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Immigration Law's Looming RFRA Problem can be Solved by RFRA

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Immigration Law’s Looming RFRA Problem Can Be Solved by RFRA

*Stephanie Acosta Inks**

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I. INTRODUCTION

Two primary objectives of President Trump's administration are expanded religious freedom and strict immigration enforcement. But many religiously motivated people are trying to help vulnerable undocumented people with necessities. Is that a crime?¹ As executive officials continue to aggressively prosecute immigration laws² and at the same time promote a robust understanding of religious freedom,³ a conflict is imminent between a *broad* interpretation of the Immigration and Nationality Act's (INA) § 1324 prohibition against harboring undocumented people⁴ and the Religious Freedom Restoration Act (RFRA).⁵ As the *Washington Post* recently noted, the executive branch will be forced to decide "what it prioritizes more: its ability to deport immigrants in the country illegally—or the right of religious Americans to stand in their way."⁶ If executive officials decide to exercise their discretion for a strict interpretation of the INA's § 1324, courts will be forced to address the conflict as well. This Article proposes resolving the conflict by applying RFRA as a tool of statutory construction, rather than on a case-by-case basis.

1. Elizabeth Eisenstadt Evans & Yonat Shimron, *'Sanctuary Churches' Vow to Shield Immigrants from Trump Crackdown*, NAT'L CATH. REP. (Nov. 21, 2016), <https://www.ncronline.org/news/politics/sanctuary-churches-vow-shield-immigrants-trump-crackdown>.

2. Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html>.

3. Memorandum from Att'y Gen. Jeff Sessions on Federal Law Protections for Religious Liberty (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001891/download>.

4. 8 U.S.C. § 1324(a)(1)(A)(iii) (2012) (criminalizes "any person who . . . knowing 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, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation").

5. 42 U.S.C. § 2000bb-1 (2012) (stating the federal "[g]overnment may [not] substantially burden a person's exercise of religion" unless it has a compelling governmental interest and the means it chose to fulfill that compelling interest is the least restrictive means).

6. Phillip Bump, *The Looming Conflict Between Trump's Immigration Sweeps and Religious Freedom*, WASH. POST (Feb. 12, 2017), https://www.washingtonpost.com/news/politics/wp/2017/02/12/the-looming-conflict-between-trumps-immigration-sweeps-and-religious-freedom/?utm_term=.5b1671c672be.

The standard tools of interpretation have failed to clarify the harboring provision in § 1324 of the INA. Judges in the United States Courts of Appeals have attempted to use traditional tools to get clarity on the ambiguous provision, yet the ambiguity remains—not just between circuits, but within some of them. In some circuits, “harboring” under § 1324 is interpreted broadly, including conduct that merely “substantially facilitates” or “makes it easier or less difficult” for an undocumented person to stay in the United States.⁷ In other circuits, the harboring provision is interpreted narrowly requiring a specific intent to conceal the undocumented person from authorities.⁸ Still others interpret the harboring provision to mean giving an undocumented person “a place to stay where it is unlikely that the authorities will be seeking him.”⁹ This ambiguity creates a problem for the religiously motivated people who are helping undocumented immigrants all around the country by providing food, water, clothing, shelter, or sanctuary.¹⁰ If the executive branch enforces the harboring provision strictly, even against religiously motivated Americans, what conduct is covered?

Consider *United States v. Warren*.¹¹ The government is criminally prosecuting Dr. Scott Daniel Warren, a professor at the University of Arizona, for violating the § 1324 prohibition against harboring illegal aliens.¹² His crime? He “took care”¹³ of two undocumented men who showed up at the door of No More

7. See *infra* Section II.A.

8. See *infra* Section II.B.

9. *United States v. McClellan*, 794 F.3d 743, 754 (7th Cir. 2015); see also *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012).

10. For purposes of this Article, “sanctuary” is defined as a nonclandestine form of shelter. This is consistent with an understanding of the New Sanctuary Movement. For example, see Myrna Orozco & Rev. Noel Andersen, *Sanctuary in the Age of Trump: The Rise of the Movement a Year into the Trump Administration*, CHURCH WORLD SERV. (Jan. 2018), https://www.sanctuarynotdeportation.org/uploads/7/6/9/1/76912017/sanctuary_in_the_age_of_trump_january_2018.pdf.

11. *United States v. Warren*, No. CR 18-002233-TUC-RCC(BPV), 2018 WL 5257807 (D. Ariz. May 31, 2018).

12. Grand Jury Indictment at 1-2, *Warren*, 2018 WL 5257807.

13. Complaint at 1, *Warren*, 2018 WL 5257807.

Deaths,¹⁴ a religiously affiliated organization where he volunteers by offering them “food, water, beds, and clean clothes.”¹⁵ In the government’s view that is illegal—even though the government presented no evidence that Dr. Warren concealed the undocumented men from detection. In fact, it is arguable that by caring for them at a facility known to provide humanitarian relief for undocumented people, Warren helped the government locate the men.¹⁶ What motivated Warren was his religious beliefs. He said they “bound [me] to offer assistance to human beings in need of basic necessities.”¹⁷

The last time the American legal system endured this significant of a conflict between religiously motivated charitable conduct and strict enforcement of immigration laws was in the 1980’s, in what became known as the Sanctuary Trials.¹⁸ The court resolved that clash in a different religious freedom paradigm. The analysis would almost certainly be different today given the new religious freedom landscape that has taken shape because of RFRA and the Supreme Court’s jurisprudence interpreting and applying RFRA in cases such as *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*¹⁹ and *Burwell v. Hobby Lobby, Inc.*²⁰ The analysis in this new religious freedom landscape reveals a very strong RFRA-based claim or defense to a *broad* interpretation of harboring under § 1324.

This Article argues for a RFRA-based statutory construction of the INA’s harboring provision, which should influence prosecutorial officials—and courts, if necessary—to minimize the potential conflict between the two statutes. Moreover, resolving the apparent tension between RFRA and the INA highlights a useful starting point for re-examining the best way to fulfill RFRA’s mandate. RFRA has traditionally been employed on a case-by-case

14. Defendant’s Motion to Dismiss Counts 2 and 3 at 2–3, *Warren*, 2018 WL 5257807 [hereinafter Motion to Dismiss] (“No More Deaths is a ministry of the Unitarian Universalist Church of Tucson . . .”).

15. Complaint, *supra* note 13.

16. Motion to Dismiss, *supra* note 14, at 19.

17. *Id.* at 3.

18. For an overview of this conflict, see Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119 (1993).

19. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

20. *Burwell v. Hobby Lobby, Inc.*, 573 U.S. 682 (2014).

exemption basis, but this Article proposes that using RFRA as a prophylactic tool of construction is a better way to fulfill its mandate when (1) the traditional tools have failed to interpret a relevant statute, (2) the statute remains irreducibly ambiguous, and (3) one interpretation would result in a large-scale RFRA infirmity.

This Article will proceed in five parts. Part I describes the current confrontation between the executive branch and religious communities. Each time the administration cracks down on immigration enforcement, especially in traditionally sensitive areas, religious communities respond with strong resistance. In some cases, they even provide “sanctuary.” Part II demonstrates how the INA’s harboring provision remains irreducibly ambiguous even after courts have applied standard tools of interpretation. Part III examines the recent paradigm shift in how conflicts between a federal statute like the INA and religiously motivated conduct are resolved and how the various interpretations of the harboring provision may or may not survive under that new regime. Part IV argues that, in construing statutes like the harboring provision, using RFRA as a tool of statutory construction is better than using RFRA on a case-by-case accommodation basis. Part V discusses how to interpret the harboring provision using RFRA as a tool of statutory construction.

II. THE EMERGING CONFLICT BETWEEN THE EXECUTIVE BRANCH’S IMMIGRATION ENFORCEMENT AND RELIGIOUS PEOPLE’S ASSISTANCE TO VULNERABLE UNDOCUMENTED IMMIGRANTS

On February 8, 2017, a group of Latino men were leaving Rising Hope Mission Church in Alexandria, Virginia, when they were arrested by Immigration and Customs Enforcement (ICE) agents and taken away in vans. Charles Haynes from the First Amendment Center writes, “The church’s pastor . . . [is worried] that ICE is now targeting churches ‘They are making people fearful of coming to church,’ [Reverend Kerry] Kincannon told a local TV station. . . . [W]e are absolutely not going to stand for it.”²¹

21. Charles C. Haynes, Opinion, *Haynes: ‘Welcoming the Stranger’ in the Age of Trump*, PAHRUMP VALLEY TIMES (Mar. 2, 2017, 7:19 PM), <https://pvtimes.com/opinion/haynes-welcoming-the-stranger-in-the-age-of-trump/>.

This resolution to stand against aggressive immigration enforcement is shared by thousands of other religiously motivated people and communities. Since President Trump took office in 2017, the number of churches offering sanctuary has doubled, from about 400 in 2016 to more than 800 in 2017.²² The *National Catholic Reporter* reports that “[t]he election of President Donald Trump precipitated [an] outbreak of fear” in the immigration community.²³ The Executive Director of the New Sanctuary Movement, Peter Pedemonti, told the *National Catholic Reporter* that after the election of Donald Trump, “[T]here’s been an ‘outpouring of inquiries and support’ from congregations across the country that want to sign on as sanctuary sites.”²⁴ One Catholic Cardinal, in a February 28, 2017, letter, told priests and school officials in the archdiocese not to allow federal agents onto church property without a warrant.²⁵ Sacramento’s Roman Catholic Bishop told the press shortly after the presidential election that if the administration attempted mass deportations of undocumented immigrants, Catholic churches would provide refuge: “[W]e have to be ready to respond if and when that happens . . . ; [w]e will be true to our values as Catholics and Americans.”²⁶

While the Catholic Church has been one of the strongest critics of President Trump’s signature policies to increase deportations,²⁷ it is not the only faith group helping undocumented immigrants. Many houses of worship are providing aid (and sometimes

22. Gabriella Borter, *Under Trump, More Churches Offer Sanctuary but Few Seek Refuge*, REUTERS (Aug. 1, 2017, 12:06 AM), <https://www.reuters.com/article/us-usa-immigration-sanctuary/under-trump-more-churches-offer-sanctuary-but-few-seek-refuge-idUSKBN1AH350>.

23. Peter Feuerherd, *Churches Upfront About Legal Risks when Providing Immigrants Sanctuary*, NAT’L CATH. REP. (Sep. 21, 2017) <https://www.ncronline.org/news/parish/churches-upfront-about-legal-risks-when-providing-immigrants-sanctuary/>.

24. Evans & Shimron, *supra* note 1.

25. Catholic News Serv., *Bishops’ Stances Vary on Sanctuary for Immigrants Facing Deportation*, CATH. PHILLY (Mar. 6, 2017), <http://catholicphilly.com/2017/03/news/national-news/bishops-stances-vary-on-sanctuary-for-immigrants-facing-deportation/>.

26. Stephen Magagnini, *Churches Could Offer Sanctuary from Mass Deportations, Says Sacramento Bishop*, SACRAMENTO BEE (Mar. 2, 2017, 9:09 AM), <https://www.sacbee.com/news/local/article135865728.html>.

27. Christopher White, *Immigrants Are Seeking Sanctuary in U.S. Churches*, CRUX (Mar. 30, 2017), <https://cruxnow.com/interviews/2017/03/30/immigrants-seeking-sanctuary-u-s-churches/>.

sanctuary), including those of the Christian, Muslim, and Jewish faiths.²⁸ Jennifer Piper, who works as the Interfaith Organizing Director for Immigrant Rights at American Friends Service Committee, responded to a media question regarding how her work has changed under the Trump administration with the following: “We are receiving overwhelming requests to lead workshops, as faith communities are disturbed by the dehumanizing rhetoric of the current Administration and the potential for indiscriminate separation of families.”²⁹

Such religiously motivated resistance, however, has not slowed the President’s aggressive agenda to “take the shackles off” ICE.³⁰ According to the *National Catholic Reporter*, between February 1, 2017, and July 31, 2017, orders of removal and voluntary departure have increased 30.9%.³¹ A month before the aforementioned raid outside Rising Hope Mission Church, the President signed an executive order entitled “Enhancing Public Safety in the Interior of the United States,” which the American Immigration Council (AIC) described as a “massive expansion of interior immigration enforcement.”³² According to AIC, the order “defines enforcement priorities so broadly as to place all unauthorized individuals at risk of deportation, including families, long-time residents, and ‘Dreamers.’”³³ And even though there is a specific policy outlined in the Morton Memo of July 2011 that identifies churches as “sensitive locations” protected from ICE enforcement, barring

28. Evans & Shimron, *supra* note 1; Kimberly Winston, *Ohio Mosque is First to Join Sanctuary Movement*, NAT’L CATH. REP. (Jan. 24, 2017), <https://www.ncronline.org/news/politics/ohio-mosque-first-join-sanctuary-movement>.

29. White, *supra* note 27.

30. Nick Miroff & Maria Sacchetti, *Trump Takes ‘Shackles’ Off ICE, Which is Slapping Them on Immigrants Who Thought They Were Safe*, WASH. POST (Feb. 11, 2018), https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5_story.html?utm_term=.ea234175a8be.

31. Feuerherd, *supra* note 23.

32. *Summary of Executive Order “Enhancing Public Safety in the Interior of the United States”*, AM. IMMIGR. COUNCIL 1, 1 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/summary_of_executive_order_enhancing_public_safety_in_the_interior_of_the_united_states.pdf.

33. *Id.*

emergency circumstances,³⁴ immigration lawyers and watchers have called into question the administration's fidelity to that policy, especially given recent raids in sensitive locations, such as the one at Rising Hope. Moreover, *United States v. Warren* illustrates that executive officials are including religiously motivated Americans in their immigration enforcement priorities.

