No. 22-582

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE FELIPE HERNANDEZ-CALVILLO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Respondents ultimately do not dispute that the petition for a writ of certiorari in this case should be held pending this Court's decision in *United States* v. *Hansen*, cert. granted, No. 22-179 (oral argument scheduled for Mar. 27, 2023), and then disposed of as appropriate in light of that decision. See Br. in Opp. 2, 21. The Tenth Circuit's decision here relied extensively on the Ninth Circuit's decision in *Hansen*, as well as that court's earlier decision in *United States* v. *Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), vacated, 140 S. Ct. 1575 (2020), to hold that the federal criminal prohibition against encouraging or inducing illegal immigration, 8 U.S.C. 1324(a)(1)(A)(iv), is "substantially overbroad" under the First Amendment and therefore invalid on its face. Pet. App. 2a; see Pet. 6-7. If this Court reverses, vacates, or otherwise disagrees with the Ninth Circuit's reasoning in *Hansen*, the Court should grant this

petition, vacate the Tenth Circuit's judgment, and remand for further proceedings. The two overbreadth holdings rise and fall together.

Respondents invoke (Br. in Opp. 17-20) a variety of rationales to suggest that the judgment below might be left undisturbed or affirmed on an alternative basis even if this Court disagrees with the Ninth Circuit's reasoning in *Hansen*. But the only ground on which the Tenth Circuit affirmed the district court's dismissal of the count charging respondents with conspiring to violate Section 1324(a)(1)(A)(iv), after the jury found respondents guilty of that offense, was the court of appeals' erroneous conclusion that the statutory provision "is substantially overbroad under the First Amendment." Pet. App. 30a; see *id.* at 5a (describing the "sole issue before" the court as "a facial constitutional challenge to § 1324(a)(1)(A)(iv)"). In reaching that conclusion, the Tenth Circuit repeatedly relied—at the urging of respondents themselves—on the Ninth Circuit's reasoning in *Hansen* and *Sineneng-Smith*. See Resp. C.A. Br. 18, 19, 20, 21, 25, 33, 34 (citing the Ninth Circuit's vacated opinion in *Sineneng-Smith*); 2/14/22 Resp. C.A. Rule 28(j) Ltr. 1 (arguing that the Ninth Circuit's then-recent decision in *Hansen* "supports [respondents'] position in these appeals").

1. Respondents do not identify any meaningful difference between the reasoning of the Tenth Circuit here and that of the Ninth Circuit in *Hansen* and *Sineneng-Smith*. Compare Br. in Opp. 10-16, with *United States* v. *Hansen*, 25 F.4th 1103, 1106-1111 (9th Cir. 2022), cert. granted, No. 22-179 (oral argument scheduled for Mar. 27, 2023). Respondents contend (Br. in Opp. 20) that the question presented in this case differs from that in *Hansen* because the verdict there included a

finding that Hansen encouraged or induced unlawful immigration "for the purpose of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i), which the Tenth Circuit stated is "not an element of [respondents'] crimes," Pet. App. 21a n.19.

It is true that respondents were found guilty of conspiring to violate Section 1324(a)(1)(A)(iv), and that the conspiracy offense does not require proof of any financial-gain purpose. See 8 U.S.C. 1324(a)(1)(A)(v)(I) (prohibiting "engag[ing] in any conspiracy to commit any of the preceding acts"); 8 U.S.C. 1324(a)(1)(B)(i) (providing for a maximum penalty of ten years "in the case of a violation of subparagraph * * * (v)(I)"). But that distinction does not place the decision below outside the scope of the issues the Court is considering in *Hansen*. In both *Hansen* and this case, the courts of appeals found Section 1324(a)(1)(A)(iv) itself to be facially overbroad. Pet. App. 2a; *Hansen*, 25 F.4th at 1105. If this Court disagrees, the appropriate course in this case will be to grant, vacate, and remand for further consideration in light of this Court's reasoning in *Hansen*. And that would remain true even if this Court's disposition of *Hansen* focuses on the financial-gain requirement. The lower courts would then be better suited to consider in the first instance how any such decision bears on the particular convictions at issue here.*

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* Although not required as a statutory matter, the indictment in this case charged respondents with conspiring to violate Section 1324(a)(1)(A)(iv) "for the purpose of commercial advantage and private financial gain." Indictment 7. The jury was instructed that the conspiracy offense required proof that the "essential objective" of the conspiracy was to encourage noncitizens to reside in the United States unlawfully "for commercial advantage or private financial gain." D. Ct. Doc. 159, at 24 (Aug. 28, 2017).

