2018) (unpublished) (also affirming defendant's conviction for defrauding the United States under 18 U.S.C. § 371); *United States v. Pena*, 418 F. App'x 335, 337 (5th Cir. 2011) (unpublished) (defendants also convicted of money laundering under 18 U.S.C. § 1956(a)(1)(B)(i)); *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1299-1300 (11th Cir. 2010) (noting the sufficiency of allegations to state a violation under § 1324(a)(1)(A)(iii)); *United States v. Lopez*, 590 F.3d 1238, 1243 (11th Cir. 2009) (also affirming conviction under 8 U.S.C. § 1327); *Tracy*, 456

F. App'x at 268 (also affirming conviction under 18 U.S.C. § 1542); *United States v. One 1989 Mercedes Benz*, 971 F. Supp. 124, 129 (W.D.N.Y. 1997) (denying defendant's motion for summary judgment and granting government's motion for summary judgment also under 8 U.S.C. § 1325(a)); *see also Hernandez-Calvillo*, __ F.4th __, 2022 WL 2709736 at *8-9 (noting the Government's failure to identify any case in which subsection (iv) is the only available statutory provision to punish deplorable conduct). The Judge Bumatay dissent therefore makes clear that there are very few cases in which a defendant committing deplorable conduct can only be convicted under subsection (iv).

V. Constitutional Avoidance

The Judge Bumatay dissent argues that it was "baffling that [the opinion] decided to give the canon [of constitutional avoidance] short shrift here." The Judge Bumatay dissent then contends that the opinion's "only response [to the canon of constitutional avoidance argument] is that 'the plain meaning of subsection (iv) does not permit the application of the constitutional avoidance canon.'" This misreads the opinion. The opinion conducted a thorough analysis of what "encourages or induces" meant within the context of § 1324, subsection (iv)'s plainly legitimate sweep, and the amount of protected speech in relation to subsection (iv)'s plainly legitimate sweep. *See Hansen*, 25 F.4th at 1107-10. Other than disagreeing with that analysis and calling it "baffling," the Judge Bumatay dissent does not identify how the opinion gave the constitutional avoidance argument "short shrift." Instead, the opinion noted "that courts 'construe[ ] [statutes] to avoid serious constitu-

tional doubts,' [and the canon of constitutional avoidance] only applies when a statute 'is readily susceptible to such a construction.'" *Hansen*, 25 F.4th at 1110 (quoting *Stevens*, 559 U.S. at 481). Here, there was no reasonable and plausible interpretation of subsection (iv) that would avoid the facial overbreadth problem on which the opinion ruled.

VI. The Facial Overbreadth Doctrine

Perhaps most offensive to Supreme Court case law, the Judge Bumatay dissent takes issue with the facial overbreadth doctrine, repeatedly referring to the facial overbreadth doctrine as a "nuclear option." But the Supreme Court's law on facial overbreadth was not pulled like a rabbit out of a hat. The *Hansen* opinion relied on the Supreme Court's own precedent. *See, e.g.*, *Stevens*, 559 U.S. at 472-73; *United States v. Williams*, 553 U.S. 285, 292-93 (2008); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002); *Oakes*, 491 U.S. at 581; *City of Houston v. Hill*, 482 U.S. 451, 458-59 (1987); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984). The Supreme Court, moreover, has very recently continued to rely on the facial overbreadth doctrine that the Judge Bumatay dissent so disfavors. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

In addition, not only the Ninth Circuit, but other federal circuits as well, have recognized and respected the Supreme Court's doctrine on facial overbreadth.[6] As

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[6] *See, e.g., Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 153 (2d Cir. 2000); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214-18 (3d Cir. 2001); *Liverman v. City of Petersburg*,

the opinion in *Hansen* correctly recognized and explained, facial overbreadth is "strong medicine." *See* 25 F.4th at 1111 (citing *United States v. Williams*, 553 U.S. 285, 293 (2008)). On occasion, strong medicine is just what is needed. It is not a "nuclear option" causing unspeakable damage without any constraint. It is a Supreme Court doctrine that has its place in protecting First Amendment freedoms.

The Judge Bumatay dissent relies primarily on a concurrence by Justice Thomas that no other justice joined. The Judge Bumatay dissent argues that the facial overbreadth doctrine is "suspect" and on a "shaky foundation." To state the obvious, a concurrence by a single justice does not make precedent for the Supreme Court or for inferior courts like the Ninth Circuit. Instead, the *Hansen* opinion properly looked to recent cases in which the Supreme Court applied the facial overbreadth doctrine. *See Hansen*, 25 F.4th at 1106-10 (citing *Stevens*, 559 U.S. 460; *Williams*, 553 U.S. 285; *Free Speech Coal.*, 535 U.S. 234; *Oakes*, 491 U.S. 576; *Hill*, 482 U.S. 451; *Taxpayers for Vincent*, 466 U.S. 789).

Of course, the Supreme Court is free to change its precedent, and if it establishes a new rule, it will be followed by the Ninth Circuit. But, unless and until the Supreme Court changes its law (and no change has as yet even been foreshadowed by a precedential Supreme

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844 F.3d 400, 409 (4th Cir. 2016); *Speet v. Schuette*, 726 F.3d 867, 879-80 (6th Cir. 2013); *Bell v. Keating*, 697 F.3d 445, 455-61 (7th Cir. 2012); *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1157-59 (8th Cir. 2014); *United States v. Rundo*, 990 F.3d 709, 717-19 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 865 (2022); *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1301-04 (11th Cir. 2017).

Court decision), this court is bound to follow the Supreme Court's current precedent, regardless of any Ninth Circuit judge's personal view about the correctness of the facial overbreadth doctrine. Ninth Circuit judges are not empowered to anticipatorily overrule a Supreme Court doctrine. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989))). Judges on this court cannot discard the Supreme Court's doctrine on facial overbreadth merely because they disfavor its application in any particular case.

BUMATAY, Circuit Judge, joined by CALLAHAN, IKUTA, R. NELSON, LEE, and VANDYKE, Circuit Judges; BENNETT, Circuit Judge, in all except Part III-A, and BRESS, Circuit Judge, in Parts I, II, and III-B, dissenting from the denial of rehearing en banc:

Today, our court invalidates a 70-year-old alien-smuggling law—8 U.S.C. § 1324(a)(1)(A)(iv)—which prohibits "encourag[ing]" or "induc[ing]" aliens to illegally enter the country. *See United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022). We do so under the banner of First Amendment protection. Freedom of speech is a core principle in our constitutional republic, but § 1324(a)(1)(A)(iv) is no threat to that guarantee. Based on text, history, and structure, the provision prohibits only criminal solicitation and aiding and abetting. But instead of following the statute's clear meaning, we

contort its scope and then imagine ways the misconstrued law might cover protected speech. We then wipe away the whole provision under the overbreadth doctrine—the nuclear option of First Amendment jurisprudence.

If this sounds familiar, it is. Our court took a similar approach a few years ago in *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018). In that case, no party asked our court to review the alien-smuggling law on overbreadth grounds. But we took it upon ourselves to pick lawyers to argue that position—and just like that, we held the statute unconstitutional.

The Supreme Court quickly rebuked our handiwork and *unanimously* vacated our decision. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1582 (2020). True, the Court was mostly concerned with our egregious violation of the party-presentation principle in that case. But Justice Ginsburg, writing for the full Court, made clear that the Justices were also unhappy with our substantive holding:

> [T]he [Ninth Circuit] panel projected that § 1324(a)(1)(A)(iv) might cover a wide swath of protected speech, including political advocacy, legal advice, even a grandmother's plea to her alien grandchild to remain in the United States. *Nevermind* that Sineneng-Smith's counsel had presented a contrary theory of the case in the District Court, and that this Court has repeatedly warned that invalidation for [First Amendment] overbreadth is strong medicine that is not to be casually employed.

Id. at 1581 (simplified) (emphasis added).

Rather than take the hint, we again strike down the same statutory provision. *Nevermind* that the law is perfectly consistent with the First Amendment under proper principles of statutory interpretation. *Nevermind* that the canon of constitutional avoidance commands us not to construe a statute in breach of the Constitution when we don't have to. And *nevermind* that the Court disfavors the invalidation of statutes under the overbreadth doctrine.

