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Sanctuary: How Churches Escape the Law and Protect the Criminal

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For eons, religion has idealized the safeguarding of the persecuted from government punishment. Ancient Greek social outcasts flocked to religious shrines for shelter, and Roman temples served the same purpose.[1] Christian churches have similarly sheltered refugees, with the provision of sanctuary being codified into law at some points in history.[2] But even in ancient times, it was recognized that religion cannot justify criminality, even if that principle required the pious to restrict their well-meaning generosity toward known lawbreakers. The Bible itself advocates that no one should be above the law:

> For there is no authority except from God, and those that exist have been instituted by God. Therefore whoever resists the authorities resists what God has appointed, and those who resist will incur judgement. For rulers are not a terror to good conduct, but to bad. Would you have no fear of the one who is in authority? Then do what is good, and you will receive his approval, for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain. For he is the servant of God, an avenger who carries out God's wrath on the wrongdoer.[3]

However, that does not mean Christianity meekly submits to all laws. Medieval theologian and Catholic saint Thomas Aquinas, one of Christianity's most prominent figures, maintained that natural law's core purpose is "that good ought to be done and pursued and that evil ought to be avoided".[4] Consequently, Aquinas believed that unnatural, unjust laws are derived from nullified authority, which people are entitled to disobey.[5] This Christian moral paradox is likely the cause of churches' vast culture of offering sanctuary, even if it breaks the law and motivates the passage of new, deterrent laws.

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[1] Valerie J. Munson, *On Holy Ground: Church Sanctuary in the Trump Administration*, 47 SOUTHWESTERN L. REV. 49 (2017), www.swlaw.edu/sites/default/files/2018-03/3%20Munson%2C%20On%20Holy%20Ground.pdf.
[2] *Id*.
[3] Paul the Apostle, ROMANS 13:1–7.
[4] Rachael I. Yonek, *Civil Disobedience: What Would Thomas Aquinas Do?*, SEATTLE UNIVERSITY UNDERGRADUATE RESEARCH JOURNAL: Vol. 2 , Art. 17, 130, 133, https://scholarworks.seattleu.edu/suurj/vol2/iss1/17.
[5] *Id.* at 134.

Like their longtime calling to shelter refugees, Christian churches have endured longstanding legal restrictions on such actions since at least the seventeenth century.[6] When a church or individual worshipper exercises religious belief, like sheltering a migrant for example, this is an "affirmative" act that might be legally permissible in certain circumstances, but unlawful in others.[7] In modern America, the legality of churches sheltering migrants is governed by federal law, and depends on the immigration status of those migrants. However, federal immigration laws have been repeatedly challenged by Sanctuary Movements, which has at the very least impacted how, and if, those laws are enforced. Churches' collective freedom to exercise their respective religions is protected by the Constitution, but that protection is subject to boundaries.

This article will explore: (1) the enforcement of immigration law since the first Sanctuary Movement, (2) how sanctuary churches fared in the face of that enforcement, and (3) how the Biden Administration's disastrous policies and willful refusal to enforce existing immigration law have greatly exacerbated illegal immigration and churches' aiding of it. Through this analysis, it will be shown that for decades, the Sanctuary Movements resulted in a backlash of immigration laws being enforced against churches, even if courts' interpretations of those laws were inconsistent. But now, churches and illegal immigrants alike have been encouraged to violate these laws by the Biden Administration's notorious, systemic refusal to enforce them.

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[6] Theodore B. Olson, *Church Sanctuary for Illegal Aliens*, 7 Op. O.L.C. 168, 168–69, https://www.justice.gov/olc/opinion/church-sanctuary-illegal-aliens; William Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND, 332–33 (1765); Theodore Plucknett, A CONCISE HISTORY OF THE COMMON LAW, 382 (2d ed. 1936); ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 536–37 (1935); AN ACT FOR CONTINUING AND REVIVING OF DIVERS STATUTES, AND REPEAL OF DIVERS OTHERS, 21 Jac. 298, 303, ch. 28, § 7 (1623).

[7] Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 KANSAS L. REV. 535 (2020), https://kuscholarworks.ku.edu/bitstream/handle/1808/30561/Carmella_2020.pdf.

Section I: The Enforcement of Immigration Law since the First Sanctuary Movement

First and foremost, the term "immigrant" encompasses all foreign "aliens" in the country, with a few statutory exceptions.[8] Refugees are people outside their respective countries of nationality who are unable or unwilling to return to it, because of persecution or a well-founded fear thereof, on account of race, religion, nationality, political opinions, or membership in a particular social group.[9] Illegal immigrants are aliens who enter or remain in the country unlawfully, pursuant to the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and various 8 U.S.C. statutes.[10] Referring to select immigrants as "illegal" is politically divisive, so the phrase is frequently substituted for "undocumented" in an attempt to lessen these individuals' criminal stigma.[11]

Both illegal immigration and the harboring/assisting of illegal immigrants generally constitute federal crimes under the Immigration and Neutrality Act of 1952, which is found in 8 U.S.C. There are several ways immigration can be illegal. Being present in the United States after entering unlawfully or under fraudulent circumstances is one such way.[12] It is also possible for legal immigration to become illegal, should an immigrant overstay a Visa or otherwise refuse a legal duty to leave the country.[13] Likewise, the smuggling of illegal immigrants into the country, or harboring them after arrival to help them evade immigration authorities, are entirely separate criminal acts, and merely a few of many that are covered by 8 U.S.C. § 1324.[14]

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[8] 8 U.S.C. § 1101(a)(15).
[9] *Id.* at 1101(a)(42).
[10] *Illegal immigrant*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/illegal_immigrant.
[11] *Id.*
[12] 8 U.S.C. § 1325.
[13] *Id.* at § 1182(a)(9).
[14] *Id.* at § 1324(a)(1)(A).

Historically, the greatest challenge to these laws is not merely illegal immigration itself, but rather the hordes of Americans who have supported the Sanctuary Movements. The First Sanctuary Movement is rooted in the early 1980s, taking shape during the Reagan Administration.[15] During this period, most illegal immigrants who crossed the Southern border were apparently from the failed South American countries of El Salvador and Guatemala; refugees of civil war and rampant violence.[16] Due to their difficult pasts, they quickly earned deep sympathy from legions of American liberals, many of whom joined the caravan as it marched through Arizona's Sonoran Desert after illegally crossing the Southern border.[17]

In recognition of this criminal activity and American diplomatic ties to the countries from which these migrants fled, the Reagan Administration pursued deportations rather than asylum.[18] A myriad of American activists, many religiously-motivated, viewed this enforcement of immigration law by the Reagan Administration as unjust and therefore illegitimate, as well as contrary to their personal beliefs.[19] To this end, at least three hundred churches, twenty American cities, and the state of New Mexico endorsed the Sanctuary Movement, with several declaring themselves "sanctuaries" and announcing their intent to defy federal immigration law. The Reagan Administration did not take this lightly—it maintained a policy of automatic deportation and issued a memorandum condemning the movement.[20]

In that memorandum, Deputy Attorney General Theodore B. Olson explained that churches' culture of offering sanctuary to unlawful refugees had been criminalized in England

