

The First Amendment and “Encouraging” or “Inducing” Unlawful Immigration

March 12, 2020

In *United States v. Sineneng-Smith*, the Supreme Court is considering the constitutionality of a federal criminal [prohibition](#) against encouraging or inducing illegal immigration. The U.S. Court of Appeals for the Ninth Circuit previously held that the law was unconstitutionally overbroad in violation of the First Amendment because the terms “encourage” and “induce” could criminalize a substantial amount of protected speech. The government appealed the decision to the Supreme Court, arguing that the law operates as a prohibition on facilitation and solicitation of unlawful activity and is therefore not overbroad. *Sineneng-Smith* is potentially important, not only for federal immigration law and how it is enforced, but also more broadly for First Amendment jurisprudence on when Congress can criminalize speech that encourages illegal activity. This Sidebar provides an overview of the case, beginning with background on immigration and free speech law, before turning to the specific issues raised by *Sineneng-Smith* and its potential implications for Congress.

Legal Background

The Immigration and Nationality Act (INA) governs the admission, removal, and presence of non-U.S. nationals (i.e., aliens). Although [it is generally not a crime](#) for a removable alien to be present in the United States, Congress has established [criminal sanctions for certain conduct](#) that undermines immigration rules. For example, [8 U.S.C. § 1324](#) contains multiple criminal offenses that penalize individuals who smuggle, transport, harbor, or conceal unlawfully present aliens, as well as the provision at issue in *Sineneng-Smith*. That provision, [8 U.S.C. § 1324\(a\)\(1\)\(A\)\(iv\)](#) (Subsection (iv)) makes it a crime for any individual to “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 the law.” A conviction may result in a [fine and up to five years’ imprisonment](#), with [enhanced penalties including imprisonment for up to ten years](#) if the crime was committed for commercial advantage or private financial gain.

Because the INA does not define the terms “encourage” or “induce,” there is some debate over the scope of Subsection (iv), primarily as to whether the terms should be [broadly construed](#) in accordance with their ordinary meaning, or whether Congress intended the terms to prohibit conduct more narrowly. As discussed below, a narrower construction of the statute would prohibit only conduct or speech that

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The Declaration of Independence
The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII
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constitutes criminal solicitation or facilitation. A broader interpretation of Subsection (iv), however, would potentially criminalize protected speech, thus raising the question of whether the statute violates the Free Speech Clause of the First Amendment.

The Free Speech Clause provides that the government “shall make no law . . . abridging the freedom of speech.” However, the right to free speech “is not absolute.” Although laws regulating speech based on content (i.e., subject matter) are [presumptively unconstitutional](#), they may pass judicial scrutiny if Congress advances a sufficient governmental interest for the regulation. In addition, the Supreme Court has carved out several [well-defined, narrow, and limited](#) categories of so-called “unprotected” speech that the government may regulate *because of* content. These categories of speech include, for example, [obscenity, defamation, and incitement](#). The government also has more leeway to regulate speech [integral to criminal conduct](#). The Court has used the speech integral to criminal conduct exception to uphold, for example, criminal statutes prohibiting the [distribution and possession of child pornography](#) and [soliciting crime](#). There is, however, a fine line between speech that [incites imminent lawless action](#) or that is integral to criminal conduct, on the one hand, and speech that the Court refers to as “[abstract advocacy](#)”—or speech that merely advocates for illegality—on the other. For example, the Court reasoned that the statement “[I encourage you to obtain child pornography](#)” is protected abstract advocacy, while a [specific offer](#) to provide someone with child pornography is unprotected speech integral to criminal conduct.

Although the categories above are generally considered unprotected, they are not “invisible” to the First Amendment, which still places some limits on how Congress can regulate in these areas. Laws that restrict speech based on the “[particular views taken by speakers on a subject](#),” may be considered unconstitutional viewpoint-based restrictions even if they are aimed at an unprotected category of speech. [Moreover](#), even when criminalizing unprotected speech, a law may be facially invalid if it is overbroad. In a facial overbreadth challenge, the court considers the universal application of the law rather than the application of the law specifically to the defendant’s conduct. A statute is [overbroad](#) if it constitutionally bans some unprotected speech, but also substantially prohibits protected speech. The Supreme Court has emphasized that to be considered overbroad, the statute must prohibit a [substantial](#) amount of protected speech relative to the statute’s “[plainly legitimate sweep](#).” The overbreadth doctrine, although applied [sparingly](#), is used to prevent the “[chilling](#)” of protected speech, or the concern that people may refrain from exercising their right to constitutionally protected expression out of fear of [criminal sanctions](#).

Facts and Procedural History of *Sineneng-Smith*

Evelyn Sineneng-Smith operated an immigration consulting firm and assisted noncitizen clients with applying for a [labor certification](#) program for foreign workers in certain jobs in the United States. Although she knew that this particular labor certification process ended on April 30, 2001, Sineneng-Smith continued to sign retainer agreements with clients and advised them that they could obtain green cards enabling them to remain in the country lawfully as part of the certification process. At least two of her clients testified that they would not have stayed in the United States but for Sineneng-Smith’s assurances.

Sineneng-Smith was charged with multiple counts of mail fraud under [18 U.S.C. § 1341](#) and with [violations of Subsection \(iv\)](#). The government also invoked the sentence enhancement provision for the Subsection (iv) violation, alleging she committed the crime for commercial advantage or private financial gain. A jury found Sineneng-Smith guilty of [both offenses](#).

