No. 15-10614

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EVELYN SINENENG-SMITH,

Defendant-Appellant.

Appeal From The United States District Court
For The Northern District Of California
San Jose Division

BRIEF OF AMICI CURIAE
AMERICAN CIVIL LIBERTIES UNION AND
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA
IN SUPPORT OF DEFENDANT-APPELLANT SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Northern California are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent of more of any stake or stock in amici curiae.

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, nonpartisan organization with over 1.6 million members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended free speech for over ninety years, and has appeared both as direct counsel and as *amicus curiae* in numerous First Amendment cases, including *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002) and *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013). Through its Immigrants' Rights Project, the ACLU engages in a nationwide litigation and advocacy program to enforce and protect the constitutional and civil rights of immigrants. The ACLU of Northern California is an affiliate of the national ACLU.

This Court invited briefing on the following question, among others:

> Whether the statute of conviction, 8 U.S.C. § 1324(a)(1)(A)(iv), is overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?

The ACLU has previously briefed issues relating to the interpretation of 8 U.S.C. § 1324, including *DelRio-Mocci v. Connolly Properties Inc.*, 672 F.3d 241 (3d Cir.

2012). The questions raised here are of significant concern to the ACLU and its membership.[1]

SUMMARY OF ARGUMENT

Section 1324(a)(1)(A)(iv) of the Immigration and Nationality Act makes it a felony to "encourage[] or induce[]" a noncitizen "to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact" that such action is or will be in violation of law. 8 U.S.C. § 1324(a)(1)(A)(iv) ("Section 1324(a)(1)(A)(iv)").

Section 1324(a)(1)(A)(iv) is a content-based, criminal prohibition of protected speech that merits strict scrutiny, and is fatally overbroad under the First Amendment. Under the broad language of this provision, the government could prosecute a loving grandmother who urged her grandson to overstay his visa; a concerned citizen who tweeted out suggestions for avoiding deportation to former recipients of deferred action under the soon-to-be defunct Deferred Action for Childhood Arrivals program; a *pro bono* immigration attorney who hosted a free

[1] Pursuant to Rule 29(a), counsel for amici curiae certifies that all parties have consented to the filing of this brief. Pursuant to Rule 29(c)(5), counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

legal clinic for undocumented immigrants; a community organizer who advised homeless undocumented immigrants on where to find local shelters and soup kitchens; and many others. As these examples make plain, the breadth of this statute places intolerable burdens on protected speech, advocacy, and association in violation of the First Amendment.

The First Amendment does not permit the government to punish advocacy of unlawful acts except in two narrow circumstances. Neither circumstance applies to Section 1324(a)(1)(A)(iv). First, the incitement doctrine permits the government to regulate speech that is intended and likely to elicit imminent violence. But Section 1324(a)(1)(A)(iv)'s prohibitions on speech involve no violence, and broadly criminalize all speech encouraging or inducing immigration violations—regardless of the likelihood or timing of such a violation actually occurring. Second, the government may criminalize "speech integral to criminal conduct," but only when the speech is closely related and necessary to the commission of a crime, such as guiding an individual step-by-step through a false tax filing.[2]

[2] As the Ninth Circuit has explained, this exception to First Amendment protection applies only when the speech is "so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

Neither incitement nor the "speech integral to criminal conduct" doctrine justifies the statute's criminal prohibition on speech advocating non-violent, non-criminal conduct, which makes up a substantial part of Section 1324(a)(1)(A)(iv)'s reach. And even speech that "encourages or induces" a violation of an immigration *crime*, such as illegal entry under 8 U.S.C. § 1325 or illegal re-entry under § 1326, is constitutionally protected if it is not closely tethered to the underlying criminal violation. Section 1324(a)(1)(A)(iv) contains none of the safeguards required to ensure that it cannot be used to prosecute fully protected political speech.

