No. 15-10614

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EVELYN SINENENG-SMITH,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of California, No. 5:10-cr-00414-RMW (Judge Ronald M. Whyte)

BRIEF FOR *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN RESPONSE TO THE COURT'S ORDER DATED SEPTEMBER 18, 2017

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October 18, 2017

CORPORATE DISCLOSURE STATEMENT

Immigrant Defense Project states that its parent corporation is the Fund for the City of New York (FCNY), which is a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code and does not issue stock.

National Immigration Project of the National Lawyers Guild states that it does not have a parent corporation. It is a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code and does not issue stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici submit this brief at the invitation of the Court in its order dated September 18, 2017. Dkt. 46.

Amici are non-profit organizations with a direct interest in preventing the criminalization of speech that supports and defends the rights of immigrants in this country. The Immigrant Defense Project is a non-profit legal resource and training center dedicated to promoting fundamental fairness for all immigrants, including those who have fallen out of legal status or are at risk of doing so. The National Immigration Project of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrant rights.

Amici are concerned that the provision at issue in this case, 8 U.S.C. § 1324(a)(1)(A)(iv), can and will be used to criminalize and thwart advocacy on behalf of immigrants due to the provision's sweeping scope and uncertain reach. At risk of facing federal felony prosecution are all types of immigration advocates, including lawyers, community and religious leaders, and family and friends with

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

whom *amici* work every day, and who engage in expressive activity and speech in support of immigrant rights.

SUMMARY OF THE ARGUMENT

8 U.S.C. § 1324(a)(1)(A)(iv) ("Section 1324(a)(1)(A)(iv)" or the "encouragement provision") makes it a felony—punishable by fine and up to five years in prison, *id.* § 1324(a)(1)(B)(ii)—for any person to "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." That provision is facially unconstitutional for at least three reasons.

First, Section 1324(a)(1)(A)(iv) discriminates on the basis of viewpoint, the most "egregious form of content discrimination." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). By its terms, the provision permits expression that ***discourages*** undocumented noncitizens from entering the United States or residing here, but subjects speech expressing the opposite viewpoint to severe criminal penalties. Laws that target disfavored views in this way are presumptively unconstitutional and subject to strict scrutiny, an exacting standard the government cannot come close to satisfying here. Indeed, the encouragement provision burdens far more speech than is necessary to further any permissible government goal, thus failing even an intermediate standard of review.

Second, the encouragement provision is unconstitutionally overbroad because it proscribes and chills an astonishing range of protected expression. The law would appear even to forbid an attorney from giving the (correct) legal advice that noncitizens within the United States have greater due process rights than noncitizens outside the United States. And Section 1324(a) contains an aiding-and-abetting clause that compounds the law's already-sweeping scope, apparently forbidding someone from recommending an attorney to provide advice to an undocumented noncitizen. *See* 8 U.S.C. § 1324(a)(1)(A)(v)(II). Moreover, because Section 1324(a)(1)(A)(iv) is not susceptible to a limiting construction, there is no curing the constitutional violation. *See United States* v. *Thum*, 749 F.3d 1143, 1147 (9th Cir. 2014) (Section 1324(a)(1)(A)(iv) applies the ordinary, expansive definition of "encourage").

Third, the encouragement provision is unconstitutionally vague. With commonsense definitions of "encourage" ranging from "instigating" to "helping" to "inspiring with hope," it is impossible for ordinary individuals to divine the line between the permissible and the criminal. People seeking to comply with the statute will thus "'steer far wide[] of the unlawful zone,'" forfeiting their First Amendment freedoms. *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)). Moreover, Section 1324(a)(1)(A)(iv)'s inscrutable standard gives prosecutors nearly unbounded

discretion and creates an intolerably high risk for arbitrary enforcement. Accordingly, in addition to offending the First Amendment, the encouragement provision violates basic principles of due process under the Fifth Amendment.

ARGUMENT

I. THE ENCOURAGEMENT PROVISION IMPERMISSIBLY DISCRIMINATES ON THE BASIS OF CONTENT AND VIEWPOINT

"Congress shall make no law … abridging the freedom of speech[.]" U.S. Const. amend. I. That prohibition is at its zenith when government seeks to ban speech on the basis of the content or viewpoint expressed. The Supreme Court has time and again affirmed "the most basic of [First Amendment] principles"—that "'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Brown* v. *Entertainment Merch. Ass'n*, 564 U.S. 786, 790-791 (2011) (quoting *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002)).

