First Amendment — Freedom of Speech — Criminal Solicitation — United States v. Sineneng-Smith

Among the "historic and traditional"[1] categories of unprotected speech — "the prevention and punishment of which have never been thought to raise any Constitutional problem"[2] — is criminal solicitation.[3] While the Court has attempted to draw clear and workable definitions for other forms of low-value speech, such as obscenity,[4] defamation,[5] fighting words,[6] and incitement,[7] it has not paid similar attention to clarifying the boundaries of criminal solicitation. Last Term, in *United States v. Sineneng-Smith*,[8] the Supreme Court heard argument on whether 8 U.S.C. § 1324(a)(1)(A)(iv) — which criminalizes "encourag[ing] or induc[ing]" a noncitizen or nonnational "to come to, enter, or reside in the United States, knowing or in reckless disregard" of the illegality of doing so[9] — was unconstitutionally overbroad.[10] The Court ultimately decided *Sineneng-Smith* on procedural grounds, holding that the Ninth Circuit abused its discretion in appointing three amici to brief and argue legal issues not raised by the parties.[11] By punting on the merits issue, the Court missed an opportunity to clarify for the first time the point at which protected abstract advocacy becomes criminal solicitation, instead leaving a patchwork regime of conflicting and flawed lower court tests unresolved.

Between 2001 and 2008, Evelyn Sineneng-Smith signed retainer agreements to help unlawfully employed individuals apply for labor certifications, which allowed certain eligible noncitizens to eventually become lawful permanent residents.[12] To obtain a green card through this process, an applicant had to be physically present in the United States on December 21, 2000, and apply before April 30, 2001.[13] Fully aware of these requirements, Sineneng-Smith continued to offer her

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[1] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment).

[2] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[3] *See* United States v. Stevens, 559 U.S. 460, 468–69 (2010) (including "speech integral to criminal conduct," *id.* at 468, within these categories). Criminal solicitation is widely recognized as a subcategory of speech integral to criminal conduct. *See* United States v. Williams, 553 U.S. 285, 298 (2008); United States v. White, 610 F.3d 956, 960 (7th Cir. 2010) (per curiam); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1051 (2016).

[4] Miller v. California, 413 U.S. 15, 23–24 (1973).

[5] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[6] *Chaplinsky*, 315 U.S. at 572.

[7] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[8] 140 S. Ct. 1575 (2020).

[9] 8 U.S.C. § 1324(a)(1)(A)(iv). Section 1324 imposes an enhanced penalty for those who violate the statute for financial gain. *Id.* § 1324(a)(1)(B)(i).

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

[11] *Id.*

[12] *Id.*; *see also* 8 U.S.C. §§ 1182(a)(5)(A), 1255(i)(1)(B)(ii).

[13] *Sineneng-Smith*, 140 S. Ct. at 1578; *see also* 8 U.S.C. § 1255(i)(1)(B)–(C).

services to new, ineligible clients, making more than $3.3 million in the process.[14]

The government charged Sineneng-Smith with ten counts, including three counts of violating subsection (iv) and three counts of mail fraud.[15] In a motion to dismiss, Sineneng-Smith challenged the immigration counts.[16] First, she argued that she did not "encourage" undocumented individuals because her conduct did not constitute "fraud against the United States."[17] The district court rejected this interpretation, reasoning that defrauding clients by promising a path to permanent residency was "plainly powerful encouragement."[18] Second, the court rejected Sineneng-Smith's argument that the statute was impermissibly vague in violation of the First Amendment.[19] An "ordinary person," the court reasoned, could have understood subsection (iv) to prohibit deceiving undocumented individuals by guaranteeing them an impossible path to permanent residency.[20] Sineneng-Smith's motion to dismiss the immigration counts was denied.[21]

Over the course of a twelve-day trial, Sineneng-Smith challenged the remaining immigration and mail fraud counts in court.[22] Though a jury found her guilty of all six counts, Sineneng-Smith moved for a judgment of acquittal, arguing that the evidence did not support the verdicts[23] and raising, "almost verbatim," the same arguments as in her motion to dismiss the immigration counts.[24] Granting and denying her motion in part, the court convicted Sineneng-Smith of two counts each of mail fraud and violating subsection (iv) and, again, rejected her First Amendment arguments as they pertained to the latter.[25] Sineneng-Smith appealed.

