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Illegal Encouragement: The Federal Statute That Makes It Illegal to "Encourage" Immigrants to Come to the United States and Why It Is Unconstitutionally Overbroad

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ILLEGAL ENCOURAGEMENT: THE FEDERAL STATUTE THAT MAKES IT ILLEGAL TO "ENCOURAGE" IMMIGRANTS TO COME TO THE UNITED STATES AND WHY IT IS UNCONSTITUTIONALLY OVERBROAD

Abstract: Section 1324(a)(1)(A)(iv) of Title 8 of the United States Code makes it illegal to "encourage" an alien to come to or reside in the United States. Since that section's 1986 amendment, the circuits have struggled to adopt a consistent definition for "encourage." Though some circuits have adopted a broad definition, the Third Circuit has explicitly taken a different route, applying a narrower construction. In addition to these different constructions, the two circuits that addressed the potential overbreadth issue of this subsection have reached contrary conclusions. This Note argues that this provision is facially unconstitutional under the overbreadth doctrine. Applying the analysis from *Brandenburg v. Ohio*, this Note first argues that the statute regulates protected speech, specifically advocacy speech. The statute's application criminalizes a substantial number of defendants who are engaging in this protected speech, and thus the statute is overly broad. Finally, this Note suggests that the statute be redrafted by Congress to include stronger words, such as "urge" and "facilitate," and carve out a special exception for immigrants with remediable claims. These solutions would bring the statute back within the realm of constitutionality.

INTRODUCTION

When Lorraine Henderson told her cleaning lady not to visit her family in Brazil, she knew she was encouraging her stay in the country illegally.[1] What she did not know was that for her troubles, less than two years later, she would become a convicted felon.[2] In 2004, Henderson employed Fabiana Bitencourt to clean her townhouse approximately every two weeks.[3] At the time, Henderson was the Boston Area Port Director for the United States Cus-

[1] *See* United States v. Henderson, 857 F. Supp. 2d 191, 196 (D. Mass. 2012) (describing how Henderson warned Bitencourt against leaving the country).

[2] *See id.* (noting that Henderson discouraged Bitencourt from leaving the country on September 8, 2008); Verdict, *Henderson*, 857 F. Supp. 2d 191 (No. 09CR10028), 2010 WL 6465313 (noting that the date of the verdict was March 22, 2010).

[3] *See Henderson*, 857 F. Supp. 2d at 195 (describing how Henderson hired Bitencourt).

toms and Border Protection.[4] When Henderson employed Bitencourt, she was unaware that Bitencourt was in the country illegally.[5] Upon learning of Bitencourt's status, Henderson advised her against leaving the country and pursued avenues for Bitencourt to adjust her immigration status.[6] A coworker advised Henderson that it was unlikely Bitencourt could lawfully remain in the United States, but Henderson nevertheless continued to employ Bitencourt.[7] Unbeknownst to Henderson, this action was in violation of 8 U.S.C. § 1324(a)(1)(A)(iv).[8] Police arrested Henderson in December of 2008, and after a six-day trial she was convicted of violating federal law.[9]

Section 1324(a)(1)(A)(iv) of Title 8 of the U.S. Code ("Subsection Four") provides that it is illegal for a person to "encourage[] or induce[] an alien to come to, enter, or reside in the United States."[10] If a person violates this statute, they are subject to a fine under Title 18, imprisonment for no more than five years, or both.[11] As evidenced by Henderson's case, the reach of this statutory language is vast.[12]

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[4] *See id.* at 194 (describing how Henderson obtained the position of Boston Area Port Director in December 2003). The Customs and Border Protection agency was formed in March 2003 by consolidating multiple organizations. *CBP Through the Years*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 8, 2017), https://www.cbp.gov/about/history [https://perma.cc/6AUL-Z4T]. In December 2003, Henderson was engaged in an extremely competitive process to become the Boston Area Port Director. *Henderson*, 857 F. Supp. 2d at 194. As Boston Area Port Director, Henderson oversaw approximately twelve ports of entry throughout Massachusetts, Connecticut, and Rhode Island. *Id.*; *see also CBP Announces New Boston Area Port Director*, U.S. CUSTOMS & BORDER PROTECTION (Apr. 11, 2013), https://www.cbp.gov/newsroom/local-media-release/cbp-announces-new-boston-area-port-director [https://perma.cc/P6LA-PZBV] (noting that the role of Boston Area Port Director would include overseeing twelve different ports).

[5] *See Henderson*, 857 F. Supp. 2d. at 195 (indicating when Henderson was explicitly told by a co-worker that Bitencourt was in the country illegally).

[6] *See id.* at 196–97 (describing how Bitencourt informed Henderson of her status as an illegal immigrant, and Henderson conferred with a co-worker to determine remedies for Bitencourt). Specifically, Henderson told Bitencourt "if you leave they won't let you back in," "you can't leave, don't leave," and "once you leave you will never be back." *Id.* at 196.

[7] *See id.* at 197 (indicating that Henderson discussed Bitencourt's immigration status with a coworker, and after learning about her unlikely chance of success, continued to employ her on a bi-weekly basis).

[8] *See id.* (describing Henderson's arrest and conviction).

[9] *See id.* (noting Henderson's trial and conviction).

[10] 8 U.S.C. § 1324(a)(1)(A)(iv) (2012).

[11] *Id.* § 1324(a)(1)(B)(ii). In accordance with 18 U.S.C. § 3559, this punishment makes encouraging an immigrant to come to the United States a felony, because part of the punishment is more than a year imprisonment. *See* 18 U.S.C. § 3559(a) (2012) (classifying the various levels of felonies and misdemeanors, making the distinction between a Class E felony and a Class A misdemeanor one-year imprisonment). Given that the punishment classifies this crime as a felony, under 18 U.S.C. § 3571(b)(3) a person convicted of a felony may not be fined more than $250,000, meaning that a person could be punished with a fine of not more than $250,000. *Id.* § 571(b)(3).

[12] *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (providing the statutory language); *Henderson*, 857 F. Supp. 2d. at 197 (describing Henderson's conviction).

In light of the statute's vast reach, this Note examines the constitutional breadth of Subsection Four.[13] Part I of this Note provides a historical overview of the statute, and explores Subsection Four's different interpretations by five circuits, as well as the two circuits that have discussed the overbreadth of Subsection Four and reached conflicting conclusions.[14] Part II introduces and examines the First Amendment's overbreadth doctrine.[15] In applying the overbreadth doctrine, Part II recognizes the importance of determining whether speech is protected under the First Amendment and applies the standard established by *Brandenburg v. Ohio*.[16] Finally, Part III argues that Subsection Four is an unconstitutional restriction on protected speech, in violation of the overbreadth doctrine.[17] Part III then argues that although the statute should be invalidated, Congress should amend and enact a statute serving a similar purpose, albeit within the bounds of the Constitution.[18]

I. HISTORICAL OVERVIEW OF SUBSECTION FOUR AND THE DIFFERENT CONSTRUCTIONS BY THE CIRCUITS

Subsection Four was enacted as part of a larger body of legislation called the Immigration and Nationality Act (INA) in 1952.[19] The statute's language, however, can be traced further back to the early nineteenth century.[20] Despite its age, the language of the statute has been preserved and left intact, undergoing only one significant revision in 1986.[21] Though the language of Subsection Four is untouched, it has not been unchallenged.[22] The

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[13] *See infra* notes 19–272 and accompanying text.

[14] *See infra* notes 19–140 and accompanying text.

[15] *See infra* notes 141–206 and accompanying text.

[16] *See infra* notes 147–165 and accompanying text.

[17] *See infra* notes 204–253 and accompanying text

[18] *See infra* notes 256–272 and accompanying text.

[19] *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat.163 (1952) (identifying the act as one to revise the laws relating to immigration to the United States).

[20] *See* BUREAU OF IMMIGRATION, IMMIGRATION LAWS: ACT OF FEBRUARY 5, 1917: RULES OF MAY 1, 1917, at 8–10 (1917) (using "encourage" in the text of the Regulating Immigration of Aliens to, and Residence of Aliens in the United States Act of February 5, 1917); *see also* United States v. Delgado-Garcia, 374 F.3d 1337, 1360 (D.C. Cir. 2004) (tracing the roots of 8 U.S.C. § 1324 to §§ 5–7 of the 1917 Immigration Act).

[21] *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112, 100 Stat. 3359, 3381–83 (1986) (noting that the Act provides amendments to the Immigration and Nationality Act). The significant revision to 8 U.S.C. § 1324(a)(1)(A)(iv) was that there was a change in the criminal standard. *Infra* notes 57–63 and accompanying text.

[22] *See* United States v. Thum, 749 F.3d 1143, 1146 (9th Cir. 2014) (challenging that the evidence was sufficient to show that the defendant encouraged an immigrant to reside in the United States); DelRio-Mocci v. Connolly Props. Inc., 672 F.3d 241, 246 (3d Cir. 2012) (describing the plaintiff's argument that the defendants were encouraging immigrants to reside in the United States); United States v. Lopez, 590 F.3d 1238, 1248 (11th Cir. 2009) (challenging a jury instruction regarding the definition of "encourage"); United States v. He, 245 F.3d 954, 958 (7th Cir. 2001) (questioning a jury instruction regarding the definition of "encourage"); United States v.

statue's primary prohibition is encouraging aliens to remain in the country unlawfully, but five circuit courts have recognized that the word "encourage" is ambiguous.[23] All five have addressed this ambiguity by attempting to define it, but in spite of the circuits recognizing the need for a definition, there is no consensus between all of the circuits on a singular definition.[24] The Fourth, Seventh, Ninth, and Eleventh Circuits generally agree on a definition for encourage, but the Third Circuit makes a distinct departure.[25] In addition to challenges to its foundational language, Subsection Four has also been subject to constitutional challenges.[26] Both the Fourth and Ninth Circuits have discussed the constitutional overbreadth of Subsection Four with the Fourth Circuit finding it constitutional and the Ninth Circuit finding it unconstitutional.[27]

A. The Deep Roots of the Language of 8 U.S.C. § 1324

Although Subsection Four was first enacted as part of the INA in 1952, its language traces its roots to the Immigration Act of 1917.[28] The Immigration Act of 1917 was also known as the Literacy Act, because it instituted a literacy test to be administered to aliens before they could enter the country.[29]

Oloyede, 982 F.2d 133, 136 (4th Cir. 1992) (approving of the district court's usage of *Black's Law Dictionary* to define "encourage"); *see also* United States v. Yoshida, 303 F.3d 1145, 1150 (9th Cir. 2002) (equating "encourage" with "help").

[23] *See Thum*, 749 F.3d at 1147–48 (distinguishing from *Yoshida* to establish that "encourage" required action beyond escorting someone); *DelRio-Mocci*, 672 F.3d at 248 (adopting *Black's Law Dictionary*'s definition of "encourage"); *Lopez*, 590 F.3d at 1249 (interpreting "encourage" to mean "to help"); *He*, 245 F.3d at 959–60 (interpreting "encourage" as "to help"); *Oloyede*, 982 F.2d at 136–37 (noting the district court's usage of *Black's Law Dictionary* and concluding, based on statutory history, that "encourage" can be equated with "help").

[24] *See Thum*, 749 F.3d at 1147–48 (differing from *Yoshida* to establish that "encourage" required action beyond escorting someone); *DelRio-Mocci*, 672 F.3d at 248 (adopting *Black's Law Dictionary*'s definition of "encourage"); *Lopez*, 590 F.3d at 1249 (construing "encourage" to mean "to help" in reliance on various dictionary definitions); *Yoshida*, 303 F.3d at 1150 (equating "encourage" with "help"); *He*, 245 F.3d at 959–60 (interpreting "encourage" to mean "to help").

[25] *See DelRio-Mocci*, 673 F. 3d at 250 (noting its distinct departure from the interpretation of its sister circuits).

[26] *See* United States v. Sineneng-Smith, 910 F.3d 461, 469–85 (9th Cir. 2018) (addressing the constitutional overbreadth of Subsection Four); United States v. Anderton, 901 F.3d 278, 282–84 (5th Cir. 2018), *cert. denied*, No. 18-846, 2019 WL 659880 (U.S. Feb. 19, 2019) (addressing the constitutional vagueness of Subsection Four); United States v. Tracy, 456 F. App'x 267, 271–72 (4th Cir. 2011) (addressing both a constitutional overbreadth challenge and a constitutional vagueness challenge).

[27] *See Sineneng-Smith*, 910 F.3d at 485 (concluding that Subsection Four was unconstitutionally overbroad); *Tracy*, 456 F. App'x at 272 (finding that Subsection Four was constitutional in the face of an overbreadth challenge).

[28] *See* BUREAU OF IMMIGRATION, *supra* note 20, at 8–10 (using "encourage" in §§ 5–7).

[29] *See id.* at 6 (detailing the illiteracy test whereby participants would have to read thirty to forty words in their own language); *see also* JOHN POWELL, ENCYCLOPEDIA OF NORTH AMERI-

The bill for the Act did not garner much support until the Immigration Restriction League, a group that advocated for more restrictive immigration regulations, lobbied Congress to implement literacy tests.[30] The Immigration Restriction League persuaded Congress to pass a bill that included a literacy test, but Presidents Grover Cleveland, William Howard Taft, and Woodrow Wilson all vetoed the bill.[31] When President Wilson vetoed this bill for the final time in 1915, he argued that the literacy test would only allow entry to those who had already had the opportunity of education.[32] The United States, Wilson pleaded, was a place where education was an opportunity, not a requirement for entry.[33] Despite President Wilson's objections, Congress overrode his veto, and on February 5, 1917, the Act became law.[34]

CAN IMMIGRATION 137 (2005) (identifying the Immigration Act of 1917 as commonly referred to as the Literacy Act).

[30] *See* POWELL, *supra* note 29, at 137 (noting that there was little support before the Immigration Restriction League); *see also* STEVEN G. KOVEN & FRANK GÖTZKE, AMERICAN IMMIGRATION POLICY 130 (2010) (identifying the Immigration Restriction League as a supporter of the literacy test). The Immigration Restriction League was founded by five Harvard graduates, and consisted of a number of prominent Boston families. *See* KOVEN & GÖTZKE, *supra*, at 130 (explaining that the Immigration Restriction League was founded by five Harvard graduates); POWELL, *supra* note 29, at 137 (identifying prominent Boston families as part of the Immigration Restriction League). In its Constitution, the Immigration Restriction League stated that its purpose was not only to promote more restrictive immigration regulations, but also to inspire the public to support the exclusion of elements that would be "injurious to our national character." Immigration Restriction League, *Constitution of the Immigration Restriction League* 1 (c. 1890), http://nrs.harvard.edu/urn-3:FHCL:949025 [https://perma.cc/CW8W-CMTQ]. The Immigration Restriction League wanted a literacy test because it wanted to identify this "undesirable" characteristic, since it believed illiterate immigrants were unlikely to be successful in the United States. *The Case for the Literacy Test*, UNPOPULAR REV., Jan.–Mar. 1916, *reprinted in* 66 PUBLICATIONS OF THE IMMIGRATION RESTRICTIONS LEAGUE 7 (c. 1915). Further, the Immigration Restriction League believed that an uneducated workforce, was more likely to damage the economy than assist it. *Id.* at 159–60.

