

IMMIGRATION V. RELIGIOUS FREEDOM IN TRUMP’S AMERICA:
OFFERING LEGAL SANCTUARY IN PLACES OF WORSHIP

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ABSTRACT

As President Trump’s administration has cracked down on immigration enforcement, places of worship have increasingly entered the fray to offer shelter to undocumented immigrants as part of a broader sanctuary movement. Over the same period, case law surrounding religious freedoms has dramatically shifted and vastly expanded the protections afforded to religious exercise. This Note describes the legal risks that places of worship could encounter should they decide to offer sanctuary. It concludes by discussing the ways places of worship can get involved in the sanctuary movement without exposing themselves to criminal liabilities or increasing undocumented immigrants’ hardships.

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INTRODUCTION

In 2014, Samuel Oliver-Bruno entered the United States using a fraudulent Texas birth certificate.¹ His wife was suffering from lupus, and he crossed the border in 2013 seeking better medical care.² Oliver-Bruno followed just months later.³ After being arrested and convicted for attempting to enter the United States with fraudulent documents, U.S. Immigration and Customs Enforcement (“ICE”) granted Oliver-Bruno permission to stay under an order of supervision, allowing him to remain with his wife while she received medical attention.⁴ However, his supervision order only lasted until November 2017, at which time ICE revoked his permission to remain in the country.⁵

When ICE ordered his deportation in November 2017, Oliver-Bruno took refuge in the basement of CityWell United Methodist Church in Durham, North Carolina, where he lived for the next eleven months.⁶ Generally, ICE does not enter places of worship to arrest undocumented immigrants,⁷ and CityWell offered Oliver-Bruno a safe place to live as he sought to defer his deportation in order to remain with his sick wife and nineteen year-old son.⁸ During his eleven-month stay at

1. Catherine E. Shoichet, *They Thought Living in Churches Would Protect Them. Now They Fear Nowhere is Safe*, CNN (Dec. 22, 2018), <https://www.cnn.com/2018/12/22/us/north-carolina-immigration-sanctuary-churches/index.html>.

2. Meagan Flynn, *Feds Deport Undocumented Immigrant Whose Church Supporters Went to Jail to Protect Him*, WASH. POST (Nov. 30, 2018) [hereinafter Flynn, *Feds Deport*], https://www.washingtonpost.com/nation/2018/11/30/feds-deport-undocumented-immigrant-whose-church-supporters-went-jail-protect-him/?noredirect=on&utm_term=.7a418f6f6ab6.

3. *Id.*

4. *Id.*

5. *Id.*

6. See *Dad Who Lived in North Carolina Church Loses Bid to Avoid Deportation*, CBS NEWS (Nov. 27, 2018), <https://www.cbsnews.com/news/samuel-oliver-bruno-immigrant-who-lived-in-north-carolina-church-loses-bid-to-avoid-deportation/>.

7. See STUDENT AND EXCHANGE VISITOR PROGRAM OPERATING INSTRUCTIONS: ICE SENSITIVE LOCATIONS, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (July 28, 2020) [hereinafter ICE SENSITIVE LOCATIONS], <https://www.ice.gov/sevis/operating-instructions#tab2>.

8. See Flynn, *Feds Deport*, *supra* note 2; see also Letter from G.K. Butterfield, Member of Congress, and David E. Price, Member of Congress, to Jay Weselmann, Field Officer Director, U.S. Citizenship and

CityWell, Oliver-Bruno never left the church—not to grocery shop, not to see a movie, not even to see his son graduate.⁹ Two North Carolina Congressmen—G.K. Butterfield and David E. Price—even supported his petition to remain in the United States.¹⁰

On November 23, 2018, Oliver-Bruno stepped out of the church for the first time in eleven months¹¹ to appear at an immigration appointment with the U.S. Citizenship and Immigration Services (“USCIS”) in Morrisonville, North Carolina.¹² He was going to provide his fingerprints to USCIS¹³—one of the steps required for any deferred-action application.¹⁴ Dozens of congregation members from CityWell escorted Oliver-Bruno to the USCIS office.¹⁵ Meanwhile, ICE agents in plain clothes awaited Oliver-Bruno’s arrival.¹⁶ Once in the building, ICE agents tackled Oliver-Bruno and his son and took them into custody.¹⁷ Oliver-Bruno was deported to Mexico just six days later on November 29, 2018.¹⁸ *The Washington Post*¹⁹ and other media outlets²⁰ have alleged that ICE coordinated with the USCIS to trap Oliver-Bruno. Documents obtained by *Rewire.News* through a Freedom of Information Act request reportedly show that ICE communicated with the USCIS to set up the arrest scheme.²¹

As the agents arrested Oliver-Bruno, his supporters from CityWell continued to advocate for his freedom.²² After exiting the USCIS office with Oliver-Bruno in custody, CityWell congregation members surrounded the ICE van and prevented it from moving for at least three hours.²³ One CityWell pastor, Cleve May, said they

Immigration Services (Nov. 1, 2018), <https://price.house.gov/sites/price.house.gov/files/documents/Samuel%20Oliver%20Bruno.pdf> (requesting the USCIS grant Oliver-Bruno deferred action).

9. See Meagan Flynn, *Singing ‘Amazing Grace,’ a Church Surrounded an ICE Van to Stop an Arrest. 27 were Jailed*, WASH. POST (Nov. 26, 2018) [hereinafter Flynn, *Singing ‘Amazing Grace’*], https://www.washingtonpost.com/nation/2018/11/26/singing-amazing-grace-church-surrounded-an-ice-van-stop-an-arrest-were-jailed/?noredirect=on&utm_term=.bcfa74b214db.

10. *Id.*

11. *Id.*

12. Flynn, *Feds Deport*, *supra* note 2.

13. See *Dad Who Lived in North Carolina Church for a Year Arrested by ICE, Sparking Protest*, CBS NEWS (Nov. 24, 2018, 11:48 AM), <https://www.cbsnews.com/news/samuel-oliver-bruno-immigrant-arrested-by-ice-durham-north-carolina-church/>.

14. See Flynn, *Feds Deport*, *supra* note 2.

15. *Id.*

16. See Press Release, Congressman David E. Price, Reps. Price and Butterfield Issue Statement on Durham ICE Arrest (Nov. 23, 2018), <https://price.house.gov/newsroom/press-releases/price-and-butterfield-issue-statement-durham-ice-arrest>.

17. See Flynn, *Feds Deport*, *supra* note 2.

18. *Id.*

19. See *id.*

20. See Tina Vasquez, *Exclusive: Immigration Agencies Communicated Prior to Arrest of Sanctuary Leader*, REWIRE.NEWS (Mar. 25, 2019), <https://rewire.news/article/2019/03/25/exclusive-immigration-agencies-communicated-prior-to-arrest-of-sanctuary-leader/> (reporting reaction of Oliver-Bruno’s family).

21. *Id.*

22. See Flynn, *Singing ‘Amazing Grace,’ supra* note 9.

23. See *id.*

surrounded the car because “we don’t really believe that sanctuary is just a building.”²⁴ Pastor May told the police chief, “[w]e understand this is your job, but we need you to understand that as a matter of conviction we cannot move.”²⁵ Local authorities arrested twenty-seven people for obstruction of justice.²⁶ Oliver-Bruno’s story is not an uncommon one. Immigrants seeking relief from deportation have at times found themselves seeking shelter in churches and other places of worship.²⁷

While the Trump administration has reiterated its commitment to strict immigration enforcement,²⁸ it has also demonstrated its commitment to safeguarding religious freedom and protecting religious expression.²⁹ In recent years, the Supreme Court has similarly gone to great lengths to protect religious liberty.³⁰ This modern political and legal landscape leaves the legal status of “sanctuary” places of worship³¹ uncertain. At the time of publication, the Trump presidency appears to be ending. While many of the policies discussed herein may shift with the transition to a Biden administration, the Trump-era policies and actions could still have lasting effects—most notably, his recent nomination of Supreme Court Justice Amy Coney Barrett. Consequently, although places of worship, immigrants in sanctuary, and religious leaders may continue to face greater legal consequences amid stricter immigration enforcement policies, they may also possess greater religious freedom protections than ever before. While lawyers grapple with these clashing doctrines, places of worship offering sanctuary are left to question their legal status.

Though much scholarship has addressed the history, theory, and legal status of religious sanctuary, this Note takes a more practical approach by analyzing the various legal consequences that places of worship may face, the likelihood of facing repercussions, and the possible criminal defenses available to religious leaders and institutions that offer immigrants sanctuary. This Note explores two questions:

24. *Id.*

25. *Id.*

26. *Id.*

27. See, e.g., Laura Benshoff, *Fugitives From ICE, a Family Finds Sanctuary in a Pennsylvania Church*, NAT’L PUB. RADIO (Mar. 7, 2019), <https://www.npr.org/2019/03/07/700215924/fugitives-from-ice-a-family-finds-sanctuary-in-a-pennsylvania-church>.

28. See, e.g., *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

29. See, e.g., *Promoting Free Speech and Religious Liberty*, 82 Fed. Reg. 21,675 (May 4, 2017).

30. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018) (holding that the Colorado Civil Rights Commission’s conduct in evaluating a cake shop owner’s reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause).

31. Although scholarship and media outlets have traditionally referred to “sanctuary churches” when discussing the sanctuary movement in the religious context, this Note attempts to adopt a broader definition of “places of worship” as the sanctuary movement has been expanding beyond Judeo-Christian “churches” to other places of worship like synagogues and mosques. See Renee Montagne & Asia Simone Burns, *Mosques Consider Sanctuary for Immigrants*, NAT’L PUB. RADIO (Mar. 4, 2018), <https://www.npr.org/2018/03/04/590670163/mosques-consider-sanctuary-for-immigrants/>; *Mikdash: The Jewish Sanctuary Movement*, T’RUAH, <https://www.truah.org/campaign/mikdash-the-jewish-sanctuary-movement/> (last visited Nov. 23, 2020).

first, what risks do sanctuary places of worship face when they provide shelter to undocumented immigrants; and second, what legal protections are available to places of worship providing sanctuary.

