



The Supreme Court could criminalize immigration advice and advocacy

Sarah Sherman-Stokes

February 25, 2020

Today the Supreme Court will hear oral argument on whether a federal statute that criminalizes any person who encourages a non-citizen to come to, or reside in, the United States, should be struck down. If the court holds that the law can stand, the impact could be devastating and far-reaching — potentially criminalizing legal advice by immigration attorneys and the written and spoken words of immigrant advocates and activists.

The chilling effect it would have on non-citizens and their allies would be profound and especially insidious in this political moment of increasing, and increasingly nefarious, anti-immigrant sentiment.

This case centers around the activities of Evelyn Sineneng-Smith, who ran an immigration consulting business in California serving mostly Filipino immigrants in the health care industry. Sineneng-Smith promised she could provide a pathway to lawful status for these non-citizens through eligibility in a labor certification program. Though Sineneng-Smith knew that they weren't statutorily eligible for this program, she took their money anyway, and over the course of seven years accumulated millions of dollars in legal fees. In 2010, Sineneng-Smith was prosecuted, and later convicted, of mail fraud, among other charges.

Among these additional charges, she was convicted under 8 USC Section 1324, a 1986 law, added through the Immigration Reform and Control Act (IRCA), that makes it a federal crime to “encourage” unauthorized immigration. The statute reads:

“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 ... shall be punished as provided in subparagraph (B).”

The Ninth Circuit, in a ruling by Judge A. Wallace Tashima, struck down the law, saying that it was too broad — chilling free speech in violation of the First Amendment. Tashima wrote that this law would criminalize “real and constitutionally protected conversations and advice that happen daily.” Indeed, he laid out several examples of conduct that might be prosecuted under this statute: a loving grandmother who urges her grandson to overstay his visa; words on social media encouraging undocumented immigrants to stay in the United States; or an attorney who tells her client she should remain in the United States while contesting her removal.

Perhaps unsurprisingly, the Trump administration thought the historically progressive Ninth Circuit Court of Appeals had gone too far, even though the judge said his examples were not “a parade of fanciful” hypotheticals. But of course, these are the very kinds of cases that “necessitate hypotheticals” because “legitimate speakers are often cowed by the severe penalties incurred for violating speech prohibitions,” Ilya Shapiro writes in a brief for the Cato Institute supporting Sineneng-Smith.

More importantly, the government is wrong that these instances are merely hypothetical. In 2008, Lorraine Henderson was arrested and charged in Massachusetts with violating 8 USC Section 1324 for giving casual legal counsel to her undocumented cleaning lady — robust advice such as “you have to put in paperwork and file” and warning her “you have to be careful ’cause they will deport you.” Henderson was convicted, and though a new trial eventually was granted and the prosecution declined to proceed, Henderson’s case serves as a cautionary tale.

In defending their conviction of Sineneng-Smith under this statute today, the government’s argument largely has been “trust us.” That is, trust us not to engage in prosecutorial overreach; trust us not to prosecute the kinds of free speech that you fear will be chilled. Among other things, the government argues that not only is the statute constitutional, it never would be used in the kinds of ways that Sineneng-Smith and her attorneys fear.

But that kind of trust must be earned. And today, with heightened racism, xenophobia and anti-immigrant advocacy, such trust is hard to come by. During today’s oral argument, immigrants and their allies will be listening to hear whether the justices are similarly skeptical of putting faith in this administration’s promises of prosecutorial restraint.