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

[15] United States v. Sineneng-Smith, 910 F.3d 461, 468 (9th Cir. 2018).

[16] Order Denying Motion to Dismiss Counts One Through Three, Nine, Ten, and the Forfeiture Allegations of the Superseding Indictment at 1, United States v. Sineneng-Smith, No. CR-10-00414 (N.D. Cal. Oct. 12, 2011).

[17] *Id.* at 4.

[18] *Id.* at 5. The court also rejected the argument that encouragement requires either helping noncitizens obtain benefits to which they are not entitled, *id.* at 4, or an affirmative act, *id.* at 5.

[19] *Id.* at 5.

[20] *Id.* at 5–6.

[21] *Id.* at 6.

[22] Order Granting-in-Part and Denying-in-Part Defendant Evelyn Sineneng-Smith's Motion for Acquittal and Denying Defendant's Motion for a New Trial at 3, United States v. Sineneng-Smith, No. CR-10-00414 (N.D. Cal. Dec. 23, 2013). Sineneng-Smith's other unrelated counts were dismissed before trial. *See* Notice of Dismissal and Order at 2, United States v. Sineneng-Smith, No. CR-10-00414 (N.D. Cal. Mar. 18, 2013).

[23] United States v. Sineneng-Smith, 910 F.3d 461, 468 (9th Cir. 2018).

[24] Order Granting-in-Part and Denying-in-Part Defendant Evelyn Sineneng-Smith's Motion for Acquittal and Denying Defendant's Motion for a New Trial at 18, United States v. Sineneng-Smith, No. CR-10-00414 (N.D. Cal. Dec. 23, 2013).

[25] *Id.* at 10–11, 17–18.

On appeal, Sineneng-Smith made the same arguments as in her motions to dismiss and for judgment of acquittal.[26] After a first set of oral arguments, the Ninth Circuit appointed three amici to answer three questions: whether subsection (iv) (1) was overbroad, (2) was void for vagueness, or (3) implicitly contained a mens rea requirement.[27] The parties were allowed, but "not required," to file supplemental briefs.[28] The case was reheard and, in oral arguments, the amici were given twenty minutes, while Sineneng-Smith was given ten.[29]

The Ninth Circuit affirmed Sineneng-Smith's mail fraud convictions but reversed her convictions under subsection (iv).[30] Writing for the unanimous panel, Judge Tashima[31] found subsection (iv) unconstitutionally overbroad.[32] He began by interpreting subsection (iv) and, relying on its language and context, concluded that its plain meaning clearly criminalized not only conduct but also speech.[33] Not all speech receives First Amendment protection, but the panel found that the speech criminalized by subsection (iv) fell outside the traditional categories of unprotected speech.[34] It did not constitute incitement, in the court's view, because subsection (iv) did not require a risk of an imminent violation of immigration law.[35] Subsection (iv) also was not an aiding and abetting statute — a subcategory of speech integral to criminal conduct — because it did not "include[] the words aiding and abetting" and did not require "the commission of a crime by another" or that the defendant "assisted or participated" in the underlying offense.[36] Instead, there was a real — not just hypothetical — danger that the statute would "significantly compromise" many types of protected speech,[37] such as a grandmother encouraging her grandchild to overstay a visa,[38] general political advocacy,[39] and other "every-day discussions in this country where

[26] *Sineneng-Smith*, 910 F.3d at 469.

[27] Order at 1–2, United States v. Sineneng-Smith, No. 10-cr-00414 (9th Cir. Sept. 18, 2017).

[28] *Id.* at 2.

[29] *Sineneng-Smith*, 140 S. Ct. at 1581.

[30] *Sineneng-Smith*, 910 F.3d at 485.

[31] Judge Tashima was joined by Judges Berzon and Hurwitz.

[32] *Sineneng-Smith*, 910 F.3d at 471. The Ninth Circuit did not reach the other two questions briefed by amici. *Sineneng-Smith*, 140 S. Ct. at 1581.

[33] *Sineneng-Smith*, 910 F.3d at 479.

[34] *Id.* at 479–80, 482. While unprotected speech includes, but is not limited to, "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct," the Ninth Circuit considered only incitement and speech integral to criminal conduct. *Id.* at 479–80.

