Cahill

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Supreme Court Narrowly Interprets Statute That Criminalizes Encouraging or Inducing Foreign Individuals to Enter the U.S. Illegally While Upholding First Amendment Overbreadth Doctrine

On June 23, 2023, in *United States* v. *Hansen*, the United States Supreme Court rejected a First Amendment overbreadth challenge to 8 U.S.C. §1324(a)(1)(A)(iv) ("clause (iv)"), which forbids "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States" if one knows or recklessly disregards the fact that such entry would violate the law.[1] In so holding, the Court interpreted the scope of the criminal statute narrowly — concluding that the terms "encourage" and "induce" were used as terms of art in the statute and referred solely to criminal solicitation and facilitation. As a result, the Court held that, when read narrowly, the statute does not prohibit a substantial amount of constitutionally-protected speech and was not legally overbroad. While the Court did not eliminate the First Amendment overbreadth doctrine altogether — as some commentators had predicted[2] — the Court's decision, and Justice Thomas's concurrence in particular, demonstrate the continued erosion of the overbreadth doctrine and signal that it may be on its final legs.

I. Factual and Procedural Background

Helaman Hansen promised hundreds of noncitizens that they could inherit U.S. citizenship if adopted by a U.S. citizen through a program he called "adult adoption." There exists no such path to citizenship, and Hansen accumulated almost $2 million from the 450-plus noncitizens that were duped into participating. The United States charged Hansen with mail and wire fraud and violating clause (iv).

[1] No. 22-179, 2023 WL 4138994 (U.S. June 23, 2023).

[2] *See, e.g.*, Amanda Shanor, *Justices divided on the constitutionality of the federal law that bans "encouraging" immigrants to remain unlawfully in the United States*, SCOTUSBLOG (Mar. 28, 2023), https://www.scotusblog.com/2023/03/justices-divided-on-the-constitutionality-of-the-federal-law-that-bans-encouraging-immigrants-to-remain-unlawfully-in-the-united-states/ ("The newly reconfigured Court appears less strongly speech-protective than its recent predecessors — and perhaps interested in making big moves to constrain or even do away with the overbreadth doctrine.").

On December 18, 2017, following a jury trial in the United States District Court for the Eastern District of California, Hansen was convicted of violating clause (iv).[3] Post-conviction, Hansen moved to dismiss the government's clause (iv) charge on First Amendment overbreadth grounds. The district court denied Hansen's motion,[4] and Hansen appealed to the United States Court of Appeals for the Ninth Circuit.

During the pendency of Hansen's appeal, the Ninth Circuit decided *United States* v. *Sineneng-Smith*.[5] In that case, the Ninth Circuit *sua sponte* raised the issue of clause (iv)'s overbreadth and held, in December 2018, that clause (iv) was an unconstitutionally overbroad restriction of speech.[6] The Supreme Court vacated that judgment in May 2020,[7] finding that the Ninth Circuit had abused its discretion by "inject[ing] the overbreadth issue into the appeal and appointing *amici* to argue it."[8] According to the Supreme Court, the Ninth Circuit had "departed so drastically from the principle of party presentation" (the notion that courts rely on the parties to formulate the issues in a case) as to "constitute an abuse of discretion."[9] In December 2020, on remand, the Ninth Circuit affirmed Sineng-Smith's clause (iv) convictions.[10]

Hansen's appeal, therefore, presented the Ninth Circuit with another opportunity to consider the constitutionality of clause (iv) under the First Amendment overbreadth doctrine. In deciding that issue, the Ninth Circuit focused on whether clause (iv) narrowly covers only the solicitation and facilitation of illegal conduct or, as was Hansen's view, more broadly covers constitutionally-protected "statements or conduct that are likely repeated countless times across the country every day."[11] In February 2022, the Ninth Circuit sided with Hansen, applying "the overbreadth doctrine so that legitimate speech relating to immigration law" — such as advising an undocumented immigrant about social services — would not be "chilled and foreclosed."[12] The Ninth Circuit denied the government's petition for rehearing *en banc*, and the Supreme Court granted *certiorari* in December 2022.[13]