[31] *See* POWELL, *supra* note 29, at 137 (noting that Presidents Cleveland, Taft, and Wilson each vetoed the bill). The bill was brought to near fruition in 1895, 1903, 1912, and 1915, only to be vetoed by the sitting president each time it reached his desk. *Id.* Both Presidents Cleveland and Taft identified the primary reason for denying the bill as the literacy test. *See* S. DOC. NO. 1087 (1913), *as reprinted in* 49 CONG. REC. 3156 (providing President Taft's veto message for what would eventually become the Immigration Act of 1917); S. DOC. NO. 185, 54th Cong., 2d Sess., at 2–3 (1896) (providing President Cleveland's veto message for what would eventually become the Immigration Act of 1917). President Cleveland vetoed a version of the bill that did not contain the "encourage" language that can be found in 8 U.S.C. § 1324(a)(1)(A)(iv). *See* S. DOC. NO. 185 at 2–3 (including a copy of the bill that was vetoed, which does not have the "encourage" language that can be found in §§ 5–7 of the Immigration Act of 1917).

[32] *See* H.R. DOC. NO. 1527 (1915), *as reprinted in* 52 CONG. REC. 2481, 2482 (arguing that the literacy test would in effect allow only those who had been taught to read into the country); POWELL, *supra* note 29, at 137 (noting that Wilson vetoed the bill in 1915).

[33] *See* H.R. DOC. NO. 1527, 52 CONG. REC. at 2482 (arguing that those who come to the United States come to learn to read instead of already knowing how to read).

[34] *See* POWELL, *supra* note 29, at 137 (noting that Congress overrode President Wilson's veto on February 5, 1917). Due to increasing literacy rates in Southern and Eastern Europe, the literacy test was not as effective as originally intended. *See* Catherine G. Massey, *Immigration Quotas and*

Sections five through seven of the Immigration Act of 1917 are the provenance of Subsection Four.[35] Section five of the 1917 Act made it illegal to encourage, or attempt to encourage any contract worker to come to the United States.[36] Section six criminalized encouraging, or attempting to encourage, an alien to come to the United States through an advertisement for employment.[37] Finally, under section seven it was illegal for anyone engaged in the business of transporting aliens to encourage, or attempt to encourage, any alien to come to the United States.[38] Though the language of these subsections is not identical to that of Subsection Four, this language marks the origin of the words used in the statute.[39]

Congress passed Subsection Four as part of the INA in 1952, formally codifying the legislation at 8 U.S.C. § 1324(a)(1)(A)(iv).[40] The INA was the first comprehensive formulation of immigration law in the United States, that amalgamated a body of immigration law into one statute that, prior to the INA's passage, had been an assortment of discrete federal statutes.[41] Before the INA, various pieces of immigration legislation, such as the Immigration Act of 1917, would repeal and amend prior statues, but there was no single, unified piece of legislation compiling the various statutes.[42] President Harry Truman initially vetoed the bill, recognizing that although an overhaul to the immigration system was necessary, in his opinion the bill perpetuated too

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Immigrant Selection, 60 EXPLORATIONS ECON. HIST. 21, 23 (2016) (identifying the rising literacy rates in Southern and Eastern Europe as a factor that prevented it from being effective, and noting that by 1921 there was an increase in immigrants). The literacy test was eventually replaced by the Emergency Immigration Act of May 19, 1921, which enacted a quota system that placed limitations on the number of immigrants from certain regions. *See id.* (noting that because of the "perceived ineffectiveness" of the literacy test led to the enactment of the Emergency Immigration Act of May 19, 1921 to place numerical restrictions on immigration); *see also* Emergency Immigration Act of 1921, Pub L. No. 67-5, § 2(a), 45 Stat. 5, 5 (detailing the quota system).

[35] *See Delgado-Garcia*, 374 F.3d at 1360 (tracing the roots of 8 U.S.C. § 1324 to §§ 5–7 of the Immigration Act of 1917).

[36] BUREAU OF IMMIGRATION, *supra* note 20, at 8.

[37] *Id.* at 9.

[38] *Id.* at 9–10.

[39] *See Delgado-Garcia*, 374 F.3d at 1360 (tracing the roots of 8 U.S.C. § 1324(a)(1)(A)(iv) to §§ 5–7 of the Immigration Act of 1917).

[40] *See* Immigration and Nationality Act of 1952, Pub. L. 82-414, § 274, 66 Stat. 163, 228–29 (current version at 8 U.S.C. § 1324 (2012)) (noting that this section was passed on June 27, 1952).

[41] *See* Annette M. Toews, *Citizenship Considerations in Minnesota Criminal Justice and the Supremacy of Federal Immigration Law*, 25 WM. MITCHELL L. REV. 1245, 1266 (1999) (explaining that there had been federal immigration statutes that were expanded around 1800, and that the passage of the INA formatted them into one comprehensive statute).

[42] *See id.* (noting that immigration statutes were formatted by the INA). The Immigration Act of 1917 is an example of this, as the Bureau of Immigration circulated a copy of the statute and included a list of immigration statutes that were not repealed by this new legislation. BUREAU OF IMMIGRATION, *supra* note 20, at 79.

many of the fundamental flaws in the immigration system.[43] The bill upheld an immigration quota system that had been established in the 1920s, and placed even greater restrictions by limiting the number of visas issued within each quota.[44] Congress disagreed, and over President Truman's objections that the statute reaffirmed the quota system, overrode the veto and enacted the INA on June 27, 1952.[45]

The Immigration Reform and Control Act (IRCA) later amended the language of Subsection Four, and akin to the passage of the INA, IRCA's path from bill to law was also not a simple one.[46] At the time of its passage, Congress's focus had shifted from restricting immigration generally, to restricting those who enter the United States illegally.[47] The first draft of IRCA was a bipartisan effort, written and presented by Alan Simpson, a Republican from

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[43] *See* H.R. DOC. NO. 520 (1952), *as reprinted in* 98 CONG. REC. 8082, 8082–85 (arguing that the bill did address some problems with the current immigration system, but was insufficient in addressing the predominant problems). In his address, President Truman argued that the predominant problem was that the bill would perpetuate the racial and national discriminatory impact of the current immigration system. *See id.* 98 CONG. REC. at 8083–84 (arguing that there were racial and national barriers that were not being abolished through this bill). President Truman argued that the current system gave priority to "Englishmen and Irishmen" and that the proposed system did not offer any real solution. *See id.* 98 CONG. REC. at 8083 (describing how with this bill, certain members of the North Atlantic Treaty would feel that their people are "less worthy" of immigration).

[44] *See* Immigration and Nationality Act of 1952 §§ 201–203 (establishing that the quota system would be upheld, and that visas would only be allocated to a portion of that quota); *see also* DANIEL J. TICHENOR, DIVIDING LINES, THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 190 (2002) (describing the way the INA placed additional restrictions on the quota system). The quota system in the 1920s was first established with the Emergency Immigration Act of 1921, and later more permanently established with the Immigration Act of 1924. KOVEN & GÖTZKE, *supra* note 30, at 132; *see* Massey, *supra* note 34, at 23 (identifying the immigration law passed in 1921 as the Emergency Immigration Act of 1921). The Emergency Immigration Act of 1921 capped immigration from certain countries at three percent based on the number of people from those countries in the 1910 census. KOVEN & GÖTZKE, *supra* note 30, at 132; *see* Massey, *supra* note 34, at 23 (identifying the immigration law passed in 1921 as the Emergency Immigration Act of 1921). The Immigration Act of 1924 prohibited immigrants from Asia, and limited immigrants from other countries to two percent of the 1890 census. KOVEN & GÖTZKE, *supra* note 30, at 132.

[45] *See* Immigration and Nationality Act of 1952, 66 Stat. 163, 281–82 (noting that the bill passed in the House of Representatives with a two-thirds majority on June 26, 1952, and in the Senate with a two-thirds majority on June 27, 1952). In 1952, the language of Subsection Four was enacted in section 274 of the INA and codified as 8 U.S.C. § 1324(a)(4). *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112, 100 Stat. 3359, 3381–83 (identifying the former § 112 of the INA as 8 U.S.C. § 1324). Subsection Four provided that it was illegal for any person to "willfully or knowingly encourage[] or induce[], or attempt[] to encourage or induce, either directly or indirectly, the entry into the United States of any alien." Immigration and Nationality Act of 1952 § 274.

[46] *See* TICHENOR, *supra* note 44, at 252–62 (describing the political struggle around IRCA's enactment).

[47] *See id.* at 252 (identifying the time right before the first draft of IRCA was proposed as one where certain members of Congress were campaigning for a "close the back door and open the front" approach to immigration).

Wyoming, and Romano Mazzoli, a Democrat from Kentucky.[48] The bill quickly passed through the Senate, but received opposition in the House from a panoply of interested groups, ranging from the U.S. Chamber of Commerce to the Mexican American Legal Defense and Education Fund, and it ultimately did not pass in the House.[49] As the drafting was bipartisan, so too was its opposition: both conservative groups and more liberal groups opposed the bill because it placed strict sanctions on employers, and the liberal groups were also opposed to the restrictions placed on legal entry.[50]

The bill was reintroduced in 1983, and it once again passed quickly through the Senate.[51] When the bill reached the House for the second time, however, it caused such deep rifts within the chamber that Speaker of the House, Thomas P. O'Neill, did not even allow it on the floor.[52] Adamant to pass this legislation Simpson proposed a revised bill in 1985.[53] This bill was again easily passed through the Senate, but once again faced issues in the House.[54] This time though, the various factions reached a compromise, and thus the final bill imposed limited sanctions on employers and included an amnesty program that allowed for certain seasonal agricultural workers to become legal permanent residents.[55] On November 6, 1986, President Reagan signed IRCA into law.[56]

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[48] *See id.* at 243, 253 (identifying Simpson and Mazzoli as the Congressmen who drafted and introduced the bill).

[49] *See id.* at 253 (observing the various groups who opposed the bill and prevented its passage). The U.S. Chamber of Commerce opposed it because it identified the plan as "extremely costly and unworkable." *Id.* On the other hand, the leader of the Mexican American Legal Defense and Education Fund, Antonia Hernandez, said she would "dance with the devil" to see the bill not pass. *Id.*

[50] *See id.* at 253–54 (noting that liberal groups also opposed the bill, and implying that conservative groups did as well, and that both groups opposed the employer sanctions).

[51] *See id.* at 257 (observing when the bill was reintroduced, and that it passed "easily" through the Senate).

[52] *See id.* at 258 (noting that, over protests, the Speaker did not allow the bill to be discussed, and that this in effect killed the bill). The Speaker of the House faced extreme backlash from the media for not allowing the bill to come to the floor, as this action was viewed as preventing immigration reform. *Id.* After this backlash, the Speaker of the House became a supporter of the bill. *See id.* (explaining that in light of media pressure, the Speaker gave his "blessing" for immigration reform).

[53] *See id.* at 259 (identifying Simpson as "undaunted" by past rejections).

[54] *See id.* at 260 (noting that the bill passed through the Senate with only one amendment, but required a lot of negotiation and additional amendments before it could pass through the House).

[55] *See id.* at 260–61 (explaining the various compromises that were reached in order for the bill to pass through the House and during the conference); *see also* SUSAN BIBLER COUTIN, NATIONS OF EMIGRANTS: SHIFTING BOUNDARIES OF CITIZENSHIP IN EL SALVADOR AND THE UNITED STATES 179 (2007) (identifying the two prongs of IRCA to be the employer sanctions and the amnesty provisions for seasonal agricultural workers). The sanctions against employers proved to be ineffective as employers still employed undocumented workers. Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IM-

IRCA not only enacted new immigration laws, it also amended the INA.[57] The first draft of IRCA completely eliminated Subsection Four, but its final compromised form added it back in shortly before its enactment—albeit with several amendments.[58] Of these changes, the most significant was the removal of the "willfully or knowingly" element replaced with "*knowing or in reckless disregard of* the fact that such coming to, entry, or residence is or will be in violation of the law."[59] This change thereby lowered the level of the mens rea required for the crime.[60] "Willfully" requires that the criminal act was done deliberately and with knowledge that the act was unlawful.[61] In contrast, "in reckless disregard of" means that the criminal act was done with a conscious disregard of the risk that the defendant was aware of.[62] This

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MIGR. L. J. 343, 346–47 (1994); *see also* TICHENOR, *supra* note 44, at 262 (noting that the employer restrictions were limited by administrative and judicial processes).

[56] *See* Immigration Reform and Control Act of 1986, 100 Stat. 3359, 3445 (recording that the act was enacted on November 6, 1986); *see also* TICHENOR, *supra* note 44, at 261 (noting that the statute was enacted during the Reagan White House).

[57] *See* Immigration Reform and Control Act of 1986, 100 Stat. 3359, 3359 (stating that one of the purposes of the Act was to revise the INA). From the law's inception, Congress recognized the necessity of immigration reform which would require amending the INA. *See* 131 CONG. REC. 13,581 (1985) (identifying the bill that would later become IRCA, bill number S. 1200, as a bill that would amend the INA).

[58] *See* 131 CONG. REC. 13,581 (introducing the bill to Congress on May 23, 1985). On October 9, 1986, the bill was read in full in the House of Representatives and did not contain the language of Subsection Four. *See* 132 CONG. REC. 30,012, 30,012–38 (1986). On October 14, 1986, the bill was revised in accordance with the Conference Report, and the revised bill included the language of Subsection Four, at that time relabeled as subsection D. *See* 132 Cong. Rec. 30,880, 30,887 (1986). *Compare* Immigration Reform and Control Act of 1986 § 112 (making it illegal to encourage an alien to "come to, enter, or reside" in the United States "knowing or in reckless disregard" that their entry or residence would be "in violation of the law"), *with* Immigration and Nationality Act of 1952 § 274 (making it illegal to "willfully or knowingly" encourage an alien to enter in the United States either "directly or indirectly"). One consideration for including Subsection Four in the bill was because it was a "useful tool in combatting alien smuggling." H.R. REP. NO. 99-682, pt. 1, at 112 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5716.

[59] *Compare* Immigration Reform and Control Act of 1986 § 112 (making it illegal to encourage an alien to come to the United States "knowing or in reckless disregard" that their entry or residence would be "in violation of the law"), *with* Immigration and Nationality Act of 1952 § 274 (making it illegal to "willfully or knowingly" encourage an alien to enter in the United States). Other changes included the addition of "reside," the removal of "attempt," and the removal of "directly or indirectly." *See* Immigration Reform and Control Act of 1986 § 112 (amending the INA).

[60] *See* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 n.9 (2007) (identifying the term "willfully" in a criminal context to require an intent that the person knew that their action was unlawful (citing Ratzlaf v. United States, 510 U.S. 135, 136–37 (1994))); *see also* Farmer v. Brennan, 511 U.S. 825, 836–37 (1994) (explaining that in criminal law, "reckless" is when a person "disregards a risk of harm of which he is aware").

[61] *See Safeco Ins. Co. of Am.*, 551 U.S. at 57 n. 9 (citing *Ratzlaf*, 510 U.S. at 136–37) (identifying the term "willfully" in a criminal context to require an intent that the person knew that their action was unlawful).

