No. 19-67

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

EVELYN SINENENG-SMITH

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

BRIEF OF IMMIGRATION REPRESENTATIVES AND ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit immigration organizations with a direct interest in opposing the criminalization of speech advising noncitizens about their physical presence in this country. *Amici* are concerned that the provision at issue in this case, 8 U.S.C. § 1324(a)(1)(A)(iv) (Encouragement Provision), criminalizes vast quantities of immigration advice, including competent, accurate, ethical advice provided by immigration attorneys.

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a national nonprofit organization providing support, referrals, and legal and technical assistance to attorneys, families, and advocates seeking to advance the rights of noncitizens. Since it began tracking inquiries in 2003, NIPNLG has provided more than 5,000 instances of direct technical assistance to attorneys nationwide.

The Immigrant Defense Project (IDP) is a nonprofit legal resource and training center that defends the rights of noncitizens facing criminal prosecution or deportation. IDP supports immigration attorneys by consulting on individual cases, offering trainings and mentorship opportunities, developing and disseminating legal strategies, and publishing written resources.

The National Immigration Law Center (NILC) is the primary national organization exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Among other

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. Counsel of record for each party has consented in writing to the filing of this brief.

things, NILC offers trainings and resources to attorneys and other advocates.

The American Immigration Lawyers Association (AILA) is a national nonprofit association with more than 15,000 members, including lawyers and professors who practice and teach in the field of immigration law. AILA seeks to advance the administration of justice and the practice of law pertaining to immigration, nationality, and naturalization.

The National Immigrant Justice Center (NIJC) is a national nonprofit organization that provides representation and legal advice to over 10,000 noncitizens and U.S.-citizen family members every year.

The Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. Since its founding in 1997, Tahirih has provided free legal and social services to more than 27,000 individuals.

The Northwest Immigrant Rights Project (NWIRP) is a nonprofit legal organization dedicated to the defense and advancement of noncitizens' legal rights. NWIRP provides community education, legal consultations, and direct representation to low-income immigrants placed in removal proceedings, as well as other noncitizens seeking immigration benefits.

The City Bar Justice Center (CBJC) is a nonprofit affiliate of the New York City Bar Association that serves more than 20,000 low-income New Yorkers annually, including noncitizens seeking humanitarian immigration relief. CBJC provides free legal services; mobilizes pro bono lawyers, law firms, and corporate legal departments; educates the public; and impacts public policy.

ASISTA Immigration Assistance (ASISTA) worked with Congress to create and expand routes to

secure immigration status for survivors of domestic violence, sexual assault, and other crimes. ASISTA serves as a liaison to federal immigration agencies and trains and provides technical support to local law enforcement, judges, attorneys, and other advocates working with immigrant crime survivors.

Freedom Network USA (FNUSA) is the largest alliance of human trafficking advocates in the United States. FNUSA's members include survivors of human trafficking and providers of legal and social services to trafficking survivors in over forty cities. FNUSA's members serve over 2,000 trafficking survivors every year.

LatinoJustice PRLDEF is a national nonprofit civil rights legal defense fund that advocates for and defends the constitutional rights and equal protection of all Latinos under the law. LatinoJustice champions an equitable society by advancing Latinx civil engagement, cultivating leadership, and protecting civil rights and equality, including in the area of immigrants' rights.

Just Futures Law (JFL) is a transformational immigration lawyering project that works to support the immigrant rights movement in partnership with grassroots organizations. JFL staff have decades of experience in providing technical assistance, written legal resources, and training for attorneys, advocates, and community groups in various areas of immigration law.

SUMMARY OF THE ARGUMENT

The plain text of the Encouragement Provision purports to criminalize vast quantities of constitutionally protected immigration advice. By its terms, the statute prohibits any speech that "encourages or induces" a noncitizen to "come to, enter, or reside in the United States, knowing or in reckless disregard" that the noncitizen's presence here "is or will be in violation of law." The statute purports to apply across the board, even if the

defendant's speech is truthful and non-misleading, and even if the noncitizen's physical presence violates only the civil immigration laws.

As a result, the Encouragement Provision on its face criminalizes enormous amounts of accurate, competent, ethical legal advice by attorneys. There are many immigration benefits noncitizens may obtain only if they are physically present in the United States, whether lawfully or unlawfully. Noncitizens inside the United States also have greater constitutional rights than noncitizens abroad. A noncitizen's physical presence also may affect how immigration officials exercise their discretion. And even if remaining in the United States is unlawful, leaving may carry risks—both legal and otherwise—that a responsible attorney can and should advise about. For all of these reasons, attorneys often may provide legal advice that encourages or induces unlawful presence in apparent violation of the Encouragement Provision.

And it is not just attorneys whose advice the Encouragement Provision threatens. Pastors, doctors, social service providers, and other professionals who counsel noncitizens also risk potential prosecution. Even law enforcement officers and prosecutors who encourage or induce noncitizen witnesses to remain in this country to answer questions or testify in court—perhaps with the possibility of obtaining legal status later—face potential criminal liability under the Encouragement Provision.