II. The Supreme Court's Decision

In a 7-2 decision authored by Justice Barrett, the Supreme Court reversed the Ninth Circuit. The majority held that clause (iv) — when interpreted correctly to reach no further than the purposeful solicitation and facilitation of specific acts known to violate federal law — does not prohibit enough constitutionally-protected speech to warrant facial invalidation under the First Amendment overbreadth doctrine. Under the overbreadth doctrine, a law will be held facially invalid if the challenger demonstrates that the statute "'prohibits a substantial amount of protected

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[3] *United States* v. *Hansen*, 2017 WL 7037306, at *1 (E.D. Cal. Dec. 18, 2017).

[4] *See* Transcript of Proceeding Re: Motion to Dismiss Counts 17 & 18, Judgment and Sentencing at 8, *United States* v. *Hansen*, No. 16-cr-24, ECF 200 (E.D. Cal. Feb. 8, 2018).

[5] 910 F.3d 461 (9th Cir. 2018), *vacated and remanded sub nom.*, *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020).

[6] *Id.* at 485.

[7] *Sineneng-Smith*, 140 S. Ct. 1575.

[8] *Hansen*, 2023 WL 4138994, at *4.

[9] *Sineneng-Smith*, 140 S. Ct. at 1578.

[10] *United States* v. *Sineneng-Smith*, 982 F.3d 766, 770 (9th Cir. 2020).

[11] *United States* v. *Hansen*, 25 F.4th 1103, 1110 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 555 (2022), *and rev'd and remanded*, 2023 WL 4138994 (U.S. June 23, 2023).

[12] *Id.* at 1110-11.

[13] *Hansen*, 143 S. Ct. 555.

speech' relative to its 'plainly legitimate sweep.'"[14] Upon such a showing, "society's interest in free expression outweighs its interest in the statute's lawful applications."[15] According to the majority, because clause (iv) uses the phrase "encourages or induces" in its "specialized, criminal-law sense — that is, as incorporating common-law liability for solicitation and facilitation" — the statute does not prohibit too much First Amendment-protected speech.[16]

The Court made this determination based on both the statute's legislative history and how those words have been employed in similar contexts. The Court explained that clause (iv)'s "template" was an 1885 law that prohibited "'knowingly assisting, *encouraging* or soliciting' immigration under a contract to perform labor."[17] The 1885 law situated "encouraging" next to "soliciting" and "assisting," thus "reinforc[ing] that Congress gave the word 'encouraging' its narrower criminal-law meaning."[18] And in 1917, Congress added "induce" — which had been used recently by Congress in a 1909 catchall prohibition on criminal facilitation — to the statute's string of verbs, further evidencing that "encourages or induces" was intended to be used solely in its specialized, criminal-law sense.[19]

The Court further noted, citing criminal law treatises, *Black's Law Dictionary*, and federal and state criminal codes, that "encourage" and "induce" are the most common verbs to denote solicitation and facilitation.[20] The Court thus concluded that using "encourage" and "induce" to describe solicitation and facilitation is "both longstanding and pervasive."[21] Clause (iv)'s use of the phrase "encourages or induces" carries a specialized meaning, because those words are "criminal-law terms [] used in a criminal-law statute," which "in and of itself [] is a good clue that it takes its criminal law meaning."[22] That inference is "even stronger" in the context of clause (iv), the Court explained, because the clause prohibits "'encouraging' and 'inducing' a *violation of law*."[23] The Ninth Circuit, in reaching the contrary conclusion, "stacked the deck in favor of ordinary meaning," rather than giving the "specialized meaning a fair shake."[24]

The Court emphasized that while the government's interpretation of clause (iv) may not be the only one, it should be adopted under the canon of constitutional avoidance. According to the majority, Hansen, in arguing for the most expansive reading of the clause, in effect applied a canon of "constitutional collision," but when "legislation and the Constitution brush up against each other," the Supreme Court's "task is to seek harmony, not manufacture conflict."[25]

Having determined the proper interpretation of clause (iv)'s "encouraging or inducing" language, and thus the proper scope for the overbreadth inquiry, the Court compared the statute's valid applications against those that would impermissibly burden speech. The Court found that clause (iv)'s "plainly legitimate sweep is extensive"

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[14] *Hansen*, 2023 WL 4138994, at *5 (quoting *United States* v. *Williams*, 553 U.S. 285, 292 (2008)).