[62] *See Farmer*, 511 U.S. at 836–37 (defining that in criminal law, "reckless" is when a person "disregards a risk of harm of which he is aware").

change to the statute allowed for a person's actions to become unlawful at a lower level of intent.[63]

IRCA's enactment opened the gates to further immigration reform, and the INA, as the flagship legislation, has accordingly been amended many times.[64] Some of these changes pertain to 8 U.S.C. § 1324—for instance, in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[65] IIRIRA was an extensive piece of legislation that took a more restrictive approach to immigration law, changing immigration procedures for both practitioners and aliens.[66] Despite the turbulent nature of the INA and immigration law overall, Subsection Four remains untouched.[67]

Though untouched, the language of Subsection Four is not unchallenged.[68] The language of Subsection Four makes it illegal to "encourage[] or induce[] an alien to come to, 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."[69] One issue with this language pays little attention to the alien party, and draws no distinction between those who come to the country illegally, but are eligible for some type of legal remedy, and those who have no remedy for their immigration cases.[70] But the greater de-

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[63] *Compare Safeco Ins. Co. of America*, 551 U.S. at 57 n.9 (2007) (citing *Ratzlaf* 510 U.S. at 136–37) (noting that the term "willfully" in a criminal context requires an intent that the person knew that their action was illegal and includes an additional "bad purpose"), *with Farmer*, 511 U.S. at 836–37 (discussing how in criminal law, "reckless" is when a person "disregards a risk of harm of which he is aware.").

[64] *See* Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. 109-97, § 796, 119 Stat. 2120, 2165 (2005) (amending § 274 of the INA to include an exception for religious organizations); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 5401, 118 Stat. 3683, 3737 (amending various parts of 8 U.S.C. § 1324); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 203, 110 Stat. 3009, 3009-565 (amending 8 U.S.C. § 1324(a) to increase penalties).

[65] *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009, 3009-569 to -575 (providing miscellaneous amendments to the INA in subtitle B).

[66] *See* SHANE DIZON & NADINE K. WETTSTEIN, IMMIGRATION LAW SERVICE § 1:28 (2d ed. 2019) (identifying IIRIRA as a massive and complex piece of legislation that altered immigration for attorneys and aliens alike).

[67] *Compare* 8 U.S.C. § 1324(a)(1)(A)(iv) (making it illegal to encourage an alien to "come to, enter, or reside" in the United States "knowing or in reckless disregard" that their entry or residence would be "in violation of the law"), *with* Immigration Reform and Control Act of 1986 § 112 (making it illegal to encourage an alien to "come to, enter, or reside" in the United States "knowing or in reckless disregard" that their entry or residence would be "in violation of the law").

[68] *See Lopez*, 590 F.3d at 1248 (appealing based on the definition provided to the jury by the lower court for the word "encourage"); *He*, 245 F.3d at 958 (bringing an appeal based on the definition provided to the jury by the lower court for the word "encourage").

[69] 8 U.S.C. § 1324(a)(1)(A)(iv).

[70] *See id.* (focusing on the actions of the perpetrator while not providing a definition for alien in the subsection); *see also* Brief for Amici Curiae Oregon Interfaith Movement for Immigrant

bate, is that the term "encourage" appears to be ambiguous, compelling the Fourth, Seventh, Eleventh, Third, and Ninth circuits to supply a definition for the word.[71] Constitutional challenges have also plagued Subsection Four in the circuit courts.[72] With respect to a constitutional overbreadth challenge, the Fourth and Ninth Circuits have reached contrary conclusions, with the Fourth Circuit concluding Subsection Four is constitutional and the Ninth Circuit concluding it is unconstitutionally over broad.[73]

B. Interpreting Encouragement: The Differing Opinions of the Circuit Courts

In 1992, the Fourth Circuit discussed the ambiguity of the term "encourage" in *United States v. Oloyede*.[74] In *Oloyede*, two defendants, Clifford Cooper and Oluwole Oloyede, were found guilty of violating Subsection Four.[75] Cooper was an immigration attorney who assisted immigrants in their applications before Immigration and Naturalization Services, while Oloyede sold fraudulent application materials to immigrants.[76] On appeal to the Fourth

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Justice, Causa Immigrant Rights Coalition of Oregon, Catholic Charities of Oregon, and Immigration Counseling Services of Oregon in Support of Defendant-Appellant at 15, *Sineneng-Smith*, 910 F.3d 461 (No. 15-10614), 2017 WL 4814895 [hereinafter Brief for Amici Curiae, *Sineneng-Smith*] (arguing that 8 U.S.C. § 1324(a)(1)(A)(iv) should be constructed to distinguish between immigration cases that have a remedy and those that do not).

[71] *See Thum*, 749 F.3d at 1147 (adopting the Seventh Circuit's definition for "encourage"); *DelRio-Mocci*, 672 F.3d at 248 (adopting *Black's Law Dictionary*'s definition of "encourage" excluding "help"); *Lopez*, 590 F.3d at 1249 (adopting *Black's Law Dictionary*'s definition of encourage "encourage," including "to help"); *Yoshida*, 303 F.3d at 1150 (equating "encourage" with "help"); *He*, 245 F.3d at 959–60 (adopting *Black's Law Dictionary*'s definition of "encourage," including "to help" relying on multiple dictionary definitions of "encourage"); *Oloyede*, 982 F.2d at 136 (approving of the district court's usage of *Black's Law Dictionary* to define "encourage").

[72] *See Sineneng-Smith*, 910 F.3d at 469–85 (discussing a constitutional overbreadth challenge to Subsection Four); *Anderton*, 910 F.3d at 282–84 (considering the constitutional vagueness of Subsection Four); *Tracy*, 456 F. App'x at 271–72 (addressing both a constitutional overbreadth challenge and a constitutional vagueness challenge).

[73] *See Sineneng-Smith*, 910 F.3d at 485 (finding that Subsection Four was unconstitutionally overbroad); *Tracy*, 456 F. App'x at 272 (holding that Subsection Four was constitutional in the face of an overbreadth challenge).

[74] *See Oloyede*, 982 F.2d at 136–37 (discussing the statute's use of the word "encourage").

[75] *See id.* at 135–36 (noting that defendants were convicted under Subsection Four); *id.* at 136 (approving of the district court's usage of *Black's Law Dictionary* to define "encourage"). Because *Oloyede* was decided before the passage of Illegal Immigration Reform and Immigrant Responsibility Act, Subsection Four is identified as 8 U.S.C. § 1324(a)(1)(D). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 203 (amending 8 U.S.C. § 1324(a) and indicating a different labeling system is to be applied); *Oloyede*, 982 F.2d at 133 (noting that the decision was rendered on November 24, 1992).

[76] *Oloyede*, 982 F.2d at 135. At the time of this case, Immigration and Naturalization Services (INS) oversaw most activities relating to immigration, including border control, undocumented immigrant removal, and asylum petitions. *See Late Twentieth Century*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/history-and-genealogy/our-history/agency-history/late-twentieth-century [https://perma.cc/H5MB-4S4C] (outlining the tasks that INS's engaged in dur-

Circuit, the defendants questioned whether their activities fell within the prohibited action of the statute.[77] The Fourth Circuit acknowledged the lower court's use of *Black's Law Dictionary* to define "encourage" and approved of its finding.[78] At the time, *Black's Law Dictionary* definition of encourage "include[d] actions taken to embolden or make confident."[79] Although the court approved of the lower court's finding, it reasoned that an analysis of Subsection Four's statutory history was more persuasive.[80] Based upon this analysis, the Fourth Circuit affirmed the convictions of the defendants.[81]

The Seventh Circuit addressed the ambiguity of the term "encourage" in 2001, in *United States v. He*.[82] Based upon evidence that indicated that the defendant, Andy He, had forged travel documents and attempted to help a woman come to the United States, He was charged under Subsection Four.[83] During deliberations, the jury asked for further instruction regarding the defi-

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ing the 1980s and 1990s). The INS was disbanded in 2003, and separated into U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection. *See Our History*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/about-us/our-history [https://perma.cc/FE79-GMP6] (describing how the INS was disbanded and superseded by three new organizations). Oloyede would sell undocumented immigrants fraudulent documents, such as social security numbers and job authorization, and then refer them to Cooper for their INS matters. *Oloyede*, 982 F.2d at 135. At trial, eight of Cooper's clients testified that the defendants led them to believe that they could obtain legal status. *Id.* at 135–36.

[77] *See Oloyede*, 982 F.2d at 135 (describing the issues raised by the defendants). The defendants specifically questioned whether the statute applied to aliens who were already living in the United States. *Id.*

[78] *See id.* at 136 (discussing the lower court's use of *Black's Law Dictionary*).

[79] *Id.* The court also noted how, according to the lower court, the defendants' actions "helped" aliens to stay in the country. *Id.*

[80] *See id.* at 136–37 (agreeing with the district court's finding but engaging in a statutory analysis). The Fourth Circuit noted that "encourage" was not anywhere else in the statute, and as such engaged in observing the statutory history. *Id.* The court noted that IRCA "expan[ded] . . . the types of activities held criminal under this statute." *Id.* at 137. As such, the defendant's actions fell within the definition of "encourage." *Id.*

[81] *Id.* at 137 (confirming the defendant's conviction).

[82] *See He*, 245 F.3d at 959–60 (adopting *Black's Law Dictionary*'s definition of "encourage," including "to help," and noting multiple dictionary definitions of "encourage" to support its conclusion).

[83] *Id.* at 956. According to the evidence presented, a woman named Jin Xing Yang arrived in O'Hare International Airport from Narita, Japan, and presented a forged United States passport to an INS officer. *Id.* at 955. Yang was travelling with the defendant, Andy He, and the trial evidence would eventually indicate that He had forged Yang's passport, provided her transportation to the United States, and assisted her in filling out her Customs Declaration form. *Id.* at 956. Evidence indicated that He and Yang were sitting next to each other on the flight, that the passport was forged in New York where He lived, that He had a bank receipt equivalent to the cost of the plane tickets, and he admitted to assisting Yang fill out her Customs form. *Id.* Additional evidence included a slip of paper in Yang's possession that contained a New York City phone number and address that He admitted was his uncle's address, and that He had his boarding pass as well as one with Yang's fake name, Yang's Chinese identification card, and two airline tickets for him and Yang from Chicago to New York, in his pocket. *Id.* Pursuant to 8 U.S.C. § 1324(a)(1)(B), Mr. He was subject to either a fine, or not more than ten years imprisonment, or both. 8 U.S.C. § 1324.

nition of "encourage."[84] The Government proposed that the Court use the definition provided in *Black's Law Dictionary*, but He's counsel objected, arguing that the dictionary definition was overly broad.[85] In consideration of He's concern, the judge did not adopt the full *Black's Law Dictionary* definition, but instead instructed the jury that "encourage" meant "to instigate, help or advise."[86] After receiving this additional instruction, the jury found He guilty.[87]

On appeal, the Seventh Circuit affirmed the supplemental jury instruction.[88] The Seventh Circuit reasoned that because the definition was taken from *Black's Law Dictionary*, and because it was in accordance with other dictionary definitions, the instruction did not inappropriately distort the meaning of encourage under the statute.[89] Since its decision in *He*, the Seventh Circuit has shortened the definition of "encourage" to only require that the prosecution prove that the defendant "knowingly helped or advised the aliens."[90]

Shortly after the Seventh Circuit's decision, the Eleventh Circuit was also confronted with a case that required it to directly address the definition of "encourage" in Subsection Four.[91] In *United States v. Lopez*, the defendant, Jorge Lopez, was driving a boat from the Bahamas to Miami that contained seventeen undocumented immigrants.[92] He was charged under Subsection

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[84] *See id.* at 957 (asking, more specifically, for a better definition for "encouraged").

[85] *Id.*

[86] *Id.* The definition provided by the district court also included "knowingly" to ensure that the jury knew the correct criminal standard to apply. *Id.* At the time, *Black's Law Dictionary* provided that "encourage" meant "to instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident; to help; to forward; to advise." *Id.* at 959 n.4.

[87] *See id.* at 958 (finding Mr. He guilty as charged). The district court later sentenced He to five months in prison, two years supervised release, and a $3,000 fine. *Id.*

[88] *Id.* at 959.

[89] *Id.* at 959–60.

[90] *See* United States v. Fujii, 301 F.3d 535, 540 (7th Cir. 2002) (concluding, relying on *He*, that encouraged means "knowingly helped or advised" (citing *He*, 245 F.3d at 957–59)). In *Fujii*, the defendant, Masao Fujii, was caught using a fraudulent passport with three Chinese nationals, after they arrived in O'Hare International Airport from Seoul, South Korea. *Id.* at 537. INS agents became concerned when Fujii's passport did not show all of the security features. *Id.* When questioned by an INS agent, Fujii admitted to transporting the three Chinese nationals, but claimed that he was forced to do so by the Cambodian mafia. *Id.* at 538. The jury found Fujii guilty under 8 U.S.C. § 1324(a)(1)(A)(iv). *Id.* On appeal, Fujii argued that the Government failed to prove that he "encouraged" the three Chinese nationals to come to the United States. *Id.* The Seventh Circuit was unpersuaded, though, finding that based on Fujii's confession he was helping a man from the Cambodian mafia get these three Chinese nationals into the United States. *Id.* at 540 (citing to *He*, 245 F.3d at 957–59, to conclude that Fujii's confession indicates that he "encouraged" these three Chinese nationals).

[91] *See Lopez*, 590 F.3d at 1248 (holding that the district court's reliance on *Black's Law Dictionary* for a definition was appropriate).

[92] *See id.* at 1243 (describing how the U.S. Coast Guard intercepted Lopez's boat and found seventeen aliens aboard). At trial, Lopez's codefendant testified against him, and claimed that he and

Four, as well as 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 8 U.S.C. § 1327.[93] During deliberations, the jury asked for clarification regarding the charge associated with Subsection Four, specifically asking whether the word "encourage" required Lopez to have communicated with the immigrants.[94] The district court here also relied on the *Black's Law Dictionary* definition of "encourage," and provided the full definition as it appears in the dictionary.[95] Shortly thereafter, the jury returned a verdict of guilty under Subsection Four.[96]

On appeal, the Eleventh Circuit affirmed the district court's decision to use the definition provided by *Black's Law Dictionary*.[97] The Eleventh Circuit concluded that the definition was appropriate because it provided an "ordi-

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Lopez had a contact in the Bahamas who told them where to pick up the passengers, and that they agreed to split the proceeds equally. *Id.* at 1244. Lopez's codefendant testified that the proceeds would be four thousand dollars per person, and that after they deducted transportation costs, they would split the remainder. *Id.* The codefendant already pled guilty and agreed to testify against Lopez. *Id.* Lopez countered his codefendant's testimony by claiming that he did not know that the seventeen passengers were undocumented, and said they were invited on to the boat by the codefendant. *Id.* at 1245.

[93] *Id.* at 1243. Section 1324(a)(1)(A)(v)(I) of Title 8 of the United States Code provides that it is illegal for any person to engage in the conspiracy of any of subsections (A)(i), (A)(ii), (A)(iii), and Subsection Four. 8 U.S.C. § 1324. Lopez was likely charged under this provision either because he engaged in conspiracy with his codefendant to bring the seventeen immigrants into the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(i) or because he engaged in a conspiracy to "encourage" the seventeen immigrants to enter the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(iv). *See Lopez*, 590 F.3d at 1243 (detailing Lopez's action of transporting seventeen immigrants). Title 8, section 1327 provides that it is illegal to knowingly assist or aid any alien who is already inadmissible, or conspire to permit such an alien to enter into the United States. 8 U.S.C. § 1327. Because the allegations were that the seventeen immigrants were undocumented, it is likely that the immigrants were already inadmissible. *See Lopez*, 590 F.3d at 1243 (describing how Lopez transported seventeen immigrants).