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[15] Carl Lindskoog, *The origins of the Sanctuary Movement*, THE NATIONAL MUSEUM OF AMERICAN HISTORY (Jul. 11, 2023), https://americanhistory.si.edu/explore/stories/origins-sanctuary-movement.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Peter Applebome, *SANCTUARY MOVEMENT: NEW HOPES AFTER TRIAL*, NEW YORK TIMES LATE EDITION (East Coast) (May 6, 1986).
[20] Lindskoog, *supra* note 15 at 5; 7 Op. O.L.C. at 168.

for hundreds of years by that point, and that there was no evidence of that culture emerging in the United States prior to the 1980's.[21] While Olson emphasized migrants' statutory right to apply for asylum (during which time they will not face deportation), this referenced the Sanctuary Movement defying that prescribed legal remedy by encouraging and aiding illegal immigration.[22]

Accordingly, Olson concluded that churches partaking in the Sanctuary Movement are probably violating § 1324, because recent case law of that time contradicted "the notion that harboring must involve actually hiding the alien or otherwise 'clandestine' activity. Instead, harboring has been held to include knowingly taking steps that 'afford shelter to' an illegal alien, even if done without the purpose of concealing the alien from the immigration authorities."[23] Through this lens, the clear purpose of § 1324 was understood "to encompass conduct tending substantially to facilitate an alien's 'remaining in the United States illegally,' provided, of course, the person charged has knowledge of the alien's unlawful status."[24]

In a move that surprised many, when President Reagan's vice president George H.W. Bush succeeded his prior boss in the presidency, he ceased the Reagan Administration's policy of automatically deporting Guatemalan and Salvadorian illegal immigrants and gave them a greater ability to petition for asylum.[25] This newfound leniency quickly encountered two issues that ultimately caused it to be temporary. First, the champions of the Sanctuary Movement proved difficult to appease. When the violent South American conflicts ended in 1992 and 1996, eroding the arguable moral justification behind breaking federal immigration law, many Sanctuary Movement activists persisted in their efforts anyway.[26] This was a catalyst for many who

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[21] 7 Op. O.L.C. at 169.
[22] *Id.* at 171, *citing* 8 U.S.C. § 1158.
[23] *Id.* at 169–70, *quoting* United States v. Acosta De Evans, 531 F.2d 428, 430 (9th Cir. 1981).
[24] *Id.* at 170, *quoting* United States v. Lopez, 521 F.2d 437, 41 (2d Cir.) (citation omitted), cert, denied, 423 U.S. 995 (1975).
[25] Lindskoog *supra* note 15 at 5.
[26] *Id.*

previously sympathized with sanctuary activists and their motives to transition their feelings to disdain. But there was another reason for this shift.[27] As the momentum behind the First Sanctuary Movement sputtered to a halt and opposition rose, that opposition coincided with widespread anti-illegal immigration sentiment that soared within the American public in response to rising crime, specifically gang violence.[28]

This fundamental shift in the American zeitgeist toward illegal immigration occurred as President H.W. Bush lost his reelection bid to Arkansas governor Bill Clinton, which certainly sculpted President's Clinton's approach to the issue. Under the Clinton Administration's guidance and leadership, Congress passed IIRIRA in 1996.[29] Essentially, IIRIRA gave federal authorities more power to deport illegal immigrants—for the inherent crime that is illegal immigration, but also for any separate misdemeanor or felony, namely racketeering, alien smuggling, and/or creating/using fraudulent immigration documents.[30] Additionally, IIRIRA requires illegal immigrants present in the United States for more than 180 days but less than one year to leave the country for three years unless pardoned.[31] Illegal immigrants who reside in the United States for a year or longer are required to leave it for ten years unless pardoned, but if they return to the U.S. without that pardon, they will be exiled again and must wait ten years before applying for a waiver.[32]

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[27] *Id.*
[28] *Id.*; David Lauter, *Clinton Calls on L.A. Crowd to Fight Crime : Violence: 'Take our communities back,' he says in Eastside appearance. He also meets with fire victims*, LOS ANGELES TIMES (Nov. 22, 1993, 12:00 PT), https://www.latimes.com/archives/la-xpm-1993-11-22-mn-59655-story.html.
[29] Lindskoog, *supra* note 15 at 5.
[30] *Immigration Reform and Immigration Responsibility Act*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act; 110 STAT. 3009–1.
[31] *Id.*
[32] *Id.*

The enactment of IIRIRA, its stern enforcement, and new foreign crises like the Haitian military coupe, which created yet another influx of would-be refugees, caused the First Sanctuary Movement of the 1980's to slowly decline. By the mid-1990's, it completely died out, due to steadfast enforcement of immigration law and the American zeitgeist sharply turning against the movement. That turning of the tide endured through the mid-to-late 2000's, stoking the flames of the New Sanctuary Movement which emerged during the administration of George W. Bush.[33] The 9/11 terrorist attacks gave shape to the later Bush's presidency early on; it motivated his signing of the Homeland Security Act of 2002, otherwise known as 6 U.S.C. § 111.

Passed in November 2002, the Act established the Department of Homeland Security (DHS) as a Cabinet-level department, which officially began operations in March 2003.[34] The Department of Homeland Security and the law establishing it was preluded by the emergency creation of the Executive Office of Homeland Security, over which Pennsylvania governor Tom Ridge served as the first director.[35] Section 111 empowered the DHS to create lower, internal federal agencies in order to delegate duties such as preventing terrorism, improving national security, securing and managing U.S. borders, and enforcing federal immigration law.[36] The DHS exercised this power by creating twenty-two lower federal agencies, the Bureau of Customs and Border Protection (CBP), Bureau of Citizenship and Immigration Services (CIS) and Bureau of Immigration and Customs Enforcement (ICE) chief among them.[37] The Homeland Security Act

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[33] *Id.*
[34] *Honoring the History of ICE 2003–2023*, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY (2023), https://www.ice.gov/features/history; *Creation of the Department of Homeland Security*, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, https://www.dhs.gov/creation-department-homeland-security#:~:text=Department%20Creation&text=With%20the%20passage%20of%20the,doors%20on%20March%201%2C%202003.
[35] *Id.*
[36] *Id.*
[37] UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 34 at 8.

also discontinued the Immigration and Naturalization Service (INS), passing on its functions to the lower federal agencies created by the Act, most notably the CPB, CIS, and ICE.[38] Previously, the federal oversight of immigration and enforcement of IIRIRA were executed by the INS, and were subsequently passed on to the CIS and ICE.[39] This proved to make an immediate impact, with ICE arresting over 1,900 illegal immigrants in its first year alone.[40]

Upon the founding of the DHS and its lower bureaus, pro-sanctuary activists soon took issue with their respective missions "framing" migration as a national security issue.[41] Beyond that inherent conflict, activists additionally took issue with these agencies implementing "increasingly severe migrant detention and deportation policies", which led to the New Sanctuary Movement reaching full swing by 2007.[42] During the second Bush Administration and in varying intervals since, the New Sanctuary Movement suffered "the criminalization of volunteers trying to save lives in the desert and the Sanctuary Movement itself."[43] The "criminalization of volunteers" presumably refers to enforcement of § 1324, which directly encompasses assisting illegal immigrants in their independent violation of § 1325.