[15] *Id.*

[16] *See id.* at *7.

[17] *Id.* at *8 (emphasis in original) (quoting Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333 (1885 Act)).

[18] *Id.* (citing *Dubin* v. *United States*, 143 S. Ct. 1557 (2023)).

[19] *Id.* (citing Act of Mar. 4, 1909, § 332, 35 Stat. 1152).

[20] *Id.* at *6.

[21] *Id.* at *7.

[22] *Id.*

[23] *Id.* (emphasis in original).

[24] *Id.*

[25] *Id.* at *10.

because it "encompasses a great deal of nonexpressive conduct—which does not implicate the First Amendment at all, such as smuggling noncitizens into the country, providing counterfeit immigration documents, and issuing fraudulent Social Security numbers to noncitizens.[26]

The Court emphasized that, on "the other side of the ledger," Hansen failed to identify a single prosecution for ostensibly protected speech in the past 70 years.[27] Although Hansen argued that clause (iv) would punish activity, such as the author of an op-ed criticizing the immigration system, he did not "filter [his examples] through the elements of solicitation or facilitation."[28] And to the extent that clause (iv) "reaches *any* speech, it stretches no further than speech integral to unlawful conduct," and it "has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[29]

The Court therefore concluded that clause (iv) is not constitutionally overbroad because — when correctly interpreted to reach no further than the purposeful solicitation and facilitation of specific acts known to violate federal law — it does not "'prohibi[t] a substantial amount of protected speech'" relative to its "'plainly legitimate sweep.'"[30] The Court explained that it was unwilling to "throw out too much of the good [of clause (iv)] based on a speculative shot at the bad."[31] According to the majority, that "is not the stuff of overbreadth" and "as-applied challenges can take it from here."[32]

Justice Thomas, while joining the majority in full, filed a concurrence in which he emphasized "how far afield the facial overbreadth doctrine has carried the Judiciary from its constitutional role."[33] According to Justice Thomas, the overbreadth doctrine "lacks any basis in the text or history of the First Amendment" and "distorts the judicial role" by transforming federal courts into "roving commissions assigned to pass judgment on the validity of the Nation's laws."[34] Justice Thomas likened the judiciary's use of the overbreadth doctrine to the now-extinct New York Council of Revision, established in 1777, which included New York Supreme Court judges and wielded the power to revise and veto legislation.[35] Justice Thomas explained that the Council was abolished because it "naturally became politicized through its intrusive involvement in the legislative process."[36] When "courts apply the facial overbreadth doctrine," Justice Thomas explained, "they function in a manner strikingly similar to the federal council of revision that

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[26] *Id.*

[27] *Id.* at *11.

[28] *Id.*

[29] *Id.* (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

[30] *Id.* (quoting *Williams*, 553 U.S. at 292).

[31] *Id.* at *12.

[32] *Id.*

[33] *Id.* (Thomas, J., concurring).

[34] *Id.* (Thomas, J., concurring) (quoting *Sineneng-Smith*, 140 S. Ct. at 1583 (Thomas, J., concurring); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610–611 (1973)).

[35] *Id.* at *13 (Thomas, J., concurring).

