No. 17-71367

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. Guadalupe MARQUEZ-REYES,

Petitioner,

v.

Merrick B. GARLAND, Attorney General

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals
Agency Case No. A205-490-228

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amici curiae American Civil Liberties Union and American Civil Liberties Union of Washington are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended free speech for more than 100 years, and has appeared both as direct counsel and as *amicus curiae* in numerous First Amendment cases, including *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013); and *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), *vacated*, 140 S. Ct. 1575 (2020). The ACLU also engages in nationwide litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants. The ACLU of Washington is an affiliate of the national ACLU. The questions raised here are of significant concern to the ACLU and its membership.[1]

[1] Pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29-2(a), counsel for *amici curiae* certifies that all parties have consented to the filing of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. No current counsel for a party authored this brief in whole or in part.

INTRODUCTION

The statutory provision at issue in this case, 8 U.S.C. § 1182(a)(6)(E)(i), provides that a noncitizen is deemed inadmissible to the United States if the noncitizen "knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States." Section 1182(a)(6)(E)(i) violates the First Amendment because it punishes constitutionally protected speech. The proper interpretation of this provision is a matter of exceptional importance that affects First Amendment rights more broadly. The panel opinion, by holding that a statute that prohibits "encouraging" unlawful activity is permissible under the First Amendment, will create a chilling effect on constitutionally protected speech, both in the immigration context and beyond. The statute cannot be saved from unconstitutionality by interpreting it, contrary to its plain meaning, as a statute prohibiting aiding and abetting only. Furthermore, the inconsistency in decisions of this Court regarding the constitutionality of a prohibition against "encouraging" unlawful activity will compound the chilling effect, leading to self-censorship, where people subject to Section 1182(a)(6)(E)(i) cannot be sure whether their speech is covered by the statutory language or not. For these reasons, the Court should grant the petition for rehearing and rehearing en banc.

ARGUMENT

I. The interpretation of 8 U.S.C. § 1182(a)(6)(E)(i) is a question of exceptional importance because of its impact on First Amendment rights.

The proper interpretation of 8 U.S.C. § 1182(a)(6)(E)(i) is a matter of exceptional importance because of the statute's impingement on First Amendment rights. Section 1182(a)(6)(E)(i) creates a ground of inadmissibility where the individual "knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law."[2] On its face, the prohibition on "encourag[ing]" unlawful immigration punishes speech that is protected by the First Amendment, including advocacy of unlawful conduct, legal advice, and commentary on the law. This statutory prohibition on "encouragement" is not limited to speech that incites imminent lawless action or speech that is an integral part of criminal conduct, which are both narrowly defined categories of unprotected speech. Accordingly, Section 1182(a)(6)(E)(i), which prohibits a substantial amount of constitutionally protected speech, is overbroad. This Court should grant the petition for rehearing and rehearing en banc given the importance of this case for First Amendment rights.

[2] Petitioner only conceded having "encouraged" a violation of immigration law, and the constitutionality of the other provisions of the statute are therefore not at issue in this case. *See Marquez-Reyes v. Garland*, 36 F.4th 1195, 1200 (9th Cir. 2022).

A. The provision at issue prohibits a substantial amount of speech protected by the First Amendment.

Speech "encouraging" unlawful acts is protected under the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment."). The First Amendment protects not only abstract advocacy of unlawfulness, but even speech that tends to "encourage" or "promote" unlawful activity. *United States v. Rundo*, 990 F.3d 709, 717 (9th Cir. 2021). "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). Accordingly, speech is not outside the First Amendment "simply because it advocates an unlawful act." *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000).

This Court has already construed the term "encourage" as it appears in another, parallel section of Title 8, Section 1324(a)(1)(A)(iv), which sets criminal penalties for encouraging or inducing a noncitizen to enter or reside in the United States in violation of law. In those binding precedents, the Court noted that the amount of constitutionally protected speech potentially swept up by the ordinary meaning of the word "encourage" is staggering, including "everyday statements or conduct that are likely repeated countless times across the country every day." *United States v. Hansen*, 25 F.4th 1103, 1110 (9th Cir. 2022), *cert. filed*, No. 22-179 (Aug. 25, 2022). This Court has defined "encourage" as "to inspire with courage,

spirit, or hope . . . to spur on . . . to give help or patronage to," and has stated that this "definition[] accord[s] with the plain meaning[] of encourage." *Id.* at 1107–08 (citing *United States v. Thum*, 749 F.3d 1143, 1147 (9th Cir. 2014)). "Many commonplace statements and actions could be construed as encouraging an undocumented immigrant to come to or reside in the United States . . . including encouraging an undocumented immigrant to take shelter during a natural disaster, advising . . . about available social services . . . or providing certain legal advice." *Id.* at 1110. The panel's decision in the instant case cannot be reconciled with these binding precedents construing the term "encourage" elsewhere in the Immigration and Nationality Act.