Part I of this Note begins by providing a brief history of the sanctuary movement as it applies to places of worship. Part II explores why places of worship are hesitant to get involved in providing sanctuary to undocumented immigrants. Part III narrows in on criminal anti-harboring laws and looks at what penalties places of worship may face under these provisions and how the Trump administration applies them. Specifically, Part III addresses key circuit splits involving anti-harboring laws and assesses how the Free Exercise Clause and the Religious Freedom and Restoration Act (“RFRA”) may apply in light of recent Supreme Court jurisprudence. Part IV concludes with recommendations for places of worship providing sanctuary to immigrants. Ultimately, this Note argues that places of worship should seek as much protection from local governments as possible, but that they should not challenge the constitutionality of federal anti-harboring laws as applied to religious institutions.

I. THE HISTORY AND DEVELOPMENT OF THE RELIGIOUS SANCTUARY MOVEMENT

The religious sanctuary movement refers to the practice of offering shelter to undocumented immigrants in places of worship, often to provide safety while the immigrant applies for legal status in the United States. This Part begins by discussing the origins of the sanctuary movement in the 1980s before turning to the reemergence of the movement in the mid-2000s.

A. *History of Sanctuary Places of Worship: The 1980s*

The original sanctuary movement emerged in the 1980s as large numbers of immigrants came into the United States across the U.S.-Mexican border.³² Most of these immigrants were asylum-seekers, coming from El Salvador and Guatemala.³³ At that time, the United States routinely denied asylum to individuals from these countries, despite claims that they faced violence at the hands of their home governments.³⁴ Members of the public criticized the U.S. government for denying entry to these asylum-seekers.³⁵ Critics accused the United States of supporting the oppressive Guatemalan and El Salvadorian governments.³⁶ In light of politically contentious American foreign policy, religious leaders established a “network” seeking to assist

32. See, e.g., Troy Harris, *Toward a Universal Standard: Free Exercise and the Sanctuary Movement*, 21 U. MICH. J.L. REFORM 745, 747 (1988).

33. See *id.* at 747 (citing *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 358 (C.D. Cal. 1982)).

34. Rose Cuisson Villazor, *What is a “Sanctuary”?*, 61 SMU L. REV. 133, 139–40 (2008).

35. *Id.* at 140.

36. *Id.*

immigrants who were being denied asylum.³⁷ This collaborative effort became the original sanctuary movement.³⁸

In light of this movement, the federal government made clear that harboring an undocumented immigrant in a place of worship is a federal crime.³⁹ The U.S. Immigration and Naturalization Service (“INS”)⁴⁰ responded by launching a targeted enforcement campaign known as Operation Sojourner.⁴¹ Throughout this operation, INS agents used informants to infiltrate places of worship offering sanctuary and criminally prosecuted religious leaders under federal anti-harboring laws.⁴² Federal agents arrested over sixty sanctuary workers during Operation Sojourner,⁴³ and eight sanctuary workers were ultimately convicted of criminal harboring in *United States v. Aguilar*.⁴⁴

When prosecuted, several sanctuary workers ensnared in Operation Sojourner argued that the First Amendment’s Free Exercise Clause protected their activities.⁴⁵ The Free Exercise Clause prevents the government from placing a “substantial burden” on one’s religious exercise unless that burden is the least restrictive means of furthering a compelling government interest.⁴⁶ However, several circuit courts rejected this argument in the 1980s.⁴⁷ For example, in *United States v. Merkt*, the Fifth Circuit found that anti-harboring laws did not substantially burden religious exercise because harboring undocumented aliens was not a widely accepted tenet of the sanctuary workers’ religion.⁴⁸ In the wake of the developing case law, places of worship were left with two certainties: offering sanctuary can

37. *Id.*

38. *See id.*

39. *See Church Sanctuary for Illegal Aliens*, 7 Op. O.L.C. 168, 168–70 (1983).

40. Until 2003, immigration enforcement was delegated to the INS. Immigration enforcement was later delegated to Immigration and Customs Enforcement (“ICE”) while the INS became the U.S. Citizenship and Immigration Services (“USCIS”). *See Celebrating the History of ICE*, <https://www.ice.gov/features/history> (last visited Nov. 23, 2020); Marian L. Smith, *History of the INS*, <https://www.uscitizenship.info/ins-usimmigration-insoverview.html> (last visited Nov. 23, 2020).

41. Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 CAP. U. L. REV. 583, 606 (2014).

42. *Id.*

43. *See* Karen E. Lavernway, *The Closing of the Golden Door: Necessity, International Law and Freedom of Religion Are Failing as Defenses for Sanctuary Movement Workers*, 25 U. RICH. L. REV. 367, 372 (1991).

44. *United States v. Aguilar*, 883 F.2d 662, 667, 694–96 (9th Cir. 1989) (rejecting First Amendment free exercise defense to criminal harboring charges brought against religious leaders who were “direct[ing] illegal aliens to several Arizona churches that operated as self-described sanctuaries” even under a strict scrutiny analysis because “assuming that appellants have proved that the enforcement of [the anti-harboring laws] interfered with their religious beliefs, they cannot escape the government’s overriding interest in policing its borders[.]” and a less restrictive means of furthering that interest is not available).

45. *See United States v. Merkt*, 764 F.2d 950, 954 (5th Cir. 1986); *United States v. Elder*, 601 F. Supp. 1574, 1576–77 (S.D. Tex. 1985). *See generally* Victoria J. Avalon, Comment, *The Lazarus Effect: Could Florida’s Religious Freedom Restoration Act Resurrect Ecclesiastical Sanctuary?*, 30 STETSON L. REV. 663, 676–77 (2000) (examining the potential impact of Florida’s Religious Freedom Restoration Act on sanctuary protections).

46. *See Aguilar*, 883 F.2d at 694.

47. *See id.*; *Merkt*, 764 F.2d at 957; *Elder*, 601 F. Supp. at 1579.

48. *Merkt*, 794 F.2d at 956.

be prosecuted as a criminal act and claiming religious freedom would not defend them against criminal prosecutions.

B. *The “New Sanctuary Movement”*

The “New Sanctuary Movement” (“NSM”) began in early 2007 while President Bush and Congress grappled with immigration reform.⁴⁹ In this new landscape, much like that of the original sanctuary movement, places of worship offering sanctuary assisted immigrants and protected them in houses of worship.⁵⁰ However, the leaders of the NSM did not initially gather the support and interest they had expected, given the broad public support for sanctuary places of worship during the 1980s.⁵¹ By 2008, one year after the launch of the new movement, only twelve places of worship across four states offered sanctuary to immigrants.⁵²

While the NSM shared a core foundation with the largely abandoned 1980s movement, there are key distinctions between the two. The 1980s movement revolved around highly politicized U.S. foreign policies and the refugee status of El Salvadorian and Guatemalan immigrants, whereas the NSM focuses more on humanitarian values like keeping immigrant families together.⁵³ The 1980s movement was more secretive and clandestine.⁵⁴ Today, places of worship often publicly announce their sanctuary status.⁵⁵ Importantly, the federal government has not prosecuted any leaders of the NSM under federal anti-harboring laws in the way it did during the 1980s.⁵⁶

49. See Pamela Begaj, Comment, *An Analysis of Historical and Legal Sanctuary and a Cohesive Approach to the Current Movement*, 42 J. MARSHALL L. REV. 135, 145–46 (2008) (citing Audrey Hudson, *Chertoff Warns Meddling ‘Sanctuary Cities,’* WASH. TIMES (Sept. 6, 2007), <https://www.washingtontimes.com/news/2007/sep/6/chertoff-warns-meddling-sanctuary-cities/> (noting that, around this time, the Bush administration began speaking out against sanctuary cities’ interference with law enforcement efforts). In 2007, Democratic Senator Harry Reid of Nevada introduced the Comprehensive Immigration Reform Act, which the Senate rejected. See Ruth Ellen Wasem, *Brief History of Comprehensive Immigration Reform Efforts in the 109th and 110th Congresses to Inform Policy Discussions in the 113th Congress*, CONG. RSCH. SERV. (Feb. 27, 2013), <https://fas.org/sgp/crs/homsec/R42980.pdf>. Although the bill proposed to increase border security funding—amongst other proposed increased enforcement efforts—it also sought to expand employment-based visa categories. See *id.*

50. *Sanctuary Congregations and Harboring FAQ*, AM. CIV. LIBERTIES UNION (Mar. 2017) [hereinafter ACLU Guidance Memo], <https://www.nwirp.org/wp-content/uploads/2017/03/ACLU-Sanctuary-FAQ-March-2017.pdf>.

51. See Julia Duin, *Safety Under the Steeple*, WASH. TIMES (May 27, 2008), <https://www.washingtontimes.com/news/2008/may/27/safety-under-the-steeple-72535028/>.

52. *Id.*

53. See Begaj, *supra* note 49, at 150.

54. See Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 133 (1993).

55. Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433, 476 (2018).

56. *Id.* at 477; but see United States v. Warren, No. CR-18-00223-001-TUC-RCC (BPV), 2018 WL 4403753, at *1–5 (D. Ariz. Sept. 17, 2018) (denying motion to dismiss federal prosecution under 8 U.S.C. § 1324(a)(1)(A) (iii)’s anti-harboring provisions where U.S. Attorneys prosecuted volunteer affiliated with religious non-profit organization who had been offering food and shelter to undocumented immigrants on privately owned property not belonging to religious entity but used by many non-profit organizations).

Since President Trump took office in 2017, the sanctuary movement has grown significantly.⁵⁷ Before President Trump's election, there were roughly four hundred sanctuary congregations around the country.⁵⁸ Immediately following his election, that number jumped to eight hundred.⁵⁹ The most recent data indicates that—as of January 2018—there were roughly 1100 sanctuary places of worship in the country.⁶⁰ However, many places of worship have been hesitant to get involved in the NSM.⁶¹ At the start of the new movement in 2008, a coordinator with the Chicago Metropolitan Sanctuary Alliance stated, “There is so much fear in the religious community in getting involved.”⁶² Part of this fear comes from the risk of legal ramifications for sanctuary places of worship.⁶³

II. WHY ARE PLACES OF WORSHIP HESITANT TO PROVIDE SANCTUARY?

Places of worship may be reluctant to get involved in the sanctuary movement for many reasons, including: (a) fears that immigrants may still be deported despite taking sanctuary; (b) worries that immigrants in sanctuary will be steeply fined for seeking shelter in a sanctuary place of worship, (c) concerns that local governments could charge places of worship with zoning and property use violations; and, most significantly, (d) worries that religious leaders could be found guilty of criminal harboring. This Part assesses the first three concerns, while Part III addresses the criminal harboring laws.