The Obama Administration's immigration reforms were the most sweeping to date, at that time. In a broad sense, President Obama adopted a pattern of signing executive orders compelling his DHS to adopt more limited enforcement of immigration law, such as "Deferred Action for Childhood Arrivals" (DACA).[44] DACA refers to a June 15th, 2012 DHS directive that

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[38] *Id.*
[39] *Id.*; *What We Do*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/about-us/mission-and-core-values/what-we-do.
[40] UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 34 at 8.
[41] Lindskoog, *supra* note 15 at 5.
[42] *Id.*
[43] *Id.*
[44] *DACA*, NATIONAL IMMIGRATION LAW CENTER (2024), https://www.nilc.org/issues/daca/.

not only halted deportations of certain illegal immigrants who entered the U.S. as children, but authorized their remaining in the country upon their reception of "deferred action".[45]

Furthermore, President Obama's executive action compelled the DHS to directly aid the New Sanctuary Movement and the churches promulgating it. In late 2011, President Obama's Director of ICE John Morton set forth an internal memorandum detailing how ICE would conduct "enforcement actions at or focused on sensitive locations" going forward.[46] According to the memorandum, "sensitive locations" included churches, schools, colleges, and any site being used for religious purposes.[47] Relating to the day-to-day tasks of ICE, "enforcement actions" self-evidently pertain to the enforcement of laws that criminalize illegal immigration and those who aid in its commission. The general rule of Director Morton's memorandum was:

> Any planned enforcement action at or focused on a sensitive location covered by this policy must have prior approval of one of the following officials: the Assistant Director of Operations, Homeland Security Investigations (HSI); the Executive Associate Director (EAD) of HSI; the Assistant Director for Field Operations, Enforcement and Removal Operations (ERO); or the EAD of ERO. This includes planned enforcement actions at or focused on a sensitive location which is part of a joint case led by another law enforcement agency. ICE will give special consideration to requests for enforcement actions at or near sensitive locations if the only known address of a target is at or near a sensitive location (e.g., a target's only known address is next to a church or across the street from a school).[48]
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> ICE officers and agents may carry out an enforcement action covered by this policy without prior approval from headquarters when one of the following exigent circumstances exists:
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> - the enforcement action involves a national security or terrorism matter;
> - there is an imminent risk of death, violence, or physical harm to any person or property;
> - the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or

[45] *Id.*
[46] John Morton, Director of U.S. Immigration and Customs Enforcement, *Memorandum to Field Office Directors, Special Agents in Charge, Chief Counsel, on Enforcement Actions at or Focused on Sensitive Locations* (Oct. 24, 2011).
[47] *Id.*
[48] *Id.*

- there is an imminent risk of destruction of evidence material to an ongoing criminal case.[49]

The tumultuous election of President Donald J. Trump in 2016 brought much uncertainty about the future of immigration law enforcement. After all, it was his signature campaign issue—as demonstrated by his repeated promises to (1) build a wall along the U.S.-Mexican border to prevent illegal immigration from the South and (2) deport as many illegal immigrants already in the U.S. as possible.[50] To the Trump Administration's credit, while it failed to fully accomplish its goals, it did make substantial strides toward achieving them. About 275 miles of border wall was either fortified or newly constructed under the Trump Administration, and catching-and-releasing illegal immigrants into the country was mostly replaced by criminal prosecutions and/or immediate deportations.[51] Overall, approximately 900,000 illegal immigrants from Mexico alone (the current largest national contributor of illegal immigration in the U.S.) were deported from 2017–2021 under the Trump Administration.[52] The "Remain in Mexico" policy played an important role in President Trump's style of enforcement; it entailed the deportation of asylum seekers to Mexico to await determination of their claims.[53]

These statistics are extraordinary in how the Trump Administration achieved them through limited enforcement. As previously stated, the Trump Administration mostly discontinued catch-and-release, but not entirely, and at least not initially.[54] But the most shocking of President Trump's enforcement measures was probably his DHS keeping the memorandum of

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[49] *Id.*
[50] Mimi Dwyer, *Factbox: How Trump followed through on his immigration campaign promises*, REUTERS (Aug. 14, 2020, 3:48 PM ET), https://www.reuters.com/article/idUSKCN25A18U/.
[51] *Id.*
[52] Jeffrey S. Passel and Jens M. Krogstad, *What we know about unauthorized immigrants living in the U.S.*, PEW RESEARCH CENTER (Nov. 16, 2023), https://www.pewresearch.org/short-reads/2023/11/16/what-we-know-about-unauthorized-immigrants-living-in-the-us/.
[53] *The "Migrant Protection Protocols"*, AMERICAN IMMIGRATION COUNCIL (Feb. 1, 2024), https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols.
[54] Dwyer, *supra* note 50 at 11.

President Obama's ICE Director Norton in effect. Indeed, Director Norton's memorandum was not rescinded until months after President Trump left office.[55] Leaving churches and other supporters of the New Sanctuary Movement out of its focus, the Trump Administration harnessed the power of 8 U.S.C. § 1101 to issue civil fines and penalties to illegal immigrants who refused to leave the country.[56] These fines and penalties amounted to hundreds of thousands of dollars in some cases, and notably targeted illegal immigrants who sheltered in churches to avoid arrest and/or deportation, rather than the churches themselves.[57]

Section 2: How Churches have Fared since the First Sanctuary Movement

The primary takeaway from the first section is that since the First Sanctuary Movement, the objective ability of American churches to shelter illegal immigrants has swung back and forth much like a pendulum, in accord with the values of ever-changing presidential administrations and cultural zeitgeists. However, these factors are not the only influences on the effectiveness of immigration law throughout the country. Much of that influence depends on how different Federal Circuits interpret and apply not only federal immigration law, but federal protections afforded to churches to freely exercise their religions in peace.

Recall that when a church shelters an individual, this is an affirmative act that may be legal in some contexts, but illegal in others.[58] Obviously, when a church performs this affirmative act for an illegal immigrant, it may be a violation of federal immigration law, namely

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[55] Alejandro N. Mayorkas, U.S. Secretary of Homeland Security, *Memorandum to Tae D. Johnson, Acting Director of U.S. Immigration and Customs Enforcement, to Troy A. Miller, Acting Commissioner of U.S. Customs and Border Protection, to Ur M. Jaddou, Director of U.S. Citizenship and Immigration Services, to Robert Silvers, Under Secretary of Office of Strategy, Policy, and Plans, to Katherine Culliton-González, Officer for Civil Rights and Civil Liberties, to Lynn Parker Dupree, Chief Privacy Officer, on Guidelines for Enforcement Actions in or Near Protected Areas* (Oct. 27, 2021).
[56] Exec. Order No. 13768 § 6, 82 FR 8799 (2017).
[57] Franco Ordoñez, *Trump Administration Hits Some Immigrants In U.S. Illegally With Fines Up To $500,000*, NATIONAL PUBLIC RADIO (July 2, 2019, 2:36 PM ET); Joel Rose, *Four immigrants who sought sanctuary in churches no longer face deportation*, NATIONAL PUBLIC RADIO (June 21, 2023, 4:00 PM ET).
[58] Carmella, *supra* note 7 at 3.

