Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* HANSEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22–179. Argued March 27, 2023—Decided June 23, 2023

Respondent Helaman Hansen promised hundreds of noncitizens a path to U. S. citizenship through "adult adoption." But that was a scam. Though there is no path to citizenship through "adult adoption," Hansen earned nearly $2 million from his scheme. The United States charged Hansen with, *inter alia*, violating 8 U. S. C. §1324(a)(1)(A)(iv), which forbids "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of law." Hansen was convicted and moved to dismiss the clause (iv) charges on First Amendment overbreadth grounds. The District Court rejected Hansen's argument, but the Ninth Circuit concluded that clause (iv) was unconstitutionally overbroad.

Held: Because §1324(a)(1)(A)(iv) forbids only the purposeful solicitation and facilitation of specific acts known to violate federal law, the clause is not unconstitutionally overbroad. Pp. 4–20.

(a) Hansen's First Amendment overbreadth challenge rests on the claim that clause (iv) punishes so much protected speech that it cannot be applied to anyone, including him. A court will hold a statute facially invalid under the overbreadth doctrine if the law "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." *case by case*. *P. 4 – 5*

(b) The issue here is whether Congress used "encou rage" and "in-duce" in clause (iv) as terms of art referring to crimina

Syllabus

Then, as now, "encourage" had a specialized meaning that channeled accomplice liability. And the words "assisting" and "soliciting," which appeared alongside "encouraging," reinforce the narrower criminal-law meaning. When Congress amended that provision in 1917, it added "induce," which also carried solicitation and facilitation overtones. 39 Stat. 879. In 1952, Congress enacted the immediate predecessor for clause (iv) and also simplified the language from the 1917 Act, dropping the words "assist" and "solicit," and making it a crime to "willfully or knowingly encourag[e] or induc[e], or attemp[t] to encourage or induce, either directly or indirectly, the entry into the United States r(w)9.6 1.211.7 (ry i)-9 .4 u ⁄2.3 (n)-6]TJfdhndtaten7 [((r d)-3.m27-1.7 (h))0.7 ((f)18 (a (.)1 (W)-um)v k)2

SUPREME COURT OF THE UNITED STATES

No. 22–179

UNITED STATES, PETITIONER *v.*
HELAMAN HANSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2023]

JUSTICE BARRETT delivered the opinion of the Court.

A federal law prohibits "encourag[ing] or induc[ing]" illegal immigration. 8 U. S. C. §1324(a)(1)(A)(iv). After concluding that this statute criminalizes immigration advocacy and other protected speech, the Ninth Circuit held it unconstitutionally overbroad under the First Amendment. That was error. Properly interpreted, this provision forbids only the intentional solicitation or facilitation of certain unlawful acts. It does not "prohibi[t] a substantial amount of protected speech"—let alone enough to justify throwing out the law's "plainly legitimate sweep." *United States* v. *Williams*, 553 U. S. 285, 292 (2008). We reverse.

I

In 2014, Mana Nailati, a citizen of Fiji, heard that he could become a U. S. citizen through an "adult adoption" program run by Helaman Hansen. Eager for citizenship, Nailati flew to California to pursue the program. Hansen's wife told Nailati that adult adoption was the "quickest and easiest way to get citizenship here in America." App. 88. For $4,500, Hansen's organization would arrange Nailati's adoption, and he could then inherit U. S. citizenship from

See 40 F. 4th 1049, 1057–1058 (2022). Correctly interpreted, he explained, clause (iv) reaches only criminal solicitation and aiding and abetting. *Ibid.* On that reading, the provision raises no overbreadth problem because, "[e]ven if §1324(a)(1)(A)(iv) somehow reaches protected speech, that reach is far outweighed by the provision's broad legitimate sweep." *Id.*, at 1072.

We granted certiorari. 598 U. S. ___ (2022).

II

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Wisely, Hansen does not claim that the First Amendment protects the communications for which he was prosecuted. Cf. *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U. S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud"). Instead, he raises an overbreadth challenge: He argues that clause (iv) punishes so much protected speech that it cannot be applied to *anyone*, including him. Brief for Respondent 9–10.

