No. 15-10614

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EVELYN SINENENG-SMITH,
Defendant-Appellant,

On Appeal from U.S. District Court for the Northern District of California, No. 5:10 cr-00414 RMW

Brief of the **National Association of Criminal Defense Lawyers** as *Amicus Curiae* in Support of Evelyn Sineneng-Smith and Reversal of the Judgment Below

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands, and up to 40,000 attorneys including affiliates' members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper and efficient administration of justice and files numerous amicus briefs each year in federal and state courts addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. Based on its criminal law expertise, NACDL seeks to assist the Court in deciding the serious issues presented in this case regarding the constitutionality of a criminal statute.[1]

SUMMARY OF ARGUMENT

Appellant Evelyn Sineneng-Smith was convicted under 8 U.S.C. § 1324(a)(1)(A)(iv) (2005) for encouraging or inducing an alien to remain

[1] NACDL files this amicus brief pursuant to the Court's order dated September 18, 2017.

in the United States, with knowledge or in reckless disregard of the fact that such residence was in violation of the law. Following oral argument, this Court invited amicus briefs on three issues of concern.

The Court asked first whether the statute of conviction is overbroad under the First Amendment, and if so, whether it could be cured by a limiting construction. As we discuss, the statute is overbroad in several respects and should be struck down because it penalizes a substantial amount of protected speech. The statute lacks a definition for "encourages or induces" and provides no clear limiting principle between protected and unprotected speech. The statute also lacks a scienter requirement that would limit the prohibited speech to unprotected speech. Nor could the statute be cured by a limiting construction, as any such construction would invade the legislative domain. The Court should hold that the statute is unconstitutionally overbroad under the First Amendment.

The Court next asked whether the statute is void for vagueness, and if so, again, whether it can be cured by a limiting instruction. As we discuss, the statute is in fact void for vagueness under the First Amendment. Vagueness can raise special First Amendment concerns

because of the potential chilling effects it can have on free speech. The Court should hold that the statute is impermissibly vague under the First Amendment for several reasons. First, the statute does not define "encourages or induces," creating an ambiguity that is particularly pronounced in the case of an attorney advising a client, where serious ethical and constitutional difficulties may arise. Second, the statute lacks an explicit *mens rea* requirement, again giving rise to issues of chilled speech. And lastly, the statute's ambiguity allows for arbitrary enforcement of the law beyond what Congress intended.

Finally, the Court asked whether the statute contains an implicit *mens rea* element, what that element should be, and whether it would cure constitutional defects. As we discuss, the Court should read a "willful" or "knowing" *mens rea* element into the statute to effectuate the intent of Congress. Even so, however, the Court should also find that implying a "willful" or "knowing" *mens rea* requirement would not cure the statute of its serious First Amendment defects. Accordingly, NACDL respectfully requests that the Court hold the statute to be unconstitutionally overbroad and vague under the First Amendment.

ARGUMENT

Appellant Evelyn Sineneng-Smith was convicted under 8 U.S.C. § 1324(a)(1)(A)(iv), which reads:

> 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 subparagraph (B).

After oral argument, this Court invited amicus briefs on the three issues of concern outlined above. The answer to each of those questions leads to the same result: the statute is impermissibly overbroad and void for vagueness under the First Amendment.

I. The statute of conviction is overbroad under the First Amendment, and a limiting construction should not be used to cure the First Amendment defect.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. In a First Amendment facial challenge to the overbreadth of a law, a court must decide whether the statute prohibits "a substantial amount of constitutionally protected conduct." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). In doing so, the court must determine what the statute covers and whether it reaches too far. *Id.* If the statute criminalizes "a substantial amount of constitutionally

protected conduct," it should be struck down. *Id.* Here, § 1324(a)(1)(A)(iv) punishes a substantial amount of constitutionally protected conduct and, therefore, it cannot pass muster under the First Amendment.

A. The statute of conviction is overbroad, reaching a substantial amount of protected speech.

The criminal statute at issue here is overbroad in several respects and should be struck down for penalizing a substantial amount of protected speech.