To lose protection under the First Amendment, speech must be linked to unlawful activity in two specific ways. It must either incite imminent lawless action or be an integral part of criminal conduct. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (advocacy can be punished only where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (speech "integral to criminal conduct" must be "so close in time and purpose to a substantive evil as to become part of the ultimate crime itself"). Neither of these categories reasonably encompasses the term "encourage" in Section 1182(a)(6)(E)(i).

Applying this settled law, all of the following examples constitute protected speech, are fairly encompassed by Section 1182(a)(6)(E)(i), and, if uttered by a noncitizen, would render them inadmissible:

- A noncitizen attorney advises someone that they can seek asylum in the United States, regardless of whether they crossed the border without inspection.[3]
- An academic advocates for the abolition of all international borders, and encourages people to ignore the United States' entry restrictions and rules.
- An individual's spouse has previously been deported from the United States for overstaying a visa. Their minor child, a U.S. citizen, is hospitalized with a terminal illness. The individual writes an op-ed in the form of an open letter begging her spouse to return to the United States to help care for their child.
- A noncitizen professor publishes a law review article arguing that asylum seekers who enter the United States without inspection cannot be criminally prosecuted under U.S. or international law, and that they should

[3] The federal government has at times prosecuted people seeking asylum who have crossed the border without inspection, likely rendering such entry "in violation of law" for purposes of Section 1182(a)(6)(E)(i). *See*, *e.g.*, Cong. Rsch. Serv., R45266, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy* 5, 12, 13 (2021), https://crsreports.congress.gov/product/pdf/R/R45266.

not be deterred from coming to the United States by any means and claiming asylum.

None of the above statements would incite imminent violence, nor is any integral to criminal conduct.

The context of the speech restriction at issue here illuminates the importance of maintaining the high bar for unprotected speech: Immigration is a matter of complex law and perennial public debate, and many people, citizens and not, share opinions on what the law should be and how immigrants and visitors to the United States should navigate it. It is difficult to imagine a more effective inhibitor of political speech than a law targeting speech uttered by one side of that debate. In this case, Section 1182(a)(6)(E)(i) targets noncitizens with the threat of inadmissibility and its severe consequences—deportation from the United States—for weighing in on that debate. Section 1182(a)(6)(E)(i)'s breadth creates the risk of punishing and chilling speech at the very center of a matter of immense public concern, and silencing the very people—noncitizens—who could speak from personal experience on the issue.[4]

[4] The First Amendment limits the government's ability to prohibit speech even when the restriction affects noncitizens living in the United States. *See Bridges v. Wixon*, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded aliens residing in this country."); *Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders . . . includ[ing]

The constitutional problem with Section 1182(a)(6)(E)(i)'s prohibition of a substantial amount of protected speech cannot be solved by the panel's narrowing construction. The ordinary meaning of "encourage" in Section 1182(a)(6)(E)(i) does not lend itself to narrow reading as a specialized term of art. "[O]ne would think that if Congress meant '[a different term] . . .' it would have said '[a different term],' not 'encouraged.'" *Marquez-Reyes v. Garland*, 36 F.4th 1195, 1212 (9th Cir. 2022) (Berzon, J., dissenting). It is clear when a legislature intends to write an aiding and abetting provision. *Hansen*, 25 F.4th at 1108 (aiding and abetting provisions in the statute were a textual indicator that "encourage" should have a different statutory meaning); *see also Thum*, 749 F.3d at 1148–49 (outlining the necessary elements for aiding and abetting). But Section 1182(a)(6)(E)(i) separately prohibits "aid[ing]" and "abet[ing]" immigration violations, leading the ordinary person to consider the prohibition on "encourage[ment]" to encompass speech that goes beyond aiding and abetting. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (cleaned up). The term "encouraged" has an ordinary and extremely broad meaning, and there are no defined safeguards or legal limitations as to how much speech the term can cover.