[35] *Id.* at 480 (citing Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam)).

[36] *Id.* at 482.

[37] *Id.* at 483 (quoting Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984)).

[38] *Id.*

[39] *Id.* at 484 ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011))).

citizens live side-by-side with non-citizens."[40] In other words, because the statute's only reasonable interpretation infringed on and chilled a substantial amount of protected speech, the panel concluded that the statute was unconstitutionally overbroad.[41] The government sought certiorari.

The Supreme Court vacated the judgment and remanded the case.[42] Writing for the unanimous Court, Justice Ginsburg chastised the Ninth Circuit for veering far from the principle of party presentation, which assumes that parties are in the best position to advocate for their own interests.[43] Courts thus must act as "neutral arbiter[s]" of the issues presented and the arguments raised by parties and cannot — except in certain exceptional circumstances[44] — reframe cases as they would like.[45] The Court explained that by striking down subsection (iv) for being overbroad, the Ninth Circuit relied on a theory that not only was contrary to the parties' but also should not be "casually employed."[46] This "radical transformation"[47] of the case constituted an abuse of discretion.[48]

Justice Thomas concurred.[49] Though he agreed that the Ninth Circuit abused its discretion, he argued that the circuit court's decision, more fundamentally, exposed the overbreadth doctrine's flaws.[50] First, it was developed in the twentieth century and has no grounding in the First Amendment's text or history.[51] Instead, it has been justified using policy and value-based rationales, such as the public good or the need to give "delicate and vulnerable" First Amendment rights the "breathing space to survive."[52] Second, the doctrine relaxes the usual requirements for a statute to be facially invalidated, allowing courts to deem an act unconstitutional even if it "can be validly applied in numerous circumstances."[53] Justice Thomas argued that this lower standard is inconsistent with judicial restraint, leads to "premature" and "unnecessary"

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[40] *Id.* at 483.

[41] *Id.* at 485.

[42] *Sineneng-Smith*, 140 S. Ct. at 1582.

[43] *Id.* at 1579.

[44] *Id.* at 1581. In an addendum, the Court conceded that there are limited situations where courts can call for supplemental briefing or appoint amici. *Id.* at 1582–83. The Court has asked for supplemental briefing when considering whether a particular controversy is appropriate for review, determining whether a question presented can be narrowed, or clarifying an issue or argument raised. *Id.* at 1582. It has appointed amici when the party that prevailed in a lower court has refused to defend the decision or when the Court has needed to decide whether it has jurisdiction over the issue presented. *Id.* at 1582–83.

[45] *Id.* at 1579 (quoting Greenlaw v. United States, 554 U.S. 237, 243 (2008)).

[46] *Id.* at 1581 (quoting United States v. Williams, 553 U.S. 285, 293 (2008)).

[47] *Id.* at 1582.

[48] *Id.* at 1578.

[49] *Id.* at 1583 (Thomas, J., concurring).

[50] *Id.*

[51] *Id.* (citing Thornhill v. Alabama, 310 U.S. 88, 101–05 (1940)).

[52] *Id.* at 1584 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

[53] *Id.* at 1585.

decisions that rely on hypothetical fact patterns not immediately before the Court,[54] and is used inconsistently — usually when "preferred rights are at stake."[55] Last, overbreadth is in tension with the principles behind standing.[56] Because standing has "roots in Article III's case-or-controversy requirement," standing doctrine traditionally maintains that an individual cannot assert another party's rights or interests.[57] In contrast, an overbreadth challenge, by definition, requires a party to adjudicate the rights of others whose actions could theoretically fall within a statute's scope.[58] According to Justice Thomas, overbreadth is "the handiwork of judges" and requires reconsideration.[59]

The protection of abstract advocacy is at the core of the First Amendment tradition.[60] To minimize the suppression of valuable speech, the Court has long committed to trying to draw "well-defined and narrowly limited" categorical exceptions to the First Amendment's speech protections.[61] However, when faced with cases that implicate criminal solicitation, the Court has simply made determinations regarding whether specific speech falls within the exception with no accompanying explanation as to why.[62] *Sineneng-Smith* offered the Court a chance to clarify the "important distinction"[63] between advocacy and solicitation — an opportunity it wasted. As a result, lower courts, which have adopted their own conflicting and flawed tests, remain without guidance, creating an incoherent legal landscape that threatens a wide range of federal statutes and chills important advocacy.