Even if the statute's reach includes a subset of unlawful conduct, it is substantially overbroad and does not provide individuals with clear guidance about when their speech risks becoming a federal felony. That guidance is particularly crucial for anyone who counts non-citizens among their friends, loved ones, coworkers, or clients. Individuals and organizations engaged in protected speech are left to guess when a prosecutor might deem their advice, comfort, or advocacy to fall under the statute. And they are required to condition their speech on their determination of someone's immigration status—a complex legal determination that might vary over time. The only sure way to avoid prosecution under Section 1324(a)(1)(A)(iv) is self-censorship. This chilling effect is particularly pernicious since immigration policy is a perennially contested issue of public concern, and

federal authorities have indicated that they will aggressively prosecute immigration-related crimes.[3]

Moreover, Section 1324(a)(1)(A)(iv) is not susceptible to a limiting construction. Several courts have expressed concern about Section 1324(a)(1)(A)(iv)'s breadth, but have chosen to apply a limiting construction. These constructions differ in approach—as is to be expected when the legislative history of the statute contains not one word to explain the interest purportedly advanced by the broad prohibitions on "encouragement" and "inducement." And critically, these federal court decisions have failed to address Section 1324(a)(1)(A)(iv)'s chilling effect on third parties not before the court: individuals who love, work with, support, raise or are raised by, advocate for, or comfort an undocumented immigrant. Rather than impose an unnatural interpretation of this

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[3] *See* Dean DeChiaro, *Sessions Directs Prosecutors to Focus on Immigration Crimes*, Roll Call, Apr. 11, 2017, https://www.rollcall.com/news/policy/sessions-directs-prosecutors-focus-immigration-crimes; Andrea Noble, *Justice Dept. Budget Seeks 300 More Prosecutors For Violent Crime, Immigration Offenses*, Washington Times, May 23, 2017, http://www.washingtontimes.com/news/2017/may/23/trump-budget-justice-department-calls-300-more-pro/; Alex Emmons, *Targeting a Sanctuary: After ICE Stakes Out a Church Homeless Shelter, Charities Worry Immigrants Will Fear Getting Help*, Intercept, Feb. 27, 2017, https://theintercept.com/2017/02/27/after-ice-stakes-out-a-church-homeless-shelter-charities-worry-immigrants-will-fear-getting-help/.

statute that would continue to chill protected speech, the Court should strike Section 1324(a)(1)(A)(iv) down as a facial violation of the First Amendment.

ARGUMENT

I. Section 1324(a)(1)(A)(iv) targets protected speech.

Speech "encouraging" or "inducing" unlawful acts is protected under the First Amendment. "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). Accordingly, speech is not outside the First Amendment "simply because it advocates an unlawful act." *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000).

The context of the speech restriction at issue here illuminates the importance of keeping this bar for unprotected speech so high: Immigration is a matter of complex law and perennial public debate, and many share opinions on what the law should be and how undocumented individuals should navigate it. It is difficult to imagine a more effective inhibitor of political speech than a criminal law targeting speech uttered by one side of that debate. Section 1324(a)(1)(A)(iv)'s breadth creates the risk of punishing and chilling speech at the very center of a matter of immense public concern.

Section 1324(a)(1)(A)(iv) broadly criminalizes "encouragement" and "inducement"—terms that allow the following acts to be penalized:

- A politician tweets a message encouraging undocumented immigrants not to fear taking shelter during a natural disaster.[4]

- An individual strikes up a conversation with a tourist and suggests that overstaying her tourist visa is not likely to result in serious consequences.

- An individual's spouse has previously been deported from the United States for overstaying a visa. Their minor child, a U.S. citizen, is hospitalized with a terminal illness. The individual writes an op-ed in the form of an open letter begging her spouse to return to the United States to help care for their child.

- A professor publishes a law review article arguing that undocumented immigrants who have family ties to the U.S. have a due process right to remain, and that they should continue to reside here to bolster their ties in contemplation of litigation raising the novel due process claim.

