NOTES

FREE EXERCISE: AN INSUFFICIENT DEFENSE FOR FAITH-BASED ORGANIZATION TO PROTECT THEIR FEDERAL FUNDING

ROSE CORCORAN*

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INTRODUCTION

Immigration and religion have long been points of contention in the American political landscape, and since the Trump era these tensions have only intensified. For instance, during Trump's administration, rhetoric around building a wall along the U.S.-Mexico border ran rampant,[1] and Trump passed the infamous Muslim travel ban.[2] In the last couple of years, divisiveness about immigration has risen as the number of migrants entering the United States has increased. In 2023, U.S. Border Patrol had 2,475,669 encounters at the southwest border, and in 2024 there were 2,135,005.[3] As more migrants flee to the United States, federal, state, and local government resources are spread increasingly thin with the task of providing temporary food, shelter, housing, and basic medical care.

Many faith-based organizations provide secular community services that supplement state goals, acting as hospitals, shelters, food kitchens, education centers, and serving a myriad of other functions in their communities. Nationwide religious non-profits such as Catholic Charities USA, The Jewish Federations of North America, and The Salvation Army use federal funding to help individuals in these capacities. Many of these organizations are under fire for serving undocumented migrants, and politicians are calling for the release of their documents and to eliminate or restrict their funding.[4] Republicans on the U.S. House of Representatives Committee on the Judiciary even wrote to the U.S. Department of Homeland Security (DHS) that "[a] major cause of this [immigration] crisis is the incentive created by non-governmental organizations (NGOs) using DHS grant funding through the Federal Emergency Management Agency (FEMA)."[5] However, eliminating or conditioning funding of religious nonprofits because they serve undocumented individuals could be considered hostility toward religion and grounds for a Free Exercise Clause challenge. In many faiths, involvement in one's community, giving charitable donations, and helping those in need without discrimination are foundational beliefs that guide people's daily lives, even if the result is secular community service.

I argue that although nondiscriminatory humanitarian aid counts as the free exercise of faith-based organizations' religious beliefs, these organizations

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1. *See* Nick Miroff & Josh Dawsey, *'Take the Land': President Trump Wants a Border Wall. He Wants It Black. And He Wants It by Election Day*, WASH. POST (Aug. 27, 2019), https://perma.cc/DR9C-MB25.

2. *See* Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611, 611-18 (2019).

3. *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT., https://perma.cc/58UB-G2BF (Feb. 18, 2025).

4. *See* Jack Jenkins, *GOP Lawmakers Once Praised Catholic Charities. Now They Want To Defund the Group.*, N.Y. TIMES (Jul. 28, 2023), https://perma.cc/SK38-LDQ7; Jack Jenkins, *Conservative PAC Sues Biden Administration, Targeting Nuns, Liberal Catholics in Records Request*, RELIGION NEWS SERV. (Feb. 10, 2022), https://perma.cc/XZ8V-FMJE; Suzanne Gamboa, *Catholic Immigrant Shelter Battles Texas AG, Who Wants To Shut It Down*, NBC NEWS (Feb. 21, 2024), https://perma.cc/43BD-VCLJ

5. Letter from the H. Comm. on the Judiciary to Alejandro Majorkas, Sec'y, Dep't of Homeland Sec. (May 15, 2023), https://perma.cc/A6CY-L733.

would fail to protect their federal funding on free exercise grounds. Losing federal funding is an economic burden that does not rise to the level of a "substantial burden." As an alternative to completely cutting funding, it would be constitutional for the federal government to provide conditional funding, so long as the conditions do not coerce the organizations into relinquishing their religious freedom. In Part I, I explain how federal funding to religious nonprofits is permissible under the Establishment Clause. I also argue that helping undocumented individuals and families based on clearly demonstrated religious beliefs qualifies as free exercise of religion under the First Amendment. In Part II, I explain the contours of substantial burden analysis and why the economic burden faith-based organizations would experience if they lost federal funding does not qualify as substantial. In Part III, I argue that conditional government funding to religious nonprofits is constitutional, but only if the conditions are sufficiently tailored to the program's purpose and do not coerce the organizations into relinquishing their religious freedom. In Part IV, I discuss how eliminating funding would survive a Religious Freedom Restoration Act (RFRA) challenge and how proposed federal legislation would also survive Free Exercise Clause challenges. To conclude, I predict how the U.S. Supreme Court might rule on this issue if it were to come before the Court.

I. CONSTITUTIONALITY OF FUNDING RELIGIOUS NON-PROFITS

A. *Establishment Clause*

Although the Establishment Clause declares that "Congress shall make no law respecting an establishment of religion,"[6] the government can fund religion in certain circumstances, such as funding religious organizations that provide secular social services without promoting or endorsing religion.[7] The Supreme Court has upheld social programs led by religious organizations like providing educational aid to poor children and supplementing care for pregnant adolescents.[8] This power is also traceable to the Spending Clause, which gives Congress broad power to authorize spending for the "general Welfare" and is supplemented by Congress's power to restrict how federal funds are used, bestowed by the Necessary and Proper Clause.[9] Religious organizations that receive public funding must be allowed to retain their religious identity, and the government cannot discriminate in awarding funds based on an organization's

6. U.S. CONST. amend. I.

7. *See* Bradfield v. Roberts, 175 U.S. 291, 297-98 (1899) (holding that religious affiliation of people providing hospital care is irrelevant to result); Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15-17 (1947).

8. VALERIE C. BRANNON, CONG. RSCH. SERV., R46517, EVALUATING FEDERAL FINANCIAL ASSISTANCE UNDER THE CONSTITUTION'S RELIGION CLAUSES 9 (2020).