1. The statute lacks a definition for "encourages or induces."

The statute does not define "encourages or induces." As a result, a broad array of speech falls within its purview, and there appears to be "no clear limiting principle" between protected and unprotected speech—conditions that lead to a determination of overbreadth. *See United States v. Alvarez*, 567 U.S. 709, 723 (2012). Indeed, at oral argument, two judges posed examples of protected speech that could be subject to criminal sanction under the statute's plain terms. Judge Berzon asked about a neighbor advising an undocumented immigrant to stay in the United States on the assumption that "[government authorities are] probably

not going to find you." Oral Arg. at 16:48-17:27. Judge Reinhardt presented a scenario of particular concern to the NACDL: a lawyer advising an undocumented immigrant client to remain in the United States because the chance of deportation was slim. *Id.* at 18:38-19:44.

In either scenario, the proffered advice could be said to fall within the plain language of the statute, because the speaker would seemingly encourage undocumented immigrants to remain in the United States. As this Court has explained, "encourage" means "to inspire with courage, spirit, or hope . . . to spur on . . . to give help or patronage to." *United States v. Thum*, 749 F.3d 1143, 1147 (9th Cir. 2014) (quoting *United States v. He*, 245 F.3d 954, 960 (7th Cir. 2001)); *see United States v. Oloyede*, 982 F.2d 133, 137 (4th Cir. 1992) (noting that "'encouraging' relates to actions taken to convince the illegal alien to come to this country or stay in this country"). The advice provided in each scenario could surely be said "to inspire with courage, spirit, or hope" or "to give help"; in particular, advice from an attorney to remain in the United States could very well inspire the immigrant to stay.[2]

[2] During oral argument, the Government asserted that in the attorney-client hypothetical, the attorney would not have been the "catalyst" for the immigrant remaining in the United States and thus would likely

Both forms of advice would also constitute protected speech. They fall well outside the narrowly demarcated categories of unprotected speech set out by the Supreme Court. *See Alvarez*, 567 U.S. at 717 (noting unprotected speech is limited to "advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words'; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent") (citations omitted). Only three such categories could conceivably be implicated here: "advocacy intended, and likely, to incite imminent lawless action"; "speech integral to criminal conduct"; and "fraud." Yet none of these categories encompasses all possible forms of encouragement and inducement under the statute.

First, it is simply not the case that all encouragement or inducement would "likely . . . incite [imminent lawless action]." *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969). In the two scenarios posed at argument, the advice provided may or may not "incite" the

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not be subject to prosecution under the statute. Oral Arg. at 17:58-21:00. But this attempted gloss is without merit, because the statute is in no way limited to situations in which the defendant acts as a purported "catalyst."

immigrants to "imminent[ly]" remain in the United States. Further, the cases dealing with this exception contemplate incitement to engage in violent, criminal action. *See, e.g., Virginia v. Black*, 538 U.S. 343, 359-60 (2003); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Brandenburg*, 395 at 447-48. That is a far cry from the situations covered by § 1324(a)(1)(A)(iv). An undocumented immigrant who resides in this country is committing a civil infraction, not a violent crime. *See Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States."); *Melendres v. Arpaio*, 695 F.3d 990, 998 (9th Cir. 2012) ("[M]ere unlawful presence in our country is not a crime . . . ." (quoting *Arizona*, 567 U.S. at 407)).[3]

[3] There exists only one unpublished decision from another circuit that takes a contrary position on this issue. In *United States v. Tracy*, the appellant argued that "speech that encourages illegal aliens to come to the United States is protected by the First Amendment in certain instances." 456 F. App'x 267, 272 (4th Cir. 2011) (unpublished). The Fourth Circuit rejected this argument on the ground that speech that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment. *Id.* It also held that "[a]lthough there may be some instances in which we might find that the statute chills protected speech, we are unconvinced that the statute prohibits a substantial amount of such speech." *Id.* This Court should decline to follow the Fourth Circuit's holding and in particular its erroneous aiding and abetting analysis. As discussed, an undocumented immigrant who remains in the United States is committing a civil infraction, not a criminal offense. And without an underlying criminal offense, there can be no crime of aiding and abetting. *See Thum*, 749 F.3d at 1148-49 ("'In