An overbreadth challenge is unusual. For one thing, litigants typically lack standing to assert the constitutional rights of third parties. See, *e.g.*, *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991). For another, litigants mounting a facial challenge to a statute normally "must establish that *no set of circumstances* exists under which the [statute] would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (emphasis added). Breaking from both of these rules, the overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied.

We have justified this doctrine on the ground that it provides breathing room for free expression. Overbroad laws "may deter or 'chill' constitutionally protected speech," and if would-be speakers remain silent, society will lose their

whether Congress used "encourage" and "induce" as terms of art referring to criminal solicitation and facilitation (thus capturing only a narrow band of speech) or instead as those terms are used in everyday conversation (thus encompassing a broader swath). An overbreadth challenge obviously has better odds on the latter view.

1

Hansen, like the Ninth Circuit, insists that clause (iv) uses "encourages" and "induces" in their ordinary rather than their specialized sense. While he offers definitions from multiple dictionaries, the terms are so familiar that two samples suffice. In ordinary parlance, "induce" means "[t]o lead on; to influence; to prevail on; to move by persuasion or influence." Webster's New International Dictionary 1269 (2d ed. 1953). And "encourage" means to "inspire with courage, spirit, or hope." Webster's Third New International Dictionary 747 (1966).

In Hansen's view, clause (iv)'s use of the bare words "encourages" or "induces" conveys these ordinary meanings. See Brief for Respondent 14. "[T]hat encouragement can *include* aiding and abetting," he says, "does not mean it is *restricted* to aiding and abetting." *Id.*, at 25. And because clause (iv) "proscribes encouragement, full stop," *id.*, at 14, it prohibits even an "op-ed or public speech criticizing the immigration system and supporting the rights of long-term undocumented noncitizens to remain, at least where the author or speaker knows that, or recklessly disregards whether, any of her readers or listeners are undocumented." *Id.*, at 17–18. If the statute reaches the many examples that Hansen posits, its applications to protected

cluster of ideas that were attached to each borrowed word." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952); see also, *e.g.*, *United States* v. *Shabani*, 513 U. S. 10, 13–14 (1994).

To see how this works, consider the word "attempts," which appears in clause (iv)'s next-door neighbors. See §§1324(a)(1)(A)(i)–(iii). In a criminal prohibition, we would not understand "attempt" in its ordinary sense of "try." Webster's New Universal Unabridged Dictionary 133 (2d ed. 2001). We would instead understand it to mean taking "a substantial step" toward theco-4.6 ( )11 (( )]TJ (co-4.6 .6 (ct c)-1.7 o-4.6 .6 (ig)11 (I)4.
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severed any connection the prohibition had to solicitation and facilitation. Brief for Respondent 25–26. In other words, Hansen claims, the 1952 and 1986 revisions show that Congress opted to make "protected speech, not conduct, a crime." *Id.*, at 27.

We do not agree that the mere removal of the words "assist" and "solicit" turned an ordinary solicitation and facilitation offense into a novel and boundless restriction on speech. Hansen's argument would require us to assume that Congress took a circuitous route to convey a sweeping—and constitutionally dubious—message. The better understanding is that Congress simply "streamlined" the pre-1952 statutory language—which, as any nonlawyer who has picked up the U. S. Code can tell you, is a commendable effort. 40 F. 4th, at 1066 (opinion of Bumatay, J.). In fact, the streamlined formulation mirrors this Court's own description of the 1917 Act, which is further evidence that Congress was engaged in a cleanup project, not a renovation. See *United States* v. *Lem Hoy*, 330 U. S. 724, 727 (1947) (explaining that the 1917 Act barred "contract laborers, defined as persons *induced or encouraged* to come to this country by offers or promises of employment" (emphasis added)); *id.*, at 731 (describing the 1917 Act as a "prohibition against employers *inducing* laborers to enter the country" (emphasis added)). And critically, the terms that Congress retained ("encourage" and "induce") substantially overlap in meaning with the terms it omitted ("assist" and "solicit"). LaFave §13.2(a). Clause (iv) is best understood as a continuation of the past, not a sharp break from it.