[4] On October 14, 2017, Senator Kamala Harris tweeted the following message: "If you need to seek shelter from the wildfires, please do so regardless of your immigration status." Kamala Harris (@SenKamalaHarris), Twitter, (Oct. 14, 2017, 9:40 AM), https://twitter.com/SenKamalaHarris/status/919241499182804992.

None of these examples can fairly be characterized as unprotected speech. None of the statements would incite imminent violence, nor is any integral to criminal conduct.

A. *Speech that "encourages or induces" non-criminal, non-violent conduct cannot be criminalized as incitement.*

The First Amendment permits punishment of advocacy only where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Supreme Court has repeatedly emphasized the centrality of violence in the incitement standard. The conduct listed in Section 1324(a)(1)(A)(iv)—coming to, entering, or residing in the United States in violation of law—is wholly unrelated to the kind of imminent, violent lawlessness described in *Brandenburg* and in decades of subsequent case law on incitement.

To lose its First Amendment protection, speech that incites must be linked to *criminal* activity and not merely *unlawful* activity. In *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) the Court drew a distinction between permissible advocacy and the "impermissible incitation to crime or violence." *Id.* at 66. It has reiterated this link to criminal activity in many cases since. *See generally Ratchford v. Gay Lib*, 434 U.S. 1080, 1085 (1978) (citing *Brandenburg* for the proposition that "some speech that has a propensity to induce action prohibited by

the criminal laws may itself be prohibited"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 579 (2001) (distinguishing Massachusetts' approved "power to punish speech that solicits or incites crime" from its regulations banning tobacco advertisements).

Yet Section 1324(a)(1)(A)(iv) on its face criminalizes the encouragement of *non-criminal* conduct. Though Section (iv)'s coverage of unlawful entry may correspond to criminal provisions in certain circumstances, *see* 8 U.S.C. § 1325(a) (improper entry), 8 U.S.C. § 1326(a) (reentry of removed aliens), its coverage of "coming to" and "residence in" the United States do not. Coming to the United States with an expired visa may be unlawful, but it is not criminal; residing in the United States after one's visa has expired may be unlawful, but it is not criminal. *See, e.g.*, *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) ("We have long made clear that, unlike illegal entry, mere unauthorized presence in the United States is not a crime."); *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."). Similarly, Congress chose "not [to] impose federal criminal sanctions" on non-citizens "who seek or engage in unauthorized work." *Arizona*, 567 U.S. at 404. Encouraging or inducing such violations of civil immigration laws does not qualify as incitement under the *Brandenburg* test.

Even where Section 1324(a)(1)(A)(iv) can be applied to encouraging or inducing a *crime*—*e.g.*, encouraging or inducing an unlawful entry or re-entry—speech encouraging such crimes still falls outside the "incitement" doctrine. That is because the Supreme Court has consistently limited the incitement doctrine to speech tending to cause immediate violence. From its first articulation of the incitement doctrine, the Supreme Court has linked it explicitly to speech that "tend[s] to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). In announcing the modern incitement standard, the Supreme Court continued its focus on violence: "'[T]he mere abstract teaching of the moral propriety . . . for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.'" *Brandenburg*, 395 U.S. at 448 (internal citation omitted).[5] None of the speech criminalized by Section 1324(a)(1)(A)(iv) even remotely relates to such violent activity.

[5] *See also Hess v. Indiana*, 414 U.S. 105, 109 (1973) ("imminent disorder" and a "'tendency to lead to violence'") (internal citation omitted); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (questioning whether speech "had been followed by acts of violence"); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) ("incitement to riot"); *Texas v. Johnson*, 491 U.S. 397, 410 (1989) (discussing incitement as geared toward "breaches of the peace").

