

The Supreme Court’s Analytical Failure and Missed Opportunity in *United States v. Hansen*

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INTRODUCTION

Helaman Hansen is an unsavory character, and no one denies it. For almost four years, from October 2012 to September 2016, he ran a scam targeting migrants and prospective migrants. Attracted to their willingness to pay hundreds and even thousands of dollars in exchange for hope, Hansen sold almost 500 people on the possibility of U.S. citizenship through a legal option of his own invention: adult adoption, he called it. Paying as much as \$10,000 per person, the hopeful people who sought Hansen’s help appear to have known little about U.S. citizenship law.

It is hard to blame these hopeful migrants for not understanding the complexities, contradictions, and limitations of the law governing citizenship in the United States. Most U.S. citizens obtain citizenship through the Fourteenth Amendment which is as clear as it is simple. Almost everyone born in the territorial United States is a citizen upon birth.¹ Other people can naturalize, itself a long series of detailed legal requirements that more than half a million people navigate annually.² Along the margins of citizenship law, however, live legal oddities. There are provisions that affect people born abroad to at least one U.S. citizen parent.³ Some of those apply as written. Some discriminate based on gender, so they apply as interpreted by courts.⁴ There are holdovers from twentieth century imperialist adventures that extend U.S. citizenship to some people born in Central America.⁵ And, ringing similar to the adoption scheme Hansen conjured, there are options for people who are adopted by U.S. citizens.⁶

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¹ U.S. CONST. amend. XIV, § 1; *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

² U.S. DEP’T OF HOMELAND SEC., 2021 Y.B. OF IMMIGR. STAT. 51-52 tbl.20 (2022) (reporting at least 500,000 naturalizations every year since 1998, except for 2003).

³ Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 301(c)-(e), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1401(c)-(e)).

⁴ *Id.* at § 309 (codified as amended at 8 U.S.C. § 1409); *see* *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001).

⁵ INA, *supra* note 3, at § 303 (codified as amended at 8 U.S.C. § 1403).

⁶ *Id.* at § 320 (codified as amended at 8 U.S.C. § 1431).

Through an organization called Americans Helping America, Hansen capitalized on citizenship law's complexity and ordinary people's desire to navigate U.S. legal requirements. For these hopeful migrants, duped into believing that they might qualify for citizenship, the problem is that adoption typically ceases to offer a route to citizenship after a person reaches sixteen years of age.⁷ For Hansen, the problem was that the Immigration and Nationality Act, the federal law governing immigration, criminalizes encouraging or inducing migrants to come to or continue living in the United States in violation of immigration law.⁸ While the migrants lost their money and their hope, Hansen earned himself a slew of convictions and twenty years of prison time.

Understandably, Hansen attempted to reduce the consequences of his illicit conduct. Concerned about the implications of Hansen's legal predicament for other people who legitimately attempt to help migrants, advocates joined his defense. The immigration provision under which Hansen was punished, they claimed, was so broad that it criminalized conduct protected by the First Amendment. After success at the U.S. Court of Appeals for the Ninth Circuit, their strategy failed before the Supreme Court.

To explain Hansen's circumstances and the implications of the Supreme Court's decision, this essay proceeds in two parts. Part I addresses the law involved in Hansen's prosecution, including its treatment by the Ninth Circuit and Supreme Court. Part II addresses the doctrinal consequences of the Supreme Court's analysis. The majority's treatment of the statute under which Hansen was convicted reveals numerous analytical gaps that ultimately leave advocates and migrants to wonder about the statute's breadth and the exposure that advocates face to liability—the very task that Supreme Court intervention should resolve.