Section 1324(a)(1)(A)(iv)'s encouragement provision violates the Free Speech Clause's core restrictions. The provision facially and undeniably targets a particular category of speech, namely speech concerning whether undocumented noncitizens should be welcome in this country. Most perniciously, it uses the criminal law to pick a side in that discussion and punishes the expression of Congress's disfavored viewpoint as a felony. The First Amendment does not permit government to criminalize speech in such a discriminatory way.

A. Section 1324(a)(1)(A)(iv)'s Viewpoint Discrimination Makes It Presumptively Unconstitutional

When government seeks to suppress "particular views taken by speakers on a subject," the First Amendment violation is "blatant," and the law is "presumptively unconstitutional." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-829 (1995). Section 1324(a)(1)(A)(iv), which criminalizes speech based on the particular ideology and perspective expressed, engages in precisely this "egregious form of content discrimination." *Id.* at 829.

Indeed, viewpoint regulation is seldom so plain. "At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring). Under Section 1324(a)(1)(A)(iv), speech or expressive conduct that ***discourages*** undocumented noncitizens from coming to, entering, or residing in the United States is altogether lawful. But the statute forbids speech that ***encourages*** noncitizens to enter or remain in the country, so long as the speaker knows or recklessly disregards the fact that such conduct is (or will later become) unlawful. 8 U.S.C. § 1324(a)(1)(A)(iv). As this Court has explained, after all, the term "encourage" in Section 1324(a)(1)(A)(iv) broadly means "'to inspire with courage, spirit, or hope … to spur on … to give help or patronage to,'" *Thum*, 749 F.3d at 1147 (quoting Merriam Webster's Collegiate Dictionary 381 (10th ed. 1996)), and

other courts of appeals have adopted the same or similarly capacious definitions, *see infra* pp. 12-13; U.S. Br. 30-32, 38 (setting forth definitions from other circuits).[2]

The implications are staggering. By its plain terms, Section 1324(a)(1)(A)(iv) exposes to prosecution anyone who participates in a "Coming Out of the Shadows" rally in solidarity with undocumented noncitizens,[3] but says nothing about participating in an "America First" anti-immigration rally.[4] It permits the display of the following blue sign, but seemingly criminalizes the red and white sign:[5]

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[2] The term "induces" in Section 1324(a)(1)(A)(iv) does not alter the viewpoint-discrimination analysis, nor does it make the provision any less susceptible to a First Amendment challenge on other grounds. *See infra* p. 14 n.11.

[3] *See* Joyce, *Undocumented Immigrants "Come Out Of The Shadows" At Chicago Rally*, Progress Illinois (Mar. 16, 2015), http://progressillinois.com/quick-hits/content/2015/03/16/undocumented-immigrants-come-out-shadows-chicago-rally (reporting on sixth annual National Coming Out of the Shadows rally in March 2015 in Chicago, which "challenged the notion that lack of citizenship makes you any less of a citizen").

[4] *See* City News Service, *'America's First' Anti-Illegal Immigration Rally Held in Laguna Beach*, NBC Bay Area (Aug. 20, 2017), http://www.nbcbayarea.com/news/california/Americas-First-Anti-Illegal-Immigration-Rally-Planned-in-Laguna-Beach-441187973.html.

[5] *See* Tundel, *Talkin' about Immigration*, MPR News (Apr. 10, 2006), https://www.mprnews.org/story/2006/04/10/protest; Portland Independent Media Ctr., *No Human Being Is Illegal* (Apr. 14, 2006), https://goo.gl/images/tYrmuR.

Moreover, the provision subjects to felony prosecution the mere giving of advice to undocumented noncitizens, if the advice recommends that the noncitizen remain in the United States. The government has already prosecuted at least one such case, where the defendant cautioned an undocumented noncitizen "'if you leave they won't let you back.'" *United States* v. *Henderson*, 857 F. Supp. 2d 191, 196 (D. Mass. 2012). In defending that conviction, "the government contended that an immigration lawyer would be prosecutable for the federal felony created by § 1324(a)(1)(A)(iv) 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." *Id.* at 203.[6] Of course, the statute leaves lawyers, employers, family, and friends free to advise noncitizens to ***leave*** the country.