57. *Sanctuary in the Age of Trump: The Rise of the Movement a Year Into the Trump Administration*, SANCTUARYNOTDEPORTATION.ORG, at 6 (Jan. 2018), https://www.sanctuarynotdeportation.org/uploads/7/6/9/1/76912017/sanctuary_in_the_age_of_trump_january_2018.pdf.

58. *Id.*

59. *Id.*

60. *Id.* More recent reports have continued to assert that the number of sanctuary places of worship remains around 1100. See Bill Rogers, *More Undocumented Immigrants Are Living in US Sanctuary Churches*, VOICE AM. (Jan. 29, 2019), <https://www.voanews.com/usa/more-undocumented-immigrants-are-living-us-sanctuary-churches>. Those reports also note the upward trend in sanctuary places of worship and the likely extent of sanctuary congregations which remain unknown to the public. See *id.* Despite the high number of congregations, only forty-five undocumented immigrants were known to be in sanctuary as of July 2019—up from three in 2015. See Regina Garcia Cano, *Immigrants Taking Sanctuary in Churches Hit With Huge Fines*, AP NEWS (July 30, 2019), <https://apnews.com/e8ff5f53c5ed4c24a2a533d56e910771>.

61. See Duin, *supra* note 51.

62. *Id.*

63. See, e.g., OFF. PUB. WITNESS PRESBYTERIAN CHURCH (USA), SANCTUARY: A DISCERNMENT GUIDE FOR CONGREGATIONS 8 (June 2017), [https://www.pcusa.org/site_media/media/uploads/oga/pdf/pc\(usa\)_opw_sanctuary_final_6.21_edit.pdf](https://www.pcusa.org/site_media/media/uploads/oga/pdf/pc(usa)_opw_sanctuary_final_6.21_edit.pdf); see also Gregg Aamot, *What Does ‘Sanctuary’ Really Mean? For Churches, Discerning the Answer is a Work in Progress*, MINN. POST (Nov. 20, 2019), <https://www.minnpost.com/new-americans/2019/11/what-does-sanctuary-really-mean-for-churches-discerning-the-answer-is-a-work-in-progress/> (explaining that following the Evangelical Lutheran Church in America's public declaration that it was a “sanctuary church body” in 2019, some “more hesitant members of [these] congregation[s], [one pastor] said, worry that churches might . . . house undocumented immigrants in potential violation of the law”).

A. Places of Worship May Fear That Immigrants Will Still Be Deported

One reason places of worship may be hesitant to offer sanctuary is because the work seems futile. Recently, the number of immigrants who have been detained and deported while seeking sanctuary has increased.⁶⁴ However, as a general matter, ICE has a policy against entering “sensitive locations” to arrest undocumented immigrants.⁶⁵ These “sensitive places” include schools, hospitals, public demonstrations, public ceremonies (such as weddings), and “churches, synagogues, mosques or other institutions of worship, such as buildings rented for the purpose of religious services.”⁶⁶ However, this list is non-exclusive and instructs ICE agents to “consult with their supervisors if the location of a planned enforcement operation could reasonably be viewed as being at or near a sensitive location.”⁶⁷

While the Obama administration initially implemented this policy, the Trump administration has claimed its continued adherence to it.⁶⁸ But—in addition to only providing a non-exclusive list of sensitive locations⁶⁹—the policy is discretionary, and ICE can change its position at any time.⁷⁰ For instance, during the Obama administration, ICE generally avoided arresting immigrants in courthouses even though they are not an enumerated sensitive location under the policy.⁷¹ However, under the Trump administration, ICE has, at times, made arrests at courthouses,⁷² and it recently published policy provisions that allow ICE to continue doing so.⁷³ Similarly, ICE has shown its proclivity to enter other sensitive locations

64. See, e.g., Flynn, *Feds Deport*, *supra* note 2.

65. See ICE SENSITIVE LOCATIONS, *supra* note 7.

66. Memorandum from John Morton, Dir., Immigration & Customs Enf't, to Field Office Dirs., Special Agents in Charge & Chief Counsel 2 (Oct. 24, 2011) [hereinafter Morton Memorandum], <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

67. *Id.*

68. See U.S. IMMIGR. & CUSTOMS ENF'T, FAQ ON SENSITIVE LOCATIONS AND COURTHOUSE ARRESTS (Sept. 25, 2018), <https://www.ice.gov/ero/enforcement/sensitive-loc>.

69. See Morton Memorandum, *supra* note 66.

70. See Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom and Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408, 450 (2018) (“Because the Sensitive Locations Memo is only guidance, however, it could be rescinded by ICE at any time and attempts to enforce it in court could face serious obstacles.”).

71. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES (Jan. 10, 2018) [hereinafter ICE, ENFORCEMENT INSIDE COURTHOUSES], <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf>; see generally Christopher N. Lasch, *A Common-Law Privilege To Protect State And Local Courts During The Crimmigration Crisis*, 127 YALE L.J. FORUM 410 (2017) (discussing prior administration's record of fewer courthouse arrests).

72. See, e.g., Olga R. Rodriguez & Juliet Williams, *ICE Ignores California Law in Courthouse Arrests, Prompting Outcry From Local Officials*, USA TODAY (Feb. 20, 2020), <https://www.usatoday.com/story/news/nation/2020/02/20/immigration-arrests-ice-ignores-california-law-courthouse-arrests/4823356002/> (reporting arrest of undocumented immigrant in California courthouse despite California state law prohibiting such arrests). In addition to state laws outlawing this practice, courthouse arrests have also been challenged in many courts—with at least one judge holding that ICE arrests in courthouses are illegal. See *New York v. U.S. Immigration & Customs Enforcement*, 431 F. Supp. 3d 377, 389–90 (S.D.N.Y. 2019) (barring arrests of undocumented immigrants in courthouses).

73. See ICE, ENFORCEMENT INSIDE COURTHOUSES, *supra* note 71.

to execute arrests of undocumented immigrants. In May 2017, ICE agents went into a hospital waiting room in Harlingen, Texas, and “intensely supervised” and threatening the arrests of Oscar and Irma Sanchez—undocumented immigrants who were seeking medical care for their infant child who had been born in the United States.⁷⁴ The COVID-19 pandemic has increased fears that ICE will arrest undocumented individuals at hospitals while they are seeking COVID-19-related medical attention,⁷⁵ which could deter some undocumented people from seeking needed medical attention.⁷⁶

On one hand, changes in practices and policies—like arrests in courthouses and medical facilities—may demonstrate ICE’s willingness to turn its back on long-standing “sensitive place” policies. However, it may also demonstrate a continued commitment to protecting places of worship out of a broad political interest in religious freedom. While ICE has disavowed the courthouse and hospital policies, ICE agents have not crossed the threshold of a place of worship. The House of Representatives has twice considered legislation that would codify ICE’s policy to avoid enforcement action in sensitive locations.⁷⁷ The first legislative attempt died in committee,⁷⁸ and the most recent proposed legislation has yet to make it out of committee.⁷⁹ Whether or not ICE remains committed to the “sensitive locations” policy, the indeterminacy of the policy can be alarming to congregations that are deciding whether to open their doors to immigrants in need of sanctuary.

74. John Burnett, *Border Control Arrests Parents While Infant Awaits Serious Operation*, NAT’L PUB. RADIO (Sep. 20, 2017), <https://www.npr.org/2017/09/20/552339976/border-patrol-arrests-parents-while-infant-awaits-serious-operation>. In at least one instance—at a hospital in Scranton, Pennsylvania—ICE arrested a Honduran immigrant who was seeking medical attention. See Peter Hall, *ICE Criticized for Arrest at Scranton Hospital*, MORNING CALL (Mar. 16, 2020), <https://www.mcall.com/news/pennsylvania/mc-nws-pa-ice-immigrant-arrest-hospital-scranton-coronavirus-20200316-3itqa2pdfau3kjnm62jcdsai-story.html>. In that case, ICE intended to take the individual into custody at the courthouse but executed the arrest after the individual fell ill and was rushed to a nearby emergency room. See *id.*

75. See Jeff Gammage, *Coronavirus Could Hit Immigrant Detainees Hard in Places That Are Already ‘a Petri Dish,’* PHILA. INQUIRER (Mar. 20, 2020), <https://www.inquirer.com/health/coronavirus/coronavirus-immigrant-detention-centers-20200320.html> (describing the arrest discussed *supra* note 74 of a Honduran immigrant at a hospital—despite ICE’s sensitive locations policy—after the man was rushed from a federal courthouse to the hospital with COVID-like symptoms).

76. See Tony Abraham, *When ICE Comes Knocking, Healthcare Workers Want to Be Prepared*, HEALTHCARE DIVE (Sept. 14, 2018) <https://www.healthcaredive.com/news/when-ice-comes-knocking-healthcare-workers-want-to-be-prepared/531058/>; see also Gaby Del Valle, *An Undocumented Woman Gave Birth in a Church to Avoid ICE*, VICE (Sept. 30, 2019), https://www.vice.com/en_us/article/zmjqv/an-undocumented-woman-just-gave-birth-in-a-church-to-avoid-ice (describing mother’s choice to give birth in a church instead of going to a hospital out of fear ICE would arrest her there).

77. Protecting Sensitive Locations Act, H.R. Res. 1011, 116th Cong. (2019); H.R. Res. 1815, 115th Cong. (2017).

78. H.R. Res. 1815, 115th Cong. (2017); see *H.R.1815 - Protecting Sensitive Locations Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1815/all-actions> (last visited Nov. 1, 2020).

79. Protecting Sensitive Locations Act, H.R. Res. 1011, 116th Cong. (2019); see *H.R.1011 - Protecting Sensitive Locations Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1011/all-actions> (last visited Nov. 1, 2020).