§ 1324.[59] In order for the enforcement of federal law against churches to be lawful in and of itself, it must now survive the strict scrutiny of the Religious Freedom Restoration Act of 1993 (RFRA).

RFRA was Congress' way of rejecting the Supreme Court's limiting of free exercise rights in *Employment Div., Dept. of Human Resources of Oregon v. Smith*. In that case, Smith lost his job because he tested positive for Peyote, an illicit drug he ingested for sacramental reasons at a Native American church.[60] The Employment Division denied Smith's request for unemployment benefits because he was terminated for misconduct, and he sued, alleging that this violated his rights under the Free Exercise Clause.[61] The Free Exercise Clause is a First Amendment provision that limits government from passing laws that burden religious free exercise.[62] Nevertheless, that protection does not entitle one to engage in crimes motivated by religion.[63]

The Supreme Court affirmed the Employment Division's denial because the law criminalizing Peyote was generally applicable and its effect on certain religious exercises was incidental rather than discriminatory, so the law's constitutionality was merely contingent on it passing the Rational Basis Test, which it did.[64] Thus, Smith's Free Exercise rights were not violated, because his injury came from the law's general applicability, not religious prejudice.[65] However, the Supreme Court affirmed the power of Congress to pass legislation as a means of expanding religious protections beyond the scope of the Free Exercise Clause.[66]

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[59] Presbyterian Church v. U.S., 725 F. Supp. 1505, 1514 (D. Ariz. 1990) *citing* United States v. Aguilar, 883 F.2d 662, 695–96 (9th Cir. 1989).
[60] Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 74 (1990).
[61] *Id.* at 874.
[62] *Id.* at 876–79, *quoting* U.S. Const. amend. I, cl. 2.
[63] *Id.*
[64] *Id.* at 878–82.
[65] *Id.* at 890.
[66] Madison v. Riter, 355 F.3d 310, 315 (4th Cir. 2003) *quoting Smith*, 494 U.S. at 890.

Congress reacted to *Smith* by passing RFRA in 1993, thereby accepting the Supreme Court's invitation to widen religious protections' reach through "the political process".[67] To that end, RFRA expressly compels government to reject the Rational Basis Test adopted by the Supreme Court in *Smith*, and instead use the earlier "compelling interest test" applied in prior religious free exercise decisions like *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).[68] According to RFRA, if government action imposes a substantial burden on religious free exercise, the government must show that the burden is narrowly tailored to serve a compelling governmental interest, otherwise the act will be struck down.[69] RFRA has a major limitation though—it only controls federal government, and does not extend to states.[70]

Although the text of RFRA is quite broad and protective, its strict scrutiny does not categorically legalize churches' activity; it only requires government to justify and tailor its burden on religion, if there is one at all. In fact, much case law reinforces that principle while simultaneously adopting the far-reaching language of RFRA. In *Presbyterian Church v. U.S.,* the Ninth Circuit held that the First Amendment protects churches and other organizations in addition to individuals, and that they would have standing to sue if their religious exercise was unreasonably burdened by government intrusion.[71] While the Ninth Circuit's tone was noticeably respectful and encouraging of the Presbyterian Church's free exercise liberties, the Court remanded the case; declining to rule for the church on the merits of its First Amendment claim, but expressing an openness to considering it in the future, should the case make its way back.[72]

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[67] *Id.*
[68] 42 U.S.C. § 2000bb et seq.
[69] *Id.*; *Sherbert*, 374 U.S. at 406–10; *Yoder*, 406 U.S. at 224–29.
[70] City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997).
[71] Presbyterian Church v. U.S., 870 F.2d 518, 521–27 (9th Cir. 1989).
[72] *Id.* at 529.

On remand, in the aftermath of *Smith* but three years before Congress enacted RFRA, the District Court nevertheless applied strict scrutiny to the government's investigation into the Presbyterian Church's suspected harboring of illegal immigrants.[73] The District Court ruled that undercover federal agents casually observing the premises during public worship services (despite lacking probable cause or a warrant) was the least restrictive means of enforcing immigration law and investigating potential violations, both of which are indeed compelling state interests.[74] But for an undercover investigation to be the least restrictive means, it must be conducted in good faith and the investigators must "adhere scrupulously to the scope of the defendant's invitation to participation in the organization."[75]

Recently, the Ninth Circuit revisited religious exercise amid undercover investigations, and the District Court's decision in *Presbyterian Church* remains good law. In *Fazaga v. Federal Bureau of Investigation*, the Ninth Circuit discussed the past decision in *Presbyterian Church*, implying that going forward, undercover agents require a warrant or probable cause to investigate churches for suspected crimes, otherwise they may lose their qualified immunity for any Fourth Amendment privacy violations.[76] Notwithstanding, the District Court's *Presbyterian Church* decision has never been overturned, even by the most recent Ninth Circuit RFRA ruling.[77] So, it remains a relevant benchmark regarding the legality of churches' involvement in the Sanctuary Movement and federal government's interests in investigating it.

Once established that RFRA does not enable churches to violate federal immigration law, the next step in determining how they have fared since the First Sanctuary Movement is to show

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[73] *Presbyterian Church*, 725 F. Supp. at 1513–14 (D. Ariz. 1990).
[74] *Id.* at 1515.
[75] *Aguilar,* 883 F.2d at 705, *quoting* Pleasant v. Lovell*,* 876 F.2d 787, 803-804 (10th Cir. 1989).
[76] Fazaga v. Federal Bureau of Investigation, 965 F.3d 1015, 1037–38 (9th Cir. 2020).
[77] Apache Stronghold v. United States, 95 F.4th 608, 620 (9th Cir. 2024).

what criminal conduct constitutes the harboring of illegal immigrants under § 1324(a)(1)(A)(iii). This has proven to be a divisive issue with no clear answer. The Supreme Court has never answered the question, and the Federal Circuits are split as to whether the *mens rea* of "intent" is required to violate § 1324, and if so, what conduct constitutes it.[78] *Mens rea* is Latin for "guilty mind" and refers to the statutory state of mind the prosecutor must prove beyond a reasonable doubt that the defendant had when committing the crime to secure a conviction.[79] It is the second of two essential elements to proving a defendant guilty of any crime, the first being *actus reus*: the physical, wrongful act which must be coupled with *mens rea* to constitute a crime.[80]

Interestingly, § 1324 expressly supplies a few different *mens reas*—"knowing" or "in reckless disregard of".[81] But for harboring purposes, these *mens rea*s are seemingly confined to the wrongdoer's awareness that the person being harbored or abetted is an illegal immigrant, and do not apply to the wrongdoer's *actus reus* of harboring or abetting.[82] In any case though, the word "intent" is not used at all in § 1324, so its attachment to the physical harboring of illegal immigrants strictly stems from judicial interpretation alone, rather than the legislation's text.