C

Hansen's primary counterargument is that clause (iv) is missing the necessary *mens rea* for solicitation and facilitation. Brief for Respondent 28–31. Both, as traditionally understood, require that the defendant specifically intend

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harmony, not to manufacture conflict.[3]

IV

Section 1324(a)(1)(A)(iv) reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law. So understood, the statute does not "prohibi[t] a substantial amount of protected speech" relative to its "plainly legitimate sweep." *Williams*, 553 U. S., at 292.

Start with clause (iv)'s valid reach. Hansen does not dispute that the provision encompasses a great deal of nonexpressive conduct—which does not implicate the First Amendment at all. Brief for Respondent 22–23. Consider just a few examples: smuggling noncitizens into the country, see *United States* v. *Okatan*, 728 F. 3d 111, 113–114 (CA2 2013); *United States* v. *Yoshida*, 303 F. 3d 1145, 1148–1151 (CA9 2002), providing counterfeit immigration documents, see *United States* v.

since Congress enacted clause (iv)'s immediate predecessor. Instead, he offers a string of hypotheticals, all premised on the expansive ordinary meanings of "encourage" and "induce." In his view, clause (iv) would punish the author of an op-ed criticizing the immigration system, "[a] minister who welcomes undocumented people into the congregation and expresses the community's love and support," and a government official who instructs "undocumented members of the community to shelter in place during a natural disaster." Brief for Respondent 16–19. Yet none of Hansen's examples are filtered through the elements of solicitation or facilitation—most importantly, the requirement (which we again repeat) that a defendant *intend* to bring about a specific result. See, *e.g.*, *Rosemond*, 572 U. S., at 76. Clause (iv) does not have the scope Hansen claims, so it does not produce the horribles he parades.

To the extent that clause (iv) reaches *any* speech, it stretches no further than speech integral to unlawful conduct.[4] "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal

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(iv) reaches some expression that is outside the speech-integral-to-unlawful-conduct exception. Of course, "that speech is not categorically unprotected does not mean it is immune from regulation, but only that ordinary First Amendment scrutiny would apply." Brief for Respondent 44.

We need not address this novel theory, because even if Hansen is right, his overbreadth challenge fails. To succeed, he has to show that clause (iv)'s overbreadth is "*substantial* . . . relative to [its] plainly legitimate sweep." *Williams*, 553 U. S., at 292. As we have discussed, the provision has a wide legitimate reach insofar as it applies to nonexpressive conduct and speech soliciting or facilitating criminal violations of immigration law. Even assuming that clause (iv) reaches some protected speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful applications is not lopsided enough to justify the "strong medicine" of facial invalidation for overbreadth. *Broadrick* v.

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[June 23, 2023]

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to emphasize how far afield the facial overbreadth doctrine has carried the Judiciary from its constitutional role. The facial overbreadth doctrine "purports to grant federal courts the power to invalidate a law" that is constitutional as applied to the party before it "'if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Americans for Prosperity Foundation* v. *Bonta*, 594 U. S. ___, ___ (2021) (THOMAS, J., concurring in part and concurring in judgment) (slip op., at 2) (quoting *United States* v. *Sineneng-Smith*, 590 U. S. ___, ___ (2020) (THOMAS, J., concurring) (slip op., at 1)). As I have explained, this doctrine "lacks any basis in the text or history of the First Amendment, relaxes the traditional standard for facial challenges," and distorts the judicial role. *Id*., at ___ (slip op., at 9).

adult adoption; he charged them up to $10,000 apiece, knowing full well that his scheme would not lead to citizenship. The Ninth Circuit even acknowledged below that "it is clear," both "from previous convictions under the statute . . . and likely from [respondent's] conduct here, that [§1324(a)(1)(A)(iv)] has at least some 'plainly legitimate sweep.'" 25 F. 4th 1103, 1106–1107 (2022).