Helaman Hansen operated a fraudulent adult adoption program that targeted undocumented aliens. Hansen preyed on their hopes by falsely telling them that they could become U.S. citizens simply by being adopted. For these false hopes, Hansen charged as much as $10,000. Hansen defrauded almost 500 aliens, and, of course, no alien became a U.S. citizen. For this scheme, the government charged Hansen with multiple offenses —including two counts of encouraging or inducing an alien for financial gain under § 1324(a)(1)(A)(iv) and (B)(i). A jury convicted him of all counts.

On appeal, we took the extraordinary step of holding § 1324(a)(1)(A)(iv) unconstitutional under the First Amendment's overbreadth doctrine. *Hansen*, 25 F.4th at 1111. In doing so, we gave "encourage" and "induce" a broad meaning untethered from the criminal law context and hypothesized that the law would chill "a vast amount of protected speech related to immigration." *Id.* at 1107. To justify that conclusion, we conjured up a parade of horribles theoretically prosecutable under the law, such as "advising an undocumented immigrant about available social services" or to "take shelter during a natural disaster." *Id.* at 1110.

Just as we were wrong in *Sineneng-Smith*, we are wrong now. For centuries, the terms "encouraging" and "inducing" have been recognized in criminal law as referring to complicity in the commission of a crime. So under established and settled meaning, § 1324(a)(1)(A)(iv) is just an ordinary criminal solicitation and aiding-and-abetting provision. Indeed, in prior versions of the alien-smuggling law, Congress used the terms synonymously with "soliciting" and "assisting" another to commit crime. And, of course, speech that solicits or aids illegal conduct is "categorically" unprotected by the First Amendment. *See United States v. Williams*, 553 U.S. 285, 297 (2008). Reading the law in its proper light thus eliminates the parade of horribles created by our court and removes any tension with the First Amendment.

Instead of following this straightforward interpretation, our court makes mistake after mistake to hold § 1324(a)(1)(A)(iv) unconstitutional.

First, we misread the statute by blindly relying on lay-dictionary definitions to reach an overly broad interpretation of the law. Instead, we should have looked to the settled meaning of the statutory terms. As the Court recently reaffirmed, "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022) (simplified). If we had followed this established principle, we would have understood that § 1324(a)(1)(A)(iv) is an ordinary solicitation and aiding-and-abetting statute and poses no free-speech concerns.

Second, we improperly invoked the surplusage canon to disregard § 1324(a)(1)(A)(iv) as a solicitation and

aiding-and-abetting statute. To begin, we seemingly conflated the two concepts and completely ignored solicitation as a distinct offense. If we had considered solicitation, then we would have found no surplusage because no other provision of § 1324 outlaws solicitation. We also misapplied the surplusage canon to erase aiding-and-abetting liability from the law. We claimed that because another aiding-and-abetting provision exists in § 1324(a)(1)(A)(v)(II), subsection (iv) could not also prohibit aiding and abetting. *See Hansen*, 25 F.4th at 1109 ("Interpreting subsection (iv) as different from aiding and abetting also avoids any related concerns that either it or § 1324(a)(1)(A)(v)(II) is superfluous."). But that's wrong. Subsection (iv) prohibits aiding and abetting a specific thing that no other provision of § 1324(a)(1)(A) targets. Specifically, subsection (iv) prohibits the aiding and abetting of an *alien* "com[ing] to, enter[ing], or resid[ing] in the United States" in violation of law, while subsection (v)(II) addresses aiding or abetting a criminal *principal* "bring[ing]," "transport[ing]," or "harbor[ing]" aliens illegally in the United States. 8 U.S.C. § 1324(a)(1)(A)(i)-(iv), (v)(II). We thus have no surplusage problem here.

Third, we failed to respect the constitutional avoidance canon. Even if exhausting statutory tools doesn't clearly show that the law prohibits solicitation and aiding and abetting, at a minimum, the constitutional avoidance canon commands that we construe it that way. Ignoring this principle of avoidance undermines the separation of powers and aggrandizes our role as judges. In fact, we seemingly invent the opposite principle—let's call it the "constitutional collision canon"—*stretching* the law to ensure that it violates the Constitution. Such a canon should be soundly rejected.

And finally, even if the provision could conceivably reach some protected speech, we still shouldn't have pulled the trigger on overbreadth invalidation—a remedy of last resort. There was no reason to cavalierly strike down the statute, especially given its long history and vast legitimate sweep.

This case was an obvious candidate for en banc review.

We now lead a circuit split. *See United States v. Tracy*, 456 F. App'x 267, 272 (4th Cir. 2011) (unpublished) ("Although there may be some instances in which we might find that [8 U.S.C. § 1324(a)(1)(A)(iv)] chills protected speech, we are unconvinced that the [provision] prohibits a substantial amount of such speech."); *United States v. Hernandez-Calvillo*, — F.4th —, 2022 WL 2709736, at *11 (10th Cir. 2022) ("[W]e hold that [8 U.S.C. § 1324(a)(1)(A)(iv)] is substantially overbroad under the First Amendment.").

And our decision may lead to the invalidation of other federal and state laws that use similar "encourage" or "induce" language. *See, e.g.*, 18 U.S.C. § 2(a) ("aids, abets, counsels, commands, *induces* or procures [the commission of an offense against the United States]"); 18 U.S.C. § 373(a) ("[w]hoever . . . solicits, commands, *induces*, or otherwise endeavors to persuade" another to engage in a crime of violence); Haw. Rev. Stat. Ann. § 705-510(1) ("commands, *encourages*, or requests"); Mont. Code Ann. § 45-4-101(1) ("commands, *encourages*, or facilitates"); Idaho Code Ann. § 18-204 ("aid and abet . . . advise[] and *encourage*[]"); Nev. Rev. Stat. Ann. § 195.020 ("aids or abets . . . , counsels, *encourages*, hires, commands, *induces* or otherwise procures") (emphases added).

Indeed, this case is already wreaking havoc in our court. *Compare Marquez-Reyes v. Garland*, 36 F.4th 1195, 1201-07 (9th Cir. 2022) (explaining that *Hansen* doesn't apply to 8 U.S.C. § 1182(a)(6)(E)(i), which affects any alien who "knowingly has encouraged, induced, assisted, abetted, or aided any other alien" to enter the country illegally), *with id.* at 1209-13 (Berzon, J., dissenting) (arguing that *Hansen* does apply).

For these reasons, I respectfully dissent from the denial of rehearing en banc.

I.

At its core, this case concerns the scope of what 8 U.S.C. § 1324(a)(1)(A)(iv) criminalizes.[1] If the provision is a straightforward solicitation and aiding-and-abetting statute (as I will show), we have little free-speech concerns. That's because "speech integral to criminal conduct" is a categorical exception to the First Amendment. *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). It's thus important to understand the common law concepts of solicitation and aiding and abetting. So I begin there.

Solicitation is a "well-established (and distinct) type of inchoate crime." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 651 (9th Cir. 2020). It prohibits the act of trying to persuade another to commit an unlawful offense with intent for the crime to be committed. *See* Wayne R. LaFave, 2 Subst. Crim. L. § 11.1 (3d ed. 2017). With

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[1] The provision provides that "[a]ny person who—encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law . . . shall be punished." 8 U.S.C. § 1324(a)(1)(A)(iv).

solicitation, the crime is complete the moment a person "entice[s], advise[s], incite[s], order[s,] or otherwise encourage[s]" another to commit the underlying offense. *Id.* The offense solicited need not be completed. *Id.*

Before the 1800s, it was generally accepted that solicitation of perjury, bribery, and forgery were crimes. *Id.* § 11.1(a) (citing *Rex v. Johnson*, 80 Eng. Rep. 753 (1679) and *Rex v. Vaughan*, 98 Eng. Rep. 308 (1769)). But it wasn't until the turn of the 19th century, that solicitation as a general crime was recognized by English courts. *See Rex v. Higgins*, 102 Eng. Rep. 209 (1801). There, a man was charged with soliciting a servant to steal his master's goods. *Id.* Even though the servant didn't carry out the theft, the court held that the solicitation was its own crime. *Id.* Since *Higgins*, solicitation has been accepted as a common law offense in both the United States and England. LaFave, *supra*, § 11.1(a). As an early state court held, "[t]he very act of advising to the commission of a crime is of itself unlawful." *Commonwealth v. Bowen*, 13 Mass. 356, 359 (1816).

