



Supreme Court Rules That Statutory Criminalization of Encouraging or Inducing Illegal Immigration Is Not Facially Overbroad Under the First Amendment

July 10, 2023

On June 23, 2023, the Supreme Court ruled in *United States v. Hansen* that the federal criminal offense of **encouraging or inducing** an **alien** “to come to, enter, or reside in the United States” unlawfully is not facially overbroad in violation of the Free Speech Clause of the First Amendment. The Court’s decision in *Hansen* follows on the heels of *United States v. Sineneng-Smith*, a case heard in the October 2019 term concerning the same issue. In that case, the Court did not reach the underlying substantive First Amendment issue and instead **reversed** and remanded the appellate court’s ruling on procedural grounds. The Court’s decision in *Hansen* resolves the substantive question by concluding that this statutory provision does not violate the First Amendment on its face. This decision raises significant considerations for Congress about the scope of the Immigration and Nationality Act’s (INA’s) statutory scheme that penalizes those who facilitate unlawful entry or presence in violation of immigration rules.

Legal Framework

Criminal Penalties for Encouraging or Inducing Illegal Immigration

The First Amendment challenges in both *Sineneng-Smith* and *Hansen* arose from prosecutions under a statute that imposes criminal penalties for immigration-related conduct. The INA punishes individuals, both aliens and U.S. citizens and nationals alike, who commit certain acts related to facilitating the unlawful entry of an alien and, once in the United States, transporting within and harboring, concealing, or shielding an alien from detection by immigration authorities while knowing or in reckless disregard that the alien has come to, entered, or remains in the United States in violation of law. The statutory provision at issue in *Hansen*—[8 U.S.C. § 1324\(a\)\(1\)\(A\)\(iv\)](#) (“Subsection (iv)”)—penalizes “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.”

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LSB11003

Cases prosecuted under Subsection (iv) demonstrate the wide range of conduct that has been construed to fall within the provision's scope. For example, some cases prosecuted under Subsection (iv) have involved immigration-related fraudulent schemes, including the [selling of false citizenship papers](#) to aliens and the paying of a government employee to issue [Social Security numbers](#) to aliens not entitled to them. Schemes providing assistance for unlawful entry and [misleadingly luring aliens into the country for unlawful work](#) have also been prosecuted under Subsection (iv). Subsection (iv) prosecutions have also covered smuggling-related activities, such as the [arranging of flights](#), obtaining fraudulent passports, and leading aliens through airports to avoid scrutiny. In *Hansen* and *Sineneng-Smith*, prosecutors utilized Subsection (iv) to prosecute fraudulent schemes that caused or solicited an alien to remain in the United States in violation of law—conduct that has not been prosecuted under Section 1324's other provisions.

A violation for encouraging or inducing illegal immigration may result in either a fine or a term of imprisonment for up to five years per alien (or both), with enhanced penalties available when there are aggravating circumstances. Specifically relevant to *Hansen*, 8 U.S.C. § 1324(a)(1)(B)(i) provides for heightened penalties of either a fine or a term of imprisonment of up to ten years per alien (or both) if the offense was committed for purposes of commercial advantage or private financial gain.

Free Speech Under the First Amendment

At least prior to the Court's decision in *Hansen*, [some argued](#) that the encouraging or inducing provision of Subsection (iv) is facially overbroad under the First Amendment because the amount of unprotected speech that it legitimately forbids is eclipsed by the amount of protected speech that it suppresses. The Free Speech Clause of the [First Amendment](#) provides that the government "shall make no law . . . abridging the freedom of speech." However, the right to free speech "[is not absolute](#)." For example, although laws regulating speech based on content (i.e., the subject matter of the speech) are [presumptively unconstitutional](#), they may pass judicial scrutiny if the government shows that the challenged law is "narrowly tailored" to serve a "compelling" governmental interest.

In addition, the Supreme Court has carved out several well-defined, narrow, and limited categories of "[unprotected](#)" speech that the government may regulate on the basis of its content. These categories of unprotected speech include, for example, [obscenity, defamation, and incitement](#). The government also has more leeway to regulate speech that is [integral to criminal conduct](#) (e.g., [soliciting criminal activity](#)). The Court has held that speech that incites imminent lawless action or is integral to criminal conduct is unprotected under the First Amendment, while speech that involves "[abstract advocacy](#)" (i.e., speech that merely advocates for certain illegal activity) is constitutionally protected.