Federal courts have tried to answer the question as to what, if any, *mens rea* applies to the *actus reus* of § 1324, and have drawn differing conclusions. Among the earliest and most notable of these cases was *United States v. Merkt*, arising during the First Sanctuary Movement and centered on one of its activists.[83] Merkt volunteered at an illicit "sanctuary" house for illegal immigrants, whose proprietor had connections to a Mexican church that would arrange to

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[78] *Acosta De Evans*, 531 F.2d at 430; United States v. Ozcelik, 527 F.3d 88, 100 (3d. Cir. 2008); United States v. McClellan, 794 F.3d 743, 751 (7th Cir. 2015).
[79] BLACK'S LAW DICTIONARY 1181 (11th ed. 2019).
[80] *Id.* at 45, 1181.
[81] 8 U.S.C. § 1324(a)(1)(A)(i–iv).
[82] *Id.* at § 1324(a)(1)(A)(iii).
[83] United States v. Merkt, 794 F.2d 950, 953–54 (5th Cir. 1986).

smuggle the aliens across the Southern border.[84] Merkt's job was to supply the illegal immigrants with bus tickets, thereby allowing them to escape deeper into the country's interior; consequently, Merkt was convicted of breaching § 1324, but on appeal, she argued that her conviction breached her rights under the Free Exercise Clause.[85]

The Fifth Circuit rejected that argument, reasoning that enforcing immigration law cannot be effectively done while allowing exceptions for those who break it in the course of religious exercise.[86] Furthermore, the Court also rejected the idea that § 1324 unduly burdened religious exercise, because there are several other ways to exercise religious belief in aiding refugees without harboring illegal immigrants.[87] However, the Fifth Circuit's language about the elements of § 1324, that "the transportation of the aliens was done willfully and in furtherance of the aliens' illegal presence in the United States" falls short of expressly deciding whether intent to hide the illegal immigrant from detection is required.[88]

As previously referenced, the Ninth Circuit's longtime ruling on this issue is that no intent is required for a breach of § 1324—the wrongdoer need not affirmatively hide or "harbor" the illegal immigrant from authorities to break the law.[89] Rather, the Ninth Circuit's textualist interpretation held that knowingly taking steps to 'afford shelter to' an illegal immigrant, even if done without intending to conceal him/her from immigration authorities, satisfies the *actus reus* of § 1324.[90] Through that lens, if any *mens rea* is required, it is limited to the wrongdoer knowing the person being harbored is an illegal immigrant.[91] The Ninth Circuit's view is

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[84] *Id.*
[85] *Id.*
[86] *Id.* at 954–55.
[87] *Id.* at 956.
[88] *Id.* at 965.
[89] Op. O.L.C. at 169–70, *quoting Acosta De Evans*, 531 F.2d at 430.
[90] *Id.*
[91] *Id.*

influenced by Arizona law, the language of which mirrors 8 U.S.C. § 1324 and "does not clearly include an intent requirement with respect to the 'furtherance of illegal presence' or shielding 'from detection' elements of the crime. The statute could be read to prohibit providing shelter that shields an alien from detection by immigration officials or transporting an alien in a manner that furthers his illegal presence regardless of the individual's intent. This is a reasonable reading of the statute since the statute includes a knowledge requirement with respect to the alien's immigration status."[92] Under this philosophy, a wrongdoer merely hosting or housing someone he/she knows to be an illegal immigrant breaks § 1324.[93]

Recently, the Sixth Circuit has addressed this issue and seems to side with the Ninth Circuit on it. In *United States v. Zheng*, the Court agreed with other Federal Circuits that "'harboring' encompasses conduct that tends to substantially facilitate noncitizens remaining in the country illegally and prevent authorities from detecting the noncitizens' presence."[94] But the Sixth Circuit explicitly rejected the notion that intent to affirmatively hide the illegal immigrant from detection was needed for a § 1324 violation. Going further, it held that even if "harboring" was read as requiring intent to protect illegal immigrants from detection, that would hardly save many defendants from conviction.[95] In *Zheng*, the defendants housed several illegal immigrants in a basement, employed them at their restaurant, and transported them from the basement to the restaurant, but warned them to remain quiet and not go outside other than going to-and-from work, because that would risk detection and deportation.[96] Their conviction was affirmed, and

[92] Valle Del Sol v. Whiting, 732 F.3d 1006, 1017 (9th Cir. 2013); ARIZ. REV. STAT. ANN. § 13-2929; *Acosta De Evans*, 531 F.2d at 430.
[93] *Valle Del Sol*, 732 F.3d at 1017.
[94] United States v. Zheng, 87 F.4th 336, 343 (6th Cir. 2023).
[95] *Id.* at 345–46.
[96] *Id.*

endpoint of that analysis is that there is little-to-no difference between knowingly harboring illegal immigrants and intentionally helping them evade detection.[97]

Apparently, every other Federal Circuit to have encountered this issue now reads § 1324(a)(1)(A)(iii) to necessarily imply a requisite of intent to "harbor" the illegal immigrant from the authorities' detection.[98] In at least one instance, a Federal Circuit went as far as reversing itself to arrive at this end. After all, the Second Circuit was previously noted for interpreting § 1324 in a similar fashion as the Ninth, quoted as explaining "[T]he term was intended to encompass conduct tending substantially to facilitate an alien's 'remaining in the United States illegally,' provided, of course, the person charged has knowledge of the alien's unlawful status."[99] This language would seem to limit the *mens rea* to the wrongdoer's knowledge of the refugee's illegal immigrant status.

But in more recent decisions, the Second Circuit discarded this precedent, in favor of requiring intent to conceal the illegal immigrant from authorities' detection for a conviction, reasoning that the word "harboring" should have a connotation of purposeful concealment.[100] The Second Circuit's modern view, which is now embraced by more Federal Circuits than not, is that "To 'harbor' under § 1324, a defendant must engage in conduct that is intended both to substantially help an unlawfully present alien remain in the United States—such as by providing him with shelter, money, or other material comfort—and also is intended to help prevent the detection of the alien by the authorities. The mere act of providing shelter to an alien, when done

[97] *Id.*
[98] United States v. George, 776 F.3d 113, 117–18 (2d Cir. 2015); *Ozcelik*, 527 F.3d at 100; Delrio-Mocci v. Connolly Properties, Inc., 672 F.3d 241, 246 (3d. Cir. 2012); United States v. Dominguez, 661 F.3d 1051, 1063–65 (11th Cir. 2011); *McClellan*, 794 F.3d 743, 751 (7th Cir. 2015).
[99] 7 Op. O.L.C. at 170, *quoting Lopez*, 521 F.2d at 441.
[100] *George*, 776 F.3d at 117–18; United States v. Vargas-Cordon, 733 F.3d 366, 382 (2d Cir. 2013).

without intention to help prevent the alien's detection by immigration authorities or police, is thus not an offense under § 1324(a)(1)(A)(iii)."[101]

