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 OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the federal criminal prohibition against encouraging or inducing a noncitizen "to come to, enter, or reside in the United States" in violation of law is facially overbroad under the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual Cato Supreme Court Review.

This case interests Cato because of its implications for the freedom of speech in a variety of contexts. In addition, as an advocate of less-restrictive immigration policies, Cato and its employees could run the risk of violating the criminal statute at issue.

SUMMARY OF ARGUMENT

Suppose a popular YouTuber with a large following in the immigrant community produces a video featuring an impassioned plea for immigrants who entered the country illegally to stay in the country despite current anti-immigrant sentiment. He argues that, even if a noncitizen is violating the law, it's better to stay here and prosper in America. The video goes viral, and the YouTuber produces a series of such videos, each one earning him more subscribers and more ad revenue. Would he have knowingly or recklessly "encourage[d] or induce[d] an alien to come to, enter, or reside in the United States" in violation of federal law? Would he be eligible for a sentencing enhancement because

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

he arguably did it "for the purpose of commercial advantage or private financial gain"?

The fact that the answer to this question is unclear—and that under a plain reading of the statute at issue it seems that the YouTuber did commit a federal crime—says just about everything about this case.

To adapt the stunningly broad language used by the government in a recent (and doctrinally identical) case, would the YouTuber have "inspired hope in his viewers" and "influenced their decision to stay in the country"? Gov. C.A. Br. at 33, *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018) (No. 15-10614), *vacated*, 140 S. Ct. 1575 (2020). The government claims it has never prosecuted such people as the hypothetical YouTuber, and, if asked in the context of litigation, would presumably aver to this Court that it would never do so. But of course, if simply averring prosecutorial restraint could defeat overbreadth challenges, then there would be no overbreadth challenges.

More to the point for overbreadth doctrine, if the YouTuber asked a lawyer about what was permissible under the challenged law, should the lawyer, based on a plain-text reading of the statute, advise him that he may very well be violating federal law by making the videos? And if the YouTuber didn't make the videos—probably wisely given the potential consequences—would that not be a paradigmatic example of "chilling" First Amendment-protected speech?

Section 1324 on its face criminalizes protected speech and is overbroad under the First Amendment. The law makes it a crime for any person to simply "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." 8 U.S.C. § 1324(a)(1)(A)(iv). The statute doesn't criminalize narrower concepts, such as to knowingly "solicit" or "aid and abet" an alien to unlawfully enter or reside in the United States. The statute speaks broadly and thus endangers the First Amendment rights of anyone in the United States who speaks or writes in support of immigration.

The government and some members of the Ninth Circuit have made various efforts to construe the statute more narrowly than it was actually written to help it pass constitutional muster. But one particularly misguided approach that continues to rear its head is that the sentencing enhancement in subparagraph (B)(i)—which increases the sentence for anyone who violates the predicate offense of (A)(iv) "for the purpose of commercial advantage or private financial gain"—is relevant to determining whether (A)(iv) is facially unconstitutional.

The Court should not adopt the government's attempt to effectively merge the predicate offense (encouraging or inducing) with the sentence enhancement (for financial gain) simply because Mr. Hansen himself happened to receive an enhanced sentence under (B)(i).[2] But even if the Court looks at the statute in the context of the sentencing enhancement charged below, that enhancement in no way diminishes the chilling effect of the predicate offense. A vast swath of

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[2] *See e.g.*, Pet. Br. at 46–48; *United States v. Hansen*, 40 F.4th 1049, 1068 (9th Cir. 2022) (Bumatay, J., dissenting from denial of rehearing *en banc*); app. at 66a–67a.

legitimate speech is chilled by the predicate offense plus the sentence enhancement.

