Appeal No. 15-10614

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

vs.

Evelyn Sineneng-Smith

Defendant-Appellant.

On Appeal from United States District Court; ND Cal., San Jose
No. 5:10-cr-00414-RMW-1

BRIEF OF *AMICUS CURIAE* ASIAN AMERICANS ADVANCING JUSTICE |AAJC IN SUPPORT OF DEFENDANT-APPELLANT EVELYN SINENENG-SMITH AND REVERSAL OF THE JUDGMENT BELOW

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

INTEREST OF ASIAN AMERICANS ADVANCING JUSTICE | AAJC

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is a national nonprofit organization founded in 1991. Based in Washington, D.C., Advancing Justice | AAJC works to advance and protect civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. Advancing Justice | AAJC is one of the nation's leading experts on issues of importance to the Asian American community, including immigration and immigrants' rights. Advancing Justice | AAJC works to promote justice and bring national and local constituencies together through community outreach, advocacy and litigation.

Advancing Justice | AAJC respectfully submits this Amicus Brief in response to the Court's September 18, 2017 Order, and with consent from the parties.[1] Advancing Justice | AAJC authored this brief in part, with the undersigned attorneys, but no money was paid or contributed by any other entity.

[1] Advancing Justice | AAJC obtained consent telephonically from counsel for each party on October 17, 2017.

INTRODUCTION

This case raises important considerations for the Asian American and immigrant communities because the statutory provision at issue is so overbroad that it can be utilized to effectively deny a multitude of basic (often, humanitarian) services to immigrants—both lawful and unlawful—who find themselves in the crosshairs of the American justice system. In its dragnet, 8 U.S.C. § 1324(a)(1)(A)(iv), stifles the ability of American citizens to perform their jobs and exercise their constitutional rights for fear of potentially running afoul of a law that criminalizes conduct that *may* be deemed to encourage *any* immigrant to enter or remain in the United States unlawfully. In the current climate of aggressive immigration enforcement, the threat of similarly aggressive prosecutions under this overbroad statute has become heightened. This cannot be the intention of this statute.

To be clear, those who assist immigrants by engaging in an otherwise unlawful enterprise should not be immune from criminal prosecution for their conduct. Amicus takes no position on whether the Defendant-Appellant in this matter engaged in otherwise criminal conduct. However, this statute is an improper vehicle for such a determination because the provision is overbroad under the First Amendment and defective as a matter of due process.

SUMMARY OF ARGUMENT

The statute of conviction, 8 U.S.C. § 1324(a)(1)(A)(iv) (hereafter "Subsection (iv)"), is overbroad and unconstitutional because it criminalizes a substantial amount of ordinary, innocent and expressive activity that is protected by the First Amendment. The statute prohibits acts that might be deemed to "encourage" or "induce" an immigrant to enter or remain in the United States where the person knows or acts in reckless disregard of the fact that the immigrant's entry or residence is in violation of law. As such, the statute's reach is not only amorphous and unclear, but also would extend to ordinary, daily life interactions. It would reach services regularly provided by organizations such as Advancing Justice | AAJC that are firmly grounded in expressions of free speech and moral and ethical advocacy, such as providing objective legal advice with respect to immigration law, explaining immigration procedures, laws and status, expressing views about immigration policy, and even advocating on behalf of immigrants regarding education, employment and housing conditions. Criminalizing such conduct and speech cannot be tolerated under the First Amendment and fundamental notions of fairness and public welfare. No amount of judicial gloss can remove everyday interactions with immigrants from the broad and excessive scope of the statute as it is written.

Even the application of a heightened *mens rea* standard would not salvage the statute, nor would it cure the serious constitutional problems posed by the statute's overbreadth. The statute would remain irreparably vague and criminalize important, protected expressive conduct and speech. Subsection (iv) reaches expression that is protected under the First Amendment, and it potentially criminalizes ordinary and innocuous interactions with unauthorized immigrants. The statute is constitutionally deficient.

But, if the Court were to imply a *mens rea* element to Subsection (iv), it should apply a heightened standard, consistent with that previously applied to the statute of conviction, that would require the government to provide beyond a reasonable doubt that a defendant had the specific intent to violate U.S. immigration law.

ARGUMENT

I. Subsection (iv) is Overbroad under the First Amendment Because it Criminalizes A Substantial Amount of Protected Expressive Activity.