I. FEDERAL IMMIGRATION CRIME

A. *Statute of Conviction*

The federal immigration crime statute under which Hansen was convicted is short, but broad. It reaches anyone who “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.”⁹ If done with “financial gain” in mind, as a jury found Hansen did, a convicted offender can be imprisoned for up to ten years.¹⁰ The judge imposed the maximum sentence on each of the two counts, meaning that Hansen faced twenty years of imprisonment; the sentences, however, were to run concurrently with each other along with

⁷ *Id.* at § 320(b) (codified as amended at 8 U.S.C. § 1431(b)); *Id.* at § 101(b)(1) (codified as amended at 8 U.S.C. § 1101(b)(1)).

⁸ *Id.* at § 274(a)(1)(A)(iv) (codified as amended at 8 U.S.C. § 1324(a)(1)(A)(iv)).

⁹ *Id.*

¹⁰ *Id.* at § 274(a)(1)(B)(i) (codified as amended at 8 U.S.C. § 1324(a)(1)(B)(i)).

separate ten-year sentences for mail and wire fraud convictions that were not at issue in the Ninth Circuit or Supreme Court decisions.¹¹

Like so much of immigration law, the encouraging or inducing statute of conviction has an ugly history. In the late nineteenth century, political preoccupations with migrants often focused on racist stereotypes of servile labor. In this climate, labor unions and their allies in Congress mounted a successful campaign to ban anyone from “knowingly assisting, encouraging or soliciting the migration or importation” of any migrant into the United States “to perform labor or service of any kind under contract or agreement...previous to becoming residents or citizens of the United States.”¹² Known as the Contract Labor Act, the law essentially barred migrants from coming to the United States with an employment contract in hand or a promise of employment. Simultaneously, the law punished severely, through a \$1,000 fine, “assisting, encouraging or soliciting” people to migrate to the United States under those conditions.¹³ In effect, the second half of the law targeted migrants interested in working in the United States while the first half targeted people or companies interested in hiring them.

Revealing the repugnant motivations of its supporters, the bill’s primary sponsor in the U.S. House of Representatives, Ohio’s Martin Foran, complained bitterly of “degraded, ignorant, brutal Italian and Hungarian laborers.” It was ugly rhetoric that “rested on racialized constructions of the immigrant threat,” according to historian Patrick Ettinger.¹⁴ Enacted early in 1885, a version of the ban on contract labor was in place until 1942.¹⁵

The Contract Labor Act’s focus on migrant workers was both its motivation and its most lasting historical significance, but that is not the language of the 1885 law that is most relevant to Hansen. Instead, Hansen’s conduct most readily implicates the “assisting, encouraging or soliciting” conduct that the 1885 law introduced. Across multiple amendments, a version of this prohibition has survived almost 140 years.

In 1917, Congress reenacted the contract labor bar with two important changes. Inducing a migrant to come with a work contract would also be illegal, and, as punishment, anyone convicted of violating this offense could be imprisoned for up to two years.¹⁶ Importantly, the 1917 act is best known for barring almost all migration from any Asian country and for imposing a literacy

¹¹ Verdict Form, *United States v. Hansen*, No. 2:16-CR-0024-MCE (E.D. Cal. May 9, 2017) (contained in Joint App. at 109-116, *United States v. Hansen*, No. 22-179 (U.S. Jan. 18, 2023)).

¹² Contract Labor Act of 1885, ch. 164, § 3, 23 Stat. 332, 333.

¹³ *Id.*

¹⁴ PATRICK ETTINGER, *IMAGINARY LINES: BORDER ENFORCEMENT AND THE ORIGINS OF UNDOCUMENTED IMMIGRATION, 1882-1930*, at 31 (2009).

¹⁵ See Agreement Between the United States of America and Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, Mex.-U.S., Aug. 4, 1942, 56 Stat. 1759.