Second, the speech itself—and only the speech—is the criminalized conduct. This distinguishes § 1324(a)(1)(A)(iv) from other statutes targeting speech that serves a role in a larger criminal scheme. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). A statute is impermissibly overbroad under the First Amendment if it "makes criminal the speech itself regardless of any defining context that assures us the law targets legitimately criminal conduct." *United States v. Alvarez*, 617 F.3d 1198, 1213 (9th Cir. 2010) (holding the Stolen Valor Act to be facially invalid under the First Amendment), *aff'd*, 567 U.S. 709 (2012).

Finally, as the Government seemed to recognize during oral argument, there is no element of fraud on the face of the statute. *See* Oral Arg. at 20:57-24:00; *see also Alvarez*, 617 F.3d at 1211 ("Fraud statutes must be precisely crafted to target only specific false statements that are likely to cause a bona fide harm."). One who encourages or

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this circuit, the elements necessary for an aiding and abetting conviction are: (1) that the accused had the specific intent to facilitate the commission of a *crime* by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense.'" (emphasis added)) (quoting *United States v. Shorty*, 741 F.3d 961, 969-70 (9th Cir. 2013)).

induces an undocumented immigrant to come to, enter, or reside in the country may do so without making false or deceiving statements. But the statute extends its reach to these instances of non-fraudulent—and hence protected—speech. This is improper. *See Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

2. The statutory terms encompass a broad array of conduct and people.

Section 1324(a)(1)(A)(iv) is also impermissibly overbroad in light of the fact that the terms "encourages or induces" reach a broad array of conduct and people. *Alvarez*, 567 U.S. at 722-23 (noting that a statute that "applies to a false statement made at any time, in any place, to any person" has a "sweeping, quite unprecedented reach [that] puts it in conflict with the First Amendment"). Statements, written or oral, made at any time, in any place, and in any manner could be construed as encouragement or inducement under the statute. Indeed, mere gestures—like a wink or a nod—could be interpreted as encouragement or inducement. Even the simple act of aligning with an immigrants' rights organization when that group makes a public statement encouraging or inducing undocumented immigrants to remain in the United States could be construed as encouragement or inducement.

Further, the provision reaches all people, without restriction, requiring each person to self-censor his or her speech or else face punishment. Attorneys in particular will confront an unwelcome choice: to avoid prosecution by refraining from engaging in protected speech, or to fulfill their duty to provide unfettered legal advice to an undocumented immigrant client. In short, there are a myriad of possible scenarios that could lead to punishment under this statute; "the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment." *Id*. at 722.

3. The statute does not include a scienter requirement that would cure the defect.

Section 1324(a)(1)(A)(iv) lacks a scienter requirement that might conceivably limit the prohibited speech to unprotected speech. *Cf. United States v. Calimlim*, 538 F.3d 706, 712 (7th Cir. 2008) ("To the extent that [the statute at issue] raises First Amendment concerns, the scienter requirement limits the prohibited speech to unprotected speech"). Accordingly, because the statute lacks this *mens rea* element, the plain language of the statute impermissibly allows for the criminalization of First Amendment-protected speech.

B. Any limiting construction should not be used to cure the First Amendment defects, as doing so would invade the legislative domain.

This Court should not attempt to cure the statute's defects with a limiting construction. To be sure, the Supreme Court has recognized "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the (constitutional) question may be avoided." *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971). But "this Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (quoting *Reno v. ACLU*, 521 U.S. 844, 884 (1997)). Courts have used a limiting construction when the statutory language is "amenable to several interpretations." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1021 (9th Cir. 2013). At the same time, however, a court should not "'rewrite a … law to conform it to constitutional requirements,' for doing so would constitute a 'serious invasion of the legislative domain,' and sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" *Stevens*, 559 U.S. at 481 (citations omitted).