As one district court has already warned, Subsection (iv), when construed broadly, is "troubling" because it could go so far as to "potentially result in the prosecution of soup kitchen managers, low-income shelters, and immigration attorneys giving advice to undocumented residents about their options to remain in the United States and pursue citizenship." *See US v. Delgado-Ovalle*, No. 13-20033-07, 2013 US Dist LEXIS 181000, at *22 (D. Kan. Dec. 30, 2013). But it is

more than troubling. It is unconstitutional because it violates the First Amendment rights to speech, petition, and association.

To determine whether a statute is overbroad, the Court must conduct a two-step analysis: (1) construe the challenged statute to determine its reach; and then, (2) examine whether the statute "criminalizes a 'substantial amount' of expressive activity." *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1208 (9th Cir. 2010).

Here, the statute's language has a broad reach: Subsection (iv) criminalizes any speech or conduct that "encourages or induces" an "alien"[2] to reside in the U.S., "knowing or in reckless disregard" that such residence is or will be against the law. "Alien" covers not only unauthorized immigrants, but also those who are here lawfully, such as green card holders or legal permanent residents ("LPR"). 8 U.S.C. § 1101(a)(3). Subsection (iv) does not define the term "encourage" and courts have broadly defined it to include anything that "facilitate[s] the alien's ability to live in this country indefinitely." *United States v. Thum*, 749 F.3d 1143, 1148 (9th Cir. 2014). Indeed, under the broadest construction, any speech or conduct that "helps" an immigrant stay in the United States in violation of the law is criminal. *See, e.g.*, *United States v. Fujii*, 301 F.3d 535, 540 (7th Cir. 2002)

[2] The term "alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Amicus finds the term "alien" offensive and derogatory, and refers to this term as "immigrant" herein, unless quoting a source. Amicus notes that immigrants are present in the United States both on an authorized or unauthorized basis.

("To prove that Fujii 'encouraged or induced' the aliens, all that the government needed to establish was that Fujii knowingly helped or advised the aliens."). Its expansive reach ensures that Subsection (iv) penalizes a "substantial amount" of expressive activity.

A. Subsection (iv) Criminalizes the Provision of Legal Advice and Information to Unauthorized Immigrants.

The broad reach of Subsection (iv) is not theoretical. It has already been used to prosecute the offering of immigration advice to unauthorized immigrants. In *United States v. Henderson*, the government prosecuted and a jury convicted a Customs and Border Patrol officer for not only employing an unauthorized immigrant as a cleaning woman, but also for giving her immigration advice. 857 F. Supp. 2d 191, 193 (D. Mass. 2012). In opposing a motion for a new trial, the Government took the "position that giving illegal aliens advice to remain in the United States while their status is disputed constitutes felonious conduct under *§ 1324(a)(1)(A)(iv)* because it constitutes encouragement or inducement under the statute." *Id*. at 203. The Government conceded that under the statute, an immigration lawyer would be similarly prosecutable if the lawyer advised an unauthorized immigrant to remain in the country so that he may seek adjustment of status, and likened that to a criminal lawyer advising a client about a bank robbery. *Id*. The District Court of Massachusetts noted that this was a false analogy because while the criminal lawyer is advising about how to commit a future crime, the

immigration lawyer is "advising the client about how to pursue entirely legal processes in seeking to adjust her status." *Id*. at 204. Nevertheless, the court concluded that the government had the power to prosecute under the statute:

> an unadorned plain meaning reading of the words "encourages or induces" can lead to the conclusion that advice about what an alien needs to do - including the need for an alien to remain in the United States - in order to seek to adjust the alien's status could support the conclusion that such advice is within the scope of § 1324(a)(1)(A)(iv)'s prohibition.

Id. The court did not address whether that violates the First Amendment rights to speech, petition and association.[3]

Such a sweeping criminal statute and consequent fear of criminal penalties will inhibit lawyers from providing legal counsel to unauthorized immigrants and advocacy organizations, such Advancing Justice | AAJC, from disseminating legal information to immigrants and conducting citizenship consultations.