¹⁶ Immigration Act of 1917, ch. 29, § 5, 39 Stat. 874, 879.

requirement on newcomers.¹⁷ The bill troubled President Woodrow Wilson so much that he vetoed it, only to see Congress override his veto.¹⁸

Thirty-five years later, in 1952, Congress revamped all of immigration law, including the contract labor law. In the midst of a massive overhaul of immigration law, Congress deleted assisting and soliciting from the list of verbs that could result in punishment.¹⁹ Instead, the amended law punished with up to five years imprisonment anyone who “willfully or knowingly encourages or induces...the entry into the United States of” a migrant “not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States” according to federal immigration law.²⁰ Importantly, by 1952, Congress had already removed the criminal offense’s concern with contract labor. Indeed, the bar on contract labor had been replaced by the Bracero Program, a large-scale binational initiative to bring Mexican workers into the United States.²¹ As a result, the 1952 amendment explicitly exempted the type of activity that previously had been the focus of congressional ire. According to the terms of the 1952 amendment, “employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.”²²

As far as Hansen is concerned, the law remained much the same for the next three decades until 1986 when Congress altered the statute once again. As part of the Immigration Reform and Control Act (IRCA), a large reformation of immigration law shepherded by President Ronald Reagan, Congress amended the INA to bring the substantive text of the statute under which Hansen was later convicted into its current form. “Any person who...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,” could be convicted.²³ The one difference between the text adopted in 1986 and the version under which Hansen was convicted roughly thirty years later concerns

¹⁷ See Monika Batra Kashyap, *Toward a Race-Conscious Critique of Mental Health-Related Exclusionary Immigration Laws*, 26 MICH. J. RACE & L. 87, 101-02 (2021); Shoba Sivaprasad Wadhia, *Decitizenizing Asian Pacific American Women*, 93 U. COLO. L. REV. 325, 347 (2022).

¹⁸ PRESIDENT WOODROW WILSON, VETO MESSAGE—H.R. 10384, H.R. DOC. NO. 64-2003 (1917); 54 CONG. REC. 2456-57 (1917) (overriding veto in the House of Representatives); 54 CONG. REC. 2629 (1917) (overriding veto in the Senate).

¹⁹ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 274, 66 Stat. 163, 229 (current version at 8 U.S.C. § 1324).

²⁰ *Id.*

²¹ Agreement Between the United States of America and Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, E.A.S. No. 278; see KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS* appx. B (1992) (2010 ed.) (reporting number of Mexicans admitted into the United States through the Bracero Program from 1942 to 1964).

²² INA, *supra* note 19.

²³ Immigration Reform and Control Act, Pub. L. No. 99-603, § 112(a), 100 Stat. 3359, 3382 (1986).

sentencing. Under IRCA, a conviction for which the underlying offense was completed for financial gain could be punished by up to five years imprisonment just as the 1952 revision provided.²⁴

Best known as the last time Congress enacted a mass regularization law (commonly referred to as amnesty), IRCA also included meaningful limitations on unauthorized migration. The bill's goal, ostensibly, was to reduce, perhaps even stop, unauthorized migration. To do that, the Reagan administration paired the regularization provision, which directly impacted millions of migrants, with various provisions hardening immigration law to curry favor with Congress.²⁵

Eight years later, Congress returned to the statute of conviction as part of a sweeping bill ratcheting up the consequences of criminal activity. The Violent Crime Control and Law Enforcement Act of 1994, better known as the Clinton Crime Bill, raised the penalty for inducing or encouraging violations of immigration law for the purpose of financial advantage from five years to ten years imprisonment. It did not alter the substantive text of the statute in any way.²⁶

Despite the long history of its various iterations, the inducing or encouraging statute has usually not been used much in comparison to the many anti-drug offenses created or enhanced in 1994. But with a myopic focus on migration, Jeff Sessions altered that norm during his time as attorney general. In April 2017, Sessions instructed U.S. Attorneys to prioritize a handful of criminal offenses. As he explained it, this was part of a Justice Department effort during the Trump administration to “further reduce illegality.” Among the crimes that he instructed prosecutors to prioritize was § 1324, the modern version of the encouraging or inducing law, in its entirety. Bowing to the realization that even federal prosecutors face resource limitations, Sessions instructed U.S. Attorneys to prioritize offenses involving three or more migrants.²⁷

B. Ninth Circuit

That spring, Hansen faced decades in prison due to his adult adoption scheme. Given the evidence against him, he did not claim to have any legal entitlement to lie about U.S. citizenship law as a means of defrauding hopeful people of their money. Instead, he focused on the broad language of the statutory text, arguing that it encompassed so much speech that is protected by the First Amendment that the statute was unconstitutionally overbroad.²⁸ Such challenges are difficult to sustain.