Aiding and abetting, or more succinctly "facilitation," resembles solicitation, but it requires the commission of a crime. At common law, "a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Rosemond v. United States*, 572 U.S. 65, 70 (2014). For aiding-and-abetting liability to attach, a person must, in part, "assist[] or participate[] in the commission of the underlying substantive offense," and "someone [else] [must have] committed the underlying substantive offense." *United States v. Thum*, 749 F.3d 1143, 1148-49 (9th Cir.

2014) (simplified). It's a broad form of criminal liability and "comprehends all assistance rendered by words, acts, encouragement, support, or presence." *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993) (simplified).

Historically, the common law divided aiders and abettors into two buckets. First were second-degree principals, who were "aiders and abettors present at the scene of the crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007). Second were accessories before the fact, who were "aiders and abettors who helped the principal before the basic criminal event took place." *Id.* As a seminal criminal treatise explains, accessory-before-the-fact liability was described as "order[ing], counsel[ing], encourag[ing], or otherwise aid[ing] and abet[ting] another to commit a felony and who [was] not present at the commission of the offense." LaFave, *supra*, § 13.1(c). Today, we focus less on this distinction and consider "aiders and abettors who fall into the [two] categories" as simply criminal facilitators. *See Duenas-Alvarez*, 549 U.S. at 189.

Speech that creates criminal liability under either solicitation or aiding and abetting is unprotected. The First Amendment establishes that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. But "speech integral to criminal conduct" is one of the "historic and traditional categories" of excepted, punishable speech. *Stevens*, 559 U.S. at 468 (citing *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). And speech that constitutes criminal solicitation or facilitation falls within this exception. *See Wil-*

liams, 553 U.S. at 297 (holding that solicitation is "categorically excluded from First Amendment protection"); *Rosemond*, 572 U.S. at 73 (approving of the federal aiding-and-abetting statute, which "comprehends all assistance rendered by words, acts, encouragement, support, or presence" (simplified)); *see generally* Eugene Volokh, The "Speech Integral to Criminal Conduct" Exception, 101 Cornell L. Rev. 981 (2016).

With this understanding of first principles, let's turn to § 1324(a)(1)(A)(iv).

II.

Section 1324(a)(1)(A)(iv) punishes any person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry or residence is or will be in violation of law." In addition, "in the case of a violation . . . in which the offense was done for the purpose of commercial advantage or private financial gain," the person will be fined or imprisoned for up to 10 years, or both. 8 U.S.C. § 1324(a)(1)(B)(i).

When Congress used the terms "encourage" and "induce" in § 1324(a)(1)(A)(iv), it was not legislating in a vacuum. Rather, it enacted the provision against the backdrop of those words having settled meaning in the criminal law. For hundreds of years, both terms were historically bound up with liability for criminal complicity. So it's clear Congress was targeting those types of crimes—solicitation (when the underlying crime isn't committed) and facilitation (when the underlying crime is committed)—when enacting § 1324(a)(1)(A)(iv). The text, history, and structure of § 1324 confirms this.

A.

First, some history. From before our Founding, to the late 19th century, to the modern era, crimes involving solicitation and facilitation were defined with terms tantamount to "encourage" and "induce."

Starting back in the 17th century, Edward Coke wrote that accessory-before-the-fact liability attached to "all those that incite, procure, set on, or stir up any other to do the fact, and are not present when the fact is done." 2 Edward Coke, Institutes of the Laws of England 182 (6th ed. 1681). He also said that it applies to "all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act, and are not present when the act is done." *Id.*

Closer to our Founding, William Blackstone described accessory-before-the-fact liability as "procur[ing], counsel[ing], or command[ing] another to commit a crime" and explained that "[i]f A then advises B to kill another, and B does it in the absence of A, now B is principal, and A is accessory in the murder." 4 William Blackstone, Commentaries on the Laws of England 36-37 (1769); *see also* 1 Matthew Hale, The History of the Pleas of the Crown 615 (1736) (noting that to "procure, counsel, command, or abet another to commit a felony" while being absent from the commission of the crime creates accessory-before-the-fact liability).

This common law understanding persisted throughout the 19th century. For example, an 1816 state court approved of a charge against a prison inmate for "induc[ing], encourag[ing], and fix[ing] the intention, and ultimately procur[ing] the perpetration" of the suicide of another inmate, who was set for execution. *Bowen*,

13 Mass. at 358-60. And prominent legal scholar Francis Wharton explained that "[i]t has been settled in England that if a man encourages another to murder himself, and he is present abetting him while he does so, such man is guilty of murder as a principal." Francis Wharton, A Treatise on the Criminal Law of the United States 230 (1846).

Further, at that time, English laws outlawing criminal encouragements and inducements were well established. For example, an English law punished "any person [who] entice[d] or encourage[d] any artificer employed in printing calicoes, cottons, muslins, or linens, to leave the kingdom." 4 Jacob Giles, The Law-Dictionary: Explaining the Rise, Progress, and Present State, of the English Law 235 (1811) (emphasis omitted). Another law provided that "[a]n attempt to induce a man to advise the king under the influence of a bribe, is criminal, though never carried into execution." 1 Giles, *supra*, at 370.

Early legal dictionaries also used variants of "encourage" and "induce" to describe criminal solicitation and aiding and abetting. Consider these definitions from the 1790s to the 1880s:

- 1 Richard Burn, A New Law Dictionary 4, 7 (1792):
    - *Accessary before the fact*: One who "procure[s], counsel[s], command[s], or abet[s] another to commit a felony."
    - *Abet*: "[I]s to stir up or incite, encourage or set on; one who promotes or procures a crime. Abettors of murder, are such as command,

procure, or counsel others to commit a murder[.]" (emphasis deleted).

- 1 Giles, *supra*, at 14:
  - *To Abet*: "In our law signifies to encourage or set on; the substantive abetment is used for an encouraging or instigation. An abettor is an instigator or setter on; one that promotes or procures a crime." (emphasis deleted).
- 1 John Bouvier, Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union 30-31 (1839):
  - *To Abet*: "[*C*]*rim. law.* To encourage or set another on to commit a crime[.] To abet another to commit a murder, is to command, procure, or counsel him to commit it."
  - *Abettor*: "[I]s one who encourages or incites, encourages or sets another on to commit a crime."
- William Cochran, The Students' Law Lexicon A Dictionary of Legal Words and Phrases 2, 142 (1888):
  - *Abet*: "[T]o aid, encourage, or incite another to commit a crime."
  - *Incite*: "[T]o stimulate or induce a person to commit a crime. This is a misdemeanor, whether the crime be committed or not."
- Henry Campbell Black, A Dictionary of Law 6, 419, 617 (1891):

- *Encourage*: "In criminal law. To instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident. See Aid."
- *Abet*: "In criminal law. To encourage, incite, or set another on to commit a crime. To abet another to commit a murder is to command, procure, or counsel him to commit it."
- *Inducement*: "In criminal evidence. Motive; that which leads or tempts to the commission of crime."

Moving forward to the 20th century, the same terminology was used to define solicitation and facilitation. In *Fox v. Washington*, for example, the Supreme Court recognized that a state statute prohibiting the publication of material "advocating, encouraging or inciting . . . which shall tend to encourage or advocate disrespect for law" was a common law solicitation or facilitation provision. 236 U.S. 273, 275 (1915) (simplified); *see also id.* at 277 (recognizing that "encouragements . . . directed to a particular persons' conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principle in the crime encouraged"). Justice Holmes understood the statute as "encouraging an actual breach of law," which is "an overt breach and technically criminal act." *Id.* at 277. Under that narrow construction, Justice Holmes thought the law could not be used to "prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general." *Id.* And so the law was no "unjustifiable restriction of liberty" and comported with the freedom of speech. *Id.*; *see also Cox v. Louisiana*, 379 U.S. 559, 563 (1965)

(explaining the familiar principle that "[a] man may be punished for encouraging the commission of a crime").