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[3] The Fourth Circuit addressed whether this statute is overbroad, but only in regard to encouraging *unauthorized* immigrants to *come* to the United States. *United States v. Tracy*, 456 Fed. Appx. 267, 272 (4th Cir. 2011) (finding speech that "encourages illegal immigrants to come to the United States" is criminal aiding and abetting, which is not protected under the First Amendment). The court did not consider whether it was overbroad in terms of encouraging *both* authorized and unauthorized immigrants to *reside* in the United States, nor did it conduct a thorough analysis about the types of protected speech that is covered under the statute.

B. Subsection (iv) Also Criminalizes the Provision of Legal Advice to Asylum Seekers.

Attorneys and organizations that assist and inform asylum seekers may also be in direct violation of this statute. An individual who is unauthorized to reside in the United States is permitted to seek asylum. *See* 8 U.S.C. § 1158. Asylum seekers are thus often unauthorized immigrants who present themselves to the United States and submit an application to United States Citizenship and Immigration Services ("USCIS"). *See* 8 C.F.R. § 1208.4. Other asylum seekers include individuals in removal proceedings who may apply for asylum to the immigration judge within the Executive Office for Immigration Review ("EOIR"). 8 C.F.R. § 1240.11(c). To navigate the process either through USCIS or the immigration courts, these individuals often seek assistance from immigrant service providers or attorneys.

Under Subsection (iv), however, any advice provided by service providers or counsel may be deemed "encouragement" in violation of 8 U.S.C. § 1324(a)(1)(A)(iv). Asylum claims are often unsuccessful; indeed, in 2016, nearly 60% of asylum claims were denied.[4] In such situations, service providers or

[4] *See* "Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality", TRACImmigration (Dec. 13, 2016), *available at* http://trac.syr.edu/immigration/reports/448/.

attorneys may be hesitant to provide assistance to an asylum seeker because the likelihood of success is low, and the service provider or attorney may be perceived to "encourage" the individual to remain in the United States while "knowing or in reckless disregard" that it "*will* be in violation of law." (emphasis added).[5] As such, Subsection (iv) undoubtedly violates both the asylum seeker's and the attorney's First Amendment rights to give and receive information.

C. Subsection (iv) Even Criminalizes the Provision of Legal Advice to Authorized Immigrants.

Critically, Subsection (iv) encompasses encouraging or inducing all "aliens," and not only unauthorized immigrants. Accordingly, Subsection (iv) may even prevent *authorized* immigrants from seeking legal information and assistance. Immigrants authorized to be in the United States may want to seek legal advice about how to remain here if they fear that their residence may become

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[5] Of course, service providers and attorneys may have a valid defense because the asylum process is codified in laws and regulations. However, this does not prevent an *allegation* of violating Subsection (iv) that subjects service providers and attorneys to expend additional resources to defend themselves and effectively chilling their First Amendment rights. In the current Administration, such a possibility is not a mere hypothetical. *See e.g. Northwest Immigrant Rights Project "NWIRP" v. Sessions*, No. 2:17-cv-00716, *4-5, 2017 U.S. Dist. LEXIS 75433, (W.D. Wash. May 17, 2017), where the United States Department of Justice (DOJ) perverted a regulation designed to prevent "notario" fraud and instead required entities providing *any* assistance, including, *inter alia*, "Know Your Rights" presentations, to file an appearance as counsel, undermining the ability of attorneys and organizations to provide crucial information to refugees, asylees, and other individuals in detention centers.

unauthorized at some future time. For example, a LPR who has committed a deportable offense may qualify for discretionary relief under the immigration statute. A legal service provider who advises this individual about her options could arguably be in violation of Subsection (iv). The LPR would be currently deportable and may be denied discretionary relief by the immigration judge at a removal hearing, and the statute prohibits "encourag[ing]… an alien to . . . reside in the United States" where the lawyer knows that such "residence . . . *will be* in violation of law." 8 U.S. Code § 1324(a)(1)(A)(iv) (emphasis added). Any attorney who advises this individual about the potential for relief under 8 U.S.C. § 1229b(a), or any service provider who assists the individual in the preparation of the application for relief under 8 U.S.C. § 1229b(a), can be targeted for encouraging or inducing an individual who is currently in the U.S. in violation of the immigration laws, and who might remain in the U.S. in violation of the immigration laws if ultimately denied relief (or if the individual chooses not to apply at all).