²⁴ *Id.*

²⁵ Katharine M. Donato et. al, *Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act*, 29 DEMOGRAPHY 139, 140 (1992).

²⁶ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60024, 108 Stat. 1796 (1994) (amending 8 U.S.C. § 1324(a)(2), INA § 274(a)(2)).

²⁷ Memorandum from Jefferson B. Sessions, U.S. Attorney General, to all prosecutors, *Renewed Commitment to Criminal Immigration Enforcement* (April 11, 2017).

²⁸ *United States v. Hansen*, 25 F.4th 1103, 1106 (9th Cir. 2022).

To win an overbreadth claim, aggrieved individuals must show that the challenged statute punishes so much activity that is legal that its punishment of admittedly illegal speech must also fall. The concern, as explained by the Supreme Court, is that excessively broad statutes “chill” protected speech.²⁹

To the Ninth Circuit, the statute’s text did just that. Giving the statutory text its ordinary meaning, the court concluded that it punishes “inspiring, helping, persuading, or influencing” people to come to or reside in the United States in violation of federal immigration law.³⁰ This is constitutionally problematic, the court added, because it “covers a substantial amount of protected speech.”³¹ The court did not claim to provide an exhaustive list of the protected speech included under its interpretation of the statutory text, but it explained that the statute subjected to punishment speech ranging from a realistic statement that overstaying a visa is unlikely to result in immigration problems to providing legal advice to unauthorized migrants about means of remaining in the United States.³²

C. Supreme Court

The Supreme Court disagreed. In a seven-person majority opinion handed down in 2023, Justice Amy Coney Barrett focused on the evolving text of the statute of conviction. Beginning with the basic fact that the statute of conviction, 8 U.S.C. § 1324(a)(1)(A)(iv), punishes encouraging or inducing violations of immigration law, Barrett explained that the Court could interpret those verbs as they “are used in everyday conversation” or “as terms of art referring to criminal solicitation and facilitation.”³³ Canvassing penal codes in the states, as well as the federal government, the majority concluded that it was most appropriate to interpret the statutory text as terms of art. “The terms ‘encourage’ and ‘induce’ are among the ‘most common’ verbs used to denote solicitation and facilitation,” the majority explained.³⁴ Having concluded that Congress meant to use “encourages or induces” as terms of art, the majority went on to clarify the common meaning ascribed to those terms in criminal law. In their “specialized, criminal-law sense,” Justice Barrett’s opinion explained, these terms are typically understood “as incorporating common-law liability for solicitation and facilitation” of illegal activity.³⁵

²⁹ *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

³⁰ Hansen, *supra* note 28, at 1109.

³¹ *Id.* at 1110.

³² *Id.*

³³ *United States v. Hansen*, 143 S. Ct. 1932, 1940 (2023).

³⁴ *Id.* at 1940-41.

³⁵ *Id.* at 1942.

