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Is It a Felony to Provide Water to Migrants?
Religious Liberty Defenses to Federal Prosecutions of Immigrants' Rights Activists

Tuesday, April 7, 2020 | 12:00pm – 2:00pm EST (9:00am – 11:00am PST)
via GoToWebinar: www.tinyurl.com/IsItAFelonyCLE
New York State CLE Credits Available:
Areas of Professional Practice (1.5 credit hours) & Ethics and Professionalism (.5 credit hours)

Required Readings

1. U.S. v. Merkt, 794 F. 2d 950 (5th Cir. 1986)
2. U.S. v. Aguilar, 883 F.2d 662 (9th Cir. 1989)
3. *Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right* (Law, Rights, and Religion Project, Columbia University, 2019)
4. Brief of and by Professors of Religious Liberty as Amicus Curiae in Support of Defendant's Motion to Dismiss, U.S. v. Warren, (D.Ariz., June 21, 2018)
5. Order, U.S. v. Warren, (D.Ariz. Nov. 21, 2019)
6. Order, U.S. v. Hoffman, (D. Ariz. Feb. 23, 2020)
7. Purvi Shah, REBUILDING THE ETHICAL COMPASS OF LAW, 47 Hofstra L.Rev. 11 (2018)

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Stacey Lynn MERKT and John B. Elder, Defendants-Appellants.

No. 85-2264.

United States Court of Appeals, Fifth Circuit.

July 17, 1986.

One defendant was convicted in the United States District Court for the Southern District of Texas, Filemon B. Vela, J., of conspiracy in bringing in and landing illegal aliens and transporting illegal aliens, and a second defendant was found guilty of conspiracy. Defendants appealed. The Court of Appeals, Edith Hollan Jones, Circuit Judge, held that: (1) convictions were not barred by First Amendment; (2) male photographic array was not unnecessarily suggestive; (3) female photographic array was impermissibly suggestive; however, in-court identification was proper; (4) recusal of trial court judge was not required; (5) testimony of alien witnesses was admissible; (6) evidence of prior conviction was admissible; and (7) evidence was sufficient to sustain convictions.

Affirmed.

1. Constitutional Law ⇐84.5(1)

Convictions of defendants for transporting illegal El Salvadoran aliens in violation of border control laws was not barred by First Amendment, although defendants contended that they were religiously motivated in conducting the "sanctuary" activities for El Salvadorans. Immigration and Nationality Act, § 274, as amended, 8 U.S.C.A. § 1324; U.S.C.A. Const.Amend. 1.

2. Criminal Law ⇐339.7(3)

Evidence of pretrial photographic identification will be inadmissible only if photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

3. Criminal Law ⇐339.7(4)

Photographic array, which consisted of newspaper pictures depicting caucasian males of varying facial and feature characteristics, but of same general age and description as defendant, was not impermissibly suggestive.

4. Criminal Law ⇐339.6

Factors to consider in determining reliability of pretrial identification are opportunity of witnesses to view suspect, witnesses' degree of attention, accuracy of preidentification description, witnesses' level of certainty, time that has elapsed between crime and identification, and corrupting influence of suggestive identification itself.

5. Criminal Law ⇐339.10(7)

Suggestive photographic array did not create substantial risk of inaccurate identification and since witness had opportunity to view defendant during the day at close range for substantial periods of time, witness' attention was often singularly focused on defendant, witness provided accurate description of defendant's car, witness positively and unequivocally identified defendant at trial, and there was no substantial passage of time which could have affected reliability of identification, pretrial identification was admissible.

court should include the stipulated amount of attorney's fees for the trial and appeal in the new judgment.

6. Criminal Law ⇐339.9(2)

Under totality of circumstances, in-court identifications of defendants by witness, who testified as to length of time he spent with each defendant and conditions under which he viewed them, were reliable, and credibility of identifications was properly left to jury.

7. Judges ⇐51(4)

A motion for recusal is committed to sound discretion of trial judge.

8. Criminal Law ⇐1148

Denial of motion to recuse will not be reversed on appeal unless trial judge abused discretion.

9. Judges ⇐49(1)

Under statutes governing recusal of trial judge because of interest in case or bias or prejudice, alleged bias or prejudice must be personal, and it must stem from extrajudicial source which would result in opinion on merits on some basis other than what judge learned from his participation in case. 28 U.S.C.A. §§ 144, 455.

10. Judges ⇐51(3)

Trial judge's disqualification was not required in criminal case under statute allowing recusal due to interest of judge, although trial judge voluntarily withdrew from another case involving one defendant, where trial judge gave no reason for withdrawal from other case, trial judge considered, and specifically rejected, recusal based on prior recusal, and defendant failed to show that trial judge's impartiality might have been questioned or that he had personal bias or prejudice against either defendant or in favor of Government. 28 U.S.C.A. § 455.

11. Judges ⇐51(4)

If affidavit for recusal of judge due to bias or prejudice is timely and technically correct, factual allegations must be taken as true. 28 U.S.C.A. § 144.

12. Judges ⇐51(4)

Trial judge considering motion for recusal due to bias or prejudice may pass only upon legal sufficiency of affidavit and may not consider truth of matters asserted therein. 28 U.S.C.A. § 144.

13. Judges ⇐51(3)

Affidavit filed in support of motion to recuse trial judge on basis of bias or prejudice is legally sufficient if facts are material and stated with particularity, facts are such, that, if true, they would convince reasonable person that bias exists, and facts show that bias is personal, rather than judicial, in nature. 28 U.S.C.A. § 144.

14. Judges ⇐49(1)

Prior judicial rulings of trial judge with respect to defendant offered no basis for recusal in instant case; rulings did not show any personal bias against defendant. 28 U.S.C.A. § 144.

15. Judges ⇐51(3)

Even if filing was appropriate, affidavit of defendant's wife, based on information told to her by unnamed individuals who did not feel capable of giving affidavits in support of motion for recusal of trial judge, was legally insufficient to require recusal. 28 U.S.C.A. § 144.

16. Criminal Law ⇐700(1)

While border patrol agents informed alien witnesses of names of defendants, that was done only after witnesses had described defendants, one witness had picked defendant from photographic array, and witnesses had given agents their phonetic understanding of names of those who had helped them; therefore, Government did not impermissibly suggest specific testimony and dismissal of indictment was not required.

17. Criminal Law ⇐369.2(1)

Before extrinsic offense evidence is admissible, it must be determined that the evidence is relevant to an issue other than defendant's character, and evidence has to possess probative value that is not substantially outweighed by its undue prejudice. Fed.Rules Evid.Rules 404, 404(b), 28 U.S.C.A.

18. Criminal Law ⇐1153(1)

A trial court's decision to admit extrinsic offense evidence will be rejected only for an abuse of discretion. Fed.Rules Evid.Rules 404, 404(b), 28 U.S.C.A.

19. Criminal Law ⇐371(1), 673(5)

Admission of evidence of prior conviction was not improper on basis that Government was trying to establish defendant's identity; trial court, in admonishing jury as to limited use of extrinsic offense evidence, cautioned that defendant's previous conviction could be considered only in determining defendant's state of mind or intent and for no other purpose. Fed.Rules Evid.Rules 404, 404(b), 28 U.S.C.A.

20. Criminal Law ⇐370, 371(1)

Defendant did nothing from which it could be concluded that she affirmatively took the issue of intent out of her case; therefore, admission of extrinsic offense evidence was admissible as bearing upon defendant's knowledge or intent. Fed. Rules Evid.Rules 404, 404(b), 28 U.S.C.A.