Under its broadest construction, providing any legal advice at all, even if unrelated to an immigrant's status, is covered under the statute. For example, giving advice regarding employment or housing conditions could potentially encourage an immigrant to stay by "facilitating" her ability to reside here. If that immigrant arrived here unlawfully, or arrived lawfully but is at risk of deportation,

the lawyer's advice would then become unlawful. The statute undoubtedly chills an attorney's ability to offer unfettered, objective legal advice to all immigrants, whether they are unauthorized or not. This in turn chills immigrants' ability to obtain legal advice and to petition the government.

D. Subsection (iv) Goes So Far as to Criminalize Advocacy on Behalf of Immigrants.

Provision of legal services is only one limited area that is negatively impacted by this statute. There are many organizations, like Advancing Justice | AAJC, who aim to assist immigrant populations with basic services so that they can live with the dignity that should be afforded to all people living within this nation's borders. Advancing Justice | AAJC seeks to empower Asian immigrants by providing them with information about the immigration process and their rights. Moreover, in order to advocate on behalf of unauthorized immigrants, organizations like Advancing Justice | AAJC must not only work with and understand the communities they are serving, but also educate the public about them. "[T]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. The freedom of speech and press embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). By criminalizing

assistance to unauthorized immigrants, this statute chills basic liberty to obtain and disseminate information about lawful and unlawful immigration, which is necessary now more than ever.

Consider the following example as one illustration of the statute's chilling effects on free speech and association. Under current estimates, there are almost 12.8 million Asian immigrants in the United States.[6] Although most arrive via authorized channels, Asian immigrants represent a significant and growing portion of the unauthorized population.[7] According to Migration Policy Institute (MPI) estimates, from 2009 through 2013, approximately 1.5 million unauthorized immigrants from Asia resided in the United States, representing 14% of the total 11 million unauthorized immigrants in the United States.[8] In August 2015, MPI estimated that approximately 151,000 Asian youth were immediately eligible for the Deferred Action for Childhood Arrivals (DACA) program, which provides temporary relief from deportation as well as work authorization.[9] From fiscal years 2012 to 2017, 42,927 unauthorized youths from India, Pakistan, the

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[6] *See* "Asian Immigrants in the United States", Jie Zong and Jeanne Batalova, MPI, (Jan. 6, 2016), *available at:* http://www.migrationpolicy.org/article/asian-immigrants-united-states.

[7] See *id.*

[8] See *id.*

[9] See *id.*

Philippines and South Korea applied for the DACA program, and 39,783 received DACA status.[10]

The status of DACA has been threatened by the current administration. Accordingly, Advancing Justice | AAJC continues to advocate for preserving the DACA program so that those who are eligible can remain in the United States and work. Under Subsection (iv), however, such constitutionally protected advocacy is criminal. Those who work for Advancing Justice | AAJC and other similarly situated organizations can be targeted for encouraging immigrants to reside and remain in the United States while advocating for a path to citizenship. In fact, everyone who is involved with advising immigrants about the DACA program or assisting in completing applications – even by simply translating the documents – is knowingly and willingly encouraging unauthorized immigrants to remain and reside in the United States. Any advice to unauthorized youth to remain while advocates challenge the current administration's termination of DACA is criminal under this statute. The statute is undeniably overbroad because it criminalizes a substantial amount of protected activity.

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[10] *See* "Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals", USCIS (June 30, 2017), *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr3.pdf.

II. The First Amendment Violation Cannot Be Cured By Any Limiting Construction.

No reasonable limiting construction exists here based on the plain language of Subsection (iv) that salvages this statute. Before striking down the statute as overbroad, this Court must first determine whether there is any reasonable limiting construction that renders the policy constitutional. *Powell's Books, Inc. v. Kroger*, 622 F.3d at 1206. In doing so, the Court may not "insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance." *Id*. But this is the only (impermissible) way to force Subsection (iv) to pass constitutional muster.