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those protected by the First . . . Amendment[].''); *cf. Bello-Reyes v. Gaynor*, 985 F.3d 696 (9th Cir. 2021) (considering the First Amendment rights of noncitizens in a different context).

Furthermore, the panel's definition of "encourage[]" in this case is inconsistent with the decisions in *Hansen* and *Rundo*, where this Court held that different federal statutory provisions that prohibit encouraging specific unlawful activity violate the First Amendment because the prohibition on mere "encourage[ment]" covers protected speech. *See Hansen*, 25 F.4th at 1110; *Rundo*, 990 F.3d at 717. This inconsistency is particularly problematic because the *Hansen* court considered an analog provision in the Immigration and Nationality Act that makes it a criminal violation to "encourage[] or induce[]" immigration violations. *See Hansen*, 25 F.4th at 1110.

Consistency in this area of law is of critical importance because of the First Amendment implications of ambiguity. There is a risk that someone subject to the prohibitions of Section 1182(a)(6)(E)(i) will refrain from *more* speech than necessary, because while the panel in this case held that "encourage[]" is a term of art meaning aiding and abetting, the *Hansen* and *Rundo* courts interpreted similar prohibitions on encouragement of unlawful activity to cover protected speech. The individual who is unsure of which construction of the word "encourage[]" will apply in their immigration case, or how the contradictory interpretations may be resolved in the future, will more likely engage in self-censorship. "When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone," because the "threat of sanctions may deter . . . almost as

potently as the actual application of sanctions." *Keyshian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (cleaned up) (quoting *NAACP v. Button*, 371 U.S. 415, 433–34 (1963)).

B. Speech that merely "encourages" unlawful conduct is not unprotected "incitement" under the First Amendment.

Unprotected incitement requires imminent criminal action resulting from the speech in question. *Brandenburg*, 395 U.S. at 447. Additionally, the Supreme Court has repeatedly emphasized the centrality of violence to the incitement standard. The conduct listed in Section 1182(a)(6)(E)(i)—entering or trying to enter the United States in violation of law—is not the kind of violent lawlessness described in *Brandenburg* and in decades of subsequent case law on incitement. From its first articulation of the incitement doctrine, the Supreme Court has linked it explicitly to speech that "tend[s] to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). In announcing the modern incitement standard, the Supreme Court continued its focus on violence: "[T]he mere abstract teaching of the moral propriety . . . for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448 (citation omitted).[5] But the speech criminalized by Section 1182(a)(6)(E)(i) does not relate to such violent activity.

[5] *See also Hess v. Indiana*, 414 U.S. 105, 109 (1973) (state could not punish speech "not intended to produce . . . imminent disorder . . . on the ground that [it] had a

The Ninth Circuit has similarly limited the incitement doctrine to speech advocating violent, riotous activity. In *United States v. Poocha*, 259 F.3d 1077 (9th Cir. 2001), this Court addressed a conviction under the federal disorderly conduct regulation, 36 C.F.R. § 2.34(a)(2), which "closely track[ed], in part, the words of . . . *Chaplinsky*." *Poocha*, 259 F.3d at 1080 (citing *Chaplinsky*, 315 U.S. at 572). It held that the defendant's statement "was neither intended to nor likely to incite the crowd at the scene to riot" and was therefore protected speech. *Id*. at 1082 (citing *Brandenburg*, 395 U.S. at 447).[6] The opinion, following the Supreme Court's precedent, repeatedly emphasized that the object of unprotected incitement was "breach of the peace," "riot," and "violence." *Id*. at 1080, 1082.

Prior to *Poocha*, one Ninth Circuit opinion suggested that Congress could punish incitement of tax evasion—a non-violent crime. *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (citing *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978)). However, the defendant in *Freeman* did not appear to raise constitutional concerns with the government's

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tendency to lead to violence") (cleaned up); *Claiborne*, 458 U.S. at 928 (questioning whether speech "had been followed by acts of violence").