2. Respondents' forfeiture arguments (Br. in Opp. 17-20) are similarly misplaced in this Court. The Tenth Circuit declined to address respondents' contention that the government had "waived" any of its arguments concerning the proper interpretation of Section 1324(a)(1)(A)(iv). Pet. App. 9a n.9. And the court proceeded to hold Section 1324(a)(1)(A)(iv) facially overbroad, thereby precluding any future Tenth Circuit prosecution under that provision. If this Court grants, vacates, and remands for reconsideration here in light of the Court's decision in *Hansen*, respondents may raise whatever forfeiture or waiver arguments they have properly preserved as to this particular case. But given that the Court has already granted certiorari on the question presented in *Hansen*, respondents identify no sound basis for this Court to consider those arguments in the first instance. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (stating that this Court is generally "a court of review, not of first view").

In any event, respondents' forfeiture-based arguments for affirmance are unavailing. Respondents contend (Br. in Opp. 19) that the government "never advanced its 'facilitation' and 'solicitation' arguments to the district court." But respondents first raised a facial overbreadth challenge to Section 1324(a)(1)(A)(iv) after the jury's verdict, at which point the government took the position that the statute is not overbroad and urged the district court to reject the Ninth Circuit's reasoning to the contrary in *Sineneng-Smith*. D. Ct. Doc. 249, at 4-10 (Apr. 19, 2019). The government's more refined and expansive appellate arguments in support of that position were properly before the Tenth Circuit under that court's rules for the preservation of arguments. Gov't C.A. Reply Br. 23-25. Moreover, the Tenth

Circuit held that Section 1324(a)(1)(A)(iv) is facially invalid in all its potential applications on overbreadth grounds. See Pet. App. 21a-30a. No case-specific forfeiture or waiver theory could support affirming that sweeping ruling, whose premise is that the statute would be unconstitutional *as applied to others* even though its application to respondents undisputedly presents no First Amendment concerns.

3. Respondents assert (Br. in Opp. 19) that the government's "litigation practices" "in fact sweep[] as broadly as the Ninth and Tenth Circuits held." But respondents do not identify a single example of a prosecution for constitutionally protected speech in the long history of Section 1324(a)(1)(A)(iv) or its predecessors. The prosecution in *United States* v. *Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012) (see Br. in Opp. 16, 19), is not such an example. In that case, the district court granted the defendant's post-trial motion for a new trial based on the court's own perceived instructional errors. See *id.* at 194. In reciting the facts "as the jury could have found them in returning a guilty verdict," *ibid.*, the court noted evidence that the defendant—who was a supervisor at the Department of Homeland Security—had told her noncitizen housekeeper, "if you leave they won't let you back." *Id.* at 196. But the court did not suggest that the government had "relied on" that statement as itself allegedly violative of the inducement statute. Br. in Opp. 19 (quoting Pet. App. 28a); cf. *Henderson*, 857 F. Supp. 2d at 194-197 (reciting additional evidence). And the government ultimately sought and received leave to dismiss the case rather than retry it. See Order at 3-9, *United States* v. *Henderson*, No. 09-cr-10028 (D. Mass. June 27, 2013).

The other cases that respondents identify (Br. in Opp. 17-18) also did not concern protected speech or, in two of those three instances, even involve Section 1324(a)(1)(A)(iv). See *United States* v. *Gonzalez-Rodriguez*, 301 Fed. Appx. 874, 875-877 (11th Cir. 2008) (per curiam) (affirming conviction for conspiring to encourage or induce unlawful immigration where the defendant was a crew member on a "go-fast vessel" caught attempting to smuggle 31 noncitizens into U.S. waters), cert. denied, 556 U.S. 1195 (2009); *United States* v. *Solis-Campozano*, 312 F.3d 164, 166-168 (5th Cir. 2002) (affirming Sentencing Guidelines enhancement predicated on prior conviction for unlawfully transporting noncitizens, in violation of 8 U.S.C. 1324(a)(1)(A)(ii)), cert. denied, 538 U.S. 991 (2003); *United States* v. *Martinez-Ruiz*, 204 F.3d 1116, 1999 WL 1328142, at *1 (5th Cir. 1999) (Tbl.) (per curiam) (similar), cert. denied, 529 U.S. 1080 (2000). Respondents' out-of-context quotations from the government's filings in those cases do not demonstrate that the government has ever endorsed the maximally speech-restrictive reading of Section 1324(a)(1)(A)(iv) embraced by the Ninth Circuit in *Sineneng-Smith* and *Hansen* and by the Tenth Circuit here. That construction of the statute is unsound and should not survive this Court's scrutiny.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's decision in *United States* v. *Hansen*, cert. granted, No. 22-179 (oral argument scheduled

for Mar. 27, 2023), and then be disposed of as appropriate in light of that decision.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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