The Ninth Circuit has similarly limited the incitement doctrine to speech advocating violent, riotous activity. In *United States v. Poocha*, 259 F.3d 1077 (9th Cir. 2001), this Court addressed a conviction under the federal disorderly conduct regulation, 36 C.F.R. § 2.34(A)(2), which "closely track[ed], in part, the words of . . . *Chaplinsky*." *Id.* at 1080 (citing *Chaplinsky*, 315 U.S. at 572). It held that the defendant's statement "was neither intended to nor likely to incite the crowd at the scene to riot" and was therefore protected speech. *Id.* at 1082 (citing *Brandenburg*, 395 U.S. at 447).[6] The opinion, following the Supreme Court's precedent, repeatedly emphasized that the object of unprotected incitement was "breach of the peace," "riot," and "violence." *Id.* at 1080, 1082.

Prior to *Poocha*, one Ninth Circuit opinion suggested that Congress could punish incitement of tax evasion—a non-violent crime. *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (citing *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978), *cert. denied*, 437 U.S. 906 (1978)). However, the defendant did not appear to raise constitutional concerns with the government's incitement

[6] In dissent, Judge Tashima wrote that he would have affirmed the defendant's conviction for disorderly conduct on the ground that the trial record supported a finding that his speech and expressive conduct "at that time and place, was likely to incite an immediate breach of the peace." *Id.* at 1085 (Tashima, J., dissenting in part). Thus, the *Poocha* panel was unanimous on the nature of the incitement standard.

theory, but instead argued that he did nothing more than advocate an abstract idea; thus, the Court focused not on the *Brandenburg* test, but rather on an independent category of unprotected speech—"speech integral to criminal conduct," discussed in Part B below. *Freeman* is therefore not a case applying the incitement doctrine. *Poocha*, however, is. Moreover, *Poocha* is a more recent statement of the Ninth Circuit's understanding of incitement doctrine and, consistent with decades of Supreme Court case law, firmly establishes that incitement means incitement of violence or a breach of the peace. Section 1324(a)(1)(A)(iv)'s broad language applies to speech well beyond this narrow category.

The speech criminalized by Section 1324(a)(1)(A)(iv) falls outside of the incitement doctrine for a separate reason: Such speech may be censured only where it is subjectively "directed to" and objectively likely to incite imminent violence. *Brandenburg*, 395 U.S. at 447. Section 1324(a)(1)(A)(iv)'s subjective element does not meet this high standard. A violation requires only that a defendant assisted someone "knowing or in reckless disregard of the fact" that the person was or would be in violation of the law—not, as required by the First Amendment, that a defendant intended to cause the violation. Furthermore, Section 1324(a)(1)(A)(iv) lacks the required objective element: that the encouragement or inducement be "likely to incite or produce" an immigration violation. Reading an

objective element into the statute would involve substantively revising it. *See United States v. Stevens*, 559 U.S. 460, 481 (2010) ("To read [the challenged statute] as the government desires requires rewriting, not just reinterpretation."). Nor can the words "encourage" or "induce" reasonably be read to provide for the necessary level of imminence. *See Nat'l Gay Task Force v. Bd. of Educ. of City of Okla. City*, 729 F.2d 1270, 1274 (10th Cir. 1984) ("'Encouraging' and 'promoting,' like 'advocating,' do not necessarily imply incitement to imminent action."), *aff'd sub nom. Bd. of Educ. of City of Okla. City v. Nat'l Gay Task Force*, 470 U.S. 903 (1985).

B. *Speech that "encourages or induces" the acts described in Section 1324(a)(1)(A)(iv) does not fall into the "speech integral to criminal conduct" doctrine because it is not tethered to a specific crime.*

The only other available theory that could be invoked to justify Section 1324(a)(1)(A)(iv)'s criminal prohibition on speech is that it is aimed at speech integral to criminal conduct. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). But *Freeman* clarifies that this category includes only speech that is "so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." *Freeman*, 761 F.2d at 552. And Section 1324(a)(1)(A)(iv) clearly sweeps much further.