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[54] *Id.* at 1585–86 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008)).

[55] *Id.* at 1586.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1587.

[59] *Id.* at 1588.

[60] *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam); Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

[61] United States v. Stevens, 559 U.S. 460, 468–69 (2010) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)). The Court's unwillingness to coalesce around a single definition of obscenity until *Miller v. California*, 413 U.S. 15 (1973), and the resulting confusion offers a good example of how important clear categories are for consistent First Amendment law. *See* Adler v. Pomerleau, 313 F. Supp. 277, 284 (D. Md. 1970) (lamenting that the court did not know what definition of obscenity to use because "members of the Supreme Court have written 55 separate opinions in 13 cases on the subject of obscenity in the 10 years prior to 1968 and have not been able to agree on what it is or how to deal with it"); *see also* Nina Totenberg, *Behind the Marble, Beneath the Robes*, N.Y. TIMES (Mar. 16, 1975), https://nyti.ms/1iJorvy [http://perma.cc/4EGD-6GX4] (explaining that at one point the Justices even set up a theater in the basement of the Supreme Court to watch explicit movies and determine, on a case-by-case basis, whether they were obscene).

[62] *See, e.g.*, United States v. Williams, 553 U.S. 285, 298–99 (2008); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[63] *Williams*, 553 U.S. at 298.

The Court's reasons for disposing of *Sineneng-Smith* without reaching the merits were unconvincing. The issue on appeal was whether subsection (iv) was unconstitutionally overbroad.[64] Because the Court would have had to decide whether the speech fell within a First Amendment exception,[65] it was presented with the opportunity to clarify when advocacy becomes solicitation. Instead, it relied on the party presentation principle to remand the case without addressing the merits. But it is unclear that the Ninth Circuit's actions violated this principle or that reversal was required even if they did.[66] In his concurrence, Justice Thomas noted that overbreadth "shares a close relationship" with vagueness.[67] This assertion seems inconsistent with the Court's claim that overbreadth is so distinct from vagueness — an issue Sineneng-Smith raised herself[68] — that the Ninth Circuit's choice to decide the case on overbreadth grounds constituted an abuse of discretion.[69] More strikingly, the Court conceded that it sometimes deviates from the party presentation principle,[70] making its exclusive reliance on it all the more unconvincing. Last Term — just over a month before *Sineneng-Smith* was decided — the Court granted certiorari on the question of whether *Ramos v. Louisiana*[71] applies retroactively.[72] Neither party had mentioned retroactivity in its briefs,[73] and the issue could not have been brought up in lower courts. "[T]he question was . . . interjected into the case for the first time by an appellate forum" — the exact conduct the *Sineneng-Smith* Court repudiated.[74]

Because the Court has yet to define criminal solicitation, lower courts have had to fashion their own tests. Although there is confusion and disagreement among them,[75] three approaches have emerged, all of which are

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

[65] *See* United States v. Sineneng-Smith, 910 F.3d 461, 471 (9th Cir. 2018).

[66] Sineneng-Smith's lawyers will undoubtedly raise the overbreadth challenge upon remand. If the Ninth Circuit again holds that subsection (iv) is overbroad, the Court will be faced with the same issue. *See* 28 U.S.C. § 2101(a).

[67] *Sineneng-Smith*, 140 S. Ct. at 1585 (Thomas, J., concurring); *see also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 873 (1970).

[68] *Sineneng-Smith*, 140 S. Ct. at 1581.

[69] *Id.* at 1581–82; *id.* at 1583 (Thomas, J., concurring).

[70] *Id.* at 1582–83 (majority opinion). The addendum was limited to cases decided in the last five years, *id.* at 1582, conveniently omitting *Citizens United v. FEC*, 558 U.S. 310 (2010), in which the Court asked for supplemental briefing on whether it should overrule a previous decision, *see id.* at 322.

[71] 140 S. Ct. 1390 (2020).

[72] Edwards v. Vannoy, 140 S. Ct. 2737, 2737–38 (2020).