The advice purportedly criminalized by the Encouragement Provision is constitutionally protected and critical to the U.S. immigration system. Immigration advice does not fall within any of the narrow categories of speech this Court has excluded from First Amendment protection. Attorney advice in particular holds a special place in our constitutional system. Immigration law is notoriously complex, moreover, and deportation is a particularly severe sanction. Accurate, competent, ethical immigration

advice is crucial, both for noncitizens themselves and for the proper functioning of our immigration system as a whole.

The government offers several limiting constructions in an attempt to narrow the Encouragement Provision's broad scope, but none eliminates the statutory text's expansive criminalization of immigration advice. Even under the government's reading, the Encouragement Provision chills vast quantities of immigration advice, by attorneys and others. For that reason alone, the statute is overbroad and invalid under the First Amendment.

ARGUMENT

I. The Encouragement Provision Purports To Criminalize Vast Quantities of Immigration Advice

The Encouragement Provision's text is broad, and its reach is sweeping. On its face, the statutory text criminalizes legal advice from attorneys—as well as advice from pastors, doctors, community leaders, social workers, police officers, and others. Whatever the Court determines is the Encouragement Provision's legitimate scope, it pales in comparison to the vast quantities of accurate, ethical, constitutionally protected speech that the statute chills.

A. The Statutory Text Is Broad

The Encouragement Provision broadly prohibits any person from "encourag[ing] or induc[ing] 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). As the jury instructions in this case explain, the statute defines a crime with three basic elements:

> First, the person identified in the count was an alien. Second, the defendant encouraged or induced the alien to [come to, enter, or] reside in

> the United States…. And third, the defendant knew [or recklessly disregarded that] the alien's [coming, entry, or] residence in the United States was or would be in violation of the law.

J.A. 117. With respect to immigration advice in particular, three features of the Encouragement Provision bear special emphasis.

First, falsity is not an element of the criminal offense defined in the Encouragement Provision, nor is truth a defense. See J.A. 35 (government's acknowledgment to district court that "intent to defraud" is not an element under the Encouragement Provision). The statute accordingly prohibits encouragement and inducement even if they take the form of truthful, non-misleading speech about the legal or other consequences of coming to, entering, or residing in the United States.

To put it concretely, in order to obtain a conviction under the Encouragement Provision in this case, the government was not required to prove that respondent misled or defrauded her clients. Nor would it have been a defense had she genuinely believed that the labor certification program in question was still in effect at the relevant time. Indeed, even if respondent's advice about the labor certification program had been *correct*—if respondent had engaged in precisely the same conduct and speech found by the jury, but did so *before* the program was discontinued rather than afterwards—she *still* fits within the plain text of the Encouragement Provision. So long as advising a noncitizen about applying for a government program encourages or induces the noncitizen to be present in this country unlawfully, it does not matter under the Encouragement Provision if the program is entirely valid and lawful.

Second, the Encouragement Provision covers encouraging or inducing any "violation of law," whether criminal or civil. 8 U.S.C. § 1324(a)(1)(A)(iv). The inclusion of civil

violations substantially broadens the scope of what the provision criminalizes. As this Court has noted, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona* v. *United States*, 567 U.S. 387, 407 (2012). Yet by statute, a noncitizen is "unlawfully present in the United States" so long as he or she is here (1) after the expiration of the period of stay authorized by the Secretary of Homeland Security or (2) without having been admitted or paroled. 8 U.S.C. § 1182(a)(9)(B)(ii). So if a noncitizen merely overstays a tourist visa, for example, which is not a crime, the text of the Encouragement Provision makes it a federal felony to encourage or induce the tourist to remain here—even if doing so is necessary for the tourist to obtain or seek lawful immigration status.

The Encouragement Provision's extension to civil violations is particularly important for attorneys. "[A] lawyer acts appropriately for purposes of professional discipline so long as the lawyer reasonably believes that the client can assert a nonfrivolous argument that the client's intended action will not constitute a crime or fraud or violate a court order." Restatement (Third) of the Law Governing Lawyers § 94 (2000). And when a proposed course of conduct is *not* criminal, fraudulent, or contumacious, attorneys are ethically *obligated* to "render candid advice" that "explain[s] [the] matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Model Rules of Prof'l Conduct 1.4(b), 2.1 (2019). The Encouragement Provision thus purports to criminalize attorney advice that is not just ethically permissible, but obligatory.

Third, the text of the Encouragement Provision admits of no relevant exceptions. "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *Int'l Bhd. of Elec. Workers* v. *NLRB*, 341 U.S. 694, 701-702 (1951). The statute on its

face contains no exemption for truthful, non-misleading immigration advice or any other category of speech with recognized social value. Cf. *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 246 (2002) (striking down as overbroad a statute that "prohibit[ed] speech despite its serious literary, artistic, political, or scientific value"). Nor does the statutory text exempt advice that takes a particular form, such as discussing the potential legal benefits of remaining in the United States. Cf. Model Rule of Prof'l Conduct 1.2(d) (2019) ("A lawyer shall not counsel a client to engage … in conduct that the lawyer knows is criminal or fraudulent, but … may discuss the legal consequences of any proposed course of conduct with a client."). And by its terms, the Encouragement Provision applies to "[a]ny person," 8 U.S.C. § 1324(a)(1)(A), with no exception for attorneys or anyone else who might speak to noncitizens about coming to, entering, or residing in this country.