Furthermore, ICE has shown increasing disdain (in the form of increased deportation enforcement) for groups and entities that protect undocumented immigrants, particularly sanctuary cities.⁸⁰ During “Operation Safe City,” ICE arrested 498 undocumented immigrants who were protected by local “sanctuary city” laws.⁸¹ President Trump has also expressed gratitude to faith leaders—particularly Latinx pastors—who support his tough-on-immigration stance.⁸² In a roundtable with Latinx pastors, President Trump stated, “[t]hese are Hispanic pastors and reverends and ministers, and they understand better than anybody, it’s an emergency.”⁸³ While sanctuary places of worship were never mentioned, religious leaders around the country may see remarks like this to be a direct condemnation of those congregations that take a position contrary to the President’s.⁸⁴

While ICE may still respect the physical threshold of places of worship, sanctuary is akin to house arrest, and stepping outside may mean immediate deportation.⁸⁵ Arrests like Samuel Oliver-Bruno’s have indicated that ICE is not shying away from arresting immigrants in sanctuary as soon as the immigrant walks away from the place of worship.⁸⁶ Oliver-Bruno is not alone in this experience. In July

80. See Press Release, U.S. Immigration and Customs Enforcement, ICE Arrests Over 450 on Federal Immigration Charges During Operation ‘Safe City’ (Sept. 28, 2017), <https://www.ice.gov/news/releases/ice-arrests-over-450-federal-immigration-charges-during-operation-safe-city>.

81. *Id.* While there is not a single definition of the term “sanctuary city,” the concept broadly encompasses state and local policies that limit cooperation with federal immigration enforcement efforts to prevent deportation of certain classes of undocumented immigrants (often low-priority immigrants without any criminal records). See, e.g., *Immigration 101: What Is a Sanctuary City*, AM.’S VOICE (Oct. 9, 2019), <https://americasvoice.org/blog/what-is-a-sanctuary-city/>; see also *Arpaio v. Obama*, 27 F. Supp. 3d 185, 208 n.12 (D.D.C. 2014) (citing *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 777, 790 (W.D. Pa. 2014) (noting that sanctuary cities often do not report certain immigration offenses to the Department of Homeland Security or automatically notify ICE)).

82. See Press Release, Remarks by President Trump in Roundtable With Hispanic Pastors (Jan. 25, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-hispanic-pastors/>.

83. *Id.*

84. Although President Trump has waged a legal and political battle against sanctuary cities, see, e.g., David G. Savage, *California ‘Sanctuary’ Rules Stay in Place After Supreme Court Rejects Trump’s Challenge*, L.A. TIMES (June 15, 2020), <https://www.latimes.com/politics/story/2020-06-15/supreme-court-rejects-trumps-challenge-to-california-sanctuary-law>, he has not waged such a public campaign against sanctuary places of worship, perhaps in part because of his staunch commitment to protecting religious freedom. See, e.g., Promoting Free Speech and Religious Liberty, 82 Fed. Reg. 21,675 (May 4, 2017). Although some have drawn connections between the two types of sanctuary, many scholars have approached the issues separately, noting that the inherently religious nature driving sanctuary places of worship could alter the political issue entirely. See generally Villazor, *supra* note 34, at 133 (noting that “[l]aws, resolutions, and policies that have created . . . ‘public sanctuaries’ [including sanctuary city policies] must be differentiated from programs and services that are provided within ‘private sanctuaries’ [including sanctuary places of worship,]” and explaining that “[b]oth types of sanctuaries have different goals and, importantly, they implicate distinct legal issues”).

85. See Leigh Giangreco, *After 18 Months In Sanctuary at a Bethesda Church, This Undocumented Mother Has Been Granted a Stay of Removal*, DCIST (June 5, 2020), <https://dcist.com/story/20/06/05/rosa-gutierrez-lopez-cedar-lane-ice-pandemic/>; Annie Rose Ramos, *A Mother Sought Sanctuary in a Church Basement in 2017. She’s Still There*, NBC NEWS (Mar. 3, 2019), <https://www.nbcnews.com/news/latino/mother-who-sought-sanctuary-church-basement-2017-still-there-n978166>.

86. See Ramos, *supra* note 85. However, it appears that, despite an increase in ICE raids, few if any have targeted individuals receiving sanctuary in places of worship. See Caitlin Dickerson, Nick Corasaniti & Edgar

2019, Jose Robles walked out of Gethsemane Lutheran Church in Seattle, Washington, and marched arm-in-arm with many supporters to a local ICE field office where he hoped to obtain an expedited U-Visa.⁸⁷ But, instead of considering Robles' application, ICE immediately detained him on the day he left his year-long sanctuary.⁸⁸ In an attempt to avoid ending up in the same position as Oliver-Bruno or Robles, Juana Tobar Ortega, an immigrant in sanctuary in Greensboro, North Carolina, has not stepped foot outside of the church since 2017 in fear that she will be deported.⁸⁹ Ingrid Encalada Latorre—an immigrant who spent over two years in sanctuary in Colorado—“decided to give birth [inside the sanctuary church] because she feared going to the hospital would make her a target for immigration officers.”⁹⁰ Places of worship are reasonably concerned that offering sanctuary to immigrants may not protect the immigrants from deportation and may present significant risks for the religious leaders and institutions themselves.

B. Undocumented Immigrants Seeking Sanctuary in Places of Worship May Face Crippling Fines

In addition to deportation, ICE recently tried to impose severe financial penalties on immigrants seeking sanctuary in places of worship.⁹¹ A 2017 executive order⁹² enabled ICE to impose fines on undocumented immigrants who fail to comply

Sandoval, *ICE Launches Raids Targeting Migrant Families*, N.Y. Times (July 14, 2019), <https://www.nytimes.com/2019/07/14/us/ice-immigration-raids.html> (describing coordinated ICE raids across the country in July 2019, and noting although few arrests resulted, none of the arrests described were in places of worship). Still, in the midst of increased raids, “People are afraid . . . to go to church.” *Id.*; see also Sophia Tareen, *Churches Jump Into Action With Threat of Immigration Sweeps*, AP NEWS (July 14, 2019), <https://apnews.com/article/e5d8464b18fc4c3e870d6e0a4bbf7490> (noting that some congregations saw decreased attendance on days where ICE raids were expected and that some “attributed the large number of no-shows to fear” of arrest or deportation while at church). In the midst of those sweeps, places of worship offering sanctuary “braced” for possible raids. Rebecca Falconer, *Churches Offer Sanctuary and Support to Immigrants Over ICE Raids*, AXIOS (July 15, 2019), <https://www.axios.com/ice-raids-churches-offer-immigrants-sanctuary-1b836459-14fc-475e-8960-696c3291d92e.html>.

87. See Nina Shapiro, *After One Year in Sanctuary, Jose Robles Detained by ICE After Leaving Seattle Church*, SEATTLE TIMES (July 17, 2019) (“ICE ha[d] been repeatedly asking Robles to come in. He couldn’t hold out any longer, his lawyer said. To be viewed as uncooperative could jeopardize a pending application for a U-Visa.”). U-Visas provide nonimmigrant status to victims of certain crimes who are now providing assistance to law enforcement officers prosecuting criminal activity. See *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVICES (June 12, 2018), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status>.

88. See Shapiro, *supra* note 87. The church where Robles took sanctuary also published a podcast telling the story of Robles’s journey in and out of sanctuary. See *Sanctuary in Downtown Seattle*, GETHESEMANE LUTHERAN CHURCH (Feb. 22–July 21, 2019), <https://www.sanctuarydowntownseattle.com/podcast>.

89. Ramos, *supra* note 85.

90. Del Valle, *supra* note 76.

91. See Maria Sacchetti, *Trump Administration Threatens Hefty Fines on Immigrants Who Elude Deportation*, WASH. POST (July 2, 2019), https://www.washingtonpost.com/immigration/trump-administration-threatens-hefty-fines-on-immigrants-who-elude-deportation/2019/07/02/956e2334-9cc2-11e9-9ed4-c9089972ad5a_story.html.

92. See, e.g., Exec. Order No. 13,768, 82 Fed. Reg. 8,799 § 6 (Jan. 25, 2017).

with deportation orders.⁹³ According to ICE, undocumented immigrants can be fined \$3000 if they fail to voluntarily leave the country after being ordered to leave, and they can be fined up to \$799 for every additional day that they fail to comply with a final order of removal.⁹⁴ While in sanctuary in the Columbus Mennonite Church in Ohio, Edith Espinal received a “notice of intention to fine” letter from ICE stating she would be fined \$497,777 if she failed to comply with her removal.⁹⁵ A handful of other immigrants seeking sanctuary in places of worship from North Carolina to Colorado received similar letters threatening fines between \$300,000 and \$500,000.⁹⁶ Such hefty financial penalties were rarely used in the past and appear to be a newly adopted method of punishing those seeking sanctuary in “sensitive locations” that might otherwise temper ICE’s power to enforce removal orders.⁹⁷ But in the months following these notices of fines, ICE reversed course and withdrew the fines.⁹⁸ Still, the risk of hefty fines looms over the heads of immigrants in sanctuary, and—even though ICE removed the immediate threat of her \$497,777 fine—Espinal “still doesn’t feel safe and will continue to live under the protection of the church.”⁹⁹

C. By Offering Sanctuary, Places of Worship May Risk Violating Local Zoning Laws

Although much of the debate surrounding sanctuary takes place in the federal spotlight, local laws may raise serious concerns for places of worship that are deciding whether to take part in the sanctuary movement. Locally-enforced zoning laws are one area where local laws may carry serious consequences for places of worship offering sanctuary.¹⁰⁰ At the time of this writing, there have not been any documented cases of places of worship being charged for violating local zoning laws. Still, places of worship have been vocal about their fears that they could be

93. See Geneva Sands & Pierre Meilhan, *ICE Seeks to Fine Some Undocumented Immigrants Potentially Thousands of Dollars*, CNN (July 3, 2019), <https://www.cnn.com/2019/07/02/politics/ice-fines-undocumented-migrants/index.html>.

94. See *id.*; Nicole Narea, *ICE Tried to Fine Immigrants Living in Sanctuary Churches. Now, It's Backing Down*, VOX (Oct. 23, 2019), <https://www.vox.com/policy-and-politics/2019/10/23/20928519/ice-fines-immigrants-sanctuary-churches-deportation-trump>.

95. Sands & Meilhan, *supra* note 93.

96. See Sacchetti, *supra* note 91.

97. See *id.* (“The agency generally does not conduct enforcement operations in churches, and although financial penalties for evading deportation have been on the books for years, they were rarely imposed.”).