[94] *See id.* at 1246 & n.2, 1247 (noting how the Government initially suggested *Black's Law Dictionary* definition of "encourage" for jury instructions and that later the district judge overruled Lopez's objection and used the Government's suggested definition); *see also He*, 245 F.3d at 957 (suggesting *Black's Law Dictionary*'s definition of encourage). Lopez's counsel objected to the definition suggested by the Government on the grounds that encourage was commonly understood to include more than just to help. *Lopez*, 590 F.3d at 1246–47.

[95] *See Lopez* at 1246 & n.2, 1247 (identifying the Government's suggested definition of "encourage" based on *Black's Law Dictionary* and then noting that was the definition the court provided to the jury). At the time, the *Black's Law Dictionary* definition for "encourage" was "to instigate, to incite to action, to give courage to, to inspirit, to embolden, to raise confidence, to help, to forward, and/or to advise." *Id.* at 1246 n.2.

[96] *Id.* at 1247. Lopez was found guilty of all charges, which included those under § 1327. *Id.* During trial, the jury inquired whether the knowledge element of § 1327 required Lopez to have personal knowledge that an immigrant was inadmissible before they got on the boat, or when they arrived in the United States. *Id.* at 1246. The district court instructed that there was no temporal requirement. *Id.* On appeal, Lopez argued that this supplemental instruction was incorrect, because § 1327 required that Lopez knew when the immigrants were boarding the boat that one was inadmissible. *Id.* at 1254. The court rejected this argument, finding instead that as long as Lopez met the knowledge requirement, when he acquired this knowledge did not matter. *Id.* at 1255.

[97] *See id.* at 1248–49, 1258 (upholding the supplemental instruction to the jury, and affirming Lopez's convictions).

nary meaning" and "common usage" of the term.[98] The Eleventh Circuit also rejected Lopez's argument that including "to help" in the definition created an overly broad construction and was thus inappropriate.[99] The court instead reasoned that because multiple dictionaries include "to help" in their definitions of the word "encourage," the definition was "internally consistent."[100] Since its decision in *Lopez*, the Eleventh Circuit has construed the definition of "encourage" as broadly as "helping" an alien come to the United States.[101]

The Third Circuit relies on a different definition of "encourage" than those used by the Fourth, Seventh and Eleventh Circuits.[102] In *DelRio-Mocci v. Connolly Properties Inc.*, the plaintiff, a tenant of one of the defendant's properties, alleged that the defendant was conspiring to rent apartments to

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[98] *Id.* at 1248–49.

[99] *See id.* at 1249, 1251 (presenting Lopez's argument and then rejecting it summarily). Lopez argued that this overly broad construction would render both § 1324(a)(1)(A)(i) and § 1324(a)(1)(A)(v)(II) superfluous. *Id.* at 1249. The Eleventh Circuit rejected this argument, first for § 1324(a)(1)(A)(i) by determining that § 1324(a)(1)(A)(i) criminalizes more than just transportation because it requires an alien to actually be brought to a port of entry. *Id.* at 1250. The Eleventh Circuit then rejected the argument that the statutory interpretation renders § 1324(a)(1)(A)(v)(II) superfluous because the interpretation relies upon other subsections of the statute, and therefore cannot be superfluous. *Id.* at 1251.

[100] *See id.* at 1249 (concluding that the definitions provided by all the dictionaries included "to help," thus being consistent among themselves and with the supplemental instructions). In reaching this decision, the Seventh Circuit relied on *United States v. Ndiaye*, 434 F.3d 1270, 1278 (11th Cir. 2006), and *United States v. Kuku*, 129 F.3d 1435, 1437 (11th Cir. 1997). *Id.* at 1251. In *Ndiaye*, the Eleventh Circuit held that the defendant provided immigrants with Social Security cards in violation of 8 U.S.C. § 1324, because a reasonable jury could conclude that such "assistance in helping" an alien to obtain a Social Security card could encourage them to stay in the country. 434 F.3d at 1298. In *Kuku*, the Eleventh Circuit found that when the defendant approved Social Security applications for aliens, that such action violated § 1324(a)(1)(A)(iv). 129 F.3d at 1437. Judge Rosemary Barkett strongly dissented against the court's inclusion of "help" in the definition of encourage in *Lopez*. *See Lopez*, 590 F.3d at 1258 (Barkett, J., dissenting) (disagreeing with the majority on the its inclusion of "help" within the definition of "encourage," but concurring otherwise). Judge Barkett argued that including "help" in the definition would render § 1324(a)(2), which provides that it is illegal to transport aliens into the United States, superfluous. *Id.* at 1258. Thus, with the inclusion of "help" in the definition, Lopez's action could have been considered illegal under either Subsection Four or § 1324(a)(2). *See id.* at 1258 (arguing that the majority's construction of "encourage" in § 1324(a)(1)(A)(iv) would now include transportation, which is exactly what § 1324(a)(2) criminalizes, and thus the two statutes are meaningless and redundant). Judge Barkett further reasoned that "to help" is inappropriate because encourage implies that affirmative action must be taken. *See id.* at 1259 (explaining how the common usage of encourage requires an affirmative act). Judge Barkett compares Lopez's actions to that of a taxi driver who takes a passenger where they want to go, and distinguishes this from a taxi driver who encourages and takes a passenger to a specific site, which would constitute encouraging that passenger to go to that site. *Id.* at 1260.

[101] *See* Edwards v. Prime, Inc., 602 F.3d 1276, 1295 (11th Cir. 2010) (concluding that the court has provided the "broad interpretation" that helping aliens means "encourage," and relying on *Lopez*, 590 F.3d at 1249–51, *Ndiaye*, 434 F.3d at 1278, and *Kuku*, 129 F.3d at 1437, to reach that conclusion).

[102] *See DelRio-Mocci*, 672 F.3d at 250 (differing from its sister circuits to reach the conclusion that "help" was too broad of a definition).

aliens, because they were less likely to complain about housing conditions.[103] Under the Racketeer Influence and Corrupt Organizations Act, "racketeering activity" includes 8 U.S.C. § 1324, and to that end the plaintiff alleged that by renting to immigrants not lawfully present, the defendant was "encouraging" them to reside in the United States.[104] The district court granted the defendant's motion to dismiss, and the plaintiff appealed to the Third Circuit.[105]

On appeal, the Third Circuit addressed the defendant's claim under Subsection Four and provided a new definition for "encourage."[106] The Third Circuit held that the best definition for "encourage" is "[t]o instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident," and intentionally excluded the word "help" from its dictionary definition.[107] The Third Circuit provided this definition in an effort to emphasize that in order for an offense to be punishable under Subsection Four, the person had to take an affirmative action.[108] The Third Circuit explicitly distinguished itself from the Eleventh and Seventh Circuits, as it found that the inclusion of "to help" in the definition of "encourage" was too broad, and rendered other sections of § 1324 superfluous.[109]

The Third Circuit's decision had immediate impact on lower court decisions.[110] The defendant in *United States v. Henderson*, was tried and convicted before *DelRio-Mocci* was decided.[111] In light of the Third Circuit's deci-

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[103] *Id.* at 243–44. The plaintiff alleged that the defendant had allowed the property to fall into disrepair as a result of this conspiracy. *Id.* at 243. The plaintiff claimed that this conspiracy was in violation of the Racketeer Influence and Corrupt Organizations Act ("RICO"). *See id.* at 244 (alleging that the defendants violated the conspiracy provision of RICO). The plaintiff specifically alleged that the defendants violated 18 U.S.C. § 1962(d), which provides that it is illegal for a person to conspire to commit any of the actions outlined in subsections (a), (b), and (c) of 8 U.S.C. § 1324. *Id.*; *see* 18 U.S.C. § 1962 (2012).

[104] *See DelRio-Mocci*, 672 F.3d at 245 (noting that on appeal, the defendant argues that he adequately pled a RICO predicate act, and then enumerates 8 U.S.C. § 1324(a)(1)(A)(iv)); *see also Edwards*, 603 F.3d at 1292 (noting that § 274 of the INA falls under the term "racketeering activity," which means that 8 U.S.C. § 1324 falls under "racketeering activity").

[105] *See* DelRio-Mocci v. Connolly Props. Inc., No. 08-2753, 2009 WL 971394, at *1 (D.N.J. Apr. 9, 2009) (granting defendant's motion to dismiss under Rule 12(b)(6)); *see also DelRio-Mocci*, 672 F.3d at 245 (noting the district court's grant of the defendant's motion to dismiss).

[106] *See DelRio-Mocci*, 672 F.3d at 248 (providing an unprompted definition for "encourage").

[107] *Id.* (internal quotation marks omitted) (alteration in original) (quoting *Lopez*, 590 F.3d at 1259 (Barkett, J., dissenting)).

[108] *See id.* (emphasizing that the common sense meaning of encourage prompts someone to do something they would not otherwise have done) (citing *Lopez*, 590 F.3d at 1259 (Barkett, J., dissenting)).

[109] *See id.* at 249, 250 (reasoning that this broad of an interpretation would render all of the other subsections of § 1324(a)(1)(A) superfluous).

[110] *See, e.g.*, *Henderson*, 857 F. Supp. 2d at 207 (finding that the Third Circuit's interpretation of § 1324(a)(1)(A)(iv) to be the most appropriate and applicable in the case at hand).

[111] *See id.* at 197 (describing Henderson's conviction after a six-day trial); *see also* Verdict, *Henderson*, *supra* note 2 (declaring a jury verdict of guilty on Count One, dated March 22, 2010).

sion, Judge Woodlock granted Henderson a new trial.[112] Although the presiding judge found that Henderson's actions could still constitute "encouragement" under Subsection Four, he was persuaded that the jury should have received an instruction that reflected the Third Circuit's recent findings.[113]

In 2014, the Ninth Circuit did not consider the Third Circuit's findings, and instead adopted the Seventh Circuit's definition.[114] In *United States v. Thum*, Jorge Humberto Thum was on supervised release, when he met with Aldo Varguez-Rodriguez, an alien who had recently entered the United States from Mexico.[115] After a short discussion, the two men left the restaurant where they had met and walked to a van pick-up station located across the street, and Thum then arranged for Varguez-Rodriguez to take a van going to Los Angeles, California.[116] Thum was arrested and charged with violating Subsection Four, which in turn violated the terms of his supervised release.[117]

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[112] *See Henderson*, 857 F. Supp. 2d at 209–10, 214 (granting defendant's motion for new trial).

[113] *See id.* at 204, 209–210 (finding that Henderson's actions fall within the definition of "encourage," but that the jury did not have the instruction as described by the Third Circuit).

[114] *See Thum*, 749 F.3d at 1147 (adopting the Seventh Circuit's definition for "encourage"). Before *Thum*, the Ninth Circuit indicated that encourage could include "help." *Yoshida*, 303 F.3d at 1150. In *Yoshida*, the Ninth Circuit upheld a jury conviction of Yuami Yoshida. *See id.* at 1147, 1150 (finding that a reasonable jury could convict based on the circumstantial evidence presented). Yoshida had allegedly been part of a larger operation, whereby aliens seeking to travel to the United States would travel from China, to Thailand, then to Japan, and finally to the United States. *See id.* at 1147–48 (describing the organization and its operation to get people to the United States). Three women, Zhuan Dan Lin ("Zhuan"), Cheng Huang ("Cheng"), and Yue Rong Lin ("Yue"), participated in this operation. *Id.* at 1147–48. Once at the airport in Japan, they were instructed to follow Yoshida, who boarded a flight to the United States. *See id.* at 1148 (stating that the individuals adhered to the instructions provided by their male escort). The Ninth Circuit affirmed the lower court's decision, reasoning that a reasonable jury could have inferred that Yoshida encouraged Zhuan, Cheng, and Yue because she led them to the correct flight. *See id.* at 1150 (reasoning that Yoshida led the girls through a complex airport to arrive at the flight just before it took off so that they would avoid scrutiny). Thus, the Ninth Circuit established that someone walking through an airport with three aliens following them was enough to "encourage." *See id.* at 1151 (upholding the jury's finding that Yoshida was guilty under § 1324(a)(1)(A)(iv)).

[115] *Thum*, 749 F.3d at 1144–45. Thum and Varguez-Rodriguez met at a Jack in the Box restaurant. *Id.* at 1144–45. Thum was previously charged and pled guilty in the District Court for the Southern District of California to transporting immigrants under § 1324(a)(1)(A)(ii), and aiding and abetting immigrants under § 1324(a)(1)(A)(v)(II). *Id.* at 1144. Under § 1324(a)(1)(A)(ii) and § 1324(a)(1)(A)(v)(II), a defendant is subjected to the same exact punishment that they would be under Subsection Four. *See* 8 U.S.C. § 1324 (noting that under subsection (a)(1)(A), a person would be punished in accordance with subparagraph (B)). Here, Thum was sentenced to thirty-three months in prison and two years of supervised release. *Thum*, 749 F.3d at 1144.

[116] *Thum*, 749 F.3d at 1145.

[117] *Id.* Under the terms of his supervised release, Thum was not allowed to commit a federal crime. *See id.* (noting that Thum violated his supervised release by allegedly committing a federal crime). Supervised release is a time after serving a prison sentence where a defendant is required to periodically meet with a parole officer, and adhere to certain conditions. *See* Note, *Designing a Prisoner Reentry System Hardwired to Manage Disputes*, 123 HARV. L. REV. 1339, 1349–50 (2010) (describing the system for supervised release). Courts are required to impose certain condi-

The district court held an evidentiary hearing and determined, based on testimony from the arresting agent and Thum's parole officer that he had committed a crime under Subsection Four thereby violating his supervised release.[118]

On appeal, the Ninth Circuit reversed the district court's decision and remanded the case with the instruction to dismiss the petition.[119] The Ninth Circuit reasoned that by simply providing transportation away from the border, Thum did not actually encourage the alien to reside in the United States.[120] The court found that because Thum would be transporting Varguez-Rodriguez *within* the United States, his actions were not illegal under Subsection Four.[121] The Ninth Circuit approved of the Seventh Circuit's definition for encourage as "to inspire with courage, spirit, or hope . . . to spur on . . . to give help or patronage to."[122] Despite seemingly adopting the Seventh Circuit's definition, the court held that in order for Thum to be convicted under Subsection Four, he would need to have taken steps to "encourage" Varguez-

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tions based on the crime, and may impose additional conditions. Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 196 (2013). If a defendant violates the conditions of their release, then they can either be sanctioned by their parole officer or, if the violation is serious enough, the parole officer is required to report it to the court. *See* Note, *supra*, at 1349–50 (describing the conditions placed upon a defendant during supervised release). In the instance where the defendant's violation is reported to the court, the court can either leave the terms of supervised release as they are, or revoke the defendant's supervised release and sentence them to an additional term. *Id.* at 1350. The system of supervised release has been critiqued by multiple scholars for various reasons. *See* Fiona Doherty, *Intermediate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1009 (2013) (arguing that the structure of supervised release has rendered the time to be served indeterminate); Scott-Hayward, *supra*, at 200–01 (noting the fiscal burden that supervised release imposes, and the negative impact on individuals); Note, *supra*, at 1352–53 (advocating for reentry courts would be a better rehabilitative measure than supervised release).

[118] *See Thum*, 749 F.3d at 1144–45. Thum had previously violated the terms of his supervised release by not reporting to his probation officer. *Id.* at 1144. The court added an additional two years of supervised release to his sentence. *Id.* at 1145. The district court sentenced Thum to time served, and added two years of supervised release to his sentence. *Id.*

[119] *See id.* at 1149 (vacating the district court's revocation of Thum's supervised release).