21. Aliens ⇐56

El Salvadorans were not aliens entitled to "reside" in the United States pursuant to Refugee Act of 1980; therefore, defendants could not avoid conviction for helping aliens cross border on basis that El Salvadorans were refugees entitled to sanctuary in United States, and thus, not illegally within the border. Immigration and Nationality Act, §§ 274, 274(a), as amended, 8 U.S.C.A. §§ 1324, 1324(a); Refugee Act of 1980, § 101 et seq., 94 Stat. 102; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

22. Aliens ⇐56
Treaties ⇐11

United States' accession to United Nations protocol relating to status of refugees did not create new rights or substantially alter existing domestic immigration and refugee laws; thus, even if El Salvadoran aliens were refugees, protocol did not permit them to "reside" in the United States contrary to domestic law and defendants could be convicted of assisting aliens not lawfully entitled to enter or reside within United States when they helped El Salvadorans cross the border. Immigration and Nationality Act, §§ 274, 274(a), as amended, 8 U.S.C.A. §§ 1324, 1324(a); Refugee Act of 1980, § 101 et seq., 94 Stat. 102; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

23. Aliens ⇐56

Within purview of statute making it unlawful for person to assist alien, who is not lawfully entitled to enter or reside within United States, the phrase "in furtherance of such violation" means that conduct involved was done with specific intent to further individual's ability to remain in United States in violation of law, and it is not enough that transportation was incidental to, or merely permitted person to maintain his or her illegal presence; rather, in order to constitute "furtherance," transportation must be directly and substantially related to individual's ability to avoid detection. Immigration and Nationality Act, § 274(a)(2), as amended, 8 U.S.C.A. § 1324(a)(2).

24. Aliens ⇐59

While trial court's instruction in prosecution for violation of statute making it unlawful for person to assist alien who is not lawfully entitled to enter or reside within United States did not use the words "direct and substantial relationship," instruction made clear that mere or incidental transportation of alien was insufficient to sustain conviction and was thus proper. Immigration and Nationality Act, § 274(a)(2), as amended, 8 U.S.C.A. § 1324(a)(2).

25. Aliens ⇐59
Conspiracy ⇐47(3)

Evidence was sufficient to sustain convictions for bringing in and landing illegal aliens and conspiring to do so. Immigration and Nationality Act, § 274(a)(2), as amended, 8 U.S.C.A. § 1324(a)(2).

Stephen Cooper, Michael E. Tigar, St. Paul, Minn., for defendants-appellants.

Steptoe & Johnson, Anthony J. LaRocca, Washington, D.C., for amicus curiae-Int'l Human Rights Law Group.

Paul L. Hoffman, ACLU Foundation of Southern Cal., Los Angeles, Cal., for amicus-Texas Civil Liberties Union & ACLU Cal.

Robert J. Erickson, Atty., Dept. of Justice, Washington, D.C., James R. Gough, Jr., Susan L. Yarbrough, Asst. U.S. Attys., Houston, Tex., Mervyn Hamburg, Atty. Appellate Section, Crim. Div., U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before WILLIAMS, GARWOOD, and JONES, Circuit Judges.

EDITH HOLLAN JONES, Circuit Judge:

In August 1984, Jose Andres Mendez-Valle and Maria Calletano Rosales-Cruz, El Salvadoran citizens, along with three El Salvadoran juveniles (hereinafter collectively referred to as "illegal aliens" or "aliens") left El Salvador.[1] Having reached Saltillo, Mexico, by bus, Mendez-Valle contacted relatives in Washington, D.C., who instructed him to remain in Mexico until further notice. Several weeks later, two American women came and took the aliens to a church in Matamoros, Mexico, near the Rio Grande River. The aliens spent the night at the church and, the following morning, a man escorted them to the river and directed them to cross at a point where the appellant, John B. Elder, was waiting on the other side.

Once in the United States, Elder drove the illegal aliens to the self-styled sanctuary, Casa Oscar Romero, in San Benito, Texas, where they remained for approximately fifteen days. While at Casa Oscar Romero, Mendez-Valle occasionally saw Elder, who directed the house, and also became acquainted with the appellant, Stacey Lynn Merkt, a volunteer there, when Mendez-Valle gave her money to buy the aliens bus tickets to Houston.

In the early morning hours of November 21, Mendez-Valle was given five bus tickets. Merkt drove the aliens to the bus station in McAllen, Texas, where they were directed to the proper bus. Enroute to Houston, the bus stopped in Weslaco. There, U.S. Border Patrol agents boarded the bus to check for illegal aliens. Mendez-Valle, Rosales-Cruz, and the three juveniles were arrested, given *Miranda* warnings, and taken to the Border Patrol station in Mercedes, Texas. There, the agents learned that the aliens might have been smuggled into the United States. Accordingly, after initial processing, the aliens were sent to the Anti-Smuggling Unit in McAllen.

At the Border Patrol station in McAllen, Mendez-Valle generally described and later identified both Elder and Merkt. Rosales-Cruz was not able to identify either defendant from a photographic line-up.

Elder was indicted, charged, and convicted of two counts of conspiracy, two counts of bringing in and landing illegal aliens, in violation of 8 U.S.C. § 1324(a)(1), and two counts of transporting illegal aliens, in violation of 8 U.S.C. § 1324(a)(2).[2] Merkt, in-

1. We recite the facts, as we must, in the light most favorable to the government and the jury's verdict. *See United States v. Alvarado Garcia*, 781 F.2d 422, 423 & n. 1 (5th Cir.1986).

2. Section 1324(a) sets forth the conditions under which persons can be found liable for bringing in and harboring illegal aliens:

> Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise; [or]
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> * * * * * *

dicted on one conspiracy count and two substantive transportation counts, was found guilty only of the conspiracy count. The appellants challenge their convictions on numerous grounds which we, after careful consideration, reject.

I.

FREE EXERCISE CLAIM

[1] Appellants contend that their convictions are barred by their religiously motivated "sanctuary" activities for El Salvadorans, which give rise to first amendment immunity from punishment for violating 8 U.S.C. § 1324.

American society extols its tradition as a haven for those to whom obligations of piety and conscience rank higher than the goods of this world. The tradition, at one level, was embodied in the "free exercise" clause of the Bill of Rights. While respecting the rights of citizens to adhere to different religions, however, it has never been doubted that the government's duty to all may, in some circumstances, encroach upon the practices of a few. Appellants Merkt and Elder seek sanctuary in the "free exercise" clause against their violation of national border control laws. This court, whose sanctuary power is rigidly controlled by precedent, cannot grant their request.

The Supreme Court in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), noted that the free exercise clause

> embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Id. at 303–04, 60 S.Ct. at 903, 84 L.Ed. at 1218 (footnote omitted). Following this dichotomy, a significant body of Supreme Court law has explained that legislation, religiously neutral on its face, may regulate the health, safety, and general welfare of the public, or certain activities within the purview of the federal government, even if individuals will thereby be penalized because the practice of their religious doctrine violates the law. *See Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965, 970 (1963). *See, e.g., Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (Sunday closing laws); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (child labor laws); *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890) (voter registration laws); *Reynolds v. United States*, 98 U.S. 145, 8 Otto 145, 25 L.Ed. 244 (1878) (polygamy laws). In *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), the Supreme Court found unconvincing a "free exercise" claim to exemption from compulsory military service by petitioners who conscientiously objected only to the Vietnam war. The government held an overriding interest in raising armies, and the exemption was theologically neutral. *Id.* at 462, 91 S.Ct. at 842–43, 28 L.Ed.2d at 188. In *Goldman v. Weinberger*, — U.S. —, 106 S.Ct. 1310, 1314, 89 L.Ed.2d 478, 485 (1986), the Court, relying on the special needs of the armed forces for uniformity and discipline, upheld a religiously neutral Air Force regulation the effect of which was to forbid an orthodox Jewish serviceman to wear a yarmulke.

The lower federal courts have consistently refused to create free exercise havens from violation of the national criminal laws against use and sale of marijuana. *See United States v. Rush*, 738 F.2d 497, 511–13 (1st Cir.1984), *cert. denied*, — U.S.

> any alien ... not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens shall be guilty of a felony....
>
> 8 U.S.C. § 1324(a)(1), (2).

——, 105 S.Ct. 1355, 84 L.Ed.2d 378 (1985); *United States v. Middleton*, 690 F.2d 820, 824–26 (11th Cir.1982), *cert. denied*, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983); *Leary v. United States*, 383 F.2d 851, 859–61 (5th Cir.1967), *rev'd in part and remanded on other grounds*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). Likewise, criminal laws prohibiting destruction of government property, *United States v. Allen*, 760 F.2d 447, 453 (2d Cir. 1985), extortion, *United States v. Starks*, 515 F.2d 112, 124 (3d Cir.1975), *aff'd in relevant part sub nom. Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), racketeering, *United States v. Dickens*, 695 F.2d 765, 772–73 (3d Cir.1982), *cert. denied*, 460 U.S. 1092, 103 S.Ct. 1792, 76 L.Ed.2d 359 (1983), and refusal to testify before a grand jury, *Smilow v. United States*, 465 F.2d 802, 804–05 (2d Cir.), *vacated and remanded on other grounds*, 409 U.S. 944, 93 S.Ct. 268, 34 L.Ed.2d 215 (1972), have been enforced against pleas for preferment based on "free exercise". The basis for these decisions was the conclusion that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 215–16, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15, 25 (1972).