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6 It does not appear that the defendant in *Henderson* challenged Section 1324(a)(1)(A)(iv) on constitutional grounds.

This is the essence of viewpoint discrimination. The government may well prefer that Americans urge undocumented noncitizens to remain outside the United States and implore those already here to leave and never return. Yet although the government may ***itself*** espouse that view, *see Matal*, 137 S. Ct. at 1757, it may not forbid the expression of a contrary view by private speakers—least of all through threat of felony prosecution. As the Supreme Court has cautioned, when "content-based prohibitions" like Section 1324(a)(1)(A)(iv) are "enforced by severe criminal penalties, [they] have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004). Such laws are accordingly "presumed invalid," and the government bears a heavy burden to show their constitutionality. *Id.*

B. Section 1324(a)(1)(A)(iv) Fails First Amendment Scrutiny

Laws like the encouragement provision, which facially target particular disfavored viewpoints, trigger strict scrutiny. *Reed* v. *Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) ("[a] law that is content based on its face is subject to strict scrutiny," regardless of government motives or justification). Section 1324(a)(1)(A)(iv) plainly fails under that exacting standard. *See Berger* v. *City of Seattle*, 569 F.3d 1029, 1052 (9th Cir. 2009) (en banc) (strict scrutiny requires the government to prove that the challenged law "serves a compelling government interest in the *least restrictive manner possible*" (emphasis added)). Indeed, the

law fails under even the First Amendment's more forgiving intermediate standard. Intermediate scrutiny requires that a restriction on speech be "'narrowly tailored to serve a significant governmental interest,'" meaning that the law "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1736 (2017) (quoting *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2534, 2535 (2014)).

The government no doubt has an interest in seeing the immigration laws observed, and it pursues that goal through a variety of prohibitions. Section 1324(a) itself contains provisions barring smuggling noncitizens into the United States (§ 1324(a)(1)(A)(i)); transporting undocumented noncitizens within the United States "in furtherance" of violating the immigration laws (§ 1324(a)(1)(A)(ii)); and concealing undocumented noncitizens from detection (§ 1324(a)(1)(A)(iii)). A separate statute, 18 U.S.C. § 1546, also criminalizes the creation and dissemination of fraudulent immigration documents. The government cannot, however, pursue its goal by banning speech it deems hostile to its purpose. *See Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 547-548 (2001) (laws "cannot be aimed at the suppression of ideas thought inimical to the Government's own interest").

Nor could the government defend the encouragement provision by arguing that it punishes only speech that falls outside the First Amendment's purview. For

one thing, Section 1324(a)(1)(A)(iv) is plainly not limited to speech that constitutes an "integral part of [a] crime," *United States* v. *Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (Kennedy, J.), or to advocacy "directed to inciting or producing imminent lawless action," *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). And even if the provision were limited to unprotected speech—though it clearly is not, *see infra* pp. 15-19—that would still not justify its viewpoint discrimination. Even within ***un***protected categories of speech, the government may not "single[] out certain speech … for special opprobrium based on the speaker's viewpoint." *Chaker* v. *Crogan*, 428 F.3d 1215, 1227 (9th Cir. 2005) (holding unconstitutional a statute prohibiting the filing of knowingly false complaints about—but not knowingly false praise of—police officer conduct); *see also R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 391 (1992) (holding unconstitutional an ordinance forbidding fighting words "on the basis of race, color, creed, religion or gender," but not on other subjects).

Because Section 1324(a)(1)(A)(iv) is a content-based and viewpoint-discriminatory criminal prohibition on speech, it falls within the heartland of the First Amendment's prohibition. Presumptively unconstitutional and unjustifiable as necessary to any legitimate government interest, the statute should be held unconstitutional as a violation of the Free Speech Clause.