On appeal, the Ninth Circuit, while affirming the mail fraud convictions, reversed her convictions under Subsection (iv), holding that the statute was [unconstitutionally overbroad](#) in violation of the First Amendment. The court first reasoned that the terms “encourage” and “induce” should be read according to [their plain meaning](#), as there is no other context within the statute suggesting that they should be

construed differently. Employing this interpretation, the court determined that Subsection (iv)'s prohibition on encouraging and inducing illegal immigration reaches **speech, conduct, or both**.

Applying the overbreadth standard, the Ninth Circuit also concluded that there was a “**realistic (and actual) danger**” that Subsection (iv) would infringe on substantial amounts of First Amendment-protected speech. In so doing, the court rejected the **government's contentions** that the law primarily regulated unprotected incitement speech or speech integral to criminal conduct. The court expressed concerns that, for example, a grandmother who urges her grandson to overstay his visa by telling him “**I encourage you to stay,**” or an attorney **who advises her client to stay in the country** while contesting removal could face prosecution under Subsection (iv).

Arguments at the Supreme Court

The government appealed the Ninth Circuit's decision to the Supreme Court, and on February 25, 2020 the Court heard oral argument in the case. The government primarily **argues** that the Ninth Circuit's interpretation of Subsection (iv) was too expansive, causing it to reach protected First Amendment activity that would not be implicated by the government's construction. The government contends that “encourage” and “induce” are criminal-law terms of art referring to the solicitation or facilitation of crime and were not intended to be used in a broad, speech-restrictive manner. Subsection (iv), according to the government, should instead be interpreted as a prohibition on facilitating or soliciting crime, and, therefore, it would be constitutional to proscribe any speech that may fall within its reach. The government disagrees that Subsection (iv) would criminalize otherwise-protected “abstract advocacy” of illegality (e.g., a person would not violate Subsection (iv) by encouraging a family member to overstay a visa absent additional action). The government further **elaborated** on this issue at oral argument, arguing that “encourage” and “induce”—when read together under Subsection (iv)—require (1) willful conduct by the defendant; (2) the alien's knowledge of the defendant's conduct; and (3) substantial participation or conduct by the defendant that would make the “encouraging” or “inducing” succeed.

Sineneng-Smith **rejects** the government's contention that Subsection (iv) only refers to the facilitation or solicitation of a crime, claiming that the government's interpretation does not have support in either the plain language of the provision or in other, related criminal offenses also contained in **8 U.S.C. § 1324**. And she argues that there is no indication that Congress intended the statute to operate in the manner advanced by the government. She maintains that “encourage” and “induce” must take on their ordinary meanings, which would encompass many examples of speech. For example, according to Sineneng-Smith, “encourage” is defined by the dictionary using words such as “inspire,” “embolden,” or “give courage to.” Likewise, she contends that, according to the dictionary definition, induce means “enticing or persuading another person to take a certain course of action.” Accordingly, Sineneng-Smith centrally argues that Subsection (iv) reaches a substantial amount of protected speech **including a person encouraging an unlawfully present alien family to remain in the United States, an attorney advising an unlawfully present alien client, or a charity advising unlawfully present aliens of resources available to them**. Additionally, she claims that the government's argument that speech covered by Subsection (iv) can be constitutionally regulated as speech integral to criminal conduct must fail because remaining in the United States without an immigration status is a civil offense, and only speech soliciting a crime can be criminally punished under the Constitution.

The argument that Subsection (iv) reaches protected speech seemed to gain traction with Chief Justice Roberts at oral argument, as **he inquired** whether the Court would have to get approval from Congress and the President to narrow the statute to apply only to solicitation of a crime. And several justices questioned the government about the potential broad reach of the statute. For example, **Justice Kavanaugh** explored whether charities who serve unlawfully present aliens could be prosecuted under Subsection (iv) during oral argument.

Considerations for Congress

Sineneng-Smith implicates matters specific to the law at issue in the case and to broader questions of when Congress can criminalize speech.

A decision in this case could provide guidance on what conduct can be penalized under Subsection (iv). For its part, the government contends that Subsection (iv) is used, for example, to prosecute those who provide [aliens with false documents or sell fake “visa extensions” to foreign tourists](#). Several interested parties, however, submitted briefs to the Court claiming that Subsection (iv) exposes a wide range of speakers to criminal liability, including persons who may be providing [information](#) or [services](#) to unlawfully present aliens for humanitarian purposes. Moreover, [several cities](#) contend that the Trump Administration has relied on Subsection (iv) to encourage state and local governments to cooperate with federal immigration enforcement efforts. A decision striking down the statute or providing it with a narrower construction could eliminate all of these possible avenues for enforcing Subsection (iv).

Nonetheless, because of how [rarely](#) the government has invoked Subsection (iv) in past immigration enforcement prosecutions, *Sineneng-Smith*’s implications may be most profound for the Court’s broader First Amendment jurisprudence. The language of Subsection (iv) raises significant questions regarding the fine line between when Congress lawfully prohibits unprotected criminal speech and when it begins to criminalize protected abstract advocacy of illegal conduct. As a result, the *Sineneng-Smith* Court may provide clarity on what is sufficient from Congress to prohibit soliciting or facilitating criminal conduct and whether the terms “encourage” and “induce” in isolation are too broad under the First Amendment.

Moreover, in considering the government’s contention that Subsection (iv) should be read as a prohibition on solicitation or facilitation, at least one prominent First Amendment scholar has argued that to be constitutional, solicitation may only be criminally punished if it consists of solicitation of [criminal](#) conduct, which raises an important issue in the current dispute because it is typically not a crime for aliens [to overstay a visa or otherwise remain in the United States beyond the period of authorization](#). The Justices referenced [this argument](#) a number of times at oral argument, exploring whether laws criminalizing the solicitation of [civil infractions](#) comport with the First Amendment.

A decision in *Sineneng-Smith* is expected sometime by late June 2020.

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