The Encouragement Provision's *only* exception allows a religious denomination to encourage or induce a noncitizen minister to reside in the United States by paying their "basic living expenses." *Id.* § 1324(a)(1)(C). By negative inference, that narrow carve-out implies that the statute applies in all *other* circumstances.

B. The Statute Purports To Criminalize Common Immigration Advice by Attorneys

In prohibiting *truthful* speech that encourages or induces noncitizens to be present in the United States, in violation of the *civil* immigration laws, *without exception*, the Encouragement Provision purports to criminalize a vast amount of competent, ethical advice by attorneys. There are numerous circumstances in which a responsible attorney might well offer advice that encourages or induces a noncitizen to be present in the United States unlawfully. Yet under the Encouragement Provision, merely by complying with her ethical obligation to provide

full, competent advice, that attorney would risk prosecution for a federal felony.

To begin with, Congress and the Executive Branch have authorized an array of *lawful* mechanisms for noncitizens to come to, enter, or reside in the United States. Many of these mechanisms, however, contemplate a prior period of physical presence that may well have been *unlawful*. Examples abound:

- **Non-LPR Cancellation of Removal**. Under 8 U.S.C. § 1229b(b)(1), the Attorney General may "cancel removal of, and adjust to the status of an alien admitted for permanent residence," certain noncitizens who are not already lawful permanent residents (LPRs). To be eligible for this relief, however, a non-LPR noncitizen must have "been physically present in the United States for a continuous period of not less than 10 years." *Id.* § 1229b(b)(1)(A). A responsible immigration attorney therefore might well advise a client who has lived in the United States for, say, nine years that another year of *unlawful* residence could enable the client to seek *lawful* status. And cancellation of removal is available only to noncitizens placed in removal proceedings, see *Matters of Jaso & Ayala*, 27 I. & N. Dec. 557, 558 (BIA 2019), which generally presuppose an allegation of unlawful presence.
- **Trafficking Visas**. Under 8 U.S.C. § 1101(a)(15)(T), "victim[s] of a severe form of trafficking in persons" may be eligible for so-called "T Visas" allowing them to remain in the United States legally. But a trafficking victim may not apply for a T Visa from outside the United States: an applicant "must be physically present in the United States[ ] … on account of [human] trafficking." 8 C.F.R. § 214.11(g).

Faced with a client who is present in the United States unlawfully because she was trafficked, an immigration attorney therefore might—indeed, should—advise that continued presence is required to apply for a T Visa, even if that presence is unlawful.

- **Temporary Protected Status**. Under 8 U.S.C. § 1254a, the Attorney General may "designate" certain foreign states where there is an "armed conflict," "environmental disaster," or "extraordinary and temporary conditions … that prevent aliens who are nationals of the state from returning to the state in safety." *Id.* § 1254a(b)(1). Nationals of a designated state may receive "temporary protected status" (TPS), under which they are not removable and may obtain authorization to work in the United States and travel outside it. See *id.* § 1254a(a), (f). To be eligible for TPS, however, a foreign national must have been "continuously physically present in the United States since the effective date" of the designation and must have "continuously resided in the United States" since a date specified by the Department of Homeland Security. *Id.* § 1254a(c)(1)(A). A responsible attorney therefore should advise a noncitizen client who is a national of a designated state—or of a state that could soon be designated—that remaining here, even unlawfully, could enable the client to apply for TPS.
- **VAWA Cancellation of Removal**. Noncitizens who have been battered or subjected to extreme cruelty by a U.S.-citizen or LPR spouse or parent are eligible for cancellation of removal under the Violence Against Women Act (VAWA). See 8 U.S.C. § 1229b(b)(2). To be eligible for VAWA cancellation of removal, however, a noncitizen

must have "been physically present in the United States for a continuous period of not less than 3 years." *Id.* § 1229b(b)(2)(A)(ii). An immigration attorney whose undocumented client is a victim of spousal or parental abuse therefore should advise that remaining in the United States could satisfy this physical presence requirement.

- **Asylum**. Certain noncitizens who have a "well-founded fear of persecution" in their country of nationality or habitual residence may seek asylum. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b). With certain exceptions, however, asylum is available only to noncitizens who are "physically present" or "arrive[ ] in the United States." *Id.* § 1158(a). An immigration attorney therefore might well advise that physical presence here would enable a noncitizen client to apply for asylum.
- **Special Immigrant Juvenile Status**. Certain juvenile immigrants who are wards of state courts because they have been abused, abandoned, or neglected by a parent may apply for LPR status, but only if they do so from within the United States. See 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(a). An immigration attorney therefore might well advise an undocumented juvenile that remaining in the United States is required to apply for special immigrant juvenile status.
- **DACA**. As this Court is aware, under the Deferred Action for Childhood Arrivals (DACA) program, certain noncitizens who came to the United States before the age of sixteen may apply for deferred action, whereby the government forbears from seeking removal for a designated period. See *Regents of the Univ. of Cal.* v. *U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019). But

> noncitizens may apply for DACA only if they are "present" in the United States and have "continuously resided" here for at least five years. *Id.* at 490. An immigration attorney therefore might well advise an eligible client that remaining here, while unlawful, is necessary to apply for or renew deferred action under DACA.