Enforcement of 8 U.S.C. § 1324 cannot, consistent with this authority, brook exceptions for those who claim to obey a higher authority. The prohibition on the landing and transport of illegal aliens represents but one facet of the comprehensive legal framework governing entry into the United States and admission to its citizenship. The importance of the prohibition is reflected in the criminalization of conduct, as opposed to milder enforcement sanctions. Control of one's borders and of the identity of one's citizens is an essential feature of national sovereignty.[3] Relinquish this control and it may fairly be said that there remains no territorial or social body which can be called a sovereign nation. The peace, order, and very existence of society are bound up in its border control laws as much as in its criminal and conscription laws. Although their scope and application may be justly criticized, there can be no doubt that, until Congress changes the border control laws, they must be uniformly obeyed. On this basis alone, the first amendment challenge of Merkt and Elder to their convictions fails.

The appellants urge us to apply the analysis of *Wisconsin v. Yoder* and *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) to their case, which would require examining the extent of the burden imposed on their religious practices, the interest of the government in uniform law enforcement, and the likelihood that the government could enforce its policy by other, less intrusive means. At the outset, we note that in *Lee* the government prevailed, even under this analysis, in requiring the Amish, against their religious dictates, to contribute to the federal Social Security system. Moreover, *Yoder* and *Lee* explicitly excluded from their analysis legislation governing the public safety, peace, and order. Despite the Court's recent fragmentation of opinions in *Bowen v. Roy*, — U.S. ——, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), the controversy there focused on whether to apply *Yoder* or a less-stringent standard to the collision between a free exercise claim and the receipt of federally funded welfare benefits. Justice Burger's opinion for the plurality in result, favorably cited *Reynolds*, which earlier rejected a free exercise challenge against laws prohibiting polygamy, and was not disputed on this point. Nevertheless, in an abundance of analytical caution, we reach the same result even under the *Yoder* test.

3. The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S.Ct. 625, 628, 97 L.Ed. 956, 961 (1953). *See also Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50, 56 (1977).

First, it is not clear to us how enforcement of 8 U.S.C. § 1324 unduly burdens appellants' free exercise of religion. *See Braunfeld*, 366 U.S. at 606–07, 81 S.Ct. at 1147–48, 6 L.Ed.2d at 568–69. The statute relates only to conduct that aids or shelters illegal aliens and contains no explicit prohibition on religious practices or beliefs. The sincerity of appellants' religious motivation to aid El Salvadorans was not doubted by the trial court. Whether such motivation, in turn, required defiance of the nation's border control laws, hence, whether enforcement of those laws so as to inhibit and punish appellants burdened their religious practice, is another matter. Representatives of Catholic and Methodist clergy testified at the pretrial hearing and at trial. None suggested that devout Christian belief mandates participation in the "sanctuary movement." Obviously, appellants could have assisted beleaguered El Salvadorans in many ways which did not affront the border control laws: they could have collected and distributed monetary and other donations, aided in preparing petitions for legal entry and assisted El Salvadorans legally in this country, or, in the Christian missionary tradition, they could have performed their ministry in El Salvador or neighboring countries where El Salvadorans are refugees. They *chose* confrontational, illegal means to practice their religious views—the "burden" was voluntarily assumed and not imposed on them by the government.

Second, contrary to appellants' assertions, there is a compelling state interest in the government's uniform enforcement of border control laws. The statute under which appellants were convicted is part of a comprehensive, essential sovereign policy. We cannot engraft judicial exceptions to the illegality of transporting undocumented El Salvadorans without thereby de facto revising, for the unique benefit of El Salvadorans, the legal conditions under which they may abide in this country. This result would create a preference utterly at odds with the fine balancing of national-origin quotas, visa preference tables, and alien residency requirements promulgated and enforced pursuant to the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101–1524 *passim*. The interest in uniform application of a facially neutral criminal law is acute: "To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos." *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir.1969), *cert. denied*, 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970). Finally, we emphatically reject appellants' suggestion that because enforcement of the border control laws has not been particularly successful, there is no compelling state interest in prosecuting violators. The argument is so broadly couched that it could be used to deny a compelling state interest in enforcement of the criminal drug laws. In any event, to the extent that appellants' conduct, amplified by the nationwide publicity given to the "sanctuary movement," has contributed to undermining compliance with the border control laws and encouraging illegal entries, appellants are trying to excuse their violation of law on the basis of other violations. This will not do. The compelling state interest becomes more compelling in proportion to the increasing magnitude of the violations.[4]

The third prong of the *Yoder* test requires consideration of any less restrictive alternative means whereby the appellants' interest in upholding their religious beliefs may be accommodated within government policy. Appellants assert that criminalizing their efforts to abet the illegal entry of El Salvadorans is "almost never" the least restrictive means. They suggest as "less restrictive" the deportation of the alien or even confiscation of vehicles. Deporting the aliens, as an alternative policy, would

4. It is unnecessary to speculate whether, in abstract terms, illegal immigration can be judged good or bad for the country. Congress has determined the distinction between entry which is legal and that which is illegal. Neither appellants nor this court can be so bold as to revise the legislative determination.

reduce appellants' efforts to a pitiful farce. It would also implicate the Border Patrol in a wasteful "catch-me-if-you-can" scheme that would not further the law's objectives. Confiscation of vehicles would be a futile remedy, imposing a tax on those who contribute to Merkt's and Elder's efforts, without, in all likelihood, diminishing the quantity of their efforts to evade the law. In short, appellants' proffered "less restrictive alternatives," by their very triviality, highlight the necessity for criminal sanctions.

An even more basic objection to requiring the government to adopt a less restrictive alternative that would protect the appellants' choice of religious practices is the open-endedness of their demand. Judge Head eloquently captured the ramifications of appellants' position in the following analysis:

> If the Government attempted to accommodate into its immigration policy [appellants'] religious beliefs, the Government's efforts would result in no immigration policy at all. As testimony from [appellants'] witnesses indicated, the moral obligation to assist others crosses religious and denominational lines. These widely-held beliefs allow adherents to exercise considerable discretion and would permit religious individuals to form personal immigration policies.... [Appellants wish] to limit this Court's view solely to the violence in El Salvador; however, the human condition remains miserable in many parts of the globe. Man's inhumanity to man, as well as nature's, has been unrelenting throughout history. Many people live on this planet who logically are no less worthy of [appellants'] Christian charity than the Salvadorans. The consciences of other religiously motivated may conclude that the starving and impoverished of North Africa, Asia, or Mexico are equally entitled to enter this country without review by the INS.

5. Judge Vela adopted Judge Head's opinion in denying the appellants' motions to dismiss.

United States v. Elder, 601 F.Supp. 1574, 1579 (S.D.Tex.1985).[5]

Appellants' "do it yourself" immigration policy, even if grounded in sincerely held religious conviction, is irreconcilably, voluntarily, and knowingly at war with the duly legislated border control policy. In this case, the claims of conscience must yield to the twin imperatives of evenhanded enforcement of criminal laws and preservation of our national identity as defined by the immigration laws.

II.

SUGGESTIVE IDENTIFICATION PROCEDURES

Elder and Merkt next assert that Mendez-Valle's pretrial and in-court identifications were inadmissible because the photographic identification procedures were impermissibly suggestive and created a substantial risk of misidentification.[6] Prior to trial, the appellants moved to suppress the photographic identification evidence. After an evidentiary hearing, the district court found that the photo array of male suspects was not unnecessarily suggestive. With respect to Merkt, however, the court found the photo array to be "disastrous." The court nevertheless held that Mendez-Valle's identification of Merkt was sufficiently reliable to outweigh the corruptive effect of the suggestive photographic array. At trial, Mendez-Valle made in-court identifications of both appellants.