Here, it might be argued that the Court could read a fraud element into the statute to cure the First Amendment problem. As noted, the Supreme Court has carved out an exception for fraud when it comes to restricting speech. *Alvarez*, 567 U.S. at 716-17. But there is no basis for inferring a fraud element here; nothing on the face of the statute indicates that it is "readily susceptible to such a construction." *Stevens*, 559 U.S. at 481 (quoting *Reno*, 521 U.S. at 884). That is, there is no "apparent gloss on the language" of the statute that could be adopted by this Court. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004) (internal quotation marks omitted). Given the many different scenarios of encouragement and inducement covered by § 1324(a)(1)(A)(iv), some rule based in fraud would have to be created to encompass only those forms of speech that do not implicate the First Amendment. But "[r]ewriting the statute is a job for the . . . legislature, if it is so inclined, and not for this court." *Whiting*, 732 F.3d at 1021.

II. The statute of conviction is void for vagueness under the First Amendment, and a limiting construction should not be used to cure the constitutional vagueness problem.

"Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards."

Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998); *see also Reno*, 521 U.S. at 871 ("Regardless of whether the [statute] is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment.").[4] The Supreme Court has held that vagueness can raise "special First Amendment concerns because of its obvious chilling effect on free speech." *Reno*, 521 U.S. at 872. "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Vill. of Hoffman Estates*, 455 U.S. at 499. And "[w]here a statute imposes criminal sanctions, 'a more demanding standard of scrutiny applies.'" *Whiting*, 732 F.3d at 1019 (quoting *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011)). Here, a more stringent analysis applies, because the statute threatens to inhibit the exercise of First Amendment rights and imposes criminal punishment on protected speech.

[4] For the reasons set forth in the briefs of other amici curiae, including that of the Federal Defender Organizations of the Ninth Circuit, we also submit that the statute is unconstitutionally vague under the Due Process Clause.

There are several ways in which § 1324(a)(1)(A)(iv) is impermissibly vague under the First Amendment.

First, as discussed above, the statute does not define "encourages or induces." The ensuing ambiguity is particularly pronounced in the attorney-client scenario. On the one hand, attorneys must be able to advise clients unencumbered by fear of recrimination. Attorneys owe a professional and ethical duty to their clients to provide zealous advocacy. On the other hand, this statute criminalizes any behavior that could be construed to encourage an undocumented client to come to, enter, or reside in the United States, without explaining what kind of legal advice would cross the line from legal advice to "encouragement." From a First Amendment standpoint, the attorney's speech is chilled given the fear of criminal prosecution. "Serious ethical and constitutional difficulties . . . lurk behind this ambiguity." *Colautti v. Franklin*, 439 U.S. 379, 400 (1979). "[W]here conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a[n attorney] to possible criminal sanctions." *Id.* at 400-01.

Second, as discussed in more detail below, there is no explicit *mens rea* requirement under the statute—that is, there is no requirement that

the encourager must act willfully or knowingly. "This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *Id.* at 395. In *Colautti*, the Supreme Court struck down a statute requiring physicians to assess viability before aborting a fetus, holding that "[b]ecause of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than 'a trap for those who act in good faith.'" *Id.* Here, in the case of an attorney who advises an undocumented client to remain in the United States, the attorney could very well be acting in good faith, given his or her ethical duty to the client. But the statute places the attorney at risk of criminal sanction, chilling protected speech and implicating the First Amendment.

Finally, the statute's ambiguity allows for arbitrary enforcement of the law beyond what Congress intended. The statute is vague in this sense because "[t]here is [a] lack of clarity . . . that would give law enforcement officials discretion to pull within the statute activities not within Congress' intent." *United States v. Collins*, 272 F.3d 984, 989 (7th Cir. 2001). Indeed, during oral argument, counsel for the Government

could not assure this Court that the attorney and neighbor presented in the judges' hypothetical scenarios would not be prosecuted under the statute. Oral Arg. at 17:58-22:00. Counsel pointed to case-by-case adjudication under this statute, but that would leave prosecution to the whims of the government and would risk inconsistent results in the courts. *Id*. at 21:29-22:30.

