



Ninth Circuit Holds that Criminal Penalties for Encouraging or Inducing Illegal Immigration Violate First Amendment

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The Immigration and Nationality Act (INA) governs the admission, removal, and presence of non-U.S. nationals (*aliens*, as the term is used [in the INA](#)) in the United States. Although [it is generally not a crime](#) for a removable alien to be present in the United States, Congress has established [criminal sanctions for certain conduct](#) that undermines immigration rules. Under [8 U.S.C. § 1324](#), it is a crime for an individual to smuggle, transport, harbor, or conceal unlawfully present aliens. One provision of this statute—[8 U.S.C. § 1324\(a\)\(1\)\(A\)\(iv\)](#) (subsection (iv)—makes it a crime for any individual to “encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of the law.” The INA does not define the terms “encourage” or “induce,” which has led to some debate over the type of conduct encompassed by subsection (iv). In particular, courts have grappled with the question of whether these terms should be [broadly construed](#) in accordance with their ordinary meaning, or whether Congress intended the terms to prohibit a narrower range of conduct. A narrower construction of the statute would serve as a prohibition against speech integral to criminal conduct—criminal solicitation or aiding and abetting. A broader interpretation of subsection (iv) would potentially criminalize protected speech, raising the question of whether the statute violates the Free Speech Clause of the First Amendment of the U.S. Constitution. This Legal Sidebar discusses the recent decision of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) in [United States v. Hansen](#), in which the court held that the criminal offense of encouraging or inducing illegal immigration under subsection (iv) violates the First Amendment.

Free Speech Under the First Amendment

The Free Speech Clause of the [First Amendment](#) provides that the government “shall make no law . . . abridging the freedom of speech.” However, the right to free speech “[is not absolute](#).” Although laws regulating speech based on content (i.e., the subject matter of the speech) are [presumptively unconstitutional](#), they may pass judicial scrutiny if Congress advances a sufficient governmental interest for the regulation. In addition, the Supreme Court has carved out several [well-defined, narrow, and limited](#) categories of so-called “[unprotected](#)” speech that the government may regulate on the basis of its

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content. These categories of unprotected speech include, for example, [obscenity](#), [defamation](#), and [incitement](#). The government also has more leeway to regulate speech [integral to criminal conduct](#). The Supreme Court has used the exception for speech integral to criminal conduct to uphold, for example, criminal statutes prohibiting the [distribution and possession of child pornography](#) and [soliciting crime](#). The Court has articulated a difference between speech that [incites imminent lawless action](#) or that is integral to criminal conduct, on the one hand, and speech that the Court refers to as “[abstract advocacy](#)”—or speech that merely advocates for illegality—on the other. For example, the Court reasoned that the statement, “[I encourage you to obtain child pornography](#),” is abstract advocacy protected by the First Amendment, while a [specific offer](#) to provide someone with child pornography is unprotected speech integral to criminal conduct.

Unprotected speech is [not, however](#), “[invisible](#)” to the First Amendment, which still places some limits on how Congress can regulate in these areas. When criminalizing unprotected speech, a law may still be held invalid if a court finds it to be overbroad. In a facial overbreadth challenge, a court considers the universal application of the law rather than the application of the law specifically to the defendant’s conduct. An [overbreadth challenge](#) may prevail in one of two ways: (1) when a party establishes that there is “no set of circumstances under which [the statute] would be valid or that the statute lacks any plainly legitimate sweep” and (2) where “a substantial number of [the statute’s] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” The Supreme Court has emphasized that to be considered overbroad, the statute must prohibit a [substantial](#) amount of protected speech relative to the statute’s “[plainly legitimate sweep](#).” The overbreadth doctrine, although applied [sparingly](#), is used to prevent the “[chilling](#)” of protected speech, or to address the concern that people may refrain from exercising their right to constitutionally protected expression out of fear of [criminal sanctions](#).

United States v. Hansen

In *United States v. Hansen*, the defendant had operated a program that purported to assist unlawfully present aliens to become U.S. citizens through adult adoption, despite the fact that it is not possible to become a U.S. citizen through adult adoption. Along with convictions for mail fraud and wire fraud, a federal jury convicted the defendant of two counts of encouraging or inducing illegal immigration in violation of subsection (iv). In his appeal, the defendant [argued](#) that subsection (iv) is unconstitutional under the First Amendment because it is (1) facially overbroad, (2) overbroad as applied to the defendant, (3) void for vagueness, and (4) a content- and viewpoint-based criminal prohibition of speech that cannot survive strict scrutiny.