98. See Franco Ordonez, *Trump Administration Withdraws Huge Fines for Some Immigrants In U.S. Illegally*, NPR (Oct. 22, 2019), <https://www.npr.org/2019/10/22/772263253/trump-administration-withdraws-huge-fines-for-some-immigrants-in-u-s-illegally>.

99. *Id.*

100. See, e.g., Teresa Mathew, *In Massachusetts, a Mayor and a Church Spar Over Sanctuary*, CITYLAB (Apr. 4, 2018), <https://www.citylab.com/equity/2018/04/in-massachusetts-a-mayor-and-a-church-spar-over-sanctuary/556958/>.

prosecuted for any housing and zoning violations as a result of their sanctuary practices.¹⁰¹

Leaders at Joy Like A River United Church for Christ in Wyoming, Michigan—the first sanctuary place of worship in the area—were concerned that the city would prohibit the church’s sanctuary work based on building safety codes that apply to “residential” structures.¹⁰² In April 2018, Joy Like a River faced an upcoming city building inspection.¹⁰³ The church worried that local building inspectors might fine them or order expensive building modifications because of the bunk beds, play room, showers, and industrial kitchen on the premises, which could have raised local-housing code issues.¹⁰⁴ The city previously had classified the church as a “no occupancy” building, and church leaders worried about the cost of obtaining an occupancy permit if the city required such a permit to comply with local codes.¹⁰⁵

Joy Like a River is not the only place of worship facing these kinds of concerns. Generally, federal law requires some buildings used for “residential” purposes to maintain certain accessibility requirements.¹⁰⁶ For example, under the Americans with Disabilities Act, residential buildings must maintain accessible showers for disabled persons.¹⁰⁷ Similarly, state ordinances may impose criminal penalties for failure to comply with disability accessibility requirements.¹⁰⁸ Places of worship in Massachusetts have faced similar types of local legal concerns related to zoning.¹⁰⁹ Recognizing that zoning ordinances may pose a serious obstacle to sanctuary places of worship, Massachusetts has proposed legislation seeking to amend local ordinances to exempt houses of worship offering sanctuary from harsh housing regulations.¹¹⁰ While the legislation is still under review, the bill seeks to “ensure that people seeking sanctuary in houses of worship be viewed as temporary residents for the purposes of state building codes.”¹¹¹ As the sponsoring legislator stated:

It takes the guesswork out of it. . . . It takes the discretion out of it. So you don’t have to worry, necessarily, if there are commissioners that feel one way

101. See, e.g., Justin P. Hicks, *Sanctuary Church Prepares for Push-back After City’s Inspection* (Apr. 14, 2018), https://www.mlive.com/news/grand-rapids/2018/04/sanctuary_church_prepares_for.html.

102. See *id.*

103. *Id.*

104. *Id.*

105. See *id.*

106. See, e.g., 28 C.F.R. § 35.151(e) (2019) (requiring residential facilities with a certain number of beds to maintain accessible showers for people with disabilities).

107. *Id.*

108. See, e.g., Ohio Rev. Code Ann. § 3781.99 (West 2019) (violating residential requirement provisions may lead to criminal misdemeanor charges).

109. See Mathew, *supra* note 100.

110. See H.R. 3728, 191st Gen. Ct. (Mass. 2019).

111. *Id.* The Bill was scheduled for a joint hearing of the Massachusetts House and Senate in January 2020 but, as of August 2020, the legislature has not taken any further action. See H.3728, Mass. Legis. (2020), <https://malegislature.gov/Bills/191/H3728>.

or another about a particular situation. If the house of worship is providing this particular purpose, then this is how it's to be deemed.¹¹²

While commentators on the religious sanctuary movement tend to focus on criminal harboring and religious freedom implications, these local concerns may come into play more often for leaders of houses of worship. The most effective way to address these concerns is to work with state and local officials to “take the guesswork out of it.”¹¹³

III. HOW MIGHT THE CRIMINAL HARBORING LAWS APPLY TO HOUSES OF WORSHIP?

While there is good reason to fear zoning concerns and immigrant deportation, federal anti-harboring laws are likely the largest deterrent for places of worship deciding whether to engage in sanctuary work. No religious leaders have been prosecuted for offering sanctuary within a place of worship since the 1980s.¹¹⁴ However, there has been at least one case—*United States v. Warren*—raising similar issues.¹¹⁵ In *Warren*, a volunteer for a religiously affiliated not-for-profit organization was prosecuted under the criminal harboring laws for offering food, shelter, and water to undocumented migrants in a privately owned barn—a space commonly used by religious organizations and other non-profits for humanitarian aid work.¹¹⁶ Before trial, the defendant, Warren, asserted a RFRA affirmative defense, but the district court denied his motion to dismiss because of “outstanding factual disputes,” making the court unable to decide “whether an RFRA defense excuses Warren’s conduct as a matter of law.”¹¹⁷ Although refusing to dismiss the charges at the pre-trial stage, the judge allowed Warren to present evidence related to his RFRA defense at trial.¹¹⁸ However, the judge rejected the defense’s proposed jury instructions, which laid out the elements of a RFRA defense, and would have read that, if the government failed to satisfy these elements—that there was no

112. Alden Bourne, *Bill Would Make It Easier for Massachusetts Churches to Provide Sanctuary*, NEW ENG. PUB. RADIO (Mar. 18, 2019), <https://www.nepr.net/post/bill-would-make-it-easier-massachusetts-churches-provide-sanctuary#stream/0>.

113. *See id.* While beyond the scope of this Note, it is also important to note that local authorities may have a role to play in granting tax exempt status for religious entities such as the South Congregational Church in Springfield, Massachusetts, whose mayor has threatened to “strip [the church] of their tax exemption status.” *See Mathew, supra* note 100. While no evidence surfaced of entities losing tax exempt status because of their sanctuary activities, it may be an area raising significant practical concerns and may be one houses of worship should consider when deciding whether to engage in the sanctuary movement.

114. *See Cade, supra* note 55, at 477.

115. *See United States v. Warren*, No. CR-18-00223, 2018 WL 4403753, at *1–5 (D. Ariz. Sept. 17, 2018).

116. *See id.* (denying motion to dismiss federal prosecution under 8 U.S.C. § 1324(a)(1)(A)(iii)’s anti-harboring provisions where U.S. Attorneys prosecuted a volunteer affiliated with a religious non-profit organization who had been offering food and shelter to undocumented immigrants on privately owned property not belonging to religious entity but used by many non-profit organizations).

117. *Id.* at *5.

118. *See Minute Order on Motion Hearing at *1, United States v. Warren*, No. CR-18-00223, 2019 WL 2365290 (D. Ariz. May 28, 2019); *Government’s Motion in Limine Regarding Evidence Related to FRA Defense at *1–3, United States v. Warren*, No. CR-18-00223, 2018 WL 4403753 (D. Ariz. May 21, 2019).

substantial burden on religious exercise and the harboring laws are the least restrictive means of furthering a compelling governmental interest—then they “must find that the defendant’s conduct [was] a protected exercise of his religion.”¹¹⁹ Even without a formal RFRA defense instruction, the jury acquitted him.¹²⁰

While it seems unlikely that “classical” sanctuary workers—those offering shelter to undocumented immigrants within the confines of a place of worship—will be prosecuted under federal anti-harboring laws in the near future, fear of prosecution is not entirely unfounded, as Mr. Warren’s case demonstrates. This Part addresses (a) the substance of federal anti-harboring laws and (b) the defenses available to houses of worship if charged with illegally harboring an immigrant.

A. The Federal Anti-Harboring Law, 8 U.S.C. § 1324, May Apply to Places of Worship

The federal anti-harboring law provides, in relevant part, that:

Any person who . . . knowingly or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection . . . such alien in any place, including any building or any means of transportation . . . shall be punished . . .¹²¹

Violations for this provision can result in a fine and imprisonment for up to five years.¹²² As the following discussion demonstrates, however, circuits are split on how to define “harboring,” and may require different elements in criminal harboring cases. For example, the Fifth Circuit has held that, to establish an anti-harboring violation, the government must be able to show that:

(1) [T]he alien entered or remained in the United States in violation of the law, (2) the defendant concealed, harbored, or sheltered the alien in the United States, (3) the defendant knew or recklessly disregarded that the alien entered or remained in the United States in violation of the law, and (4) the defendant’s conduct tended to substantially facilitate the alien remaining in the United States illegally.¹²³

Prosecutors can easily satisfy the third element—knowledge or reckless disregard—in any sanctuary case because offering sanctuary is predicated on the immigrant’s status as an undocumented alien. However, courts have disagreed on the fourth element, and the Seventh Circuit has rejected this element entirely, reasoning that the

119. Compare Defendant’s Proposed Jury Instructions at *15–16, *United States v. Warren*, No. CR-18-00223, 2019 WL 2365300 (D. Ariz. May 23, 2019), with Closing Jury Instructions at *13–23, *United States v. Warren*, No. CR-18-00223, 2018 WL 4403753 (D. Ariz. June 7, 2019).

120. See Jury Verdicts as to Scott Daniel Warren, *United States v. Warren*, No. CR-18-00223, 2019 WL 9098533 at *1 (D. Ariz. Nov. 20, 2019).

121. 8 U.S.C. § 1324(a)(1)(A)(iii).

122. 8 U.S.C. § 1324(a)(1)(B)(ii).

123. *United States v. Shum*, 496 F.3d 390, 391–92 (5th Cir. 2007).

statute does not specify what “degree” of assisting the immigrant is required for a conviction.¹²⁴ Whether or not the fourth element is required, courts have indicated that sheltering an alien meets this standard.¹²⁵ Under this approach, offering sanctuary would “substantially facilitate” illegal presence merely by providing shelter.¹²⁶ Therefore, this element has little practical effect on places of worship concerned about anti-harboring prosecution.

