



Mark Brnovich  
Arizona Attorney General

April 21, 2022

The Honorable Merrick Garland  
Attorney General of the United States  
950 Pennsylvania Ave NW  
Washington, DC 20530-0001

The Honorable Elizabeth Prelogar  
Solicitor General of the United States  
950 Pennsylvania Ave NW  
Washington, DC 20530-0001

*Via U.S. Mail and E-Mail*

**Re: Constitutionality of 8 U.S.C. § 1324(a)(1)(A)(iv) Prohibiting Encouragement  
Or Inducement Of Illegal Entry Into The United States**

Dear Attorney General Garland and Solicitor General Prelogar,

I write to strongly urge you to seek further review of the Ninth Circuit’s decision in *United States v. Hansen*,<sup>1</sup> which held that 8 U.S.C. § 1324(a)(1)(A)(iv) (“subsection iv”) is facially unconstitutional under First Amendment overbreadth principles. The deadline to seek rehearing at the Ninth Circuit is **April 27, 2022**.

Subsection iv is a vital tool for addressing the crisis at our southern border. It criminalizes “encourag[ing] or induc[ing] 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.” *Id.* The penalty is notably enhanced where such actions are “done for the purpose of commercial advantage or private financial gain.” Given the importance of subsection iv, failure to seek rehearing of *Hansen*’s holding would further exacerbate the harms caused by this Administration’s calamitous immigration policies, which have resulted in unprecedented amounts of drugs and unlawful immigrants crossing the southern border every day.

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<sup>1</sup> 25 F.4th 1103 (9th Cir. 2022). The case is Case No. 17-10548.

Secretary of Homeland Security Alejandro Mayorkas has acknowledged that the Department of Homeland Security has lost control of the border, lamenting that the current situation is “unsustainable,” that it “cannot continue,” that the system is getting close to “breaking,” and that “we’re going to lose.”<sup>2</sup> This crisis is almost entirely of this Administration’s own creation. Indeed, a long-delayed Immigration and Customs Enforcement (ICE) annual report revealed that ICE “deported 63% fewer criminals and issued 46% fewer ‘detainer’ requests to other law enforcement agencies last year.”<sup>3</sup> Now, more than ever, the constitutionality of subsection iv must be defended, since it is an important tool of the federal government for reducing illegal reentry into the United States.

Given that the Supreme Court has already concluded that an identical holding by the Ninth Circuit warranted review, and because this Administration has explicitly argued that subsection iv is constitutional, we cannot conceive of any legitimate basis for not seeking rehearing en banc and/or Supreme Court review of *Hansen*. Nonetheless, the Department of Justice has now sought *two* extensions of time, totaling 62 days, so that the “Solicitor General [can] make a decision as to whether she wishes the United States to file a petition for rehearing or suggestion for rehearing en banc.”

The States should not have to worry about the administration doing its job and defending federal law. But given this administration’s habit of policymaking through the expedient of strategic surrender, the States have ample reason to fear. We hope that you will do the right thing and take appropriate action to defend this statute.

Respectfully,

A handwritten signature in black ink that reads "Mark Brnovich". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mark Brnovich  
Arizona Attorney General

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<sup>2</sup> Edmund DeMarche, Emma Colton, and Bill Melugin, “Mayorkas says border crisis ‘unsustainable’ and ‘we’re going to lose’ in leaked audio,” *Fox News* (August 13, 2021), <https://www.foxnews.com/politics/mayorkas-leaked-audio-border>.

<sup>3</sup> Dinan, Stephen, “Exclusive: Secret ICE data shows drop in arrests of criminals, surge in arrests of non-criminals,” *Washington Times* (March 16, 2021), <https://www.washingtontimes.com/news/2022/mar/16/exclusive-secret-ice-data-shows-drop-arrests-crimi/>