II. READING THE SUPREME COURT DECISION

A. *Analytical Gaps*

Framed as a straightforward instance of traditional statutory interpretation, the Court's decision raises many questions. First is its curious interpretation of the statutory text. Despite acknowledging that the statute's earlier version contained an explicit reference to solicitation, the majority interprets Congress's decision to delete the word "soliciting" as effectively irrelevant. While the word solicit was part of the text, the statute clearly targeted solicitation. Now that it is gone, it still does, in the majority's view. Across multiple pages, the majority opinion conjures an analytical chain that leads from Congress's decision to delete solicitation from the text to the majority's conclusion: The words that Congress left behind, encourage and induce, "carry the usual attributes of solicitation."³⁶

This is an odd conclusion that conflicts with traditional tools of statutory interpretation. Typically, courts take seriously the words of a statute, aiming to give meaning to each word.³⁷ Likewise, courts weigh congressional action in amending statutes. Assuming it acts within constitutional bounds, Congress is entitled to alter statutes as it sees fit. Over the years, Congress can choose to go in different directions. Though Congress could start from scratch each time it chooses to shift the direction of a statute, more often it adds or deletes individual words or phrases to existing statutes. When it does, courts often attempt to read meaning into those alterations. In the Court's words, "Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."³⁸ As such, a decision to remove a word from a list of actions contemplated by a statute would normally suggest that Congress wanted to exclude that action from the list of actions reached by the statute moving forward. The majority's analysis clearly parts way with this approach to statutory interpretation instead emphasizing the statute's legislative history.

Turning to the legislative history, the Supreme Court makes its second analytical error. Here, "the legislative history only muddies the waters," to borrow the Court's earlier colorful description of the complication that legislative history sometimes creates.³⁹ The majority opinion's dive into almost 150 years of legislative history mistreats two of Congress's most recent changes. The majority, for example, played down the 1986 amendments. When it enacted IRCA, "Congress was engaged in a cleanup project, not a renovation," the majority

³⁶ *Id.* at 1945.

³⁷ See *Bailey v. United States*, 516 U.S. 137, 146 (1995) (instructing that "each term" in a statute should be understood to have "a particular, nonsuperfluous meaning.").

³⁸ 62 Cases, *More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951).

³⁹ *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

explained.⁴⁰ That is a curious characterization of one of the last major overhauls of immigration law. That alone should have counseled against such a glib comment. The majority's description of IRCA substantially understates the effects of Congress's actions that year, suggesting that the majority does not understand the significance of the 1986 public law's impact on immigration law and policy.

Moreover, the Court's analysis of the most recent amendments to the encouraging or inducing statute of conviction does not give much weight to the shift that IRCA represented to the statute's substantive requirements or the shift that came later in 1994 to its sentencing provisions. The 1986 amendment eliminated the mental state requirement that was part of the statute as enacted in 1952, a point that Justice Ketanji Brown Jackson raised in the dissenting opinion that Justice Sonia Sotomayor joined.⁴¹ Justice Jackson could have noted that the statutory offense included an explicit mens rea requirement since it was first added to federal law in 1885. Indeed, that version of the statute, like every version until IRCA was enacted 101 years later, targeted "knowingly" participating in violations of immigration law through use of one of an evolving list of verbs.⁴² As it did with Congress's decision to eliminate the verb solicitation from the text, the majority reached into congressional silence to close its analytical loop. When Congress eliminated the explicit mental state requirement in 1986, enacting instead a version that lacks any mental state requirement in the text, it nonetheless retained a mental state requirement, concluded the majority. "[T]he traditional intent associated with solicitation and facilitation was part of the package," Justice Barrett's opinion explained.⁴³ In other words, when Congress eliminated the words that conveyed a mental state requirement, it did not eliminate the mental state requirement.

IRCA also altered the encouraging or inducing criminal offense by significantly broadening the range of substantive behavior that could form the basis of § 1324 convictions. Previously, under the 1952 amendments, only participating in a migrant's unlawful entry into the United States could lead to a conviction. Through IRCA, Congress in 1986 added unauthorized residence to the list of conduct that can give rise to a conviction. This alteration, though seemingly minor textually, expanded the pool of people potentially penalized for violating the statute. Under the statute's former focus on entry, the only people who could be punished under the statute were those who helped migrants reach the United States in violation of immigration law. That was internally limited in part because of the evidentiary obstacles to proving that a particular person encouraged another to come to the United States knowing that doing so was not permitted by federal law. More practically, though, it also meant prosecuting people who were part of a single social network. Through the late twentieth century and into the early

⁴⁰ Hansen, *supra* note 33, at 1944.