This confusion has created a problem both for the religiously motivated people providing aid to undocumented people and for the government. As the National Latino Evangelical Coalition stated, "Churches need to follow their conscience. . . . If they feel the need to protect undocumented immigrants, they're within their biblical and theological right to do so."³⁵ If it is clear to the churches that they are within their biblical right to do so, it is less clear to them whether they are within their legal right to do so. The *Catholic Philly* reported that the Catholic community is torn over what to do about the uptick in deportation enforcement because their attorneys have questioned whether they can legally offer sanctuary.³⁶ The *National Catholic Reporter* documented Jesuit Father Bryan Pham, a canon and civil lawyer and professor at Marymount University in Los Angeles, urging Catholic institutions to be cautious of the potential consequences for giving sanctuary: "It's a prophetic stance . . . but there's no legal defense."³⁷ Jennifer Piper from American Friends Service Committee, however, disagrees: "[C]hurches are not breaking laws against 'harboring aliens' because they are open about which immigrants they have taken in, and where."³⁸

34. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Morton Memo]; *FAQ on Sensitive Locations and Courthouse Arrests*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (last updated Sept. 25, 2018), <https://www.ice.gov/ero/enforcement/sensitive-loc> (defining "sensitive locations").

35. Evans & Shimron, *supra* note 1.

36. Loken & Bambino, *supra* note 18, at 182 n.380.

37. Feuerherd, *supra* note 23.

38. Rachel Estabrook, *What Makes a Church a Sanctuary for Undocumented Immigrants?*, COLO. PUB. RADIO (Feb. 20, 2017), <http://www.cpr.org/news/story/inside-colorados-church-movement-to-protect-immigrants-due-for-deportation>.

III. THE HARBORING PROVISION IN THE INA IS IRREDUCIBLY AMBIGUOUS

The federal courts, like the churches discussed previously, are divided about whether harboring includes providing mere shelter or whether it is limited to clandestine sheltering.³⁹ The relevant portion of the statute makes it a federal felony for any person to

knowing[ly] 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, or attempts to conceal, *harbor*, or shield from detection, such alien in any place, including any building or any means of transportation⁴⁰

Recent cases have brought some clarity to a few circuits, but federal courts remain divided about how broadly to interpret this criminal provision of the INA. One scholar notes:

The anti-harboring provision, however, is quite special. Its language presents enormous interpretative problems, most obviously in its use of the term “harbor.” How should this uncommon word be read? The Supreme Court, in its only encounter with the problem in this context, openly admitted it was stumped. The Second Circuit was likewise frustrated in its attempt to construe the anti-harboring statute in *Lopez*. “Our task would have been lightened,” the court noted dryly, “if Congress had expressly defined the word ‘harbor.’”⁴¹

This criminal offense is punishable by a large fine or imprisonment and applies to all persons – not just those engaged in transporting undocumented people into the United States and not just those who are motivated by financial gain.⁴² Despite the severity of the offense and ambiguity over what conduct it covers, the Supreme Court has not yet ruled on a uniform definition of harboring, nor has Congress elaborated on its meaning. As a result, courts have tried to construe the § 1324 prohibition using

39. SHANE DIZON & NADINE WEITSTEIN, 3 IMMIGRATION LAW SERVICE 2D § 17:56 (2d ed. 2018).

40. 8 U.S.C. § 1324(a)(1)(A)(iii) (2012) (emphasis added).

41. Loken & Bambino, *supra* note 18, at 143 (footnote omitted).

42. *See* § 1324(a)(1)(B).

traditional tools of statutory interpretation. Yet the ambiguity remains.

Even though a survey of the legislative history, congressional intent, or textual understanding of the harboring provision⁴³ is beyond the scope of this Article, it is important to this Article's broader argument concerning RFRA to note that, even when these interpretative tools are employed, the ambiguity remains. For example, one court considered the provision's plain meaning and found it to be clearly "directed against those who abet evaders of the law against unlawful entry, as the collocation of 'conceal' and 'harbor' shows. Indeed, the word 'harbor' alone often connotes surreptitious concealment."⁴⁴ The same circuit, however, later found the provision's plain meaning less clear: "We do not think the ordinary meaning of 'harbors,' at least with respect to whether it entails avoiding detection, is unambiguous. While 'harbor' may sometimes be synonymous with 'shelter,' many of its most common uses—for example, 'harboring a fugitive'—also connote concealment."⁴⁵

Dictionaries and modern internet searches have not proved helpful, either. One court noted, "Dictionaries, either from the early twentieth century or today, do not consistently define 'harbor' as containing or lacking an element of concealment."⁴⁶ Another court relied on the 1910 edition of *Black's Law Dictionary*, which states that "a person may be convicted of harboring a slave, although he may not have concealed her."⁴⁷ But another judge on the panel resorted to a Google search and found it "apparent from [the] results that 'harboring,' as the word is actually used, has a connotation—which 'sheltering' and *a fortiori* 'giving a person a

43. See, e.g., Emily Breslin, *The Road to Liability is Paved with Humanitarian Intentions: Criminal Liability for Housing Undocumented People Under 8 U.S.C. § 1324(A)(1)(A)(III)*, RUTGERS J.L. & RELIGION 214 (2009); Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147 (2010); Loken & Bambino, *supra* note 18; see also *United States v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. 2013); *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012).

44. *Vargas-Cordon*, 733 F.3d at 380 (citing *United States v. Mack*, 112 F.2d 290, 291 (2d Cir. 1940) (L. Hand, J.)).

45. *Id.* at 381.

46. *Id.*

47. *Costello*, 666 F.3d at 1043.

place to stay’ – does not, of deliberately safeguarding members of a specified group from authorities”⁴⁸

Even after considering the placement and structure of the term in the statute, it is still unclear what the harboring provision means. One court found the placement to suggest that it was

intended to encompass an element of concealment . . . The other two terms – ‘conceals’ and ‘shields from detection’ – both carry an obvious connotation of secrecy and hiding. The canon of *noscitur a sociis* would thus suggest that ‘harbors,’ as the third and only other term . . . also shares this connotation⁴⁹

But another court found this meant the exact opposite, stating, “We needn’t assume that harboring is redundant; it can be given a meaning that plugs a possible loophole left open by merely forbidding concealing and shielding from detection.”⁵⁰ This same court noted that “[w]hen a statute is broadly worded in order to prevent loopholes from being drilled in it by ingenious lawyers, there is a danger of its being applied to situations absurdly remote from the concerns of the statute’s framers.”⁵¹

This ambiguity in the meaning of “harboring” is not resolved by any of the major theoretical approaches to statutory interpretation. Plain meaning textualists would seek to resolve the ambiguity by looking to context, but each of the alternative readings is consistent with § 1324 as a whole: this is not a situation where only one of the alternative meanings of a statutory term makes sense in light of surrounding provisions. Nor does purposivism provide a clear resolution of the ambiguity. Both wide and narrow readings of “harboring” are consistent with the purposes that a reasonable legislature could have had in enacting § 1324. Finally, an approach to statutory interpretation that focuses on the intent of Congress fails to clarify the ambiguity. As is frequently the case, the legislative history does not address the question adequately.⁵²

48. *Id.* at 1044.

49. *Vargas-Cordon*, 733 F.3d at 381.

50. *Costello*, 666 F.3d at 1045.

51. *Id.* at 1046 (quoting *Abbot Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 426 (7th Cir. 2007)).

52. For a more fulsome discussion of the legislative history, see Loken & Babino, *supra* note 18, at 143, and also, generally Breslin *supra* note 43, and Jain, *supra* note 43.

In sum, “harboring” is irreducibly ambiguous as a matter of statutory interpretation from the perspective of textualism, purposivism, and intentionalism. This backdrop of irreducible ambiguity permits utilizing RFRA as a tool of construction to narrowly interpret the statute. For purposes of this Article, I have categorized the ambiguity in the circuits into three interpretations: a) harboring as merely substantial facilitation, b) harboring as substantially facilitating plus evading detection from the authorities, and c) harboring as providing a person “a place to stay that the authorities are unlikely to be seeking him.”⁵³

*A. The Broadest Interpretation of “Harboring” Includes Mere
“Substantial Facilitation” of an Undocumented Person’s
Ability to Stay in the Country*

The broadest interpretation of the harboring provision includes conduct that “tends to substantially facilitate” an undocumented alien remaining in the United States, regardless of whether the defendant intended to conceal the alien from authorities.⁵⁴ For example, the Eighth Circuit held in *United States v. Sanchez* that a couple who had rented an apartment for undocumented aliens and promised to help them obtain work and immigration papers were guilty under the harboring provision.⁵⁵ Likewise, in *United States v. Rushing* and *United States v. Tipton*, the Eighth Circuit held that convictions for harboring were sufficiently supported where the defendants helped the undocumented persons obtain work and a place to live, even if the defendants did not intend to hide them.⁵⁶

For decades, the Fifth Circuit held the same broad view about what constitutes harboring.⁵⁷ This view can be summarized by *United States v. Balderas*, where the court ruled that “affording

53. See *United States v. McClellan*, 794 F.3d 743, 755 (7th Cir. 2015).

54. See *United States v. Shum*, 496 F.3d 390, 392 (5th Cir. 2007) (defining “substantially facilitate” to mean making the undocumented person’s stay in the United States “easier or less difficult”).

55. *United States v. Sanchez*, 927 F.2d 376 (8th Cir. 1991).

56. *United States v. Tipton*, 518 F.3d 591 (8th Cir. 2008); *United States v. Rushing*, 313 F.3d 428 (8th Cir. 2002), *judgement vacated* (Jan. 14, 2003).

57. See, e.g., *Shum*, 496 F.3d at 390; *United States v. De Jesus-Batres*, 410 F. 3d 154 (5th Cir. 2005); *United States v. Valerio-Santibanez*, 81 F. App’x. 836 (5th Cir. 2003); *United States v. Rubio-Gonzales*, 674 F.2d 1067 (5th Cir. 1982); *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977).

shelter to an illegal alien is conduct which by its nature tends to substantially facilitate the alien's remaining in the United States⁵⁸ This view that mere sheltering amounts to harboring maintains that Congress intended to broadly proscribe conduct that makes it "easier or less difficult"⁵⁹ for undocumented people to remain in the United States, regardless of a specific intent to prevent the undocumented person from being detected. The Fifth Circuit, however, may have recently signaled a changing viewpoint. In *Villas at Parkside Partners v. City of Farmers Branch*, the court acknowledged that Congress "intended to broadly proscribe any knowing or willful conduct fairly within any of these terms that tends to substantially facilitate an alien's remaining in the United States illegally[,]"⁶⁰ but ultimately went in seemingly the opposite direction, concluding, "To that end, we have interpreted the statutory phrase 'harbor, shield, or conceal' to imply that 'something is being hidden from detection.'⁶¹

Likewise, in the Ninth Circuit, after decades of finding harboring to include substantial facilitation, a similar shift in viewpoint may be occurring. In two prominent cases, *United States v. Acosta de Evans*⁶² and *United States v. Aguilar*,⁶³ the court held that mere provision of shelter could violate the harboring provision. In *Acosta de Evans*, the defendant provided housing to undocumented family and friends but argued at trial that she did not intend or try to hide them from authorities.⁶⁴ The court rejected her argument and held that her mere provision of shelter was harboring.⁶⁵ More than a decade later, in the Sanctuary Trials, the court held that harboring an unlawful alien does not require an intent to evade authorities (even though the court went on to find that it was what the defendants were in fact doing).⁶⁶ The court stated:

58. *United States v. Balderas*, 91 F. App'x 354, 354 (5th Cir. 2004).

59. *Shum*, 496 F.3d at 392.

60. *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 529 (5th Cir. 2013) (quoting *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 n.5 (5th Cir. 1982)).

61. *Id.* (quoting *United States v. Varkonyi*, 645 F.2d 453, 459 (5th Cir. 1981)).

62. *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976).

63. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989).

64. *Acosta*, 531 F.2d at 429.

65. *Id.* at 430.

66. *Aguilar*, 883 F.2d at 689-90.

In *United States v. Acosta de Evans*, this court rejected the very claim that appellants are making in this case. The court examined the legislative history of § 1324(a) and case law from other circuits that already addressed the issue, concluding that the word ‘harbor’ means ‘to afford shelter to’ and does not require an intent to avoid detection.⁶⁷

Although these two prominent cases have not been overruled, it appears the Ninth Circuit may be signaling a change in its view about whether a specific intent to help the undocumented person evade detection is required as an element of harboring. For instance, in *United States v. You*, the court held that the jurors were properly instructed regarding § 1324(a) when they were told they “must find that Appellants had acted with ‘the purpose of avoiding the aliens’ detection by immigration authorities.”⁶⁸ Likewise, in *United States v. Latysheva*, the court held “harboring of [undocumented] aliens under 8 U.S.C.A. § 1324(a)(1)(A)(iii), is a specific intent crime”⁶⁹ It is unclear in the Fifth and the Ninth Circuits whether harboring under § 1324 requires an intent to conceal an undocumented person and not merely substantially facilitating the presence of undocumented people. The same ambiguity existed in the Second Circuit until *United States v. George*⁷⁰ was decided in 2015. I discuss *George* in further detail in my discussion of the narrowest interpretation of the harboring provision.

B. The Narrowest Interpretation of “Harboring” Requires “Substantial Facilitation” Plus Preventing Authorities from Detecting the Undocumented Individual’s Presence

The second way courts have tended to interpret § 1324(a)(1)(A)(iii) is to find that harboring not only requires substantially facilitating an undocumented person’s stay in the country, but also a specific intent to help the undocumented person evade detection from authorities.

67. *Id.* at 690 (citation omitted).