Yet, instead of applying Congress' duly enacted law to respondent, the Ninth Circuit held the statute unconstitutional under this Court's facial overbreadth doctrine. Specifically, it took the doctrine as license to "speculate about imaginary cases and sift through an endless stream of fanci-

good, may be hastily and unadvisedly passed," section III of the New York Constitution required the two Houses of the New York Legislature to present "all bills which have passed the senate and assembly" to the "council for their revisal and consideration." *Ibid.* The Council's power "to revise legislation" meant that, if it "objected to any measure of a bill, it would return a detailed list of its objections to the legislature," which "could change the bill to conform to those objections, override" them by a two-thirds vote of both Houses, "or simply let the bill die." J. Barry, Comment: The Council of Revision and the Limits of Judicial Power, 56 U. Chi. L. Rev. 235, 245 (1989) (Barry) (emphasis deleted).[1] The grounds for the Council's vetoes "ranged from an act being 'inconsistent with the spirit of the Constitution' to an act being passed without 'the persons affected thereby having an opportunity of being heard'" to an act being "'inconsistent with the public good.'" *Id.*, at 245–246 (alteration and footnote omitted).

At first, the Council was a well-respected institution, and several prominent delegates to the Philadelphia Convention sought to replicate it in the Federal Constitution. Resolution 8 of the Virginia Plan proposed a federal council of revision composed of "the Executive and a convenient number of the National Judiciary" that would have "authority to examine [and veto] every act of the National Legislature before it shall operate." 1 Records of the Federal Conven-

to empower judges to pass upon not only the constitutionality of laws, but also their policy. One of the council's main supporters, James Wilson, stated that the council would share the New York Council's power of reviewing laws, not only on constitutional grounds, but also to determine if they were "unjust," "unwise," "dangerous," or "destructive." 2 Farrand 73. Such a power was needed, according to Wilson, because the ordinary judicial power of refusing to apply unconstitutional laws in cases or controversies did not include the authority to decline to give effect to a law on policy grounds. *Ibid.* The other leading proponent of a council, James Madison, similarly argued that the council would veto "laws unwise in their principle, or incorrect in their form." 1 *id.*, at 139. For Madison, the council was necessary to remedy the defect caused by the limits of judicial power: Judges could not prevent the "pursuit of . . . unwise & unjust measures." 2 *id.*, at 74. In that vein, George Mason similarly argued that a council was needed to prevent "unjust oppressive or pernicious" laws from taking effect. *Id.*, at 78.

Significantly, proponents of a council rejected the premise that judicial power included a power to refuse to apply a law for policy reasons. In fact, "[nHe42.3 (,)6.2 (")-22.2 (4n0)8.5 ( )0

963 (2018).[2]

Despite the support of respected delegates like Wilson and Madison, the Convention voted against creating a federal council of revision on four different occasions. P. Hamb

ment in such a council would foster internal biases"). Opponents thus concluded that to include judges in the policy decisions inherent in the legislative process would be a "dangerous innovation," one that would erode public confidence in their ability to perform their "proper official character." 2 Farrand 75–76 (L. Martin); see also *id.*, at 77 ("[T]he Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating ag[ainst] popular measures of the Legislature").

The later history of the New York Council of Revision demonstrates the wisdom of the Framers' decision. The Council naturally became politicized through its intrusive involvement in the legislative process. Over the course of its existence, it returned 169 bills to the legislature; the legislature, in turn, overrode only 51 of those vetoes and reenacted at least 26 bills with modifications. Barry 245. Moreover, "[t]he Council did not shrink from tough stands on controversial or politically charged issues." *Id.*, at 246. For example, early in its existence, it vetoed a bill barring those convicted of adultery from remarrying and one that declared Loyalists aliens. *Ibid.* Decades later, it very nearly blocked the bill authorizing the Erie Canal's construction for policy reasons. P. Bernstein, Wedding of the Waters: The Erie Canal and the Making of a Great Nation 197–199 (2005). Some members of the Council opposed the bill due to "concern[s] about committing the state to this huge project before public opinion was more clearly and more emphatically in favor." *Id.*, at 198. Others were concerned that the legislation gave the canal commission arbitrary powers. *Ibid.* The canal legislation—one of the most im-

when it vetoed a bill passed by the legislature that called for a convention to revise New York's Constitution. 1 C. Lincoln, The Constitutional History of New York 623–626

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2023]

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR joins, dissenting.

At bottom, this case is about how to interpret a statute that prohibits "encourag[ing] or induc[ing]" a noncitizen "to

books in order to avoid chilling constitutionally protected speech. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487 (1965). Because the majority's interpretation of §1324(a)(1)(A)(iv) diverges from the text and history of the provision, and simultaneously subverts the speech-protective goals of the constitutional doctrine plainly implicated here, I respectfully dissent.