[73] *See generally* Petition for Writ of Certiorari, *Edwards*, 140 S. Ct. 2737 (No. 19-5807); Respondent's Brief in Opposition, *Edwards*, 140 S. Ct. 2737 (No. 19-5807).

[74] *Sineneng-Smith*, 140 S. Ct. at 1582.

[75] In *Sineneng-Smith*, the Court acknowledged that "'pervasive disagreement' in the lower courts" is another reason to deviate from the party presentation principle. *Id.* (quoting Johnson v. United States, 135 S. Ct. 2551, 2560 (2015)); *see also* Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 447 (2009) (explaining that when there is a circuit conflict that the Court has granted

flawed. Some courts, like the Seventh Circuit, focus only on a speaker's intent.[76] It does not matter whether a listener is likely to listen and follow through.[77] As long as a speaker intends that somebody will hear and carry out the crime, the speech is punishable.[78] On one hand, to focus on intent makes sense because criminal solicitation is an inchoate crime,[79] and a state's interest in deterring bad conduct can be satisfied only when speakers know their speech could be criminalized.[80] In fact, the Court has implied that, for speech to constitute solicitation, a speaker must, at the very least, have the specific intent to induce a listener to commit a crime.[81]

On the other hand, to focus only on intent is to criminalize speakers for the words they utter rather than for the likely consequences of their words. This approach treats solicitation inconsistently with the First Amendment's other exceptions, such as incitement,[82] fighting words,[83] or true threats,[84] which require that further action is, at the very least, likely to occur. Because the government cannot suppress speech on the basis that it is "offensive or disagreeable,"[85] it has long been understood that a state's interest is in deterring the harmful consequences of speech — not the speech itself.[86] An intent-only approach implies the opposite, risking significant chilling effects. Provocative or inflammatory speakers could be silenced even if their words ran no risk of crime or violence, and individuals could be punished for the indirect and potentially attenuated consequences of their speech, an idea that is "foreign

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certiorari on and that has already been briefed and argued, "prudential concerns" favor deciding the case on its merits and resolving the split).

[76] *See* United States v. White, 610 F.3d 956, 960 (7th Cir. 2010) (per curiam).

[77] *See id.* It also does not matter whether a specific listener is being addressed. *Id.*

[78] *See id.* at 961; *see also* United States v. Ulibarri, 115 F. Supp. 3d 1308, 1334–35 (D.N.M. 2015).

[79] *White*, 610 F.3d at 960. Requiring specific intent aligns solicitation with other inchoate crimes. *See* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. LEGIS. 1, 8 (1989).

[80] *See* Rogers v. United States, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring) (explaining that a statute criminalizing threats will deter only speakers who intend to threaten).

[81] *See* United States v. Williams, 553 U.S. 285, 298 (2008) (explaining that solicitation is a subcategory of speech "that is intended to induce or commence illegal activities"). Because juries and judges cannot see inside defendants' heads, specific intent may be reframed as whether a reasonable person could have interpreted the relevant speech to be soliciting a crime. *Cf.* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1074–75 (9th Cir. 2002) (applying such a test in the context of true threats).

[82] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (explaining that a state can regulate advocacy only when it is "likely to incite or produce" imminent lawless action).

[83] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) ("The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." (quoting State v. Chaplinsky, 18 A.2d 754, 762 (N.H. 1941))).

[84] Bridges v. California, 314 U.S. 252, 263 (1941) ("[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.").

[85] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[86] *Cf.* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (recognizing a state interest in compensating victims for harm but not in suppressing speech that society may find offensive).

to the First Amendment."[87] A definition of solicitation independent of listeners' potential responses, therefore, creates an exception that is uncabined and imposes "no limit to the State's censorial power."[88]