[2, 3] Evidence of a pretrial photographic identification will be inadmissible only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253 (1968). Elder asserts that the male photo array was impermissibly suggestive because his photograph was the only one that even

6. Rosales-Cruz was unable to identify the appellants from the photographs and could not identify them at trial.

remotely resembled the very general description given by Mendez-Valle at the outset of the interview. We are unable to conclude that the district court was clearly erroneous in its determination that the male photographic array was not unnecessarily suggestive. *See United States v. Diecidue*, 603 F.2d 535, 565 (5th Cir.1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980).

At the Border Patrol station in McAllen, Mendez-Valle described the man who had met and transported them to the Casa Oscar Romero as a tall man with a mustache who possibly wore glasses and had a name phonetically similar to "Mr. Mack" or "Mr. Yack." (Elder is known as "Jack.") Mendez-Valle also indicated that, while in Mexico, he was aided by a religious organization. Based on this information, the agents compiled a photographic lineup. Because the agents did not have access to a regular photograph of Elder, they clipped his picture from a newspaper and included in the lineup pictures of other men also taken from a newspaper. In addition to the seven newspaper clippings were four "hard" photos of men, three of whom appeared to be of Hispanic descent.

Even excluding the four "hard" photographs, the remaining seven newspaper clippings depicted caucasian males of varying facial and feature characteristics but of the same general age and description. Three of the men in the newspaper clippings wore glasses, while two had mustaches. Mendez-Valle testified that no one suggested any certain photograph to him but that he pointed out Elder's photograph because "that looked very much like Mr. Mac." Based on these facts, the male photographic array was not impermissibly suggestive.

The female photographic array consisted of eight "hard" photographs. Seven of the photographs were in color and depicted women of obvious Hispanic origin. Merkt was the only caucasian female in the array and her photograph was in black and white. The government concedes that the female photographic array was impermissibly suggestive. Nevertheless, the district court found that other factors weighed in favor of the reliability of Mendez-Valle's identification of Merkt and outweighed the effects of the impermissibly suggestive photo identification. We agree.

In *Simmons*, the Supreme Court held that if a photo array was unnecessarily suggestive, the court must then determine whether, under the totality of the circumstances, the suggestiveness leads to a substantial likelihood of irreparable misidentification. 390 U.S. at 384–86, 88 S.Ct. at 971–72, 19 L.Ed.2d at 1253–54. Under this analysis, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977). *See United States v. Cueto*, 611 F.2d 1056, 1063–64 (5th Cir.1980). A pretrial identification found to be reliable will be admitted despite an impermissibly suggestive photographic array.

[4] This Circuit relies on six factors to determine the reliability of a pretrial identification: (1) the opportunity of the witness to view the suspect, (2) the witnesses' degree of attention, (3) the accuracy of the pre-identification description, (4) the witnesses' level of certainty, (5) the time that has elapsed between the crime and the identification, and (6) the corrupting influence of the suggestive identification itself. *United States v. Woolery*, 735 F.2d 818, 821 (5th Cir.), *reh'g denied*, 740 F.2d 359 (1984), *cert. denied*, — U.S. —, 105 S.Ct. 1172, 84 L.Ed.2d 322 (1985). "[T]he fact that some, or even a majority, of the *Manson* factors weigh against the reliability of the identification is not conclusive. We must examine all of the factors and decide, whether, on the whole, the suggestiveness of the line-up created a 'very substantial risk of misidentification.'" 740 F.2d at 360–61 (quoting *United States v. Atkins*, 698 F.2d 711, 713 (5th Cir.1983)).

[5] 1. **The opportunity to view the suspect.** Mendez-Valle testified that he saw Merkt a few times at the Casa Oscar Romero, that he asked her to purchase five bus tickets, and that he gave her $100.

Mendez-Valle further testified that, on November 21, 1984, Merkt gave him five bus tickets and drove the aliens to the bus station, which was approximately twenty minutes from Casa Oscar Romero. Mendez-Valle had the opportunity to view Merkt during the day at close range for substantial periods of time. *See, e.g., Woolery,* 735 F.2d at 821; *Passman v. Blackburn,* 652 F.2d 559, 570 (5th Cir. 1981), *cert. denied,* 455 U.S. 1022, 102 S.Ct. 1722, 72 L.Ed.2d 141 (1982); *Allen v. Estelle,* 568 F.2d 1108, 1113–14 (5th Cir.1978).

2. **Degree of attention.** Mendez-Valle presented Merkt with what was probably a great deal of money to him. Merkt was the individual who paved the way for the aliens' journey to Houston. From these facts, we can conclude that Mendez-Valle's attention was often singularly focused on her. *See, e.g., Passman,* 652 F.2d at 570–71; *Swicegood v. Alabama,* 577 F.2d 1322, 1328 (5th Cir.1978).

3. **The accuracy of the pre-identification description.** Mendez-Valle described Merkt as a short Anglo or light-skinned woman with curly or kinky yellowish-blond hair. He said her name was phonetically similar to "Daisy." Although perhaps general in terms of providing a "measuring stick" for comparison, this was an accurate description of Merkt. Mendez-Valle did, in addition, provide an accurate description of Merkt's car. *See, e.g., Allen,* 568 F.2d at 1114.

4. **The witness' level of certainty.** Mendez-Valle testified that he picked Merkt's picture from the lineup "[b]ecause it looked very much like [Daisy]." At the evidentiary hearing, in response to a question by the court, Mendez-Valle testified that, even if he had not seen the picture of Merkt, he believed he would have been able to identify her. At trial, Mendez-Valle positively and unequivocally identified Merkt. *See, e.g., United States v. Jennings,* 528 F.2d 222, 223 (6th Cir.1975). *Cf. Cueto,* 611 F.2d at 1064 (no in-court identification of the defendant).

5. **The time between the crime and the confrontation.** Mendez-Valle was asked to describe Merkt and identify her photograph only hours after the aliens had been placed on the bus. *See, e.g., Allen,* 568 F.2d at 1114. Thus, there was no substantial passage of time which could have affected the reliability of the identification.

Virtually all of these factors indicate a reliable basis for the identification. Because the suggestive photographic array did not create a substantial risk of an inaccurate identification, the pretrial identification evidence against Merkt was properly admitted.

[6] Under the totality of the circumstances, Mendez-Valle's in-court identifications of Elder and Merkt were reliable also. Mendez-Valle testified as to the length of time he spent with each appellant and the conditions under which he viewed them. At trial, Mendez-Valle said that Elder resembled the man who had helped them and he positively identified Merkt. Defense counsel challenged the basis for both the pretrial and in-court identifications during his closing arguments. The credibility of those identifications was properly left to the jury. *See United States v. Fernandez-Roque,* 703 F.2d 808, 814 (5th Cir.1983).[7]

III.

RECUSAL OF THE TRIAL COURT JUDGE

Prior to trial, Elder and Merkt moved for the recusal of the trial court judge, the Honorable Filemon B. Vela, pursuant to 28 U.S.C. §§ 144 and 455. The motion was

7. The appellants also assert that the identification procedures were impermissibly suggestive because Mendez-Valle and Rosales-Cruz were shown a video tape in which the female dominantly portrayed was Merkt. This video tape was only shown to the aliens after Mendez-Valle had already described Merkt and picked her photo from the lineup and after Rosales-Cruz was unable to identify either Elder or Merkt. After viewing the video tape, Rosales-Cruz was still unable to identify anyone on the tape and Mendez-Valle again identified Merkt. In light of these facts, and our finding that the pretrial identification procedures were reliable, we cannot conclude that the video tape had any effect on the ability of the aliens to identify Merkt.

denied by Judge Vela initially and upon reconsideration. On appeal, appellants assert that Judge Vela abused his discretion in refusing to recuse himself because (1) he had acknowledged his personal bias by recusing himself, upon his own motion, in another case in which Elder was the defendant, and (2) he improperly considered the truth of the matters alleged in affidavits submitted under § 144 rather than merely passing upon the legal sufficiency of those affidavits.