The Eleventh Circuit concurs with the rationale of the Second, but its reasoning is more ambiguous.[102] In *Dominguez*, the Eleventh Circuit reversed the defendant's conviction for violating § 1324.[103] The Court expressly defined § 1324(a)(2) as having two elements: "(1) that the defendant knowingly brought an alien to the United States; and (2) that the defendant knew or was in reckless disregard of the fact that the alien had not received prior official authorization to come to or enter the United States."[104] It then agreed with the trial court that the defendant's smuggling of individuals he knew to be illegal immigrants into the U.S. satisfied these elements.[105] Nevertheless, the conviction was reversed because, rather than knowingly conceal, harbor, or shield the illegal immigrants from detection, the defendant showcased them and tried to help them find employment as professional baseball players.[106] Despite outlining the elements of a § 1324 violation and failing to include "intent to harbor from detection" among them, the Eleventh Circuit relied on that absent requisite to reverse.[107]

Unfortunately, even when most Federal Circuits agree on the element of "intent", they disagree over what conduct constitutes it. For instance, in *Ozcelik*, the defendant encouraged the illegal immigrant he was housing to "keep a low profile and not draw attention…" to avoid detection, and commended him for living at a different address than that on file with the United States Immigration and Naturalization Service (INS), which resulted in his conviction under §

[101] *Vargas-Cordon*, 733 F.3d at 382.
[102] *Dominguez*, 661 F.3d at 1058–59, 1063–64.
[103] *Id.* at 1063.
[104] *Id.* at 1063–64.
[105] *Id.*
[106] *Id.* at 1058–59, 1063.
[107] *Id.*

1324.[108] On appeal, the Third Circuit reversed, finding that the defendant's statements and conduct did not "substantially facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting the alien's unlawful presence."[109] The Eleventh Circuit's holding in *Dominguez* is somewhat similar—intentionally smuggling illegal immigrants into the country and then housing them may not constitute intent to shield them from the authorities' detection.[110]

Under a different Federal Circuit's jurisdiction however, similar or even more conservative case facts could easily result in the finding of a defendant's intent to harbor an illegal immigrant, in violation of § 1324. In *McClellan*, despite an apparent lack of such self-incriminating comments like those in *Ozcelik*, the Seventh Circuit affirmed a defendant's conviction under § 1324, finding that merely providing housing, utilities, and food to a known illegal immigrant proves intent to help the latter avoid detection and evade capture.[111] In this way, the Seventh Circuit's rule is quite like the Sixth and Ninth Circuits', in finding that sheltering a known illegal immigrant inherently violates § 1324.[112] However, the Seventh Circuit holds this to be true because it views such conduct as inherently proving the wrongdoer's intent to harbor an illegal immigrant, while the Sixth and Ninth Circuit believe such intent is simply unnecessary.[113]

This outlining of the Federal Circuit split regarding the elements needed for a conviction under § 1324 may provide a key indication as to how sanctuary churches would fare across different jurisdictions. No Federal Circuit has expressly held smuggling an alien into the country

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[108] *Ozcelik*, 527 F.3d at 97.
[109] *Id.* at 99, *quoting* United States v. Rubio-Gonzalez, 674 F.2d 1067, 1073 (5th Cir. 1982).
[110] *Dominguez*, 661 F.3d at 1058–59, 1063–64.
[111] *McClellan*, 794 F.3d at 751.
[112] *Id.*; *Zheng*, 87 F.4th at 343; *Valle Del Sol*, 732 F.3d at 1017.
[113] *Id.*

to be required for conviction, as that would plainly contradict § 1324(a)(1)(A)(iii) in that harboring alone is a violation. In the Sixth, Seventh, and Ninth Circuits, a church that knowingly shelters an illegal immigrant likely breaches § 1324, because their precedent holds such conduct as inherently intending to hide the alien from protection, or alternatively that intent is not needed. The Second, Third, and Eleventh Circuits would probably be less likely to convict sanctuary churches, because those courts distinguish the providing of shelter from intent to harbor the alien from detection. In fact, even if church personnel were found to have encouraged the alien to remain hidden within the church to avoid detection, that may not constitute intent to harbor according to the Third Circuit, pursuant to *Ozcelik*.

With all that being said, it should now be clear that there are several factors to be weighed in determining how churches have fared over time since the First Sanctuary Movement, including (1) presidential policy, (2) supplemental legislation regarding immigration and religious exercise, (3) the shifting, sometimes clashing cultures that inspired the relevant statutes, and (4) which Federal Circuit has jurisdiction over the case at hand, and how it interprets the *mens rea* of § 1324. In the 1980's, the First Sanctuary Movement gained prominence not merely because of the migrants' plight, but from the opposition it faced from government actors. The facts show that the First Sanctuary Movement was part of counterculture, fueled at least partially by its rejection by presidential administrations and courts.[114] During this time, before the passage of RFRA, churches partaking in the Sanctuary Movement had few protections against § 1324 criminality, if any at all.

At the dawn of the 1990's, change arrived in the form of President H.W. Bush ending automatic deportations of South American refugees, the resurgence of strict scrutiny under

[114] Lindskoog, *supra* note 15 at 5; 7 Op. O.L.C. at 168; Merkt, 794 F.2d at 954–56, 965; *Acosta De Evans*, 531 F.2d at 430; *Lopez*, 521 F.2d at 441.

RFRA.[115] But this change, which favored sanctuary churches at face value, was limited and temporary. Strict scrutiny does not prevent federal authorities from investigating churches for violating § 1324, but merely molds their ability to do so during the church's religious services.[116] Moreso, presidential administrations continuously stood against illegal immigration during this time, occasionally collaborating with Congress to enact new legislation to combat it. President Clinton fit this mold with his war on crime and signing IIRIRA in 1996.[117] Notably, IIRIRA came three years after RFRA, serving as an executive and legislative limitation to churches' free exercise—codifying legal protections for churches that extend beyond the Constitution itself, then subsequently checking the practice of illegal immigration and the harboring of aliens.[118]

President George W. Bush followed suit by working with Congress to pass the Homeland Security Act of 2002.[119] This directly led to the creation of ICE, streamlining the enforcement of immigration law and advancing the widespread recognition of illegal immigration as a national security issue.[120] These acts went far enough to provoke disenfranchised activists into starting a New Sanctuary Movement, as a second-wave counterculture response to further criminalization of illegal immigration.[121] Even so, during the 2000's it became apparent that enhancing the enforcement of immigration law can only accomplish so much as long as Federal Circuits are divided on which *mens rea* and basic behavior breaks that law.[122]

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[115] Lindskoog, *supra* note 15 at 5; *Presbyterian Church*, 725 F. Supp. at 1514 (D. Ariz. 1990).
[116] *Id.*
[117] Lindskoog, *supra* note 15 at 5; Lauter, *supra* note 28 at 7; CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, *supra* note 30 at 7.
[118] *Id.*; *Madison*, 355 F.3d at 315 *quoting Smith*, 494 U.S. at 890.
[119] UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 34 at 8; UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *supra* note 34 at 8; 6 U.S.C. § 111.
[120] *Id.*
[121] Lindskoog, *supra* note 15 at 5.
[122] *Ozcelik*, 527 F.3d at 97.