II. THE ENCOURAGEMENT PROVISION IS UNCONSTITUTIONALLY OVERBROAD

So poorly tailored is Section 1324(a)(1)(A)(iv) to any legitimate government interest that it runs afoul of the overbreadth doctrine as well. Under the First Amendment, a law may be "invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States* v. *Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The overbreadth doctrine guards against far-reaching, often imprecise criminal laws that may chill protected expression. *See New York* v. *Ferber*, 458 U.S. 747, 768-769 (1982) ("'[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'" (citations omitted)).[7] The encouragement provision's expansive scope and severe criminal penalties create exactly that peril.

A. Section 1324(a)(1)(A)(iv) Criminalizes Vast Amounts Of Protected Speech

The first step in any overbreadth analysis "is to construe the challenged statute," for "it is impossible to determine whether a statute reaches too far without

[7] For this reason, overbreadth challenges against speech-restrictive laws are allowed "even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." *Ferber*, 458 U.S. at 768-769.

first knowing what the statute covers." *Stevens*, 559 U.S. at 474 (internal quotation marks omitted). Like many of its sister circuits, this Court has already recognized the commonsense meaning of the law's plain terms, which produces a criminal prohibition of extraordinary breadth.[8]

When a statutory term is undefined—such as "encourages" in Section 1324(a)(1)(A)(iv)—courts "give it its ordinary meaning," *United States* v. *Santos*, 553 U.S. 507, 511 (2008), often turning to dictionary definitions for guidance. This Court and the Seventh Circuit, for instance, have agreed that the term "encourage" in Section 1324(a)(1)(A)(iv) means simply "'to inspire with courage, spirit, or hope … to spur on … to give help or patronage to.'" *Thum*, 749 F.3d at 1147 (quoting Merriam Webster's Collegiate Dictionary 381 (10th ed. 1996)); *see*

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[8] In enacting the current version of the encouragement provision, the Senate Judiciary Committee explained that its alterations to the predecessor provision were intended to "expand[] the coverage of [the statute]." S. Rep. No. 99-132, at 30 (1985). Section 1324(a)(1)(A)(iv)'s predecessor applied only to the encouragement or inducement of ***entry*** into the United States by undocumented noncitizens. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 274(a)(4), 66 Stat. 163, 229 (making it a felony to "willfully or knowingly encourag[e] or induc[e], or attempt[] to encourage or induce" "entry into the United States" by any undocumented noncitizen). The current law is not limited to encouraging entry, but rather criminalizes encouraging undocumented noncitizens (*and* those at risk of losing lawful status) to "come to, enter, ***or reside***" in the United States. 8 U.S.C. § 1324(a)(1)(A)(iv) (emphasis added).

also United States v. *He*, 245 F.3d 954, 960 (7th Cir. 2001) (relying on the same definition).[9]

Other circuits are in accord. *See, e.g.*, *United States* v. *Lopez*, 590 F.3d 1238, 1249 (11th Cir. 2009) (defining "encourage" in Section 1324(a)(1)(A)(iv) to mean "'[t]o instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident; to help; to forward; to advise'" (quoting Black's Law Dictionary 620 (4th ed. 1968), definition in effect at the time of Section 1324(a)(1)(A)(iv)'s enactment)); *United States* v. *Oloyede*, 982 F.2d 133, 137 (4th Cir. 1992) ("to encourage" encompasses any "actions taken to convince the illegal alien to come to this country or to stay," including "reassur[ing]" a noncitizen that he may remain in the United States without "threat of imminent detection and deportation").[10]

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[9] The breadth of this definition, ranging from giving "hope" to giving "patronage," highlights another of Section 1324(a)(1)(A)(iv)'s constitutional deficiencies: vagueness. Although the literal scope of the encouragement provision encompasses all expression within the expansive meaning of "encourage," that term inescapably means different things to different people—including the ordinary individuals who must confine their speech to the law's requirements, lest they face felony prosecution, and the federal prosecutors charged with enforcing it. *See infra* Part III.