9. U.S. CONST. art. I, § 8, cl. 18; VICTORIA L. KILLION, CONG. RSCH. SERV., R46827, FUNDING CONDITIONS: CONSTITUTIONAL LIMITS ON CONGRESS'S SPENDING POWER 1 (2021).

religious character.[10] However, once a religious organization receives an award, the funds cannot be used for religious activities.[11] For instance, I will discuss later how the Federal Emergency Management Agency (FEMA) provides grants through the Humanitarian Emergency Food and Shelter Program (EFSP-H), which supplements and expands the work of both nongovernmental and governmental social service organizations to provide people in need with food, shelter, and other necessities.[12] The EFSP National Board awards EFSP-H funds to organizations assisting migrants through distribution to local jurisdictions specifically with families and individuals encountered by DHS who need support.[13] This form of direct aid is permissible because the funding is used for the government's and the religious organizations' shared objective of providing secular social services to those in need, not using community outreach to endorse or promote religion.[14] Although organizations like Catholic Charities USA help migrants, such aid does not violate the Establishment Clause because spreading religion is not the primary effect of those services.[15]

B. *Free Exercise Clause*

The Free Exercise Clause protects religious nonprofits' right to express their religious beliefs through nondiscriminatory community outreach, encompassing aid to undocumented migrants. Precisely what qualifies as "religion" and the "free exercise" of religion remains intentionally undefined to prevent the judiciary from deciding on the substance or validity of religious doctrine,[16] but the Supreme Court has peppered some guiding factors throughout case law. For example, the truth of a religious belief is not open to question – only the sincerity of it.[17] The beliefs must stem from "deep religious conviction," not mere personal preference, and idiosyncratic beliefs are less likely to qualify as religious compared to beliefs shared by an organized group.[18] A belief or act is also more likely to be considered religious if it is "intimately related to daily living."[19] The Free Exercise Clause "does perhaps its most important work by protecting the ability of those who hold religious

10. CYNTHIA BROUGHER, CONG. RSCH. SERV., R41099, FAITH-BASED FUNDING: LEGAL ISSUES ASSOCIATED WITH RELIGIOUS ORGANIZATIONS THAT RECEIVE PUBLIC FUNDS 1 (2011); *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 450-51 (2017).
11. BROUGHER, *supra* note 10, at 1.
12. FEMA, *Emergency Food and Shelter Program*, https://perma.cc/A7GU-XHMN.
13. *Id*.
14. Bradfield v. Roberts, 175 U.S. 291, 297-98 (1899).
15. *See* Bowen v. Kendrick, 487 U.S. 589, 613 (1988).
16. Samuel J. Levine, *The Supreme Court's Hands-off Approach to Religious Questions in the Era of COVID-19 and Beyond*, 24 U. PA. J. CONST. L. 276, 282 (2022).
17. United States v. Seeger, 380 U.S. 163, 165-66 (1965).
18. Mark Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts*, 53 HOUS. L. REV. 909, 916 (2016); Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).
19. Strasser, *supra* note 18, at 916; *Yoder*, 406 U.S. at 216.

beliefs of all kinds to live out their faiths in daily life through the 'performance of (or abstention from) physical acts'."[20]

Freedom of religion applies not only to individuals but also to religious nonprofit corporations. The First Amendment rights of protected speech and religion apply to corporations and nonprofits,[21] and nonprofits are protected by RFRA.[22] Regardless of how unfamiliar, bizarre, or distasteful a sincerely held religious belief might be, once a court decides that a claimant has asserted a clearly held religious belief, the claim falls under the Free Exercise Clause, Establishment Clause, RFRA, and the Religious Land Use and Institutionalized Persons Act.[23] As such, First Amendment and RFRA protection apply to religious nonprofits that clearly demonstrate how religious beliefs motivate and guide the organization's work.[24] When a religious nonprofit states that its humanitarian relief and community outreach activities are the result of its sincerely held religious beliefs, this shows how the organization's religious beliefs are "intimately related to daily living"[25] and qualify as protected religious exercise, not as mere personal beliefs.

II. SUBSTANTIAL BURDEN ANALYSIS

The federal government cannot substantially burden the free exercise of religion, but there is no bright line rule or universal test to determine what qualifies a burden as substantial. *Employment Division, Department of Human Resources of Oregon v. Smith* permitted neutral laws of general applicability to "incidentally" burden religion without exemptions, but what counts as a substantial burden both pre- and post-*Smith* has not been made

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20. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 524 (2022).

21. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342-43 (2010); Ronald J. Colombo, *Corporate Entanglement with Religion and the Suppression of Expression*, 45 SEATTLE U. L. REV. 187, 210 (2021); *see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 752-53 (2014).

22. Colombo, *supra* note 21, at 209.

23. Levine, *supra* note 16, at 280-81.

24. CATHOLIC CHARITIES USA, *About Us*, https://perma.cc/3PS2-4RFY (last visited Mar. 17, 2025) ("As Catholic Charities, we labor in the streets inviting and serving those who have been left out to know and experience the tremendous and abundant love of God through Jesus Christ."); CATHOLIC CHARITIES USA, *What We Do*, https://perma.cc/6HWJ-FWF4 (last visited Mar. 17, 2025) ("The work of Catholic Charities is a tangible response to the Gospel call to care for the least among us."); CATHOLIC CHARITIES USA, *Immigration Services*, https://perma.cc/CY22-NGBT (last visited Mar. 17, 2025) ("Catholic Charities agencies provide care to all our sisters and brothers, many of whom come to us in their time of greatest need. Our ministry to vulnerable people on the move is a cornerstone of our Catholic identity.") ("People migrating to the United States are often fleeing war, violence, persecution, economic and political upheaval, and devastating natural disasters. Catholic social teaching holds that humans have a right to move to protect their lives and families."); THE SALVATION ARMY, *What Do We Do?*, https://perma.cc/3AJ5-TQLU (last visited Mar. 17, 2025) ("The Salvation Army, an international movement, is an evangelical part of the universal Christian Church. Its message is based on the Bible. Its ministry is motivated by the love of God. Its mission is to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination."); HEBREW IMMIGRANT AID SOCIETY, *Who We Are*, https://hias.org/who/(last visited Mar. 17, 2025) ("Drawing on our Jewish values and history, and working with host communities, HIAS provides vital services to refugees, asylum seekers, and other forcibly displaced and stateless persons around the world and advocates for their fundamental rights so they can rebuild their lives").