First, as is the case with incitement, this category of unprotected speech covers only speech integral to *criminal* conduct, not speech integral to unlawful activity in general. *See, e.g.*, *Stevens*, 559 U.S. at 471 (specifying that such speech loses its constitutional protection only when "'used as an integral part of conduct in violation of a valid criminal statute'") (internal citation omitted); *see also Freeman*, 761 F.2d at 552 ("[W]here speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone."); *United States v. Meredith*, 685 F.3d 814, 819–20 (9th Cir. 2012) ("At issue here is the First Amendment exception that allows the government to regulate speech that is integral to criminal conduct."), *cert. denied sub. nom. Giordano v. United States*, 133 S. Ct. 563 (2012). Encouraging or inducing violations of *civil* immigration laws is protected speech.

Second, the speech integral to criminal conduct exception requires proximity between the prohibited speech and the ensuing criminal violation. Even if Section 1324(a)(1)(A)(iv) could be construed as barring only such speech that encourages or induces criminal conduct (which it cannot), the statute would still fail this relational test. Speech that "encourages or induces" individuals to reside or remain in the country is not "integral," in either a temporal or causal sense, to criminal activity.

Courts frequently invoke the "speech integral to criminal conduct" doctrine to permit prosecution of unprotected speech in cases of stalking, enticement of a minor, and harassment, where the speech itself is part of the substantive crime. In *United States v. Meek*, 366 F.3d 705 (9th Cir. 2004), for example, the Ninth Circuit held that a statute criminalizing the inducement of minors for criminal sexual activity did not violate the First Amendment, as "speech is merely the vehicle through which a pedophile ensnares the victim." *Id.* at 721. *See also United States v. Williams,* 553 U.S. 285, 297 (2008) (speech uttered in connection with illegal transactions, such as offers to provide or requests to obtain child pornography, enjoys no First Amendment protection).

By contrast, the speech at issue in Section 1324(a)(1)(A)(iv) is not inherently part of an unlawful activity. Cases involving this doctrine deal with speech that cannot exist independently of criminal conduct; encouraging and inducing may in some circumstances be linked to or refer to criminal conduct, but they are not so deeply bound up in such conduct that they necessarily shed First Amendment protection. *Cf. State v. Melchert-Dinkel*, 844 N.W.2d 13, 23 (Minn. 2014) (finding that a statute punishing one who "advises, encourages, or assists" the suicide of another was unconstitutional in part, as "nothing in the definitions of 'advise' or 'encourage' requires a direct, causal connection to a suicide"). The

speech covered by Section 1324(a)(1)(A)(iv) is, therefore, quite unlike the defendant's conduct in *Freeman* preparing and approving a false tax return. *Freeman*, 761 F.2d at 552. Based on the foregoing, speech that "encourages or induces" cannot be interpreted to fall into the "speech integral to criminal conduct" exception to First Amendment protection.

II. Section 1324(a)(1)(A)(iv) is a content-based, criminal prohibition of speech that cannot survive strict scrutiny, as it is not narrowly tailored to a compelling governmental interest.

"Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004). Section 1324(a)(1)(A)(iv) criminalizes speech based on its content, is subject to strict scrutiny, and is presumptively unconstitutional. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). To survive strict scrutiny, the government must demonstrate that the statute is narrowly tailored to achieving a compelling governmental interest, and that it represents the least restrictive means of advancing that interest. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (providing this standard). The government cannot meet this burden.

The government cannot demonstrate a compelling interest in Section 1324(a)(1)(A)(iv). While the government certainly has an interest in censuring

conduct that assists or furthers violations of the Immigration and Nationality Act, as described in Sections 1324(a)(1)(A)(i)–(iii), there is no conceivable interest in restricting "encourag[ing]" or "induc[ing]"—which by definition constitute speech or expressive activity—as described in Section 1324(a)(1)(A)(iv).[7]