Circuits are even more divided on the definition of “harbor” as it is used in § 1324.¹²⁷ The root of this disagreement is on the issue of whether “harboring” means *any* conduct facilitating an undocumented immigrant’s presence in the United States, or whether it means facilitating conduct that is *an attempt to prevent the government from discovering the immigrant’s whereabouts*. For example, the Second, Third, Sixth, and Seventh Circuits require some form of “secrecy,” like shielding the immigrant or preventing the authorities from discovering the immigrant’s location.¹²⁸ The Seventh Circuit, in *United States v. Costello*, defined “harboring” as “providing . . . a known illegal alien a secure haven, a refuge, a place to stay in which the authorities *are unlikely to be seeking him*.”¹²⁹ Thus, in the Seventh Circuit, “‘simple sheltering’ in the sense of just providing a place to stay or just cohabiting,” without more, is not equivalent to “harboring.”¹³⁰ Relying on Sixth Circuit precedent, the Eastern District of Kentucky held that “the word ‘harbor’ means to ‘clandestinely shelter, succor and protect improperly admitted aliens’ When an act is done ‘clandestinely’ it is done *secretly or in hiding*.”¹³¹

Similarly, the Second Circuit has held that harboring requires:

[C]onduct [that] is intended both to substantially help an unlawfully present alien remain in the United States—such as by providing him with shelter, money, or other material comfort—and *also is intended to help prevent the detection* of the alien by the authorities. The mere act of providing shelter to

124. *United States v. Xiang Hui Ye*, 588 F.3d 411, 415–16 (7th Cir. 2009); *see also* *United States v. Aguilar*, 477 F. App’x 1000, 1002 (4th Cir. 2012) (discussing the circuit split on the “substantially facilitate” element). The debate over what conduct satisfies the “substantially facilitates” standard commonly arises in cases where the defendant never provided shelter or transportation to the alien. *See Xiang Hui Ye*, 588 F.3d at 413, 415–16. In *Xiang Hui Ye*, the question was whether offering employment to undocumented immigrants was sufficient to establish criminal harboring, and the court—rejecting the substantially facilitates test—held that it was. *See id.* at 412.

125. *See United States v. Cuevas-Reyes*, 572 F.3d 119, 122 (3d Cir. 2009) (adopting the substantially facilitates test and explaining that it “ordinarily includes affirmative conduct—such as providing shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations—that facilitates an alien’s continuing illegal presence in the United States”).

126. *See id.*

127. 8 U.S.C. § 1324(a)(1)(A)(iii).

128. *See, e.g., United States v. Vargas-Cordon*, 733 F.3d 366, 381–82 (2d Cir. 2013); *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012); *Susnjar v. United States* 27 F.2d 223, 224 (6th Cir. 1928); *United States v. Blevin-Ramales*, 458 F. Supp. 2d 409, 411 (E.D. Ky. 2006).

129. *Costello*, 666 F.3d at 1050 (emphasis added).

130. *Id.*

131. *Belevin-Ramales*, 458 F. Supp. 2d at 411 (emphasis added) (internal citations omitted) (quoting *Susnjar*, 27 F.2d at 224).

an alien, when done without intention to help prevent the alien's detection by immigration authorities or police, is thus not an offense¹³²

The Third Circuit has also defined harboring as “prevent[ing]” government authorities “from detecting the alien’s unlawful presence.”¹³³ While the Third Circuit has also held that merely renting an apartment to an undocumented immigrant will not constitute criminal harboring,¹³⁴ this holding may not apply to sanctuary places of worship that open their doors specifically to undocumented immigrants outside of any regular business activity. In these jurisdictions, it appears that a sanctuary place of worship could escape criminal culpability by simply notifying the authorities that the immigrant is being housed inside the place of worship. Although this may lower the risk of criminal conviction, it will likely increase the risk that ICE may try to detain the immigrant as soon as he or she steps off the “sensitive location” premises.

On the other side of the circuit split, the Fifth, Eighth, and Ninth Circuits do not include any “secrecy” element in criminal harboring charges under § 1324. For example, the Fifth Circuit does not require any “specific intent” to violate anti-harboring laws.¹³⁵ The Eighth Circuit’s definition is the broadest—not requiring any proof of secrecy or concealment.¹³⁶ In *United States v. Rushing*, the court upheld a conviction of an employer who employed an undocumented immigrant “in plain view.”¹³⁷ The Ninth Circuit—like the Eighth—has held that harboring means “afford[ing] shelter to,” requiring no secrecy.¹³⁸ In these jurisdictions, sanctuary places of worship and their leaders¹³⁹ are more likely to be convicted of criminal harboring because knowingly housing an undocumented immigrant would seem to satisfy this broad standard of “harboring.”¹⁴⁰

132. *Vargas-Cordon*, 733 F.3d at 382 (emphasis added).

133. *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2012).

134. *See DelRio-Mocci v. Connolly Props., Inc.*, 672 F.3d 241, 247–48 (3d Cir. 2012).

135. *See United States v. De Jesus-Batres*, 410 F.3d 154, 162 (5th Cir. 2005).

136. *United States v. Rushing*, 313 F.3d 428, 434 (8th Cir. 2002), *vacated on other grounds*, 388 F.3d 1153 (8th Cir. 2004).

137. *Id.*

138. *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976); *see also United States v. Aguilar*, 883 F.2d 662, 690 (9th Cir. 1989) (noting that “harbor . . . does not require an intent to avoid detection”).

139. In the past, throughout the 1980s sanctuary movement, prosecutions were against individual leaders within specific sanctuary places of worship. *See United States v. Aguilar*, 883 F.2d 662, 689–90 (9th Cir. 1989). The INA, however, defines person—as used in § 1324—as simply “an individual or an organization.” 8 U.S.C. § 1101. Prosecutions for criminal harboring under 8 U.S.C. § 1324(a)(1)(A)(iii) most commonly target individuals rather than organizations. *See, e.g., United States v. De Jesus*, 808 F. App’x 503 (9th Cir. 2020); *United States v. Navarrete-De Grubich*, 781 F. App’x 369 (5th Cir. 2019). Some corporations, however, have been charged under theories of respondeat superior. *See United States v. Grayson Enters.*, 950 F.3d 386, 392, 407 (finding Grayson Enterprises vicariously liable for the roofing manager’s actions of harboring and employing unauthorized aliens).

140. Importantly, the Ninth Circuit covers the U.S.-Mexico border, *see Map of the Ninth Circuit*, U.S. Ct. APPEALS NINTH CIR., https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 (last visited Nov. 1, 2020), and places of worship offering sanctuary in this region are more likely to be found in violation of the criminal anti-harboring laws.

The statute of limitations in § 1324 is particularly important in the sanctuary context. Criminal harboring charges can be brought up to ten years after the alleged offense.¹⁴¹ While the government has not charged any sanctuary workers of harboring offenses since the 1980s, the Trump administration's changing policies reflect harsher enforcement priorities.¹⁴² Consequently, religious leaders may be vulnerable to criminal charges for up to a decade after their involvement in any sanctuary work.¹⁴³

B. Places of Worship Likely Have Few Viable Defenses to Criminal Harboring Charges

There are very few defenses to criminal harboring charges.¹⁴⁴ This Section addresses two available defenses. It primarily focuses on the first defense, under RFRA, which limits the government from burdening religious practices. The Section then discusses a second defense—selective prosecution—which bars prosecutors from making decisions “based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’”¹⁴⁵

First, the religious freedom defense, though rejected by courts in the 1980s, could provide a strong defense today. Because courts rejected this defense to criminal harboring charges,¹⁴⁶ religious leaders and legal scholars assumed that they

141. 18 U.S.C. § 3298.

142. See Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8,799 (Jan. 25, 2017) (discussing enforcement against sanctuary jurisdictions).

143. See 18 U.S.C. § 3298.

144. While beyond the scope of this note, there is a third, narrow defense to § 1324's anti-harboring provisions providing that:

It is not a violation . . . for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

8 U.S.C. § 1324(a)(1)(C). Thus far, scholars and organizations engaged in the sanctuary movement have generally dismissed this exception as a viable defense for places of worship offering sanctuary, claiming it is a narrow exception not intended to cover “classic” sanctuary activities. See ACLU Guidance Memo, *supra* note 50 at 2. However, it is significant to note that this provision was adopted in 2005, well after the contentious prosecutions of religious leaders in the 1980s. See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-97, 119 Stat. 2120 (2005) (codified as amended in part at 8 U.S.C. § 1324(a)(1)(C)). To date, it is unclear whether courts will extend this provision to general sanctuary activities by religious institutions. A version of this defense was raised in the defendant's motion to dismiss in *United States v. Warren*—a significant case described in the introduction to this Part—but the court did not address this defense. See Motion to Dismiss Counts 2 and 3 at 20, *United States v. Warren*, No. CR-18-00223, 2018 WL 4403753 at *5 (D. Ariz. Sept. 17, 2018); *United States v. Warren*, No. CR-18-00223, 2018 WL 4403753, at *1–5 (D. Ariz. Sept. 17, 2018).

145. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

146. See, e.g., *United States v. Merkt*, 794 F.2d 950, 957 (5th Cir. 1986).

could be prosecuted for criminal harboring and that religious freedom would not provide a strong defense.¹⁴⁷ However, the legal landscape of religious freedom has dramatically changed since the original sanctuary movement. RFRA was enacted in 1993, and its restrictions apply to all federal laws,¹⁴⁸ including criminal anti-harboring laws.¹⁴⁹ It prohibits the government from “substantially burden[ing] a person’s exercise of religion,” unless the government demonstrates that the burden: (1) “is in furtherance of a compelling governmental interest” and (2) “is the least restrictive means of furthering that compelling governmental interest.”¹⁵⁰ While RFRA parallels the constitutional restrictions in the Free Exercise Clause,¹⁵¹ the Supreme Court has significantly extended religious protections since RFRA was enacted.¹⁵²

Recent Supreme Court cases, including *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* and *Burwell v. Hobby Lobby*, have led at least one legal scholar and a handful of law students to conclude that religious sanctuary workers may now be shielded from criminal harboring prosecution under the First Amendment and RFRA’s religious protections.¹⁵³ Additionally, RFRA could limit ICE’s surveillance and enforcement methods.¹⁵⁴ As demonstrated by its recent

147. See Scott-Railton, *supra* note 70, at 423 (describing how academics have commonly accepted this reality).

148. 42 U.S.C. § 2000bb-3(a).

149. See Scott-Railton, *supra* note 70, at 433–35 (noting criminal anti-harboring laws do not appear to be exempted).

150. 42 U.S.C. § 2000bb-1(a)–(b).