68. *United States v. You*, 382 F.3d 958, 966 (9th Cir. 2004) (emphasis in original).

69. *United States v. Latysheva*, 162 F. App’x. 720, 727 (9th Cir. 2006).

70. *United States v. George*, 779 F.3d 113 (2d Cir. 2015). *George* was not an *en banc* decision. *Id.*

The Second Circuit followed this approach in a 2015 case called *United States v. George*.⁷¹ After acknowledging the decades of ambiguity on how to interpret the provision,⁷² the court held that although the government must show the defendant shielded the alien from detection or discovery from authorities, it does *not* have to show that the defendant acted secretly or that the hiding was necessarily clandestine.⁷³

“A defendant who intends to conceal an illegal alien from authorities may be guilty of harboring,” it explained, “even though his conduct ‘lack[s] the hallmarks of active, classic concealment.’”⁷⁴ As a result, when the defendant in *George* argued that “she never hid the [immigrant] from visitors nor restricted her movements or mistreated her in any way,”⁷⁵ the court responded that harboring requires proof only that the defendant sheltered the immigrant “intending to make the alien’s ‘detection by the authorities substantially more difficult.’”⁷⁶ Citing *Vargas-Cordon*, the *George* court reiterated its previous holding that “where a defendant’s conduct ‘undoubtedly diminished the government’s ability to locate’ an illegal alien, he was guilty of harboring even if he ‘did not actively hide the alien from the outside world.’”⁷⁷

The Sixth Circuit takes a slightly different approach. It has held that preventing detection from authorities requires some level of *clandestine* behavior. Harboring occurs, in its view, where the defendants “clandestinely shelter, succor and protect improperly admitted aliens” and conceal them by “shielding [them] from

71. *Id.*

72. *Id.* at 117.

73. *Id.* at 118.

The *George* Court said that, prior to its 2013 decision in *Vargas-Cordon*, 733 F.3d 366 (2d Cir. 2013), its precedents lacked consistency in construing the harboring provision. *George*, 779 F.3d at 118. So it tried to provide clarity by making clear that *Vargas-Cordon* settled the debate in the Second Circuit that a “defendant’s action must be intended [to not only] (1) substantially . . . facilitate an illegal alien’s remaining in the United States, [but also] (2) . . . prevent the alien’s detection by immigration authorities . . .” *Id.*

74. *Id.* at 119 (quoting *Vargas-Cordon*, 733 F.3d at 382) (alteration in original); see also *Vargas-Cordon*, 733 F.3d at 382 (“[E]ven if *Vargas-Cordon*’s conduct lacked the hallmarks of active, classic concealment, it nevertheless was intended to make [the undocumented immigrant’s] detection by the authorities substantially more difficult.”).

75. *George*, 779 F.3d at 121.

76. *Id.* (emphasis in original).

77. *Id.* (citing *Vargas-Cordon*, 733 F.3d at 382).

observation and preventing [their] discovery.”⁷⁸ As one court recently put it, clandestinely implies that harboring includes the “intent to assist the alien’s attempt to evade or avoid detection by law enforcement.”⁷⁹ The addition of clandestine behavior separates the Sixth Circuit from the Ninth, Second, or Fifth Circuits by adding an additional specific intent that is harder to prove and adds protection for those providing aid to undocumented immigrants.⁸⁰

Similarly, the Third Circuit found no harboring when the government failed to provide sufficient evidence that a woman cohabitating with her undocumented boyfriend attempted to actively hide him from the authorities.⁸¹ “Reasonable control of the premises,” the court explained, “is not an element of ‘harboring’ under § 1324. Rather, the government had to prove that Silveus’s ‘conduct tend[ed] substantially to facilitate [the alien’s] remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence.”⁸²

The Third Circuit also reversed the conviction of a defendant who had done nothing other than provide general advice to an undocumented alien, such as saying to “lay low,” “[d]isappear, don’t tell anyone what address you’re staying at.”⁸³ The court noted that while the legislative history of § 1324 “suggested that Congress intended to strengthen the law in ‘preventing aliens from entering or remaining in the United States illegally,’” the court had “found no cases in which a defendant [had] been convicted under this statute for merely giving an alien advice to lay low and to stay away from the address on file with INS, obvious information that any fugitive would know.”⁸⁴ The Third Circuit appears to think that

78. *Susnjar v. United States*, 27 F.2d 223, 224 (6th Cir. 1928).

79. *See United States v. Belevin-Ramales*, 458 F. Supp. 2d 409, 410–11 (E.D. Ky. 2006).

80. Thus, it is unclear whether the Ninth, Second or Fifth Circuits hold that the ‘government does not have to prove that the Defendant harbored the alien with the intent to assist the alien’s attempt to evade or avoid detection by law enforcement’ as provided in the government’s proposed jury instructions. In contrast, in *Susnjar*, the Sixth Circuit clearly stated 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.
Id. at 410–11 (citations omitted).

81. *See United States v. Silveus*, 542 F.3d 993, 1003–04 (3d Cir. 2008).

82. *Id.* at 1004.

83. *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008).

84. *Id.* at 98–99.

holding defendants criminally liable for low level facilitating of undocumented aliens “would effectively write the word ‘substantially’ out of the test we have undertaken to apply.”⁸⁵ Along these same lines, it recently emphasized that “‘harboring’ requires some act of obstruction that reduces the likelihood the government will discover the alien’s presence.”⁸⁶ That is more than substantially facilitating.

The Eleventh Circuit articulated a similar interpretation in *United States v. Dominguez*,⁸⁷ where it reversed the defendants’ harboring convictions because the defendants had not substantially facilitated the aliens’ “escaping detection from immigration officials.”⁸⁸ The court noted that the defendants took the aliens to “experienced immigration counsel shortly after they arrived to process them through immigration, and the [aliens] in no way engaged in conduct suggesting that they were hiding from or otherwise avoiding immigration officials.”⁸⁹

In summary, under the narrowest interpretation of the harboring provision, courts not only emphasize that the facilitation must be substantial, they require specific intent to help the undocumented person evade detection by authorities. In some courts, this additional element requires clandestine hiding; in others, it does not. In some courts, it means helping the migrant escape detection; in others, it is merely obstructing the immigration authorities from detecting them. In all these circuits, however, something more than merely providing shelter is required.

85. *Id.* at 101; *see also* *DelRio-Mocci v. Connolly Props., Inc.*, 672 F.3d 241, 246 (3d Cir. 2012); *United States v. Cuevas-Reyes*, 572 F.3d 119, 123 (3d Cir. 2009).

86. *DelRio-Mocci*, 672 F.3d at 246 (citing *Lozano v. City of Hazleton*, 620 F.3d 170, 223 (3d Cir. 2010), *vacated on other grounds*, 563 U.S. 1030).

87. *United States v. Dominguez*, 661 F.3d 1051 (11th Cir. 2011).

88. *Id.* at 1063.

89. *Id.*

Hiding, however, does not necessarily require a physical barrier. For example, where defendant employers paid in cash and falsified social security numbers, an Eleventh Circuit court found that enough evidence existed for a successful conviction of harboring under § 1324. *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1299 (11th Cir. 2010).

C. The Middle-of-the-Road Interpretation Is that “Harboring” Requires Providing a Person “a Place to Stay in Which the Authorities Are Unlikely to Be Seeking Him”

A third interpretation appears as a middle ground. It is best described as requiring something more than “substantial facilitation,” but less than a specific intent to conceal the undocumented person from authorities. The Seventh Circuit took this position in *United States v. McClellan*.⁹⁰ Relying on a previous Seventh Circuit decision called *United States v. Costello*, the defendant argued that, because he did not shield the undocumented person from authorities, he did not harbor them. The court, however, disagreed, and distinguished *Costello*. In *Costello*, the defendant was romantically involved with the man she knew was an undocumented alien. The *McClellan* court notes this fact: “We, however, rejected the idea that harboring included ‘letting your boyfriend live with you.’”⁹¹

McClellan was not romantically cohabitating with an undocumented alien. Instead he was employing undocumented aliens and providing them “housing to help compensate them for the otherwise low wages that he was paying them.”⁹² Yet, even in deciding against the defendant, the Seventh Circuit failed to resolve the issue of what constitutes harboring. It appears that “letting your [undocumented] boyfriend live with you” does not constitute harboring but giving a person a certain kind of shelter without an intent to hide them might. One Seventh Circuit judge articulated his interpretation of the provision as:

The terms ‘conceal,’ ‘harbor,’ and ‘shield from detection’ have independent meanings, and thus a conviction can result from committing (or attempting to commit) any one of the three acts. These terms are not defined in the statute, and courts have

90. *United States v. McClellan*, 794 F.3d 743, 749 (7th Cir. 2015). See the *McClellan* Court’s characterization of *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012):

He maintains that *Costello* “reject[ed] the premise that ‘harboring’ can be equated to ‘simple shelter in the sense of just providing a place to stay.’” He submits that, because he did not take ‘any actions for the purpose of shielding the illegal aliens from law enforcement detection,’ his convictions under § 1324 cannot stand.

Id.

91. *Id.*

92. *Id.* at 750.

devoted substantial effort to pinning down their precise meanings in the context of the harboring statute . . . “and the office left to ‘harboring’ is, then, materially to assist an alien to remain illegally in the United States without publicly advertising his presence but without needing or bothering to conceal it.”⁹³

In *Costello*, Judge Posner specifically pointed out that “harboring *could* involve advertising, for instance if a church publicly offered sanctuary for illegal aliens and committed to resist any effort by the authorities to enter the church’s premises to arrest them.”⁹⁴

When the *McClellan* court distinguished *Costello* it explained, “In striving to define harboring, we observed that ‘harboring as the word is actually used has a connotation . . . of deliberately safeguarding members of a specified group from the authorities, whether through concealment, movement to a safe location, or physical protection.’”⁹⁵ The court reasoned that the harboring provision “should be seen as ‘plug[ging] a possible loophole left open by merely forbidding concealing and shielding from detection.’”⁹⁶ It then rests on an interpretation of 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.”⁹⁷ The court emphasized that this interpretation is founded on their understanding that the essence of harboring is a “decision to provide a refuge for an illegal alien *because* he’s an illegal alien.”⁹⁸

While it remains opaque, this middle-of-the-road interpretation appears to require less than specific intent to conceal the alien or prevent their detection from authorities.⁹⁹ But it also appears to require more than merely substantially facilitating an undocumented person’s ability to stay in the country.¹⁰⁰ Moreover,

93. *United States v. Campbell*, 770 F.3d 556, 569 (7th Cir. 2014) (quoting *Costello*, 666 F.3d at 1046–47).

94. *Costello*, 666 F.3d at 1047 (emphasis in original).

95. *McClellan*, 794 F.3d at 749 (quoting *Costello*, 666 F.3d at 1044).

96. *Id.* (citing *Costello*, 666 F.3d at 1045).

97. *Id.* at 749–50 (quoting *Costello*, 666 F.3d at 1050).

98. *Id.* at 749 (quoting *Costello*, 666 F.3d at 1044).

99. *But see Costello*, 666 F.3d at 1048 (“So concealment (‘clandestinely shelter’) is an element of harboring.”).

100. *McClellan*, 794 F.3d at 751.

[I]f our statement in *Costello* were not sufficiently clear, we hold that, when the basis for the defendant’s conviction under § 1324(a)(1)(A)(iii) is providing housing

there are two more reasons this middle-of-the-road interpretation remains ambiguous. First, until *McClellan* in 2015, the Seventh Circuit held there was *not* a specific intent requirement for a violation of § 1324.¹⁰¹ Secondly, as recently as 2009, the Seventh Circuit held in *United States v. Ye* that the language “conduct tending substantially to facilitate,” which originated in the Second Circuit,¹⁰² was unwelcome in the Seventh Circuit.¹⁰³ The Seventh Circuit has still not cleared up what specific conduct is covered by the harboring provision.

This lack of clarity within and between the federal circuits regarding how to interpret the harboring provision is important to the religiously motivated people described in Part I. Depending on how broadly or narrowly the harboring provision is interpreted, the religiously motivated conduct of churches could be implicated. Moreover, just as there is a spectrum of interpretations for the harboring provision, there is also a spectrum of pertinent

to a known illegal alien, there must be evidence from which a jury could conclude, beyond a reasonable doubt, that the defendant intended to safeguard that alien from the authorities. Such intent can be established by showing that the defendant has taken actions to conceal an alien by moving the alien to a hidden location or providing physical protection to the alien.

Id.

101. *Id.* at 755.

Indeed, we noted on more than one occasion in *Li* that there was no law from this circuit holding that § 1324 incorporates a specific intent requirement and, relatedly, no circuit law requiring a specific intent instruction. We also observed that counsel’s general intent instruction was consistent with the approach of several other circuits.

Id.

102. See *United States v. Lopez*, 521 F.2d 437, 441 (2d Cir. 1975).

103. *United States v. Ye*, 588 F.3d 411, 417 (7th Cir. 2009) (“Because we decline to import that statutory interpretation into the law of this Circuit, we conclude that the district court’s supplemental jury instruction was not erroneous.” (footnote omitted)). The court further noted:

Whether that conduct ‘tends substantially’ to assist an alien is irrelevant, for the statute requires no specific quantum or degree of assistance.

Congress could not have been clearer: it said that concealing, harboring, or shielding from detection an alien is unlawful conduct, regardless of how effective a defendant’s efforts to help the alien might tend to be. If a person commits a relatively nominal act that is proscribed by § 1324(a)(1)(A)(iii), the executive branch has the discretion to forego prosecution. Courts’ overlaying the statute with the ‘tending substantially’ veneer appropriates that discretion and also invades the province of Congress by de-criminalizing lesser forms of conduct – i.e., actions that only ‘tend slightly or moderately’ to help an alien.