[120] *See id.* at 1146 (noting that the evidence only indicated that Thum intended to transport Varguez-Rodriguez to Northern California).

[121] *See id.* at 1146 (acknowledging Thum's persuasive argument that his actions were not in violation of § 1324(a)(1)(A)(iv)). Thum argued that his actions would be illegal under § 1324(a)(1)(A)(ii), but not Subsection Four. *Id.* Section 1324(a)(1)(A)(ii) provides that it is illegal to transport an alien within the United States, which is exactly what Thum was prepared to do for Varguez-Rodriguez. 8 U.S.C. § 1324(a)(1)(A)(ii); *Thum* 749 F.3d at 1146. The Court proceeded to reject the government's argument that by leading Varguez-Rodriguez to the van meant to transport him further north, he was encouraging Varguez-Rodriguez to reside within the United States. *See Thum*, 749 F.3d at 1147 (noting that the government's argument "clashes" with the statute's text). The court was not persuaded by this argument because such an interpretation is already provided in § 1324(a)(1)(A)(ii). *Id.*

[122] *Thum*, 749 F.3d at 1147 (internal quotations omitted) (quoting *He*, 245 F.3d at 960). The Ninth Circuit also relied upon its holding in *Yoshida* to reach this conclusion. *See id.* (noting that in *Yoshida*, the court had previously "equated" encourage and "to help" (citing *Yoshida*, 303 F.3d at 1150)).

Rodriguez to reside in the United States as opposed to merely supplying him transportation.[123] Thus, the Ninth Circuit found that Thum had not violated Subsection Four, and as such he did not violate his supervised release.[124] Although the court seemed to have adopted the Seventh Circuit's definition for "encourage," and resolved the ambiguity, the Ninth Circuit later found that Subsection Four was unconstitutional.[125]

Five circuit courts have grappled with the definition of "encourage," and each has come out with a different statutory interpretation, while two are split over whether the statute itself is unconstitutional.[126] In 2011, the Fourth Circuit addressed Subsection Four's constitutional breadth in *United States v. Tracy*.[127] The defendant, Anthony Tracy, worked to procure fraudulent travel

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[123] *Id.*

[124] *See id.* at 1148 (reversing the district court and holding that Thum did not violate the terms of his supervised release).

[125] *Sineneng-Smith*, 910 F.3d at 485; *see also Ninth Circuit Invites Amicus Briefs on Question of Whether Statutory Provision Criminalizing Encouraging or Inducing an Alien to Reside in the U.S. Is Overbroad or Void for Vagueness*, INTERPRETER RELEASES, Sept. 25, 2017, at 7, 7–8 Art. 7 [hereinafter *Ninth Circuit Invites Amicus Briefs*] (reporting that the Ninth Circuit invited amicus briefing with respect to Subsection Four's constitutionality).

[126] *See Sineneng-Smith*, 910 F.3d at 485 (concluding that Subsection Four was overbroad); *Thum*, 749 F.3d at 1147 (adopting the Seventh Circuit's definition for "encourage"); *DelRio-Mocci*, 672 F.3d at 248 (adopting *Black's Law Dictionary*'s definition of "encourage" excluding "help"); *Tracy*, 456 F. App'x at 272 (finding that Subsection Four was not overbroad); *Lopez*, 590 F.3d at 1249 (adopting *Black's Law Dictionary*'s definition of "encourage," including "to help"); *Yoshida*, 303 F.3d at 1150 (identifying "helping" as a possible definition for "encourage"); *He*, 245 F.3d at 959 (adopting *Black's Law Dictionary*'s definition of "encourage," including "to help"). There have been constitutional challenges to Subsection Four in other circuit courts, but they did not address the overbreadth issue. *See, e.g.*, *Aberton*, 901 F.3d at 282–84 (assessing the potential constitutional vagueness of Subsection Four). For instance, in the Fifth Circuit there was a constitutional vagueness challenge to Subsection Four. *See id.* at 282–83 (describing appellee's constitutional vagueness challenge); *see also* Kolender v. Lawson, 461 U.S. 352, 357 (1983) (establishing the void-for-vagueness doctrine requirements). Under the Due Process Clause of the Fifth Amendment, and its application to the states through the Fourteenth Amendment, a statute must satisfy two elements to be declared void for vagueness. *See* Skilling v. United States, 561 U.S. 358, 402–03 (2010) (identifying the two elements of a constitutional vagueness challenge). The first element is notice, which requires that the law was articulated in a way that an "ordinary person exercising common sense" can understand what conduct the law is prohibiting. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 578 (1973); *see* Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 271–72 (2010) (discussing the notice element). The second element in a void-for-vagueness challenge is that the law cannot be enforced in an arbitrary and discriminatory manner. *See Kolender*, 461 U.S. at 357–58 (noting the importance of the equal enforcement of the law). The Fifth Circuit was not persuaded by a constitutional-vagueness argument and found that based upon the language in the statute, both encourage and induce were "sufficiently clear to provide fair notice to the public." *Aberton*, 901 F.3d at 283.

[127] *Tracy*, 456 F. App'x at 272. The defendant not only raised a constitutional challenge to Subsection Four's breadth, but also a vagueness challenge. *Id.* at 271–72. The Fourth Circuit summarily dismissed this argument by finding that a "person of ordinary intelligence" would know that the defendant's actions constituted a violation of Subsection Four. *Id.*

documents for aliens.[128] These documents would allow the aliens to travel from Kenya to Cuba.[129] Tracy would meet with the undocumented immigrants in Kenya to give them the documents, and tell them how to travel from Cuba to the United States.[130] Based on these actions, Tracy was indicted by a grand jury for conspiracy to induce or encourage undocumented immigrants to come to the United States.[131] Tracy moved to dismiss the conspiracy charge, but the district court denied his motion, and Tracy later pled guilty to the charge.[132] On Tracy's appeal to the Fourth Circuit, he raised the question about the constitutional reach of Subsection Four.[133] The Fourth Circuit acknowledged there are instances where the statute might "chill[] protected speech," but did not find that this potential chilling effect warranted holding Subsection Four unconstitutionally broad.[134]

After the Fourth Circuit's holding, Subsection Four was again subjected to a constitutional overbreadth challenge in the Ninth Circuit.[135] In 2018, the Ninth Circuit addressed the constitutionality of Subsection Four in *United States v. Sineneng-Smith*.[136] Between 1990 and 2008, the defendant, Evelyn Sineneng-Smith, ran an immigration consulting business that assisted immigrants in obtaining employment-based visas to work in the residential healthcare industry.[137] The district court found that she violated Subsection Four when she made representations to certain clients that would lead them to believe that they were legally allowed to stay in the United States, when they were in fact unlawfully present.[138] Sineneng-Smith appealed the district

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[128] *Id.* at 270.

[129] *Id.*

[130] *Id.* at 269.

[131] *Id.* The indictment for Tracy only provides that he violated 8 U.S.C. § 1324(a)(1)(A)(v)(I). *See id.* (providing part of the indictment); *see also* Indictment at 4, United States v. Tracy (E.D. Va. Apr. 7, 2010) (No. 1:10-cr-00122-LMB) (describing Tracy's actions and then concluding that such actions were in violation of § 1324(a)(1)(A)(v)(I)). This is because § 1324(a)(1)(A)(v)(I) prohibits conspiracy to commit any actions enumerated in the previous subsections. 8 U.S.C. § 1324(a)(1)(A)(v)(I). Thus, even though it may seem as though Tracy was only charged under § 1324(a)(1)(A)(v)(I), the criminal case cover sheet provides that Tracy was charged under both Subsection Four and § 1324(a)(1)(A)(v)(I), because Tracy was charged with conspiracy to violate Subsection Four. *See* Indictment at attachment 1, United States v. Tracy (No. 1:10-cr-00122-LMB) (providing the code and sections that Tracy was indicted under).

[132] *Tracy*, 456 F. Appx at 269. Tracy appealed the conviction based upon the denial of his motion to dismiss. *Id.*

[133] *Id.* at 272.

[134] *Id.*

[135] *See Sineneng-Smith*, 910 F.3d at 475–76 (noting that the Fourth Circuit is the only other circuit to address this issue).

[136] *See id.* at 485 (concluding that Subsection Four is constitutionally overbroad).

[137] *See* United States v. Sineneng-Smith, No. CR-10-00414, 2013 WL 6776188, at *1 (N.D. Cal. Dec. 23, 2013) (explaining Sineneng-Smith's business operation).

[138] *See id.* at *3–5 (finding that a reasonable jury could conclude that Sineneng-Smith was guilty with respect to encouraging Amelia Guillermo and Hermansita Esteban to reside in the Unit-

court's decision and after receiving briefs from both parties, the Ninth Circuit asked for additional briefing to specifically address the issue of Subsection Four's constitutionality.[139] In consideration of this briefing, the Ninth Circuit concluded that Subsection Four was unconstitutional under the overbreadth doctrine.[140]

II. First Amendment Protection and the Overbreadth Doctrine

To declare a statute overly broad, a court must find that the statute violates the overbreadth doctrine.[141] The overbreadth doctrine is a facial challenge to a statute under the First Amendment.[142] Under the overbreadth doctrine, a statute is overly broad if it regulates a substantial portion of protected speech.[143] As part of an overbreadth analysis, a court must determine that the statute regulates protected speech.[144] Upon determining that the statute regulates protected speech, the first step to an overbreadth analysis is to construe the statute, an analysis for which the Supreme Court has adopted a variety of approaches.[145] After construing the statute, the court considers *jus tertii*, or third-party standing, whereby the defendant may assert that based on instanc-

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ed States). In connection with this business, Sineneng-Smith had two clients named Guillermo and Esteban. *Id.* at *1. Initially, Sineneng-Smith was convicted after a twelve-day trial based upon three clients. *Id.* at *1–2. On appeal, the court did not find that her interactions with one of the clients constituted a violation of Subsection Four because she only lent the client money. *See id.* at *6 (discussing how the government's argument fails with respect to Oliver Galupo). The court equated such an agreement with hiring an unlawful alien and such action does not constitute a violation of Subsection Four. *Id.* (citing Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 3028 (D.N.J. 2005)).

[139] Order at 1, *Sineneng-Smith*, 910 F.3d 461 (No. 15-10614), ECF No. 46; *see also Ninth Circuit Invites Amicus Briefs*, *supra* note 125, at 7–8 (noting that the Ninth Circuit called for briefs to address the constitutionality of Subsection Four).

[140] *See Sineneng-Smith*, 910 F.3d at 485 (concluding that Subsection Four was unconstitutionally overbroad). The Supreme Court has denied certiorari with respect to the constitutional vagueness challenge. *Anderton*, 901 F.3d 278, *cert. denied*, No.18-846, 2019 WL 659880 (U.S. Feb. 19, 2019).

[141] *See* 16A Am. Jur. 2d *Constitutional Law* § 429 (2017) (describing how a law can be found to be facially overbroad under the overbreadth doctrine).

[142] *See id.* (identifying the challenge as a "facial" one); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 863 (1991) (explaining how the overbreadth doctrine is a facial challenge under the First Amendment).

[143] *See* United States v. Stevens, 559 U.S. 460, 473 (2010) (noting that under the First Amendment overbreadth challenge, there needs to be a substantial number of applications whereby the statute is unconstitutional (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008))).

[144] *See* Fallon, *supra* note 142, at 867 (arguing that because the substantive First Amendment principle is especially sensitive to content-based regulations of protected speech, the overbreadth doctrine should also be especially sensitive).

[145] *See* United States v. Williams, 553 U.S. 285, 293 (2008) (noting that the first step in an overbreadth analysis is to construe the statute). *Compare Stevens*, 559 U.S. at 474 (construing the statute and reading it to have "an alarming amount of breadth"), *with Williams*, 553 U.S. at 293–98 (using a variety of factors to construe the statute).

es where a third party's protected speech is illegal under the statute, the statute should be declared overly broad and thus in violation of the First Amendment.[146]

A. Protected Speech: Determining Whether Advocacy Speech Is Protected

When mounting a facial challenge to a statute under the overbreadth doctrine, a crucial part of the analysis is establishing that the statute regulates protected speech.[147] The Supreme Court has applied many analyses to determine whether a certain type of speech falls into a protected category.[148] In instances where the speech advocates unlawful conduct, the Supreme Court has explicitly held that it is unconstitutional for statutes to prohibit advocacy speech.[149] Despite this, the Court has carved out certain exceptions where the prohibition of advocacy speech is acceptable.[150] To determine whether a form of advocacy speech can be criminalized, the Supreme Court established the *Brandenburg* standard in 1969.[151]

In *Brandenburg v. Ohio*, Clarence Brandenburg, a leader of the Ku Klux Klan ("KKK"), was charged and sentenced under the Ohio Criminal Syndi-

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[146] *See Stevens*, 559 U.S. at 476 (describing the arguments made regarding third-party rights of hunters after construing the statute); *Williams*, 553 U.S. at 297 (noting that after construing the statute, the next step is to determine if the statute prohibits a substantial amount of protected speech); *see also* Fallon, *supra* note 142, at 863 (identifying the overbreadth doctrine under the First Amendment as an exception to *jus tertii*, which allows a defendant to articulate situations where the law would violate the protected speech).

[147] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 872–74 (1997) (addressing the overbreadth issue after reaching the conclusion that the statute was content-based and the speech it was regulating was protected in accordance with the *Miller* test); *see also* Fallon, *supra* note 142, at 867 (arguing that because the substantive First Amendment principle is especially sensitive to content-based regulations of protected speech, the overbreadth doctrine should also be especially sensitive).

[148] *See Stevens*, 559 U.S at 468–69 (noting the historical categories where the Supreme Court has recognized exceptions to First Amendment protections); *see also* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (providing an exception for speech regarding fraud); Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (providing an exception for speech that incites lawless action); Roth v. United States, 354 U.S. 476, 483 (1957) (providing an exception for "obscenity"); Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952) (providing an exception for defamation); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (providing an exception for speech that is "integral" to the crime); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (establishing the standard to determine whether "fighting words" are protected).

[149] *See Brandenburg*, 395 U.S. at 447–48 (finding that the state cannot make a law forbidding advocacy of unlawful action).

[150] *See id.* (establishing the standard used to determine whether the speech is protected or not).

[151] *Id.* at 444, 447–48 (establishing the standard and noting that the case was decided on June 9, 1969); *see also* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action*, 1994 SUP. CT. REV. 209, 240 (identifying the *Brandenburg* standard to require "(1) express advocacy of law violation; (2) the advocacy must call for immediate law violation; and (3) the immediate law violation must be likely to occur").

calism Statute.[152] The statute provided that it was illegal to advocate for "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[153] The defendant had invited the announcer-reporter of a Cincinnati television station to attend and film a KKK rally, which was then broadcasted on local and national television.[154] A portion of the film that was broadcasted featured the defendant boasting about the high number of KKK members, and stating that although the KKK was "not a revengent organization," if the President, Congress, and the Supreme Court "continue[d] to suppress the white, Caucasian race," the KKK might have to take some "revengance."[155]

The Supreme Court reversed the trial court's conviction, and held the Ohio Criminal Syndicalism Statute unconstitutional because it violated the First and Fourteenth Amendments.[156] The Court found that a state cannot forbid the "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[157] Thus, *Brandenburg* classifies speech as protected speech, unless that speech "(1) express[es] advocacy of law violation; (2) the advocacy . . . call[s] for [imminent] law violation;" and (3) that such law violation is likely to occur.[158] If the language does not satisfy any part of this standard then the speech is protected.[159]

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[152] *Brandenburg*, 395 U.S. at 444. Clarence Brandenburg was the appellant and identified as a leader of the Ku Klux Klan. *Id.*

[153] *Id.* at 444–45. The statute was similar to criminal syndicalism laws enacted in twenty other states and two territories. *Id.* at 447. Criminal syndicalism laws were enacted under the pretext that there was a need to prosecute the threat of violent rebellion. *See* Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World 1917-1927*, 85 OR. L. REV. 649, 700–01 (2006) (identifying the need to prosecute as a pretext to justify the criminalization of advocacy).