[10] Although the Third Circuit has made some effort to cabin the reach of Section 1324(a)(1)(A)(iv), First Amendment compliance was neither the objective nor the result of its limiting construction. *See DelRio-Mocci* v. *Connolly Properties Inc.*, 672 F.3d 241, 248 (3d Cir. 2012) (requiring that there be "some affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise might have been");

The government does not merely concede the point; it crows about it. The government asserts that the circuits have "interpreted Section 1324(a)(1)(A)(iv) ***broadly***," considering simply whether the defendant's "***statements*** or actions" somehow encouraged or induced a noncitizen to enter or remain in the United States unlawfully. U.S. Br. 30 (emphasis added); *see also id.* 30-33 (collecting circuit definitions and contending that the statute covers Appellant's conduct because she "inspired hope in her clients"). In short, the plain language of the encouragement provision criminalizes most forms, and perhaps any form, of advice, comfort, or reassurance given to an undocumented noncitizen present in the United States—as well as to a lawfully present noncitizen who risks falling out of status in the future. *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (criminalizing not only the encouragement of noncitizens whose presence in the United States is *currently* unlawful, but also those whose residence "*will be* in violation of law" (emphasis added)).[11]

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id. (concluding, after settling on this "affirmative assistance" reading, that the term "encourage" in Section 1324(a)(1)(A)(iv) "is best defined" according to Black's Law Dictionary 620 (4th ed. 1968), a source that includes among its definitions "to give courage to; to inspirit; to embolden").

[11] The verb "induce" does nothing to narrow the reach of Section 1324(a)(1)(A)(iv). In addition to being set off from "encourage" by the disjunctive "or," the word "induce" is itself a capacious term. *See, e.g.*, *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754, 760 (2011) ("The term 'induce' means '[t]o lead on; to influence; to prevail on; to move by persuasion or influence.'" (quoting Webster's New International Dictionary 1269 (2d ed. 1945))); Black's

The potential applications are countless. A priest, it seems, violates the law when he counsels an anxious, undocumented parishioner to remain in the country to care for his family—as does a pastor who advises a congregant to stay in the United States rather than return to her persecutors, or who preaches disobedience of the immigration laws in the name of righteousness. *See Brandenburg*, 395 U.S. at 448 (the First Amendment protects "abstract teaching … of the moral propriety or even moral necessity" of unlawful action). Protesters who march in support of immigrants' rights and a path to lawful status apparently violate Section 1324(a)(1)(A)(iv) by inspiring undocumented noncitizens to remain here in the hope that the law will change. Natural-born U.S. citizen children may be subject to prosecution for beseeching undocumented parents or relatives to remain here to care for them. A college student may be charged with a felony for urging her noncitizen boyfriend to stay with her in the United States, despite knowing that his student visa will soon expire. Immigration advocates and attorneys could face years in prison for informing undocumented clients that certain forms of relief from removal are available only to those who can show longtime, continuous

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Law Dictionary 697 (5th ed. 1979) ("to induce" means "to bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on").

presence in the country[12]—or that this Court and the Supreme Court have repeatedly ruled that noncitizens within the United States have greater legal protections if they remain here than if they depart and try to return.[13] A public-school guidance counselor might be prosecuted for informing an undocumented family that the State cannot forbid undocumented children from pursuing their education in the United States. *Plyler* v. *Doe*, 457 U.S. 202, 224, 230 (1982).

Even House Speaker Paul Ryan seems fair game after reassuring the "Dreamers"—young, undocumented noncitizens currently protected from removal under the Deferred Action for Childhood Arrivals (DACA) program—that they can "rest easy."[14] A prosecutor could surely argue that Speaker Ryan's advice was

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[12] *See, e.g.*, 8 U.S.C. § 1229b(b) ("[t]he Attorney General may cancel removal" if, among other things, the individual "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application").

[13] *See, e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." (citations omitted)); *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law."); *United States* v. *Raya-Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014) ("the Due Process Clause applies to all who have entered the United States—legally or not").

[14] Gambino, *Paul Ryan says Dreamers should 'rest easy' over expiring DACA policy*, Guardian (Sept. 6, 2017), https://www.theguardian.com/us-

"in reckless disregard of the fact" that the Dreamers' residence in the United States soon "will be in violation of law," 8 U.S.C. § 1324(a)(1)(A)(iv); *see* U.S. Dep't of Justice, *Attorney General Sessions Delivers Remarks on DACA* (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca (announcing the Department of Justice's view that DACA "was an unconstitutional exercise of authority by the Executive Branch" and "is being rescinded").