⁴¹ *Id.* at 1956 (Jackson, J., dissenting).

⁴² Alien Contract Labor Law of 1885, ch. 164, § 3, 23 Stat. 332.

⁴³ Hansen, *supra* note 33, at 1944.

decades of the twenty-first century, it was common for people to enter the United States clandestinely without assistance. When they did receive assistance, border-crossing assistance was often provided by friends or relatives of the people being smuggled or their friends or relatives.⁴⁴ Attempting to prosecute a person for encouraging another to enter the United States unlawfully meant trying to find witnesses within the same social network as defendants.

By adding unlawful residence to the list of actions that could result in conviction for someone who encouraged or induced it, IRCA's 1986 alteration fundamentally rewrote the statute. Suddenly, people who had much more limited ties to one another could become targets. From a busy professional who hired a housekeeper knowing about their unauthorized immigration status to an immigration lawyer who gave advice about the details of immigration law and the realities of immigration law enforcement could be accused of encouraging or inducing a migrant's unauthorized residence. Importantly, the pool of relationships that IRCA made amenable to prosecution were often transactional. That is, they were based on financial convenience rather than kinship or social solidarity derived of shared experience. For these reasons, IRCA's change to the statute, meaningfully "expanded the scope of § 1324(a)," explained a federal district court that grappled with this statutory text in 2012.⁴⁵ The majority does not discuss or cite this decision despite its receiving significant attention in the Ninth Circuit's opinion.⁴⁶

Lastly, the majority entirely ignored the subsequent 1994 amendment through which Congress doubled the maximum permitted prison time. The mere possibility of such a substantially increased maximum penalty is significant because of the ordeal that prison represents, but it is made eminently relevant by the fact that Hansen was sentenced to the maximum term of imprisonment on two counts. Had the sentence not been doubled in 1994 and everything else remained the same, he would have been facing a combined prison sentence of ten years for the encouragement convictions. As it is, he received twenty years of prison time for those charges. Ignoring this change leaves the majority looking aloof about the practical realities of the law that it interpreted.

The analytical gaps in the majority opinion weaken its purchase. The majority could have done better with the interpretive tools at its disposal. A stronger position on which to rest its conclusion, for example, would have been to wholeheartedly embrace the canon of constitutional avoidance. Using that tool, the majority could have ended with the same outcome—affirming Hansen's conviction—in a more intellectually honest manner. Instead of the analytical gymnastics that it performed to close a statutory circle that Congress instead

⁴⁴ DAVID SPENER, *CLANDESTINE CROSSINGS: MIGRANTS AND COYOTES ON THE TEXAS-MEXICO BORDER* 62, 97 (2009); see Gabriella Sanchez, *Women's Participation in the Facilitation of Human Smuggling: The Case of the US Southwest*, 21 *GEOPOLITICS* 387, 394, 399 (2016).

⁴⁵ *United States v. Henderson*, 857 F. Supp. 2d 191, 202 (D. Mass. 2012).

⁴⁶ Hansen, *supra* note 28, at 1110-11.

painted as a straight line, the majority could have canvassed the interpretive options available, including the position that Hansen advocated, and adopted the version that does not clash with the First Amendment.⁴⁷ To be fair, the majority gestures in this direction, but only in passing instead relying on its statutory analysis which proves unconvincing.⁴⁸