[154] *Brandenburg*, 395 U.S. at 445.

[155] *Id.* at 445–46. The film depicted twelve people in Klan regalia gathered around a large burning cross, uttering derogatory phrases about African Americans and Jews. *Id.* These derogatory remarks included "[a] dirty nigger," "[s]end the Jews back to Israel," and "[b]ury the niggers," among other phrases. *Id.* at 446 n.1. There was also footage of the defendant making a statement that he believed that "the nigger should be returned to Africa, the Jew returned to Israel." *Id.* at 447.

[156] *See id.* at 445, 448 (reversing, and noting that under its established standard, the Ohio statute would not survive).

[157] *Id.* at 447. The Court did not actually address whether Brandenburg's actions fell within the standard, but rather held that the statute was unconstitutional. *See id.* at 448–49, 449 n.3 (addressing the statute, but not addressing Brandenburg's actions).

[158] *See* Schwartz, *supra* note 151, at 240 (parsing out the *Brandenburg* standard, and determining that it requires: "(1) express advocacy of law violation; (2) the advocacy must call for immediate law violation; and (3) the immediate law violation must be likely to occur").

[159] *See* DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 3.5 (2012) (explaining how the *Brandenburg* standard was applied to *Hess v. Indiana*, 414 U.S. 105 (1973), whereby the Court found that the defendant's language was not imminent and thus was protected).

The Court further developed the *Brandenburg* standard in 1973 with *Hess v. Indiana*.[160] In *Hess* the defendant was charged with violating Indiana's disorderly conduct statute when he claimed, "[w]e'll take the fucking street later" during an antiwar protest.[161] The trial court found that Hess's words did intend to incite further violence, but only at some point in the indefinite future.[162] As such, because Hess's words did not demonstrate imminence, this speech also did not satisfy the *Brandenburg* standard and Hess's speech is protected.[163] Thus, the *Hess* decision established the imminence requirement of the *Brandenburg* standard.[164] Since then, the *Brandenburg* standard has not been substantially modified, and continues to be the standard used to determine whether speech is protected.[165]

B. The Overbreadth Doctrine

The overbreadth doctrine provides that a statute is overly broad when the amount of protected speech and expression that the statute regulates is substantial.[166] The origin of the overbreadth doctrine has been traced back to the 1940s when the Supreme Court determined that there needed to be a more aggressive facial challenge to overly broad laws.[167] The doctrine was later

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[160] *See id.* (noting that *Hess* applied the *Brandenburg* standard and clarified the "imminent" part of the standard).

[161] 414 U.S. at 107. An alternative is that Hess said "we'll take the fucking street again." *Id.* The Indiana disorderly conduct statute provided that, "Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct." *Id.* at 105 n.1.

[162] *See id.* at 108 (noting that the Indiana Supreme Court relied primarily on the trial court's finding that Hess's statement intended to incite further violence).

[163] *See id.* (describing the indefinite nature of Hess's statement).

[164] *See* William Li, Note, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467, 483 (2003) (describing the impact of the *Hess* decision).

[165] *See* Andrianna D. Kastanek, *From Hi Man to a Military Takeover of New York City: The Evolving Effects of* Rice v. Paladin Enterprises *on Internet Censorship*, 99 NW. U. L. REV. 383, 383 (2004) (noting that the *Brandenburg* standard has not been substantially modified).

[166] *See Stevens*, 556 U.S. at 473 (noting that a "substantial number of [a statute's] application [must be] unconstitutional" in order for a statute to be overbroad); *Williams*, 554 U.S. at 292 (noting the substantial overbreadth requirement); Fallon, *supra* note 142, at 863 (noting that the overbreadth doctrine requires that a statute be "substantially overbroad"); *see also* Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 648, 664 (2012) (noting that a facial challenge to a statute is that a "substantial amount of the conduct is protected by the First Amendment").

[167] *See* Fallon, *supra* note 142, at 863 (explaining the history of the overbreadth doctrine, and pinpointing *Thornhill v. Alabama*, 310 U.S. 88 (1940), as the decision that marked the beginning of the overbreadth doctrine). In *Thornhill*, the defendant, Byron Thornhill was charged with violating a state law that prohibited picketing and loitering. 310 U.S. at 91–92. Thornhill had been picketing at the plant for the Brown Wood Preserving Company. *Id.* at 94. The Supreme Court found that the statute had to be read on its face in light of its potential First Amendment violation.

limited in 1972 with the Supreme Court's decision in *Broaderick v. Oklahoma*.[168]

In *Broaderick*, the plaintiffs challenged certain paragraphs of an Oklahoma statute that prohibited specific political actions by the state's classified civil servants.[169] The Court found that although certain paragraphs of the statute were potentially overbroad, the overbreadth was not substantial enough to merit striking down the entire law.[170] The Court further reasoned that any overbreadth that was present in these paragraphs could be remedied in an as-applied, "case-by-case analysis."[171] Since *Broaderick*, for a court to declare a statute unconstitutional under the overbreadth doctrine, it must find that the statute is "substantially" overbroad.[172] Thus, it is not enough that there are a few instances where protected speech would be criminalized under the statute, but rather the amount of protected speech that would be criminalized must be substantial.[173]

In an overbreadth analysis, the court first construes the statute.[174] When construing the statute, a court can focus on a variety of the statute's features to assist its analysis.[175] As two points of comparison, the Supreme Court in *United States v. Williams* focused on a variety of factors to reach the conclusion that the statute was not overly broad, while in *United States v. Stevens*, the Court adopted a plain meaning interpretation of the statue.[176]

Id. at 96–97. The Court also considered how the statute would be applied to people besides the defendant and found that the "range of activities" that the statute regulated would prevent laborers from communicating their issues in the workplace. *Id.* at 98–99, 104.

[168] 413 U.S. 601, 615–16 (1973); *see also* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 133 (4th ed. 2012) (noting that the "substantial" requirement was a limitation adopted in *Broaderick*); Fallon, *supra* note 142, at 863 n.62 (noting that the doctrine has been limited in various ways, and identifying *Broaderick* as a case that limited the overbreadth doctrine).

[169] 413 U.S. at 602–06 (describing how plaintiffs were challenging an Oklahoma statute). The statute was Section 818 of Oklahoma's Merit System of Personnel Administration Act, and the plaintiffs were specifically challenging paragraphs six and seven. *Id.* at 603–06.

[170] *Id.* at 615–16.

[171] *Id.*

[172] *See* STONE ET AL., *supra* note 168, at 134–35 (describing the impact of *Broaderick* and noting the ambiguities of this limitation).

[173] *See Williams*, 533 U.S. at 292–93, 303.

[174] *See id.* at 293, 297 (identifying the first step of an overbreadth challenge to construe the law, and later identifying the next step as determining if a significant amount of protected speech is criminalized).

[175] *See id.* at 293–97 (noting the scienter requirement, the use of operative verbs, the subjective and objective components, the phrases that contain only subjective elements, and definitions provided by the statute). *But see Stevens*, 559 U.S. at 474 (focusing on the lack of using any words to indicate cruelty).

[176] *Compare Stevens*, 559 U.S. at 474–75 (construing the statute and reading it to have "an alarming amount of breadth" and rejecting the government's canon of interpretation in favor for reading the statute with its "ordinary meaning"), *with Williams*, 553 U.S. at 293–98 (using a variety of factors to construe the statute).

In *Williams*, the Court found that an Act that prohibited the pandering and solicitation of child pornography was not overly broad.[177] The Court in *Williams* construed the statute by observing the scienter requirement, the use of operative verbs, the subjective and objective components, the phrases that contain only subjective elements, and definitions provided by the statute.[178] For the scienter requirement, or the requirement that the acting party had some degree of intent of wrongdoing, the Court observed how this particular statute included "knowingly."[179] The Court noted that the statute included the operative verbs of "advertises, promotes, presents, distributes, or solicits."[180] The Court discussed the subjective and objective elements conveyed in the statute through "in a manner that reflects the belief."[181] The Court considered how the phrase "in a manner . . . that is intended to cause another to believe" expressed only a subjective element.[182] Finally, the statute provided a definition for "sexually explicit conduct."[183] The presence of these different features assisted in determining what type of speech the statute actually covered.[184]

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[177] 553 U.S. at 289–90, 307 (reaching the conclusion that the prior unconstitutional version of the statute has been remedied by Congress's redrafting). The subsection at issue, codified at 18 U.S.C. § 2252A(a)(3)(B), provides that it is illegal for any person to knowingly

> advertise[], promote[], present[], distribute[], or solicit[] through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct . . . .

Id. at 289–90 (quoting 18 U.S.C. § 2252A(a)(3)(B)).

[178] *Id.* at 293–97.

[179] *Id.* at 294; *see Scienter*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining scienter as the "degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission").

[180] *Williams*, 553 U.S. at 294–95.

[181] *Id.* at 295–96.

[182] *Id.* at 296.

[183] *Id.* at 296–97.

[184] *Id.* at 293. The Court in *Williams* found that the type of speech that the statute regulated did not enjoy First Amendment protection. *Id.* at 297–99. The Court reached this conclusion by finding that offers to engage in the distribution of child pornography made the speech integral to the illegal conduct. *Id* at 297. The principle that speech that is integral to criminal conduct does not enjoy constitutional protection was established in *Giboney*. *See* 336 U.S. at 489 (establishing the exception that speech that is "an integral part of conduct in violation of a valid criminal statute" is not protected by the First Amendment). This principle was largely dormant from the early 1990s until 2006, after which the Supreme Court began to apply the principle with increasing frequency. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 10 COLUM. L. REV. 981, 983 & n.1 (noting the increased frequency with which the Supreme Court cites *Giboney*). One of the considerations that the Court in *Stevens* noted was the "intrinsically related" nature of the speech and the illegal activity. *See* 559 U.S. at 471 (discussing its earlier decision in *New York v. Ferber*, 458 U.S. 747, 759, 761 (1982), and its conclusion that the "market for child

In contrast, the Court in *Stevens* did not observe nearly as many statutory features as the Court in *Williams*.[185] The Court in *Stevens* found that a statute prohibiting the creation, sale, and distribution of animal cruelty depictions was overly broad.[186] In *Stevens*, the Court considered the Government's argument, which urged the Court to adopt the *noscitur a sociis* canon of interpretation to read additional limitations into the statute.[187] The Court rejected this argument, instead choosing to focus on the plain meaning of the statutory language.[188] Also crucial to the Court's holding was that the statute lacked the word "cruelty," and was therefore lacking a key limiting factor or boundary on the speech it restricted.[189] After construing the statute, the Court considered the arguments asserted by the defendant.[190]

For a defendant to successfully challenge a statute for overbreadth, the defendant's actions themselves need not be protected speech.[191] Instead, a defendant can argue that a third party's actions are a form of protected speech that would be criminalized by the statute at issue.[192] The overbreadth doctrine thus operates as an exception to *jus tertii*, or third-party standing.[193] Under *jus tertii*, a defendant generally cannot assert a third-party's rights unless there is a relationship whereby the third-party's rights are dependent upon the defendant's ability to assert those rights.[194]

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pornography was 'intrinsically related' to the underlying abuse"). In *Williams*, the Court sought to distinguish between the integral-to-the-crime speech, and advocacy speech by stating that there is a difference between "a proposal to engage in illegal activity and the abstract advocacy illegality." 553 U.S. at 298–99. Thus, as an example, the Court noted that a statement such as "I encourage you to obtain child pornography" would fall within the protected category of abstract illegality. *Id.* at 300.

[185] *Compare Stevens*, 559 U.S. at 474 (focusing on the lack of using any words to indicate cruelty), *with Williams*, 553 U.S. at 293–97 (noting the scienter requirement, the use of operative verbs, the subjective and objective components, the phrases that contain only subjective elements, and definitions provided by the statute).

[186] *Stevens*, 559 U.S. at 482.

[187] *See id.* at 474 (outlining the government's argument). The canon of *noscitur a sociis* provides that ambiguous words should be defined based on the words surrounding it. *Noscitur a sociis*, BLACK'S LAW DICTIONARY, *supra* note 179.

[188] *See Stevens*, 559 U.S. at 474–75 (adopting to interpret the language of the statute in accordance with its "ordinary meaning").

[189] *See id.* at 474 (focusing on the issue that "cruelty" did not limit the statute the way the government argues).

[190] *See id.* at 475–76 (addressing the potential situations whereby the defendant's activities would be illegal).

[191] *See* 16A AM. JUR. 2D *Constitutional Law* § 429 (2017) (describing how a defendant's activity need not be constitutionally protected).

[192] *See id.* (noting how an overbreadth claim can be brought on the basis of a hypothetical third person's actions).

[193] *See* Fallon, *supra* note 142, at 859–60, 863 (identifying a First Amendment exception to *jus tertii*).

[194] *See id.* at 859–60 (describing *jus tertii*).

In *Stevens*, the defendant successfully argued that the statue was overly broad, because of how it applied to the actions of a third-party, specifically hunters.[195] The defendant's was accused of filming and distributing videos of dogfighting, which the government argued fell within the definition of the statute and was therefore a criminal act.[196] Although dogfighting is criminalized in all fifty states, and although the defendant's action was undoubtedly illegal, the Court took issue with the fact that the statute did not account for the way different jurisdictions criminalize the same actions.[197] As a case study, the Court looked to activities of hunters that while legal in one state, would be illegal under the statute.[198] Thus, the Court found that the statute was overly broad, not based on defendant's unlawful actions, but rather based on the potentially criminal actions of hunters.[199]

Given that the overbreadth doctrine acts as an exception to *jus tertii*, the Supreme Court has acknowledged that the application of the overbreadth doctrine operates as "strong medicine" to a statute.[200] Because the overbreadth doctrine is "strong medicine" that can prove fatal to a statute, it is to be administered cautiously.[201]

One of the primary concerns with a statute that regulates protected speech is that it would cause a "chilling effect" on the protected speech.[202] The "chilling effect" occurs when there is legal reprisal—either through prosecution or lawsuit—for an individual's constitutionally protected speech,

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[195] *See Stevens*, 559 U.S. at 474–75 (describing the benefits of hunting).

[196] *See id.* at 466 (detailing the respondent's actions that led to him being indicted, and noting that dogfighting is illegal in fifty states).

[197] *See id.* at 475–76 (describing how there are certain jurisdictions where hunting is legal and jurisdictions where hunting is illegal).

[198] *See id.* (noting that hunting practices in one state could be illegal in another).

[199] *See id.* at 482 (finding that the statute is limited as the government contends, and affirming the Third Circuit's decision).

[200] *Broaderick*, 403 U.S. at 613.