Id. at 416.

religiously motivated conduct. On one end of the spectrum is the church or person that does nothing more than shelter people regardless of their status—for instance, a hypothermia shelter that provides free shelter and knowingly includes undocumented immigrants in their population. It is plausible in some circuits that this behavior could constitute a criminal violation of harboring. On the other end of the spectrum is a church that is openly providing “sanctuary” to an undocumented person, such as the church featured on the cover of the *Washington Post* on March 31, 2018.¹⁰⁴ That church, the United Methodist Church of Mancos in Colorado, is offering sanctuary to Rosa Sabido, an undocumented woman who has lived in the United States for thirty years.¹⁰⁵ This would almost certainly constitute harboring in some circuits.

IV. RESOLVING CONFLICTS BETWEEN FEDERAL STATUTES AND RELIGIOUSLY MOTIVATED CONDUCT UNDER THE RFRA REGIME

Given the increased efforts by religiously motivated people to resist a “zero-tolerance”¹⁰⁶ immigration policy, and the unresolved ambiguity in the federal circuits regarding interpreting the INA’s § 1324, it is not hard to foresee a conflict between the harboring provision and religiously motivated conduct towards the undocumented alien. This is not the first time, however, that the executive branch has had to deal with a conflict between its immigration policies and resistance from religious communities. In the 1980s, President Ronald Reagan’s immigration policy in Central America was strongly resisted by religious communities who called themselves the “Sanctuary Movement.”¹⁰⁷ Gregory Loken and Lisa Bambino recount the story of Maria Aguilar, the woman whose

104. Stephanie McCrummen, *A Sanctuary of One*, WASH. POST, (Mar. 31, 2018), https://www.washingtonpost.com/news/national/wp/2018/03/31/feature/after-30-years-in-america-she-was-about-to-be-deported-then-a-tiny-colorado-church-offered-her-sanctuary/?utm_term=.6613fb9c4e69.

105. *Id.*; see also Loken & Bambino, *supra* note 18, at 141 (“The broadest contingent of sanctuary churches and workers have been engaged in the reactive, non-clandestine *shelter* of the undocumented.”).

106. Press Release, Department of Justice Office of Public Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (April 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

107. See generally, ANN CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION* (1988).

name would become famous as one of the defendants in the Sanctuary Trials of the 1980s:

Maria, a graying, recently widowed woman of fifty-seven, knelt to say the rosary. No doubt she needed the spiritual strength it provided, for her house was full of destitute foreigners sent to her by her parish priest. Beside her was a man named Jesús, who joined in her prayer. According to the ancient forms, they would introduce each decade of Hail Mary's with the Lord's Prayer and the words "Thy kingdom come." They would conclude by addressing the Virgin Mary: "To thee do we cry, poor banished children of Eve; to thee do we send up our sighs, mourning and weeping in this valley of tears." Yet while they spoke the same words, their motivations could not have been more contrary: Maria del Socorro Pardo de Aguilar believed it her duty to shelter those whom civil war had banished from their homeland; Jesús Cruz was attempting to prove Mrs. Aguilar guilty of a federal crime for acting on that belief.¹⁰⁸

Several years later, Maria Aguilar and seven other religious workers were prosecuted under § 1324's harboring provision¹⁰⁹ and convicted of federal felonies for acting on their religious beliefs.¹¹⁰ Yet, the Sanctuary Movement persisted.¹¹¹

The Sanctuary Trials of the 1980s revealed that, under the former religious freedom paradigm, a religious defense to harboring an undocumented person was weak. A legal memo written on October 31, 1983, by Ted Olson, then the Assistant Attorney General in the Office of Legal Counsel, said that "[p]roviding church sanctuary to illegal aliens probably violates 8 U.S.C. § 1324(a)(3), which forbids the harboring of illegal aliens."¹¹² The memo continued,

Courts are unlikely to recognize church sanctuary as legally justified under the Free Exercise Clause of the First Amendment, because disagreement with the government's treatment of aliens

108. Loken & Bambino, *supra* note 18, at 119.

109. 8 U.S.C. § 1324(a)(1)(C) (2012) is the successor under the Immigration Control and Reform Act of 1986 to the anti-harboring provision applicable to the *Aguilar* defendants. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989).

110. *Aguilar*, 883 F. 2d at 709.

111. See Loken & Bambino, *supra* note 18, at 121-22.

112. Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168, 168 (1983).

is not a religious belief that is burdened by enforcement of the immigration laws, and the government has a compelling countervailing interest in uniform law enforcement.¹¹³

Olson concluded, “[t]he integrity of our government would be seriously threatened if individuals could escape the criminal law by pleading religious necessity.”¹¹⁴

Since the Sanctuary Trials, however, a dramatic shift has occurred in religious freedom law, with the 1993 Federal RFRA, and Supreme Court cases applying RFRA, such as *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006)¹¹⁵ and, perhaps most importantly, *Burwell v. Hobby Lobby Stores, Inc.* (2014).¹¹⁶ This change in the religious freedom landscape creates a viable religious defense to the *broadest* interpretation of the harboring provision (conduct that merely “substantially facilitates”).

“Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty.”¹¹⁷ It states:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

113. *Id.*

114. *Id.* at 171.

115. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420 (2006).

116. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

117. *Id.*

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.¹¹⁸

In *Hobby Lobby*, the Supreme Court stated, “By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.”¹¹⁹ RFRA requires the government to not substantially burden a person’s religious exercise unless the government can show a compelling interest and that it is implemented in the least restrictive means. The next three sections analyze each of the three previously outlined harboring interpretations under the new religious freedom paradigm created by RFRA (and the Supreme Court’s RFRA jurisprudence), showing that there is a viable RFRA claim or defense to at least the broadest interpretation.

A. A “Substantial Burden on a Person’s Religious Exercise” Will Be Demonstrated Under All Interpretations of the Harboring Provision

During the Sanctuary Trials, the government brought in so-called experts¹²⁰ to testify to the centrality of the religious beliefs at issue.¹²¹ These experts testified that helping an immigrant flee persecution by offering them sanctuary was not central to the Christian faith.¹²² Persuaded by the experts’ testimony, the court found that the defendant’s religious beliefs were not substantially burdened because the beliefs were not mandated or central.¹²³ Specifically, the court noted that the defendants could have found other ways to express their faith.¹²⁴

118. 42 U.S.C. § 2000bb-1(c) (2000).

119. *Hobby Lobby*, 573 U.S. 682 at 706.

120. See generally, WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* xxii–xxv (new ed. 2018).

121. *United States v. Aguilar*, 883 F.2d 662, 694 (9th Cir. 1989).

122. *Id.*

123. *Id.*

124. *Id.*

RFRA as amended, however, says that it covers “any exercise of religion whether or not compelled [by] or central”¹²⁵ Moreover, Congress mandated that RFRA “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”¹²⁶ In *Hobby Lobby*, the Court noted that this broad deference regarding what constitutes a religious belief is found both in the Court’s Free Exercise jurisprudence (citing previous decisions such as *Employment Division, Department of Human Resources v. Smith* (*Employment Division v. Smith*)¹²⁷) and RFRA itself:

RFRA’s question is whether the mandate imposes a substantial burden on the objecting parties’ . . . with *their religious beliefs*. . . . It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable. . . . The Court’s “narrow function . . . is to determine” whether the plaintiffs’ asserted religious belief reflects “an honest conviction”¹²⁸

The Supreme Court was clear that it is not the province of the judiciary to determine whether a religious belief is flawed, plausible, mistaken, substantial, or reasonable.¹²⁹

First, the court was unconvinced that section 1324 unduly burdened defendants’ free exercise of religion, noting: “Representatives of Catholic and Methodist clergy testified at the pretrial hearing and trial. None suggested that devout Christian belief mandates participation in the ‘sanctuary movement.’ Obviously, [defendants] could have assisted beleaguered El Salvadorans in many ways which did not affront border control laws”

Id. (alteration in original) (quoting *United States v. Merkt*, 794 F.2d 950, 956 (5th Cir. 1986)).

125. 42 U.S.C. § 2000cc-5(7)(A) (2012).

126. *Id.* § 2000cc-3(g); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 684 (2014) (“First, nothing in RFRA as originally enacted suggested that its definition of ‘exercise of religion’ was meant to be tied to pre-*Smith* interpretations of the First Amendment. Second, if RFRA’s original text were not clear enough, the RLUIPA amendment surely dispels any doubt that Congress intended to separate the definition of the phrase from that in First Amendment case law.”).

127. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

128. *Hobby Lobby*, 573 U.S. at 686.

129. *Id.* at 724–25; see *Smith*, 494 U.S. at 887 (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.”); see also *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715 (1981) (“[I]t is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.”).

For a successful defense based on RFRA, however, it must also be proven that, whatever the religious belief, it was substantially burdened. First, a violation of § 1324 is a criminal felony.¹³⁰ That alone would likely prove a substantial burden. Secondly, however, the punishment for *each count* of violating § 1324 comes with a maximum of a \$10,000 fine plus five years in prison,¹³¹ as well as the potential for forfeiture of property. For violations of § 1324 committed for commercial or economic gain, the punishments are higher.¹³²

Regardless of which interpretation of the harboring provision is used, the new religious freedom paradigm no longer allows judicial testing of the centrality of a person's religious beliefs as it did in the old paradigm. Furthermore, because violating § 1324 is a criminal offense and the punishment is grave, this first RFRA element of a "substantial burden on religious belief" will likely be met under all the interpretations.

*B. Under a Broad Interpretation of the Harboring Provision,
the Government Will Not Be Able to Show
a Sufficiently Compelling Interest*

When the defendants in the 1980s Sanctuary Trials invoked their Free Exercise Clause defense, they came up against a powerful, categorical "overriding" governmental interest.¹³³ The court found that the government's power to regulate immigration was so compelling that it trumped any religiously motivated conduct.¹³⁴ A major paradigm shift, however, is being born in the way the Court thinks about the federal power to regulate immigration. This paradigm shift in immigration law is important because it submits the government's power in immigration to scrutiny by the judiciary in new ways.

130. 8 U.S.C. § 1324(B)(i)-(iv) (2012).

131. *Id.*

132. *Id.*

133. *United States v. Aguilar*, 883 F.2d 662, 695 (9th Cir. 1989).

134. *Id.*; *see also United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986).

1. *The government's interest in enforcing immigration laws is not as categorically exceptional as it once was*

It is well-known that the federal government has strong power to regulate its borders.¹³⁵ As one scholar noted, in the former immigration law paradigm, “constitutional rights that shaped other areas of law enforcement were effectively inapplicable” in the immigration context.¹³⁶ Another scholar’s research points out that, “probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”¹³⁷ The reasons for the divergence of immigration law from the rest of American law in adhering to legal norms is the subject of extensive research and scholarship, and outside the scope of this Article.¹³⁸ For purposes of this Article, what is relevant is that the government’s immigration power is no longer viewed as categorically exceptional as it once was. While the power may have once been considered plenary enough that it would override—with remarkable deference to the federal government—the substantive rights of even American citizens, this is changing.

The federal government’s plenary power in immigration started to face restrictions at the turn of the twenty-first century

135. The government’s ability to exclude aliens is “essential to its safety, its independence, and its welfare[.]” *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); see also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

136. Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 129 (2015) [hereinafter *Fourth Amendment Problem*].

137. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984); see also David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 594–95 (2017) (“[J]udicial review of federal immigration law under the ‘plenary power doctrine’ is extremely lax and forgiving. Thus, substantive constitutional rights—such as equal protection, due process, freedom of association, and so on—tend to garner less judicial scrutiny in immigration cases than other areas of federal regulation.” (footnote omitted)).

138. “The academic literature on immigration exceptionalism is legion, featuring commentary from nearly every prominent immigration law scholar, and others, over the past four decades.” Rubenstein & Gulasekaram, *supra* note 137, at 588 n.21; see also *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909) (“Over no conceivable subject is the legislative power of Congress more complete”); *Fourth Amendment Problem*, *supra* note 136, at 136 (2015); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (plenary power rendered immigration law a “constitutional oddity”).

with the Supreme Court's decision in *Zadvydas v. Davis*,¹³⁹ in which the Supreme Court sought to answer whether immigration law permitted the indefinite detention of noncitizens.¹⁴⁰ As Professor Michael Kagan articulated:

In *Zadvydas*, the Court introduced two critical constitutional tools that continue to provide fodder for constitutional challenges to immigration law. First, in response to the government's argument that plenary power permitted indefinite detention, the Court said "that power is subject to important constitutional limitations" After a century of plenary power meaning unlimited or nearly unreviewable power, *Chadha* and *Zadvydas* returned immigration law to a more normal constitutional path, wherein Congress has authority, but must still respect fundamental rights.¹⁴¹

The Court resolved the question in *Zadvydas* by interpreting the relevant portion of the INA regarding indefinite detentions to require a hearing, thereby avoiding the constitutional question.¹⁴² A decade later in *Arizona v. United States*, when the Court was presented with a state law that made it a misdemeanor to violate a federal law regarding alien-registration requirements, the Court said that the state law was preempted, not because the federal government's power over immigration is inherent in national sovereignty (the traditional rationale under immigration exceptionalism), but because of enumerated constitutional federal powers such as "naturalization."¹⁴³ "In short, sovereignty is not a reason why the Constitution should not apply," one scholar noted.¹⁴⁴ "The exclusivity principle seems to have less traction in the Supreme

139. *Zadvydas v. Davis*, 533 U.S. 678 (2001). Michael Kagan argues persuasively that the shift actually started to occur in *INS v. Chadha*, 462 U.S. 919 (1983). "What the Court did in *Chadha* was to begin to normalize immigration law within the broader context of administrative law. . . . *Chadha* was a critical step by which the Court gradually reintroduced the possibility of meaningful constitutional scrutiny, setting the stage for more dramatic changes in the twenty-first century." *Fourth Amendment Problem*, *supra* note 136, at 141.