As a basic definitional matter, these words cover a broad range of speech. The ordinary definition of the verb "encourage" is to "[g]ive courage, confidence, or hope." *The Shorter Oxford English Dictionary* 822 (5th ed. 2002); *Melchert-Dinkel*, 844 N.W.2d at 23; *Associated/ACC Int'l, Ltd. v. Dupont Flooring Sys. Franchise Co.*, 89 F. App'x 758, 760 (3d Cir. 2004) ("A reasonable person would expect that the term 'encourage' means 'to spur on' or 'to stimulate.' This is the term's common and ordinary usage."); *see also Melchert-Dinkel*, 844 N.W.2d at 23–24 ("While the prohibition on assisting covers a range of conduct and limits only a small amount of speech, the common definitions of 'advise' and 'encourage' broadly include speech that provides support or rallies courage.").

The word "induce" similarly sweeps in a broad range of speech. For example, where a statute criminalized "inducing others to participate" in union

[7] It is difficult to define the governmental interest in Section 1324(a)(1)(A)(iv) given the dearth of legislative history on the two verbs "encourages" and "induces." *See* S. Rep. No. 99-132 (1985); H.R. Rep. No. 82-1377 (1952); H.R. Rep. No. 99-682 (1986).

demonstrations, the California Supreme Court held that it was "broad enough to include the distribution of literature, the circulation of petitions, the publication of articles," and other acts, meaning that "a vast area of constitutionally protected activity falls within the wide reach of the ban"). *In re Berry*, 68 Cal. 2d 137, 154 (1968). Similarly, in *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994), the D.C. Circuit held that a district court's injunction barring an anti-abortion organization from "*inducing*, *encouraging*, directing, aiding, or abetting others" to engage in trespass and other illegal activities bore an "impermissible potential for overinclusiveness." *Id.* at 655, 657 (emphasis added). Without other textual safeguards to ensure that "inducement" is read as conduct integral to a crime, the word itself defines protected speech. *See generally United States v. Dhingra*, 371 F.3d 557, 562 (9th Cir. 2004), *as amended on denial of reh'g* (July 23, 2004) (upholding statute criminalizing the inducement of minors for illegal sexual activity, due to the statute's intent provision and a requirement that the purpose of the inducement was for criminal sexual activity).

More fundamentally, to argue that "encourages or induces" is tailored to conduct that directly assists the commission of immigration crimes ignores that other subsections of § 1324(a)(1)(A) already criminalize the range of that conduct. Subsection (i) criminalizes bringing an undocumented individual into the U.S.;

subsection (ii) criminalizes transporting an undocumented individual within the U.S.; and subsection (iii) criminalizes "conceal[ing], harbor[ing], or shield[ing] from detection . . . such alien in any place, including any building or means of transportation." *See* 8 U.S.C. § 1324(a)(1)(A)(i)–(iii). As subsections (i) through (iii) address this more targeted conduct, "encourages or induces" must be read to address something different in order to avoid redundancy. All that the former sections leave uncovered is speech-related, so Section 1324(a)(1)(A)(iv)'s language of "encourages or induces" must be understood to cover speech. Section 1324(a)(1)(A)(iv) contains no language narrowing its scope to speech that incites or is integral to criminal conduct, as discussed *supra* in Parts I.A and I.B.

Apart from their basic definitions, "encourage" and "induce" describe a diverse range of protected speech in the context of Section 1324(a)(1)(A)(iv). All of the examples listed in Part I, *supra*, involve classic political speech or even basic conversation: expressing one's views about immigration on the Internet, discussing the state of immigration law and its enforcement with a foreigner visiting the United States, speaking to a family member about options in a crisis, or forging innovative legal theories about this complex body of law. Under Section 1324(a)(1)(A)(iv), each of the speakers in the examples above could be charged

with a felony. No such prosecution could reasonably advance a governmental interest in prohibiting speech directly tied to criminal conduct.