The enhancement in subparagraph (B)(i) does not thaw the chill of (A)(iv) simply because it offers increased penalties for a narrower subset of speech. The government misreads *United States v. Alvarez*, 567 U.S. 709 (2012), and posits a theory that, in an overbreadth challenge, the Court may only evaluate the predicate offense *in conjunction with* any sentence enhancement the government happened to charge in that particular case. The Court in *Alvarez* invalidated a statute proscribing falsely claiming to have won service medals, with additional penalties for claiming to have won the Medal of Honor. But *Alvarez* does not require courts to look only at the predicate offense in conjunction with the applicable sentence enhancement. Justice Breyer's concurrence (necessary to form a majority for the Court's holding) flatly contradicts that characterization of the Court's analysis. Justice Breyer's opinion suggests that a statute limited to special awards might survive scrutiny in a *future* case, making plain that the Court was *not* treating the law as if it were limited to the Medal of Honor in *that* case. Nevertheless, the government treats the *Alvarez* opinions' factual focus on lying about the Medal of Honor as suggesting that an overbroad statute may be saved by a sentence enhancement. But that could lead to the absurd result of a ban on flag-burning that survives scrutiny because of a sentence enhancement for, say, inciting a riot.

Nor is it relevant to the chilling effect of the main statute that the elements of the sentencing enhancement must be proven to a jury before it may increase a defendant's sentence. The verdict forms in this case

show that subparagraph (A)(iv), the predicate offense, is where the chilling effect must lie. J.A. at 115–16. The jury here was asked whether the defendant was guilty of violating (A)(iv) and *then* asked if the financial gain enhancement could be applied. Thus, a defendant's ability to show she had not been motivated by financial gain would do nothing to save her from a guilty verdict—nor save the hypothetical YouTuber if he showed a lack of profit motive. The chilling effect remains with the predicate offense.

Finally, even if this Court were to merge the enhanced and predicate offenses in the manner suggested by the government, the primary burden of the revised law would still fall on protected speech. The statute as a whole would be unconstitutionally overbroad regardless of additional non-speech elements the government may look to. Accordingly, immigration attorneys, medical professionals, YouTubers, policy scholars, and members of the Court's own bar would still reasonably fear the consequences of their legitimate speech, and that makes the law fatally overbroad.

ARGUMENT

Title 8 U.S.C. § 1324(a)(1)(A)(iv), even limited by subsection (B)(i), is facially invalid. When statutes regulate or punish broad swaths of protected speech, "the transcendent value to all society of constitutionally protected expression" justifies invalidating the overinclusive prohibition. *Gooding v. Wilson*, 405 U.S. 518, 520–21 (1972). The Constitution protects people "from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

Under the First Amendment, a law is invalid for overbreadth 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 *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). "[A] statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it." *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984) (citing *Gooding*, 405 U.S. 518).

Amicus endorses respondent's arguments that subparagraph (A)(iv), itself, is overbroad. Furthermore, the government is wrong to suggest that subparagraph (B)(i) in some way limits this Court's review of (A)(iv). And regardless, a statute limited to prohibiting speech that encourages or induces aliens to remain in the United States for financial gain would still be unconstitutional in "a substantial number of its applications," chilling the legitimate speech of lawyers, doctors, civil servants, and many other professionals.

I. THE GOVERNMENT'S EFFECTIVE MERGER OF THE PREDICATE OFFENSE AND THE SENTENCING ENHANCEMENT DOES NOT THAW THE CHILLING EFFECT OF § 1324.

Mr. Hansen contends that § 1324(a)(1)(A)(iv), standing alone, is unconstitutionally overbroad and chills protected speech beyond the legitimate scope of the statute. Resp. Cert. Br. at 20–21; *see also United States v. Hansen*, 25 F.4th 1103, 1106 (9th Cir. 2022); app. at 3a. This provision should be viewed on its own in evaluating Hansen's overbreadth challenge. None of this Court's precedents suggest otherwise, contrary to

the Government's representations. The sentencing enhancement provisions in (B)(i) are irrelevant to (A)(iv)'s chilling effect.

A. The Government's Understanding of *Alvarez* is Wrong and Does Not Justify the Piecemeal Overbreadth Doctrine the Government Suggests.

Suppose Congress enacted a law imposing a $50 fine for burning a piece of cloth attached to a stick, but if that piece of cloth happens to be the American flag, then the fine is doubled. A reviewing court may properly consider a challenge to that statute only in the context of the sentence enhancement, since it is only the enhancement that implicates protected speech. If, however, the hypothetical statute imposed a $50 fine for burning the American flag—and then added five days in jail if the flag were burned for financial gain—a court would certainly strike down the $50 fine regardless of the sentencing enhancement for financial motivation. *Cf. Texas v. Johnson*, 491 U.S. 397 (1989).