[7–9] A motion for recusal is committed to the sound discretion of the trial judge. The denial of such a motion will not be reversed on appeal unless the judge has abused his discretion. *See United States v. Harrelson*, 754 F.2d 1153, 1165 (5th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 599, 88 L.Ed.2d 578 (1985). Under both § 144 and § 455, the alleged bias or prejudice must be personal and it must stem from an extrajudicial source which would result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *See United States v. Reeves*, 782 F.2d 1323, 1325 (5th Cir.1986).

[10] Judge Vela's disqualification was not required under § 455 merely because he voluntarily withdrew from another case in which Elder was the defendant.[8] *See, e.g., Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir.1981). Judge Vela gave no reason for his withdrawal from that case, other than to state that it was "for none of the reasons urged by the Defendant in his Motions." In this case, Judge Vela considered, and specifically rejected, recusal based on his prior recusal. The appellants have not shown, by affidavit or otherwise, that Judge Vela's impartiality might reasonably be questioned or that he had a personal bias or prejudice against either Elder or Merkt or in favor of the government. These facts do not indicate that a reasonable person would harbor doubts about Judge Vela's impartiality based solely on his prior recusal. *See Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1019–20 (5th Cir.1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982).

[11–13] Section 144 provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144. If an affidavit filed under § 144 is timely and technically correct, the factual allegations must be taken as true for purposes of recusal. The trial judge may pass only upon the legal sufficiency of the affidavit;[9] he may not consider the truth of the matters asserted therein. *Joint Legislative Comm.*, 637 F.2d at 1019 & n. 6.

[14] Merkt, in her affidavit, refers primarily to statements and rulings made by Judge Vela during her trial and sentencing in a previous case.[10] These prior judicial

8. Under § 455(a), a judge must disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." Under § 455(b)(1), a judge must also disqualify himself where he has a "personal bias or prejudice concerning a party." If the evidence shows that a reasonable person "would harbor doubts about the judge's impartiality," the trial judge must disqualify himself. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.) *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

9. An affidavit is legally sufficient if it meets a three-part test: (1) the facts must be material and stated with particularity; (2) the facts must be such that, if true, they would convince a reasonable person that bias exists; and (3) the facts must show that the bias is personal, rather than judicial, in nature. *Joint Legislative Comm.*, 637 F.2d at 1019. *See Parrish v. Bd. of Comm'rs*, 524 F.2d 98, 100 (5th Cir.1975) (*en banc*), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). Each party may submit only one such affidavit. 28 U.S.C. § 144.

10. *See United States v. Merkt*, 764 F.2d 266 (5th Cir.), *reh'g denied*, 772 F.2d 904 (1985).

rulings, however, offer no basis for recusal; they do not show any personal bias against Merkt. Elder's affidavit asserts prejudice on the basis of Judge Vela's prior recusal. We have already rejected this ground. Additional allegations center on the statements made by Judge Vela during the previous trial and sentencing of Merkt. Again, these prior judicial rulings do not show any personal bias.

[15] Finally, the appellants assert that Judge Vela should have recused himself because of religious pressure. In support of this contention, Merkt refers to the affidavit of Diane Elder, the wife of John Elder. Diane Elder's affidavit violates the one-affidavit rule of 28 U.S.C. § 144 and need not be considered. *See United States v. Balistrieri*, 779 F.2d 1191, 1200 & n. 6 (7th Cir.1985) (a court need only consider the first affadavit submitted in support of a § 144 motion), *cert. denied*, — U.S. —, 106 S.Ct. 1490, 89 L.Ed.2d 892 (1986). Even if its filing were appropriate, Diane Elder's affidavit, based, as it is, on information told to her by unnamed individuals who did "not feel capable of giving affidavits," is legally insufficient to require the recusal of Judge Vela on religious grounds. *Id.* at 1199 (affidavits based on mere conclusions, opinions, or rumors are legally insufficient to require recusal). *See also Davis v. Comm'r*, 734 F.2d 1302, 1303 (8th Cir.1984).[11]

IV.

COERCED TESTIMONY

The appellants timely moved to dismiss the indictment based on government coercion and misconduct. On appeal, the appellants contend that their fifth amendment right to due process was violated when the district court failed to hold an evidentiary hearing on the voluntariness of the testimony of the alien witnesses.

It is established in this Circuit that "the admission at trial of a coerced out-of-court statement from a non-defendant may violate the defendant's right to a fair trial as guaranteed by the due process clause of the fifth amendment." *Merkt*, 764 F.2d at 274. *See also United States v. Chiavola*, 744 F.2d 1271, 1273 (7th Cir.1984); *LaFrance v. Bohlinger*, 499 F.2d 29, 35 (1st Cir.), *cert. denied*, 419 U.S. 1080, 95 S.Ct. 669, 42 L.Ed.2d 674 (1974). The voluntariness of the statement of a witness is generally determined in a pretrial suppression hearing. *See, e.g., Merkt*, 764 F.2d at 273; *LaFrance*, 499 F.2d at 36. Here, however, defense counsel indicated that he wished to carry the motion with the case, and testimony was presented at trial regarding the voluntariness of the statements of Mendez-Valle and Rosales-Cruz.

The appellants first assert that Mendez-Valle's testimony was coerced with promises that he and the children would be sent to Washington, D.C., if he testified favorably to the government. At the outset of his testimony, Mendez-Valle stated that he wanted to request a "condition" from the government. At that point, the jury was excused and the proceedings continued. Mendez-Valle stated that, when he was detained, the government promised him that the children would be reunited with their parents in Washington, D.C. The government denied making any such promise but acknowledged that, when Mendez-Valle had asked what would happen to the children, he had been told that the children would be held until their parents could be located. At the time of trial, the children remained in the government's custody because no one had come forward to accept responsibility for them. Mendez-Valle stated that no other promises or threats had been made and the court ordered him to testify. On cross-examination, Mendez-Valle stated his belief that if he gave the Border Patrol agents answers that they liked, they would

11. Both appellants also incorporate, by reference, the affidavits of other individuals in support of their motion for recusal. In addition to violating § 144's one-affidavit rule, we note that these affidavits are also predicated on Judge Vela's religious background and his rulings in Merkt's previous trial, evidence no personal bias or extrajudicial prejudice, and are legally insufficient to require recusal.

let them go to Washington, D.C. However, Mendez-Valle elsewhere indicated that, despite this belief, he nevertheless told the truth.

[16] Appellants assert, based on the fact that the border patrol agents told the alien witnesses the names of the appellants, that the government impermissibly suggested specific testimony. While the agents did inform the alien witnesses of the names of the appellants, this was done only after the witnesses had described the appellants, after Mendez-Valle had picked both of the suspects from the photographic arrays, and after the aliens had both given the agents their phonetic understanding of the names of the individuals who had helped them.

The facts presented at trial did not warrant an evidentiary hearing. Neither witness claimed that he or she was threatened or coerced into making untrue statements. Other than concern for the children, both witnesses testified that no promises were made in exchange for their testimony. Furthermore, even if one of the government agents did bang his fist on the table twice while questioning Rosales-Cruz, as suggested by defense counsel, such actions would not lead this court to conclude that the entire trial testimony of the aliens should be excluded. In *United States v. Fredericks*, 586 F.2d 470 (5th Cir.1978), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979), the defendant moved to exclude the testimony of an unindicted co-defendant. The witness' testimony was obtained in violation of her *Miranda* rights and, according to the witness' uncontroverted testimony, only after being subjected to threatening and heavy-handed interrogation. *Id.* at 477. Refusing to exclude the witness' testimony, this court held that the actions of the government officials, "even if viewed in the worst possible light, were a far cry from the sort of third-degree physical or psychological coercion that might prompt us to disregard altogether the societal interest in law enforcement by excluding the highly probative testimony of a nondefendant." *Id.* at 481. In this case, we can find no reason to exclude the trial testimony of the alien witnesses.

V.

EVIDENCE OF A PRIOR CONVICTION

Merkt was previously convicted of conspiring to transport, and of transporting, illegal aliens. *See Merkt*, 764 F.2d at 268.[12] That conviction was the subject of a motion *in limine*, which was granted to the extent that the government was required to get permission from the court prior to introducing evidence of that conviction. While cross-examining one of the defense witnesses, the prosecutor elicited testimony regarding the previous conviction without prior approval of the court. The district court summarily found the conviction admissible under Fed.R.Evid. 404. The court carefully admonished the jury, however, as to the purposes for which the conviction could be considered. Merkt challenges the introduction of the prior offense evidence.