151. See Scott-Railton, *supra* note 70, at 424–29; see also *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017)) (“The Free Exercise Clause . . . ‘protects religious observers against unequal treatment’ and against ‘laws that impose special disabilities on the basis of religious status.’”).

152. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723–24 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 683, 735 (2014).

153. See generally John J. Infranca, *(Communal) Life, (Religious) Liberty, and Property*, 2017 MICH. ST. L. REV. 481, 535–40 (asserting that churches’ dual property and religious liberty rights could provide a stronger legal basis for sanctuary churches’ resisting immigration enforcement targeted at individuals on their property); Scott-Railton, *supra* note 70, at 449–53; Avalon, *supra* note 45, at 697–711. Scott-Railton summarized these lines of cases, stating:

[T]he protections afforded by RFRA and RLUIPA have expanded through the case law. . . . In 2006 in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, [546 U.S. 418, 423 (2006),] the Supreme Court unanimously affirmed a grant of a preliminary injunction against criminal prosecution for a small religious sect that used a hallucinogenic sacramental tea. In *Holt v. Hobbs*, [135 S. Ct. 853, 859 (2015),] a Muslim inmate challenged an Arkansas Department of Correction regulation that forbade him from growing a half-inch beard. In 2015, the Court again ruled unanimously for the prisoner. . . . In explaining her [concurring] position, Justice Ginsburg distinguished a recent case that . . . symbolize[s] the political fissures within the area of religious exemptions: *Burwell v. Hobby Lobby Stores, Inc.*, [134 S. Ct. 2751 (2014)]. . . . [*Hobby Lobby*] held that for-profit corporations were protected by RFRA from having to offer [contraceptive] coverage [to employees under the Affordable Care Act].

Scott-Railton, *supra* note 70, at 430.

154. See Scott-Railton, *supra* note 70, at 433 (analyzing how RFRA may limit ICE’s ability to conduct raids or surveillance of places of worship offering sanctuary).

decisions in *Masterpiece Cakeshop* and *Hobby Lobby*, the current Court may be more receptive to First Amendment and RFRA defenses to criminal prosecutions of religious sanctuary workers. However, cases expanding religious protections still do not address some of the specific questions the circuits grappled with during the original sanctuary movement in the 1980s.

Specifically, *Masterpiece Cakeshop* addressed the right to discriminate based on sexual orientation in private business dealings if that discrimination is based upon sincerely held religious beliefs.¹⁵⁵ There, the Court held that a baker's refusal to provide a wedding cake to a same-sex couple was protected by the Free Exercise Clause, and that the Colorado Civil Rights Commission was obligated to consider the baker's religious protections when enforcing state anti-discrimination legislation.¹⁵⁶ *Hobby Lobby* addressed a closely held corporation's right to violate the Affordable Care Act by denying contraceptives in its medical insurance coverage plans for employees based on the religious beliefs of the family who owned Hobby Lobby.¹⁵⁷ However, neither case involved immigration, where the Court appears to uphold strict government enforcement laws.¹⁵⁸ While the Court might be more receptive to a general free exercise defense, it is still unclear whether prohibiting sanctuary would "undu[ly] burden" free exercise¹⁵⁹ or whether prosecution is the least restrictive means of achieving a "compelling governmental interest."¹⁶⁰

Second, non-Judeo-Christian places of worship may be able to establish selective prosecution defenses should they be charged with criminal harboring.¹⁶¹ To succeed on this defense, the charged individual "must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'"¹⁶² While religious sanctuary scholarship tends to focus on "sanctuary churches," the movement goes beyond just Judeo-Christian

155. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

156. *See id.* at 1724.

157. *See Hobby Lobby*, 573 U.S. at 702–03.

158. *See, e.g., Nielsen v. Preap*, 139 S. Ct. 954 (2019). *Nielson* provides one example of the less friendly Supreme Court precedents in immigration cases, unlike in religious freedom cases, where the Court has been more receptive.

159. *Compare United States v. Merkt*, 794 F.2d 950, 956 (5th Cir. 1986) (finding no sincere religious belief burdened), *with United States v. Elder*, 601 F. Supp. 1574, 1577–78 (S.D. Tex. 1985) (finding sincere religious belief).

160. *See Elder*, 601 F. Supp. at 1578 ("The Court finds that the Government meets its burden to demonstrate an overriding interest in protecting a congressionally-sanctioned immigration and naturalization system designed to maintain the integrity of this Nation's borders. In discussing the importance of United States' immigration laws, the Supreme Court has repeatedly emphasized the importance which sovereign nations place upon controlling entry through their borders.").

161. *See United States v. Hanna*, 639 F.2d 192, 194 (5th Cir. 1980) (discussing the potential interplay of criminal harboring and selective prosecution).

162. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). Certain circuits have rephrased this requirement, for example, the Fifth Circuit requires the defendant prove that "others similarly situated have generally not been prosecuted" or that prosecutors selected the individual "invidious[ly] or in bad faith." *Hanna*, 639 F.2d at 194 (quoting *United States v. Lichenstein*, 610 F.2d 1272, 1281 (5th Cir. 1980), *abrogated on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995)).

institutions.¹⁶³ For instance, on January 18, 2017—less than a week before President Trump’s inauguration—the Clifton Mosque in Cincinnati, Ohio, announced its intention to offer sanctuary to undocumented immigrants.¹⁶⁴ Just days later, the mosque quietly backed down on that position.¹⁶⁵ The mosque received dozens of threats after making the announcement, and members of the Latinx community even expressed a lack of interest in taking sanctuary at a mosque, fearing that their marginalization as undocumented immigrants would only be intensified by taking refuge with another marginalized group.¹⁶⁶ If a mosque—or the religious institution of another marginalized group—were the first to be prosecuted for any sanctuary activity under the anti-harboring laws, they would have a strong selective prosecution defense.

Ultimately, both defenses face uphill battles in courts. The factual questions surrounding what constitutes a sincerely-held religious belief, the nature of government interests at stake, and the motivations of prosecutors present delicate inquiries with abstract evidentiary standards. A free exercise defense would be available in a wide swath of cases and may receive more success following the Supreme Court’s expansion of religious freedom protections since the early 2000s. The selective prosecution defense is likely only available in a narrow set of cases, but it could be brought alongside a potentially more successful religious freedom defense.

IV. WHAT SHOULD SANCTUARY PLACES OF WORSHIP DO?

After considering the possible consequences of engaging in the sanctuary movement, places of worship are left with several options. They might: (a) directly participate in the sanctuary movement by sheltering undocumented immigrants or engage in lower risk activities that support the sanctuary movement; (b) seek protection from local and state governments; and/or (c) file for a preliminary injunction to prevent the government from enforcing criminal harboring laws against religious workers. Ultimately, this Note concludes that sanctuary places of worship should minimize their possible criminal culpability by engaging in certain “lower risk” activities while seeking protection from local and state governments. However, places of worship and religious leaders should not file for a preliminary injunction.

163. See Montagne & Burns, *supra* note 31; Sigal Samuel, *Mosques Want to Offer Sanctuary, but Will Anyone Accept?*, ATLANTIC (Feb. 10, 2017), <https://www.theatlantic.com/politics/archive/2017/02/mosques-want-to-provide-sanctuary-but-will-anyone-accept-the-offer/516366/>.

164. *See id.*

165. *Id.*

166. *Id.*

A. *Places of Worship Should Consider Engaging in Lower-Risk Sanctuary Activities*

Places of worship may be able to take some steps at lower risk in order to (1) protect immigrants in sanctuary from detention and deportation and (2) protect the place of worship and sanctuary workers from criminal harboring prosecution.

1. Sanctuaries May Protect Immigrants from Deportation

The primary way for religious leaders to prevent arrest and deportation of immigrants is to shelter them within the house of worship and advise them against leaving the premises.¹⁶⁷ While this scenario is not ideal—as it often means immigrants cannot fully participate in their families or communities—it is likely the safest option. ICE and USCIS have shown increased willingness to collaborate to detain and deport undocumented immigrants who are sheltered in houses of worship upon leaving the premises.¹⁶⁸ In this context, the best way to protect an immigrant from detention and deportation is to shelter them within the four walls of the house of worship at all times.

As a result of this ICE-USCIS strategy, immigrants are left in a lose-lose situation.¹⁶⁹ As Samuel Oliver-Bruno's Congressman stated: "At best, Mr. Oliver-Bruno was presented with a catch-22 dilemma; at worst, he was entrapped."¹⁷⁰ In the case of Oliver-Bruno, the only path available to him for legal permanent residence was through a deferment application that required a meeting with USCIS.¹⁷¹ Sanctuary workers should be aware of this predicament, and should inform immigrants of risks associated with leaving the house of worship. While there is no right answer to this problem, sanctuary workers should seek creative solutions to protect the immigrant from arrest and deportation. Questions to ask include: whether it is possible to invite USCIS officials to the house of worship for on-site fingerprinting and whether local lawmakers and law enforcement authorities can assist or protect immigrants throughout this process. Sanctuary workers should investigate these possible alternatives before marching immigrants into meetings at USCIS offices.

2. Places of Worship Can Engage in Activities Less Likely to Lead to Criminal Harboring Prosecution

Beyond physically protecting immigrants, there are several ways that places of worship can aid and assist immigrants without risking their own exposure to criminal harboring prosecution. First, and most importantly, if the place of worship is

167. See Flynn, *Singing 'Amazing Grace,' supra* note 9.

168. Vasquez, *supra* note 20.

169. See Press Release, Congressman David E. Price, Reps. Price and Butterfield Issue Statement on Durham ICE Arrest (Nov. 23, 2018), <https://price.house.gov/newsroom/press-releases/reps-price-and-butterfield-issue-statement-durham-ice-arrest>.