25. *Yoder*, 406 U.S. at 216 (1972).

clear.[26] For some courts, there is a substantial burden only when the government forces someone to "choose between forgoing a religious obligation and facing a direct or indirect consequence."[27] In other courts, substantiality turns on whether a state action makes it "effectively impracticable" for someone to continue practicing their faith.[28] For some, the substantiality of a burden depends on the weight of the "penal or economic consequences" claimants face if they choose religion over compliance.[29] More broadly, one definition holds that for a state action to impose a substantial burden, it must prevent, prohibit, or raise the cost of religious exercise.[30] There is also a proposed "religious substantiality" test that requires courts to ask what type of religious exercise has been burdened because only certain types of religious exercise can experience substantial burdens.[31] Under this test, burdens on religion are substantial if they forbid or penalize practices central to religion, or if a state action creates a strict obligation of religion.[32] However, I argue that the centrality of a belief should not be a factor in the substantial burden analysis because it invites the courts to analyze the truth, validity, and substance of religious beliefs. The measure of whether a burden is substantial should hinge on the form and severity of the impact and how it prevents, prohibits, and/or coerces the relinquishment of a religious exercise.

Case law provides a rough, unclear guide to substantial burden analysis. *Braunfeld v. Brown* permitted Sunday store-closing laws even though they burdened businesses who observed the Sabbath on a different day, because the economic impact was an indirect burden, not a direct conflict between religious exercise and following the law.[33] Later in *Sherbert v. Verner*, the Supreme Court provided a two-prong framework that required courts to determine whether the government policy at issue burdened religious exercise and whether the burden was justified by a "compelling state interest."[34] *Wisconsin v. Yoder* later added the qualifier of "unduly burdens" to this framework.[35] *Bob Jones University v. United States* revoked tax-exempt status of a university because its policies—which incorporated its religious beliefs by prohibiting interracial dating and marriage—went against a revenue ruling that prohibited racial discrimination in private schools' admission policies to

26. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 892 (1990).
27. Eric H. Wang, *To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion*, 72 EMORY L.J. 723, 726 (2023).
28. *Id.*
29. *Id.*
30. Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1795 (2022).
31. Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755, 1761 (2020).
32. *Id.* at 1761-62.
33. Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961).
34. Jess Zalph, *A Weighty Question: Substantial Burden and Free Exercise*, 25 U. PA. J. CONST. L. 953, 958-59; Sherbert v. Verner, 374 U.S. 398, 403 (1963).
35. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

qualify for tax-exempt status.[36] The limitation on religious freedom was justified by the "overriding governmental interest" in preventing racial discrimination.[37] There was no substantial burden because the university chose to adhere to religious beliefs instead of opting into a government benefit like tax-exempt status, and that choice did not incur an economic burden that denied their ability to operate the university or exercise their religious beliefs. The Supreme Court also held in *Jimmy Swaggart Ministries v. Board of Equalization of California* that the First Amendment does not prohibit a state from imposing a generally applicable sales tax on the distribution of religious materials by a religious organization.[38] The burden was not substantial because the tax represented only a small fraction of the sale. Jimmy Swaggart Ministries was still able to sell materials and practice its religion, so the tax did not rise to the level of a substantial burden. Economic burdens thus do not automatically rise to the level of a substantial burden and must be significant enough to prevent, prohibit, or coerce the relinquishment of a religious exercise. Religious organizations have the right to freely exercise their religion, but not the right to have the government fund it.

One framework proposes four categories of burdens: simply punitive, indirectly punitive, non-punitive, and preventive.[39] Simply punitive burdens are direct because they force individuals to choose between forgoing religious compliance and being subject to significant punishment, like criminal penalties.[40] Indirectly punitive burdens force individuals to choose between forgoing religious exercise, incurring punishment, or forgoing access to a public benefit or entitlement that they would otherwise receive.[41] Non-punitive burdens provide a choice between public benefit and religious practice in a way that does incur any punishment in the form of civil or criminal penalties.[42] Preventive burdens involve no choice, but rather involve a state action that hinders the practice of religion, like building on sacred land or knocking down a church.[43] If faith-based organizations lose their funding for helping undocumented migrants, that economic burden would qualify as a non-punitive burden. The organizations choose between federal grants or the religious practice of providing nondiscriminatory humanitarian aid, but there is no civil or criminal penalty because of their choice. The receipt or rejection of funding is not an indirectly punitive burden because the FEMA grants are competitive grants and not guaranteed sources of funding that the organizations are normally entitled to receive.

36. Bob Jones Univ. v. United States, 461 U.S. 574, 575 (1983).
37. *Id*. at 603.
38. Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378, 384-97 (1990).
39. Girgis, *supra* note 31, at 1771-74.
40. *Id*. at 1772.
41. *Id*.
42. *Id*. at 1773-74.
43. *Id*. at 1774.

The aforementioned cases demonstrate that faith-based organizations that lose federal funding would experience an indirect economic burden, but not a substantial burden. Direct burdens are likely to be considered substantial, but indirect burdens vary widely and are thus harder to evaluate for substantiality.[44] Indirect burdens generally make people choose between "compliance with their faith and freely engaging in a secular practice."[45] In this paper, for example, a FEMA's EFSP-H program uses its requirements to regulate the secular activity of humanitarian relief. Faith-based organizations' financial statements show that these organizations have sufficient assets to operate without federal grants, which would let them serve undocumented migrants without violating federal grant requirements. For example, in 2024 Catholic Charities of the Archdiocese of Washington D.C. had $102,310,000 in financial assets, of which $9,932,000 came from grants and contracts primarily from the government.[46] These grants and contracts account for less than ten percent of the organization's federal assets, so losing federal funding would perhaps motivate Catholic Charities to find new sources of income, but it would not force them to cease operations. In 2024, the Salvation Army had $4,775,585,000 in total revenue, $641,459,000 of which came from government funds.[47] In 2023, the Jewish Federations of North America had $289,762,000 in total current assets, of which $2,477,00 came from federal grants.[48] Although some organizations rely more on government grants than others, these charities are not wholly dependent on government funding to operate. Other sources of revenue enable them to continue their missions, so the economic burden of losing federal funding if they choose to serve undocumented migrants does not force them to choose between the financial ability to continue operating or exercising their religious beliefs.