All of these immigration benefits reflect congressional or regulatory judgments that some noncitizens who may be present in this country unlawfully should be allowed to seek authorization to stay. And these are just *some* of the circumstances in which a competent, ethical immigration attorney might advise a noncitizen client about coming to, entering, or residing in the United States in violation of the law.

The number of noncitizens who apply for these benefits, moreover, is enormous. During 2017 alone, for example, more than 250,000 noncitizens applied for asylum. Dep't of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2017* at 7-8 (Mar. 2019).[2] During fiscal year 2018, nearly 4,000 non-LPRs *obtained* cancellation of removal; the number of applications was of course substantially higher. See U.S. Dep't of Justice, Executive Office for Immigration Review, *Statistical Yearbook: Fiscal Year 2018* at 32.[3] And during the same fiscal year, nearly 3,000 noncitizens applied for T Visas. See U.S. Citizenship and Immigration Servs., *Form I-914 Applications for T Nonimmigrant Status*, (Sept. 2019).[4] These figures alone are "*substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 553 U.S. 285, 292 (2008). Indeed, they are likely orders of magnitude greater than the total

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[2] Available at http://bit.ly/30tnZMO.

[3] Available at http://bit.ly/2QTVt2r.

[4] Available at http://bit.ly/2N0y5zb.

number of actual prosecutions ever brought under the Encouragement Provision.

Furthermore, the circumstances in which responsible attorneys might provide advice that runs afoul of the Encouragement Provision are not limited to the immigration benefits described above. For example, "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (citing cases). "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause," for example, "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Ibid.* A competent immigration attorney therefore might well convey that it would be in a noncitizen client's interest to assert a constitutional claim from inside the United States rather than from abroad.

Similarly, a noncitizen's physical presence in the United States may affect the discretionary decisions immigration officials must make about whether and how to apply the immigration laws in a given case. "Discretion in the enforcement of immigration law embraces immediate human concerns," after all. *Arizona*, 567 U.S. at 396. And "[t]he equities of an individual case may turn on many factors, including whether the alien has … long ties to the community." *Ibid.*

In addition to the potential legal benefits of physical presence in the United States, moreover, responsible immigration attorneys also may counsel clients about the *risks*, legal and otherwise, of physical presence *outside* the United States. Voluntarily departing the United States after a period of unlawful presence, for example, can render a noncitizen inadmissible and unable to return here for three or ten years, depending on the duration of that unlawful presence. See 8 U.S.C. § 1182(a)(9)(B).

Leaving the United States with a child who is habitually resident here could expose a noncitizen parent to a civil suit under the Hague Convention on the Civil Aspects of International Child Abduction. See 22 U.S.C. § 9003. And remaining in or returning to another country may entail any number of horrors: forced marriage, physical abuse, discrimination, and persecution in myriad forms. Regardless of whether these risks could form the basis for a successful asylum claim, a competent attorney can—and should—help her client weigh the real-world consequences of her actions. See Restatement (Third) of the Law Governing Lawyers § 94 (2000) ("In counseling a client, a lawyer may address nonlegal aspects of a proposed course of conduct, including moral, reputational, economic, social, political, and business aspects."). The Encouragement Provision nevertheless threatens such attorney advice.

C. The Statute Also Purports To Criminalize Lay Immigration Advice

The Encouragement Provision's criminalization of immigration advice is not limited to advice given by attorneys. As a practical matter, noncitizens may seek and obtain guidance from a wide array of non-legal sources. If that guidance encourages or induces a noncitizen to come to, enter, or reside in this country unlawfully, those individuals, too, may be subject to prosecution under the Encouragement Provision.

A pastor, for example, could face federal felony charges if he advises a trafficking victim who is unlawfully present in the United States to remain here to contact an attorney about applying for a T Visa. A priest runs a similar risk if he counsels an anxious noncitizen parishioner to stay in the United States to avoid persecution in her home country, or to fulfill a religious obligation to care for her family here. The same goes for a doctor advising a noncitizen to remain in this country to receive treatment,

or a social service provider who offers guidance to noncitizens fleeing domestic abuse or trafficking. Any of these individuals could face prosecution, either under the Encouragement Provision itself or under the accompanying conspiracy and aiding-and-abetting prohibitions in 8 U.S.C. § 1324(a)(1)(A)(v).

Even law enforcement officers could face criminal liability under the Encouragement Provision for encouraging or inducing a noncitizen to remain in the United States unlawfully in order to answer questions pertinent to an investigation, or to testify as a witness at trial. In fact, Congress has facilitated precisely this kind of encouragement or inducement by allowing certain noncitizen crime victims, witnesses, and informants who are helpful to law enforcement to apply for so-called "U" or "S Visas." See 8 U.S.C. § 1101(a)(15)(U), (S). Yet a noncitizen who remains here to help law enforcement nevertheless may be "unlawfully present in the United States" up until the moment her stay has been formally authorized. *Id.* § 1182(a)(9)(B)(ii). Ironically, *federal agents and prosecutors* could easily run afoul of the Encouragement Provision in this way, including when investigating or prosecuting violations of the Encouragement Provision itself. See, *e.g.*, *United States* v. *Henderson*, 857 F. Supp. 2d 191, 204 n.6 (D. Mass. 2012) (witness in Encouragement Provision prosecution "ha[d] been permitted to continue residing in the United States in deferred status to permit her participation as a cooperating witness in this criminal proceeding").