[201] *Williams*, 553 U.S. at 293 (quoting L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999)) (identifying the overbreadth doctrine as "strong medicine" not to be "casually employed"). Though the overbreadth doctrine is identified as "strong medicine," this only serves to caution the court and does not prohibit the doctrine's application because of the concerns that a statute regulating protected speech raises. *See Stevens*, 559 U.S. at 484 (Alito, J., dissenting) (arguing that the court's invalidation of § 48 was improper, and noting that the "strong medicine" of the overbreadth doctrine should be administered as a "last resort"). In contrast to Justice Alito's dissent in *Stevens*, the majority did not even mention the "strong medicine" aspect of the overbreadth doctrine when it reached the conclusion that § 48 was overly broad. *See generally* 559 U.S. at 460–82 (majority opinion) (lacking a reference to "strong medicine").

[202] *See Williams*, 553 U.S. at 293 (identifying the concerning "chilling effect" overly broad statutes can have on protected speech); STONE ET AL., *supra* note 168, at 136 (describing the potential chilling effect that comes from concerns for vague statutes when the First Amendment is involved).

causing that individual to suppress their speech out of fear.[203] In the eyes of the Court, the idea that protected speech would be chilled in any way is intolerable—hence the need for the overbreadth doctrine.[204]

The overbreadth doctrine is an extremely potent facial challenge to a statute that regulates protected speech.[205] As such, it is only administered in instances where a statute violates a "substantial" portion of protected speech.[206] As Subsection Four regulates a form of protected speech, namely advocacy speech, and such regulation substantially infringes on protected speech, Subsection Four falls within the overbreadth doctrine's ambit.[207]

III. SUBSECTION FOUR IS OVERLY BROAD

Under the *Brandenburg* standard, Subsection Four regulates protected speech and as such, it should be facially challenged under the First Amendment as overbroad.[208] Applying the overbreadth doctrine to Subsection Four makes clear that the statute's reach is overly broad and that it criminalizes a substantial portion of protected advocacy speech.[209] Furthermore, the statute cannot be remedied by a construction that could be applied in a "case-by-case" basis as evident through the conflicting interpretations among the circuits.[210] As such, the law should be declared unconstitutional, and it should be

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[203] *See* STONE ET AL., *supra* note 168, at 136 (internal quotation omitted) (describing the concerns for vague statutes when the First Amendment is involved); Fallon, *supra* note 142, at 861 n.48 (discussing the causes of the "chilling effect").

[204] *See* Fallon, *supra* note 142, at 867 (noting that it would be "intolerable" for there to be any chilling effect on protected speech); *see also* Igor Helman, Note, *Spam-A-Lot: The States' Crusade Against Unsolicited E-mail in Light of the CAN-SPAM Act and the Overbreadth Doctrine*, 50 B.C. L. REV. 1525, 1547–48 (2009) (explaining the overbreadth doctrine and identifying three limitations).

[205] *See Williams*, 553 U.S. at 293 (quoting *L.A. Police Dep't*, 528 U.S. at 39) (noting that the overbreadth doctrine as "strong medicine" that should not be "casually employed").

[206] *See Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6) (noting that under the First Amendment overbreadth challenge, there needs to be a substantial number of applications whereby the statute is unconstitutional).

[207] *See infra* notes 208–253 and accompanying text.

[208] *See* United States v. Stevens, 559 U.S. 460, 483–84 (Alito, J., dissenting) (identifying the overbreadth doctrine); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (establishing the standard used to determine if advocacy is a protected speech); *see also* 8 U.S.C. § 1324(a)(1)(A)(iv) (2012).

[209] *See Stevens*, 559 U.S. at 473 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)) (noting that under the First Amendment overbreadth challenge, there needs to be a "substantial number of . . . applications" whereby the statute is unconstitutional).

[210] *See* Broadrick v. Oklahoma, 413 U.S. 601, 615–16 (1973) (discussing how an overbreadth issue can be remedied through a "case-by-case analysis"); United States v. Sineneng-Smith, 910 F.3d 461, 485 (9th Cir. 2018) (concluding that Subsection Four was overbroad); United States v. Thum, 749 F.3d 1143, 1147 (9th Cir. 2014) (adopting the Seventh Circuit's definition for "encourage"); DelRio-Mocci v. Connolly Props. Inc., 672 F.3d 241, 248 (3d Cir. 2012) (adopting *Black's Law Dictionary*'s definition of "encourage" excluding "help"); United States v. Tracy,

invalidated under the First Amendment.[211] If Subsection Four is declared unconstitutional, Congress would have a new opportunity to revise the statute.[212] If given the opportunity, Congress should amend the subsection to include stronger language and specifically criminalize assisting immigrants with an "unremediable violation of immigration law or conduct that constitutes fraud or a criminal violation."[213]

A. Subsection Four Regulates Protected Speech

Part of the overbreadth analysis involves determining whether the speech is protected speech.[214] As such, should a challenge to Subsection Four reach the Supreme Court, it is appropriate to apply the *Brandenburg* doctrine to determine if Subsection Four regulates protected speech.[215] The statute

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456 F. App'x 267, 272 (4th Cir. 2011) (finding that Subsection Four was not overbroad); United States v. Lopez, 590 F.3d 1238, 1249 (11th Cir. 2009) (adopting *Black's Law Dictionary*'s definition of "encourage," including "to help"); United States v. Yoshida, 303 F.3d 1145, 1150 (9th Cir. 2002) (identifying "helping" as a possible definition for "encourage"); United States v. He, 245 F.3d 954, 959 (7th Cir. 2001) (adopting *Black's Law Dictionary*'s definition of "encourage," including "to help").

[211] *See Stevens*, 559 U.S. at 482 (holding that a law was overbroad, and invalid under the First Amendment).

[212] *See* Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 784 (2012) (discussing how the Supreme Court would use anticipatory overruling decisions by declaring statutes unconstitutional, but give Congress a chance to fix them); Leon Friedman, *Overruling the Court*, AM. PROSPECT (Dec. 19, 2001), http://prospect.org/article/overruling-court [https://perma.cc/2U5Z-HG99] (arguing that Congress's response to the Supreme Court's dissatisfaction with its legislation is to amend and re-enact).

[213] Brief for Amici Curiae, *Sineneng-Smith*, *supra* note 70, at 15

[214] *See Stevens*, 599 U.S. at 469–72 (addressing whether the statute was regulating protected speech before analyzing whether it satisfied the overbreadth doctrine).

[215] *See id.* (discussing whether the statute regulated protected speech). Although it may seem as though Subsection Four falls within the "integral to the crime" exception, it does not. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (establishing the exception). As noted by *Stevens*, a consideration as to whether speech is "integral to the crime," is if the speech is "intrinsically related" to the illegal activity. *See Stevens*, 599 U.S. at 471 (noting that the "market for child pornography was 'intrinsically related' to the underlying abuse" (citing New York v. Ferber, 458 U.S. 747, 759, 761 (1982))). In contrast, a person encouraging an undocumented immigrant to come to the United States is not "intrinsically related" to people immigrating to the country illegally. *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (regulating speech that encourages a person to come to the United States). Furthermore, the speech regulated by Subsection Four falls within the abstract advocacy of illegality. *See id.* (regulating encouraging speech); United States v. Williams, 553 U.S. 285, 298–99 (2008) (distinguishing integral-to-crime speech from advocacy speech). The example of advocacy speech provided by the Court in *Williams* was "I encourage you to obtain child pornography." 553 U.S. at 300 (providing an example of advocacy speech). That would be akin to speech regulated by Subsection Four whereby the speaker would say "I encourage you to come to the United States." *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (regulating speech regarding encouraging undocumented immigrants to come to the United States). Thus, *Brandenburg* is the appropriate analysis. *See* 395 U.S. at 447–48 (establishing the test to determine whether advocacy speech is protected by the First Amendment).

provides that it is illegal 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 law."[216]

The use of the word "encourage" in the statute encompasses advocacy speech, because in order to encourage someone to act, the speech must advocate for such action.[217] Given that the statute regulates language that is advocacy speech, it meets the first prong of the *Brandenburg* standard.[218] Under the second prong of *Brandenburg*, an illegal activity must be imminent, and if speech satisfies this prong, then is not protected.[219] As the statute stands, its "encourage" language also encompasses activities that are not imminent, as required by *Hess*.[220] Because the statute fails to place any time qualifier between the encouragement and the alien entering into the United States, the statute fails to meet the second prong of the *Brandenburg* test, and thus the speech is protected.[221] Finally, Subsection Four criminalizes speech regardless of whether the illegal activity is likely to happen, and thereby fails the third prong of the *Brandenburg* standard.[222] There is no caveat within the statute that provides for the likelihood of someone entering into the United States in violation of the law.[223] As such, the speech identified in Subsection

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[216] 8 U.S.C. § 1324(a)(1)(A)(iv) (emphasis added).

[217] *See id.* (stating that it is illegal to "encourage"); *Brandenburg*, 395 U.S. at 448 (forbidding the state from enacting laws that prohibit advocacy); *see also Williams*, 553 U.S. at 300 (providing "I encourage you to obtain child pornography" as an example of abstract advocacy speech).

[218] *See Brandenburg*, 395 U.S. at 448 (noting that states are not allowed to enact laws that prohibit advocacy).

[219] *See id.* at 447–48 (establishing that it is a violation of the First Amendment to prohibit advocacy unless such advocacy "incites imminent lawless action and is likely to incite or produce such action").

[220] 8 U.S.C. § 1324(a)(1)(A)(iv) (prohibiting encouragement, but not specifying when such encouragement is illegal); *see* Hess v. Indiana, 414 U.S. 105, 108 (1973) (describing the indefinite nature of Hess's statement); *Brandenburg*, 395 U.S. at 447–48 (establishing that it is a violation of the First Amendment to prohibit advocacy unless such advocacy incites "imminent lawless action and is likely to incite or produce such action").

[221] *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (forbidding a person to encourage another to enter the United States, but not specifying *when* such encouragement would be illegal); *Brandenburg*, 395 U.S. at 448 (establishing that it is a violation of the First Amendment to prohibit advocacy unless such advocacy incites "imminent lawless action").

[222] *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (prohibiting a person to "encourage" another to come to the United Sates, but not identifying whether it is necessary for a person to come to the United States); *Brandenburg*, 395 U.S. at 448 (establishing that it is a violation of the First Amendment to prohibit advocacy unless such advocacy "incites imminent lawless action and is likely to incite such action").

[223] *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (making it illegal for a person to "encourage" another to enter the United Sates, but not identifying whether it is necessary for that person to actually come to the United States); *Brandenburg*, 395 U.S. at 447–48 (establishing that it is a violation of the First Amendment to prohibit advocacy unless such advocacy incites "imminent lawless action and is likely to incite such action").

Four does not satisfy the *Brandenburg* standard, and thus is protected by the First Amendment.[224]

B. Subsection Four Is Facially Overbroad

An overbreadth analysis begins with construing the statute.[225] The statute at issue here is not nearly as descriptive as the one that was upheld in *United States v. Williams*.[226] The Court in *Williams* observed multiple factors within the statute, beginning with the scienter requirement.[227] Although Subsection Four also has a scienter requirement, its requirement is distinguishable from the statute in *Williams*, which had scienter of "knowingly" at the beginning of the statute that applied to the rest of the statute.[228] Here, the statute has both a "knowing" *and* "reckless disregard" scienter requirement in the middle of the statute.[229] The statute in *Williams* also contained a bevy of operative words, such as "advertises, promotes, presents, distributes, or solicits," which the Court found to indicate the transactional connotation of the statute.[230] In contrast, Subsection Four only has two operative words—"encourage" and "induce"—both of which, given the different interpretations within the Circuits, are unclear and do not create any such connotation.[231] Furthermore, the Court in *Williams* was able to rely on a clear definition for "sexually explicit conduct," and compare this definition to prior case law.[232] In contrast, Subsection Four does not provide a definition of "encourage,"

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[224] 8 U.S.C. § 1324(a)(1)(A)(iv); *see Brandenburg*, 395 U.S. at 448 (establishing the standard for advocacy speech to not be protected by the First Amendment).

[225] *See Williams*, 553 U.S. at 293 (noting that the first step in an overbreadth analysis is to construe the statute).

[226] *Compare* 8 U.S.C. § 1324(a)(1)(A)(iv) (making it illegal to encourage an alien to come to the United States), *with* 18 U.S.C. § 2252A(a)(3)(B) (2012) (making it illegal to knowingly distribute material displaying a minor engaging in sexually explicit conduct).

[227] *See Williams*, 553 U.S. at 293–97 (identifying various features of the statute).

[228] *Compare* 18 U.S.C. § 2252A(a)(3)(B) (containing the scienter requirement of "knowingly"), *with* 8 U.S.C. § 1324(a)(1)(A)(iv) (containing the scienter of "knowing" and "in reckless disregard of" but only applied to the status of the individual that was being encouraged).

[229] 8 U.S.C. § 1324(a)(1)(A)(iv); *see infra* notes 62–63 and accompanying text (discussing the lower level of intent conveyed by "in reckless disregard").

[230] *Williams*, 553 U.S. at 294.

[231] 8 U.S.C. § 1324(a)(1)(A)(iv); *see Thum*, 749 F.3d at 1147 (distinguishing from *Yoshida* to establish that "encourage" required action beyond escorting someone); *DelRio-Mocci*, 672 F.3d at 248 (adopting *Black's Law Dictionary*'s definition of "encourage"); *Lopez*, 590 F.3d at 1249 (interpreting "encourage" to mean "to help"); *He*, 245 F.3d at 959 (interpreting "encourage" to mean "to help").

[232] *See Williams*, 553 U.S. at 296–97 (identifying the definition provided for "sexually explicitly conduct" and likening it to "sexual conduct" in the statute in *Ferber*).

and Circuit case law indicates that there is not a clear or consistent definition of the word.[233]

Subsection Four also lacks any phrase that could place a limitation on the action it criminalizes, much like the statute in *Stevens*.[234] In *Stevens*, the Court struck down a statute purporting to criminalize depicting animal cruelty because the statute did not require a showing that the conduct actually be cruel, and therefore it lacked boundaries.[235] Subsection Four also places no limitation on the general requirement of "encourage."[236] If Subsection Four could place a limiting factor on "encourage" to require an affirmative act on the part of the encourager, then the statute would not apply as broadly as it does.[237] For instance, if Subsection Four specified that the encouragement needed to be "active," then perhaps this limiting factor would serve to tailor the statute enough to prevent an overbreadth finding.[238] Despite this, there is presently no such limiting factor in Subsection Four, and as such it cannot stand.[239]

After construing the statute, the next question is whether the statute prohibits a substantial amount of protected speech.[240] When a statute prohibits a substantial amount of protected speech, the "chilling effect" on such speech is

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[233] *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (providing no definition for "encourage"); *see also Thum*, 749 F.3d at 1147 (distinguishing from *Yoshida* to establish that "encourage" required action beyond escorting someone); *DelRio-Mocci*., 672 F.3d at 248 (adopting *Black's Law Dictionary*'s definition of "encourage"); *Lopez*, 590 F.3d at 1249 (interpreting "encourage" to mean "to help"); *Yoshida*, 303 F.3d at 1150 (equating "encourage" with "help"); *He*, 245 F.3d at 959 (interpreting "encourage" to mean "to help"). In *Williams*, Justice Stevens' concurring opinion also considered the legislative history as a potential source for a statutory construction. 553 U.S. at 307–08 (Stevens, J., concurring) (discussing the legislative history of a statute that criminalized pandering child pornography). The language of Subsection Four stems from the Immigration Act of 1917, which also established a literacy test as a requirement to enter this country, and was later incorporated into the Immigration and Nationality Act. *See infra* notes 28–45 and accompanying text. Subsection Four would not have been included in the Immigration Reform and Control Act, but for being unceremoniously added back in shortly before its enactment. *See infra* note 58 (discussing how Subsection Four was added back in to IRCA). In sum, the legislative history offers little guidance regarding a potential construction.