Contrary to the claims of the government, neither the plurality nor the concurrence in *United States v. Alvarez* required or encouraged courts to look only at the predicate offense *tied to* a sentence enhancement when evaluating overbreadth claims. 567 U.S. 709 (2012). The concurrence's reasoning in *Alvarez* implicitly contradicts the government's reading here. *See* 567 U.S. at 736 (Breyer, J., concurring in judgment). Potential speakers will continue to be chilled by subparagraph (A)(iv) regardless of the subparagraph (B)(i) enhancement, and *Alvarez* does not require this Court to limit its review to that enhancement.

A four-justice plurality and two-justice concurrence together invalidated the Stolen Valor Act in *Alvarez*. *Id.* at 730. As the government notes, Pet. Br. at 47–48, the plurality reached this conclusion by examining the act's general prohibition against falsely claiming to have won military honors, along with the sentence enhancement for falsely claiming to have won the Congressional Medal of Honor in particular. *Alvarez*, 567 U.S. at 715–16. The concurrence, however, did not distinguish between general and enhanced offenses. *See id.* at 736 (Breyer, J., concurring in judgment) (noting that the statute covers marksmanship awards).[3]

Instead, the concurrence contemplated alternate versions of the statute that could have perhaps survived First Amendment review. Pertinent to the government's reading, Justice Breyer suggested that Congress could determine that certain awards, like the Medal of Honor, deserve greater protection. Justice Breyer suggested that Congress could have thus limited the Stolen Valor Act to encompass only those awards.[4] *Id.* at 737. Eschewing the opportunity to construe the statute in a more First Amendment-conscious manner, the concurrence noted that the statute as written was unconstitutional.

Nevertheless, the government treats the Court's factual focus in *Alvrarez* on lying about the Medal of Honor as if it means the predicate offense may be

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[3] Nor can the government look to the dissent, which makes no suggestion that the First Amendment analysis in the case should have been limited to the Medal of Honor enhancement. *See Alvarez*, 567 U.S. at 739 (Alito, J., dissenting).

[4] Congress, accepting that the predicate offense of claiming military honors was invalidated by *Alvarez*, took Justice Breyer's suggestion to heart and limited the act to certain specific medals. H.R. Rep. No. 113-84, at 4 (2013). Congress also added the requirement of specific intent to obtain a tangible benefit. *Id.*

ignored when a sentence enhancement is present. Instead, the more reasonable conclusion is that the plurality opinion in *Alvarez* mainly discussed the Medal of Honor because that is the particular lie the defendant in that case happened to tell. *See id.* at 713 (plurality).

As with the hypothetical flag-burning statute above, the chilling effect of subparagraph (A)(iv) must be viewed on its own. Any person reading § 1324(a)(1) would read subparagraph (A)(iv) as self-actualizing, just as any person who read the Stolen Valor Act would be chilled from claiming to have won any number of medals, whether the Medal of Honor or for marksmanship. And anyone who reads the hypothetical flag-burning act above would plainly be discouraged from burning an American flag, regardless of whether they stood to gain financially. Similarly, any person reading § 1324 would be chilled by (A)(iv) alone, regardless of the sentence enhancements in (B)(i)–(iv). This is underscored, not mitigated, by the government's arguments invoking *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

B. *Apprendi* Is a Shield Protecting Against Increased Sanctions for Facts not Found by a Jury—not a Sword Allowing the Government to Evade the First Amendment with Sentencing Enhancements.

The government argues that the First Amendment concerns in this particular case are mitigated by the fact that a jury found Hansen guilty of the sentence enhancement beyond a reasonable doubt. Pet. Br. at 46.[5] This is, of course, true for all upward departures

[5] *See also* app. at 79a–80a (Collins, J., dissenting from denial of rehearing *en banc*) (similarly invoking *Apprendi* to justify (A)(iv)).

from a statutory maximum sentence. In *Apprendi*, the Court held that every fact supporting an upward departure from a crime's sentencing range must meet the same burden of proof as the facts of the predicate offense. 530 U.S. at 482. The government must submit additional facts needed for a sentence enhancement—like facts supporting a financial gain incentive per (B)(i)—to a jury before seeking the enhanced sentence. In this case, the facts of the predicate offense—encouraging or inducing an alien to immigrate illegally—must be found by a jury beyond a reasonable doubt, which automatically qualifies for sentencing under subparagraph (B)(ii). If the government adds a financial-gain enhancement, then a jury must find the facts supporting that charge beyond a reasonable doubt as well.