Strict scrutiny of a content-based speech regulation also requires that the regulation be "the least restrictive means among available, effective alternatives" of effectuating a compelling governmental interest. *Ashcroft*, 542 U.S. at 666. Even assuming a compelling governmental interest in censuring some speech closely tied to criminal conduct, however, Congress enacted a far more restrictive alternative to Section 1324(a)(1)(A)(iv) than needed to advance that interest. Congress could have authored a statute prohibiting encouragement or inducement only when it constituted solicitation of an unlawful entry. But Congress did not include language in the text of the statute limiting prosecutions of Section 1324(a)(1)(A)(iv) to specific factual circumstances—or specific crimes. Congress opted for a more expansive statute, which cannot survive First Amendment scrutiny.

III. Alternatively, Section 1324(a)(1)(A)(iv) is overbroad in violation of the First Amendment.

Section 1324(a)(1)(A)(iv) is separately unconstitutional as an overbroad criminal regulation of speech. Even assuming there is a narrow band of speech covered by Section 1324(a)(1)(A)(iv) that directly enables or causes an immigration violation so as to make it unprotected, it is disproportionately small in

comparison to the universe of advocacy speech covered by this statute. This "statute's overbreadth [is] *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292. And a limiting construction would do nothing to remove this astonishingly broad criminal prohibition from public law. *See Entm't Prods., Inc. v. Shelby Cty.*, 588 F.3d 372, 388 (6th Cir. 2009) ("The central inquiry in overbreadth analysis is whether protected expression will be burdened by the actual enforcement of the Act or *chilled by virtue of its sheer presence on the books*.") (emphasis added). Therefore, the Court should find Section 1324(a)(1)(A)(iv) substantially overbroad and facially unconstitutional.

The plainly legitimate sweep of 1324(a)(1)(A)(iv) is grossly overwhelmed by a substantial number of its applications that are unconstitutional. This much is clear from the discussion above. And this statute's breadth has been commented on by several courts. In *DelRio-Mocci v. Connolly Props., Inc.*, 672 F.3d 241 (2012), the Third Circuit described the potential breadth of "encourag[ing] or induc[ing]" as used in Section 1324(a)(1)(A)(iv) by noting that even the federal government undertakes some actions that encourage those lacking lawful status to reside here. *Id.* at 250 ("Persons who currently lack lawful immigration status may nonetheless reside in the United States, often with the explicit knowledge or even permission of

the federal government."). In *United States v. Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012), the court remarked that the "wide net" of this statute had allowed "meretricious prosecution of a factitious felony"—a woman who "advised [her] cleaning lady generally about immigration law practices and consequences." *Id.* at 193, 203, 213. In *United States v. Delgado-Ovalle*, No. 13-20033-07-KHV, 2013 WL 6858499 (D. Kan. Dec. 30, 2013), the court worried that the statute could "potentially result in the prosecution of soup kitchen managers, low-income shelters, and immigration attorneys giving advice to undocumented residents about their options to remain in the United States and pursue citizenship." *Id.* at *7.[8]

There is no limiting construction that can properly cure the statute's overbreadth. Each of the courts above attempted to fashion one. The Third Circuit applied a limiting construction of Section 1324(a)(1)(A)(iv) to cover only encouragement or inducement that is "substantial" or made an undocumented individual "more likely to enter or remain in the United States than she otherwise

[8] As the Third Circuit has explained, the only reason some courts engaging with Section 1324(a)(1)(A)(iv) have *not* expressed concerned with its breadth is that they have addressed acts of encouragement or inducement closely tied to criminal immigration violations, such as "where defendants were personally involved in bringing aliens lacking lawful immigration status into the United States." *DelRio-Mocci*, 672 F.3d at 250. For example, the courts in both *United States v. Lopez*, 590 F.3d 1238, 1249 (11th Cir. 2009), and *United States v. He*, 245 F.3d 954, 959 n.4 (7th Cir. 2001), define "encourage" to mean "to help."

might have been." *DelRio-Mocci*, 672 F.3d at 248. The *Henderson* court embraced this construction. *Henderson*, 857 F. Supp. 2d at 207. The *Delgado-Ovalle* court opted for a different limiting construction from the Third Circuit's, stating that encouragement—in that case, employment of an undocumented individual—coupled with "aggravating factors consistent with knowingly assisting such persons in maintaining illegal residence" qualified as violating Section 1324(a)(1)(A)(iv). *Delgado-Ovalle*, 2013 WL 6858499 at *7.