I

Section 1324(a)(1)(A)(iv) makes it a federal crime to "encourag[e] or induc[e]" a noncitizen "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." For ease of reference, I will refer to

particular piece of purported child pornography with the intent of initiating a transfer" is properly proscribed by federal statute. *Ibid.* (internal quotation marks omitted); see also, *e.g.*, *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it").

B

The Government does not dispute that the encouragement provision is unconstitutional as overbroad if it is read according to its plain text, thereby reaching these various fact patterns. This point is worth repeating: Under the broad interpretation of the statute, the Government does not even attempt to argue that the unconstitutional applications in category one are not "substantial," *Stevens*, 5d [(S)16.8 (t)6.-

a particular unlawful act," *ante*, at 6 (emphasis added). But the encouragement provision hints at no such thing. It simply prohibits "encourag[ing] or induc[ing]" a noncitizen "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." §1324(a)(1)(A)(iv). Nor does the ordinary meaning of "encourages or induces" carry the intent requirement that solicitation and facilitation do: By describing the attractions of my hometown, for instance, I might end up inducing a listener to move there, even if that was not my intent.

It is also telling that the *very next* subdivision of §1324(a)(1)(A) expressly prohibits "aid[ing] or abet[ting] the commission of any of the preceding acts." §1324(a)(1)(A)(v)(II). That provision indicates that Congress knows how to create an aiding-and-abetting prohibition when it wants to—and that it did not do so in §1324(a)(1)(A)(iv).[3]

The majority's mere observation that the encouragement provision's terms are used to define solicitation and facilitation is thus insufficient to establish that the terms mean the same thing or incorporate the same features.

B

The majority next turns to "[s]tatutory history" to support its transformation of the broad encouragement provision that Congress wrote into a narrow solicitation or aiding

violate the immigration laws—while inserting a *mens rea* requirement for knowledge or reckless disregard of the noncitizen's immigration status. See Immigration Reform and Control Act of 1986, §112(a), 100 Stat. 3381–3382. Simultaneously, and for the first time, Congress made it a crime to encourage or induce an unauthorized noncitizen not merely to *enter* the United States, but also to encourage or induce such a person to "reside" here unlawfully. *Ibid.*

Finally, in 1996, Congress crafted a separate penalty enhancement for certain kinds of violations. It raised the maximum punishment from 5 years to 10 years of imprisonment if themmf t ttione.5 (-)](m)C Td [2.3 (h)2.42 (e)-235lt (-4.3032 (e)-2Tc)-1.7 (ou

The majority first points out that the 1885 version of the encouragement provision criminalized "knowingly *assisting*, encouraging or *soliciting*" certain immigration. §3, 23 Stat. 333 (emphasis added); see *ante*, at 11. Because the term "encouraging" was placed alongside "assisting" and "soliciting" in this precursor provision, the majority maintains that the term "encouraging" is narrowed by the canon of *noscitur a sociis*, "which counsels that a word is given more precise content by the neighboring words with which it is associated." *Williams*, 553 U. S., at 294; see *ante*, at 11. In *Williams*, the Court (in an opinion by Justice Scalia) reasoned that, "[w]hen taken in isolation," the broad term "'promotes'" is "susceptible of multiple and wide

the majority now reads back into the statute.[4]

The majority brushes off Congress's revision by speculating that Congress was merely "engaged in a cleanup project" and was just "streamlin[ing]" the statutory language. *Ibid.* This contention, however, gets our ordinary presumption in statutory interpretation cases precisely backwards. We "usually presume differences in language . . . convey differences in meaning," absent some indication from Congress to the contrary. *BNSF R. Co.* v. *Loos*, 586 U. S. ___, ___ (2019) (slip op., at 10) (internal quotation marks omitted). Thus, we have found the presumption overcome where, for example, Congress has expressly "billed" the changes as "effect[ing] only '[t]echnical [a]mendments.'" *Id.*, at ___ (slip op., at 9).