B. Doctrinal Implications

In addition, the majority opinion leaves open a significant concern about whether the statute of conviction, as it currently stands, can lead to a conviction for encouraging people to engage in non-criminal conduct. That is, can a person like Hansen be convicted of a criminal offense for encouraging or inducing people to engage in civil violations of immigration law? Most violations of immigration law are not crimes.⁴⁹ Living in the United States without the federal government's permission, for example, can result in deportation, but it cannot result in a conviction because it is not a crime. Rather, it is a civil violation of immigration law. On its face, the statutory text does seem to encompass the possibility that someone could be convicted of encouraging or inducing violations of immigration law in a manner that does constitute a criminal offense. The statute's reference to coming to or entering the United States in violation of law seems to fall within the ambit of the crimes of unauthorized entry and unauthorized reentry.⁵⁰ In recent years, those offenses have regularly ranked among the most prosecuted crimes in federal courts nationwide.

As far as is evident in the record, none of the people deluded by Hansen committed an immigration crime. And if they had at some point in the past, there was no suggestion that they did so at Hansen's encouragement or inducement. That is, the evidence against Hansen suggests that he regularly convinced people that they could apply for citizenship despite citizenship law not providing them a legitimate option by which to do so, but there is nothing to suggest that he convinced people to enter to the United States in violation of immigration law, the basis for an unauthorized entry conviction under 8 U.S.C. § 1325. Much less is there evidence suggesting that Hansen encouraged or induced anyone to enter the United States in violation of immigration law after having previously been removed, the basis for an unauthorized reentry conviction under 8 U.S.C. § 1326. In concluding that § 1324 was excessively broad, the Ninth Circuit accounted for the statute's reach into the realm of civil administrative violations of immigration law.⁵¹

⁴⁷ See *Clark v. Martinez*, 543 U.S. 371, 380-82 (2005).

⁴⁸ Hansen, *supra* note 33, at 1946.

⁴⁹ See *Arizona v. United States*, 567 U.S. 387, 407 (2012).

⁵⁰ 8 U.S.C. §§ 1325-1326, INA §§ 275-276.

⁵¹ Hansen, *supra* note 28, at 1108.

Despite the recent popularity of unauthorized entry and unauthorized reentry among prosecutors, it remains far more common for people to violate immigration law through non-criminal means and for government officials to sanction immigration law violations through civil administrative adjudication methods. In *United States v. Henderson*, a Massachusetts federal district court modeled a more thorough approach that the Supreme Court would have done well to follow.⁵² That case involved a federal prosecution under § 1324 against Lorraine Henderson, a high school graduate who rose to the ranks of a high-level immigration official in the Department of Homeland Security. In 2004, shortly after being appointed to oversee Customs and Border Protection (CBP) operations at all ports-of-entry in New England, including the Boston airport, Henderson hired an unauthorized migrant to clean her home roughly every two weeks. There was no suggestion that Henderson encouraged or induced the housecleaner to enter the United States in violation of immigration law. On the contrary, the court states that the two met in the suburban Boston city where Henderson bought a home after taking the CBP position and only after Henderson responded to an advertisement that the housecleaner left in Henderson's building. Indeed, the court does not even mention whether the housecleaner's entry into the United States was lawful or unlawful. It was, frankly, irrelevant to Henderson's legal problems.⁵³

As such, it was not Henderson's role in the housecleaner's entry that created problems, but rather Henderson's role in her staying in the United States. Henderson continued employing the housecleaner even after learning that she lacked the federal government's permission to be present in the United States. At one point, Henderson even consulted with a CBP officer whom she supervised about the housecleaner's legal situation and conveyed that information to the housecleaner.⁵⁴ Much more innocent than Hansen's behavior lying to people about a legal option that does not exist, employing and advising the housecleaner was nonetheless problematic for Henderson. It is also infinitely more common.