Recognizing that focusing only on intent is inadequate, some courts, like the Ninth Circuit, have required both intent and speech that are "so close in time and purpose to a substantive evil as to become part of the ultimate crime itself."[89] This approach is circular and fails to draw lines at sufficiently granular levels. Solicitation is commonly recognized as a subcategory of speech integral to criminal conduct.[90] The Ninth Circuit's approach thus tautologically defines solicitation by restating the name of the broader category. In doing so, it fails to distinguish solicitation from other subcategories such as conspiracy, incitement, fighting words, or threats, all of which are First Amendment exceptions due to their crucial role in the ultimate bad conduct.[91] The unsustainability of not developing more specific tests for each subcategory was on display in *Sineneng-Smith*, in which the Ninth Circuit concluded that subsection (iv) was overbroad in part because it did not mirror the language of typical solicitation or aiding and abetting statutes.[92] By resorting to reasoning by analogy, the court assumed that the statutes used for comparison were constitutional, when, in fact, the Ninth Circuit has not provided the tools to make such a determination. This approach thus invites courts to rely on analogy in ways that are disconnected from First Amendment principles[93] and offers little clarity about how solicitation should independently be defined.

Many state courts take a third approach, equating criminal solicitation to incitement.[94] A California Court of Appeal, for example, has rejected

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[87] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 580 (2001) (Thomas, J., concurring in part and concurring in the judgment); *see also* Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 627 (1961); *cf.* Schenck v. United States, 249 U.S. 47, 52 (1919) (noting that whether speech constitutes "a clear and present danger" is a question of "proximity and degree").

[88] *Lorillard Tobacco Co.*, 533 U.S. at 580 (Thomas, J., concurring in part and concurring in the judgment).

[89] United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985).

[90] *See supra* note 3. The category "speech integral to criminal conduct" is somewhat misleading, since this exception also seems to apply in situations where a civil infraction is committed. *See, e.g.*, Rumsfeld v. FAIR, 547 U.S. 47, 62 (2006); *see also* Volokh, *supra* note 3, at 983 n.1.

[91] *See* United States v. Williams, 553 U.S. 285, 298 (2008).

[92] United States v. Sineneng-Smith, 910 F.3d 461, 480 n.9, 481–82 (9th Cir. 2018).

[93] The Ninth Circuit treated solicitation as a subcategory distinct from aiding and abetting but did not explain why from a First Amendment perspective. The court differentiated aiding and abetting on the basis that it requires that an illegal act ultimately be committed. *Id.* at 482. But this requirement is inconsistent with other First Amendment exceptions, such as incitement, fighting words, or true threats, which require only that a subsequent crime is likely, not inevitable. *See* cases cited *supra* notes 82–84. To mandate that a crime must be completed for speech to be unprotected defeats the purpose of carving out these exceptions in the first place: to preempt the ultimate criminal conduct.

[94] *See, e.g.*, State v. Davis, 272 S.E.2d 721, 722 (Ga. 1980); Podracky v. Commonwealth, 662

the idea that a speaker's intent should be considered and has treated criminal solicitation and incitement as the same exception to abstract advocacy.[95] This approach has been squarely rejected by lower federal courts[96] and implicitly rejected by the Supreme Court, which lists solicitation and incitement as separate categories of unprotected speech.[97] Under the California court's approach, speech is unprotected solicitation only when it triggers the risk of an imminent crime.[98] This imminence requirement significantly cabins the reach of the exception, allowing courts to grant full protection to speech simply because the resulting illegal conduct occurs days — even hours — after the speech at issue.[99]

Individually, each of these lower court tests is flawed. But taken together, the fractured legal landscape preserved by *Sineneng-Smith* further harms both advocates and legislators. Faced with the same facts, the three approaches may lead to different substantive outcomes. Speech may be protected in one state, only for it to be unprotected when a speaker crosses state lines. Because of this inconsistency, speakers will remain uncertain whether their speech is protected, producing a chilling effect antithetical to "free speech, thought, and discourse" — "foundation[s] of our freedom."[100] Similarly, as long as there is confusion about what constitutes unprotected solicitation, legislators will struggle to draft statutes that are not overbroad under at least one of the lower courts' tests.[101] The Court was — and still is — in the best position to evaluate the various lower courts' definitions, assess the tradeoffs between public safety and the chilling of speech, and create a uniform understanding of solicitation. It should have done so in *Sineneng-Smith*.

The stakes of leaving this category undefined are high. In the context of subsection (iv) alone, not all defendants are as unsympathetic as Sineneng-Smith. Potential borderline cases include a lawyer who provides know-your-rights training or represents a client in an asylum proceeding,[102] a government official who declares that a city is a sanctuary city,[103] a pediatrician who encourages an individual unlawfully in the country

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S.E.2d 81, 84 (Va. Ct. App. 2008); State v. Ferguson, 264 P.3d 575, 578 (Wash. Ct. App. 2011).