[17, 18] Rule 404(b) provides that evidence of other crimes is not admissible to prove the character of a person in order to show that she acted in conformity therewith, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The admissibility of extrinsic evidence is determined in light of the two-part test established by this court in *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir.1978) (*en banc*), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979): (1) it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character, and (2) the evidence must possess probative value that is not substantially outweighed by its un-

12. On appeal, this court reversed that conviction and remanded the case for a new trial. *Merkt*, 764 F.2d at 275. On remand, the government elected not to retry Merkt and dismissed the indictment.

due prejudice.[13] A trial court's decision to admit extrinsic offense evidence will be rejected only for an abuse of discretion. See *United States v. Maggitt*, 784 F.2d 590, 597 (5th Cir.1986).

[19] Merkt first asserts that admission of evidence of the prior conviction was improper because the government was trying to establish her identity. This assertion is frivolous. The trial court, in admonishing the jury as to the limited use of the extrinsic offense evidence, cautioned that Merkt's previous conviction could be considered only in determining Merkt's state of mind or intent and "for no other purpose."

[20] Merkt next asserts that admission of the extrinsic offense evidence as bearing upon her knowledge or intent is irrelevant because her sole defense in this case was misidentification. It is clear, however, that "Rule 404(b) evidence is particularly probative where the government has charged conspiracy." *United States v. Gordon*, 780 F.2d 1165, 1174 (5th Cir.1986).

> In the context of a conspiracy case, the mere entry of a not guilty plea sufficiently raises the issue of intent to justify the admissibility of extrinsic offense evidence.... Only when the defendant affirmatively takes the issue of intent out of the case is he entitled to an exclusion of the evidence.

Id. See *United States v. Roberts*, 619 F.2d 379, 383 (5th Cir.1980). Here, Merkt did nothing from which this court could conclude that she affirmatively took the issue of intent out of her case. *See, e.g., Id.* at 383 n. 2 ("a defendant who intends to assert a defense based upon mistaken identity may make an appropriate stipulation to avoid the introduction of extrinsic offense evidence").

Merkt also contends that a remand is mandatory because the district court allowed the admission of the extrinsic offense evidence without a prior on-the-record determination that the probative value of the evidence outweighed its prejudicial effect. In *United States v. Robinson*, 700 F.2d 205 (5th Cir.1983), *cert. denied*, 465 U.S. 1008, 104 S.Ct. 1003, 79 L.Ed.2d 235 (1984), this court held that:

> [I]n Rule 404(b) cases an on-the-record articulation by the trial court of *Beechum's* probative value/prejudice inquiry [is warranted] *when requested by a party.* In the absence of on-the-record findings *in response to such a request*, we will be obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling.

Id. at 213 (emphasis added; footnote omitted).

Robinson's requirement of a prior on-the-record articulation of the probative value/prejudice analysis is only triggered by the request of a party. Here, defense counsel made no specific request for an on-the-record probative value/prejudice determination. Because the district court subsequently made the probative value/prejudice evaluation,[14] this contention, like the others, fails to persuade. Cf. *United States v. Lavelle*, 751 F.2d 1266, 1279 (D.C.Cir.) ("no reversal or remand is warranted unless the trial court refuses to make an on-the-record determination *in response to such a request*"), *cert. denied*, — U.S. —, 106 S.Ct. 62, 88 L.Ed.2d 51 (1985) (emphasis in original).[15]

13. The extrinsic offense evidence must also meet the other requirements of Fed.R.Evid. 403, which provides that, although relevant, extrinsic offense evidence may be excluded if it will confuse the issues, mislead the jury, or cause undue delay, waste of time, or needless presentation of cumulative evidence.

14. Further, although the appellants do not specifically challenge the district court's post-trial findings, we find that the extrinsic evidence was relevant to Merkt's knowledge or intent and that the substantive value of the extrinsic evidence outweighed its possible prejudicial effect.

15. The admission of the extrinsic offense evidence prior to court approval was in violation of court order. However, the government actions did not rise to the level of prosecutorial misconduct. It appears from the record that the initial injection of the prior conviction information was inadvertent. The evidence was

VI.

REFUGEE STATUS

Section 1324 makes it unlawful for a person to assist an alien who is "not lawfully entitled to enter or reside within the United States." 8 U.S.C. § 1324(a). The appellants assert that El Salvadorans, as nationals of a country torn by internal conflict, are "refugees" entitled to sanctuary in the United States and, thus, are not "illegally" within its borders. Since the aliens' status is an element of the crime charged, the appellants assert that whether the aliens are refugees entitled to remain in the United States is a question of fact which should have been submitted to the jury.

[21] Appellants first contend that the aliens are entitled to "reside" in the United States pursuant to the Refugee Act of 1980, Pub.L. No. 96–212, 94 Stat. 102. This inventive argument was previously rejected by this court in *United States v. Pereira-Pineda*, 721 F.2d 137, 139 (5th Cir.1983). We are bound by our own precedent.

[22] Appellants also assert that the United States' accession to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967 [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, creates for all "refugees" an "entitlement" to "reside" in the United States. Even though the Protocol bound the signatories to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), the Supreme Court has held that accession to the Protocol did not create new rights or substantially alter existing domestic immigration and refugee law. *See I.N.S. v. Stevic*, 467 U.S. 407, 417–18, 428–29 n. 22, 104 S.Ct. 2489, 2494–95, 2500 n. 22, 81 L.Ed.2d 321, 330–32, 336–37 n. 22 (1984). *See also Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir.1982); *Pierre v. United States*, 547 F.2d 1281, 1288–89 (5th Cir.), *vacated and remanded for consideration of mootness*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977). Thus, even if the aliens are refugees, the Protocol does not permit them to "reside" here contrary to domestic law or for purposes of 8 U.S.C. § 1324(a).[16]

VII.

JURY INSTRUCTIONS

[23] To establish a violation of 8 U.S.C. § 1324(a)(2), the government must prove, *inter alia*, that the defendants acted willfully in furtherance of the aliens' violation of the law. See *Merkt*, 764 F.2d at 270. Although the appellants challenge the district court's refusal to give their proffered instruction on the "furtherance" element of the offense,[17] we find no reversible error in this instruction.

In *Merkt*, this court, for the first time, directly examined the requirement under § 1324(a)(2) that the defendant act willfully in furtherance of the aliens' violation of law. 764 F.2d at 271. This court held that:

properly admitted under Fed.R.Evid. 404(b) and, thus, the appellants can show no prejudice. Further, the jury was carefully instructed on the limited purpose for which the evidence could be considered. While we in no way condone the government's misstep, the appellants suffered no harm and the prosecutor was properly reprimanded by the trial court.

16. Amici urge this court to provide sanctuary, and thus legal status, to the aliens based on "custom" under international law. In enacting our refugee statute, however, Congress was not bound by international law, much less a purported "custom" of international law. *See, e.g., United States v. Quemener*, 789 F.2d 145, 156 (2d Cir.1986); *United States v. Allen*, 760 F.2d 447, 454 (2d Cir.1985); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir.1983), *modified on other grounds*, 728 F.2d 142 (1984).

17. The appellants submitted the following instruction on "furtherance":

> The phrase "in furtherance of such violation" means that the conduct involved was done with the specific intent of furthering the individual's ability to remain in the United States in violation of law. It is not enough that the transportation was incidental to, or merely permitted the person to maintain his or her illegal presence here. In order to constitute "furtherance" in violation of 8 U.S.C. 1324(a)(2), the transportation must be directly and substantially related to the individual's ability to avoid detection.

> For the government to show that Merkt transported the aliens willfully "in furtherance of [their] violation of law," as the statute requires, it must show "a direct and substantial relationship between that transportation and its furtherance of the alien's presence in the United States." Willful transportation of illegal aliens is not, per se, a violation of the statute, for the law proscribes such conduct only when it is in furtherance of the alien's unlawful presence. The jury must be instructed that proof of this element of the offense is prerequisite to conviction.