140. *See Zadvydas*, 533 U.S. 678.

141. *Fourth Amendment Problem*, *supra* note 136, at 143–44.

142. *Zadvydas*, 533 U.S. 678.

143. *Arizona v. United States*, 567 U.S. 387 (2012).

144. Rubenstein & Gulasekaram, *supra* note 137, at 616.

Court than it once did.”¹⁴⁵ The rationale in *Arizona v. United States* revealed that the shift started by *Zadvydas* was gaining traction.

The same is true in *Kerry v. Din*.¹⁴⁶ Although the Court rejected the claim of a United States citizen that her due process rights were violated when immigration authorities failed to specify the reason(s) her foreign husband was not allowed to enter the United States, the decision was closely decided.¹⁴⁷ One of the reasons it was closely decided was because, although Din was a citizen exerting her due process claim as derived from her association with an undocumented person, the person was not yet in the country. This is important because “the federal government’s plenary authority to regulate immigration . . . was usually assumed to be at its height when a noncitizen had not yet entered the country.”¹⁴⁸

Just recently, in *Sessions v. Morales* (2017), the Court dealt a strong blow to immigration law’s exceptionalism in ruling that the INA violated the Equal Protection Clause of the Fifth Amendment.¹⁴⁹ The Court held that because the INA granted or denied benefits based on the gender of the qualifying parent, it is subject to heightened review under the Court’s equal protection

145. *Id.* at 605.

146. *Kerry v. Din*, 135 S. Ct. 2128 (2015); see also Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 21 (2015) [hereinafter *Plenary Power is Dead*] (“*Kerry v. Din*” [was] a case in which a U.S. citizen, Fauzia Din, challenged the State Department’s refusal to grant a visa to her Afghan husband, Kanishka Berashk, effectively refusing the couple the right to live together. Din argued that the visa denial infringed her right to marriage, and as a matter of due process, the State Department owed her a specific explanation for the decision. The State Department had given no explanation except for a vague reference to the statute banning people who have engaged in terrorist activities from entering the United States. Din did not ask the Court to rule on whether her husband actually was a terrorist. Rather, she asked for a process that would meaningfully allow the couple to respond to the allegations.” (footnotes omitted)).

147. *Kerry*, 135 S. Ct. 2128 (2015); see also *Plenary Power is Dead*, *supra* note 146, at 22. [In *Kerry v. Din*, Fauzia Din won] four justices on the Court: Justices Breyer, Ginsburg, Sotomayor, and Kagan. Moreover, her challenge severely divided the other five Justices, so much so that there is no controlling decision for the case. Only two justices—Justices Kennedy and Alito—used an analysis based on plenary power doctrine as it has been traditionally known in immigration law. Yet, even they were willing to assume for the sake of argument that Din was owed some measure of due process. The plurality opinion by Justice Scalia largely sidestepped the Court’s immigration jurisprudence and focused instead on a critique of substantive due process jurisprudence generally.

Id. (footnotes omitted).

148. *Plenary Power is Dead*, *supra* note 146, at 22.

149. *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

jurisprudence. To be valid, such legislation must serve an important government objective and the means of accomplishing it must be substantially related to that objective. In this instance, the INA failed that test.¹⁵⁰

One of the most recent Supreme Court cases to touch upon the government's immigration power was *Jennings v. Rodriguez* (2018).¹⁵¹ In it, the Court punted the constitutional question whether the government's power to enforce immigration was so strong as to not require a bond hearing for prolonged immigration detention.¹⁵² At the time of this writing, the Ninth Circuit will decide the constitutionality of the government's power to detain an immigrant without a bond hearing. While *Jennings v. Rodriguez* initially appears to shift the paradigm back to pre-*Zadvydas*, a careful analysis reveals that the reasoning behind the case had much more to do with statutory interpretation and the doctrine of Constitutional avoidance than the fundamental issue of plenary power. It is possible that the Court's punt means it did not want to advance the "important constitutional limitations" set forth in *Zadvydas*. It could also be the Supreme Court choosing, as it often does, to make legal changes slowly and incrementally. In any case, this decision did not send backwards the new paradigm of normalizing immigration law within U.S. law. Professor Kagan has articulated the second view:

Just as the Court has become more willing to find constitutional limitations on immigration enforcement, it has also changed its conception of the foundations of that power. The Court continues to hold that the federal government has broad immigration authority, but it has more recently rooted this authority in constitutionally enumerated powers, specifically naturalization, foreign affairs, and the impact on commerce. These two changes—finding both a source and a limit for immigration law in the Constitution—push strongly toward normalizing immigration within constitutional law.¹⁵³

150. *Id.*

151. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), *remanded to* 909 F.3d 252 (9th Cir. 2018) (remanding to consider the constitutional question).

152. *Id.*

153. *Plenary Power is Dead*, *supra* note 146, at 25.

At a macro level, there is a change in basic assumptions about immigration law generally. The government's interest in enforcing immigration laws is not as categorically exceptional as it once was. It is now subject to "important constitutional limitations"¹⁵⁴ and, as Professor Kagan articulates, is grounded in enumerated powers, not inherent in being the sovereign.¹⁵⁵ In the Sanctuary Trials, the court gave broad deference to the government's immigration interest regardless of whether it burdened a citizen's free exercise of religion or other constitutional rights; the Court is unlikely to give such broad deference again.

2. The government's interest is not focused enough to survive RFRA scrutiny under the broadest interpretation of the harboring provision

Because the government's interest in enforcing immigration laws is no longer categorically exceptional and outside the norms of American law, and because Congress did not exempt the INA from RFRA, the court would likely subject the INA's harboring provision to a compelling interest standard under RFRA. What specific goal is the government trying to accomplish with the harboring provision? This depends on what interpretation is being analyzed. If it is the broadest interpretation—merely "substantial facilitation"—then the interest appears to be the government's desire to disincentivize undocumented people from being in the United States. Anyone, including religiously motivated citizens, is in violation of the statute if she makes it "easier or less difficult"¹⁵⁶ for the undocumented person to stay in the country. If it is the narrowest interpretation—substantial facilitation plus specific intent to conceal from detection—then it appears that the government's interest is the ability to *find* undocumented people if they choose to. If it is the mid-way interpretation—providing a person "a place to stay in which the authorities are unlikely to be seeking him"¹⁵⁷—then it appears that the government's interest is having undocumented people easily accessible. These varying interpretations of the harboring provision affect what the government's purported compelling interest is, which means they

154. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

155. *Plenary Power is Dead*, *supra* note 146, at 25.

156. *United States v. Shum*, 496 F.3d 390, 392 (5th Cir. 2007).

157. *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012).

also *directly affect the viability* of a claim or defense under RFRA. In this section, I subject each one of these harboring interpretations to the compelling interest test of RFRA scrutiny. I analyze them at a micro level, since the compelling interest that the government may attempt to advance under its formerly plenary power doctrine has already been shown as weak.

Under the broadest interpretation—harboring as merely “substantial facilitation”—the government’s argument is that it has a compelling interest in enforcing immigration laws uniformly and needs to be able to punish anyone, without exception, who merely substantially helps an undocumented immigrant stay in the country. This interpretation reveals the weakest governmental interest. The government must show that in spite of the twelve million undocumented people that have not faced prosecution—some of them for many years and with fluctuating stages of status—it has a compelling interest in criminally prosecuting citizens for making it easier for an undocumented person to remain in the United States, regardless of whether the citizen is exercising a fundamental right such as being religiously motivated to aid the undocumented immigrant.

In the old religious freedom paradigm which existed during the Sanctuary Trials, the court was concerned about the consequences of granting a Free Exercise defense that could create a “personal immigration polic[y].”¹⁵⁸ They reasoned that, if they allowed an exception to the harboring provision for religiously motivated conduct, even if interpreted as merely “substantial facilitation,” it “would result in no immigration policy at all.”¹⁵⁹ This common bureaucratic concern for uniform enforcement, however, has been decisively dismantled in the new religious freedom law paradigm. RFRA requires a “more focused inquiry.”¹⁶⁰ In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* the Supreme Court demonstrated this new shift when it applied RFRA to the Controlled Substances Act,¹⁶¹ which the government argued could

158. *United States v. Aguilar*, 883 F.2d 662, 696 (9th Cir. 1989).

159. *Id.*

160. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420 (2006).

161. *Id.* at 439.

not accommodate exceptions, even towards a religious group's sacramental use of hoasca.¹⁶² The Court found that RFRA requires a determination of whether exceptions, including to criminal laws, are possible.¹⁶³

The government's argument in *O Centro*, that it maintained a general interest in uniform enforcement of the Controlled Substance Act as a "'closed' system that prohibits all use of controlled substances . . . [and] 'cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions,'" was flatly rejected.¹⁶⁴ The Court has previously stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."¹⁶⁵ Although the compelling interest standard must be applied to the particularized facts of a case,¹⁶⁶ the broad interpretation of the harboring provision will likely not pass RFRA's compelling interest scrutiny (which the Supreme Court called "onerous"¹⁶⁷) in the large swath of cases where religiously motivated people are merely "substantially facilitating" undocumented immigrants.

Under the narrowest interpretation—harboring as substantial facilitation plus specific intent to conceal from detection—the government's argument is likely that it has a compelling interest in being able to *detect* undocumented people. As a result, it also has a compelling interest in being able to punish anyone who *conceals* the undocumented persons such that the government cannot detect them. This is the government's interest almost at its strongest.¹⁶⁸ The government is acknowledging it does not have the capacity to

162. Hoasca is "a hallucinogenic tea . . . made from two plants found only in the Amazon rain forest," including a controversial substance called DMT. Linda Greenhouse, *Sect Allowed to Import Its Hallucinogenic Tea*, N.Y. TIMES (Feb. 22, 2006), <https://www.nytimes.com/2006/02/22/politics/sect-allowed-to-import-its-hallucinogenic-tea.html>.

163. *O Centro*, 546 U.S. at 439.

164. *Id.* at 430.

165. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

166. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014) ("[RFRA] requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particularized claimant whose sincere exercise of religion is being substantially burdened." (quoting *O Centro*, 546 U.S. at 430–31)).

167. *See id.* at 729 n.37.

168. The government's interest could be stronger if the provision were even more narrowly interpreted so as to prevent the concealing of undocumented people known to be, or in reckless disregard of the fact, criminals. *See Jain, supra* note 43.

deport the millions of undocumented people living in the country, but it is focusing on its more specific interest in being able to detect undocumented people, should it need or want to deport them. This may pass RFRA's compelling interest test because it is not "whole system" enforcement; rather, it is more specifically focused.¹⁶⁹

The mid-way interpretation—providing a "person a place where the authorities are unlikely to be seeking him"—is likely to fall in between the broadest and narrowest interpretations on the compelling interest spectrum. It appears the government's interest is that it should have easy access to undocumented persons. This interpretation is the most challenging to analyze under the Supreme Court's RFRA jurisprudence of the compelling interest standard because it is unclear whether the Court would find this interest overly broad. It is also difficult because little guidance is given to what is meant by a place where "it is unlikely that the authorities will be seeking him"¹⁷⁰ and who determines this. The fact that authorities are unlikely to be seeking an undocumented person in a sanctuary (because they are "sensitive" locations¹⁷¹) could further complicate this interpretation for religiously motivated people.

In summary, while the government's immigration power may be strong and comprehensive, it is no longer outside the boundaries of constitutional norms. Unlike in the Sanctuary Trials, the federal government must show that its interest is compelling, not as a system, but in a more focused way. If the government is prosecuting a religiously motivated person under the broadest interpretation of the harboring provision (merely "substantial facilitation"), it is likely going to fail showing it has a compelling interest under RFRA. It is no longer sufficient for the government to argue it has a compelling interest in the uniform enforcement of a criminal law, even if it is an immigration law.¹⁷² If the government

169. *O Centro*, 546 U.S. at 419.

170. *United States v. McClellan*, 794 F.3d 743, 755 (7th Cir. 2015).

171. *FAQ on Sensitive Locations and Courthouse Arrests*, *supra* note 34.

172. The one exception to this seems to be the taxation system. See *Hobby Lobby*, 573 U.S. at 733–34 (2014).

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes.

is prosecuting a religiously motivated person under the narrowest interpretation, or possibly under the middle view of the harboring provision (substantial facilitation plus intent to conceal from detection or providing a place where the authorities are unlikely to be seeking him, respectively), it may prevail in showing that it has a compelling interest because its interest is more focused on being able to find undocumented people rather than a broadly formulated interest in uniform enforcement of immigration laws.

C. Under the Broadest Interpretation, the Government's Exceptions for Analogous Secular Conduct Will Prevent a Showing That it Used the Least Restrictive Means as Required by RFRA

RFRA's last requirement is that, assuming the government can show it has a compelling interest, it must also show there are no other means of achieving this interest without imposing a substantial burden on religion.¹⁷³ This last standard of RFRA is "exceptionally demanding."¹⁷⁴ The broadest interpretation of the provision will likely not pass the compelling interest test of RFRA. But, even if the court were willing to assume, for the sake of

HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *Lee* despite the religious objection of an employer, but these cases are quite different. Our holding in *Lee* turned primarily on the special problems associated with a national system of taxation. . . . We observed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."

Lee was a free-exercise, not a RFRA, [sic] case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos.

Id. (citations omitted) (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)).

It is worth further distinguishing *Lee* by noting that the Court said that the social security system rests on "a complex of actuarial factors," *Lee*, 455 U.S. at 259, and that exceptions could not be made because the very purpose of the system depended on everyone participating: "Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer." *Id.* at 258.