Some courts have skirted this issue by focusing on the illegality or impropriety of the underlying conduct by which an individual assisted an immigrant, thus incorrectly reading into Subsection (iv) a fraud or misconduct element, which does not appear anywhere in the plain text. *See, e.g.*, *Hager v. ABX Air, Inc.*, No. 2:07-cv-317, 2008 U.S. Dist. LEXIS 23486, *23-26 (S.D. Ohio Mar. 25, 2008) (finding that defendants did not violate Subsection (iv) by employing unauthorized immigrants because "[t]here are no allegations in Plaintiff's Complaint that the Moving Defendants ever provided false identification documents to unauthorized aliens…"); *United States v. Delgado-Ovalle*, 2013 US Dist LEXIS 181000, at *22 (upholding indictment under Subsection (iv) for instructing employees to hide from immigration officials and to

lie to OSHA investigators, because employment "coupled with aggravating factors consistent with knowingly assisting such persons in maintaining illegal residence" constitutes encouragement). Here, appellee therefore consistently highlighted appellant's alleged fraudulent behavior (despite arguing that fraud is not necessary for conviction under the statute). Appellee's Br. at 27, Dkt. No. 25 ("The court found that the fact that Sineneng-Smith was accused of defrauding the aliens themselves, as opposed to the federal government, 'more strongly supporte[d] the conclusion that she encouraged or induced the aliens to remain in the United States than if she had merely assisted the aliens in obtaining fraudulent documents.'") (quoting the excerpted record at ER1:51:4-5)). Other courts have required a causal nexus between the alleged encouragement and the immigrant's decision to remain in the United States. *See, e.g.*, *DelRio-Mocci v. Connolly Props.*, 672 F.3d 241, 248-249 (3d Cir. 2012) (concluding that "the word 'encourage,' in the context of this statute, also refers to conduct that causes someone to do something that they otherwise might not do" and that "encouragement or inducement must also be 'substantial' to support a conviction under the statute").

Nothing, however, on the face of the statute provides for a causation requirement or existence of "aggravating factors." Nor does the statute require that the encouragement itself be unlawful. Inclusion of these elements does not constitute a reasonable limiting construction of the statute; rather, it is a complete

rewriting of it. But such rewriting is not within the Court's authority. "Courts may not rewrite a state law to conform it to constitutional requirements." *Powell's Books, Inc.*, 622 F.3d at 1206. Thus, as currently written, the statute is unconstitutionally overbroad.

III. Application of a Stringent *Mens Rea* Requirement Does Not Cure Serious Constitutional Problems

The statute's inescapable defect is that, as written, it criminalizes unintentional or innocuous conduct, and it exposes those who engage in everyday interactions with immigrants to lengthy incarceration. Even if this Court adopts a heightened *mens rea* element, which would require proof of specific intent to violate the U.S. immigration laws, *see infra*, Part IV, this would be insufficient to salvage Subsection (iv) as a constitutional matter for two reasons: First, the language of the statute is so profoundly vague and overbroad that people cannot know whether or not their conduct is criminal, regardless of the *mens rea* requirement, which violates basic notions of due process. Second, where individuals engage in conduct that they do have reason to believe will encourage unauthorized immigrants to stay, by for example, providing legal advice and advocating for immigration reform, criminalizing that behavior violates the First Amendment.

A. The Language of the Statute Fails to Provide Fair Notice of Criminal Conduct, with or without a Heightened *Mens Rea* Standard.

On the most basic level, a criminal statute is required to provide fair notice of the conduct that it prohibits as a matter of due process. *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). A statute fails the basic due process threshold, as a matter of fair warning, if it is so vague that its prohibitions or limitations are indiscernible, or if the statute is applied to conduct that does not fall within the ordinary scope of the statutory language or relevant jurisprudence. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 266 (1997); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Here, even under a heightened *mens rea* standard, the reach of Subsection (iv) is so overbroad that individuals have no reasonable way of knowing whether any otherwise innocuous conduct that may have the effect of "encouraging" or "inducing" an unauthorized immigrant to remain here amounts to a crime that may be prosecuted and punished under the statute. The statute provides the government with broad power to prosecute innocuous conduct – which may include teaching English as a second language, advocating change to the immigration laws, or even proclaiming "I stand with Dreamers" – while providing no cogent or reasonable warning to the public that engaging in these activities may constitute a crime under the U.S. immigration laws. [11]

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[11] In *United States v. Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012), the district court, interpreting 8 U.S.C. § 1324(a)(1)(A)(iv), adopted the Third Circuit's
(Continued...)