And more recently, courts have used "encouraging" and "inducing" to define criminal complicity. For example, in *Williams*, the Court equated "induce" with "solicit." 553 U.S. at 294. There, the Court said that the solicitation statute at issue "penalizes speech that accompanies or seeks to induce a transfer of child pornography." *Id.* Our court sitting en banc has also understood this settled meaning. In *United States v. Lopez*, we explained that an abettor "commands, counsels or otherwise encourages the perpetrator to commit the crime," and a facilitator "aid[s], counsel[s], command[s], induce[s] or procure[s] [the principal] to commit each element" of the crime. 484 F.3d 1186, 1199 (9th Cir. 2007) (en banc) (simplified).

Modern dictionaries also recognize the established meaning of the terms in the criminal context. In legal dictionaries, "abet" has been defined as "[t]o encourage, incite, or set another on to commit a crime." Black's Law Dictionary (4th ed. 1951). That dictionary also used the term synonymously with "encourag[ing], counsel[ing], induc[ing], or assist[ing]" the commission of crime. *Id.* The 2019 edition of Black's retains a similar meaning for "abet": "[t]o aid, encourage, or assist (someone), esp. in the commission of a crime." Black's Law Dictionary (11th ed. 2019). And it defines criminal inducement as "entic[ing] or urging another person to commit a crime." *Id.* Even lay dictionaries understand the words as terms of art to define criminal complicity. *See, e.g.*, Webster's Third New International Dictionary 3 (2002) (defining "abet" as to "incite, en-

courage, instigate, or countenance," as in "the commission of a crime"); Webster's New International Dictionary 4 (2d ed. 1958) (same).

Longstanding federal and state statutes also employ "encourage," "induce," and other variants to define criminal solicitation and aiding and abetting. For example, one federal statute punishes as solicitation "[w]hoever . . . solicits, commands, induces, or otherwise endeavors to persuade" another to engage in a crime of violence. 18 U.S.C. § 373(a). Another punishes as aiding and abetting a person who "aids, abets, counsels, commands, induces or procures [the commission of an offense against the United States]." 18 U.S.C. § 2(a). The Model Penal Code defines solicitation as "command[ing], encourag[ing], or request[ing] another person to engage in specific [unlawful] conduct." Model Penal Code § 5.02(1) (1985). And many state statutes defining solicitation[2] and accessory liability[3] look the same.

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[2] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1002(A) ("commands, encourages, requests or solicits"); Idaho Code Ann. § 18-2001 ("solicits, importunes, commands, encourages or requests"); Haw. Rev. Stat. Ann. § 705-510(1) ("commands, encourages, or requests"); Mont. Code Ann. § 45-4-101(1) ("commands, encourages, or facilitates"); Wyo. Stat. Ann. § 6-1-302(a) ("commands, encourages or facilitates"); Colo. Rev. Stat. § 18-2-301(1) ("commands, induces, entreats, or otherwise attempts to persuade another person"); Tex. Penal Code Ann. § 15.03(a) ("requests, commands, or attempts to induce").

[3] *See, e.g.*, Idaho Code Ann. § 18-204 ("aid and abet . . . advise[] and encourage[]"); Nev. Rev. Stat. Ann. § 195.020 ("aids and abets [or] counsels, encourages, hires, commands, induces or otherwise procures"); Colo. Rev. Stat § 18-1-603 ("aids, abets, advises, or

B.

With this understanding of the well-settled meaning of "encourage" and "induce," I return to the statutory provision at issue: encouraging and inducing an alien to illegally enter the country under 8 U.S.C. § 1324(a)(1)(A)(iv). Its statutory history confirms Congress's goal to prohibit criminal solicitation and facilitation. And that's how we should have interpreted the provision.

i.

In 1885, Congress enacted the statute that would later become 8 U.S.C. § 1324. That statute criminalized "knowingly assisting, encouraging or soliciting the migration or importation of any alien or aliens, foreigner or foreigners, into the United States." Alien Contract Labor Law, ch. 164, § 3, 23 Stat. 332, 333 (1885). Thus, from the beginning, we know that Congress intended "encouraging" to take on a similar meaning as "assisting" or "soliciting" illegality. That's because "a word is given more precise content by the neighboring words with which it is associated." *Williams*, 553 U.S. at 294 (describing the "commonsense canon of *noscitur a sociis*"); *see also id.* at 294-95 (construing "promotes" and "presents" to mean "solicits" in a statute punishing any person who "advertises, promotes, presents, distributes, or solicits" child pornography). Indeed, the Court understood that the statute "punish[ed] those

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encourages"); Tex. Penal Code Ann. § 7.02(a)(2) ("solicits, encourages, directs, aids, or attempts to aid"); Utah Code Ann. § 76-2-202 ("solicits, requests, commands, encourages, or intentionally aids").

who assist in introducing, or attempting to introduce, aliens in violation of [Congress's] prohibition." *Lees v. United States*, 150 U.S. 476, 480 (1893).

Congress's use of "encouragement" to refer to solicitation and facilitation remained consistent through 1903 and 1907 updates. For example, the 1903 version of the law made it unlawful to (1) "prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States"; (2) "assist or encourage the importation or migration of any alien by a promise of employment through advertisements"; (3) "directly or through agents, either by writing, printing, or oral representations, solicit, invite, or encourage the immigration of any aliens into the United States"; and (4) "[t]o knowingly aid[], advise[], or encourage[] any such person to apply for or to secure [unlawful] naturalization." Immigration Act of 1903, ch. 1012, § 5, 32 Stat. 1213, 1214-15, 1222. Again, Congress used "encourage" in the same breath as criminal "assist[ance]" and "solicit[ation]"—demonstrating their equivalence.

The 1907 version was similar. It made it unlawful to (1) "prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States"; (2) "assist or encourage the importation or migration of any alien by promise of employment through advertisements printed and published in any foreign country"; and (3) "either by writing, printing, or oral representation, solicit, invite, or encourage the immigration of any aliens into the United States." Immigration Act of 1907, ch. 1134, § 5, 34 Stat. 898, 900.

With the 1917 iteration, Congress added "inducement" as another variant of the soliciting and assisting

language. It updated the statute to make it unlawful to (1) "in any way to induce, assist, encourage, or solicit . . . the importation or migration of any contract laborer or contract laborers into the United States"; and (2) "induce, assist, encourage, or solicit . . . any alien to come into the United States by promise of employment through advertisements." Immigration Act of 1917, ch. 29, § 5, 39 Stat. 874, 879. The *noscitur* canon makes clear that "induce" also takes on a similar meaning to criminal "asssist[ance]" and "solicit[ation]." And there's certainly no evidence that Congress intended to encompass non-criminal conduct by the inclusion of the word "inducement."

Indeed, the Court also interpreted "induce" in the 1917 law to mean the solicitation or facilitation of a crime. *See United States v. Hoy*, 330 U.S. 724 (1947). There, a man was charged for "writ[ing] a letter to certain persons living in Mexico to induce them to come to the United States to work for him." *Id.* at 725. In the letter, he assured the aliens that he would "arrange everything," and get them out on bond if they were caught by immigration officials. *Id.* In analyzing the case, the Court described the 1917 law's solicitation and facilitation provision as a "prohibition against employers inducing laborers to enter the country." *Id.* at 731.

In 1952, Congress streamlined its language in enacting the modern-day § 1324 statute. The new version made it unlawful to "willfully or knowingly encourage[] or induce[], either directly or indirectly, the entry into the United States of—any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States[.]" Immigration and Nationality Act, ch. 477, 66 Stat. 163, 229 (1952)

(8 U.S.C. § 1101 *et seq.*). Once again, there's nothing to suggest that Congress altered the meaning of the immigration statute by reducing the number of operative verbs to two.

And a few decades later, Congress made final tweaks to the provision—giving the statute its current form. In 1986, Congress amended the law to punish a person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry or residence is or will be in violation of law." Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (current version at 8 U.S.C. § 1324(a)(1)(A)(iv)).

Then in 1996, Congress added enhanced penalties for conduct undertaken for the "purpose of commercial advantage or private financial gain." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C Tit. II, Subtit. A., § 203(a), (b), 110 Stat. 3009, 3009-565 (1996) (codified as 8 U.SC. § 1324(a)(1)(B)(i)). At the same time, Congress added punishments for conspiracy and for aiding or abetting the other provisions of § 1324. *Id.* (codified as 8 U.S.C. § 1324(a)(1)(A)(v)(I)-(II)).