173. Under this test, the government would have to show that it "lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Hobby Lobby*, 573 U.S. at 728.

174. *Id.*

argument, that the government *did* meet its burden in showing a compelling interest, the broadest interpretation will still likely not survive RFRA's least restrictive means test. This is especially true because the government will be hard pressed to show why religiously motivated people cannot also provide non-clandestine humanitarian aid when secular institutions are being permitted to do so.

Moreover, assuming the government had the desire and capacity to deport every undocumented person, it could still accomplish that goal if undocumented people are being provided with aid or shelter openly. Even if the government could show that allowing citizens to provide non-clandestine aid to undocumented people made it more expensive for the government to apprehend these undocumented immigrants, the court would likely find this a worthy cost. "[RFRA] may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs."¹⁷⁵ Congress understood that protecting religious exercise may increase the government's costs and was willing to accept that cost; "[t]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."¹⁷⁶

Not only is the government likely to fail the least restrictive means test of RFRA because it has "other means" of finding undocumented immigrants while still allowing them to receive humanitarian aid, but the government itself has already allowed an analogous system of substantial facilitation through humanitarian aid to undocumented immigrants available for secular institutions such as public schools and hospitals.¹⁷⁷ The government's argument that it cannot more narrowly tailor its means therefore is fatally flawed.

In *Hobby Lobby*, when discussing the system of exceptions to the contraceptive mandate provided for in the Affordable Care Act, the Court noted: "Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same

175. *Id.*

176. 42 U.S.C. § 2000cc-3(c) (2012).

177. *See Plyler v. Doe*, 457 U.S. 202, 205 (1982); *see also* 42 U.S.C. § 1395dd (2012).

system cannot be made available [to corporations].”¹⁷⁸ Likewise, a person with a RFRA claim or defense could argue that the government already has a system of exceptions available that allows, and even mandates, substantial facilitation to undocumented people. Undocumented immigrants are permitted to send their (also potentially undocumented) children to public school.¹⁷⁹ Moreover, public schools are not allowed to inquire or report the status of undocumented immigrants.¹⁸⁰ Hospitals are required to provide emergency care to undocumented people.¹⁸¹ Undocumented immigrants have many of the same labor rights as authorized workers under federal law, including the ability to receive workers compensation, join a union, receive state disability benefits, and report health and safety violations.¹⁸² Although state law is beyond the scope of this Article, some states provide more extensive opportunities for undocumented people.¹⁸³

178. *Hobby Lobby*, 573 U.S. at 692.

179. *Doe*, 457 U.S. at 205.

180. *Immigrant Students’ Rights to Attend Public Schools - School Opening Alert 2017*, IDRA NEWSL. (Intercultural Development Research Association, San Antonio, Tex.), August 2017, <https://www.idra.org/resource-center/immigrant-students-rights-attend-public-schools-school-opening-alert-2017/>.

181. 42 U.S.C. § 1395dd (2012).

182. See *Undocumented Workers’ Employment Rights*, LEGAL AID AT WORK, <https://legalaidatwork.org/factsheet/undocumented-workers-employment-rights/> (last visited Apr. 9, 2019).

183. *Id.* Some states offer medical insurance to undocumented people. Ruben Castaneda, *Where Can Undocumented Immigrants Go for Health Care?*, U.S. NEWS (Nov. 2, 2016, 1:01 PM), <https://health.usnews.com/wellness/articles/2016-11-02/where-can-undocumented-immigrants-go-for-health-care>. Medical schools often provide free medical care to known undocumented immigrants. Undocumented immigrants are helped by state and federal housing laws that prohibit discrimination against them. See also Angela Hart, *Rent Increases, Evictions Up in Immigrant Communities Under Trump*, HOUSING LAWYERS SAY, SACRAMENTO BEE (July 10, 2017 12:01 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article160239609.html>. California’s recently adopted budget includes \$45 million to assist undocumented people and has recently proposed a law to give undocumented people the right to sue their landlord for threatening to report them or actually reporting them to ICE. Amy Dobson, *Calif. Lawmakers Approve Bill Protecting Undocumented Immigrant Tenants from Landlord Harassment*, WASH. POST (Sep. 19, 2017), <https://www.washingtonpost.com/news/where-we-live/wp/2017/09/19/calif-lawmakers-approve-bill-protecting-undocumented-immigrant-tenants-from-landlord-harassment>; Jazmine Ulloa, *Nearly \$50 Million in the California State Budget Will Go to Expanded Legal Services for Immigrants*, L.A. TIMES (Jun. 15, 2017, 6:38 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-nearly-50-million-in-the-california-1497576640-htmstory.html>. As of May 2017, some states allow undocumented immigrants to receive state driver licenses. Gilberto Mendoza, *States*

Considering an extensive system of exceptions to the broadest interpretation of the harboring provision (merely “substantial facilitation”), the government will be hard pressed to provide a reason why accommodation for religiously motivated people and organizations cannot be made available. The government would likely lose under the least restrictive means test of RFRA. As Justice Kennedy said, “[T]he government has not made the second showing required by RFRA, that the means it uses to regulate is the least restrictive way to further its interest. . . . [T]he record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage.”¹⁸⁴

When there is an “existing, recognized, workable and already-implemented framework” for providing “substantial facilitation” to undocumented immigrants through public schools, hospitals, or in a host of other secular ways, the government’s denial of religiously motivated aid to undocumented immigrants is not likely to going to pass the least restrictive means test of RFRA.¹⁸⁵ A court examining the least restrictive means test in this context would likely say, “[W]e therefore conclude that this system constitutes an alternative that achieves all of the Government’s aims while providing greater respect for religious liberty.”¹⁸⁶

Whether a religiously motivated claimant or defendant could succeed on a Free Exercise defense under the First Amendment is beyond the scope of this Article, but there does seem to be a strong possibility for success under the Supreme Court’s decision in *Employment Division v. Smith*.¹⁸⁷ There, the Court articulated a “mechanism for individualized exceptions”¹⁸⁸ which might be better described as an exceptions exception. The *Smith* Court sent shock waves through the community of Free Exercise scholars for its controversial decision, in which laws that are “valid and neutral

Offering Driver’s Licenses to Immigrants, NAT’L CONF. ST. LEGISLATURES (updated Nov. 30, 2016), <http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx>.

184. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 737–38 (2014).

185. *Id.*

186. *Id.* at 692.

187. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

188. *Id.* at 884 (quoting *Bowen v. Roy*, 106 S. 2147, 2156 (1986)).

law[s] of general applicability”¹⁸⁹ are usually not granted religious accommodations. The Court said, however, that if the government is already making exceptions to a rule for secular conduct, it cannot escape strict scrutiny for denying an exception to the same rule for religiously motivated conduct.¹⁹⁰ As Justice Scalia explained while writing for the majority, “[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”¹⁹¹ Given the number of exemptions already available to individuals for purely secular conduct such as public education, medical care, and labor laws to the broadest interpretation of the harboring provision, the government will likely face a strong Free Exercise defense, even under *Smith*.

Under the narrowest interpretation of the harboring provision, the government has a stronger chance of showing it had no less restrictive means of achieving its interest, because under this interpretation, the government’s interest is in being able to *find* the undocumented person. Under this narrow interpretation, the religiously motivated claimant or defendant will be hard pressed to show that the government was systematically allowing for exceptions to concealing undocumented people from detection (and not merely providing substantial help in a non-clandestine manner as hospitals, labor laws, or schools do). Moreover, whether the churches or religiously motivated people could be successful in mounting a defense under RFRA for concealing undocumented people is beyond the scope of this Article since “concealing” undocumented people is clearly prohibited by the INA’s § 1324. This Article offers the modest point that to help clear up the ambiguity in the harboring provision of § 1324, the viability of a RFRA claim or defense for a large number of people should be influential in an overall interpretive rationale.

189. *Id.* at 879 (quoting *United States v. Lee*, 455, 102 S. Ct. 1051, 1058, n.3 (1982)).

190. *Id.* at 884.

191. *Id.*

V. USING RFRA PROPHYLACTICALLY TO INTERPRET THE
 AMBIGUOUS PROVISION IS THE BEST WAY TO SOLVE THE PUZZLE

A solution to this potential large-scale conflict between a broad interpretation of the INA's harboring provision and RFRA is found in the text and spirit of RFRA itself. Since a large amount of religious people would be affected by the ambiguity that remains in the INA's harboring provision despite the federal courts' employment of traditional rules of interpretation, the ambiguity should be resolved by using RFRA to influence a narrow construction of the provision and thereby avert a wide-spread RFRA problem. Traditionally, RFRA is used on the back-end of a federal law to craft a judicial case-by-case exception to an otherwise neutral and generally applicable law where that law substantially burdens a person's exercise of religion (and where the government does not override that substantial burden with a compelling interest that is narrowly tailored).¹⁹² While RFRA has not generally been viewed as a tool to construe an ambiguous prior statute, there are some rare instances, such as the INA's harboring provision, where such an application makes sense in order to fulfill RFRA's mandate.

This proposal may sound like the privileged doctrine of constitutional avoidance being applied with RFRA: if RFRA casts doubts on a statute's ability to survive RFRA scrutiny, the RFRA question is avoided altogether by construing the statute narrowly. That is not an accurate understanding. Scholars have written persuasively about what kind of statute RFRA is – some calling it a “super-statute,”¹⁹³ a precommitment statute,¹⁹⁴ or even an unconstitutional statute.¹⁹⁵ But the one thing everyone can agree on is that RFRA is not the Constitution and it does not carry the same

192. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 421 (2006). (“The Government’s argument that the existence of a *congressional* exemption for peyote does not indicate that the Controlled Substances Act is amenable to *judicially crafted* exceptions fails because RFRA plainly contemplates court-recognized exceptions . . .” (emphasis added)).

193. Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995).

194. Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1920 (2001).

195. Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 19 (1998).

weight as the Constitution. RFRA is, after all, subject to the same rules of modification or repeal as other statutes.¹⁹⁶ So I am not proposing that statutory interpreters create a doctrine of RFRA avoidance that should trump all other interpretive considerations solely to avoid a problem with RFRA.

I am also not proposing that we harmonize the statutes. Whatever RFRA is—super-statute, pre-commitment statute, framework statute, foundational statute—just about everyone agrees it is *not* just like every other statute. Scholars who support and oppose RFRA have argued that RFRA “amends” all federal law.¹⁹⁷ RFRA by its own terms says that it applies “to *all* Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted *before* or after [this enactment of this Act].”¹⁹⁸ It states that all federal law is “subject” to it.¹⁹⁹ RFRA is not on equal footing with other statutes. RFRA is on a higher level.

Using RFRA to narrowly construe a prior ambiguous statute after traditional tools of interpretation have failed is more like using it as a later tool of interpretation, and less like an avoidance doctrine or a harmonization rule. I am not offering a comprehensive theory on how RFRA could be used as a tool of statutory construction. I am offering the much more modest point that, when a statute like the INA’s § 1324 harboring provision is irreducibly ambiguous, and one construction would lead to a viable RFRA claim or defense for a sweeping amount of religious people, and another construction likely does not, it is reasonable to use RFRA as a tool of construction (in certain circumstances). In the first instance, this use should happen with executive officials when they exercise their discretionary interpretive judgment. If executive officials fail to do this, as they did in *United States v. Warren*,²⁰⁰ then courts should use RFRA to narrowly construe § 1324’s harboring provision.

196. Even admirers of RFRA admit this. See Magarian, *supra* note 194, at 1928 & n.110. (“Federal RFRA is only a statute, and it occupies the same, inferior position to the Constitution that every other federal statute occupies.”).

197. See Paulsen, *supra* note 193, at 270; see also Hamilton, *supra* note 195, at 7–8.

198. 42 U.S.C. § 2000bb-3(a) (2012) (emphasis added).

199. *Id.* § 2000bb-3(b).

200. *United States v. Warren*, No. CR 18-002233-TUC-RCC(BPV), 2018 WL 5257807 (D. Ariz. May 31, 2018).

While one may agree with my proposal as applied to executive officials, one major objection to my proposal is that if judges use RFRA as a tool of construction for INA § 1324, the statute's scope is narrowed beyond what RFRA requires, i.e., secular conduct is protected as well as religious conduct. Undoubtedly, Congress intended for RFRA to protect religiously motivated conduct "in all cases where free exercise of religion is substantially burdened."²⁰¹ This makes my method an imperfect solution because it is overinclusive in theory. But the alternative—using the traditional case-by-case exception method—is not the best solution in this situation because it will merely attempt to treat a rampant and an overwhelming amount of RFRA claims and defenses. If widespread injury to religious freedom can be prophylactically prevented by utilizing RFRA as a tool that narrowly construes § 1324 when the traditional tools have failed to interpret it, then this is the best use of RFRA, even if it is overinclusive in protecting secular conduct, as well. I discuss in further detail later why I think the overinclusiveness of my proposal is more of an asset than a liability.²⁰²

Specifically, my argument for a RFRA-based statutory construction of INA § 1324 is as follows: (A) It follows *a fortiori* that since RFRA amends all federal law, RFRA should influence the interpretation of an irreducibly ambiguous, previously enacted statute. (B) This is consistent with RFRA's statutory framework and the Constitution. (C) Using RFRA as a tool of construction for previously enacted statutes, like the harboring provision, is not a technique that should be invoked all of the time, but there are good reasons for invoking it here.

The first of these reasons is that, because a large percentage of the conduct prosecuted under a broad interpretation of the harboring provision would be religiously motivated, the efficient administration of justice would be better served by considering RFRA to construe the statute narrowly. This method is easier for the courts to administer than case-by-case accommodations because it prevents an onslaught of cases from burdening the court system, which would likely require the courts to delve into the nature and sincerity of a claimant or defendant's beliefs. The second

201. 42 U.S.C. § 2000bb(b)(1) (2012).