The issue is not solvable by applying a *mens rea* standard because the undefined and amorphous words "encouragement" or "inducement" of an immigrant to come to, enter or reside in the United States, fail to describe any clear threshold or indicia for liability. Unlike its "companion" subsections in 8 U.S.C. § 1324(a)(1)(A)(i)-(iii), Subsection (iv) is not limited by its terms to physical action (*i.e.*, bringing in, transporting or concealing an immigrant) from which intent to violate the immigration laws may be directly inferred. In *United States v. Thum*, 749 F.3d 1143 (9th Cir. 2014), the Court equated "to encourage" under Subsection (iv) with "to inspire with courage, spirit or hope…to spur on…to give help or patronage to." *Id.* at 1147 (citing *United States v. He*, 245 F.3d 954, 960 (7th Cir. 2001) and *United States v. Yoshida*, 303 F.3d 1145, 1150 (9th Cir. 2002) (equating "encouraged" with "helped")). "Encouragement" was further described as "tak[ing] some action 'to convince the illegal alien to…stay in this county' or to facilitate the alien's ability to live in this country indefinitely." *Id.* at 1148 (citation omitted). Thus, the question arises – apart from the *defendant's* specific

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standard of "substantial" encouragement or inducement that amounts to affirmative assistance that makes an unauthorized immigrant "more likely to enter or remain in the United States than she otherwise might have been." *Id.* at 210, citing *DelRio-Mocci v. Connelly Properties, Inc.*, 672 F.3d 241, 248 (3d Cir. 2012). But the court in *Henderson* nevertheless acknowledged that this standard left the government with "a tool" by which to prosecute "housewives for employing undocumented aliens to clean their house periodically and immigration lawyers for advising legal aliens regarding the circumstances under which they may pursue adjustment in status." 857 F. Supp. 2d at 211-12.

intent – whether there can be liability under Subsection (iv) unless *an immigrant becomes inspired* with courage, spirit or hope as a result of the defendant's conduct. In certain cases, an unauthorized immigrant who resides in the United States has presumptively *already* made a decision to remain in the country, so it is especially impossible to know what is encouragement or inducement in that context.

B. The Statute Criminalizes Activity Protected Under the First Amendment.

Moreover, there may be other instances where an individual will meet a heightened *mens rea* standard and possess a specific intent to provide "encouragement" to unauthorized immigrants by, *e.g.*, providing legal advice or representation or by advocating restoration of DACA. For those cases, Subsection (iv) would punish expressive conduct that is clearly protected under the First Amendment. Thus, the statute remains unconstitutional.

C. If Interpreted Broadly, the Implications on the Asian American Community Could Be Far-Reaching.

From the perspective of amicus Advancing Justice | AAJC, the vague language of Subsection (iv) threatens members of the Asian American community who engage in lawful conduct. As set forth *supra*, although the vast majority of the approximately 12.8 million Asian immigrants in the United States reside here lawfully, there are approximately 1.5 million immigrants from Asia who are

unauthorized. Authorized and unauthorized immigrants often live together in the same communities and within the same families. As such, they will be motivated to help each other adapt to life in the United States and render a wide variety of assistance that may include, *inter alia*, learning English, supporting their families, and finding living quarters. Through their employment, many people who work in community-based organizations and local government agencies assist unauthorized immigrants in enrolling their children in school and accessing educational programs, accessing healthcare and other benefits that U.S. citizens and LPR family members qualify for, and other humanitarian and social activities.

Such activities, which are both innocent and beneficial, are potentially within the nebulous scope of "encouraging" or "inducing" immigrants to enter or remain in the United States under 8 U.S.C. § 1324(a)(1)(A)(iv).[12] Moreover, Subsection (iv) has a more pervasive and harmful chilling effect with respect to the provision of important professional services to the Asian immigrant population. Since 1990, the number of unauthorized Chinese, Korean and Indian immigrants increased four-fold, eight-fold and ten-fold, respectively. In 2015 alone, DHS apprehended, through all programs (including ICE and CBP), over 462,000

[12] Such conduct, otherwise lawful in all respects, is a far cry from *United States v. Nidaye*, 434 F.3d 1270, 1298 (11th Cir. 2006) and *United States v. Oloyede*, 982 F.2d 133, 135-37 (4th Cir. 1993), both of which involved "encouragement" by means of supplying unauthorized immigrants with Social Security numbers or false documentation for citizenship applications.