With that overview, we can now interpret the meaning of § 1324(a)(1)(A)(iv).

ii.

When it comes to statutory interpretation, we must always be mindful of "the specific context in which the language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537 (2015) (simplified). And while we often look to the or-

dinary meaning of the statute, sometimes looking at dictionary definitions in isolation can lead us astray. *See, e.g.*, *Bloate v. United States*, 559 U.S. 196, 205 n.9 (2010). As we've recently said, "when a phrase is obviously transplanted from another legal source," such as other legislation or the common law, "it brings the old soil with it." *United States v. Randall*, 34 F.4th 867, 875 (9th Cir. 2022) (simplified). In other words, when Congress adopts a phrase with a settled meaning "absent some indication to the contrary, we presume that Congress chose to give the phrase its established meaning." *Id.* Indeed, the Court recently explained that "[t]he point of the old-soil principle is that when Congress employs a term of art, that usage itself suffices to adopt the cluster of ideas that were attached to each borrowed word." *McDonough*, 142 S. Ct. at 1963 (simplified). Here we have buckets of soil to understand Congress's meaning.

From before the Founding until today, both in statutes and in common law, the terms "encourage" and "induce" have been used to define solicitation and aiding and abetting. Congress knew that when it began passing criminal immigration laws in 1885. So when interpreting § 1324(a)(1)(A)(iv)'s prohibition of "encourag[ing] or induc[ing] an alien to [illegally] come to, enter, or reside in the United States," our duty is to apply settled meaning. Thus, the best reading of the provision is that it prohibits the solicitation and facilitation of the underlying offense—coming to, entering, or residing in the country in violation of law. In other words, subsection (iv) is just an ordinary solicitation and facilitation provision.

Once subsection (iv) is understood as a solicitation and facilitation statute, to be charged, any words of encouragement or inducement must be tied to the speaker's "purpose of promoting or facilitating [the offense's] commission." Model Penal Code § 5.02(1). That's because those crimes "require as one element the *mens rea* to achieve the commission of a particular crime." *United States v. Vidal*, 504 F.3d 1072, 1079 (9th Cir. 2007) (en banc); *see also* Charles E. Torcia, Wharton's Criminal Law § 38 (15th ed. 1993) (describing an accomplice as one who "with the intent to promote or facilitate the commission of the crime, . . . solicits, requests, or commands the other person to commit it, or aids the other person in planning or committing it" and noting that "[t]he absence of mens rea precludes one from being an accomplice").

And even if those crimes encompass some speech, speech "that is intended to induce or commence illegal activities" is "undeserving of First Amendment protection." *Williams*, 553 U.S. at 298. As the Court said back in 1893, "[i]f congress has power to exclude [certain aliens], as . . . it unquestionably has, it has the power to punish any who assist in their introduction" into the country. *Lees*, 150 U.S. at 480.

Contrary to our holding then, the provision does not outlaw "commonplace statements and actions" or "general immigration advocacy." *Hansen*, 25 F.4th at 1107, 1110. We reached this erroneous conclusion by broadly defining "encourage" and "induce" under ordinary dictionary definitions without checking whether the terms are specialized terms-of-art in the criminal law context. *Id.* at 1108-09. Indeed, we've recognized that this lan-

guage criminalizes criminal complicity many times before, and it's unclear why we failed to do so here. *See, e.g.*, *Lopez*, 484 F.3d at 1199 ("[W]e have stated that an abettor is one who, with *mens rea* commands, counsels or otherwise encourages the perpetrator to commit the crime." (simplified)).

The statutory structure also supports reading the provision as a solicitation and facilitation law. First, although the statute is silent on this question, we have held that § 1324(a)(1)(A)(iv) requires a criminal mens rea consistent with criminal complicity. "[T]o convict a person of violating section 1324(a)(1)(A), the government must show that the defendant acted with criminal intent, i.e., the intent to violate United States immigration laws." *United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002) (simplified). So, under our own interpretation, to convict a person under subsection (iv), the defendant must encourage or induce an alien to enter the United States with "the intent to violate United States immigration laws." *Id.* (simplified). This mens rea requirement makes clear that subsection (iv) is a solicitation and facilitation provision because a defendant must act with "criminal intent." *Id.*

Second, the offense at issue in this case requires proof that the defendant acted to obtain "commercial advantage or private financial gain." 8 U.S.C. § 1324(a)(1)(B)(i). So when subsection (iv) is charged with § 1324(a)(1)(B)(i), as here, it requires a financial incentive—a common criminal purpose. That eliminates the concern "that commonplace statements" about politics or immigration policy would be swept up by § 1324(a)(1)(A)(iv)—as our court imagined. *Hansen*, 25 F.4th at 1110. Any statements prosecuted under

this law must be designed to make money off the targeted aliens—fitting solicitation and facilitation.

Finally, as we recognized, "the subsection requires the encouragement or inducement of a specific alien or aliens," *Hansen*, 25 F.4th at 1108, which corresponds with the requirement for specificity in soliciting and facilitating crime. *See Williams*, 553 U.S. at 300 (emphasizing that a child-pornography solicitation statute does not target abstract advocacy because it refers to a "particular piece" of child pornography with the intent to transfer it); *see also* Volokh, *supra*, at 993-94 (recognizing that specificity is the dividing line between punishable solicitation and protected advocacy).

Once understood as a criminal solicitation and facilitation statute, the parade of horribles made up by our court fades away. We contended that the law punishes (1) "encouraging an undocumented immigrant to take shelter during a natural disaster"; (2) "advising an undocumented immigrant about available social services"; (3) "telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa"; or (4) "providing certain legal advice to undocumented immigrants." *Hansen*, 25 F.4th at 1110. But none of those examples involve any proof of "*mens rea* to achieve the commission of a particular crime." *Vidal*, 504 F.3d at 1079. That means one thing: the law does not reach abstract advocacy. It only prohibits speech that targets particular aliens with a proper criminal intent.

iii.

Contrary to our court's reasoning, interpreting § 1324(a)(1)(A)(iv) as a solicitation and facilitation provision does not create a surplusage problem. *Hansen*

suggested that subsection (iv) could not be an aiding-and-abetting provision because § 1324(a) has another aiding-and-abetting provision. *Hansen*, 25 F.4th at 1108-09. To be sure, § 1324(a)(1)(A)(v)(II) creates criminal liability for anyone who "aids or abets the commission of any of the preceding acts"—meaning subsections (i) through (iv). But our court incorrectly took this as proof that subsection (iv) was not an aiding-and-abetting provision. *See Hansen*, 25 F.4th at 1109 ("Interpreting subsection (iv) as different from aiding and abetting also avoids any related concerns that either it or § 1324(a)(1)(A)(v)(II) is superfluous.").

But the surplusage canon is only employed to avoid "entirely redundant" provisions in a statute. *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion). It only comes into play if an interpretation would render one provision as having "no consequence." *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (plurality opinion) (simplified). We have none of these concerns here.

First, we ignored analyzing § 1324(a)(1)(A)(iv) as a solicitation provision. If we had, we would have recognized that no other provision of § 1324 punishes solicitation. So that's one reason why there's no surplusage problem here.

And second, subsection (iv) and subsection (v)(II) prohibit the aiding and abetting of different things. As we have previously recognized:

> The "encourages or induces" offense, § 1324(a)(1)(A)(iv), criminalizes the act of encouraging *the alien herself* to illegally enter or reside in the United States,

> whereas aiding and abetting the principal in a "bringing to" offense, § 1324(a)(2)(B)(ii), criminalizes the act of aiding, counseling, inducing or encouraging *not the alien but the principal*, the person or venture who is illegally bringing the alien to the United States.

United States v. Singh, 532 F.3d 1053, 1059 (9th Cir. 2008). While *Singh* interpreted a neighboring provision, § 1324(a)(2)(B)(ii), that subsection employs identical language as § 1324(a)(1)(A)(i), and so *Singh*'s logic directly governs. Thus, subsection (iv) prohibits the aiding and abetting of an *alien* to "come to, enter, or reside in the United States" in violation of law, while subsection (v)(II) outlaws aiding and abetting a *principal* from committing the other alien-smuggling violations—"bring[ing]," "transport[ing]," and "harbor[ing]" aliens illegally. *See* 8 U.S.C. § 1324(a)(1)(A)(i)-(iii). Indeed, subsection (v)(II) can even prohibit aiding and abetting an encourager under subsection (iv). *See, e.g.*, *United States v. Lopez*, 590 F.3d 1238, 1250 (11th Cir. 2009) (recognizing that (v)(II) can harmoniously modify subsection (iv)). So again, there is no surplusage problem. We were thus wrong to invoke that canon to avoid concluding that § 1324(a)(1)(A)(iv) targets solicitation and facilitation.

