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US IMMIGRATION & NATIONALITY LAW

# SUPREME COURT AGREES TO HEAR CONSTITUTIONALITY OF SMUGGLING STATUTE THAT COULD IMPACT IMMIGRATION LAWYERS

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The Supreme Court has agreed to review the constitutionality of a smuggling statute under the Immigration and Nationality Act. *United States v. Sineneng-Smith, No. 19-67.* The statutory provision in question, INA §274(a)(1)(A)(iv), permits a felony prosecution of anyone who "encourages or induces an alien to come to, enter, or reside in the United States" if the encourager knew or recklessly disregarded "the fact that such coming to, entry, or residence is or will be in violation of the law."

INA §274(a)(1)(A)(iv), which involves encourage a non-citizen to reside in the United States in violation of law, is a companion to other related smuggling provisions such as "brings to" or "smuggling" (INA §274(a)(1)(A)(i)), "transportation" (INA §274(a)(1)(A)(ii)), and "harboring" (§274(a)(1)(A)(iii)). While these three provisions relating to smuggling, transportation and harboring are discrete, the "encouraging" provision is far broader and can potentially apply to a person who encourages an undocumented person who is already residing in the United States to do so in violation of the law. This provision could thus also potentially reach ethical lawyers who advise and represent undocumented clients.

The Ninth Circuit in *United States v. Evelyn Sineneng-Smith* ruled last year that INA §274(a)(1)(A)(iv) was so broad and vague that it could criminalize speech protected under the First Amendment. The following examples were provided in the Ninth Circuit's decision that could potentially constitute criminal conduct under this provision:

- A loving grandmother who urges her grandson to overstay his visa by

telling him "I encourage you to stay"

- A speech addressed to a gathered crowd or directed to undocumented individuals on social media in which the speaker says something such as "I encourage all you folks out there without legal status to stay in the US! We are in the process of trying to change the immigration laws, and the more we can show the potential hardship on people who have been in the country a long time, the better we can convince American citizens to fight for us and grant us a path to legalization"
- An attorney tells her client that she should remain in the country while contesting removal – because, for example, non-citizens within the United States have greater due process rights than those outside the United States, and because as a practical matter, the government may not physically remove her until removal proceedings have been completed.

The government, on the other hand, argued that INA §274(a)(1)(A)(iv) should be read narrowly to target unscrupulous lawyers and unauthorized practitioners who dupe migrants into staying in the United States in violation of the law. Despite the broadness of INA §274(a)(1)(A)(iv), the government asserted that it was not its intention to prosecute people in the above examples who were exercising free speech. Indeed, *United States v. Evelyn Sineneng-Smith* involved an unauthorized practitioner who operated an immigration consulting firm in San Jose, California. Sineneng-Smith represented mostly natives of the Philippines who were unlawfully employed in the home health care industry and who sought to adjust their status to permanent residence through the filing of a labor certification by an employer. These clients were not eligible to apply for adjustment of status in the United States under INA § 245(i) which expired on April 30, 2001 and they also did not appear to be grandfathered under this provision. Although Sineneng-Smith knew that her clients were not eligible under 245(i), she continued to sign retainer agreements with them and tell them that they could apply for green cards in the United States. At least two of the clients testified that they would have left the country if they were advised that they were not eligible to apply for permanent residence.

Sinseneng-Smith was convicted by a jury on two counts of encouraging and inducing an alien to remain in the United States for the purposes of financial gain, in violation of INA §274(a)(1)(A)(iv) and INA §274(a)(1)(B)(i). She also got convicted on two counts of mail fraud in violation of 18 U.S.C. §1341. The Ninth Circuit reversed her convictions under INA §274(a)(1)(A)(iv) and INA

§274(a)(1)(B)(i) on the ground that "encourage" and "induce" under their plain meaning restrict vast swaths of protected expression in violation of the First Amendment despite the government countering that the statute only prohibits conduct and a narrow band of unprotected free speech. Because the provision was so overbroad, the Ninth Circuit refused to construe it narrowly as the Third Circuit in *DelRio-Mocci v. Connolly Properties* had done by holding that encouraging or inducing an alien to reside in the United States did not mean just general advice but some more substantial assurance that would make someone lacking lawful status more likely to enter or remain in the United States.

The Supreme Court granted the government's petition for a writ of certiorari. According to the Crimigration blog, the "Supreme Court's decision to hear this case is … fascinating" as there was not really a circuit split. Typically, the Court agrees to hear a case when there is a sharp conflict in the lower courts regarding the proper interpretation of a statute. Here there is hardly a split between the Ninth Circuit in *United States v. Sinseneng-Smith* and the Third Circuit in *DelRio-Mocci* as the latter does not involve First Amendment. Instead, the Third Circuit's holding was based on a private lawsuit claiming that an apartment property management company violated the Racketeer Influenced and Corrupt Organizations Act by encouraging undocumented people to reside in the United States unlawfully in their property as tenants. Sinseneng-Smith *claimed* in opposition to the government's certiorari petition that the government asserting that the circuits are in conflict is nothing more than an "attempt to conjure a limited circuit split." It will also be interesting to see how Justice Gorsuch rules in this case as he is averse to laws that are void for void for vagueness as he did in demolishing "crimes of violence" in *Sessions v. Dimaya*. Although the Ninth Circuit did not have to deal with the void for vagueness challenge as it found the statutory provision unconstitutional under First Amendment overbreadth analysis, both sorts of challenges might be of interest to Justice Gorsuch that might potentially align him with the four liberal justices.