Perhaps embracing the New Sanctuary Movement, the Obama Administration went in a different, more pro-sanctuary direction than its predecessors. Both DACA and Director Morton's memorandum served as remarkably pro-sanctuary exercises of executive action during this time.[123] Even as the Federal Circuits remained divided on what conduct from churches and other sanctuaries violates § 1324, the Obama Administration granted millions of illegal immigrants a "pathway to citizenship" and limited enforcement actions in sanctuaries, but allowed exceptions for such enforcement to commence as necessary.[124]

As aggressive as the Trump Administration was toward illegal immigrants, it was shockingly moderate toward pro-sanctuary churches that sought to harbor them. Not only were Director Morton's sanctuary policies kept in-place, but President Trump used alternative means of combating illegal immigration.[125] This struck an unexpected balance—churches, even pro-sanctuary ones, were mostly left alone, but illegal immigration, and by extension the New Sanctuary Movement as a whole, were attacked in other ways. The fining and deporting of illegal immigrants increased dramatically, as well as construction efforts to prevent the illegal immigration in the first place.[126] Unfortunately, it was only shortly after this balance was reached that it was completely upended.

Section 3: Sanctuary under the Biden Administration

When President Biden took office in early 2021, he very quickly went unprecedentedly farther in warping the landscape of immigration law enforcement. Primarily, this entailed replacing President Trump's executive policies with his own, which were more in-line with the

[123] NATIONAL IMMIGRATION LAW CENTER, *supra* note 44 at 9; Morton, *supra* note 46 at 10.
[124] *Id.*; *Valle Del Sol*, 732 F.3d at 1017; *George*, 776 F.3d at 117–18; *Vargas-Cordon*, 733 F.3d at 382; *McClellan*, 794 F.3d at 751.
[125] Exec. Order No. 13768 § 6, 82 FR 8799 (2017).
[126] *Id.*; Dwyer, *supra* note 50 at 11; Ordoñez, *supra* note 57 at 12; Rose, *supra* note 57 at 12; Passel and Krogstad, *supra* note 52 at 11.

Sanctuary Movement than any president's had ever been. He began with suspending then reviving the "Remain in Mexico Policy" in a much more softened form, and rescinding Exec. Order No. 13768 with its fines and other punishments for illegal immigration, already setting the stage for a far less punitive approach to the issue.[127] Then, the Biden Administration took a large leap forward. It compelled the DHS to rescind Director Morton's memorandum with its policies that were in-place since the Obama Administration, and replace it with a memorandum much more self-restrictive.[128] In it, DHS Secretary Mayorkas commanded ICE and several other DHS agencies to cease all "enforcement activities" in or near "protected areas".[129] The proposed justification for doing so was articulated by Mayorkas himself in that same memorandum:

> When we conduct an enforcement action — whether it is an arrest, search, service of a subpoena, or other action — we need to consider many factors, including the location in which we are conducting the action and its impact on other people and broader societal interests. For example, if we take an action at an emergency shelter, it is possible that noncitizens, including children, will be hesitant to visit the shelter and receive needed food and water, urgent medical attention, or other humanitarian care. To the fullest extent possible, we should not take an enforcement action in or near a location that would restrain people's access to essential services or engagement in essential activities. Such a location is referred to as a 'protected area.' This principle is fundamental. We can accomplish our enforcement mission without denying or limiting individuals' access to needed medical care, children access to their schools, the displaced access to food and shelter, people of faith access to their places of worship, and more. Adherence to this principle is one bedrock of our stature as public servants.[130]

With this policy, all the case law regarding the proper *mens rea* and enforcement of § 1324 is rendered irrelevant in regard to churches and other protected areas.[131] The strides of Congress and courts alike in balancing churches' Free Exercise protections with the rule of law, pursuant to RFRA, IIRIRA, and 8 U.S.C. are now indefinitely shelved, because federal law only

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[127] AMERICAN IMMIGRATION COUNCIL, *supra* note 53 at 11; Exec. Order No. 13993, 86 FR 7051 (2021), *rescinding* Exec. Order No. 13768.
[128] Mayorkas, *supra* note 55 at 12.
[129] *Id.*
[130] *Id.*
[131] *Id.*

has effect when enforced by the Executive Branch.[132] Overall, the Biden Administration has discontinued the vast majority of Trump-era illegal immigration policies, which has caused illegal immigration across the Southern border to increase during his term, skyrocketing in recent months.[133] Many believe that the refusal of Mayorkas and the greater Biden Administration to enforce federal immigration laws is itself illegal. This sentiment is reflected by polls showing citizens' disdain for Biden's failure to adequately address illegal immigration, and the recent impeachment of Mayorkas by the House of Representatives for "high crimes and misdemeanors, including for his handling of issues involving fentanyl and border security".[134]

Secretary Mayorkas' impeachment is especially significant. The two impeachment counts against him specifically allege he "refused to comply with Federal immigration laws" and violated "public trust."[135] Additionally, Mayorkas is one of only two members of a president's cabinet to ever be impeached; and the first since 1876, when U.S. Secretary of War William Belknap was impeached for "corruption blatant even by the standards of the scandal-tarnished Grant administration."[136] United States Representative Mike Gallagher, one of only three Republicans to vote against Mayorkas' impeachment, expressed his opinion that Mayorkas' implementation of President Biden's policy to not enforce immigration laws does not rise to the level of "high crimes and misdemeanors" like impeachable offenses should.[137] Mr. Gallagher

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[132] U.S. Const. art. II, § III.
[133] Rose *supra* note 57 at 12; Camilo Montoya-Galves, *Migrant crossings at U.S. southern border reach record monthly high in December*, CBS NEWS (Dec. 28, 2023, 6:39 PM ET), https://www.cbsnews.com/news/us-mexico-border-migrants-processed-december-record/.
[134] *Id.*; H.Res.863 — 118th Congress (2023-2024).
[135] Elizabeth Elkind and Bradford Betz, *House votes to impeach DHS Secretary Mayorkas over border crisis*, FOX NEWS (Feb. 13, 2024, 7:23 PM ET) https://www.foxnews.com/politics/mayorkas-impeachment-vote-house-representatives, *quoting* H.Res.863.
[136] *Id.*; *Impeachment Trial of Secretary of War William Belknap, 1876*, UNITED STATES SENATE, https://www.senate.gov/about/powers-procedures/impeachment/simpeachment-belknap.htm.
[137] Mike Gallagher, *Why I Voted Against Impeaching Alejandro Mayorkas*, WALL STREET JOURNAL, EASTERN EDITION, (Feb. 8, 2024), *quoting* U.S. Const. art. II, sec. IV.

rested his position on the executive branch's broad discretion in deciding its own policies of enforcing immigration law, which according to Gallagher, shields the executive branch's policy decisions from criminality.[138] As an alternative, Mr. Gallagher suggested that Congress accept the Supreme Court's invitation in *United States v. Texas* to pass legislation which authorizes states to sue the executive branch for failure to enforce laws and prosecute offenders.[139]