Nor does the 1996 addition of subsection (v)(II) change the meaning of subsection (iv), which was enacted some 50 years prior. Our court was wrong to hold otherwise. *See Hansen*, 25 F.4th at 1108-09 ("Subsection 1324(a)(1)(A)(v)(II) . . . strongly suggests that subsection (iv) should not also be read as an aiding and abetting provision."). It would be "entirely unrealistic to suggest that Congress" meant to expand the scope of encourage and induce "by such an oblique and

cryptic route" as simply adding an aiding-or-abetting provision in a different subsection 50 years later. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 99 (2006). Indeed, "later laws that do not seek to clarify an earlier enacted general term and do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute, are beside the point in reading the first enactment." *Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000) (simplified). So there is no reason to believe that Congress upended the well-settled meaning of "encourage" and "induce" in subsection (iv) by adding a separate aiding-and-abetting provision. From the day they were enacted to today, those terms have referred to the same thing—solicitation and facilitation.

iv.

Even if any doubt remains about § 1324(a)(1)(A)(iv)'s reach, under the constitutional avoidance canon, we are required to construe the provision as a criminal solicitation and facilitation provision. When "a serious doubt" is raised about the constitutionality of an act of Congress, it is a "cardinal principle" that courts will "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (simplified). If a "fairly possible" interpretation averts a clash with the Constitution, *id.*, we must follow it. *See Boos v. Barry*, 485 U.S. 312, 330-31 (1988) (explaining that federal courts not only have the "power" but also "the duty" to narrowly construe federal statutes when possible to avoid constitutional issues). Such a doctrine is rooted in the separation of powers; we respect Congress by not holding that it violated its duty to follow the Constitution unless it's necessary.

We've had no problems liberally applying the canon to avoid constitutional questions in the past—especially in the immigration context. *See, e.g.*, *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-85 (9th Cir. 2015) (construing 8 U.S.C. §§ 1225(b), 1226(c) and 1226(a) to require a bond hearing despite the statutory text), *rev'd sub nom. Jennings*, 138 S. Ct. at 852. Indeed, we've invoked the canon even when it "inflict[ed] linguistic trauma" on the text of the statute. *Jennings*, 138 S. Ct. at 848. That's why it's baffling that our court decided to give the canon short shrift here.

Not only is it "fairly possible" to construe § 1324(a)(1)(A)(iv) as a solicitation and facilitation provision, it's the best reading. Hundreds of years of authorities use "encourage," "induce," and other near synonyms to define solicitation and facilitation. Further, the structure of § 1324(a)(1)(A) supports reading subsection (iv) that way. The provision's mens rea requirement, the financial-gain element, and specificity all narrow its scope. Given that the provision is "readily susceptible" to a construction that avoids protected speech, we should've adopted it. *Stevens*, 559 U.S. at 481 (simplified). Our court's only response is that "the plain meaning of subsection (iv) does not permit the application of the constitutional avoidance canon," *Hansen*, 25 F.4th at 1110—but as the above shows, that's wrong.

Rather than force the statute into a direct collision with the Constitution, we should have taken the more textually appropriate road and read § 1324(a)(1)(A)(iv) as a solicitation and facilitation provision. Under this interpretation, the law easily survives First Amendment scrutiny and there is no reason to reach the overbreadth

doctrine. But even if this law reaches some speech, it is a poor candidate for overbreadth invalidation.

III.

A.

The overbreadth doctrine is the nuclear option of First Amendment law. With it, a federal court can essentially level a federal statute if the law "prohibits a substantial amount of protected speech." *Williams*, 553 U.S. at 292. Such a doctrine is a facial challenge on steroids. With facial challenges, courts may only invalidate a law if "no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). But with overbreadth, courts may wipe out laws merely by finding that a "substantial amount" of protected speech is impacted, even if "some of [the law's] applications [are] perfectly constitutional." *Williams*, 553 U.S. at 292.

That's a huge expansion of our Article III powers. So to balance-out that power, courts must "vigorously enforce[] the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* And "there must be a realistic danger" that the statute "significantly compromise[s] First Amendment protections." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Id.* at 800. Overbreadth invalidation is "strong medicine" that is "not [to

be] casually employed" and must only be used as an option of "last resort." *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999) (simplified).

The overbreadth doctrine should be rarely used especially because it appears to be ahistorical and atextual. As Justice Thomas has explained, the doctrine first arrived in the mid-20th century with *Thornhill v. Alabama*, 310 U.S. 88 (1940), with no indication that the doctrine was rooted in the history or text of the First Amendment. *Sineneng-Smith*, 140 S. Ct. at 1583 (Thomas, J., concurring). Rather, the Court has justified overbreadth invalidation in terms of "policy considerations and value judgments." *Id.* at 1584. It has said that First Amendment freedoms are "supremely precious" with "transcendent value to all society," and so a court may strike down a statute if it decides that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted[.]" *Id.* (simplified); *see generally* Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L. J. 853, 855 (1991) (explaining in detail how "First Amendment overbreadth is largely a prophylactic doctrine, aimed at preventing a chilling effect" (simplified)).

Essentially, Justice Thomas observed that the doctrine lets judges decide what "serves the public good." *Sineneng-Smith*, 140 S. Ct. at 1584. But as he notes, there is no historical evidence to suggest judges were given such a power "to determine whether particular restrictions of speech promoted the general welfare." *Id.* (quoting Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L. J. 246, 259 (2017)). In Justice Thomas's view, the overbreadth doctrine is just "the

handiwork of judges, based on the misguided notion that some constitutional rights demand preferential treatment." *Id.* at 1588 (simplified).

Indeed, to apply the doctrine, judges must become storytellers and bean counters. We first make up the most outrageous violations of free speech we can think of and then count whether those imaginary scenarios are "substantial" enough. Such a creative calculus is beyond our competence. We are at our best when we stick to the facts presented in the record—not when we speculate about "imaginary cases" and sift through "an endless stream of fanciful hypotheticals." *See id.* at 1586 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) and *Williams*, 553 U.S. at 301) (simplified). Those balancing and policy judgments are best left to *elected* officials.

On top of its suspect historical roots, the overbreadth doctrine also clashes with traditional standing principles. Ordinarily, the rule is that a person may not challenge a law that "may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). But overbreadth is "a constitutional anomaly" that relaxes the standing requirement to protect against the chilling of speech. *United States v. Yung*, 37 F.4th 70, 76 (3rd Cir. 2022); *see also Sineneng-Smith*, 140 S. Ct. at 1586-87 (Thomas, J., concurring) (explaining the overbreadth doctrine's departure from traditional standing principles). Just recently, the Court has reasserted its preference for a "strict standard for facial constitutional challenges" and has eschewed the dilution of the "third-party standing doctrine." *See Dobbs v.*

Jackson Women's Health Org., 142 S. Ct. 2228, 2275 (2022).

Given the overbreadth doctrine's shaky foundation, we must be cautious in deploying it. While we have a duty to follow Supreme Court precedent, we must also "resolve questions about the scope of [] precedents in light of and in the direction of the constitutional text and constitutional history." *Edmo v. Corizon, Inc.*, 949 F.3d 489, 506 (9th Cir. 2020) (Bumatay, J., dissenting from the denial of rehearing en banc) (simplified). The text and history here counsel us not to expand the doctrine, but to pause before applying it. *See Yung*, 2022 WL 2112794, at *2 ("Courts must hesitate before stopping the government from prosecuting conduct that it has the power to ban.").

B.