That distinction is seen in the verdict forms given to the jury below. J.A. at 115–16. Counts Seventeen and Eighteen ask the same questions with respect to two aliens. *Id.* Each is expressly divided into two parts. *Id.* Count Seventeen reads:

> Encouraging and Inducing Illegal Immigration, in violation of Title 8, United States Code, Section 1324(a)(1)(A)(iv), regarding Epeli Q. Vosa, between on or about January 19, 2014 and July 18, 2014.

Id. at 115. This instruction provides the jury with a choice of guilty or not guilty, with no mention of any financial-gain incentive. Only after providing an answer to the guilty or not-guilty question is the jury then asked:

> If you found the defendant guilty of Count 17, do you find beyond a reasonable doubt that the offense was done for the purpose of private financial gain?

Id. at 116. If the jury found Mr. Hansen guilty of the predicate offense, then, and only then, would *Apprendi* come into play.[6] To enhance the sentence, the district judge must know beyond a reasonable doubt the answer to the second question, and it is only with an affirmative answer to that question that the judge can constitutionally move from the default sentencing scheme in subparagraph (B)(ii) to the enhanced sentencing scheme in (B)(i). Had the jury returned a negative answer to that second question, Mr. Hansen would have still faced prison. 8 U.S.C. § 1324(a)(1)(B)(ii). The question of financial gain was relevant here only because the jury first determined that Mr. Hansen uttered the speech necessary to commit an offense under subparagraph (A)(iv) alone.

Speech is chilled by the statutory command against "encourag[ing] or induc[ing]" regardless of whether a (B)(i) or (B)(ii) sentence is subsequently tacked on. A speaker cannot take heart in his ability to prove to a jury that he neither sought nor received any commercial advantage or financial gain. If the jury answers that he is guilty of encouragement or inducement and returns a negative to the financial gain question, the speaker will not walk free. The government would still seek a sentence under the default range of subparagraph (B)(ii), where no *Apprendi* factors impede them. *Apprendi* does nothing to thaw the chill of this statute because the additional conduct and additional sentence are irrespective of the speech forming the predicate offense.

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[6] An identical structure exists for Count Eighteen.

II. CRIMINALIZING ENCOURAGEMENT AND INDUCEMENT FOR FINANCIAL GAIN CHILLS A BROAD SWATH OF PROTECTED SPEECH.

Even if the government were right to essentially merge the sentencing enhancement of (B)(i) with the predicate offense of (A)(iv)—which it is not—the law still criminalizes protected speech that incidentally encourages or induces aliens to unlawfully remain in the United States. And the breadth of protected speech criminalized by the enhancement still dwarfs any legitimate sweep the statute might have. "Some of our most valued forms of fully protected speech are uttered for a profit," and some of our most valued forms of protected speech are chilled by the statute here. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989).

Overbreadth cases necessitate hypotheticals about scenarios not before the Court. As the Court has noted, legitimate speakers are often cowed by "severe penalties" risked by violating unconstitutional speech prohibitions. *See Free Speech Coal.*, 535 U.S. at 244. As in any law school class, hypotheticals are often necessary to understand a statute's full scope.[7] This Court must "strike a balance between competing social costs."

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[7] The government correctly notes that the court below did not cite any actual prosecutions, but rather presented a series of examples of speech that could be chilled by the statute. Pet. Br. at 13, 17, 44–45. Of course, had the government prosecuted this hypothetical conduct, the First Amendment violation would be manifest, not latent. But that objection ignores the very reason this Court recognizes facial overbreadth challenges when protected speech is at risk: because of the chilling effect on law-abiding citizens who will seek to avoid potential prosecution by giving the law's speech proscriptions a wide berth.

