No. 22-179

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

HELAMAN HANSEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF IMMIGRATION LAW REFORM INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

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In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EVELYN SINENENG-SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

[1] Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity — other than *amicus* and its counsel — contributed monetarily to preparing or submitting the brief.

STATEMENT OF THE CASE

The United States of America (hereinafter, the "Government") charged the defendant with multiple counts of mail and wire fraud, 18 U.S.C. §§1341, 1343, and encouraging or inducing illegal immigration for financial gain, 8 U.S.C. §1324(a)(1)(A)(iv), (B)(i). He appealed the conviction, and the Ninth Circuit reversed with respect to the latter, finding §1324(a)(1)(A)(iv) to violate the First Amendment facially under an overbreadth analysis.

Constitutional Background

The Constitution gives Congress plenary power over immigration, U.S. CONST. art. I, §8, cl. 4, and protects the right to speech, expression, and petition. U.S. CONST. amend. I. To protect these First Amendment rights, this Court has adopted the overbreadth doctrine to allow litigants to assert a statute's chill on third parties' protected First Amendment activity, even when the First Amendment may not protect that litigant's own conduct.

The overbreadth doctrine is a combination of substantive rules for reviewing statutes under First Amendment challenge and a relaxation of third-party standing. *See New York v. Ferber*, 458 U.S. 747, 767 (1982). An overbreadth challenge requires "a 'substantial' amount of protected speech in relation to [a statute's] legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 124 (2003). For the overbreadth doctrine to apply, moreover, "there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801

(1984) (emphasis added); *Parker v. Levy*, 417 U.S. 733, 760 (1974) ("even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct") (interior quotation marks and alterations omitted).

While the doctrine is concerned with chilling protected speech, *Hicks*, 539 U.S. at 124; *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser"), that concern "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Indeed, the further the statute gets from targeting actual speech or speech-related conduct, the less likely that overbreadth doctrine will apply:

> Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).

Hicks, 539 U.S. at 124. Importantly, when (as here) a defendant cannot succeed on an as-applied challenge, denying that defendant the right to bring a facial challenge to a purportedly overbroad statute does not prevent someone whose legitimate speech is impinged from challenging the statute. *Id.*

Legislative Background

The Immigration and Nationality Act, 8 U.S.C. §§1101-1537 ("INA"), sets the terms under which aliens lawfully may enter and remain in the United States. As relevant here, the INA provides criminal penalties for third parties whose conduct contributes to an alien's violation of the INA's terms for the alien to enter or remain in the United States. *See* 8 U.S.C. §1324(a). Specifically, the INA makes it a crime for someone to take any of the following knowing actions:

- Bringing aliens to the United States at places other than a designated port of entry;
- Transporting an illegal alien within the United States;
- Concealing, harboring, or shielding an illegal alien from detection in the United States; and
- Encouraging or inducing an illegal alien to come to, enter, or reside in the United States.

8 U.S.C. §1324(a)(1)(A)(i)-(iv). The INA also prohibits conspiring to accomplish these acts and aiding and abetting them, *id.* §1324(a)(1)(A)(v)(I)-(II), and sets different levels of severity for violations that include a purpose of commercial advantage or private financial gain, *id.* §1324(a)(1)(B)(i), or involve serious bodily injury or death. *Id.* §1324(a)(1)(B)(iii)-(iv).

Factual Background

IRLI adopts the facts as stated by the Government brief. *See* Gov't Br. at 7-9. In summary, the defendant knowingly induced aliens to overstay their visas to seek U.S. citizenship through adult adoption that he knew was not available. In doing so, he not only charged these aliens a large fee, but also led them to

overstay their visas in the vain hope that adult adoption would provide them with U.S. citizenship.

On top of the case's actual facts, the Ninth Circuit envisioned hypothetical impingements of protected speech that §1324(a)(1)(A)(iv) would cover. Pet. App. 11a-12a. While not as extravagant as hypotheticals conjured in the Ninth Circuit's decision in *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), *vacated and remanded*, 140 S.Ct. 1575 (2020), the hypotheticals do not represent actual practice under §1324(a)(1)(A)(iv).