In a decision issued on February 10, 2022, the Ninth Circuit [reversed](#) the defendant’s convictions for encouraging or inducing illegal immigration. Looking to the statutory construction of subsection (iv) in the broader context of 8 U.S.C. § 1324(a)(1)(A), the Ninth Circuit panel [interpreted](#) subsection (iv) “as prohibiting someone from (1) inspiring, helping, persuading, or influencing, (2) through speech or conduct, (3) one or more specified aliens (4) to come to or reside in the United States in violation of civil or criminal law.”

The court then looked to whether subsection (iv) “criminalizes [a substantial amount of protected expressive activity](#).” The panel agreed with the government that various acts fell within the provision’s “legitimate sweep,” including procuring and providing fraudulent documents and identification information to unlawfully present aliens, assisting in unlawful entry, misleadingly luring aliens into the country for unlawful work, and smuggling activities. The court specified that the “core” of subsection (iv)’s legitimate sweep is relatively narrow and seemingly falls within the scope of the other subsections of 8 U.S.C. § 1324(a)(1)(A).

Looking at protected speech [in relation to subsection \(iv\)’s plainly legitimate sweep](#), the court observed that subsection (iv) includes a substantial amount of protected speech as well, reasoning that

“commonplace statements and actions could be construed as encouraging or inducing an undocumented immigrant to come to or reside in the United States.” The court noted that knowingly telling an unlawfully present alien, “I encourage you to reside in the United States,” would fall within subsection (iv)’s scope despite the fact that the statement is, according to the court, protected speech under the First Amendment. The Ninth Circuit then listed other examples of commonplace speech that would fall within its scope: encouraging an alien to take shelter during a natural disaster; providing information on accessing social services; or telling a tourist that she is unlikely to face serious consequences if she overstays her visa. Because subsection (iv) potentially criminalizes a substantial amount of protected speech in relation to the narrow category of plainly legitimate criminal conduct it encompasses, the court [invalidated](#) subsection (iv) as overbroad in violation of the First Amendment.

Considerations for Congress

The Ninth Circuit’s decision invalidating subsection (iv) in *Hansen* follows on the heels of decisions by two courts of appeals and the [Supreme Court addressing the provision](#). In an unpublished 2011 decision, the Fourth Circuit [held](#) that subsection (iv) is not overbroad because it does not prohibit a substantial amount of protected speech. In 2018, [a different Ninth Circuit panel](#) held in another case that subsection (iv) is unconstitutionally overbroad in violation of the First Amendment because it criminalizes a substantial amount of protected expression in contrast to the statute’s narrow legitimate sweep. [The Supreme Court](#) reversed the Ninth Circuit’s judgment on procedural grounds, declining to address whether subsection (iv) unconstitutionally encompasses protected speech. Accordingly, whether subsection (iv) is unconstitutionally overbroad in criminalizing protected speech remains a question undecided by the Court.

In the absence of controlling guidance from the Supreme Court, *Hansen* is the only precedential decision of a federal court of appeals on the constitutionality of subsection (iv). The Ninth Circuit’s decision that subsection (iv)’s prohibition against “encouraging” or “inducing” illegal immigration is overbroad in violation of the First Amendment is binding within the states over which the Ninth Circuit has jurisdiction. It remains to be seen how other courts of appeals, and ultimately, the Supreme Court, will rule on the constitutionality of subsection (iv). Further, *Hansen* may inform the broader development of First Amendment jurisprudence. The Ninth Circuit’s analysis of the language of subsection (iv) suggests that there may be a fine line between unprotected criminal speech that Congress may lawfully prohibit and protected advocacy that is beyond the reach of criminal statutes. *Hansen* may provide guidance to Congress on how to navigate this divide.

Congress has [broad power](#) to establish rules for the admission, removal, and presence of non-U.S. nationals. These rules are buttressed by a multifaceted enforcement scheme. Congress may opt to use its legislative authority to amend or further clarify the circumstances when an alleged perpetrator unlawfully encourages or induces an alien to come to, enter, or reside in the United States.

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