The Overbreadth Doctrine and Free Speech

When criminalizing unprotected speech, a law may be held invalid if a court finds it [facially overbroad](#). As a general principle, in a facial challenge based on overbreadth, a court considers the universal application of the law rather than the application of the law specifically to the defendant's conduct. In the First Amendment context, a person whose own conduct may not be constitutionally protected may bring a facial challenge to a law if the statute is so broadly written that it sweeps in protected speech and could have "[a deterrent effect on free expression](#)."

As recounted by the Supreme Court in *United States v. Williams*, "the first step in an overbreadth analysis is to [construe](#) the challenged statute" on the basis that "it is impossible to determine whether the statute reaches too far without first knowing what the statute covers." For instance, some of the *Williams* Court's considerations included the statute's scienter requirement (i.e., mens rea), its "operative verbs," the definitions of key terms, and whether the provision contains objective and subjective components. The [second step](#) is to evaluate whether the statute, as construed, "criminalizes a substantial amount of

protected speech.” The overbreadth doctrine allows the facial invalidation of a law that punishes a *substantial* amount of protected speech relative to the statute’s “plainly legitimate sweep.”

The Court has explained that the overbreadth doctrine, although applied sparingly, is used to prevent the “chilling” of protected speech or, in other words, to address the concern that people may refrain from exercising their right to constitutionally protected expression out of fear of *criminal sanctions*.

United States v. Hansen

Background

Helaman Hansen *operated a program* that purported to help unlawfully present aliens become U.S. citizens through adult adoption, even though federal law does not provide a pathway to U.S. citizenship through adult adoption. Hansen’s fraudulent scheme and false representations allegedly caused some aliens to enter the United States unlawfully and caused others to overstay their periods of authorized stay in the United States. Along with convictions for mail fraud and wire fraud, a federal jury convicted Hansen of two counts of encouraging or inducing illegal immigration for purposes of financial gain on the basis that Hansen encouraged two aliens to overstay their visas in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i).

On appeal, the Ninth Circuit *reversed* Hansen’s encouraging or inducing convictions, concluding, among other things, that Subsection (iv) is overbroad on its face in violation of the First Amendment because it encompasses a substantial amount of protected speech in relation to its “legitimate sweep.” (To read about the Ninth Circuit’s decision, *see this CRS Legal Sidebar*.)

Decision by the Supreme Court

The *question before the Supreme Court* was “[w]hether the federal criminal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional on First Amendment overbreadth grounds.”

In a *7-2 decision*, the Court held that Subsection (iv) is not unconstitutionally overbroad on its face under the First Amendment because the provision forbids only the purposeful solicitation and facilitation of specific acts that violate federal law. In the majority opinion authored by Justice Barrett (joined by Chief Justice Roberts and Justices Thomas, Alito, Kagan, Gorsuch, and Kavanaugh), the Court first construed the scope of the statute. A *central area of focus* was whether Congress used *encourage* and *induce* as terms of art referring to criminal solicitation and facilitation or instead as those terms are used in everyday use. The former would narrow the statute to “capture[e] only a narrow band of speech,” the Court observed, while the latter would capture “a broader swath” of protected speech.

The majority *concluded* “that clause (iv) uses ‘encourages or induces’ in its specialized, criminal-law sense—that is, as incorporating common-law liability for solicitation and facilitation.” The Court observed that *encourage* and *induce* have well-established legal meanings. When Congress “borrows terms of art,” the majority asserted, “it presumably knows and adopts the cluster of ideas” attached to each word. The Court rejected Hansen’s argument that the absence of the necessary mens rea for solicitation and facilitation means that the statute’s scope is not limited to solicitation and facilitation. The majority *explained* that “the defendant generally must *intend* to facilitate the commission of the crime.... Since ‘encourages or induces’ in clause (iv) draws on the same common-law principles, it too incorporates them implicitly.”

Because Subsection (iv) “reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law,” according to the majority, the statute **does not prohibit** a substantial amount of protected speech in relation to its plainly legitimate sweep. Examining activity that may fall within the provision’s purview, the Court pointed out that “a great deal of nonexpressive conduct” (i.e., conduct that does not qualify as speech) falls within the provision’s scope, such as “smuggling noncitizens into the country, providing counterfeit immigration documents, and issuing fraudulent Social Security numbers to noncitizens.” The Court noted that “the other side of the ledger ... is pretty much blank,” observing that Hansen failed to identify a single Subsection (iv) prosecution implicating protected speech in the past 70 years. Accordingly, “[e]ven assuming clause (iv) reaches some protected speech ... the **ratio of unlawful-to-lawful application** is not lopsided enough to justify the ‘strong medicine’ of facial invalidation for overbreadth.” The Court also noted the availability of relief through **as-applied challenges** under the First Amendment “or another constitutional constraint,” meaning that an aggrieved individual could still challenge a conviction under Subsection (iv) as unconstitutional depending on the facts of a particular case.