SUMMARY OF ARGUMENT

In refusing to include the charged crime's commercial-advantage and financial-gain element, the Ninth Circuit evaluated the wrong crime. Not only did it fail to address the statute at issue (Section I.A), but it also failed to recognize that the crime it did evaluate is a lesser included offense of, and thus distinct from, the crime at issue here (Section I.B).

Assuming *arguendo* that the Ninth Circuit rightly analyzed only §1324(a)(1)(A)(iv), its analysis nonetheless violated this Court's First Amendment and overbreadth precedents. First, the Ninth Circuit failed to apply the canon of constitutional avoidance by adopting a narrowing construction to eliminate the perceived constitutional violations (Section II.A). Second, the Ninth Circuit failed to consider this Court's precedents that provide a narrowing construction—namely, soliciting illegal actions—as a permissible construction of the "encouraging or inducing" language that troubled the Ninth Circuit (Section II.B). Finally, when viewed in the context of that narrowing construction and this Court's

precedents on conduct versus speech and soliciting illegal activity, the Ninth Circuit's perceived First Amendment violations vanish (Section II.C).

If this Court considers—as it should—all the elements of the charged crime, the for-profit nature of the defendant's crimes makes the Ninth Circuit's perceived First Amendment violations vanish again, this time because the Ninth Circuit's hypotheticals do not involve a financial element (Section III.A), Once the for-profit element is considered, the Ninth Circuit's hypotheticals also fail under the more-limited protection afforded commercial speech and the lack of such protection for fraudulent commercial speech (Section III.B).

ARGUMENT

I. THE NINTH CIRCUIT ANALYZED THE WRONG CRIME.

Because overbreadth doctrine weighs a statute's chilling or restriction of protected speech *vis-à-vis* the statute's legitimate application to unprotected speech, the first step in deciding an overbreadth claim is to determine what the statute covers:

> [T]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.

United States v. Stevens, 559 U.S. 460, 474 (2010) (interior quotation marks omitted). As explained below, the Ninth Circuit failed at this first step by looking only to the elements of §1324(a)(1)(A)(iv), without looking also to the commercial-advantage and

financial-gain element of §1324(a)(1)(B)(i). That was error.

A. The Ninth Circuit improperly ignored the commercial-advantage and financial-gain element of the crime.

As the Government explains, by deeming a crucial element of the charged crime "irrelevant" to its overbreadth analysis, the Ninth Circuit failed to evaluate the right statute. *See* Gov't Br. at 47-49. Significantly for this Court's *de novo* review, restoring the element of commercial advantage and financial gain to the analysis eliminates most—if not all—of the protected speech that the Ninth Circuit found §1324(a)(1)(A)(iv) to impinge. For example, intra-personal discussions are not held for financial gain. *See* Section III.A, *infra*. Because the overbreadth doctrine requires weighing the protected speech that is chilled versus the statute's legitimate applications, striking most—or all—of the Ninth Circuit's examples of protected speech that §1324(a)(1)(A)(iv) purportedly chills would fatally undermine the Ninth Circuit's holding.

B. The Ninth Circuit analyzed a lesser included offense.

Guided by FED. R. CRIM. P. 31(c)(1), the Ninth Circuit should have recognized that—by wholly ignoring the commercial-advantage and financial-gain element of the charged crime—the Ninth Circuit panel analyzed a lesser included offense (*i.e.*, not the crime charged). As this Court has explained, federal courts should follow the "elements test" to identify and distinguish the charged crime from any lesser included offenses:

> The Rule speaks in terms of an offense that is "necessarily included in the offense charged." This language suggests that the comparison to be drawn is between offenses. Since offenses are statutorily defined, that comparison is appropriately conducted by reference to the statutory elements of the offenses in question[.]