Here, the majority points to no signal from Congress that it sought to change the encouragement provision's language without changing its meaning. It seems that the only support the majority can muster for its "cleanup project" theory is a 1947 Supreme Court case that at several points refers to the statute as a prohibition on "encourag[ing]" or "induc[ing]" certain unlawful immigration. *Ante*, at 13 (citing *United States* v. *Lem Hoy*, 330 U. S. 724 (1947)). From this, the majority infers that, when Congress amended the encouragement provision five years later to remove the words "solicit" and "assist," it must have been adopting *Lem Hoy*'s shorthand characterization of the statute. But the majority L]/Subtype /Footer1 Type /Pag

fails to support this connection—tenuous on its face—with any evidence that Congress actually consulted our 1947 decision when it drafted the 1952 amendments, or anything else that might establish the primary significance that the majority ascribes to our decision's phrasing.

The majority similarly characterizes Congress's decision to remove the intent requirement from the statute in 1986

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For example, one does not know from today's determination whether a noncitizen must actually complete the underlying offense of coming to, entering, or residing in the United States (à la aiding and abetting) or whether completion is not a prerequisite for prosecution (à la solicitation). This sort of uncertainty—

its prosecutorial discretion several times." *Ibid.* But we were not moved: Such a prosecution was permitted by the statute, we noted, and that was enough to make it a serious threat. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Ibid.*

Second, just as in *Stevens*, "[t]his prosecution is itself evidence of the danger in putting faith in Government representations of prosecutorial restraint." *Ibid.* At trial in this very case, the Government objected to Hansen's proposed jury instructions, which would have required, among other things, that the Government prove that Hansen intended the noncitizen in question to reside in the United States illegally. The Government's objection was telling. It was based on the argument that the proposed instructions added elements not found in the text of the statute itself. And the District Court was persuaded; it sided with the Government in that regard.[9] But now that the statute's validity hangs in the balance, the Government has reversed course entirely—it now implores us to read into the statute the very element that it earlier opposed as atextual. See Brief for United States 23–28.

This debacle exemplifies the real and ever-present risk of continuing to have facially overbroad criminal statutes on the books. In its role as prosecutor, the Government often stakes out a maximalist position, only later to concede limits when the statute upon which it relies might be struck down entirely and the Government finds itself on its back foot.[10] I am not suggesting bad faith on anyone's part; these

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[9] As the Government conceded during oral argument before this Court, given that its elements argument prevailed below, the instructions that the District Court gave to the jury in this cas (t)-2pf217210.7 (7—. ( )13.7)-9 (n)-6.4 (.6 (ii)11 (828)-9 (8)-9

kinds of turnabouts might well be chalked up to institutional incentives and coordination challenges in a massive prosecutorial system. But given these dynamics, the answer to whether the Government has, as of today, prosecuted Hansen's hypothetical scenarios may understandably provide cold comfort to those living and working with immigrants.

In any event, it makes little sense for the number of unconstitutional prosecutions to be the litmus test for whether speech is being chilled by a facially overbroad statute. The number of people who have not exercised their right to speak out of fear of prosecution is, quite frankly, unknowable.

Moreover, criminal prosecutions are not the only method by which statutes can be wielded to chill free speech. Hansen's *amici* detail how Customs and Border Protection (CBP) relied on the encouragement provision to justify its creation of a "watchlist" of potential speakers that CBP had compiled in connection with its monitoring of a large group of migrants—a list that included journalists simply reporting factual information about the group's progress. Brief for Reporters Committee for Freedom of the Press as *Amicus Curiae* 5–6. CBP allegedly compiled dossiers on those reporters and singled them out as targets for special screenings. *Ibid.* There can be no doubt that this kind of Government surveillance—targeted at journalists reporting on an important topic of public concern, no less—tends to chill speech, even though it falls short of an actual prosecution.

Hansen's *amici* also describe how a group of Members of

ganizations to preserve documents and communications related to their work in advance of a potential congressional investigation into whether such organizations are "'harbor[ing], transport[ing], and *encourag[ing]*'" noncitizens to settle unlawfully in this country. Brief for Religious Organizations as *Amici Curiae* 34 (emphasis added). Again, this kind of letter invoking the language of the encouragement provision can plainly chill speech, even though it is not a prosecution (and, for that matter, even if a f r