It is no answer that the government might, of its own accord, hesitate before prosecuting a pastor, doctor, social service provider, law enforcement officer, or prosecutor. This Court has refused to "uphold an unconstitutional statute merely because the Government promised to use

it responsibly." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010).[5]

II. The Advice Threatened by the Encouragement Provision Is Constitutionally Protected and Practically Significant

The immigration advice the Encouragement Provision purports to prohibit is not only vast in scope, but also critical in both constitutional and practical significance. Immigration advice receives strong protection under the First Amendment. Immigration law is notoriously complex, moreover, and deportation is a severe penalty, making full and frank advice all the more crucial, both for noncitizens themselves and for the proper functioning of our immigration system as a whole.

A. Immigration Advice Receives Strong Constitutional Protection

Like any other kind of speech, immigration advice is presumptively protected by the First Amendment unless it falls within one of the "well-defined and narrowly limited classes of speech" this Court has recognized as excluded from constitutional protection. *Stevens*, 559 U.S. at 468-469 (quotation marks omitted).

Advice by attorneys in particular has a special place in our constitutional system. This Court has "upheld the commonsense proposition" that "attorneys" offering "advice or counsel"—including through nonprofit organizations similar to *amici*—are "protected by the First Amendment." *United Transp. Union* v. *State Bar of Mich.*, 401 U.S. 576, 580 (1971). Indeed, this Court has afforded "speech by attorneys," on "matters of legal

[5] To the extent non-lawyers offer *legal* advice, *amici* do not condone the unauthorized practice of immigration law. The government can and does adequately combat unauthorized practice, however, by restricting legal representation to authorized individuals. See 8 C.F.R. § 1292.1.

representation," the "strongest protection our Constitution has to offer," *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 634 (1995), and has taken care to confirm that restrictions on attorney advice do not "chill attorney speech or inhibit the attorney-client relationship," *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 247 (2010). The Court has even invalidated restrictions on the permissible range of government-funded attorney advice and advocacy because they "distort[ed] the legal system by altering the traditional role of … attorneys." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 544 (2001).

The Encouragement Provision threatens other constitutional values, too. Any "serious and fundamental restriction on advocacy of attorneys" necessarily undermines "the functioning of the judiciary"—as well as any administrative agency before whom the attorneys practice. *Ibid.* The First Amendment's Petition Clause "extends to all departments of the Government," *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972), and thus protects attorneys' ability to submit visa applications and other immigration papers on their clients' behalf. And "[a]n attorney's duties do not begin inside the courtroom door"—or, for that matter, the door to any of the U.S. government's numerous immigration agencies. *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1043, (1991) (plurality op.). "[B]lanket rules" that, like the Encouragement Provision, "restrict[ ] speech of … attorneys" accordingly "should not be accepted without careful First Amendment scrutiny." *Id.* at 1056.

The government here suggests that the Encouragement Provision permissibly targets unprotected speech because it prohibits only "speech integral to criminal conduct." U.S. Br. 32 (quotation marks omitted). But that is plainly wrong: as explained, the Encouragement Provision criminalizes the encouragement or inducement of

mere *civil* violations, such as a tourist who overstays her visa. See *supra*, p. 7.

The government then switches tack, relying principally on *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), for the notion that speech is unprotected if it is integral to *any* illegality, whether criminal or civil. See U.S. Br. at 41-42. But *Pittsburgh Press* involved employment advertisements—"classic examples of commercial speech," which under then-existing doctrine was "unprotected by the First Amendment." 413 U.S. at 384-385. Immigration advice is not commercial, as it does much "more than propose a commercial transaction." *Id.* at 385. The illegality in *Pittsburgh Press*, moreover, could not have occurred without facilitation by the newspaper defendant: the newspaper published help-wanted ads under separate columns for male and female job-seekers, creating "an integrated commercial statement" that incorporated the newspaper into the advertisers' unlawful employment discrimination. *Id.* at 388. Attorneys and other advisors merely provide information and counsel, which noncitizens are free to follow or disregard as they wish. Immigration advice thus is at least one step removed from noncitizens' civil immigration violations.

The government also cites two cases involving "picketing." U.S. Br. at 42 (quotation marks omitted). But picketing "is a mixture of conduct and communication" in which a coercive "conduct element" often is "most persuasive." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 580 (1988) (quotation marks omitted). Immigration advice, by contrast, is pure speech. As such, it is protected by the First Amendment.