Here there's no justification for deploying the nuclear option. Even if § 1324(a)(1)(A)(iv) somehow reaches protected speech, that reach is far outweighed by the provision's broad legitimate sweep. Consider just a few concrete examples of the activity legitimately punishable by subsection (iv):

- Escorting illegal aliens onto a plane bound for the United States. *Yoshida*, 303 F.3d at 1150.
- Arranging fraudulent marriages for aliens to receive permanent residency. *United States v. Lozada*, 742 F. App'x 451, 453-55 (11th Cir. 2018) (unpublished).
- Selling H-2B work visas to illegal aliens for American jobs that don't exist. *United States v. Pena*, 418 F. App'x 335, 338-39 (5th Cir. 2011) (unpublished).

- Facilitating the employment of illegal aliens by providing them with fraudulent social security numbers. *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1295-97 (11th Cir. 2010).
- Picking up illegal aliens from the Bahamas and boating them to the United States. *United States v. Lopez*, 590 F.3d 1238, 1252 (11th Cir. 2009).
- Providing fraudulent travel documents and instructions to illegal aliens to facilitate travel to the United States. *Tracy*, 456 F. App'x at 269-71.
- Lying on behalf of an illegal-alien passenger to an immigration inspector about the alien's citizenship and purpose for entry. *United States v. One 1989 Mercedes Benz*, 971 F. Supp. 124, 128 (W.D.N.Y. 1997).

What's on the other side of the ledger? According to our court, there's *United States v. Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012) and some inapposite hypotheticals. But on closer inspection, those examples don't help our court's case.

Our court cites *Henderson* for the proposition that a person could be prosecuted under § 1324(a)(1)(A)(iv) for simply advising an alien "generally about immigration law practices and consequences." *Hansen*, 25 F.4th at 1111 (quoting *Henderson*, 857 F. Supp. 2d at 193). But we only tell half the story. In that case, the government prosecuted a U.S. Customs and Border Patrol supervisor for employing an undocumented alien, knowing that the employee was in the country illegally and even

coaching the employee on how to evade immigration authorities while residing in the country. *Henderson*, 857 F. Supp. 2d at 195-97. The district court reversed the conviction and doubted that the facts supported a conviction, and the government never retried the case. *Id.* at 200-14. *Henderson* is thus a poor reason to invalidate an entire law. Even if Henderson were convicted under a properly construed § 1324(a)(1)(A)(iv) (as a solicitation and facilitation statute), it's doubtful the First Amendment permits a CBP supervisor, whose job includes enforcing immigration laws, to knowingly violate those laws by employing an illegal alien and advising that alien on how to reside in the country illegally.

And as discussed earlier, our court's hypotheticals are irrelevant. For example, we say that the phrase—"I encourage you to reside in the United States"—is prosecutable under § 1324(a)(1)(A)(iv). *Hansen*, 25 F.4th at 1110 (citing *Williams*, 553 U.S. at 300). But that's not true under the proper reading of the statute. That statement doesn't direct a specific alien to violate the law and doesn't show the speaker's intent to violate immigration law. So while *Williams* noted the line between abstract advocacy and criminal solicitation, the provision can't target abstract advocacy under a proper interpretation.

So even if we apply the overbreadth doctrine, I can't find any—let alone a substantial amount of—protected speech that can be swept up by the provision's reach. It was thus inappropriate for us to invalidate § 1324(a)(1)(A)(iv) for overbreadth. By doing so, we "short circuit the democratic process by preventing [a]

law[] embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Republican Party*, 552 U.S. at 451.

IV.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

COLLINS, Circuit Judge, dissenting from the denial of rehearing en banc:

For reasons similar to those recounted in Judge Bumatay's dissent, I conclude that (1) under the canon of constitutional avoidance, we can and should interpret the statute at issue here as being limited to soliciting and facilitating the unlawful entry of, or the unlawful taking up of residence by, specific aliens;[1] and (2) so

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[1] This reading of the statute is narrower than the one that the Government apparently advocated in *United States v. Hernandez-Calvillo*, ___ F.4th ___, 2022 WL 2709736 (10th Cir. 2022). There, the defendants' charge for conspiring to violate 8 U.S.C. § 1324(a)(1)(A)(iv) apparently rested on the theory that the object of their illegal employment scheme was to encourage and induce aliens who were *already* unlawfully present in the U.S. to *continue* that unlawful presence. It is not clear to me that the statute should be read so broadly. The prohibition on encouraging or inducing a particular alien to "come to, enter, or reside in the United States," 8 U.S.C. § 1324(a)(1)(A)(iv), is most naturally read, I think, to reach those who encourage or induce particular aliens to *acquire* an unlawful presence or residence that they do not already have. (One does not normally speak of "inducing" another to do what he or she is already doing.) Moreover, the first two listed verbs ("come to" and "enter") plainly refer to such an acquisition, and under the principle of *noscitur a sociis*, the third verb ("reside in") should be read the same way. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (stating that the principle "avoid[s] ascribing to one

construed, the statute is not facially unconstitutional. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 239 (2010) (stating that, under "the canon of constitutional avoidance," a reading of the statutory words that is "fairly possible" and that avoids the constitutional difficulty is to be preferred); *cf. also United States v. Williams*, 553 U.S. 285, 298-300 (2008) (holding that solicitation of an illegal transaction is "categorically excluded from First Amendment protection").

Facial invalidation is particularly inappropriate here, given that Defendant Helaman Hansen was convicted of an *aggravated* version of the § 1324(a)(1)(A)(iv) offense, one that required the Government to prove the additional fact that Hansen acted "for the purpose of commercial advantage or private financial gain." 8 U.S.C. § 1324(a)(1)(B)(i). Because proof of that specific purpose raised the applicable statutory maximum from 5 years to 10 years, *compare id. with id.* § 1324(a)(1)(B)(ii), that purpose constitutes an element of Hansen's offense and was required to be found by the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In Hansen's case, the jury in its verdict made such a specific finding as to both of the § 1324(a)(1)(A)(iv) charges against him. Hansen therefore did *not* suffer any conviction for the lesser offense, but *only* for the greater one. Accordingly, the relevant First Amendment issue before the panel in this case was

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word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress" (citation omitted)). The prosecution in Defendant Helaman Hansen's case is fully consistent with this narrower reading, because his indictment rests on the theory that he used his sham adult-adoption program to persuade two specific aliens to overstay their visas *before* their visas had expired.

whether the statutory language defining the aggravated version of the offense at issue—*i.e.*, the offense defined by 8 U.S.C. § 1324(a)(1)(A)(iv), (B)(i)—is facially unconstitutional. That question is easy. The additional element of acting "for the purpose of commercial advantage or private financial gain," *id.* § 1324(a)(1)(B)(i), substantially narrows the reach of the relevant language in a way that, in my view, leaves little doubt that its "plainly legitimate sweep" greatly exceeds any plausible overbreadth.[2] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

For these reasons, I agree that the panel seriously erred in facially invalidating the relevant statute, and I respectfully dissent from our failure to rehear this case en banc.

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[2] This represents an additional point of distinction between this case and *Hernandez-Calvillo*. There, the court concluded that, on the facts before it, the § 1324(a)(1)(B)(i) "enhancement does not apply to [the defendants'] offense" and "is therefore not an element of [the defendants'] crimes." 2022 WL 2709736, at *8 n.19. Here, by contrast, the opposite is true.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. 2:16CR00024-1

UNITED STATES OF AMERICA

v.

HELAMAN HANSEN

Filed: Dec. 18, 2017

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐ pleaded guilty to count(s) ___.

☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.

☒ was found guilty on counts 1-9 and 11-18 after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature Of Offense	Date Offense Concluded	Count Number
18 U.S.C. § 1341	Mail Fraud (Class C Felony)	10/1/2012-09/02/2016	1 - 9
18 U.S.C. § 1341	Mail Fraud (Class C Felony)	10/1/2012-09/02/2016	11-13
18 U.S.C. § 1343	Wire Fraud (Class C Felony)	10/1/2012-09/02/2016	14-16
9 U.S.C. § 1324(a)(1)(A)(iv)	Encouraging and Inducing Illegal Immigration for Private Financial Gain (Class C Felony)	10/1/2012-09-02-2016	17-18

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ___.

☒ Count 10 of the Superseding Indictment was dismissed on the motion of the United States.

☐ Indictment is to be dismissed by District Court on motion of the United States.