[6] Dissenting in *Poocha*, Judge Tashima wrote that he would have affirmed the defendant's conviction for disorderly conduct on the ground that the trial record supported a finding that his speech and expressive conduct "at that time and place, was likely to incite an immediate breach of the peace." *Poocha*, 259 F.3d at 1085 (Tashima, J., dissenting in part). Thus, the *Poocha* panel was unanimous on the nature of the incitement standard.

incitement theory, instead arguing that he did nothing more than advocate an abstract idea; thus, the Court focused not on the *Brandenburg* test, but rather on an independent category of unprotected speech—"speech integral to criminal conduct," discussed in Part I.C below. *Freeman* is therefore not a case applying the incitement doctrine. *Poocha*, however, is. Moreover, *Poocha* is a more recent statement of the Ninth Circuit's understanding of incitement doctrine and, consistent with decades of Supreme Court case law, firmly establishes that "incitement" means incitement of violence or a breach of the peace.

But Section 1182(a)(6)(E)(i)'s language applies to speech well beyond the narrow category of incitement. Even in cases where Section 1182(a)(6)(E)(i) applies to speech encouraging criminal violations of immigration law, such as entry or re-entry into the United States that can be criminally prosecuted, *see Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 746 (9th Cir. 2007) (discussing the inadmissibility of an individual who agreed to pay his brother's smuggling fee across the border), the provision prohibits speech far beyond incitement to *imminent, violent* action—the standard required for such speech to lie outside the protection of the First Amendment. Therefore, even as to encouraging criminal immigration violations under 8 U.S.C.§§ 1325 and 1326, Section 1182(a)(6)(E)(i) does not satisfy the standard for incitement because it applies to speech encouraging an

individual not to commit violence, but merely to enter or try to enter the United States unlawfully.

Additionally, the incitement doctrine does not apply to speech penalized by Section 1182(a)(6)(E)(i) because the subjective nature of encouragement falls outside the "imminence" requirement under *Brandenburg*. 395 U.S. at 447. Encouraging someone to enter the United States does not equate to that person imminently entering the United States unlawfully.

C. Speech that "encourages" unlawful acts does not fall into the "speech integral to criminal conduct" exception.

Section 1182(a)(6)(E)(i) is not limited to prohibiting speech integral to criminal conduct. The prohibition on "encourag[ing]" immigration violations does not require proximity between the speech and the ensuing criminal activity *in every case*. Speech that encourages someone to unlawfully enter or try to enter the United States is not "integral," in either a temporal or causal sense, to someone unlawfully entering the United States. It is clear from the above-named examples, *see supra* Part I.A, that instances of speech penalized by this provision do not constitute speech that is integral to effectuating the act of illegally entering the United States.

Courts frequently invoke the "speech integral to criminal conduct" doctrine to permit prosecution of unprotected speech in criminal cases of stalking, enticement of a minor, and harassment, where the speech itself is part of the substantive crime. In *United States v. Meek*, 366 F.3d 705 (9th Cir. 2004), for example, this Court held

that a statute criminalizing the inducement of minors to engage in criminal sexual activity did not violate the First Amendment, as "speech is merely the vehicle through which a pedophile ensnares the victim." *Id*. at 721. Similarly, in *Freeman*, the defendant did not solely "urge[] the improper filing of returns" but also personally showed how to file a false tax return by "demonstrating how to report wages, then cross out the deduction line for alimony and insert again the amount of the wages, showing them as 'nontaxable receipts.'" 761 F.2d at 551. Freeman's "words" were also "quite proximate to the crime of filing false returns" and "likely to produce an imminent criminal act." *Id.* at 552.

By contrast, the speech at issue in Section 1182(a)(6)(E)(i) is not inherently part of a criminal act. Not only can the speech at issue occur without any connection or proximity to imminent criminal activity—as in the case of an op-ed or law review article—there is also no statutory requirement that the speech be coupled with other affirmative conduct to advance criminal activity. Indeed, any other affirmative conduct accompanying the speech would likely trigger Section 1182(a)(6)(E)(i)'s prohibition on "aid[ing]" or "abet[ting]" or constitute other conduct already clearly prohibited. Section 1182(a)(6)(E)(i) therefore is overbroad because it covers speech that is not integral to the commission of criminal acts.

CONCLUSION

Section 1182(a)(6)(E)(i) is overbroad in violation of the First Amendment because it covers a substantial amount of constitutionally protected speech. For the foregoing reasons, this Court should grant the petition for rehearing and rehearing en banc.

October 6, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) & Ninth Circuit Rule 29-2, I certify that:

1. This brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(2) because it contains 3,355 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, 14-point Times New Roman font.

Dated this October 6, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2022, I electronically filed the foregoing Brief of *Amici Curiae* American Civil Liberties Union and American Civil Liberties Union of Washington with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this October 6, 2022.

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