Schmuck v. United States, 489 U.S. 705, 716 (1989) (quoting FED. R. CRIM. P. 31(c)(1)). "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *Id.* at 719 (interior quotation marks omitted). Under the elements test, the Ninth Circuit's stand-alone violation of §1324(a)(1)(A)(iv) without a financial-gain element is a lesser included offense of the crime charged here. By analyzing only this lesser included offense, the Ninth Circuit plainly did not analyze the crime charged here.

Of course, there is nothing wrong with a court's analyzing two related crimes and subjecting only the lesser included offense to an overbreadth analysis. *See*, *e.g.*, *United States v. Brewster*, 506 F.2d 62, 67-68 (D.C. Cir. 1974) (analyzing federal gratuity provision under overbreadth doctrine, but not the federal bribery provision). There is, however, something very wrong with a court not analyzing the crime charged.

II. THE CRIME DEFINED BY §1324(a)(1)(A)(iv) IS NOT OVERBROAD.

Although the Ninth Circuit analyzed the wrong statute, *see* Section I, *supra*, IRLI respectfully submits that even §1324(a)(1)(A)(iv) by itself is not overbroad.

Thus, for example, if someone acted the same as the defendant in all respects, but without a profit motive (*e.g.*, a legal aid volunteer who wanted to keep aliens here illegally to seek adult adoption), the crime in §1324(a)(1)(A)(iv) would not be overbroad if that person knowingly induced an alien client to remain here illegally.

A. The canon of constitutional avoidance counsels for a narrowing interpretation.

Under the doctrine of constitutional avoidance, a court reviewing an act of Congress susceptible to a reading that would violate the Constitution should avoid that reading if a plausible alternate reading would avoid the constitutional violation. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013). Under this doctrine, whenever that alternate reading is "fairly possible" courts "are *obligated* to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (interior quotation marks omitted, emphasis added). That doctrine applies with special emphasis in overbreadth cases, given "the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals." *United States v. Williams*, 553 U.S. 285, 301 (2008). In sum, if this Court *can* fathom an interpretation of §1324(a)(1)(A)(iv) that avoids the Ninth Circuit's hypothetical impingements of speech protected by the First Amendment, this Court *must* adopt that narrowing construction.

B. This Court has approved a narrowing interpretation that applies here.

Contrary to the Ninth Circuit's hypotheticals on protected speech that §1324(a)(1)(A)(iv) restricts or

might restrict, this Court long ago upheld similar language in a predecessor immigration statute as being confined to encouraging or inducing illegal conduct. *See* Gov't Br. at 43 (discussing *Lees v. United States*, 150 U.S. 476 (1893)). Under *Lees*, the power of Congress to exclude aliens includes the power "to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition." *Lees*, 150 U.S. at 480. The same analysis should apply here, either directly under *Lees* or by analogy to *Lees*.

Significantly, even if *Lees* did not control directly, it would suffice for this Court to apply the same narrowing construction to §1324(a)(1)(A)(iv) *now*:

> Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants.

Dombrowski, 380 U.S. at 491 n.7 (citations omitted); *Osborne v. Ohio*, 495 U.S. 103, 115-16 (1990) (citing *Hamling v. United States*, 418 U.S. 87, 114-16 (1974)). The defendant here knew that he was violating the law and thus suffers no lack of fair warning.

C. Properly understood, §1324(a)(1)(A)(iv) does not pose a risk of chilling speech protected by the First Amendment.

Because invalidation of a legislative act is "strong medicine" for a court to use in support of someone to whom the statute validly can apply, this Court has limited the overbreadth doctrine to where the law has "substantial" application to protected speech, not only in an "absolute sense" but also *vis-à-vis* the law's valid

application to non-protected speech. *Hicks*, 539 U.S. at 119-20. As narrowed above by its legislative context and a narrowing interpretation, all the Ninth Circuit's bases for facial invalidation must fail.

First, because §1324(a)(1)(A)(iv) not only targets conduct more than speech, *Hicks*, 539 U.S. at 122-23, but also targets the solicitation of illegal activity, *Winters v. New York*, 333 U.S. 507, 510 (1948), the overbreadth doctrine is inapposite.