☒ Appeal rights given. ☐ Appeal rights waived.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution or fine, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

12/14/2017

Date of Imposition of Judgment

/s/ MORRISON C. England, Jr.
Signature of Judicial Officer
MORRISON C. ENGLAND, JR.,
United States District Judge
Name & Title of Judicial Officer
12/18/2017
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 240 months on each Counts 1-9 and 11-16, to be served concurrently to each other and a term of 120 months on each of Counts 17 and 18 to be served concurrently to each other for a total term of 240 months.

☐ No TSR: Defendant shall cooperate in the collection of DNA.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be incarcerated in the Lompoc, California facility, but only insofar as this accords with security classification and space availability.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district

- ☐ at ___ on ___ .
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before ___ on ___.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.

If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to at _____, with a certified copy of this judgment.

_____

United States Marshal

_____

By Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

24 months on each of Counts 1-9 and 11-18 all to be served concurrently to each other for a total term of 24 months..

MANDATORY CONDITIONS

You must not commit another federal, state or local crime.

You must not unlawfully possess a controlled substance.

You must refrain from any unlawful use of controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.

☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

☒ You must cooperate in the collection of DNA as directed by the probation officer.

☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.

☐ You must participate in an approved program for domestic violence.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible

due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

2. The defendant shall not dispose of or otherwise dissipate any of his assets until the fine and/or restitution ordered by this Judgment is paid in full, unless the defendant obtains approval of the Court or the probation officer.

3. The defendant shall apply all monies received from income tax refunds, lottery winnings, inheritance, judgments and any anticipated or unexpected financial gains to any unpaid restitution ordered by this Judgment.

4. The defendant shall provide the probation officer with access to any requested financial information.

5. The defendant shall not open additional lines of credit without the approval of the probation officer.

6. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.

7. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the

vendor under contract with the United States Probation Office of up to $25 per month.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$1,700.00	$0.00	$576,264.22

☐ The determination of restitution is deferred until ___ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment colunm below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

***** See next page for list *****

☐ Restitution amount ordered pursuant to plea agreement $____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalities for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived for the ☐ fine ☒ restitution ☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ If incarcerated, payment of the fine is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

☒ If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
ADONY LOPEZ		$7,000.00	
AGUSTINA FLORES		$6,000.00	
AKESA WAQABACA		$3,000.00	
ALLAN MORASTIL		$7,000.00	
AMELIA TUUNGAFASI		$150.00	
AMETE ROKOLEWENI SOKO		$4,500.00	
AMILDA ALVARADO		$5,000.00	
ANNIE MAFOA'AEATA		$300.00	
BALBINO RAMIREZ		$7,000.00	
BEATRIZ SANTOS DIAZ		$5,000.00	
BORA KIM		$35,000.00	
CARMELA CALDERON		$7,000.00	
CARMELA DIAZ		$7,000.00	
CARMEN MUNIZ		$2,500.00	
CHRISTIAN RISOS		$5,200.00	

CRESENCIO PALOMARES		$9,000.00	
DALILA LOPEZ		$7,000.00	
DELIA V. STUCCILLI		$5,500.00	
DEVIN MENDEZ		$7,000.00	
DEVIN MENDEZ		$7,000.00	
DIANA CERDA ZEPEDA		$5,000.00	
DIKITI MORRILL		$2,500.00	
DOMINGO ALVAREZ, LEVI ALVAREZ, EDILBERTO ALVAREZ		$11,000.00	
EDNA DE LEON GARCIA		$6,000.00	
EDSON VINDEL		$7,000.00	
ELI PAINTED-CROW		$4,500.00	
ELI PAINTED-CROW		$4,500.00	
ELIDA RAMOS		$5,000.00	
EM TRUONG		$15,000.00	
EMERSON PEREZ RIVAS		$6,050.32	

EPELI SAMU-SAMUVODRE		$3,500.00	
FELIPE WAQA-TAIREWA		$4,500.00	
FULORI TAMANILATUI		$4,500.00	
GABRIELA HERNANDEZ GONZALEZ		$4,800.00	
GIOVANNY RAMIREZ		$4,000.00	
GUADALUPE JARA		$5,000.00	
HABACUC REYES		$6,000.00	
HECTOR DE LEON		$4,500.00	
HENRIETTA MATAKITOGA		$4,500.00	
ISIKELI NAKATO		$4,620.00	
JASON PILLAY-MUDALIAR		$7,000.00	
JAVIER SANCHEZ		$7,000.00	
JOSAIA BULIVOU		$3,500.00	
JOSEFATA TUKAINIU		$2,320.00	
JUAN ALVAREZ		$7,000.00	

JUAN GONZA-LEZ PENA		$6,000.00	
JUNGWOO HA		$35,000.00	
KINISIMERE MORRILL		$2,500.00	
LOU YANG		$5,700.00	
LUIS DIAZ AND MIRSA DE LEON		$11,500.00	
LUIS DIAZ REYES		$5,000.00	
MAGDA DE LA CRUZ		$6,000.00	
MAGDALI UDIEL REYES VASQUEZ		$6,000.00	
MANJIT SINGH		$3,500.00	
MANUEL MIRAMONTES CORTEZ		$7,000.00	
MARACLEO MANING		$5,000.00	
MARCO RUBI		$6,000.00	
MARCOS LOPEZ		$4,500.00	
MARGARITA HERNANDEZ MOLINA		$5,000.00	
MARIA ARLENE OLIVAR		$800.00	
MARIA DE LA TORRE		$5,000.00	

MARIA ELETICIA PEREZ RIVAS		$6,000.00	
MARIA RIVAS		$6,000.00	
MARIA TORRE		$5,000.00	
MARICEL PANGA		$6,000.00	
MARICEL PANGA		$6,000.00	
MARILYN CUREG		$7,000.00	
MARIO CRUZ SANTIAGO		$7,000.00	
MARTA HERRERA MEJIA		$7,000.00	
MARVIN DE LEON		$5,000.00	
MATTEO STUCCILLI		$5,500.00	
MELI VUNIVALU HIGUERA		$6,500.00	
MEREANI SALUSALU		$4,940.00	
MIRIAM CARRADA		$4,500.00	
MYRA MANING		$5,300.00	
NAILATI VAISITI		$2,000.00	
NENGGE VANG		$5,400.00	

NENGGE VANG		$6,563.90	
NOEL RAMOS VILLAREAL		$6,000.00	
NORA MARLENI RODAS DIAZ		$6,000.00	
NUBIA MEDRANO		$6,000.00	
OLYMPIA MIRAMONTES		$7,000.00	
PENJIAMINI NAILATI		$2,000.00	
RAFAEL DE LA TORRE		$4,500.00	
RAFAEL RODRIGUEZ		$4,500.00	
RAMEEZ RAJA BASHEER-AHAMED		$10,000.00	
RAMON OVALLE		$5,000.00	
RAMONA VALVERDE		$5,000.00	
REJIELI TUKAINIU		$2,620.00	
RENATO C. BOLACOY		$7,000.00	
REYES MEDRANO		$5,000.00	
RICARDO M. DAISOG		$7,000.00	
ROGER C. BOBIS		$7,000.00	

ROMEO ABRAHAM OVALLE PEREZ		$5,000.00	
Totals	**$____**	**$576,264.22**	

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. ☐ Lump sum payment of $ ___ due immediately, balance due

☐ Not later than ___, or

☐ in accordance ☐ C, ☐ D, ☐E, or ☐ F below; or

B. ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C. ☐ Payment in equal ___ *(e.g. weekly, monthly, quarterly)* installments of $____ over a period of _____ *(e.g. months or years)*, to commence ____ *(e.g. 30 or 60 days)* after the date of this judgment; or

D. ☐ Payment in equal ___ *(e.g. weekly, monthly, quarterly)* installments of $____ over a period of _____ *(e.g. months or years)*, to commence ____ *(e.g. 30 or 60 days)* after release from imprisonment to a term of supervision; or

E. ☐ Payment during the term of supervised release/probation will commence within ___ *(e.g. 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendants ability to pay at that time; or

F. ☐ Special instructions regarding the payment of crimimal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX F

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 8 U.S.C. 1324 provides:

Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who—

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the

United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as de-

fined in section 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, or both.

(C) It is not a violation of clauses[1] (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs—

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[1] So in original. Probably should be "clause".

(A) be fined in accordance with title 18 or imprisoned not more than one year, or both; or

(B) in the case of—

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who—

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if—

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as

may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.