Notably, in contrast to the overbroad animal-cruelty law invalidated by the Supreme Court in *Stevens*, Section 1324(a)(1)(A)(iv) does not even contain an exception for works of political, journalistic, or artistic value. *See* 559 U.S. at 477-478. The result is that journalists, publishers, authors, and filmmakers likewise face the specter of felony prosecution under Section 1324(a)(1)(A)(iv). With its story on "How an Undocumented Immigrant from Mexico Became a Star at Goldman Sachs," Bloomberg Businessweek no doubt inspired undocumented noncitizens to try their luck in the United States.[15] And the filmmakers behind the documentary "Underwater Dreams" and its Hollywood adaptation "Spare Parts"

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news/2017/sep/06/paul-ryan-says-dreamers-should-rest-easy-over-expiring-daca-policy.

[15] Abelson, *How an Undocumented Immigrant From Mexico Became a Star at Goldman Sachs*, Bloomberg Businessweek (Feb. 25, 2015), https://www.bloomberg.com/news/articles/2015-02-25/how-an-undocumented-immigrant-from-mexico-became-a-star-at-goldman-sachs.

surely spurred undocumented students to pursue the American dream with the inspiring tale of undocumented high school students who defeated the Massachusetts Institute of Technology in a national robotics competition.[16]

The law's overbreadth is only aggravated by the fact that one may be convicted for aiding and abetting the encouragement offense. 8 U.S.C. § 1324(a)(1)(A)(v)(II). Pursuant to that subsection, anyone who aids or abets an encouragement crime is, like the encourager, subject to imprisonment and a fine. *Id.* § 1324(a)(1)(B)(ii). Potential applications of such accessory liability are even more alarming; they would presumably include a neighbor who tells an undocumented noncitizen to seek counsel from a priest; a bankruptcy attorney who, upon learning that a client is undocumented, refers him to an immigration

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[16] Goldstein, *Review: An Inspiring and Insightful 'Underwater Dreams'*, L.A. Times (July 11, 2014), http://www.latimes.com/entertainment/movies/la-et-mn-underwater-dreams-movie-review-20140711-story.html (the documentary "recounts how a group of Mexican-born students from a beleaguered Arizona high school trumped opponents from the esteemed Massachusetts Institute of Technology" and "presents a cogent case why, for the good of the United States and its future, Congress should pass the Dream Act and other pending immigration reforms"); O'Sullivan, *'Spare Parts' Movie Review: Making Robots and Changing Lives*, Wash. Post (Jan. 15, 2015), https://www.washingtonpost.com/goingoutguide/movies/spare-parts-movie-review-making-robots-and-changing-lives/2015/01/14/c784ead8-983a-11e4-8005-1924ede3e54a_story.html?utm_term=.30c01e8aaf4d ("Spare Parts" is "an inspirational underdog drama about four undocumented immigrant kids from a Phoenix high school who go toe-to-toe against a team of MIT whiz kids in an underwater robotics contest").

attorney; and a student who, upon learning that a classmate is undocumented, takes her to the school guidance counselor for advice.

The government might try to deride the foregoing applications as far-fetched, arguing (as it did in *Stevens*) that it "neither has brought nor will bring a prosecution for anything less" than an encouragement offense involving fraud or other nefarious conduct. 559 U.S. at 480 (internal quotation marks omitted). Such an argument is at the very least belied by *Henderson*, where the government insisted that "giving illegal aliens advice to remain in the United States while their status is disputed constitutes … encouragement or inducement under the statute." 857 F. Supp. 2d at 203. More importantly, however, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480. A court may "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.*[17]

[17] It is no answer that the Court's model jury instruction for Section 1324(a)(1)(A)(iv) requires the government to prove that the defendant encouraged a *particular* undocumented noncitizen to come to or remain in the United States. *See* Ninth Circuit Model Criminal Jury Instruction 9.4. To meet this requirement in the prosecution of a protester or filmmaker, a prosecutor would need only find an undocumented noncitizen who witnessed the protest or viewed the film. Neither the statute nor the Ninth Circuit's instruction requires proof that the defendant directed the encouragement to a particular known individual; it requires only encouragement of an undocumented noncitizen to enter the country or reside here. Although the provision formerly required that the defendant act "willfully or knowingly," *see* Pub. L. No. 82-414, § 274(a)(4), 66 Stat. 163, 229, Congress deleted those words when it amended the statute in 1986 to read as it now does. And even if the statute were limited to encouragement of a particular known