B. Advice About Physical Presence Is Crucial to the U.S. Immigration System

All aspects of our legal system depend on competent advice and advocacy by trained professionals. Even outside the criminal context, this Court has long recognized "the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice." *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). "[S]ound legal advice or advocacy serves public ends," the Court has explained, by "promot[ing] broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). This Court accordingly has taken care not to restrict, but instead to "encourage full and frank communication between attorneys and their clients." *Ibid.*

The need for "full and frank legal advice," *id.* at 392, is particularly urgent in the area of immigration law. To begin with, "[t]here are significant complexities involved in … federal immigration law, including the determination whether a person is removable." *Arizona*, 567 U.S. at 409. "Immigration law … is a legal specialty of its own," *Padilla* v. *Kentucky*, 559 U.S. 356, 369 (2010), and the Immigration and Nationality Act and its accompanying regulations are "notoriously complicated"—"second only to the Internal Revenue Code." *Singh* v. *Gonzales*, 499 F.3d 969, 980 (9th Cir. 2007) (quotation marks omitted). The Federal Reporter is replete with expressions of frustration by *sitting federal judges* who have noted the "Byzantine," *Carranza* v. *I.N.S.*, 277 F.3d 65, 68 (1st Cir. 2002), "maze of immigration laws," *J.E.F.M.* v. *Lynch*, 837 F.3d 1026, 1040 (9th Cir. 2016) (McKeown, J., concurring), which have "aptly been compared to the labyrinth of ancient Crete," *Sang Seup Shin* v. *I.N.S.*, 750 F.2d 122, 130 (D.C. Cir. 1984) (Starr, J., dissenting). The contemporary U.S. immigration system, in other words, contains

intricacies "that only a lawyer could navigate." *Biwot* v. *Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005).

Furthermore, the ultimate consequence of violating U.S. immigration law—deportation—is "particularly severe." *Lee v. United States*, 137 S. Ct. 1958, 1968 (2017). The "right to remain in the United States," this Court has recognized, "may be more important … than any potential jail sentence." *Padilla*, 559 U.S. at 368 (quotation marks omitted). Deportation is "the equivalent of banishment," *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948), and "may result … in loss of both property and life, or of all that makes life worth living," *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). At a minimum, deportation "visits a great hardship on [an] individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945).

These considerations apply with full force to the immigration advice threatened by the Encouragement Provision. The circumstances described above, in which U.S. immigration law provides affirmative benefits to noncitizens who are physically present in the United States in violation of the law, are by no means obvious or intuitive. In order to identify what those benefits are and complete the steps necessary to apply for them, most (if not all) noncitizens will require assistance—often from an attorney. Applicants for immigration benefits must "weave together a complex tapestry of evidence and then juxtapose and reconcile that picture with the voluminous, and not always consistent, administrative and court precedent." *Baltazar-Alcazar* v. *I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004). That task can be challenging even for seasoned immigration attorneys, let alone for noncitizens untrained in the law, many of whom may have limited proficiency in English. Enabling attorneys to provide advice in this area freely, without the looming possibility of a felony

prosecution under the Encouragement Provision, is both a constitutional and practical imperative.

III. The Government's Limiting Constructions Cannot Save the Encouragement Provision from Overbreadth

The government offers a number of limiting constructions that seek to cabin the Encouragement Provision's broad scope. Those limiting constructions are dubious at best, as respondent's brief demonstrates. But even if the government's limiting constructions were feasible, they would not eliminate the Encouragement Provision's constitutional defects.

A. The government offers three relevant limiting constructions, but under all three, the Encouragement Provision still chills vast swaths of protected, accurate, ethical immigration advice.

First, the government spills considerable ink arguing that the Encouragement Provision is a "criminal complicity" statute that prohibits only "direct facilitation or solicitation of unlawful conduct by an identifiable alien." U.S. Br. 19, 25; see *id.* at 18-28. That argument again conflates the encouragement of conduct that is "criminal" with the encouragement of conduct that is merely "unlawful." As noted above, the Encouragement Provision threatens felony prosecution even for attorneys who advise their clients to remain in the United States after legal permission has expired, which "is not a crime." *Arizona*, 567 U.S. at 407; see *supra* p. 7.

In any event, the government never adequately explains how its understanding of "facilitation" and "solicitation" are relevantly different from the ordinary, plain meaning of "encourage[ment]" and "induce[ment]." At most, the government asserts that "[f]acilitation and solicitation laws … are ordinarily understood not to prohibit abstract or generalized advocacy of illegality." U.S. Br. 34. The government thus contends that the

Encouragement Provision "prohibits only acts … directed at a specific alien or aliens, not the general public." *Id.* at 24. But even if that contention were correct, and the Encouragement Provision did not criminalize *abstract* advocacy, its plain text still purports to criminalize accurate, competent, ethical immigration advice given to individual clients. By its nature, such advice is given to an identified person to assist that person in deciding whether and how to engage in a particular proposed course of conduct.

Second, the government asserts that, "just as a lawyer does not aid, abet, or solicit a crime if she tells a client in good faith that a particular type of illegal conduct is rarely prosecuted, a lawyer similarly does not violate [the Encouragement Provision] if she tells a client who is present unlawfully that she is unlikely to be removed." U.S. Br. 35. The textual basis for that asserted limitation on the statute is unclear. The government's only cited authority is an oblique "Cf." citation to Model Rule 1.2, which provides that a lawyer "shall not counsel a client to engage … in conduct that the lawyer knows is criminal or fraudulent, but … may discuss the legal consequences of any proposed course of conduct with a client." Model Rule of Prof'l Conduct 1.2(d) (2019). The government fails to explain what the Model Rules could possibly have to say about the public meaning of the statutory phrase "encourage or induces."