Id. at 271–72 (footnote omitted). Here, the court instructed the jury that, in order to find the appellants guilty, it must find

> that the transportation of the alien was done willfully in furtherance of the alien's violation of law; that is, to further the alien's illegal presence in the United States. Just incidental transporting [of] an illegal alien will not make you guilty of that offense. It has to be something that furthers that person's illegal presence in the United States.

[24] The court's instruction substantially covers the instruction requested by the appellants and, in substance, embodies the principles expressed in *Merkt*. While the court's instruction in this case does not use the words "direct and substantial relationship," the court's instruction makes clear that mere or incidental transportation of an alien is not sufficient to sustain a conviction under § 1324(a)(2). The court instructed that the jury must find that the transportation of the aliens was done willfully and in furtherance of the aliens' illegal presence in the United States. When viewed as a whole, this instruction satisfies the test in *Merkt*. We find the appellants' remaining challenges to the jury instructions to be without merit.[18]

VIII.

SUFFICIENCY OF THE EVIDENCE

[25] The appellants assert that the evidence was insufficient to sustain their convictions. Having reviewed all the evidence and the inferences which may be drawn therefrom in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942), we must conclude that it was sufficient to sustain the convictions of both Elder and Merkt.

AFFIRMED.

BAKER INDUSTRIES, INC.,
Plaintiff-Appellee,

v.

HOWARD ELECTRICAL AND MECHANICAL INCORPORATED,
Defendant-Appellant.

No. 85–1758
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

July 18, 1986.

Rehearing Denied Aug. 19, 1986.

On appeal from judgment of the United States District Court for the Northern District of Texas, Barefoot Sanders, J., the Court of Appeals, Johnson, Circuit Judge, held that notice of appeal filed before disposition of motion for additional findings of fact was ineffective.

Appeal dismissed.

18. The appellants' assertion that they were entitled to a good faith belief instruction is, in essence, a mistake of law defense which was foreclosed by this court in *Merkt*, 764 F.2d at 273. *But see Merkt*, 764 F.2d at 275 (Rubin, J., dissenting). The appellants' assertion that they were entitled to a religious defense instruction has been foreclosed by our holding that they had no religious defense. Finally, the court's charge on conspiracy was adequate. *See United States v. Martin*, 790 F.2d 1215, 1219 (5th Cir. 1986).

UNITED STATES of America, Plaintiff–Appellee,
v.
Maria del Socorro Pardo Viuda De AGUILAR, Defendant–Appellant.
UNITED STATES of America, Plaintiff–Appellee,
v.
Anthony CLARK, a/k/a Antonio Clark, Defendant–Appellant.
UNITED STATES of America, Plaintiff–Appellee,
v.
Sister Darlene NICGORSKI, School Sisters of Saint Francis, Defendant–Appellant.
UNITED STATES of America, Plaintiff–Appellee,
v.
Philip M. WILLIS–CONGER, a/k/a Phillip M. Conger, Defendant–Appellant.
UNITED STATES of America, Plaintiff–Appellee,
v.
John M. FIFE, Defendant–Appellant.
UNITED STATES of America, Plaintiff–Appellee,
v.
Margaret Jean HUTCHISON, a/k/a Peggy Hutchison, Defendant–Appellant.
UNITED STATES of America, Plaintiff–Appellee,
v.
Wendy LeWIN, Defendant–Appellant.
UNITED STATES of America, Plaintiff–Appellee,
v.
Ramon Dagoberto QUINONES, Defendant–Appellant.

Nos. 86–1208 to 86–1215.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 1988.

Decided March 30, 1989.

As amended on Denial of Rehearing and Rehearing En Banc April 14, 1989.

Defendants were convicted before the United States District Court for the District of Arizona, Earl H. Carroll, J., of violations of the immigration laws, arising from their participation in a "sanctuary movement" aimed at the smuggling, transporting, and harboring of Central American refugees. On defendants' appeal, the Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that: (1) defendants could not establish a mistake of law defense by proffering evidence of their misunderstanding of status of aliens, based on their statutory construction; (2) defendants were not entitled to a necessity defense based on allegation that the INS frustrated legal means of obtaining refugee status; (3) First Amendment did not prevent conviction on ground that sincere religious beliefs inspired defendants to commit the forbidden conduct; (4) invited informer doctrine was applicable to presence of undercover agents and informants at group meetings and activities, and to tape recordings of church meetings; and (5) defendants failed to establish that they were selectively prosecuted.

Affirmed.

Opinion 871 F.2d 1436 superseded.

1. Criminal Law ⇐1139

Court of Appeals reviews a district court's decision to preclude a mistake of law defense under the nondeferential de novo standard.

2. Aliens ⇐56

Defendants charged with smuggling, transporting and harboring Central American aliens in the United States were precluded from asserting a mistake of law defense, based on assertion that the aliens were bona fide political refugees entitled to political asylum in the United States pursuant to the Refugee Act. Immigration and Nationality Act, §§ 274, 274(a)(1–3), as amended, 8 U.S.C.A. §§ 1324, 1324(a)(1–3).

3. Aliens ⇐53.10(3)

An alien must file application for political asylum in order to be lawfully entitled

to reside in the United States pending a final ruling. Immigration and Nationality Act, §§ 208(a), 243(h), 274, as amended, 8 U.S.C.A. §§ 1158(a), 1253(h), 1324.

4. Aliens ⇐53.10(3)

With regard to section of the Immigration and Nationality Act providing that an alien is judged to be lawfully entitled to enter or reside in the United States "under the terms of this chapter or any other law relating to the immigration or expulsion of aliens," the term "other law" does not include the United Nations protocol relating to the status of refugees. Immigration and Nationality Act, §§ 101(a)(17), 274, as amended, 8 U.S.C.A. §§ 1101(a)(17), 1324.

See publication Words and Phrases for other judicial constructions and definitions.

5. Aliens ⇐56

With regard to statute making it a felony to bring in an alien making an illegal entry, an "entry" has not been accomplished until physical presence is accompanied by freedom from official restraint. Immigration and Nationality Act, § 274(a)(1), as amended, 8 U.S.C.A. § 1324(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

6. Aliens ⇐56

An alien must be under official restraint at all times during and subsequent to physical entry in order to void a conviction under section of the Immigration and Nationality Act making it a felony to bring in an alien making an illegal entry. Immigration and Nationality Act, § 274(a)(1), as amended, 8 U.S.C.A. § 1324(a)(1).

7. Aliens ⇐56

Rationale for official restraint rule that an alien must be under official restraint at all times during and subsequent to physical entry in order to void a conviction for bringing in an alien making an illegal entry did not support finding that brief visits by undercover agent to residence of illegal alien constituted official restraint; doctrine is premised on theory that alien is in the Government's constructive custody at time of physical entry; by contrast, where an alien is able to exercise his free will subsequent to physical entry, he is not under official restraint. Immigration and Nationality Act, § 274(a)(1), as amended, 8 U.S.C.A. § 1324(a)(1).

8. Aliens ⇐59

Defendant charged with bringing in an alien making an illegal entry was not entitled to instruction on official restraint doctrine, that "entry" is not accomplished if alien's physical presence is not accompanied by freedom from official restraint; there was no evidence from which jury could find that alien was under official restraint during her entire residency in the United States; alien exercised free will in the seven months she lived with her parents, and undercover agent's short visits were insufficient to prevent her from escaping. Immigration and Nationality Act, § 274(a)(1), as amended, 8 U.S.C.A. § 1324(a)(1).

9. Aliens ⇐59

Evidence in prosecution for bringing in an alien making an illegal entry supported finding that defendant brought alien, a 13-year-old girl, into the United States within the meaning of statute; defendant procured false papers for alien and coached her to lie to immigration authorities; defendant walked ahead of alien through immigration, and the two met up immediately thereafter and walked to a church. Immigration and Nationality Act, § 274(a)(1), as amended, 8 U.S.C.A. § 1324(a)(1).

10. Aliens ⇐59

Defendant charged with aiding and abetting alien's illegal entry into the United States was not entitled to instruction on doctrine of official restraint, i.e., that "entry" has not been accomplished until alien's physical presence is accompanied by freedom from official restraint; although the INS had advance notice from an undercover agent that aliens were crossing the bor-

der, aliens did not cross at an official port of entry, and they were not in close proximity to immigration officials at the point of physical entry; moreover, aliens were in the United States for about eight months prior to their eventual arrests, and defendant did not allege that aliens were under INS scrutiny for their entire stay. Immigration and Nationality Act, § 274(a)(1), as amended, 8 U.S.C.A. § 1324(a)(1).