Indeed, results have varied to date under this approach. For example, providing undocumented immigrants with information at an airport about their departure for the United States, concealing the baggage check claims of the immigrants, and leading them to the boarding gate for departure to the United States, taken together, have been deemed sufficient to prove unlawful encouragement under § 1324(a)(1)(A)(iv). *United States v. Yoshida*, 303 F.3d 1145, 1150-51 (9th Cir. 2002). But hiring undocumented workers was not enough to show that a defendant "took affirmative steps to assist Plaintiffs to enter or remain unlawfully in the United States, or that [the defendant] agreed to undertake conduct with the purpose of unlawfully encouraging undocumented aliens." *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 308 (D.N.J. 2005), *aff'd sub nom. Zavala v. Wal Mart Stores Inc.*, 691

F.3d 527 (3d Cir. 2012). Given the uncertainty of outcomes, there is "danger that this subsection will chill constitutionally protected conduct or that it will be used to subject persons engaging in wholly innocent conduct to criminal liability." *United States v. Matus-Leva*, 311 F.3d 1214, 1219 (9th Cir. 2002) (citation omitted). Meanwhile, interpreting the statute broadly

> would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise. It could only exacerbate the plight of these aliens and, without adding anything significant to solving the problem, create, in effect judicially, a new crime and a new class of criminals. All of our freedom and dignity as people would be so reduced.

United States v. Moreno, 561 F.2d 1321, 1323 (9th Cir. 1977).[5]

[5] As the decisions just cited show, this Court has previously considered cases involving convictions under § 1324(a)(1)(A)(iv). In only one such case, leading to a non-precedential decision, did the Court consider a vagueness challenge. *United States v. Wagner-Kin*, 937 F.2d 614 (9th Cir. 1991) (unpublished). But beyond the fact that it lacks precedential value, *Wagner-Kin* is inapposite. The Court relied on previous authorities considering vagueness challenges to provisions of § 1324 other than subsection (a)(1)(A)(iv), the provision at issue here. *See Moreno,* 561 F.2d at 1322 (concerning the transportation provision of § 1324); *United States v. Gonzalez-Hernandez*, 534 F.2d 1353, 1354 (9th Cir. 1976) (same); *United States v. Sanchez-Mata,* 429 F.2d 1391, 1392 (9th Cir. 1970) (quoting *Herrera v. United States*, 208 F.2d 215 (9th Cir. 1954)) (same). Other decisions have also involved challenges to provisions of § 1324 other than subsection (a)(1)(A)(iv). *See Matus-Leva*, 311 F.3d at 1218 (concerning a penalty provision of § 1324); *United States v. Ortega-Torres*, 174 F.3d 1199, 1200-01 (11th Cir. 1999) (considering the penalty provisions of § 1324(a)(2) and whether courts should count

As discussed above, the Court should not usurp the legislature's function by attempting to cure the statute's vagueness with a limiting construction.

III. The Court should find that the statute of conviction contains an implicit "willful" or "knowing" *mens rea* requirement, but nevertheless should conclude that such a *mens rea* element would not cure the statute of its serious constitutional problems.

On its face, § 1324(a)(1)(A)(iv) lacks an explicit *mens rea* requirement; the language of the section is silent as to the necessary mental element associated with the acts of "encourag[ing]" or "induc[ing]" an alien. Accordingly, beginning from "the basic premise that '[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute,'" this Court must ascertain the intent of Congress in

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each immigrant as a separate violation for sentencing purposes); *United States v. One 1990 GEO Storm*, 106 F.3d 410 (9th Cir. 1997) (unpublished) (concerning the transportation provision); *United States v. Pruitt*, 719 F.2d 975, 977 (9th Cir. 1983) (challenging the language of the indictment based on alleged violations of § 1324(a)(2)); *Banderas-Aguirre v. United States*, 474 F.2d 985, 986 (5th Cir. 1973) (same); *United States v. Cantu*, 501 F.2d 1019, 1020-21 (7th Cir. 1972) (concerning the transportation provision); *Bland v. United States*, 299 F.2d 105, 109 (5th Cir. 1962) (same); *Martinez-Quiroz v. United States*, 210 F.2d 763, 764-65 (9th Cir. 1954) (same); *Herrera*, 208 F.2d 215 (considering a vagueness challenge to the transportation provision based on an argument that it is unclear whether the pronouns in the statute refer to the undocumented immigrant or the transporter).

determining what mental state is required to establish a violation of the statute. *United States v. Nguyen*, 73 F.3d 887, 890 (9th Cir. 1995) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)); *see also United States v. Johal*, 428 F.3d 823, 826 (9th Cir. 2005).