Regardless, this limiting construction removes remarkably little from the statute's sweep. Professor Volokh argues that, if read as a criminal solicitation statute, the Encouragement Provision would not prohibit "simply explaining the likely consequences of a particular course of action," Br. of Prof. Eugene Volokh as Amicus Curiae in Support of Neither Party at 14, but the government refrains from conceding even that much. The government thus provides no assurance that it could not prosecute an immigration attorney for advising a client that staying in

the country unlawfully would be necessary to allow the client to apply for non-LPR cancellation of removal, for example, or for a T Visa.

And even if the Encouragement Provision somehow did not criminalize encouragement or inducement accomplished by candidly explaining the potentially beneficial consequences of staying in this country unlawfully, the statute *still* would chill advice that is accurate, ethical, and constitutionally protected. The First Amendment protects "the opportunity to persuade to action, not merely to describe facts." *In re Primus*, 436 U.S. 412, 432 (1978). And as explained, while it is unethical for a lawyer to advise a client to engage in a crime, fraud, or contempt of court, it generally is *not* unethical to advise engaging in a nonfraudulent, non-contumacious civil violation. See *supra*, pp. 7-8. "A client is entitled," moreover, "to straightforward advice expressing the lawyer's honest assessment." Model Rule of Prof'l Conduct 2.1 cmt. (2019). An attorney who (outside the context of crime, fraud, or contempt) speaks only in conditional probabilities—declining ever to say what course of action best fits the client's stated objectives—is a poor attorney indeed.

Elliptical counseling is particularly ill-suited to the immigration context, which is high-stakes and notoriously complex. Clients in this area need straightforward advice about what to do. And it would be particularly strange to fault an attorney for advising a noncitizen client about remaining in the United States in violation of the civil immigration laws, when *those laws themselves* condition numerous benefits on a noncitizen's physical presence in the United States.

Third, the government contends that the Encouragement Provision is limited "in the context of this case" by the "financial-gain requirement" necessary to impose the enhanced maximum penalty that respondent faced. U.S. Br. 36. As an initial matter, that limitation on enhanced

punishment does nothing to narrow the scope of the Encouragement Provision itself: providing immigration advice could still be a felony, punishable by up to five years of imprisonment, even if the motive for that advice were non-financial. See 8 U.S.C. § 1324(a)(1)(B)(ii).

Even as to the enhanced-penalty version of the offense, moreover, there is no basis for the government's assurance that prosecution for protected speech is "highly unlikely." U.S. Br. 36. Private immigration attorneys, like other professionals, routinely receive payment for their services—often on a per-hour or per-matter basis—and thus can be said to act "for the purpose of commercial advantage or private financial gain," 8 U.S.C. § 1324(a)(1)(B)(i). Even lawyers working with nonprofits like *amici* sometimes charge a small fee. Indeed, while the *quality* of advice respondent gave here may have been deficient, there is no reason to think that her *motivation* for giving it was different from that of any ordinary attorney.

B. The government also contends that, to the extent the Encouragement Provision criminalizes competent, ethical attorney advice or other constitutionally protected speech, "[a]s-applied challenges" are "[ ]sufficient to address chilling concerns." U.S. Br. 37. Not so. The Encouragement Provision is not a statute that merely "could be read to cover some protected speech," as the government understatedly suggests. *Ibid.* As explained, even under the government's limiting constructions, the statute's plain terms criminalize vast swaths of everyday immigration advice, affecting many thousands of cases per year. Any immigration attorney who advises a client falling into one of the categories described above could face a choice between her legal obligation to avoid committing a federal crime and her ethical duty to provide competent advice. And "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights

through case-by-case litigation," many immigration attorneys and other advisors may "choose simply to abstain from protected speech, harming not only themselves but society as a whole." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (internal citation omitted). That prospect is precisely what the overbreadth doctrine is designed to prevent. See *ibid.* The government's plea to adjudicate the constitutionality of the Encouragement Provision only through case-by-case as-applied challenges amounts to an invitation to abdicate this Court's role in upholding the First Amendment.

The sheer volume of immigration advice the Encouragement Provision criminalizes, moreover, "foster[s] arbitrary and discriminatory application." *Buckley* v. *Valeo*, 424 U.S. 1, 41 n. 48 (1976) (quotation marks omitted). Even if individual attorneys and other speakers could ultimately mount as-applied First Amendment defenses and avoid being convicted for protected speech, the mere possibility of a felony prosecution is a powerful tool that "carries with it the opportunity for abuse." *Minn. Voters All.* v. *Mansky*, 138 S. Ct. 1876, 1891 (2018) (brackets and quotation marks omitted). This Court repeatedly has "warn[ed] of the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority." *Ibid.* (quotation marks omitted).

C. Finally, the government argues that a prosecution under the Encouragement Provision for giving immigration advice is a "fanciful hypothetical[ ]." U.S. Br. 32 (quotation marks omitted). Far from it. For starters, the government itself has expressly argued that the Encouragement Provision criminalizes immigration advice by attorneys. As described by the district court in *United States* v. *Henderson*:

> In response to my questioning, the government contended that an immigration lawyer would be

> prosecutable [under the Encouragement Provision] if he advised an illegal alien client to remain in the country because if the alien were to leave the alien could not return to seek adjustment of status. The government at argument likened such advice to that of a criminal defense lawyer who advises a client regarding the prospective robbery of a bank.