Organizations also have the option of physically and legally separating their own funds from government grants by creating a new corporate entity. If an organization undertakes activities that are distinct from their grant's purpose, grantees must maintain physical and financial separation between government funded activities and privately funded activities.[49] The organizations could receive government money only through the newly incorporated organization to ensure that government funds are used only for approved purposes. However, this raises issues that depend on the structure, size, and capabilities of each organization. For example, if a larger organization like

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44. Zalph, *supra* note 34, at 967.

45. *Id*. at 966.

46. Consolidated Financial Statements and Independent Auditor's Report: Years ended June 30, 2024 and 2023, *Consolidated Statements of Activities*, CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC. AND AFFILIATES, https://perma.cc/G3KU-J5WQ.

47. 2024 National Annual Report, *The Salvation Army USA Unaudited Combined Statement of Financial Position*, THE SALVATION ARMY 24, https://perma.cc/8FL4-XQGS.

48. *Consolidated Financial Statements and Supplementary Information: Years Ended June 30, 2023*, THE JEWISH FEDERATIONS OF NORTH AMERICA, INC. AND SUBSIDIARIES 19, https://perma.cc/X25S-CHV4.

49. *See* Rust v. Sullivan, 500 U.S. 173, 180-81 (1991).

the Salvation Army went this route, then it might be able to keep itself separate more easily from the new entity. The Salvation Army has more resources available to ensure strict separation. However, smaller organizations are more likely to share personnel, office space, supplies, and other resources that might blur the lines between the original and new entities and jeopardize the feasibility of this method of grant receipt. Despite the difficulties of this method for smaller organizations, the revocation of funding still would not rise to the level of a substantial burden because they could still choose to forgo funding altogether and serve who they please without funding restrictions.

III. CONSTITUTIONAL CONDITIONS ON FEDERAL FUNDING

Instead of completely defunding religious organizations for serving undocumented migrants, receipt of federal funds could come with conditions. This approach would allow the government to meet its interests in using federal resources properly and in helping local and state governments manage the increasing migrant population, while also avoiding free exercise challenges. However, the conditions placed upon the funds must meet certain criteria to be constitutional. First, I will explain the unconstitutional conditions doctrine, after which I will explain the constitutionality of current conditions on FEMA funding.

A. *Unconstitutional Conditions Doctrine*

The unconstitutional conditions doctrine prohibits the government from conditioning a benefit – like a grant – on the potential recipient's forced relinquishment of a constitutional right.[50] The doctrine "'examines the extent to which government benefits may be conditioned or distributed in ways that burden constitutional rights or principles.'"[51] When applied to faith-based organizations, the doctrine prevents the government from conditioning funding on an organization's compromising its religious freedom. Funding conditions must meet several requirements. First, the government must provide clear notice to the recipient of what actions are required in exchange for the funds and the consequences for failure to comply.[52] Additionally, funding conditions must be related to the purposes of the federally funded program or activity.[53] The most relevant requirements in this paper are that a funding condition cannot violate an independent constitutional bar,[54] and Congress may incentivize the adoption of the policy and related funds, but it cannot

50. Jennifer Davidson, *Lessons From Trinity Lutheran: An Entity-Based Approach to Unconstitutional Conditions and Abortion Defunding Laws*, 43 N.Y.U. REV. L. & SOC. CHANGE 581, 583 (2019).
51. Killion, *supra* note 9, at 19.
52. *Id*. at 5.
53. *Id*.
54. Davidson *supra* note 50, at 587.

coerce participation.[55] Anti-coercion analysis requires us to determine whether the potential recipient has a "legitimate choice whether to accept the federal conditions in exchange for federal funds."[56] Indirect coercion on the free exercise of religion, not just explicit prohibitions, are subject to strict scrutiny under the First Amendment,[57] and the Supreme Court has "upheld conditions that 'define the limits of the government spending program–those that specify the activity that Congress wants to subsidize,' but it has applied heightened scrutiny to conditions that 'seek to leverage funding' in a way that burdens constitutional rights 'outside the contours of the program itself.'"[58] Congress may not use its spending power to violate a private recipient's constitutional rights,[59] such as a nonprofit. These general limits on conditional funding have never been expressly confined to the states,[60] so I apply them here to religious nonprofits.

Case law provides guidance on when conditions cross over from constitutional to coercive. Constitutional conditions prevent an "excessive entanglement" with religion, align with the funded program's scope and objectives, and allow the recipients to exercise their religious beliefs. For instance, a state program that provided college scholarships on the condition that students did not pursue a devotional theology degree was constitutional, because pursuing that degree is an "essentially religious endeavor" that would create an excessive entanglement with religion by using direct government aid to promote or endorse religion.[61] Similarly, the Supreme Court upheld the conditions in *Bowen v. Kendrick* because they sought to prohibit the misuse of funds and ensure that the government's resources were used to promote services and research regarding premarital teenage sexuality–not the advancement of religion.[62] Should an organization wish to undertake activities that are distinct from the purpose for which they received government funding, grantees must maintain physical and financial separation between government-funded activities and privately-funded activities.[63] However, in *Rosenberger v. Rector & Visitors of the University of Virginia*, denial of public university funds to a religious student magazine was coercive because it forced students to either accept school funds and relinquish their religious freedom, or forgo university funding and the ability to publish their student magazine.[64] In *Rosenberger*, the denied funds came from a general pool of money that student organizations

55. Killion, *supra* note 9, at 5.
56. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 578 (2012).
57. Brannon, *supra* note 8, at 16-17.
58. Killion, *supra* note 9, at 19.
59. *Id*. at 23.
60. *Id*. at 21.
61. Locke v. Davey, 540 U.S. 712, 721 (2004).
62. Bowen v. Kendrick, 487 U.S. 589, 590 (1988); *see* Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973) (holding that funding programs violated Establishment Clause because they lacked measures to ensure funds would not be used for religious purposes).
63. Rust v. Sullivan, 500 U.S. 173, 188-89 (1991).
64. Rosenberger v. Rectors & Visitors of the Univ. of Virginia, 515 U.S. 819, 820 (1995).

were generally entitled to, unlike the funding in *Locke v. Davey* and *Bowen* where the funds were like limited contracts because they were purpose-specific, required application, and not guaranteed.