Justice Thomas joined the majority opinion in full but issued a **concurring opinion** “to emphasize how far afield the facial overbreadth doctrine has carried the Judiciary from its constitutional role.” He criticized the Ninth Circuit decision holding Subsection (iv) as overbroad, arguing that the court passed judgment on the validity of the statute based on “fanciful hypotheticals” of First Amendment violations. In a **historical recount**, he observed how the Framers rejected “the premise that judicial power included a power to refuse to apply the law for policy reasons.” Justice Thomas advocated that, in an appropriate case, the Court “should carefully reconsider the facial overbreadth doctrine.”

In a **dissenting opinion** joined by Justice Sotomayor, Justice Jackson asserted that Subsection (iv) is facially overbroad in violation of the First Amendment, rejecting the majority’s reading of the provision “as a narrow prohibition on the intentional solicitation or facilitation of a specific act of unlawful immigration.” According to Justice Jackson, “**ordinary people** confronted with the encouragement provision ... will see only its broad, speech-chilling language. Even if they do consult this Court’s decision, and do recognize that it substantially narrows the statute’s scope, the Court’s decision leaves many things about future potential prosecution up in the air.”

Implications and Considerations for Congress

As demonstrated in *Hansen* and *Sineneng-Smith*, Subsection (iv)’s encouraging or inducing illegal immigration offense has raised significant questions about the type of conduct that the provision encompasses. By ruling that Subsection (iv) is not facially overbroad in violation of the First Amendment, Subsection (iv) will continue to provide a basis for criminal prosecutions for immigration-related conduct encouraging or inducing unlawful entry or presence.

Hansen provides some guidance on what type of conduct properly falls within Subsection (iv)’s scope, declaring that the statute reaches only conduct that constitutes facilitation or solicitation of an unlawful act. As demonstrated in *Hansen*, Subsection (iv) may apply in a variety of contexts, including those that do not involve protected speech. For instance, prosecutors have used the provision to punish those who engage in fraudulent schemes that encourage unlawfully present aliens to remain in the United States under false pretenses. In the absence of caselaw providing examples of when words alone constitute a violation of Subsection (iv), however, it remains to be seen which words, or speech, qualify as protected speech not encompassed by the statutory provision and which words constitute “the **purposeful solicitation and facilitation** of specific acts known to violate federal law.” The *Hansen* court **defined solicitation** as “the intentional encouragement of an unlawful act” and **facilitation** (i.e., aiding and abetting) as “the provision of assistance to a wrongdoer with the intent to further an offense’s commission.” The Court added that “lending physical aid” is not required and that “words may be

enough.” Although *Hansen* held that the statute is not overbroad in violation of the First Amendment, an individual could pursue an as-applied challenge under the First Amendment based on the speech implicated.

Congress has [broad power](#) to either clarify or amend the INA’s statutory scheme. If lawmakers are concerned about the chilling of protected speech, Congress could consider amending Subsection (iv) to clarify what conduct the statute prohibits, particularly which speech falls within the provision’s scope. For instance, one possibility may include expressly defining the terms *encourage* and *induce* to mean facilitating or soliciting specified immigration-related conduct, consistent with the Court’s opinion. Congress instead might opt to pass new legislation penalizing those who facilitate unlawful entry or presence in certain enumerated manners in lieu of the existing more general provision.

To address First Amendment concerns, Congress could also choose to repeal the provision in its entirety if it were to conclude that other federal statutes sufficiently penalize conduct and other schemes that involve facilitating or soliciting illegal immigration, whether it be in the other provisions of Section 1324 (i.e., smuggling, harboring, transporting) or generally applicable criminal statutes. Other federal statutes can provide a basis to prosecute persons who employ fraudulent schemes that promote unlawfully present aliens to remain in the United States in violation of law. For instance, prosecutors could charge those engaging in such schemes under broad criminal prohibitions against document fraud in violation of immigration laws (e.g., [8 U.S.C. § 1324c](#) and [18 U.S.C. § 1546](#)) and other generally applicable criminal statutes, such as [mail](#) or [wire](#) fraud. Indeed, the jury also convicted Hansen of multiple counts of mail fraud and wire fraud because he had fraudulently made false representations about an adult adoption program to unlawfully present aliens to obtain immigration benefits.

Alternatively, Congress might determine that the current version of the statute, as interpreted by the Court, appropriately encompasses and punishes immigration-related conduct that may arise in a variety of contexts.

Author Information

Kelsey Y. Santamaria
Legislative Attorney

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