[95] People v. Rubin, 158 Cal. Rptr. 488, 491–92 (Cal. Ct. App. 1979).

[96] *See, e.g.*, *Sineneng-Smith*, 910 F.3d at 480; United States v. Bell, 414 F.3d 474, 482 n.8 (3d Cir. 2005).

[97] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

[98] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[99] *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982); Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[100] United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion).

[101] *See* WHITNEY K. NOVAK & KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB10419, THE FIRST AMENDMENT AND "ENCOURAGING" OR "INDUCING" UNLAWFUL IMMIGRATION 4 (2020).

[102] Brief for Amnesty International as Amicus Curiae in Support of Respondent at 20, *Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67).

[103] United States v. Sineneng-Smith, 910 F.3d 461, 483 n.12 (9th Cir. 2018).

who needs vital medical care to accept treatment,[104] or a charity that provides food to low-income undocumented communities.[105] Moreover, as the government has conceded, the stakes extend far beyond subsection (iv) because the words "encourage" and "induce" are common in criminal statutes.[106] Without a clear definition of solicitation, vital aid and advocacy live in limbo and will inevitably remain unnecessarily suppressed until the Court provides guidance as to the bounds of the exception.

As the lower courts' attempts illustrate, it is not easy to determine when abstract advocacy becomes criminal solicitation. But the Court has risen to a similar challenge before. In *Brandenburg v. Ohio*,[107] the Court drew a sharp distinction between incitement and abstract advocacy — a line that had been blurry for half a century — and explained that advocacy of violence can be criminalized only when it is directed at and likely to produce imminent lawless action.[108] Arguably, *Brandenburg*'s intent, likelihood of harm, and imminence requirements provide ready tools with which the Court could have marked the boundary between advocacy and solicitation as well. The justifications for requiring intent and likelihood of harm apply naturally to solicitation, and specificity, which some scholars argue could be the *sine qua non* of solicitation,[109] could perform a similar speech-protecting function as does *Brandenburg*'s imminence requirement. Given the confusion in the lower courts, the Court should have used this opportunity to articulate a definition of solicitation consistent with its First Amendment jurisprudence. *Brandenburg* is an example of — and possibly a guide for — the type of decision the Court should have written.

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[104] Brief for the Cato Institute as Amicus Curiae Supporting Respondent at 17, *Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67).

[105] Transcript of Oral Argument at 7–8, *Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-67_e1p3.pdf [https://perma.cc/S3GQ-FU4L].

[106] Brief for United States at 20, *Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67); *see also id.* at 20–22 (cataloging statutes).

[107] 395 U.S. 444 (1969) (per curiam).

[108] *Id.* at 447. Though the Court applied *Brandenburg* in *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (per curiam), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982), the holding in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), raised some doubts about *Brandenburg*'s continued stability, *see id.* at 43–44 (Breyer, J., dissenting).

[109] Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party at 5–7, *Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67); *see also* MODEL PENAL CODE § 5.02 (AM. L. INST. 1985). Though the Second Circuit has not explicitly fashioned its own test, there is some indication that, if forced to articulate one, it would include intent and specificity. *See, e.g.*, United States v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999) (finding that Rahman's speech was solicitation based on its detailed and exacting nature). Applying this test to *Sineneng-Smith*, Professor Eugene Volokh argued that specificity is crucial to decriminalize the speech of a grandmother who asks her grandson to overstay his visa, Brief Amicus Curiae of Professor Eugene Volokh, *supra*, at 6 — a hypothetical that troubled both the Ninth Circuit, *see* United States v. Sineneng-Smith, 910 F.3d 461, 483 (9th Cir. 2018), and the Supreme Court, *see* Transcript of Oral Argument, *supra* note 105, at 5–6. However, it is unclear how much more specific one can get when encouraging lawbreaking that merely entails not leaving the country. Instead, under this approach, specific intent would likely do the heavy lifting in decriminalizing the grandmother's speech, as she likely just wants her grandson to stay by her side and be safe — not break the law. *Cf.* Scales v. United States, 367 U.S. 203, 229–30 (1961).