170. *Id.*

171. See Flynn, *Feds Deport, supra* note 2.

within a jurisdiction that requires a “secrecy” component to criminal harboring culpability, then the place of worship may be able to avoid prosecution by publicly disclosing their status as a sanctuary place of worship and the identities of any immigrants they shelter.¹⁷² Those places of worship within the jurisdiction of the Second, Third, Sixth, and Seventh Circuits might successfully avoid criminal harboring prosecutions in this manner.¹⁷³ However, those places of worship in the remaining circuits that do not require a “secrecy” element—including the Fifth, Eighth, Ninth and Eleventh Circuits, some of which cover the majority of the Southern and Western United States—cannot avoid liability simply through disclosing their sanctuary status.¹⁷⁴

Even in locations where disclosure may protect against criminal harboring charges, disclosure may place immigrants in sanctuary at greater risk of arrest or deportation.¹⁷⁵ Additionally, even in disclosure jurisdictions, disclosure alone may not prevent the government from bringing harboring charges, even if it lowers the likelihood of criminal convictions.¹⁷⁶ However, there is little case law on this point. Because the law in this area remains unsettled, prosecutors may still bring charges, even if those charges might ultimately fail in a disclosure jurisdiction. Thus, places of worship should still consider litigation costs a risk when deciding whether to offer sanctuary.

Second, places of worship can engage in activities that lower their likely exposure to criminal liability. The American Civil Liberties Union (“ACLU”) has provided some guidance for places of worship¹⁷⁷ and has identified ways places of worship can get involved in the sanctuary movement without risking criminal harboring prosecution, including:

- Adopting a policy of nondiscrimination at your place of worship and of welcoming and helping persons in need, regardless of immigration and citizenship status. . . .

...

172. See Scott-Railton, *supra* note 70, at 434–35; ACLU Guidance Memo *supra* note 50, at 2–3.

173. See, e.g., *United States v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir. 2013); *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012); *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2012); *Susnjar v. United States* 27 F.2d 223, 224 (6th Cir. 1928); *United States v. Blevin-Ramales*, 458 F. Supp. 2d 409, 411 (E.D. Ky. 2006).

174. See, e.g., *United States v. De Jesus-Batres*, 410 F.3d 154, 162 (5th Cir. 2005); *United States v. Rushing*, 313 F.3d 428, 434 (8th Cir. 2002), *vacated on other grounds*, 388 F.3d 1153 (8th Cir. 2004); *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976); see also *United States v. Aguilar*, 883 F.2d 662, 690 (9th Cir. 1989) (holding that the First Amendment did not allow defendants to shelter Central American refugees).

175. ACLU Guidance Memo, *supra* note 50, at 3.

176. It is important to note that while many of the individuals charged in the cases from the Second, Third, Sixth, and Seventh Circuits were not ultimately convicted, they were still prosecuted, and the long and expensive trial process is, itself, a significant consequence to consider.

177. ACLU Guidance Memo, *supra* note 50, at 2.

- Providing shelter, food, or other services to a broad set of people, including citizens and noncitizens, regardless of immigration status.

...

- Exercising the right to refuse to consent to law enforcement officers coming into or searching non-public areas of the church, and demanding to see a lawful warrant signed by a federal judge.¹⁷⁸

While these methods place significant restrictions on the scope of the sanctuary ideology and methodology, these alternatives should be considered by places of worship as they decide whether to participate in the sanctuary movement.

B. Places of Worship Should Seek Protections from Local and State Governments

There are two ways that sanctuary workers can seek protection from state and local governments. First, state and local governments may be able to ameliorate any zoning concerns, like the proposed bill in Massachusetts discussed above would do.¹⁷⁹ Second, local governments could express their explicit support for immigrants in sanctuary. For example, in Ohio, the Columbus City Council passed a resolution supporting two undocumented immigrants—Edith Espinal and Miriam Vargas—who were in sanctuary, calling on the Department of Homeland Security (“DHS”) to exercise discretion in the cases of these two women.¹⁸⁰ However, the President of the City Council, Shannon Hardin, stated, “This is a ceremonial resolution. The truth is, when we take this vote in a few seconds, it won’t change Edith or Miriam’s predicament.”¹⁸¹ Ultimately, while zoning laws like the proposed bill in Massachusetts may offer some practical protection to sanctuary places of worship, ceremonial resolutions like those in Ohio offer little practical protection for immigrants in sanctuary or for sanctuary workers. Still, such ceremonial resolutions may help tip the scales toward protection of religious sanctuary activity or grassroots protections of immigrant families more generally.

C. Places of Worship Should Be Cautious of Bringing an As-Applied Constitutional Challenge Against § 1324

It seems unlikely that any sanctuary leaders will be prosecuted for criminal harboring in the near future; however, there is another way that the revitalized RFRA defense can be raised. A place of worship interested in providing sanctuary but concerned about the repercussions might be able to mount an “as-applied”

178. *Id.* at 2.

179. See H.R. 3655, 191st Gen. Ct. (Mass. 2019); Bourne, *supra* note 112; Section I.B, *supra*.

180. See Lauren Segal, *Council Passes Resolution Supporting Undocumented Immigrants in Sanctuary*, COLUMBUS UNDERGROUND (Feb. 26, 2019), <https://www.columbusunderground.com/council-passes-resolution-supporting-undocumented-immigrants-in-sanctuary-ls1>.

181. *Id.*

constitutional challenge¹⁸² to § 1324, arguing that it impinges on the places of worship's First Amendment free exercise rights.¹⁸³ To do so, plaintiffs engaged in the sanctuary movement could seek a preliminary injunction in a federal district court, asking the court to bar future enforcement of the anti-harboring provisions to those offering religiously motivated sanctuary under both the First Amendment and RFRA.¹⁸⁴ When a regulation impinges on a fundamental right, like freedom of religion or expression under the First Amendment, that regulation must pass constitutional muster when enforced in a way that burdens constitutionally-protected rights.¹⁸⁵ By seeking a preliminary injunction, places of worship could ask the court to declare that their sanctuary actions are constitutionally protected even before any criminal harboring charges are ever brought against a place of worship or sanctuary worker.¹⁸⁶

However, seeking a preliminary injunction may not be necessary given the Trump administration's publicly-declared commitment to protecting religious liberty¹⁸⁷ and ICE's policy against arresting immigrants in "sensitive locations."¹⁸⁸ There is no immediate need to challenge a criminal law that is not currently being

182. See, e.g., *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from denial of certiorari) ("Statutes are ordinarily challenged, and their constitutionality evaluated, 'as applied'—that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative."); see also *Elgin v. Dep't of Treasury*, 567 U.S. 1, 16 n.5 (2012) ("[A plaintiff's] claim that [an] agency 'acted in an unconstitutional manner' will generally be a claim that the statute authorizing the agency action was unconstitutionally applied to him."). For more information on the differences between facial and as-applied constitutional challenges, see Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 3 (2010).

183. This Note does not address the standing issues that may arise in this type of "as-applied" constitutional challenge. Cases addressing government surveillance of religious activities seem most analogous in the standing context. For example, in *Dousa v. U.S. Department of Homeland Security*, the court found that plaintiff, a pastor who was involved in an organization called the New Sanctuary Coalition—though not alleged to be offering sanctuary to immigrants—had standing to seek a preliminary injunction against government surveillance of her religious activities because "[the plaintiff] ha[d] plausibly show[n] that the Government surveilled her religious and political activities . . . and that she ha[d] withdrawn from many of her normal religious activities as a result of that surveillance." No. 19cv1255, 2020 WL 434314, at *3–6 (S.D. Cal. Jan. 28, 2020). The effects of government surveillance mirror the deterring effect that criminal anti-harboring laws have on places of worship. Deterrence may itself satisfy the injury requirement if religious leaders and institutions can show that anti-harboring laws effectively stifle religious expression in the form of sanctuary activities. See, e.g., *id.* at *5 (finding injury sufficient to provide standing when plaintiff cancelled a trip to Mexico, stopped offering blessings to migrant and refugee marriages, and declined to host a *pro se* asylum clinic at her church).

184. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2301 (2016) (hearing case on appeal after plaintiff doctors "sought an injunction preventing enforcement of [an abortion related state law] as applied to" them); see also *June Med. Servs., LLC v. Gee*, 139 S. Ct. 663 (2019) (Kavanaugh, J., dissenting from grant of stay) (recognizing that "the plaintiffs could file an as-applied complaint or motion for preliminary injunction in the District Court, and the District Court could consider under [existing case law] whether to enter a preliminary or permanent injunction").

185. See *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476 (2007).

186. See *id.* at 460.

187. See, e.g., *Promoting Free Speech and Religious Liberty*, 82 Fed. Reg. 21, 675 (May 4, 2017).

188. ICE SENSITIVE LOCATIONS, *supra* note 7.

enforced against religious leaders and places of worship, even if accepting the status quo means places of worship will continue to face uncertain consequences and possible criminal culpability. Ultimately, this uncertainty is better than risking a lawsuit that could culminate in the Supreme Court declaring § 1324 *constitutional* as applied to sanctuary places of worship. Even if unlikely, such a ruling would open the prosecutorial floodgates against sanctuary workers. Places of worship, therefore, should not seek preliminary injunctions.

CONCLUSION

A place of worship must consider numerous variables when deciding whether to get involved in the sanctuary movement. Thus far, ICE has avoided enforcing immigration laws within the confines of places of worship—although the policy is discretionary and could change at any time. Similarly, the Department of Justice has not criminally charged religious leaders and religious institutions offering sanctuary for violations of federal criminal harboring laws since the 1980s.

Yet, as Parts I and II, *supra*, demonstrate, places of worship still have many reasons to be hesitant when getting involved in the sanctuary movement, including the immigrant's continued risk of deportation, the possible fines the immigrant could face, or the fines and penalties the place of worship may suffer under local and state zoning laws. The most daunting fear, however, is the risk of criminal prosecution under the federal anti-harboring laws. As Part II, *supra*, demonstrates, although certain policies—including ICE's sensitive locations policy and President Trump's stated commitment to religious freedom—may offer some solace to places of worship, they do not provide any binding legal protections against the anti-harboring laws.

This Note therefore concludes that, if places of worship are concerned about legal repercussions, they should seek protection from local authorities and should research anti-harboring precedent in their jurisdictions before making any decisions about offering sanctuary. While there may come a day when a RFRA defense against anti-harboring laws reaches the Supreme Court, that issue is best raised by prosecutors rather than religious groups initiating litigation in hopes of a positive outcome. In an age of simultaneous immigration crackdowns and vast religious liberty protections, it is hard to say exactly what will happen to places of worship offering sanctuary. For now, it appears that immigrants are safe within the walls of places of worship and religious leaders are unlikely to face any criminal penalties for offering sanctuary within houses of worship.