The federal grants and their requirements that I discuss in this paper are not coercive like in *Rosenberger*. The conditional funding I discuss is akin to limited contracts like in *Rosenberger* because the grants are awarded specifically to provide humanitarian relief to homeless and migrant populations, organizations must apply for the grant, and the receipt of funds is not guaranteed. Religious organizations are not coerced into choosing between federal grants and the survival of their organization, because, as I explained earlier, they can afford to operate without government funds. Organizations review and choose to commit themselves to the terms of a "contract" to receive funding. Conditions on these grants are permissible if they allow the organizations to continue their operations and serve undocumented migrants in a way that they can clearly demonstrate does not come from government funds. For instance, the conditions could limit the use of funds to food, transportation, and housing costs. By limiting the use of government funds to services that generate easily trackable receipts, organizations can keep clear records of which constituents incur those expenses to ensure that government money is used only for documented people. The organization could provide those same services to undocumented migrants using its own funds. However, if the conditions that are too broad, perhaps by funding overhead expenses like personnel costs or office space, then the conditions are more likely to be unconstitutional. Broad conditions on shared resources would touch all aspects of the organization's work and thus subject all work to the funding conditions. Funding for employee salaries, for example, would more likely raise free exercise challenges. Employees paid through government funds would be forced to choose between fulfilling their religious and/or professional duties and complying with the grant's conditions. Accordingly, so long as the conditions apply to specific expenditures that enable the organization to compartmentalize its operations based on the source of funding, conditions on funding to religious organizations who wish to serve undocumented migrants are constitutional.

B. *Current Conditions on FEMA Funding*

There are currently conditions on federal funding to religious nonprofits, and I will focus on the EFSP as a prime example. The EFSP National Board–which is composed almost entirely of religious organizations–is a competitive grant program that allocates funding to counties and cities across the country to support social service organizations feed, shelter, and otherwise aid people experiencing homelessness or hunger.[65] Congress has specifically appropriated funds for families and individuals encountered by DHS. Eligible applicants must "[b]e

65. FEMA FACT SHEET, *supra* note 12.

a non-profit, faith-based, or governmental entity that provided, or will provide, humanitarian relief in the form of shelter and other direct services to families and individuals encountered by DHS at the Southern Border."[66] Eligible services encompass five categories:

> Primary Services (e.g., food, shelter), Secondary Services (e.g., health/medical services), Administrative Services (e.g., staff time, postage), Equipment and Assets Services (e.g., necessary renovations to agency-owned facilities such as bathrooms and showers), and Transportation Services (e.g., taxi, bus, air, train). All expenditures made by agencies must fall within one of these categories.[67]

Primary services are considered for reimbursement first, and reimbursement for other services will be considered depending on how much funding remains after providing primary services.[68]

There are also requirements for government oversight. Recipients must establish Local Boards (LB) that mirror the EFSP National Board's composition, and the LB function as the governing body for the local EFSP.[69] The LB must share information with other organizations in their communities and use every available opportunity to advertise the funding availability to community agencies.[70] There are also State Set-Aside Committees (SSA Committees), which mirror the composition of the EFSP National Board and represent state-wide interests in any state-wide agency's application for humanitarian relief funding.[71] For organizations that receive funding and seek reimbursement, they must submit proof of payment and maintain documentation that verifies that the expenditures were used for families and individuals encountered by DHS.[72] Recipients must also provide logs of individuals served who have encountered DHS, and they must maintain, but not necessarily submit, documentation verifying families and individuals, such as Alien Identification Numbers.[73] Recipients must provide DHS with access to examine and copy documents related to the grant and permit access to facilities or personnel.[74] For reimbursement for providing food and shelter, organizations must provide a daily log of meals and shelter nights.[75] Legal aid is limited to "know your rights" presentations and the completion of forms necessary for onward travel.[76] Recipients can provide

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66. *Emergency Food and Shelter National Board Program: Humanitarian Relief Funding Guidance Fiscal Year 2023 (Department of Homeland Security Appropriations Act, 2023 – $350 Million),* THE EMERGENCY FOOD AND SHELTER PROGRAM NATIONAL BOARD 12 (2023), https://perma.cc/L42E-EDWT.
67. *Id.* at 12.
68. *Id.*
69. *Id.* at 7.
70. *Id.*
71. *Id.*
72. *Id.* at 9.
73. *Id.* at 13.
74. *Id.* at 48.
75. *Id.* at 14-15.
76. *Id.* at 17-18.

transportation services and receive reimbursement, but only within the United States.[77] Ineligible services include relief provided outside of the eligible time frame, outside the United States, fraudulent applications/expenditures, and services "not in alignment with program guidance or not authorized by the Local Board and National Board."[78]

These conditions are constitutional because they provide clear notice to applicants and are related to the objectives of the program. The conditions seek to provide government oversight and guidance through LBs and SSA Committees, promote the awareness of these services through community advertising efforts, and ensure the proper use of funds through access to specific expenditures for food, shelter, and transportation costs. The one challengeable condition is that the funding only applies to individuals and families that have experienced a "DHS Encounter," which is defined as "[i]nteraction with DHS that results in a non-citizen receiving an Alien Identification Number."[79] An Alien Identification Number is assigned to a noncitizen by DHS and listed on their Permanent Resident Card,[80] so the program's funding does not consider undocumented migrants eligible recipients of its services. Therefore, any religious nonprofits who receive funding from this program cannot provide food, shelter, or any other EFSP-H services to individuals or families who lack Alien Identification Numbers.

Religious organizations that apply for the grant and hold core beliefs in nondiscriminatory community service are thus faced with four options: 1) adhere to the grant's conditions and deny service to undocumented individuals; 2) accept the grant but serve undocumented migrants with that money anyway; 3) refuse government funding; or 4) accept the funding and its conditions, but serve undocumented migrants with its own money. As explained earlier, religious organizations can refuse the funding without having to cease operations. Choosing not to apply for a competitive grant to carry out community service in accordance with religious beliefs does not deny organizations a public entitlement that they would otherwise rely on to operate. Similarly, organizations that apply for and accept the grant could use it to help documented individuals and use their own funds to aid undocumented people. The EFSP-H reimburses expenses for goods like food, hotel stays, and medical supplies, so organizations can keep receipts for those services provided to documented individuals, but then use their own funds for undocumented migrants and for overhead costs. Accordingly, the conditions on the EFSP-H grant are constitutional because they do not coerce religious organizations into relinquishing their religious freedom to receive federal grants.