Whatever may have been the motivations of the Supreme Court to take up the case, how the Supreme Court will rule carries important implications especially for immigration lawyers. If the Supreme Court reverses the Ninth Circuit and upholds the constitutionality of the provision, would an immigration attorney advising unauthorized individuals to remain in the United States to seek

adjustment of status at a later point in time, whenever they become eligible, be within the scope of the prohibition against encouragement or inducement under INA §274(a)(1)(A)(iv)? Granted that the facts in Sineneng-Smith are bad as she advised clients as an unauthorized practitioner, but even if Sineneng-Smith was a lawyer, she would have still been convicted under the provision. Even if this lawyer had provided more appropriate advice when filing the labor certification such that the clients would have to return to their home country for consular processing, assuming an I-601A would be approved based on extreme hardship to a qualifying relative, the lawyer could have still been potentially implicated by advising the unauthorized person to remain in the US during the processing of the labor certification, I-140 petition and the I-601A waiver.

It is indeed salutary that the government strenuously argued in *United States v. Sineneng-Smith* that it would not prosecute cases cited in the above three examples or with respect to lawyers giving legitimate advice to clients. But there is no guarantee that if the statute remains intact an overzealous prosecutor cannot try to prosecute attorneys providing legitimate advice to their clients in other examples, as I have discussed with Alan Goldfarb in AILA's practice advisory, Executive Disorder: Ethical Challenges for Immigration Lawyers Under the Trump Administration. A lawyer may advise a client whose citizen child is turning 21 in two years to remain so that she can adjust status in the United States. Even if the client may not have a citizen child who is turning 21, there is a possibility that the client may marry a US citizen some day and likewise be eligible for adjustment of status. Alternatively, if this client entered without inspection and is not eligible for adjustment of status, he may be eligible to file an advance I-601A waiver application of the 3 or 10 year bar based on a qualifying relationship with the prospective citizen spouse, and return to the home country for consular processing upon the approval of the I-601A application. A lawyer who may competently advise the client to remain in the United States during the pendency of the I-601A application could get snared for encouraging the unauthorized client to remain in the United States in violation of the law. In yet another example, lawyers represent clients who have outstanding orders of removal and have not departed the United States. Failure to depart within 90 days after a removal order pursuant to INA §237(a) under INA §243 renders such conduct a criminal felony. However, even here, INA §243(a)(2) provides for an exception: "It is not in violation of paragraph (1)

to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody." The competent lawyer will advise the client with the removal order to remain in the United States while every effort is made to reopen the removal order. A person with a final order of removal may attempt to reopen a removal order after several years if the government consents to reopening and there is available relief against deportation. See 8 C.F.R. §1003.2(c)(iii); 8 C.F.R. §1003.23(b)(4)(iv). Yet, under INA §274(a)(1)(A)(iv) an ethical lawyer, who exercises great competence and diligence in representing a vulnerable client with a removal order, could get snared for encouraging the client to remain in the United States in violation of the law even if there is a game plan down the road to render the client's stay lawful.

The most prudent approach is for a lawyer to refrain from expressly advising or encouraging a client to remain in the U.S. in violation of the law; and instead, present both the adverse consequences and potential benefits to clients if they to remain in the United States in violation of the law. Such an approach would also be prudent if the Supreme Court upholds the constitutionality of §274(a)(1)(A)(iv) even if the government has asserted in its pleadings that it will enforce the law in a limited manner. Regardless of whether §274(a)(1)(A)(iv) is upheld or not, a lawyer's conduct should be guided by rules of professional responsibility. Significantly, ABA Model Rule 1.2(d) states that " lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Please note that this is only a Model Rule, and readers should check the analog to Rule 1.2(d) within the rules of professional responsibility within their own state.

In the immigration law context, a disciplinary authority would be hard pressed to conclude that a lawyer who advises an unauthorized client to remain in the United States due to the likelihood of benefiting at some point in the future would be engaging in conduct that is criminal or fraudulent. Still, there is still a possibility of criminal prosecution under the broad ambit of §274(a)(1)(A)(iv), and  a lawyer who practices within the confines of Model Rule 1.2(d) – such as presenting the legal consequences of remaining in the United States or not

rather than explicitly advising the client to remain - should be more insulated than a lawyer who does not.