United States v. Williams, 553 U.S. 285, 292 (2008). A statute is invalid under the First Amendment "if it prohibits a substantial amount of protected speech," which necessitates thinking beyond the case at bar to the protected speech of the community. *Id.*

The statute at issue here engenders plenty of entirely plausible hypotheticals. For example, the government could convict an immigration attorney of this crime merely by showing that the attorney, knowing her client was present unlawfully, counseled her about potential advantages of remaining in the United States—and did so in the hope that she might receive a fee. Consider the following hypothetical exchange with an alien who sought advice about the Deferred Action for Childhood Arrivals (DACA) program:

> Alien: I want to stay in America. My parents brought me here from Ruritania when I was four. I don't even speak Ruritanian. But if I can't figure out whether I qualify for DACA, I will have to leave.
>
> Attorney: I am an immigration lawyer and can help. Come by my office at 123 Main Street. I normally bill $75 per hour.
>
> Alien: I don't know, I think I should just leave.
>
> Attorney: How about we look at your situation first? Stay put until we have done that, let's schedule a consultation next week.

Here the attorney has knowingly encouraged a particular alien to remain in the country, perhaps in reckless disregard for whether remaining violates federal law, and the attorney has made this statement for financial gain.

The government offers two answers in attempting to neutralize these types of hypotheticals. First, citing the Model Rules of Professional Conduct, it suggests that instead of advising her client to remain in the country, the lawyer can only go so far as stating things like the client is "unlikely to be removed." Pet. Br. at 34 (citing Model Rules of Prof'l Conduct 1.2(d) (2018) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client.")). Left unexplained is how this would not qualify as encouragement, or why requiring a lawyer to limit her communication with clients to vague suppositions rather than clear answers is not an example of chilled speech. A lawyer would still be forbidden from telling her client what she most needs to know—the benefits of staying rather than leaving—which could induce the client to remain.[8]

Second, the government points to the requirement that the alien's residence be in violation of law. Pet. Br. at 34. Because aliens already in removal proceedings are not in violation of the law when given a reprieve during the proceedings, the government suggests that the legal advice they seek after the commencement of proceedings will not violate (A)(iv) and

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[8] Additionally, it is incorrect to suggest, as the government does, that Model Rule 1.2(d) limits such a lawyer's behavior similarly to the way Section 1324(a)(1)(A)(iv) purports to do. The model rule concerns advising clients on future criminal activity. Continued residence is not criminal. *Arizona v. United States*, 567 U.S. 387, 407 (2012). Accordingly, a lawyer should be able to advise this course of action without transgressing Model Rule 1.2.

(B)(i). *Id.* This is true, and immigration attorneys entering at this stage need not be chilled. But noncitizens are often concerned with the uncertainty of their status, and they often seek immigration assistance before the government catches them and grants them temporary legal reprieve.

Apart from legal advice, additional vital services involve speech that would be penalized by the sentence enhancement. A pediatrician may encourage patients to stay in America because of vital medical care being provided to an illegally present child. To convict the pediatrician of the predicate merged with the sentence enhancement, the government need only prove that, for the purpose of financial gain, she knowingly encouraged specific aliens—her patients or their families—to remain in the United States in knowing or reckless disregard of the fact that such residence is in violation of law. Informing the patient that there is no better available care than what they can receive in the United States is protected speech. That information would certainly "encourage" or "induce" a patient to remain where medical care is superior.

This statute also covers public servants trying to help aliens access state programs. To convict a California Department of Motor Vehicles employee of this crime, the government need only prove that she knowingly encouraged or induced a particular alien—any of the available customers—to reside in the United States by informing them about the availability of California driver's licenses for aliens in the country illegally.[9] The licenses allow such persons to drive, thus

[9] California forbids public employees from denying a driver's license because the candidate is in the country illegally, so long as

making them more likely to remain in the United States. The DMV worker's salary would be the financial gain.

Overbroad proscriptions on speech violate the First Amendment and chill speech because the risk of "severe penalties" will often prove too great a risk to legitimate speakers. *Free Speech Coal.*, 535 U.S. at 244. By threatening lengthy prison sentences, the law at issue in this case imposes just such a risk on speakers engaged in legitimate, constitutionally protected speech.

CONCLUSION

For the foregoing reasons, and those described by the Respondent, this Court should invalidate 8 U.S.C. § 1324(a)(1)(A)(iv) as a facially overbroad prohibition on protected speech.

Respectfully submitted,

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such person can prove California residency. Cal. Veh. Code § 12801.9. Such employees are thus caught between violating state and federal law. *See also* Cal. DMV, AB 60 Driver License, https://www.dmv.ca.gov/portal/driver-licenses-identification-cards/assembly-bill-ab-60-driver-licenses/ (last visited Feb. 16, 2023).