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77. *Id*. at 20.
78. *Id*. at 23.
79. *Id*. at 27.
80. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Glossary: A-Number/Alien Registration Number/Alien Number (A-Number or A+)*, https://perma.cc/39B7-X8HU (last visited Feb. 23, 2025).

IV. DEFUNDING FAITH-BASED ORGANIZATIONS

Religious organizations that use a free exercise defense against the elimination of their funding for helping undocumented migrants would likely fail. Even though nondiscriminatory humanitarian relief is a free exercise of religion, the denial of funding is not a sufficiently substantial burden to render the loss of funding unconstitutional. First, I will explain how eliminating funding would withstand a RFRA challenge by passing the first prong despite failing the second prong. Then I will show how proposed legislation that would cut federal funding to religious organizations who serve incoming migrants would likely survive Free Exercise challenges.

A. *Surviving a RFRA Challenge*

Under RFRA, the federal government can burden free exercise of religion only if doing so (1) furthers a compelling government interest and (2) is the least restrictive means of furthering that compelling interest.[81] In the context of today's controversies around immigration, there are two main categories of compelling government interests in conflict with each other. First, there is a compelling government interest in enforcing immigration laws to prevent the unlawful entry and transportation of undocumented individuals over and within American borders.[82] However, this paper focuses on how federal funding is allocated to and distributed by religious organizations regarding migrants that are already in the United States, so border protection is beyond the scope of this paper. The government also has an interest in providing temporary relief to undocumented migrants to ease pressure on state and local resources, which are being used to keep migrants safely off the streets and provide temporary relief while migrants find housing, employment, and legal assistance.

Revoking funding from religious organizations for serving undocumented migrants passes the first prong of RFRA, because revoking all funding would prevent the misuse of federal funds without substantially burdening religion and free up resources to directly aid cities and states that need federal assistance. Cities and states are struggling with the growing influx of migrants and spending hundreds of millions of dollars to house, transport, and provide medical care.[83] For example, Chicago, New York City, and Denver are struggling to house the thousands of migrants coming from Texas and other southern states.[84] In New York City, there are over 200 sites that were established to house incoming migrants, mostly as part of a busing campaign

81. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, §3, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb-1).

82. *See* 8 U.S.C. § 1324(a)(1)(A) (imposing criminal penalties for anyone who knowingly or recklessly moves or attempts to move someone who has entered the U.S. illegally, and for concealing, harboring, or shielding undocumented individuals from detention).

83. The Associated Press, *NYC Mayor Eric Adams, other Democratic mayors ask for federal help coordinating migrant buses from Texas*, NBC NEWS (Dec. 27, 2023, 9:01 PM), https://perma.cc/S59Y-MQCF.

84. *Id.*

spearheaded by the Texas governor, who is pushing for stricter border security as communities along the southern border are overwhelmed.[85] New York City alone has taken in roughly 170,000 asylum seekers in the last two years, with about 70,000 in its care in addition to the preexisting homeless population.[86] Providing food, shelter, and other services to asylum seekers is estimated to cost the city $4.7 billion in 2024.[87] Similarly in Massachusetts, emergency shelters reported in November that they were reaching capacity and that the state could no longer guarantee placement to families sent to them.[88] Families who arrived after the shelters hit maximum capacity would be placed on a waitlist, and if they had nowhere else to go, would have to sleep on the street.[89] Massachusetts Governor Maura Healey declared that "[t]his is a federal problem that demands a federal solution."[90]

Unlike religious organizations that can privately fundraise and operate without federal grants, state and city governments rely on taxes and federal assistance to address crises like this. As explained in Part II, religious organizations could continue serving those in need if their funding was revoked and gain the freedom to help undocumented migrants without the restrictions of conditional funding. Although religious organizations supplement the government's efforts to provide social services, the government could also meet its compelling interests in managing the migrant crisis by redirecting funding to states with the most urgent needs. This would equip states to provide more food, shelter, and medical services to protect migrants from sleeping on the street or turning to unlawful, dangerous methods of survival like theft or exploitative "off-the-books" employment. States could also provide the federal government with more centralized, easily accessible records about how many individuals request aid, which services are in highest demand, and where assistance is most needed so that federal entities can tailor resource distribution to communities' evolving needs. In short, eliminating funding from religious organizations passes the first RFRA prong because then the government could meet its compelling interests in managing the migrant crisis, law enforcement, and public safety by allocating those funds directly to the states that the religious organizations are helping.

However, defunding religious nonprofits that aid undocumented migrants violates the second prong of RFRA because it is not the least restrictive means of furthering the government's compelling interests. Less restrictive methods of meeting the governments' interests exist, such as conditional funding, as explained in Part III. Alternatively, religious organizations could

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85. Daniella Silva, Andy Weir & Antoni Hylton, *NYC decision to move migrants from tent shelter to a school amid storm draws fire*, NBC NEWS (Jan. 10, 2024, 4:37 PM), https://perma.cc/5LPK-LFH2.

86. *Id.*

87. *Id.*

88. *Massachusetts emergency shelters reaching capacity*, CBS NEWS (Nov. 9, 2023) 00:15-00:27, https://perma.cc/A2QN-GESX.

89. *Id.*

90. *Id.*

create a separate affiliate corporation that receives the government funds to use solely for government-specified purposes, while using privately raised and donated funds at their discretion within the original nonprofit. However, because eliminating funding passes the first prong, it would be allowed under RFRA.

B. *Proposed Legislation Under the* Fulton *Standard*

There are several proposed federal statutes that seek to eliminate or reduce funding for religious nonprofit organizations. I will confine my analysis to the Secure the Border Act of 2023 and the DHS Appropriations Bill ("Appropriations Bill"). Both would likely survive free exercise challenges because they are neutral, generally applicable, do not substantially burden religion, and meet the government's compelling interests in preventing the misuse of federal funds and regulating the flow and care of migrants.