B. The Provision Permits Of No Curing Construction

Courts "will not rewrite a … law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain." *Stevens*, 559 U.S. at 481 (citations and internal quotation marks omitted). A court may therefore impose a limiting instruction on an overbroad statute "only if it is 'readily susceptible' to such a construction." *Id.* (quoting *Reno* v. *ACLU*, 521 U.S. 844, 884 (1997)). Section 1324(a)(1)(A)(iv) does not qualify.

As in *Stevens*, to read the challenged provision in a manner consistent with the First Amendment would "require[] rewriting, not just reinterpretation." 559 U.S. at 481. Beyond flouting the commonsense meaning of "encourage," limiting the encouragement provision to apply only to unprotected expression like fraud or speech that materially aids criminal conduct would render other federal laws superfluous—a point the government itself urges. *See* U.S. Br. 35 ("An interpretation of Section 1324 that limits the statute solely to document fraud would render [18 U.S.C. § 1546] superfluous."); 8 U.S.C. §§ 1324(a)(1)(A)(v)(II), 1324(a)(1)(A)(i)-(iii) (prohibiting the aiding and abetting of smuggling noncitizens into the United States and transporting and concealing undocumented noncitizens). And it makes little sense to limit Section 1324(a)(1)(A)(iv) to speech integral to

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individual, it would still be overbroad, as it would still ensnare the individualized forms of comfort, advice, and advocacy described above.

criminal conduct when "[i]t is not a crime," except in limited circumstances, "to be an illegal alien present in the United States." *Henderson*, 857 F. Supp. 2d at 204; *see also United States* v. *Costello*, 666 F.3d 1040, 1047 (7th Cir. 2012) (noting that "generally it is not a crime to be an illegal alien" and listing the few exceptions to this rule). Nor could the provision be limited to advocacy ***intended*** and ***likely*** to "produc[e] imminent lawless action." *Brandenburg*, 395 U.S. at 447. Congress criminalized "encourage[ment]," not "incitement"—a well-known First Amendment carveout. And when Congress amended the law to its current form in 1986, it deliberately eliminated the preexisting scienter requirement of "willful[] or knowing[]" encouragement, *compare* Pub. L. No. 82-414, § 274(a)(4), 66 Stat. 163, 229, *with* 8 U.S.C. § 1324(a)(1)(A)(iv), in an effort to "expand[] the coverage of [the provision]," S. Rep. No. 99-132, at 30 (1985).[18]

Besides, even if a court were inclined to try to wring such a construction out of Section 1324(a)(1)(A)(iv), the First Amendment's strict viewpoint proscription would doom it in any event. See *supra* p. 10. There is no saving this law.

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[18] Speech that abstractly promotes violating the immigration laws is, of course, wholly protected by the First Amendment. See *McCoy* v. *Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (applying *Brandenburg* to hold that a former gang member's advice to a street gang on how to operate the gang was "mere abstract advocacy of lawlessness" entitled to protection).

III. THE ENCOURAGEMENT PROVISION IS UNCONSTITUTIONALLY VAGUE

Amici respectfully submit that the foregoing considerations demonstrate conclusively that Section 1324(a)(1)(A)(iv) is unconstitutional under the First Amendment. In the event the Court nevertheless considers whether the encouragement provision comports with principles of due process, *see* Dkt. 46 at 2, *amici* explain why the provision is void for vagueness as well.

Although many circuits have recognized that the term "encourage" in Section 1324(a)(1)(A)(iv) carries its ordinary and expansive meaning—which is itself sufficient to rule the law unconstitutional—the outer limits of the term "encourage[ment]" are uncertain and signify different things to different people. *See supra* pp. 12-13 (reproducing dictionary definitions of "encourage" adopted by courts of appeals ranging from "instigate" to "help" to "inspire with hope"). Because it is unclear just what the encouragement provision bars, ordinary people cannot determine whether their speech or conduct crosses the line from permissible to criminal, and prosecutors wield virtually unbounded discretion to charge citizens with violating the law. As a result, Section 1324(a)(1)(A)(iv) is unconstitutionally vague in violation of the First Amendment and the Fifth Amendment's Due Process Clause.