Here, the intent of Congress is clear: the statute contains an implicit *mens rea* requirement, but the nature of that requirement has not been defined. Accordingly, this Court should give effect to Congress's original intent and read a "willful" or "knowing" *mens rea* into the statute. Even so, imposing such a *mens rea* requirement would not cure the statute's constitutional defects.

A. The Court should imply a *mens rea* element into the statute because neither the statutory text nor the legislative history reflects Congressional intent to dispense with a *mens rea* requirement.

While the plain language of the statute would ordinarily inform this Court's understanding of Congress's intent, the statute's "silence [regarding the required mental element of the offense] by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element." *Nguyen*, 73 F.3d at 890 (quoting *Staples v. United States*, 511 U.S. 600, 605 (1994)). The Supreme Court has remarked that "[t]he existence of a *mens rea* is the rule of, rather than

the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). Recognizing that criminal offenses lacking *mens rea* requirements are "'generally disfavored,'" courts are "reluctant to conclude that Congress intended to dispense with *mens rea* as an element of a crime absent some indication of congressional intent." *Nguyen*, 73 F.3d at 890-91 (quoting *Liparota*, 471 U.S. at 426). And this is with good reason—such a rule of construction reflects the fundamental principle that "'wrongdoing must be conscious to be criminal'" and "that a defendant must be 'blameworthy in mind' before he can be found guilty." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). It follows that the Court should construe § 1324(a)(1)(A)(iv) "'in light of the background rules of the common law in which the requirement of some *mens rea* for a crime is firmly embedded.'" *Johal*, 428 F.3d at 826-27 (quoting *Staples*, 511 U.S. at 605).

This approach is especially compelling given the ambiguity surrounding Congress's intention to dispense with a *mens rea* requirement. *See Nguyen*, 73 F.3d at 891 ("If after examining the statutory language and the legislative history we perceive any ambiguity

regarding Congress's intent to require a showing of criminal intent, we will resolve the ambiguity by implying a *mens rea* element."). Congress passed the Immigration and Nationality Act in 1952, and, as part of the Act, enacted criminal penalties relating to the bringing in and harboring of certain aliens. *See* 82 Pub. L. 414, 66 Stat. 163, 229 (1952). In particular, Congress provided that a felony is committed by

> [a]ny person . . . who . . . *willfully or knowingly* encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of . . . any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens.

8 U.S.C. § 1324(a)(4) (1952) (emphasis added). Over thirty years later, Congress amended § 1324(a) as part of section 112 of the Immigration Reform and Control Act of 1986. *See* 99 Pub. L. 603, 100 Stat. 3359, 3381-82 (1986). In restructuring the statute, Congress removed the "willfully or knowingly" language from the statute, thus eliminating the mental elements associated with "encourages" and "induces." *See id.* at 3382 (providing that a felony is committed by "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.").

The legislative history does not address this amendment to the statute. Nevertheless, this Court's decision in *Nguyen* is instructive. There, this Court examined the legislative history of 8 U.S.C. § 1324 and concluded that the history "does not . . . support [an] argument that Congress intended to dispense with a *mens rea* requirement for the felony offense in section 1324(a)(1)(A)." *Nguyen*, 73 F.3d at 892-93. While the *Nguyen* Court did not specifically address Congress's amendments to § 1324(a)(1)(A)(iv), this Court concluded four years later that "nothing in the statute or the legislative history indicated that, with respect to the felony offense found at § 1324(a)(1)(A), Congress meant to 'dispense with the *mens rea* requirement assumed to be an element of every common law offense.'" *United States v. Barajas-Montiel*, 185 F.3d 947, 952 (9th Cir. 1999) (quoting *Nguyen*, 73 F.3d at 893). This broad holding remains valid, as this Court implicitly acknowledged when it recently explained that "to convict a person of violating section 1324(a)(1)(A), the government must show that the defendant acted with criminal intent, i.e., the intent to violate United States immigration laws." *Yoshida*, 303