1. *Secure the Border Act of 2023*

The portion of the Secure the Border Act of 2023 that is most likely to be contested by religious organizations is Section 115. Section 115(b) states that no funds are authorized for any nongovernmental organization that facilitates or encourages unlawful activity, including unlawful entry, human trafficking, and human smuggling.[91] Section 115(c) adds that "no funds are authorized to be appropriated to the Department [of Homeland Security] for disbursement to any nongovernmental organization to provide, or facilitate the provision of, transportation, lodging, or immigration legal services to inadmissible aliens who enter the United States. . ."[92] A free exercise challenge to this legislation would likely fail, because Section 115(b) and (c) comply with *Fulton v. City of Philadelphia* and *Kennedy v. Bremerton*. *Fulton* held that Philadelphia's refusal to contract with Catholic Social Services ("CSS") to provide foster care services unless CSS agreed to certify same-sex couples as foster parents violated the Free Exercise Clause, because it forced CSS to either curtail its mission or certify same-sex couples in violation of its declared religious beliefs. CSS was choosing between "two evils," not between optional federal funding or the lack thereof. CSS could not provide foster services at all if it did not violate its religious beliefs to comply with Philadelphia's requirements. In contrast, the religious organizations at issue in this paper are not coerced into choosing between religious beliefs and carrying out their mission, because they can adhere to their religious beliefs and provide services to undocumented migrants without government funding.

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91. Secure the Border Act of 2023, H.R. 2, 118th Cong. § 115(b), (c) (2023) (received in Senate, read the second time, May 16, 2023).

92. *Id.*

Additionally, the law is neutral and generally applicable. A plaintiff carries the burden of proving a free exercise violation by showing that the government has burdened their sincere religious practice pursuant to a policy that is not neutral or generally applicable.[93] A law is not neutral if it is specifically directed at religious practice, such as through explicit discrimination or if a religious practice is the object of the policy.[94] Sections 115(b) and (c) are neutral because it is not specifically directed at religious practice.[95] As explained in Part I, providing nondiscriminatory humanitarian relief is a free exercise of religion, but it is also a widespread secular activity undertaken by individuals and the government.[96] The statute does not explicitly prohibit conduct that is uniquely religious like in *Church of the Lukumi Babalu Aue, Inc. v. City of Hialeah*,[97] and the restrictions on eligibility for funding applies to all non-profits, not just religious ones. Similarly, a law is not generally applicable if it gives the government discretion to consider the reasons for a person's conduct by creating a mechanism for individual exemptions.[98] Although many religious organizations receive funding through the EFPS-H's board that is composed mostly of religious organizations, that does not automatically make the distribution or use of funds a protected religious practice. Religious organizations that receive the grant are not granted an exemption that allows them to serve undocumented migrants because of their religious beliefs in nondiscriminatory community service. The organizations have the right to freely exercise their religious beliefs by serving who they choose, but they do not have the right to government funding to exercise those beliefs. In sum, Sections 115(b) and (c) are neutral and generally applicable because they do not target a specific, uniquely religious practice or grant religious organizations an exemption based on their religious motivations for aiding undocumented migrants.

2. *The Department of Homeland Security Appropriations Bill*

The Appropriations Bill includes no funds for the EFSP-H or the Shelter and Services Program for the 2024 fiscal year.[99] The Committee on Appropriations cut the funding out of concern that FEMA has not adequately overseen the EFSP program.[100] The committee is particularly worried that the Humanitarian program–which is intended to provide food, shelter, and services to migrants encountered by DHS–is allocating funds to cities not adjacent to the southern border where funds are most needed, and that FEMA is unable to provide basic

93. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525 (2022).
94. *Id.*; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521-22 (1993).
95. *See Lukumi*, 508 U.S. at 521-22.
96. *See* Bradfield v. Roberts, 175 U.S. 291, 297-98 (1899).
97. *Lukumi*, 508 U.S. at 521-22.
98. Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021).
99. Department of Homeland Security Appropriations Bill, 2024, H.R. 4367, 118th Cong. Title III, Emergency Food and Shelter Program (2023) (passed in House, Sept. 28, 2023).
100. H.R. REP. No. 118-123 (2023).

information on how these funds are being used by program recipients.[101] This bill directs FEMA to, within 60 days of the bill's enactment, submit a report on EFSP and EFSP-H grant awards from 2022 and 2023 by recipient, location, amount received, eligible activities, and the reports must "include: the total number of individuals and families served; demographics (age, gender, nationality, language) of individuals and families served; and a description of private resources or contributions and community engagement to supplement federal dollars."[102]

The Appropriations Bill is neutral, generally applicable, and does not substantially burden religion, so it would survive a free exercise challenge. The bill is neutral because it is not specifically directed at religious practice through explicit discrimination or by making a religious practice the object of the policy.[103] As explained in regard to the Secure the Border Act, community service to migrants—regardless of documentation status—likely does not qualify as a religious practice, in contrast to a distinctly religious activity like animal sacrifice in *Lukumi*.[104] The law is also generally applicable because it does not provide religious organizations an exemption to receive funding based on their religious motivations for providing community service.[105] The bill's objectives are to allocate federal aid to cities where it is needed most along the southern border and to ensure that the funds are being used properly by recipients. Preventing or hindering religious practice is not the objective of the statute. As explained in Part II, eliminating federal funding is not a substantial burden on the organizations' religious beliefs, so the bill would survive free exercise challenges because it is neutral, generally applicable, and does not substantially burden religious organizations' beliefs.

CONCLUSION

In sum, I argue that religious organizations serve undocumented migrants in accordance with their religious beliefs would fail to protect their federal funding based on a Free Exercise Clause violation. The grants these organizations compete for, like EFSP-H funding, are not public entitlements that are generally available and guaranteed. Therefore, religious organizations are not denied a public benefit because of their religious beliefs. Losing this type of funding is an economic burden, but not a substantial burden, because the organizations can afford to operate without federal funding. Religious organizations who help undocumented migrants can do so by not applying for conditional funding like the EFSP-H. Constitutional conditions, like those in the EFSP-H, should specify the functions, products, and services that the grant is

101. *Id.*
102. *Id.*; Department of Homeland Security Appropriations Bill, 2024, H.R. 4367, 118th Cong. Title III, Emergency Food and Shelter Program (2023) (passed in House, Sept. 28, 2023).
103. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525 (2022).
104. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1992).
105. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 537 (2021).

for. This allows organizations to identify and separate the services paid for using government money and the services paid for using the organization's money in case they choose to help undocumented migrants with their own resources. Organizations could put separation mechanisms in place or even create a separate affiliate corporation to ensure physical and legal separation of funds. Proposed legislation like the Secure the Border Act and the Appropriations Bill do not substantially burden organizations' religious freedom by cutting their funding, and both statutes are neutral and generally applicable.