A statutory provision that "fails to give ordinary people fair notice of the conduct it punishes," or that is "so standardless that it invites arbitrary

enforcement," violates the Fifth Amendment's Due Process Clause. *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). These core principles apply to all criminal laws, regardless of the type of conduct prohibited. But "[w]here a statute's literal scope [reaches] expression sheltered by the First Amendment," thus chilling protected speech, "the doctrine demands a greater degree of specificity than in other contexts." *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974). Indeed, any "loss of First Amendment freedoms," even if only for a "minimal period[] of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).[19]

Although the provision is unquestionably broad—indeed overbroad—it is impossible for ordinary people to discern its limits. Not only does the expansive

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[19] It is unclear whether an individual whose speech clearly falls within the scope of an imprecise law may challenge the law on vagueness grounds. Although the Supreme Court has instructed that such an individual "cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment *for lack of notice*," *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (emphasis added), a substantial threat of unrestrained, arbitrary enforcement might support a facial challenge, *cf. Johnson*, 135 S. Ct. at 2560-2561 (finding the residual clause of the Armed Career Criminal Act unconstitutionally vague without considering its application to the petitioner, and noting that the Court's "holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp").

term "encourage" inescapably mean different things to different people, but it is also impossible to predict whether speech will in fact "inspire" or give "hope." After all, speech that one listener brushes off as speculation, fantasy, or off-point may "embolden" or "inspire" another, leaving speakers to guess at which words (or expressive actions) cross the line. *Cf. Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971) ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'" (quoting *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391 (1926))).

The difficulty in determining whether particular communications will "inspire" undocumented noncitizens to remain in the United States is heightened by the frequent debate over immigration in our public discourse and the habitual blurring of ***illegal*** immigration with other immigration issues. A teacher might not know whether she could teach a class on the contributions of ***lawful immigrants*** to this country without implicitly conveying a message of welcome to ***undocumented*** noncitizens who would thereby be "encouraged" to remain. A corporate executive might not know whether she could announce a policy to pay for employees' legal

fees in removal proceedings[20] without effectively encouraging ***undocumented*** persons (or those who may become undocumented) to apply for a job with the company and "reside" here while the application is pending. And anyone wishing to publicly extol America's tradition of welcoming immigrants might be concerned that, if an ***undocumented*** noncitizen hears the message and views it as reflecting favorably on the United States, that person will be "encourage[d]" to come here in pursuit of a better life rather than go elsewhere. An ordinary person confronted with this provision would thus be unable to "intelligently choose, in advance, what course it is lawful for him to pursue." *Connally*, 269 U.S. at 393.

The uncertain reach of the encouragement provision also creates an alarming risk of arbitrary and discriminatory enforcement. A criminal statute must "establish minimal guidelines to govern law enforcement," *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983), because without such guidelines, it "confers on police a virtually unrestrained power to arrest and charge persons with a violation," *Lewis* v. *City of New Orleans*, 415 U.S. 130, 135 (1974). Section 1324(a)(1)(A)(iv)'s ambiguous "encouragement" standard creates just such boundless discretion,

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[20] *See* Jan, *Companies to offer 'dreamers' legal protection as Trump scraps DACA*, Wash. Post. (Sept. 5, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/05/trumps-decision-to-scrap-daca-will-fall-heavily-on-the-hospitality-retail-and-construction-industries/?utm_term=.785a29cd0373 (reporting several such statements).

permitting "prosecutors[] and juries to pursue their personal predilections." *Smith*, 415 U.S. at 575. Words of advice, reassurance, solidarity, or advocacy may be categorized as criminal "only at the whim" of federal officials. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972). Due Process and the First Amendment do not allow Congress to give prosecutors this power or require citizens to endure it.

CONCLUSION

For the foregoing reasons, the Court should hold that 8 U.S.C. § 1324(a)(1)(A)(iv) is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29 and Circuit Rule 32.1(a).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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