202. See *supra* Section IV.B.

reason is that this method prevents the burden of litigation to religiously motivated defendants. Third, another substantive canon of construction—the rule of lenity—counsels in favor of a narrow construction and courts are familiar with implementing it. While it is not within the scope of this Article, it is worth noting that my proposal also avoids the contention that arises from the more conventional case-by-case exemption approach where the tension is not necessary. While it is best if executive officials adopt this method of allowing RFRA to influence their statutory construction of an ambiguous statute, if they do not, then courts should (as shown by *United States v. Warren*²⁰³).

*A. It Follows A Fortiori that Since RFRA Amends All Federal Law,
RFRA Should Influence the Construction of an
Ambiguous, Previously Enacted Statute*

The applicability section of RFRA states in § 3(a): “IN GENERAL.— This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.”²⁰⁴

It is generally agreed that Congress intended RFRA to serve as an amendment to all federal law.²⁰⁵ “RFRA operates as a sweeping ‘super-statute,’ cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach.”²⁰⁶ It follows *a fortiori* that if RFRA amends all federal law, including previously enacted statutes, that RFRA should at least influence the construction of an ambiguous prior statute after other traditional interpretive tools have failed.

One objection to this logic is that of a general retrospective method of interpretation; it is the concern “for far reaching and unanticipated consequences”²⁰⁷—the same concern that was held

203. *United States v. Warren*, No. CR 18-002233-TUC-RCC(BPV), 2018 WL 5257807 (D. Ariz. May 31, 2018).

204. 42 U.S.C. § 2000bb-3(a) (2012).

205. See Paulsen, *supra* note 193, at 270; see also Hamilton, *supra* note 195, at 7–8.

206. See Paulsen, *supra* note 193, at 253.

207. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2113 (2002) (quoting *Federalism Accountability Act of 1999: Hearing on S. 1214 Before the Senate S. Comm. on Governmental Affairs*, 106th Cong. 303 (1999) (statement of Randolph D. Moss, Acting Assistant Att’y Gen., Off. of Legal Counsel)).

by the Senate Committee on Governmental Affairs, which considered the appropriate scope of the proposed Federalism Accountability Act, which would have had general retrospective (as well as prospective) application.²⁰⁸ The Senate Committee was concerned that, as applied to prior acts, “it would have unsettled vast areas of preemption doctrine, shrinking the already-judicially-determined preemptive effect of countless federal statutes.”²⁰⁹ Professor Rosenkranz explained:

The objection to retrospective interpretive statutes is that they amend the entire United States Code in one fell swoop. Congress of course has constitutional power to do so; indeed, Congress could repeal the entire United States Code with one sentence if it so chose. But mandating a new interpretive principle to gloss all previous acts of Congress may seem a particularly irresponsible way to amend the United States Code. Perhaps it is implausible that Congress could analyze thoroughly the sudden effects of such a statute. The potential for “far reaching and unanticipated consequences” is the heart of the objection to general retrospective interpretive statutes.²¹⁰

Whether RFRA was a good idea as a matter of policy, however, is beyond the scope of this Article. Like it or not, RFRA is a retrospective interpretive statute. While this has traditionally been understood as commanding case-by-case exemptions to prior federal law that meets RFRA’s strict scrutiny test, my point is that it is not clear if that is the only way RFRA amends federal law. If a prior federal statute is notoriously ambiguous after the traditional interpretive tools have been used (as evidenced by the federal circuit split over the scope of § 1324), RFRA—as an “amendment” to § 1324—should influence the final construction of it.

Another objection is that, since the INA predates RFRA, we do not know whether Congress would have exempted it from RFRA (whereas Congress can create a clear statement exception to RFRA in future statutes, which creates the implication that if Congress does not create such an exception, they did not want one).²¹¹ But

208. *Id.*

209. *Id.*

210. *Id.* at 2113–14.

211. 42 U.S.C. § 2000bb-3(b) (2012) (requiring a clear statement to exempt future statutes from RFRA).

this objection proves too much. Since the INA was created before RFRA was enacted, if Congress meant to exempt it, or any part of it, from RFRA's reach, it could have done so in RFRA itself.

B. Using RFRA to Narrowly Construe § 1324 Is Consistent with RFRA's Statutory Framework and the Constitution

RFRA has not generally been viewed as a tool of construction. Instead, it has generally been viewed as requiring judicially crafted exceptions to general rules of applicability. RFRA's text does not say that it is *solely* to be mobilized as judicially crafted exceptions. The Congressional Findings and Declaration of Purposes and the Applicability sections are particularly helpful in considering how to implement RFRA.²¹² They state:

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
- (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
- (3) governments should not substantially burden religious exercise without compelling justification;
- (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
- (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

212. *See Id.* § 2000bb.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.²¹³

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.²¹⁴

RFRA provides judicial relief for a person whose religious exercise has been substantially burdened by the government, stating they may exert either a claim or a defense under RFRA in court.²¹⁵ Undoubtedly, RFRA provides an explicit private right of action. Whether a successful class action can be brought under RFRA is beyond the scope of this Article, but is being reasonably attempted.²¹⁶ The fact that RFRA provides a private right of action, however, does not preclude implementing RFRA's broader

213. *Id.*

214. *Id.* § 2000bb-3.

215. *Id.* § 2000bb(b)(2); *Id.* § 2000bb-1(c).

216. *See Teneng v. Trump*, No. 5:18-cv-01609-JGB-KK (C.D. Cal. filed Aug. 1, 2018).

mandate and purpose to “restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened”²¹⁷ in limited instances of statutory construction, especially where doing so would be both a prophylactic measure to prevent unnecessary widespread burdens on religious exercise and a prophylactic measure to prevent needless contention with non-religiously motivated conduct.

Moreover, RFRA’s Applicability Section states that it applies to the implementation of all federal law, regardless of whether such law was adopted before or after the enactment of RFRA.²¹⁸ Executive officials have the authority to weigh RFRA’s mandate in implementing the law through their exercise of prosecutorial discretion. Whether rule-making agencies such as the Department of Homeland Security should allow RFRA to prophylactically influence their discretion is beyond the scope of this Article as this Article is limited to instances, like INA § 1324, where a pre-RFRA statute is irreducibly ambiguous, and courts must construe it to effectively “implement” the law.

The second part of RFRA’s Applicability Section is the Rule of Construction: “federal statutory law adopted after [the date of this enactment of this Act] is subject to this Act unless such law explicitly excludes such application by reference to this chapter.”²¹⁹ Almost certainly this provision was created to dispel any doubt about where RFRA ranked on the hierarchy of subsequently enacted laws. It says that RFRA has the higher ground; subsequent laws are not to be harmonized with RFRA in traditional ways unless the subsequent law has a clear statement exception to RFRA. This prospective rule of construction has led to scholarly debate, most notably between Lawrence Tribe, Nicholas Rosenkranz, Larry Alexander, Saikrishna Prakash, and others, about the propriety and constitutionality of Congress imposing mandatory prospective rules of statutory interpretation.²²⁰ Imposing “constraints upon, or

217. 42 U.S.C. § 2000bb(b)(1) (2012).

218. *Id.* § 2000bb-3(a).

219. *Id.* § 2000bb-3(b).

220. See Rosenkranz, *supra* note 207, at 2113-14. But see Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97 (2003).

tak[ing] presumptive priority over, downstream legislative decision making” is subject to special concerns that are not applicable to using RFRA as a retrospective rule of construction for statutes like the INA and is beyond the scope of this Article.²²¹

What matters for purposes of resolving the ambiguity in the INA’s harboring provision is whether it is constitutional for RFRA to be used as a *retrospective* method of statutory interpretation (assuming that it is within the statutory framework of RFRA itself as discussed previously). As Professor Rosenkranz notes, there is nothing in the Constitution that prevents Congress from creating a retrospective method of statutory interpretation, in general.²²² Examining whether this specific retrospective method is constitutional is best accomplished by, as Rosenkranz instructs, asking what former method is being displaced by the proposed method and whether that former method is constitutionally required.²²³ In this case, using RFRA’s strict scrutiny standard as a method of interpretation displaces the standard set out in *Employment Division v. Smith*, that laws which are neutral and generally applicable are not required to meet strict scrutiny under the Free Exercise Clause.²²⁴ Congress intended RFRA to be a “powerful tool . . . shift[ing] an animating policy of federal law without picking through the United States Code section by section.”²²⁵ This shift in policy was to ratchet up the standard of what is required by the Free Exercise Clause. When the strict scrutiny standard is applied on a retail level, the court balances various competing interests, including constitutional ones. When RFRA’s strict scrutiny mandate is applied wholesale—as a method of statutory construction to resolve ambiguity in a statute—this ratcheted-up free exercise standard must not upset the usual balance with the Establishment Clause.²²⁶

An analysis of whether using RFRA as a retrospective method of statutory construction is constitutional is a substantive question

221. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L.J.* 400, 421 (2015).

222. Rosenkranz, *supra* note 207.

223. *See id.* at 2087.

224. *Emp’t Div. v. Smith*, 494 U.S. 872, 878 (1990).

225. *See* Rosenkranz, *supra* note 207, at 2114.

226. *See generally id.*

that should be resolved by weighing Establishment Clause concerns on a statute specific basis. Courts should weigh Establishment Clause considerations because using RFRA's mandate as an interpretive method wholesale may "unconstitutionally privilege[] religious interests at the expense of secular interests"²²⁷ in a way that does not usually happen when RFRA is used to craft a limited exception. In this instance, however, using RFRA to resolve the ambiguity in the INA's harboring provision would not upset the usual Free Exercise and Establishment Clause balance because it leads to a narrower construction of the criminal provision for not only religiously motivated conduct but purely secular conduct as well. This is, even many RFRA skeptics would likely agree, a constitutional use of RFRA. As one scholar puts it, the RFRA protection in this instance would not "improperly privilege religion, because [it] would [not] inequitably relieve believers of constraints from which many nonbelievers might also prefer to be free."²²⁸

C. There Are Good Reasons for Using RFRA as a Tool of Construction for Specific Prior Ambiguous Statutes, like the Harboring Provision

Allowing RFRA to influence the construction of prior statutes when traditional tools have failed is a technique that should not be invoked all the time. As the Article discusses more fully in Part V, it should be invoked in certain narrow circumstances. There are, however, good reasons for invoking it here. First, it is easier for the courts to administer than case-by-case accommodations because it prevents an onslaught of cases from burdening the administration of the courts—something that would likely lead to inappropriate judicial scrutiny of religious beliefs. Second, it prevents the burden of litigation to religiously motivated defendants. Third, the rule of lenity advises it. Lastly, it avoids the needless contention that some scholars argue arises from the more conventional case-by-case approach, which sometimes privileges religious conduct over secular conduct.

227. Magarian, *supra* note 194, at 1970.

228. *Id.* at 1977.

1. A RFRA-based construction of the harboring provision prevents both the onslaught of cases from burdening the courts and the needless judicial scrutiny of religious beliefs

Mobilizing RFRA's mandate prophylactically to construe narrowly the ambiguous harboring provision is easier for the court to administer than case-by-case accommodations because a narrow construction prevents an onslaught of accommodation cases from burdening the court system. If the Trump administration creates another "zero tolerance" policy²²⁹ and strictly and narrowly enforces § 1324 as it is doing in *United States v. Warren*,²³⁰ there will be widespread RFRA defenses and probably widespread RFRA claims. There might even be a RFRA class-action. This sweeping mobilization of RFRA in response to a narrow construction of a federal criminal law will cause the court to delve into the nature and sincerity of a claimant or defendant's beliefs to discern which qualify.²³¹

Few other instances in the U.S. Code make what is generally understood as charitable conduct (i.e. "substantially facilitating" an undocumented person's stay regardless of intent to hide them from authorities) a criminal offense. Not only is this unusual in and of itself, but the large presence of unauthorized aliens in the United States makes it extraordinarily difficult for charitable people to avoid violating a broad interpretation of § 1324, even if they are not providing open sanctuary. A broad spectrum of conduct falls under the standard of "substantial facilitation" of an undocumented person. Defendants who have been charged with "harboring" under this broad interpretation of the statute may raise a RFRA defense, whether they are motivated by a mainstream religious belief, an obscure religious belief, something that looks like religious belief, some other deeply held conscientious objection, or

229. Trump's "zero tolerance" policy has already strained the federal court system, leading to mass trials. See Russell Berman, *85 Immigrants Sentenced Together Before One Judge*, THE ATLANTIC (June 19, 2018), <https://www.theatlantic.com/politics/archive/2018/06/zero-tolerance-inside-a-south-texas-courtroom/563135/>.

230. *United States v. Warren*, No. CR 18-002233-TUC-RCC(BPV), 2018 WL 5257807 (D. Ariz. May 31, 2018).