None of these constructions properly cures the statute's breadth. First, the disagreement among circuits over exactly *how*—not whether—to trim Section 1324(a)(1)(A)(iv)'s breadth demonstrates the lack of any natural limiting construction that flows from Section 1324(a)(1)(A)(iv)'s text or purpose. Second, they are not anchored in the text or legislative history. In the absence of any legislative history specific to the terms "encourage" or "induce," choosing a narrowing focus necessarily requires guesswork as to Congress' purpose. The only other tool for discerning the reach of subsection (iv) is to examine its neighboring provisions. By enacting this provision alongside the far more specific subsections (i)–(iii), which cover conduct in furtherance of illegal entry and remaining in the United States, it appears that Congress intended Section 1324(a)(1)(A)(iv) to target something else—pure speech. As such, identifying a limiting construction that

would bring a statute intentionally criminalizing protected speech in line with the First Amendment is no mean feat. When a saving construction would "require[] rewriting, not just reinterpret[ing]" a statute, it cannot cure a First Amendment problem. *Stevens*, 559 U.S. at 481. Any limiting construction of Section 1324(a)(1)(A)(iv) would require just such a contortion.[9]

Finally, there is an even a more glaring problem with these judicial attempts to limit the Section's breadth: they fail to assess the statute's potential First Amendment infirmities, and thus they ignore the felony statute's chilling effect on third parties not before the court. Indeed, this kind of statute is precisely why the overbreadth doctrine exists: those whose speech is chilled by Section 1324(a)(1)(A)(iv) are especially unlikely to "undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation," and will instead "choose simply to abstain from protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Those who would engage in the speech covered by Section 1324(a)(1)(A)(iv)—suggesting to a loved one that they remain in the

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[9] In parallel circumstances, courts have refused to impose a saving construction on statutes that criminalize "encouragement." In *National Gay Task Force*, the Tenth Circuit considered an overbreadth challenge to a statute allowing punishment for "advocating, soliciting, imposing, encouraging or promoting" homosexual activity. 729 F.2d at 1274. The court refused to narrowly construe the statute, and struck it down as unconstitutionally overbroad. *Id.* at 1275.

United States unlawfully, reassuring a friend that crossing the border without authorization is the best course of action to avoid death or torture in her home country—will likely remain silent when uttering such speech could jeopardize not only their lives but the lives of those close to them. And on the other hand, a stranger who merely seeks to give courage or professional guidance to an undocumented individual navigating the complex web of immigration law may view this speech as not worth the potential consequence of a criminal prosecution, and will refrain from uttering it.

CONCLUSION

The expansive reach of Section 1324(a)(1)(A)(iv) sweeps in protected speech on a topic of great public concern, and in doing so transgresses basic constitutional principles of free speech. An encouraging word to a newcomer cannot be regarded as incitement; the provision of free legal resources to a noncitizen deciding her future cannot be regarded as speech integral to criminal conduct. Laws like these advance no governmental interest in the prevention of crime or the orderly enforcement of immigration law. They menace, they threaten, and they stifle speech on issues of paramount public importance.

Section 1324(a)(1)(A)(iv) is in violation of the First Amendment, and should be held unconstitutional. "To rule otherwise would ignore the 'profound national

commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Claiborne*, 458 U.S. at 928 (1982) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

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Dated: October 18, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	CA No. 15-10614
	)	
v.	)	
	)	
EVELYN SINENENG-SMITH,	)	
	)	
Defendant-Appellant.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,501 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2010, 14-point Times New Roman font.

Dated this October 18, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, I electronically filed the foregoing Brief of Amici Curiae Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Northern California with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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