More usefully to other courts, the district court overseeing the government's prosecution of Henderson carefully parsed the outer limits of the statute of conviction. Unlike Hansen, who profited from misleading hapless migrants, Henderson merely engaged in a common business relationship with the housecleaner. That, the government claimed, was enough to constitute encouraging the housecleaner to reside in the United States in violation of immigration law—enough for a § 1324 conviction.⁵⁵

More importantly, the government took the position that even more soundly protected behavior can also be a violation. According to the court in *Henderson*, “the government contended that an immigration lawyer would be prosecutable for the federal felony created by § 1324(a)(1)(A)(iv) if he advised an [unauthorized

⁵² Henderson, *supra* note 45.

⁵³ *Id.* at 194-95.

⁵⁴ *Id.* at 197.

⁵⁵ *Id.* at 203.

migrant] client to remain in the country because if the alien were to leave the alien could not return to seek adjustment of status,” referencing the same statutory subsection under which Henderson was convicted.⁵⁶ The government analogized an immigration lawyer’s advice regarding adjustment of status—a legal process through which a migrant can transition from unauthorized immigration status to the status of lawful permanent residence—to “a criminal defense lawyer who advises a client regarding the prospective robbery of a bank.”⁵⁷ To the district court’s credit, it found this analogy unconvincing as bank robbery is clearly criminal while adjustment of status is not even illegal. Still, it is not possible for a migrant to undergo the adjustment of status process from outside the United States, so an immigration lawyer who advises a client about navigating the legal requirements for adjustment of status must necessarily counsel them to remain in the United States despite knowing that they do so without the government’s permission. Put like this, the text of § 1324 seems to encompass the type of advice immigration lawyers offer regularly. In the *Henderson* court’s words, “an unadorned plain meaning reading of the words ‘encourages or induces’ can lead to the conclusion that advice about what an alien needs to do—including the need for an alien to remain in the United States—in order to seek to adjust the alien’s status could support the conclusion that such advice is within the scope of § 1324(a)(1)(A)(iv)’s prohibition.”⁵⁸ The court found this possibility disturbing. Ultimately charged with overseeing a single prosecution of one person, Henderson, the court moved on.

Addressing the prickly nuances of a statute as it applies generally is the Supreme Court’s role. In *Hansen*, the Court had the opportunity to clarify the statute’s breadth—indeed, it was asked to do that—and it reneged on its obligation. It simply failed to address how far the statute reaches into the kind of conversations that are routine in the closed quarters of immigration lawyers’ offices and elsewhere.

CONCLUSION

In contrast to *Henderson*, the seven justices who constitute the majority in *Hansen* failed to grapple with their decision’s impact on the complicated realities of immigration law practice or the complexities of life in communities in which migrants live—these days, just about every community of any size in the United States. Rather than frame its opinion as a matter of immense importance to migrants and their advocates, as several amici invited them to do, the justices treated Hansen’s claim as nothing more than a pedestrian question of substantive criminal law as it potentially intersects with traditional features of constitutional

⁵⁶ *Id.*

⁵⁷ *Id.* at 203-04.

⁵⁸ *Id.* at 204.

law. In the hands of the majority of the Court, an immigration law scheme that preyed on people desperate for help navigating the legal thicket of U.S. citizenship law turned into nothing more than an opportunity for decontextualized statutory interpretation and legislative history analysis. By doing so, the majority discounted the high stakes that the case presented for migrant communities.

Hansen's scheme was popular—garnering for him and his organization approximately \$1.8 million—precisely because people intent on navigating U.S. immigration law are common.⁵⁹ Many of them rely on trusted advisors to guide them through the law's details. Some, lamentably, are duped by people like Hansen. But plenty more find themselves in front of legitimate advocates attempting in good faith to balance the law's requirements with the hopes and dreams of clients and prospective clients. It is the latter group, migrants and advocates alike, that the majority opinion fails. By passing up the opportunity to grapple with the messy margins of the encouraging or inducing statute, the Supreme Court missed a moment in which it could explain how much risk immigration lawyers and other well-meaning advocates put themselves in when they counsel clients and cajole the law.

⁵⁹ Hansen, *supra* note 28, at 1106.