F.3d at 1149-51 (9th Cir. 2002) (quoting *Barajas-Montiel*, 185 F.3d at 951) (affirming conviction under § 1324(a)(1)(A)(iv) where evidence was sufficient to establish that defendant "*knowingly* 'encouraged and induced' [aliens] to enter the United States and . . . did so with knowledge or with reckless disregard of the fact that their entry was in violation of the law" (emphasis added)); *see also Matus-Leva*, 311 F.3d at 1218-19 ("As demonstrated by our analysis in *United States v. Nguyen*, 73 F.3d 887, 894 (9th Cir. 1995), section 1324 *does* have a *mens rea* requirement, namely that the alleged smuggler intend to violate the immigration laws.").

Because Congress has not provided "a clear indication of legislative intent" to dispense with a *mens rea* requirement for § 1324(a)(1)(A)(iv), *United States v. Semenza*, 835 F.2d 223, 224 (9th Cir. 1987), this Court should imply a *mens rea* element into the statute.

B. The Court should give effect to Congress's original intent and imply a "willful" or "knowing" *mens rea* element in the statute.

While this Court's decisions in *Barajas-Montiel* and *Yoshida* are clear that § 1324(a)(1)(A)—and, by extension, subsection (iv)—has a *mens rea* requirement, neither this Court nor any other court of appeals

has explicitly determined what level of criminal intent is required for conviction. Having ascertained Congress's original intent regarding the mental state necessary to prove a violation of the statute, however, this Court should "giv[e] effect to [Congress's] legislative will" and imply a knowing or willful *mens rea* element into the statute. *United States v. Sagg*, 125 F.3d 1294, 1295 (9th Cir. 1997) (quoting *United States v. Koyomejian*, 946 F.2d 1450, 1453 (9th Cir. 1991)).

Prior to the 1986 amendment to the statute, the predecessor to § 1324(a)(1)(A)(iv) prohibited the willful or knowing encouragement or inducement of an alien. *See* 8 U.S.C. § 1324(a)(4) (1952). Congress's inclusion of both "willfully" and "knowingly" and its use of the word "or" in the 1952 statute suggests that this Court should interpret the statute to allow for the government to prove either mental state in securing a conviction. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (recognizing that the "ordinary use" of the term "or" "is almost always disjunctive, that is, the words it connects are to be given separate meanings" (quoting *United States v. Woods*, 134 S. Ct. 557, 567 (2013))). Because "the intent of Congress is evidenced clearly in the language of the statute," the Court should hold that the government must prove that

a defendant acted willfully or knowingly in order to obtain a conviction. *Sagg*, 125 F.3d at 1295 (quoting *Koyomejian*, 946 F.2d at 1453).

C. Implying a "willful" or "knowing" *mens rea* requirement into § 1324(a)(1)(A)(iv) will not cure the statute of its serious constitutional defects.

Even if this Court were to read a "willful" or "knowing" *mens rea* element into the statute of conviction, however, doing so would not cure the serious First Amendment constitutional problems with § 1324(a)(1)(A)(iv). Adding this scienter requirement would not exclude protected speech from the statute's umbrella. Even if an encourager acts willfully or knowingly, such encouragement would not necessarily "incit[e] . . . imminent lawless action." *See Brandenburg*, 395 U.S. at 447-48. And even willful or knowing conduct under the statute would still not constitute "speech integral to criminal conduct," given that the conduct promoted by the encouragement is not a crime but rather is a civil offense.

CONCLUSION

For these reasons, we respectfully request the Court find the statute to be unconstitutionally overbroad and vague under the First Amendment.

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Respectfully submitted,

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