Second, properly construed, §1324(a)(1)(A)(iv) does not reach the hypothetical protected speech that the Ninth Circuit imagines. *See* Section III.A, *infra*. As such, the defendant lacks the "realistic danger" that §1324(a)(1)(A)(iv) could "significantly compromise" protected speech. *Taxpayers for Vincent*, 466 U.S. at 801.

III. THE CRIME DEFINED BY §1324(a)(1)(A)(iv) AND (B)(i) IS NOT OVERBROAD.

In the prior two sections, *amicus* IRLI has argued that the Ninth Circuit erred not only in analyzing §1324(a)(1)(A)(iv) as the stand-alone crime in this case, without including the commercial-advantage and financial-gain element in §1324(a)(1)(B)(i), but also in finding §1324(a)(1)(A)(iv) overbroad in its own right. Of course, if a stand-alone §1324(a)(1)(A)(iv) is not overbroad, the Court would not need to consider whether §1324(a)(1)(A)(iv) *and* (B)(i) *together* are overbroad. The Ninth Circuit would have erred even on its wrongly confined reading of the statute.

But, if the charged crime indeed constitutes all the elements of §1324(a)(1)(A)(iv) *and* (B)(i), then the Ninth Circuit erred even more flagrantly. Adding a for-profit element not only reduces the amount of

privileged speech that the INA purportedly chills but also further removes a defendant's actions from the First Amendment's protections.

A. When this Court properly considers the commercial-advantage and financial-gain element of the crime, no instances of chilled speech protected by the First Amendment remain.

Recalling that overbreadth doctrine weighs the impingements to—or chilling of—protected speech against the statute's legitimate applications, adding the for-profit element of §1324(a)(1)(B)(i) back to the charged crime undermines the Ninth Circuit's balancing by eliminating the hypothetical harms to protected speech that the Ninth Circuit conjured. In a weighing of the chilling effect of the actual crime at issue (namely, soliciting illegal conduct for profit), there is little real or even hypothetical concern that the INA is overbroad.

First, intra-personal discussions are not held for financial gain. As such, those conversations are not reasonably considered to be chilled by the crime that the Government charged against the defendant.

Second, the same would be true of pure advocacy undertaken with no financial gain, such as marches, speeches, and the like. Again, those core First Amendment activities are not reasonably considered to be chilled by the crime that the Government charged against the defendant.

Third, even pure advocacy coupled with a speaking fee would not apply, albeit for a different reason. Speaking to an audience does not encourage

or induce a *specific* alien's immigration violation, which is part of what §1324(a)(1)(A)(iv) requires:

> Any person who …
>
> encourages or induces *an* alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that *such* coming to, entry, or residence is or will be in violation of law …
>
> shall be punished as provided in sub-paragraph (B).

8 U.S.C. §1324(a)(1)(A) (emphasis added). In short, there is not much—if any—protected speech caught up in the crime for which defendant was convicted.

B. Commercial speech is inherently less protected than the speech that the Ninth Circuit analyzed.

Unlike the protected speech that the Ninth Circuit hypothesized by ignoring §1324(a)(1)(B)(i), the speech here—assuming *arguendo* that it was speech and not conduct—was *commercial speech*. Under this Court's First Amendment precedents, commercial speech is not as protected as pure speech:

> there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980). As the Government explains, the history of proscribing incitement and encouragement applies to both criminal and civil laws, Gov't Br. 42-43, so the commercial-advantage and financial-gain components of §1324(a)(1)(B)(i) is

valid, even as applied to violating purely civil laws. In addition to not protecting defendants' soliciting unlawful conduct, *see* Section II.C, *supra*, the First Amendment similarly does not protect his fraudulent speech.

CONCLUSION

The Court should reverse the Court of Appeals' holding that §1324(a)(1)(A)(iv) facially violates the First Amendment.

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Respectfully submitted,

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