If the funding issues I discuss in this paper came before the current Supreme Court, I believe the Court would allow for the elimination or restriction of funding to religious nonprofits that insist on aiding undocumented migrants. Admittedly, the Court has broadened the meaning of free exercise and come down hard on decisions that use religion as a factor to deny government funding, which could work in religious organizations' favor. For example, *Carson v. Makin* and *Espinoza v. Montana*[106] required that a state subsidy for private education cannot disqualify schools that would use the funds for religious instruction, so perhaps they would apply a similar line of reasoning to allocating funds among secular and faith-based nonprofits. The court has also expanded the meaning of free exercise by accepting religious displays in government settings. In *Kennedy*, the Court found that prohibiting Kennedy's prayer on the school football field was not narrowly tailored to achieving a compelling government interest.[107]

Today's Court has a conservative majority, and I predict that it would align with the trend of conservative-leaning decisions in recent years, such as *Dobbs v. Jackson*'s overturning of *Roe v. Wade*[108] and the condemnation of affirmative action in *Students for Fair Admissions, Inc. v. Harvard*.[109] The Court has broadened the range of permissible uses of state funds for religious purposes with decisions like *Caron* and *Espinoza*, and will likely continue to do so with similar cases it has taken on. This year, the Supreme Court will hear *Oklahoma Statewide Charter School Board v. Drummond* and *St. Isidore of Seville Catholic Virtual School v. Drummond*, which will determine whether the nation's first publicly funded religious charter school can open in Oklahoma.[110] The Court may allow this school to open by using the malleable "history-and-tradition" test.

The history-and-tradition test has drawn criticism, especially because it could be molded to suit a judge's desired outcome. The Supreme Court adopted this test in *New York State Rifle & Pistol Ass'n v. Bruen*, when the Court decided that gun regulation laws are permissible under the Second Amendment only if they are "consistent with the Nation's historical tradition

106. Carson v. Makin, 596 U.S. 767, 779-81 (2022); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 487 (2020).

107. *Kennedy*, 597 U.S. at 526.

108. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overturning *Roe v. Wade* protection for the constitutional right to abortion).

109. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023).

110. Mark Sherman, *Supreme Court to weigh approval for 1st publicly funded religious charter school*, CBS NEWS (Jan. 24, 2025), https://perma.cc/S6WP-VYFW.

of firearm regulation."[111] The Court reiterated this test in *Dobbs* by saying that abortion is not a constitutionally protected right because it is not protected by substantive due process, which only protects rights that are "deeply rooted in the Nation's history and tradition."[112] The historical record is—and always will be—incomplete and subject to myriad interpretations, which makes the nation's "history and tradition" a difficult standard for making precise, consistent constitutional decisions in the modern day. Critics have also argued that the test is so malleable that it is hard to get to an objectively "correct" outcome.[113] This relatively new test could be used to open a publicly funded religious charter school, and perhaps to deny funding to religious nonprofits that aid undocumented migrants. President Trump's recent immigration policy changes[114] may be an indication of how conservatives—including the Court's conservative majority—wish to deport undocumented migrants and restrict aid to those already within our borders.

This trend of increasing conservatism, expansion of free exercise, and the abandonment of the *Lemon* test in favor of a more malleable "history-and-tradition" test[115] lead me to believe that despite the Court's permissive view of funding religion and religious demonstrations in public spaces, the Court would eliminate or restrict government funding for religious organizations that aid undocumented migrants. The Court would likely align with increasingly vocal concerns from Republican politicians about controlling the number of undocumented migrants entering the United States and keeping track of them when they are in the care of religious nonprofits.[116] The compelling government interests in border control, national security, and overseeing government spending would likely outweigh humanitarian concerns or free exercise concerns. As the number of migrants entering the United States continues to grow as more individuals and families flee dangerous homelands, perhaps this is an issue that may come before the Supreme Court one day soon.

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111. N. Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022); *see also* Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J. 946, 947 (quoting *Bruen*, 597 U.S. at 24).

112. *Dobbs*, 597 U.S. at 231; Franklin, *supra* note 111, at 947.

113. Franklin, *supra* note 111, at 947-48; *see* Bruen, 597 U.S. at 113 (Breyer, J., dissenting) (observing that "history, as much as any other interpretive method, leaves ample discretion to 'loo[k] over the heads of the [crowd] for one's friends'" (quoting Antonin Scalia & Brian A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 377 (2012))).

114. *See* Camilo Montoya-Galvez, *Trump officials make plans to revoke legal status of migrants welcomed under Biden*, CBS NEWS (Feb. 1, 2025), https://perma.cc/4LTJ-YH9D; Bernd Debusmann Jr., *Migrants on edge as Trump administration ramps up raids and arrests*, BBC (Jan. 29, 2025), https://perma.cc/B6KS-LQTM; Suzanne Gamboa et al., *Trump's stepped-up immigration arrests escalate need for more detention space*, NBC NEWS (Jan. 31, 2025), https://perma.cc/7TQK-5DSR.

115. Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 68-71 (2019) (Kavanaugh, J., concurring).

116. *See* Letter from House Judiciary Republicans, *supra* note 5; Jack Jenkins, *GOP Lawmakers Once Praised Catholic Charities. Now They Want To Defund the Group.*, N.Y. TIMES (Jul. 28, 2023), https://perma.cc/SK38-LDQ7; Gamboa, *supra* note 4; Letter to Lutheran Immigration & Refugee Service On Document Preservation (Dec. 14, 2022), https://perma.cc/2EA6-86EA; HOMELAND SECURITY COMMITTEE REPUBLICANS, *Chairman Green, Homeland Security Republicans Introduce the Border Reinforcement Act* (Apr. 24, 2023), https://perma.cc/2T69-M6HL.