JURISPRUDENCE

The Supreme Court May Criminalize Immigrant Advocacy

The case could let the government prosecute people for routine legal work or even sympathetic tweets.

By LORELEI LAIRD
NOV 18, 2019 • 1:13 PM

Hundreds of people gathered outside the U.S. Supreme Court in Washington in support of the Deferred Action for Childhood Arrivals program as the court heard arguments about DACA on Tuesday.

Chip Somodevilla/Getty Images

Recently in **Jurisprudence**

1 **There's Proof Trump Officials Lied About the Census Citizenship Question. Will They Be Punished?**

2 **Roger Stone Found Guilty on All Seven Counts. Will His Defense Work for Trump?**

3 **Senate Confirms Controversial Judicial Nominee, Flipping Court That Will Decide Trump Subpoena Cases**

4 **What One Must Believe to Let Donald Trump Off the Hook**

Freedom of speech is one of the few issues that could be said to have bipartisan support at the Supreme Court. While the justices might differ as to what exactly counts as "speech"—money, for example—they agree that it takes a lot for the government to overcome First Amendment objections.

Now the conservative justices have a chance to prove their commitment to that principle. The Supreme Court has agreed to take up *United States v. Sineneng-Smith* this term, a case that concerns a little-used provision of immigration law that forbids "encourag[ing] or induc[ing] an alien to … reside in the United States" when the encourager knows that person has no legal status.

The case seems straightforward enough: Immigration consultant Evelyn Sineneng-Smith told her undocumented clients they could stay in the United States under a program she knew had ended. That was fraud, and the government ultimately convicted her for it.

But the government also convicted her on the encouragement provision, which on its face appears to criminalize any pro-immigration speech.

And that has the immigrant rights community worried that the court—with its recent record of unprecedented deference to the president on immigration matters—could greenlight the Trump Justice Department to criminalize routine legal work and political speech.

"An advocate or lawyer now has to worry, given the government's position in this case, that this language … may trigger criminal liability just for correctly

advising a noncitizen," said Manny Vargas, senior counsel for the nonprofit Immigrant Defense Project in New York City.

The 9th U.S. Circuit Court of Appeals made short work of rejecting Sineneng-Smith's appeal on the fraud convictions but reversed her encouragement convictions, finding that the government's interpretation of the statute criminalizes a large amount of constitutionally protected speech.

Writing for a three-judge majority, Judge A. Wallace Tashima said the provision could send a social media user to prison for encouraging undocumented people to stay until the law is changed, or a lawyer for telling her client that he has fewer due process rights outside the United States than inside. In so ruling, he had the help of a great many amicus briefs from immigration advocacy groups, attorney groups, and First Amendment advocates, mostly arguing that the encouragement provision criminalizes protected political speech and routine legal work.

Tashima's ruling dismissed claims from the federal government that the encouragement provision is not really a law against speech but requires "specific actions that facilitate" the entry or presence of an undocumented person. That's not what the statute says, Tashima wrote. Indeed, he noted that the federal government has already prosecuted at least one person who "advised the cleaning lady generally about immigration law" in *U.S. v. Henderson*, without any of the specific actions that the government said in *Sineneng-Smith* were required.

In *Henderson*, filed during the end of the George W. Bush administration, a Customs and Border Protection official knowingly employed an undocumented housekeeper, whom she advised not to leave the country because she would not be readmitted. According to the Massachusetts district judge overseeing the case, the government argued that an immigration lawyer who gave the same advice could be criminally prosecuted. The judge ultimately granted a new trial, but not on First Amendment grounds, which don't appear to have been raised.

Nor may courts let an unconstitutional law stand merely because the government promises not to use it, Tashima said.

"Indeed, [*Henderson*] exemplifies why we cannot take the government's word for how it will enforce a broadly written statute," he wrote, "and suggests that any would-be speaker who has thought twice about expressing her views on immigration was not being paranoid."

Nonetheless, the government repeated its "conduct, not speech" argument in its petition for Supreme Court review. The appeal alone makes some advocates nervous.

"The fact that the U.S. is looking to get the Supreme Court to reverse the lower court's finding … is an indication that the government wants to use this provision," Vargas said.

Then there's the fact that that the Supreme Court took up *Sineneng-Smith*, even though it's not an obvious candidate for review. At least until now, the statute has rarely been used, despite having been in the Immigration and Nationality Act for decades. As a result, there's no circuit split and no case of any kind from other federal appeals courts. And if the government wants to prosecute immigration-related wrongdoing like trafficking, it has plenty of other statutes at hand.

Given that, Khaled Alrabe of the National Immigration Project of the National Lawyers Guild found the cert grant "concerning." He's particularly worried about the possibility that attorneys will be too afraid of prosecution to give accurate legal advice.

"It's ultimately terrible for the undocumented individuals," said Alrabe, because attorneys may withhold important information out of fear.

It could even put lawyers in an ethical bind, advocates say, threatening them with prosecution for meeting their obligations to provide zealous and correct representation. For example, Vargas says, an undocumented person who marries a citizen can adjust her status to lawful, but if she leaves the United States, she won't be permitted to come back. Advising that client to stay would be an important part of representing her—but also potentially a felony.

"If you interpret the plain meaning of the statute as it is, then you'd be in violation of the statute for doing your job," Alrabe notes.

That's a reasonable concern under a presidential administration that has repeatedly arrested outspoken immigrant advocates. At least some people in the immigration law community see a political agenda. The administration has already threatened to use these laws against sanctuary city officials who refuse to cooperate with immigration enforcement.

"Naturally, immigrant advocates or lawyers have to worry about what the federal government's going to do with respect to effective, competent legal advocacy," Vargas said.

And the court's recent record on immigration, particularly its abdication of its duties to the free exercise clause in the travel ban case, may not offer much hope to immigrants and their advocates.

But in *Sineneng-Smith*, there's no national security fig leaf to hide behind, just a dispute about whether the statute means what it says. What the court's conservatives do about it will say a lot about their commitment to free speech.