[234] 8 U.S.C. § 1324(a)(1)(A)(iv); *see Stevens*, 559 U.S. at 474 (asserting that the requirement that the conduct be cruel would narrow the statute's breadth).

[235] *See Stevens*, 559 U.S. at 474 (noting that the breadth of the statute would be limited if the statute specified that the conduct needed to be cruel).

[236] 8 U.S.C. § 1324(a)(1)(A)(iv).

[237] *See id.* (beginning without any limiting factor on "encourage"); *Stevens*, 559 U.S. at 474 (noting that the breadth of the statute would be limited if the statute specified that the conduct needed to be cruel).

[238] *See DelRio-Mocci*, 672 F.3d at 248 (emphasizing that the common sense meaning of encourage prompts someone to do something they would not otherwise have done (citing *Lopez*, 590 F.3d at 1259 (Barkett, J., dissenting))).

[239] *See* 8 U.S.C. § 1324(a)(1)(A)(iv) (beginning with "encourage" and no further indication that there is any limitation on this aspect).

[240] *See Williams*, 553 U.S. at 297 (noting that after construing the statute, the next step is to determine if the statute prohibits a substantial amount of protected speech).

significant.[241] In its current form, Subsection Four criminalizes certain communications with non-citizen family members, communications related to advocacy for immigrants, and communications between employers and employees.[242] In these scenarios, there is no requirement that the criminalized conduct is imminent, burdening a substantial amount of speech.[243] As such, this "advocacy" speech fails to meet the *Brandenburg* standard and is therefore protected speech.[244]

Subsection Four also "chills" this protected speech by putting a strain on family relationships, which can lead to disengagement from discussions about visiting or staying in the United States.[245] Furthermore, Subsection Four serves to "chill" the speech between advocates and those immigrants coming to the United States.[246] This impacts a wide breadth of people, from those who assist individuals in finding housing in the United States, to those who provide supplies to people crossing the border.[247] Thus, the "chilling" effect

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[241] *See id.* at 293 (identifying the concerning "chilling effect" overly broad statutes can have on protected speech); STONE ET AL., *supra* note 168, at 136 (describing the potential chilling effect that comes from concerns for vague statutes when the First Amendment is involved).

[242] 8 U.S.C. § 1324(a)(1)(A)(iv) (2012); *see, e.g.*, United States v. Henderson, 857 F. Supp. 2d 191, 197 (D. Mass. 2012) (exemplifying an instance when an employer was charged and convicted based on communications with an employee); *see also* Fallon, *supra* note 142, at 859–60, 863 (identifying the overbreadth doctrine under the First Amendment as an exception to *jus tertii*, which allows a defendant to articulate situations where the law would violate the protected speech). An example that the Ninth Circuit found persuasive was a grandmother who asks her grandson to overstay his visa. *Sineneng-Smith*, 910 F.3d at 483–84.

[243] *See* Fallon, *supra* note 142, at 859–60, 863 (identifying the overbreadth doctrine under the First Amendment as an exception to *jus tertii*, which allows a defendant to articulate situations where the law would violate protected speech).

[244] 8 U.S.C. § 1324(a)(1)(A)(iv); *see Brandenburg*, 395 U.S. at 447–48 (establishing that it is a violation of the First Amendment to prohibit advocacy unless such advocacy incites "imminent lawless action and is likely to incite such action").

[245] *See* Fallon, *supra* note 142 at 863 (noting that an exception to *jus tertii* is the overbreadth doctrine, and a defendant can assert the rights of a third-party not present in the court).

[246] *See id.* (describing how the overbreadth doctrine is an exception to *jus tertii*, and thus allows a defendant to assert the rights of a third-party).

[247] *See, e.g.*, Piper Ehlen, HomeBase, Housing and Serving Undocumented Individuals and Families (2017), https://static1.squarespace.com/static/553bd8dfe4b06d949518334e/t/59b1809b46c3c472328b7805/1504805070281/Undocumented+Immigrants+by+Piper+Ehlen.pdf [https://perma.cc/TP9U-D8RU] (providing information regarding how undocumented immigrants can obtain housing); *About No More Deaths*, NO MORE DEATHS · NO MÁS MUERTES, http://forms.nomoredeaths.org/about-no-more-deaths/ [https://perma.cc/QF7B-DMT7] (noting the work that No More Deaths does in the desert to assist immigrants crossing the border from Mexico to the United States); *Ayuda a Mariposas Asegurar un Deposito Para su Propia Casa!*, MARIPOSAS SIN FRONTERAS (June 22, 2017), https://mariposassinfronteras.org/ [https://perma.cc/D5ND-QE5] (discussing the work that Mariposas Sin Fronteras does with LGBTQIJ + immigrants, including finding housing); *Border Water Drop*, BORDER ANGELS, https://www.borderangels.org/desert-water-drops/ [https://perma.cc/432G-ACMZ] (detailing the way that Border Angels leave gallons of water in the desert for immigrants); *Humanitarian Respite Services*, CATH. CHARITIES OF THE RIO GRANDE VALLEY, http://catholiccharitiesrgv.org/Home.aspx [https://perma.cc/5D4B-B4E2] (noting that the Catholic Charities of the Rio Grande Valley provides refuge to immigrants at their

of Subsection Four has the potential to completely remove immigrant advocacy in its entirety.[248]

With respect to employment, the "chilling effect" has very real consequences.[249] Convicted defendants like Lorraine Henderson, who was arrested and found guilty under Subsection Four because she employed and advised an alien not to leave the United States, serve as a signal to people to not communicate with anyone they employ and suspect of being an illegal immigrant.[250] If Henderson had not communicated with her employee at all, she likely would not have been arrested under Subsection Four.[251] As such, allowing the statute to stand could very likely chill communications between an employer and an employee.[252] Given the high potential for Subsection Four to chill protected speech, Subsection Four violates the First Amendment, and it should be declared invalid under the overbreadth doctrine.[253] Both the Ninth Circuit and the Fourth Circuit have applied an overbreadth analysis to Subsection Four, and each reached different conclusions, with the Ninth Circuit finding that Subsection Four is overly broad and unconstitutional, and the Fourth Circuit finding the subsection constitutional.[254] The Supreme Court should resolve these different conclusions and find that Subsection Four is overly broad, and thus unconstitutional.[255]

Respite center); *Social Services*, TAHIRIH JUST. CTR., https://www.tahirih.org/what-we-do/direct-services/social-services/ [https://perma.cc/BV7L-U46U] (describing various social services that Tahirih Justice Center provides to immigrant women and girls fleeing violence); *see also* Fallon, *supra* note 142, at 863 (identifying the overbreadth doctrine under the First Amendment as an exception to *jus tertii*, which allows a defendant to articulate situations where the law would violate the protected speech).

[248] *See Williams*, 553 U.S. at 293 (describing the "chilling effect"); STONE ET AL., *supra* note 168, at 136 (describing the potential chilling effect that comes from concerns for vague statutes when the First Amendment is involved).

[249] *See, e.g.*, *Henderson*, 857 F. Supp. 2d at 197 (describing Henderson's criminal conduct as the discussions she had with the woman who cleaned her house, and the resulting conviction).

[250] *See id.* at 196 (noting how Henderson advised Bitencourt against leaving the country).

[251] *See id.* at 203–04 (describing and agreeing with the government's argument that the advice Henderson provided to Bitencourt could constitute encouragement).

[252] *See* STONE ET AL., *supra* note 168, at 136 (describing the potential chilling effect that comes from concerns for vague statutes when the First Amendment is involved).

[253] 8 U.S.C. § 1324(a)(1)(A)(iv); *see, e.g.*, *Stevens*, 559 U.S. at 474, 481–82 (applying an overbreadth analysis and finding that the statute was invalid under the First Amendment).

[254] *Compare Sineneng-Smith*, 910 F.3d at 485 (concluding that Subsection Four was unconstitutional), *with Tracy*, 456 F. App'x 267, 272 (4th Cir. 2011) (finding that Subsection Four was not substantially overbroad).

[255] *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 4.4, at 243 (10th ed. 2013) (noting that the Supreme Court resolves different opinions between circuit courts in order to bring "uniformity"); REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 322, at 269 (Richard F. Wolfson & Philip B. Kurland eds., 2d ed. 1951) (noting that the Supreme Court should grant certiorari in instances where different courts of appeals reach different answers to the same legal question).

C. Potential Solutions

Should the Supreme Court declare Subsection Four unconstitutional, Congress would have the opportunity to readdress the statute and find a way to make it constitutionally permissible.[256] To avoid another overbreadth challenge to the statute, Congress must provide a replacement word with a clear definition.[257] For instance, as opposed to "encourage" Congress could use "facilitate" or "urge" to capture the idea that an affirmative action is required, and avoid criminalizing protected speech.[258] This stronger language would allow defendants, like Henderson, to be safe from prosecution.[259] Henderson's actions fell within the definition of "encourage," but proving that her actions went so far as to constitute "urging" Bitencourt to reside in the country, or "facilitating" her residence, would not be a viable allegation.[260] Henderson advised Bitencourt against leaving the country, and such advisement would not rise to the level of actively "facilitating" or "urging" Bitencourt to stay.[261]

In the amended statute, Congress should also provide an exception for those aliens to have an express remedy to their seemingly unlawful presence, to ensure that the statute does not infringe upon protected speech.[262] One important aspect of the *Brandenburg* standard is that the advocacy must be for an unlawful action.[263] As such, the exception should distinguish between facilitating and urging people who have immigration violations that can be remedied, and those whose violations cannot be remedied.[264] There are cer-

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[256] *See* Friedman, *supra* note 212 (arguing that Congress's response to the Supreme Court's dissatisfaction with its legislation is to amend and re-enact).

[257] *See Williams*, 553 U.S. at 296–97 (identifying the definition as a factor to consider in construing a statute for the purposes of an overbreadth analysis).

[258] *See Facilitate*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/facilitate [https://perma.cc/75E2-CADG] (defining "facilitate" as "to make easier: to help bring about"); *Urge*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/urge [https://perma.cc/QJA7-ZFA2] (defining "urge" as "to present, advocate, or demand earnestly or pressingly").

[259] *See Henderson*, 857 F. Supp. 2d at 197, 204 (describing Henderson's six-day trial and jury conviction under 8 U.S.C. § 1324(a)(1)(A)(iv)).

[260] *See id.* at 204 (finding that Henderson's actions did constitute "encouragement" but expressing discomfort with the flexibility of the statute).

[261] *See id.* at 196 (describing Henderson's conversation with Bitencourt, advising her not to leave the country).

[262] *See Brandenburg*, 395 U.S. at 447 (establishing the standard); HUDSON, *supra* note 159, § 3.5 (describing the large amount of protection that is given under the *Brandenburg* standard).

[263] *Brandenburg*, 395 U.S. at 447; *see* Schwartz *supra* note 151 (parsing out the *Brandenburg* standard, and determining that it requires "(1) express advocacy of law violation; (2) the advocacy must call for immediate law violation; and (3) the immediate law violation must be likely to occur").

[264] *See* Brief for Amici Curiae, *Sineneng-Smith*, *supra* note 70, at 15 (arguing that 8 U.S.C. § 1324(a)(1)(A)(iv) should be constructed to distinguish between immigration cases that have a remedy and those that do not).

tain violations within immigration law for which there is no remedy, and this crucial lack of remedy erases a path to legal status in the United States.[265] Those who do not have a remedy within the United States would be committing an unlawful action simply by virtue of being present, and a defendant who communicates with such a person about their immigration status would also be inherently guilty of violating Subsection Four.[266] In contrast, if a defendant is urging or facilitating an individual whose actions can be remedied, then they are not necessarily advocating for an unlawful action.[267] Drawing this distinction is less threatening to protected speech because it sharpens the understanding of the unlawful action.[268]

This distinction could potentially allow defendants, like Henderson, some leeway in their expression and speech.[269] Henderson had advised Bitencourt not to leave the country, and she sought immigration advice on behalf of Bitencourt.[270] Though the court indicates that Henderson's inquiry was unsuccessful, that does not necessarily mean that Bitencourt's case was entirely without remedy.[271] If there was an exception for immigrants with a remedy, then Henderson could have potentially avoided her conviction as advising Bitencourt would not have been in violation of the law.[272]

CONCLUSION

In conclusion, Subsection Four should be invalidated under the overbreadth doctrine. Although Subsection Four has a long history within the

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[265] *See id.* at 21 (identifying the instances when there is an unremediable immigration violation). For instance, falsely claiming citizenship is an unremediable violation. 8 U.S.C. § 1227(a)(3)(D); *see* Brief for Amici Curiae, *Sineneng-Smith*, *supra* note 70, at 21 (noting that falsely claiming citizenship is an unremediable violation).

[266] *See* Brief for Amici Curiae, *Sineneng-Smith*, *supra* note 70, at 20–21 (arguing that "in violation of the law" in § 1324(a)(1)(A)(iv) should be interpreted to apply only to unremediable immigration violations).

[267] *See Facilitate*, *supra* note 258 (defining "facilitate" as "to make easier: to help bring about"); *Urge*, *supra* note 258 (defining "urge" as "to present, advocate, or demand earnestly or pressingly"); *see also* Brief for Amici Curiae, *Sineneng-Smith*, *supra* note 70, at 20–21 (describing instances where there is an unremediable immigration solution).

[268] *See Brandenburg*, 395 U.S. at 447 (establishing the standard to determine if speech is protected); Brief for Amici Curiae, *Sineneng-Smith*, *supra* note 70, at 20–21 (identifying instances when an immigrant's case would be unremediable).

[269] *See Henderson*, 857 F. Supp. 2d at 197 (describing Henderson's six-day jury trial and conviction).

[270] *See id.* at 196 (noting how Henderson advised Bitencourt against leaving, and asked a coworker for advice regarding Bitencourt's case).

[271] *See id.* at 196–97 (describing Henderson asking her coworker about Bitencourt, and then her coworker asking a series of questions for Bitencourt to answer, and noting that after providing her co-worker with Bitencourt's answers, the coworker advised Henderson that Bitencourt had no "meaningful prospect of adjusting her status").

[272] *See id.* at 197 (noting Henderson's conviction).

United States, the use of the word "encourage" in the statute has proven problematic as five circuit courts have struggled to define "encourage," and two circuit courts have disagreed regarding its constitutionality. Further, an application of the *Brandenburg* standard reveals that Subsection Four regulates a substantial amount of protected speech, and as such the statute is in violation of the overbreadth doctrine.

The amendments proposed above would allow defendants, like Henderson, to not live in fear of prosecution over hiring someone to clean their house. Also, since Subsection Four can make it illegal for an individual to discuss immigration consequences with members of their own family, and potentially prohibits counseling undocumented aliens, the changes to the statute would eliminate these injustices as well. Henderson's case is unique because while the judge found that her actions could constitute encouragement, she was still entitled to a new trial and the prosecution ultimately dropped the charges against her. Although Henderson was allowed to go free, she lost five years of her life to this criminal charge, conviction, and appeal before the prosecution finally released her. Amending Subsection Four would prevent this unconstitutional injustice from happening again.

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