[36] *Id.* at *14 (Thomas, J., concurring).

the Framers rejected."[37] Finally, Justice Thomas encouraged the Court, in "an appropriate case," to "carefully reconsider" the doctrine.[38]

Justice Jackson, joined by Justice Sotomayor, dissented. The dissent argued that the majority had "depart[ed] from ordinary principles of statutory interpretation," and that when the phrase "encouraging or inducing" is "read literally," the "encouragement provision prohibits so much protected speech that it appears to qualify as overbroad under" Supreme Court precedent.[39] The dissent also disagreed with the majority's use of the canon of constitutional avoidance, stating that in the context of an overbreadth challenge, "countervailing constitutional concerns — namely, that constitutionally[-]protected speech will be chilled — must be considered."[40] The dissent also criticized the majority's overbreadth doctrine analysis — specifically, the majority's emphasis on Hansen's inability to point to any prior unconstitutional prosecutions under clause (iv) — because the "number of people who have not exercised their right to speak out of fear of prosecution is, quite frankly, unknowable."[41]

III. Implications

Many First Amendment scholars and associations had argued that clause (iv) should be struck down as overbroad because they believed that, on its face, it criminalizes a significant amount of constitutionally-protected speech.[42] The Reporters Committee for Freedom of the Press, for instance, argued that clause (iv) will continue to "chill lawful and valuable newsgathering at the southern border."[43] A group of press organizations filed an *amicus* brief that argued that clause (iv) "can easily be used" to "intimidate and silence any journalist who covers immigration matters."[44] The Court did not find these arguments persuasive, stating that, when "filtered through the traditional elements of solicitation or facilitation" (*e.g.*, "the requirement" that "a defendant *intend* to bring about a specific result"), clause (iv) would not punish such speech or conduct.[45]

Ultimately, although *Hansen* did not reject the overbreadth doctrine, the majority opinion, which called the overbreadth doctrine "unusual" for allowing litigants to "assert the constitutional rights of third parties,"[46] and Justice Thomas's concurring opinion, which explicitly called for a "reconsider[ation]" of the doctrine,[47] together indicate that

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[37] *Id.* (Thomas, J., concurring). The federal council of revision was a proposed "replicat[ion]" of the New York Council of Revision that the Federal Convention ultimately "voted against" adopting.

[38] *Id.* at *15 (Thomas, J., concurring).

[39] *Id.* at *15–16 (Jackson, J., dissenting).

[40] *Id.* at *23 (Jackson, J., dissenting).

[41] *Id.* at *24 (Jackson, J., dissenting).

[42] *See* Brief of The Reporters Committee for Freedom of the Press as *Amicus Curiae* Supporting Respondent, *Hansen*, (U.S. Feb. 23, 2023) (No. 22-179) (discussing clause (iv)'s role in the maintenance of a speech-chilling border watchlist); Brief of The First Amendment Coalition, Freedom of the Press Foundation, National Association of Hispanic Journalists, National Press Photographers Association, and News Leaders Association as *Amici Curiae* Supporting Respondent, *id.* (U.S. Mar. 8, 2023) (stating that clause (iv) could be used to prosecute certain journalists reporting on immigration); Brief of Professor Eugene Volokh as *Amicus Curiae* Supporting Respondent, *id.* (U.S. Feb. 2023) (stating that clause (iv) criminalizes speech that solicits or facilitates a civil, rather than criminal, violation, and such speech is protected under the First Amendment).

[43] Brief of The Reporters Committee for Freedom of the Press as *Amicus Curiae* Supporting Respondent, *Hansen*, at 2.

[44] Brief of The First Amendment Coalition, Freedom of the Press Foundation, National Association of Hispanic Journalists, National Press Photographers Association, and News Leaders Association as *Amici Curiae* Supporting Respondent, at 15–16.

[45] *Hansen*, 2023 WL 4138994, at *11 (emphasis in original) (rejecting argument that "clause (iv) would punish the author of an op-ed criticizing the immigration system").

[46] *Id.* at *5.

[47] *Id.* at *15 (Thomas, J., concurring).

the doctrine is generally disfavored by the current Court. *Hansen* demonstrates that while the overbreadth doctrine lives on for now, that may not be the case for long.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; Jason Rozbruch (Associate) at 212.701.3750 or jrozbruch@cahill.com; or Christina Lee (Associate) at 212.701.3266 or clee@cahill.com; or email publications@cahill.com.