231. For a full discussion on the complexity surrounding the court's examination of the nature and sincerity of religious belief in religious freedom cases, see Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017).

a philosophical belief based on generally accepted understandings of the Golden Rule.²³² Given that RFRA was amended to even more broadly cover religious exercise than it initially did²³³ and given the wide-ranging amount of people charitably helping undocumented immigrants, it is not hard to foresee widespread RFRA defenses, or a RFRA class-action being raised to a narrow (“merely substantial facilitation”) interpretation of § 1324, should executive officials strictly enforce § 1324’s prohibition against those who harbor, as prosecutors are doing right now in *United States v. Warren*.²³⁴

2. Using a RFRA-based construction of the harboring provision prevents the burden of litigation to religiously motivated defendants

Similarly, mobilizing RFRA to construe an ambiguous statute with strong RFRA implications like the harboring provision prevents unnecessary criminal prosecution from burdening religiously motivated people. It hardly needs stating that undergoing prosecution for a federal crime is burdensome. Not only is there the potential loss of liberty and extensive legal costs, but the stigma associated with being criminally prosecuted can last a lifetime. Congress and the courts have recognized the burden that even the threat of litigation can place on Free Exercise. The text of RFRA also acknowledges this and provides that RFRA can be not only a defense, but a “*claim . . . to persons whose religious exercise is substantially burdened by government.*”²³⁵ In providing for a RFRA claim, Congress gave religiously motivated people not just a shield from prosecution, but also a sword to stop a potential threat of prosecution from having a chilling effect on their religious exercise. If the harboring provision is interpreted broadly, with the expectation that RFRA accommodations will be made on the back-end of the statute on a case-by-case basis during litigation, the potential chilling effect could be wide-ranging on religious exercise, given the number and diversity of religiously motivated people who are, or want to be, aiding undocumented people.

232. Denial of Defendant’s Motion to Dismiss Counts 2 and 3 at 2, *Warren*, 2018 WL 5257807.

233. 42 U.S.C. § 2000cc (2012).

234. *United States v. Warren*, No. CR 18-002233-TUC-RCC(BPV), 2018 WL 5257807 (D. Ariz. May 31, 2018).

235. 42 U.S.C. § 2000bb (2012) (emphasis added).

Preventing religious people from being burdened with the widespread threat of prosecution is consistent with the text of RFRA, which provides broad and robust coverage for religious exercise. It is arguably more consistent with the spirit of RFRA to avert this chilling of religious exercise where the litigation burden is unnecessary and can be avoided prophylactically.

3. The rule of lenity advises answering the interpretive question in § 1324 consistently with a RFRA-based construction and judges are familiar with implementing it

“One of the most fundamental principles of the criminal law is that it should punish culpable conduct—bad acts by persons with culpable mental states. One significant reason for this principle is obvious: The criminal law exists to maintain order through predictable schemes of punishment”²³⁶ The rule of lenity is a substantive canon of interpretation that, as a matter of policy, addresses this concern regarding criminal culpability. As one scholar succinctly put it, the rule of lenity “requires that ambiguity in criminal statutes be resolved in favor of the defendant.”²³⁷

While a fulsome analysis of applying the rule of lenity’s interpretive framework is beyond the scope of this Article, it is important to realize this “ancient principle [that] direct[s] judges to construe ambiguous criminal statutes narrowly,”²³⁸ and advises answering the interpretive question posed in § 1324’s harboring provision in a way consistent with RFRA and in a way which judges are already familiar with implementing. Like the RFRA-based construction this Article proposes, the rule of lenity is not the highest priority rule in statutory interpretation. “Judges who consider the framework may ultimately reject the rule in favor of a higher-priority canon, a claim of statutory clarity reached through reading the text and applying other interpretive tools, or a competing constitutional concern.”²³⁹ When, exactly, in the interpretive process RFRA should influence judges is beyond the

236. Mary L. Dohrmann, *Hemming in “Harboring”: The Limits of Liability Under 8 U.S.C. § 1324 and State Harboring Statutes*, 115 COLUM. L. REV. 1217, 1237 (2015).

237. *Id.* at 1239.

238. Intisar A. Rabb, Response, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 180 (2018).

239. *Id.* at 182.

scope of this Article. This Article's modest point is that while RFRA should not be the highest priority tool in interpretation, it can and should be a part of the interpretive rationale when the higher priority tools are not working to provide clarity.

VI. HOW A RFRA-BASED STATUTORY CONSTRUCTION OF THE HARBORING PROVISION IS REACHED

A. The Necessary and Sufficient Conditions for Using the RFRA-Based Statutory Construction of the Harboring Provision

This Article explained in Part IV why RFRA should be used to construct the ambiguous harboring provision, as opposed to creating case-by-case exemptions. This section seeks to explain when and how a RFRA-based statutory construction of a federal provision such as the harboring provision should be invoked. My proposal is as follows: (1) if the federal statute remains ambiguous after employing standard rules of interpretation and (2) after scrutinizing each interpretation of the ambiguous statute under RFRA's strict scrutiny test, one interpretation of the ambiguous statute creates a viable RFRA claim or defense, and (3) there are prudential reasons for mobilizing RFRA on a macro scale instead of case-by-case exemptions, such as because a large amount of religiously motivated people would be implicated and (4) the usual balance with the Establishment Clause is not upset by mobilizing RFRA this way, then (5) invoke a RFRA-based statutory construction of the statute so as to avert a large scale RFRA problem.

As already discussed in Part II, the INA's § 1324 remains irreducibly ambiguous even after applying traditional rules of interpretation. As Part III discussed, the broadest interpretation of the harboring provision ("substantial facilitation") creates a viable RFRA claim or defense. As Part IV discussed, this broad interpretation will implicate the conduct of a large amount of religiously motivated people, which will burden the courts. Because of this, it is better to employ RFRA as a tool of statutory construction than to use it on a case-by-case exemption basis. When the RFRA-based statutory construction of the harboring provision is complete, a narrow interpretation of the harboring provision ("substantial facilitation" plus concealment) results (which would apply to both religiously and non-religiously motivated people alike).

B. RFRA Should Influence the Statutory Interpretation of the Harboring Provision First at the Prosecutorial Stage and the Courts, if Necessary

Until this point in the Article, the discussion has centered on RFRA influencing the *court's* construction of an ambiguous statute. The interpretation, however, should first be influenced at the prosecutorial discretion stage for two primary reasons. First, as a general matter, prosecutors have long exercised discretion in initiating a charge under federal law (resulting in a “case or controversy” starting) and that discretion generally considers viable defenses that would undermine the ability for a prosecutor to prove a case beyond a reasonable doubt. Second, the *Justice Manual* specifically details that religious liberty concerns should inform litigation strategy.

1. Prosecutors have discretion in initiating a charge under federal law and consider viable defenses that would undermine the case

The *Justice Manual* describes the general discretion prosecutors exercise when initiating a charge:

Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor’s broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts. *See, e.g., United States v. LaBonte*, 520 U.S. 751, 762 (1997); *Oyler v. Boles*, 368 U.S. 448 (1962); *United States v. Fokker Services B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *Powell v. Ratzenbach*, 359 F.2d 234 (D.C. Cir. 1965). This discretion exists by virtue of the prosecutor’s status as a member of the Executive Branch, and the President’s responsibility under the Constitution to ensure that the laws of the United States be “faithfully executed.” U.S. Const. Art. II § 3. *See Nader v. Saxbe*, 497 F.2d 676, 679 n. 18 (D.C. Cir. 1974).²⁴⁰

240. UNITED STATES DEPARTMENT OF JUSTICE, JUSTICE MANUAL § 9-27.110 (2018), <https://www.justice.gov/jm/justice-manual>.

This broad discretion includes whether to initiate a charge where a viable defense (such as RFRA) would make it very difficult for the prosecution to prove the crime beyond a reasonable doubt.²⁴¹

Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the attorney for the government believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact.²⁴²

2. *The Justice Manual specifies that religious liberty concerns should inform litigation strategy*

More specifically regarding the broad first interpretation of the harboring provision, the *Justice Manual* states that “to the greatest extent practicable and permitted by law, Department components and United States Attorneys’ Offices must reasonably accommodate religious observance and practice in all activities, including litigation.”²⁴³ The manual itself goes on to articulate the strict scrutiny that RFRA requires:

RFRA prohibits the federal government from substantially burdening a person’s exercise of religion, unless the federal government demonstrates that application of such burden to the religious adherent is the least restrictive means of achieving a compelling governmental interest. RFRA applies to all actions by federal administrative agencies, including rulemaking, adjudication or other enforcement actions, and grant or contract distribution and administration.²⁴⁴

This section of the manual further details the various ways religious freedom under RFRA are to be accommodated. It also provides for a point person to coordinate religious liberty issues in litigation: “Each litigating division should select a member of its

241. See the *Justice Manual* guidance stating, “The attorney for the government should commence or recommend federal prosecution if he/she believes that the person’s conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction” *Id.* § 9-27.220.

242. *Id.*

243. *Id.* § 1-15.100.

244. *Id.* § 1-15.300.

front office and each United States Attorney's Office should assign its Civil Chief, or his/her designee, to coordinate religious liberty litigation issues and to implement this section."²⁴⁵ Given this guidance in the *Justice Manual* regarding the paramountcy of religious liberty in informing litigation strategy generally, it follows that prosecutors should use RFRA when exercising their judgment in how broadly to construe the INA's harboring provision. The Attorney General noted this in his guidance memorandum on interpreting religious liberty protections in federal law:

Much like administrative agencies engaged in rulemaking, agencies considering potential enforcement actions should consider whether such actions are consistent with federal protections for religious liberty. In particular, agencies should remember that RFRA applies to agency enforcement just as it applies to every other governmental action. An agency should consider RFRA when setting agency-wide enforcement rules and priorities, as well as when making decisions to pursue or continue any particular enforcement action²⁴⁶

Moreover, the DOJ made it plain in the memo that religious liberty was to be respected at every level of the government's litigation strategy, including prosecutorial discretion.²⁴⁷

VII. CONCLUSION

The Trump administration's "zero tolerance" policy towards undocumented people has resulted in religiously motivated resistance movements proliferating. Since President Trump has been in office, the sanctuary movement alone has more than doubled. Such religiously motivated resistance, however, has not slowed the administration's aggressive agenda to "take the shackles off" ICE.²⁴⁸ In what has the potential to be a vicious cycle, the more the administration cracks down on undocumented people, the more the religiously motivated movement grows. And the more the movement grows, the more the administration may feel the need to crack down on the undocumented people.

245. *Id.* § 1-15.200.

246. Memorandum from Att'y Gen. Jeff Sessions, *supra* note 3, at 8.

247. *See generally id.*

248. Miroff & Sacchetti, *supra* note 30.

The state of the law regarding religiously motivated aid to undocumented people, however, is unclear. Although recent years have brought some clarity to a few circuits, federal courts remain divided about how broadly to interpret the INA's provision against harboring undocumented people, even after employing the standard tools of interpretation. In at least two circuits,²⁴⁹ the courts interpreted the harboring provision to mean merely "substantially facilitating" (or "to make easier or less difficult") an undocumented person's stay in the United States. In at least three circuits,²⁵⁰ the courts decided that harboring involves more than mere substantial facilitation. These circuits require a specific intent to hide the undocumented person from authorities, although not necessarily in a clandestine manner. Lastly, in at least one circuit,²⁵¹ the court interpreted the harboring provision to mean more than substantially facilitating, but not necessarily active hiding from authorities. This view, as articulated by the Seventh Circuit, is that harboring is conduct that substantially facilitates and that provides a person "a place to stay in which the authorities are unlikely to be seeking him."²⁵²

It is not difficult to foresee a conflict between the ambiguous harboring provision and a spectrum of religiously motivated conduct toward undocumented people. As the first version of this Article was being completed, Professor Scott Daniel Warren was being indicted under § 1324 for "taking care" of two undocumented men with food, water, and shelter because his religious beliefs compelled him to help human beings in distress.²⁵³ The last time the American legal system endured this significant of a clash between a president's immigration policies and religiously motivated conduct towards undocumented people was in the 1980s. It was resolved in a different religious liberty paradigm—pre-RFRA, pre-*O Centro*, and pre-*Hobby Lobby*. Analysis under the new religious liberty paradigm reveals a strong RFRA claim or defense

249. See *supra* Section II.A (specifically, the Eighth, Fifth, and Ninth Circuits).

250. See *supra* Section II.B (specifically, the Second, Sixth, Third, and Eleventh Circuits).

251. See *supra* Section II.C (the Seventh Circuit).

252. *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012).

253. *United States v. Warren*, No. CR 18-002233-TUC-RCC(BPV), 2018 WL 5257807 (D. Ariz. May 31, 2018).

to a broad interpretation of the harboring statute as conduct that merely “substantially facilitates.”

A solution to this looming conflict between a broad interpretation of the INA’s harboring provision and RFRA is for RFRA to influence the statutory construction of the INA’s harboring provision. Using RFRA as a tool of statutory construction is consistent with the text of RFRA and is constitutionally permitted in this instance. It may not be a technique that should be invoked all the time, but there are good reasons for invoking it here over RFRA’s traditional mechanism of case-by-case exemptions. First, it is easier for the courts to administer than case-by-case accommodations because it prevents an onslaught of litigation from burdening the court system, which would likely require them to delve into the nature of a defendant or claimant’s beliefs. Second, it prevents the burden of litigation to religiously motivated defendants. Third, another substantive canon of construction—the rule of lenity—counsels in favor of a narrow construction and courts are familiar with implementing it. Last, it avoids the contention that arises from the more conventional case-by-case exemption approach where the clash is not truly necessary.

The puzzle of how to resolve the interaction of RFRA and the INA highlights a useful starting point for considering a range of different legal tools available to both executive officials and courts for operationalizing RFRA’s mandate and its interaction with other federal statutes. The modest point of this Article is to show that (1) if a federal statute remains ambiguous after employing traditional rules of interpretation and (2) after scrutinizing each possible interpretation of the ambiguous statute under RFRA’s strict scrutiny test, one interpretation of the ambiguous statute creates a viable RFRA claim or defense, and (3) there are prudential reasons for mobilizing RFRA on a macro scale than case-by-case exemptions, such as because a large amount of religiously motivated people would be implicated and (4) the usual balance with the Establishment Clause is not upset by mobilizing RFRA this way, then (5) it behooves executive officials and courts, if necessary, to invoke a RFRA-based statutory construction of the statute to solve the RFRA problem.