However, for one to be guilty of violating 8 U.S.C. § 1324(a)(1)(A)(iv)–(v), the wrongdoer must encourage illegal immigration; or conspire, aid, or abet in any of the other acts criminalized by §1324, like smuggling or harboring aliens.[140] When Mayorkas directed ICE and other agencies under his command to completely cease enforcement of illegal immigration laws in churches and other "protected areas", it is self-evident that he did so intending to help illegal immigrants avoid capture from those agencies, and aid those "protecting areas" in sheltering aliens and providing them other services.[141] If that was his intention, then it follows that Secretary Mayorkas violated § 1324 under color of law, using the power of his position to cripple authorities' investigative abilities and assist illegal immigrants evade their detection by aiding their harboring by "protected areas". Under this theory, the impeachment of Mayorkas could be related to his own personal breach of § 1324, and not merely his refusal to enforce § 1324 and other federal immigration laws, which could easily constitute a "high crime" because violating § 1324 is a felony. After all, the discretion allotted to executive officers to execute their functions does not entitle those public servants to abuse their power in ways that violate federal law.[142]

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[138] *Id.*
[139] *Id.*; United States v. Texas, 599 U.S. 670, 682 (2023).
[140] 8 U.S.C. § 1324(a)(1)(A)(iv)–(v); Munson, *supra* note 1 at 2; *George*, 776 F.3d at 117–18; *Ozcelik*, 527 F.3d at 100; *Delrio-Mocci*, 672 F.3d at 246; *Dominguez*, 661 F.3d at 1063; *McClellan*, 794 F.3d at 751.
[141] Mayorkas, *supra* note 55 at 12.
[142] Fall v. United States, 60 App. D.C. 124, 149, *writ of certiorari denied* 283 U.S. 867 (1931) (discussing and upholding the conviction of former Secretary of the Interior Albert B. Fall for accepting a bribe while in office).

For clergy who embrace the "Sanctuary Movement", the Biden Administration's discontinuation of enforcing illegal immigration law has enabled and emboldened them to exercise their religious beliefs in blatantly illegal ways. Granted, enforcement actions against churches did not surge during the Obama and Trump Administrations, despite ample evidence of churches continuing their illicit sanctuary culture—but illegal immigration was effectively combated in other ways, like President Trump's 'Remain in Mexico" policy and other actions.[143] However, the politicization of illegal immigration cuts both ways, and it is unclear how long this lawlessness will last in the face of voter disapproval and a pending presidential election.

For instance, the Biden Administration's purposeful inaction on this matter has already sparked an ongoing conflict with the border-state of Texas, which is now trying to address the illegal immigration issue on its own, and enthralled in a legal battle with the Biden Administration over its asserted right to do so.[144] Although the unpublished Supreme Court opinion ended an injunction against the federal government by a 5-4 vote, the issue has yet to be decided on the merits.[145] At the heart of this conflict is Texas governor Abbott's contention that the Biden Administration broke the federal government's social compact with the states; pursuant to Article IV, § 4, which obliges federal government to "protect each [State] against invasion," and Article I, § 10, Clause 3, which acknowledges "the States' sovereign interest in protecting their borders."[146] The federal government breaching the social compact this way, Governor Abbott argues, invokes Article I, § 10, Clause 3, which reserves states' right to self-

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[143] Ordoñez, *supra* note 57 at 12; Rose, *supra* note 57 at 12; AMERICAN IMMIGRATION COUNCIL, *supra* note 53 at 11; Suzanne Gamboa, *Catholic immigrant shelter battles Texas AG, who wants to shut it down*, NBC NEWS (Feb. 21, 2024, 6:14 PM ET), https://www.nbcnews.com/news/latino/catholic-migrant-shelter-battles-texas-paxton-rcna139809.

[144] William Melhado, *U.S. Supreme Court says Texas can't block federal agents from the border*, THE TEXAS TRIBUNE (Jan. 23, 2024), https://www.texastribune.org/2024/01/22/texas-border-supreme-court-immigration/.

[145] *Id.*

[146] Memorandum from Greg Abbott, Governor of Texas (Jan. 24, 2024), *quoting* Arizona v. United States, 567 U.S. 387, 419 (2012) (Scalia, J., dissenting).

defense against invasion.[147] Part of Texas' efforts in that is taking whatever action it can against Sanctuary Movement activists harboring illegal immigrants within the confines of the state.[148]

Furthermore, the Biden Administration and Catholic associations alike are currently facing lawsuits and congressional inquiries.[149] These probes accuse the Biden Administration and Catholic groups of coordinating with each other to facilitate illegal immigration into the United States, and demand that the entities provide information provide information surrounding these alleged acts.[150] If these allegations are true, it would prove that the spirit of the Sanctuary Movement is not only alive and well, but it has now formed a union with the Biden Administration to circumvent federal immigration law. However, only historical hindsight will tell whether this constitutes the Second Sanctuary Movement reaching its peak, or if this is the rise of an entirely new, farther-reaching Sanctuary Movement.

Of particular interest is that now more than ever, churches are on notice that knowingly harboring illegal immigrants is probably a crime.[151] Yet some of their legal counsel readily admits "Church leaders may feel that they have a religious obligation to help some types of fugitive, such as a family with young children that is facing deportation. The decision to offer such support should be made by the church's board, and only after examining all the facts and measuring the potential risks."[152] Churches' collective knowledge regarding the illicitness of these acts, contrasted with their continuously common commissions of them anyway, proves that the Thomistic philosophy is still embraced by churches amidst the surge of illegal

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[147] *Id.*
[148] Gamboa, *supra* note 143 at 28.
[149] Catholic News Service, *Groups file suit to get information on Catholic agencies helping migrants*, CRUX (Feb. 11, 2022), https://cruxnow.com/church-in-the-usa/2022/02/groups-file-suit-to-get-information-on-catholic-agencies-helping-migrants.
[150] *Id.*
[151] *Dispelling Myths About Churches as Sanctuaries from the Law*, CHURCH LAW CENTER (Aug. 9, 2018), https://www.churchlawcenter.com/church-law/churches-as-sanctuaries/.
[152] *Id.*

immigration.[153] Many churches, and possibly the Biden Administration as well, enduringly view federal immigration laws as unjust, and so openly consider and sometimes exploit ways to disobey them.

In conclusion, the Sanctuary Movements initially resulted in a backlash of illegal immigrant harboring laws being continuously, strictly enforced against churches, even if judicial interpretations of those laws were inconsistent. During the Obama and Trump Administrations, an uneasy balance was reached between respecting church sacredness and enforcing the rule of law. But now, churches and illegal immigrants alike have been aided and abetted in violating these laws by the Biden Administration's notorious, systemic refusal to enforce them, even in the face of potential criminal liability. Yet ironically, even under the Biden Administration's absolute protection, the sanctuary provided by churches remains finite— it extends to illegal immigrants and those who enable their crimes by harboring them from the law. But this newfound notion of sanctuary alienates those who believe in both God and the rule of law.

[153] *Id.*; Ordoñez, *supra* note 57 at 12; Rose, *supra* note 57 at 12; Gamboa, *supra* note 143 at 28; Yonek, *supra* note 4 at 2.