857 F. Supp. 2d at 203–204. Of course, the government's analogy was inapt: while "[t]he bank robbery example involves giving advice on how to commit a crime at a future time," "[t]he immigration lawyer" is "advising the client about how to pursue entirely legal processes in seeking to adjust her status." *Id.* at 204. But it is striking—and deeply troubling—that the government itself has insisted to a federal court that accurate, ethical legal advice about the physical presence required for an immigrant client to adjust status is analogous to advice about how to commit a violent felony.

Remarkably, the government here never disavows the aggressive position it took in *Henderson*. To the contrary, at oral argument before the Ninth Circuit in this case, the government described an attorney offering "free legal advice" to an undocumented noncitizen as a "hard case," and pointedly declined to concede that such conduct is not criminal under the Encouragement Provision. C.A. Oral Arg. 1:00:10-1:01:00.

Rather than argue that the Encouragement Provision does not encompass competent, ethical attorney advice, the government instead observes that "*Henderson* itself" did not involve "an immigration lawyer's advice to a client." U.S. Br. 33. True enough—the defendant in *Henderson* was not an attorney. But the government's refusal to back away from the aggressive position it espoused there means that no immigration attorney can be certain that her next case will not expose her to criminal

liability. And regardless, the government's that's-not-this-case non-response is cold comfort to pastors, social service providers, and other non-lawyers who routinely offer non-legal advice to undocumented noncitizens.

Moreover, the facts of *Henderson* should worry immigration attorneys. While not a lawyer, the defendant in *Henderson* was the "Boston Area Port Director for United States Customs and Border Protection, a position at the highest regular civil service rank," which gave her "supervisory responsibility for the government in enforcing immigration laws." *Henderson*, 857 F. Supp. 2d at 193–194. The defendant "employed a person she came to learn was an illegal alien to clean her home from time to time and, when asked, advised the cleaning lady generally about immigration law practices and consequences," including by cautioning her that "if you leave[,] they won't let you back." *Id.* at 193, 196. While the district court described the prosecution as an "improvident invocation of federal criminal felony process" and "overkill," the government pursued it with "dogged consistency." *Id.* at 193. If the government is willing to treat one of its own officials that way, there is little reason to believe it would stay its hand in the case of immigration attorneys, whose professional position regularly entails opposing federal immigration enforcement efforts.

More fundamentally, the overbreadth doctrine is prospective in nature, serving to forestall an invalid statute from "chill[ing] protected expression *in the future*." *Massachusetts* v. *Oakes*, 491 U.S. 576, 583 (1989) (emphasis added). The government cannot remedy that effect merely by implying—not even clearly representing—that it will not *actually* prosecute conduct that it has previously described, in open court, as criminal. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480.

Furthermore, the Encouragement Provision's chilling effect is not some theoretical future possibility; it is happening right now. The immigration bar has taken note of the government's arguments in this case, and is actively discussing when and how immigration practitioners should self-censor the advice they give to clients so as to avoid potential criminal prosecution under the Encouragement Provision. See, *e.g.*, Cyrus Mehta, *Supreme Court Agrees To Hear Constitutionality of Smuggling Statute That Could Impact Immigration Lawyers*, The Insightful Immigration Blog, Oct. 21, 2019.[6] *Amici* are directly involved in these ongoing discussions.

Indeed, this very case shows that immigration attorneys' fears about the Encouragement Provision are well founded. For it takes only the slightest variation on the facts to transform respondent's case into precisely the kind of prosecution the government derides as "fanciful." U.S. Br. 32, 36 (quotation marks omitted). Consider, for example, a defendant who engages in the very same conduct and speech as respondent here, with just two differences: (1) instead of working as an "immigration consultant," *id.* at 7, the defendant was an attorney; and (2) instead of advising clients about the labor certification program *after* it was discontinued, *id.* at 8, the defendant did so in 2000—while the program was still operational. That hypothetical defendant's legal advice to her clients would have been accurate, competent, and ethical; yet, under the government's interpretation, it would have been just as criminal as what respondent did here. In the language of the statute, the defendant would have, "for the purpose of commercial advantage or private financial gain," "encourage[d] or induce[d] an alien to … reside in the United States, knowing … that such … residence is or will be in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv), (B)(i). The

[6] Available at http://bit.ly/2MTVxOH.

defendant also would satisfy all three elements of the jury instructions the government procured in this case. See *supra*, pp. 5-6. Nothing in the government's proffered limitations would shield this attorney's advice from the Encouragement Provision's broad sweep.

* * *

The Encouragement Provision is an unusual statute. *Amici* are aware of no other provision in the U.S. Code that purports to criminalize such vast quantities of truthful, non-misleading advice, by attorneys and others. While the parties dispute various aspects of the Encouragement Provision's scope, it is clear that, even under the government's narrowest limiting constructions, the statute chills staggering amounts of immigration advice that is not only constitutionally protected but also critical to the proper functioning of our immigration system. This Court need look no further to find a "realistic danger" that the Encouragement Provision "will significantly compromise recognized First Amendment protections of parties not before the Court," rendering the statute impermissibly overbroad on its face. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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