

SOCIAL JUSTICE PRO BONO

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The United States Statute that attempted to make it a federal crime to “encourage” or “induce” noncitizens to come into or reside in the United States was found to be unconstitutional by the U.S. Court of Appeals. The Tenth Circuit held that the Statute violated the First Amendment, since it prohibited “vast amounts of protected speech uttered daily.” The Court stated that the government was not deprived of any “critical enforcement tool,” because the conduct the unconstitutional Statute sought to prohibit was already made criminal in other statutes.

Tenth Circuit Finds Immigration Law Unconstitutional On Free Speech Grounds



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The Tenth Circuit struck down a federal statute that made it a crime to encourage noncitizens to enter or live in the United States, finding that the statute was unconstitutional because it violated the First Amendment's free speech protections.

Background

Defendants Jose Hernandez-Calvillo and Mauro Papalotzi were charged with violating [8 U.S.C. § 1324\(a\)\(1\)\(A\)\(iv\)](#). *United States v. Hernandez-Calvillo*, 39 F.4th 1297, 1300 (10th Cir. 2022). The statute makes it a crime when a person "encourages or induces 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." *Id.* at 1300-01.

The case arose from Defendants' role in an alleged scheme to employ noncitizens in the drywall-installation business. *Id.* at 1300. Torres Drywall was a "financial intermediary" between construction companies and subcontracted construction crews primarily composed of noncitizens. *Id.* "In a nutshell, the companies hired the crews for drywall projects and paid for the work by writing checks to Torres Drywall, whose operators in turn cashed the checks for the leaders of each crew (in exchange for a cut of the wages) so the leaders could pay their crew members." *Id.* Defendants each led construction crews that were paid by Torres Drywall. *Id.*

[Defendants were convicted in federal district court of violating § 1324\(a\)\(1\)\(A\)\(iv\)](#), which is referred to below as subsection (A)(iv). *Id.* at 1301. Defendants moved to dismiss, contending that subsection (a)(iv) was facially unconstitutional on First Amendment overbreadth grounds because it proscribed a substantial amount of protected speech. *Id.* The federal district court agreed, granted Defendants' motion, vacated the convictions, and dismissed the indictment. *Id.* The government appealed. *Id.*

Tenth Circuit Holds That Subsection (A)(iv) Is Unconstitutional

The Tenth Circuit began its analysis by considering the meaning of "encourage" and "induce" as those words are used in subsection (A)(iv). The Tenth Circuit found that "[t]he ordinary meanings of *encourage* and *induce* encompass both conduct and speech, and nothing in the statutory language or surrounding context suggests that Congress gave those terms a narrower meaning akin to the criminal-law concepts of facilitation and solicitation." *Id.* at 1307.

The Tenth Circuit next found that subsection (A)(iv) proscribes at least some protected speech. For example, the statute prevents a person from encouraging or inducing a noncitizen to reside in the United States even though such residence is not a crime. *Id.* at 1308-09. This finding next required the Tenth Circuit to undertake an overbreadth analysis. *Id.* at 1309.

A statute is facially overbroad only if it criminalizes a *substantial amount* of protected speech. *Id.* That number must be substantial “not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.” *Id.* To assess whether subsection (A)(iv) was overbroad, the Tenth Circuit compared its “legitimate and illegitimate applications.” *Id.* In making this overbreadth comparison, the court considered whether there is a realistic danger that subsection (A)(iv) will significantly compromise recognized First Amendment protections. *Id.*

The Tenth Circuit found that subsection (A)(iv)’s illegitimate applications substantially exceeded its legitimate applications because subsection (A)(iv) proscribed vast amounts of protected speech. “The statute makes it a crime, for example, to tell a family member who has overstayed his or her visa, ‘I encourage you to reside in the United States’; to ‘tell[] a tourist that she is unlikely to face serious consequences if she overstays her tourist visa’; or to inform a noncitizen ‘about available social services.’ And an immigration attorney could face prosecution for ‘providing certain legal advice to [noncitizens].’ Although impossible to

quantify with exact precision, these ‘commonplace statements’ are ‘likely repeated countless times across the country every day.’” *Id.* at 1311.

The Tenth Circuit found that “the comparison of subsection (A)(iv)’s constitutional and unconstitutional applications is one-sided” toward unconstitutional applications. *Id.* at 1313. “[A]s much as there are some legitimate applications of subsection (A)(iv), they pale in comparison to the illegitimate ones. The statute’s plain language is ‘susceptible of regular application to protected expression,’ reaching vast amounts of protected speech uttered daily.” *Id.* Moreover, the statute mostly proscribes conduct already made criminal by other statutes, so invalidating subsection (A)(iv) would not deprive the government of a critical enforcement tool. *Id.* For these reasons, the Tenth Circuit held that subsection (A)(iv) is substantially overbroad under the First Amendment, and affirmed the dismissal of the indictment against Defendants. *Id.*

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