individuals.[13] The leading countries of origin for these individuals are Mexico, Guatemala, El Salvador, Honduras, Ecuador, India, Dominican Republic, Cuba, Brazil and China.[14] The many thousands of individuals whom DHS has apprehended – as well as those who fear they may be subject to DHS action – often need legal representation, translation services and other services for advice concerning the immigration processes and institutions that they may face. The provision of legal services, consultation, translation services and the like may also be swept within the scope of "encouraging" or "inducing" immigrants to reside or remain in the United States. Subjecting such activity to potential prosecution is, by any reasonable standard, a far cry from the statute's overall purpose, *i.e.*, preventing the bringing, transporting and concealment of unauthorized immigrants into the United States and inducing them to remain here. *See* 8 U.S.C. § 1324(a)(1)(A)(i)-(iv).

Subsection (iv) jeopardizes legitimate and needed services rendered by the legal community and all those who provide related services to immigrants. As written, Subsection (iv) criminalizes lawful conduct that advises immigrants of

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[13] *See* "Immigration Enforcement Actions: 2015", Bryan Baker and Christopher Williams, Homeland Security Office of Immigration Statistics (July 2017), *available at*: https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2015.pdf.

[14] *See id*.

their rights, enables them to access services or integrate into local communities, or provides immigrants with a simple sense of dignity in their day-to-day lives in a different and challenging environment.

Because the statute is so far-reaching and because the conduct punishable thereunder is poorly defined, the Court should rule that it is not possible for a reasonable person to understand what is prohibited under the statute. Subsection (iv) provides no fair or intelligent warning as to when any lawful activity can be prosecuted. Accordingly, the statute is deficient as a matter of due process.

IV. Even if the Statute Passes Constitutional Muster, the Court Should Apply a Stringent *Mens Rea* Element Because the Statute Criminalizes Innocent Conduct

A. The Government Should be Required to Show Specific Intent to Violate the Immigration Laws under Subsection (iv).

Subsection (iv) prohibits undefined and unspecified conduct – indeed any conduct – that may "encourage" or "induce" an immigrant to come to, enter or reside in the United States. However, the statute does not expressly contain a *mens rea* element that must be shown in order to establish what conduct rises to the level of criminal activity. The statute's reference to knowledge or reckless disregard of an immigrant's status does not, in and of itself, constitute an express *mens rea* standard. Even where a criminal statute contains a reference to "knowing" conduct, this indicates only that Congress intended to require *some* mental state with respect to *some* element of the crime, and more precise interpretation is

necessary, particularly where the statute conceivably criminalizes innocent conduct. *Liparota v. United States*, 471 U.S. 419, 424, 426 (1985).

If the Court were to articulate an implied *mens rea* element, it should be a heightened standard that requires specific intent to violate a specific immigration law. That standard could help protect innocent and expressive conduct and provide clear guidance as to what "encouragement" or "inducement" may be punishable as a criminal act. This is of particular importance here, where Subsection (iv) references unspecified conduct that somehow "encourages" or "induces" an immigrant – who may *already* reside in the United States – to remain here.

B. An Implied *Mens Rea* Element Requiring Specific Intent is Consistent with the Standard Applied to Other Portions of the Same Statute

If the court were to articulate an implied *mens rea* element, it should be a heightened standard that requires the government to prove, beyond a reasonable doubt, that a defendant acted with specific intent to violate a specific immigration law. Significantly, this Court has interpreted 8 U.S.C. § 1324(a)(1)(A) and every subsection thereunder to require proof beyond a reasonable doubt that a defendant acted with specific intent to violate the immigration laws.

In *United States v. Nguyen*, 73 F.3d 887, 893 (9th Cir. 1995), this Court ruled that Subsection (i) of 8 U.S.C. § 1324(a)(1)(A), which prohibits the discernible *physical* act of bringing or attempting to bring an immigrant into the

United States, lacked an express *mens rea* requirement, and required proof of specific intent to violate the law for a conviction.[15] As equally applicable here, the Court recognized the importance of avoiding a *mens rea* standard that "exposes persons who perform innocent acts to lengthy prison sentences." *Id.*

Four years after *Nguyen*, in a case arising under Subsection (ii) of § 1324(a)(1)(A), which generally prohibits the transportation of immigrants,[16] this Court recognized that without an instruction as to specific intent, a jury "could conceivably believe that they had to convict" where the conduct at issue fell within the statutory description but there was a plausible claim that the defendant lacked the intent to violate the law. *United States v. Barajas-Montiel*, 185 F.3d 947, 953 (9th Cir. 1999). This Court upheld a jury instruction that required a finding that the conduct occurred "in order to help the alien remain in the United States illegally." *Id.* at 953-54.[17]

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[15] 8 U.S.C. § 1324(a)(1)(A)(i) imposes liability on any person who "knowing that a person is an alien, brings or attempts to bring to the United States…such person at a place other than a designated port of entry…"

[16] Subsection (ii) imposes liability upon any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States…"

[17] Nevertheless, simply transporting an unauthorized immigrant to work does not amount to improper or surreptitious transportation prohibited by Subsection (ii). *United States v. Fierros*, 692 F.2d 1291, 1295 (9th Cir. 1983); *United States v. One 1984 Chevrolet Truck*, 701 F. Supp. 213, 215-17 (N.D. Ga. 1988).

In *United States v. You*, 382 F.3d 958 (9th Cir. 2004), this Court addressed the *mens rea* element applicable to 8 U.S.C. § 1324(a)(1)(A)(iii), which imposes criminal liability upon a person who conceals or harbors an unauthorized immigrant in the United States, or attempts to do so. Consistent with *Nguyen* and *Barajas*, this Court approved an instruction requiring the jury to find that the defendants acted with "*the purpose* of avoiding [the unauthorized immigrant's] detection by immigration authorities." 382 F.3d at 966 (emphasis in original).

Also drawing from *Barajas-Montiel* and *Nguyen*, this Court has addressed the applicable *mens rea* standard for Subsection (iv). In *United States v. Yoshida*, 303 F.3d 1145 (9th Cir. 2002), this Court upheld a defendant's conviction under Subsection (iv) for participating in a complex scheme to smuggle immigrants through foreign airports and into the United States. The Court referred to 8 U.S.C. § 1324(a)(1)(A) generally and, citing *Barajas-Montiel* and *Nguyen*, recognized that "the government must show that the defendant acted with criminal intent, *i.e.*, the intent to violate United States immigration laws." 303 F.3d at 1149 (quotation marks omitted). In *Yoshida*, specific intent to violate the immigration laws was proved by, *inter alia*, the defendant's overt acts, which included escorting immigrants through a foreign airport and onto a U.S.-bound flight; concealing the immigrants' baggage claim checks in her underwear; stating a false purpose for her own trip; and her overall participation in the smuggling operation. *Id.* at 1150-51.

From the perspective of amicus Advancing Justice | AAJC, the vague language of Subsection (iv), combined with strong practical considerations, warrant application of the highest and most restrictive *mens rea* standard. A *mens rea* element requiring proof beyond reasonable doubt of a defendant's specific intent to violate the immigration laws is necessary to avoid a harmful chilling effect upon the provision of lawful representation and related services to immigrants, and to avoid liability for conduct that is otherwise commonplace and innocuous. *See Nguyen*, 73 F.3d at 803 ("We cannot believe that it was Congress' intent…to criminalize wholly innocent conduct" under Section 1324(a)(1)(A)).

Advancing Justice | AAJC, however, reiterates that the heightened *mens rea* standard will not cure the constitutional problem that remains unaddressed by these cases. In *Yoshida*, for example, which purports to already apply a heightened *mens rea* requirement to Subsection (iv), the defendant was prosecuted for smuggling, which is conduct far removed from the case at bar. Thus, *Yoshida* was an easier case that did not raise the questions raised here by the prosecution of conduct relating to the provision of immigration advice. Even adoption of a heightened *mens rea* standard is insufficient to salvage a flawed, overbroad statute that provides no cogent parameters to allow professionals, community groups and individuals who interact with the immigrant community to understand what

conduct may be subject to criminal prosecution or to exercise rights that are clearly protected under the Constitution.

CONCLUSION

Advancing Justice | AAJC respectfully requests that this Court find that the statute of conviction, 8 U.S.C. § 1324(a)(1)(A)(iv), criminalizes a substantial amount of expressive activity, and is therefore unconstitutionally overbroad under the First Amendment.

Dated: October 18, 2017

Respectfully submitted,

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Signature of Attorney or Unrepresented Litigant: s/ Emily Kuwahara

Date: Oct 18, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

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