11. Aliens ⇐59

Defendants charged with aiding and abetting unlawful entry of aliens were not entitled to their proposed jury instruction on the First Amendment which stated that their expression was protected unless it was intended and likely to produce or incite an imminent lawless act; defendants failed to produce "some evidence" that their expression was "remote" from the commission of a crime; defendants instructed illegal aliens on how and where to cross the border and supplied them with "sanctuary" contacts in the United States; their speech was inextricably intertwined with actions that facilitated illegal entry of the aliens. Immigration and Nationality Act, § 274(a)(1), as amended, 8 U.S.C.A. § 1324(a)(1); U.S.C.A. Const.Amend. 1.

12. Aliens ⇐59

Evidence was sufficient to convict defendant of illegally transporting aliens; although there was no direct evidence that defendant knew about the recent illegal status of the aliens, there was sufficient circumstantial evidence; alien admitted that during his trip with defendant he freely discussed his experiences in Guatemala and his intention to assert refugee status; moreover, other aliens, in the presence of defendant, were interviewed on television wearing masks. Immigration and Nationality Act, § 274(a)(2), as amended, 8 U.S.C.A. § 1324(a)(2).

13. Aliens ⇐59

Defendants charged with illegally transporting aliens or aiding and abetting in such illegal transport were not entitled to jury instruction that a person intending to assist an alien in obtaining legal status is not acting "in furtherance" of the alien's illegal presence in the country, in absence of evidence that defendants made any effort to present any aliens to the INS. Immigration and Nationality Act, § 274(a)(2), as amended, 8 U.S.C.A. § 1324(a)(2).

14. Aliens ⇐59

Defendants charged with transporting or aiding and abetting in transporting of illegal aliens were not entitled to a jury instruction that transporting a person who one knows to be an illegal alien out of purely humanitarian concern is not a crime, where instances of transportation were not merely incidentally related to furthering the alien's presence in the United States; in fact, defendants transported aliens throughout the country as part of their plan to shelter illegal aliens from the grasp of the INS. Immigration and Nationality Act, § 274(a)(2), as amended, 8 U.S.C.A. § 1324(a)(2).

15. Aliens ⇐56

Religious motivation of defendants in transporting illegal aliens did not negate requisite intent to directly or substantially further presence of aliens in the United States; so long as defendants intended to directly or substantially further illegal presence of aliens, it was irrelevant that they did so with a religious motive. Immigration and Nationality Act, § 274(a)(2), as amended, 8 U.S.C.A. § 1324(a)(2).

16. Aliens ⇐56

Convictions for aiding and abetting transportation of illegal aliens were not invalid because government undercover agents transported the aliens. Immigration and Nationality Act, § 274(a)(2), as amended, 8 U.S.C.A. § 1324(a)(2).

17. Aliens ⇐56

Fact that government agents filed "control load sheets" for aliens who were illegally transported to alert law enforcement officers that aliens were connected to an undercover operation and should not be intercepted did not compel conclusion that aliens were under such INS control that no person could further their illegal presence in the United States for purposes of statute prohibiting transportation of illegal aliens.

Immigration and Nationality Act, § 274, as amended, 8 U.S.C.A. § 1324.

18. Aliens ⇐59

Evidence was sufficient to support conviction for harboring illegal alien, notwithstanding defendant's claim that Government failed to establish that he knew that alien's entry into the United States was illegal; alien testified that he left El Salvador for Mexico on his way to the United States; in Mexico he met third party, who was to help him get into the United States; third party showed alien a hole in the international border fence, through which alien illegally entered the United States; and alien went directly to church where he met defendant who invited alien to stay in apartment behind church. Immigration and Nationality Act, § 274(a)(3), as amended, 8 U.S.C.A. § 1324(a)(3).

19. Aliens ⇐56

Crime of harboring an unlawful alien does not require an intent to aid the unlawful alien for the purpose of evading INS detection. Immigration and Nationality Act, § 274(a)(3), as amended, 8 U.S.C.A. § 1324(a)(3).

20. Criminal Law ⇐870, 1040

While a special verdict in a criminal case is the exception and not the rule, there may be cases in which it is appropriate; however, it is counsel's duty to request a special verdict in order to record the jury's thinking for purposes of appeal; failure to make such request to the trial court waives any error, except plain error, premised on lack of a special verdict.

21. Criminal Law ⇐1040

Trial court's failure to require jury to specify precise subsections of statute upon which conspiracy convictions were based did not require reversal on ground that conviction may not have been unanimous, where defendants did not request a special verdict, and they did not demonstrate plain error.

22. Aliens ⇐56

Defendant's conviction for conspiring to violate statute prohibiting the inducing of aliens to enter the United States was not invalid simply because the criminal acts were committed in Mexico, and the defendant was not a United States citizen or resident. Immigration and Nationality Act, § 274(a)(4), as amended, 8 U.S.C.A. § 1324(a)(4).

23. Criminal Law ⇐1139

Court of Appeals reviews de novo a district judge's decision to bar a necessity defense.

24. Criminal Law ⇐38

As a matter of law, defendant must establish existence of four elements to be entitled to a necessity defense: that he was faced with a choice of evils and chose the lesser evil; that he acted to prevent imminent harm; that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and that there were no legal alternatives to violating the law.

25. Aliens ⇐56

Defendants convicted of masterminding and running an underground railroad that smuggled Central American aliens into the United States illegally were not entitled to a necessity defense, based on allegation that the INS continuously frustrated the legal avenue of obtaining refugee status; defendants failed to show that there were no legal alternatives to violating the law, because they failed to appeal to the judiciary to correct any alleged improprieties by the INS and the immigration courts.

26. Aliens ⇐56
Constitutional Law ⇐84.5(1)

First Amendment free exercise clause did not prevent conviction of defendants charged with smuggling, transporting, and harboring Central American aliens as part of "sanctuary movement," on ground that their sincere religious beliefs inspired them to commit the forbidden conduct; even assuming that defendants proved that enforcement of penal statutes interfered with their religious beliefs, Government's interest in controlling immigration outweighed their purported religious interest. U.S.C.A. Const.Amend. 1; Immigration and Na-

tionality Act, §§ 274, 275, as amended, 8 U.S.C.A. §§ 1324, 1325.

27. Constitutional Law ⇐84.5(1)

The First Amendment did not provide defendants charged with transporting and harboring illegal aliens from Central America, as part of religious "sanctuary movement," with an additional expectation of privacy making the "invited informer" rationale inapplicable in judging validity of infiltration of various church meetings and activities by government agents and informants and their tape recording of church meetings; under the invited informer rule, Government did not need a search warrant to place informants at church meetings or to tape-record such meetings. U.S.C.A. Const.Amends. 1, 4.

28. Constitutional Law ⇐91

There are two limitations on Government's use of undercover informers to infiltrate an organization engaging in protected First Amendment activities: Government's investigation must be conducted in good faith, i.e., not for the purpose of abridging First Amendment freedoms; and the First Amendment requires that undercover informers adhere scrupulously to scope of a defendant's invitation to participate in the organization. U.S.C.A. Const.Amend. 1.

29. Criminal Law ⇐37.10(2)

Defendants charged with smuggling, transporting and harboring illegal aliens from Central America, as part of religious "sanctuary movement," did not establish that they were selectively prosecuted because of their vocal opposition to government refugee and asylum policy and to United States foreign policy in Central America; defendants were similarly situated to organized alien smuggling conspiracies for profit, and they did not contend that the Government does not prosecute organized alien smugglers. Immigration and Nationality Act, §§ 274, 275, as amended, 8 U.S.C.A. §§ 1324, 1325.

1. Appellants were convicted on the following counts:

30. Criminal Law ⇐36.5

Law enforcement officials are not precluded from initiating an investigation after they become aware of illegal conduct through an unconstitutional search; where the Government stumbles upon illegality, albeit through an improper search, the law breaker is not somehow insulated forever thereafter from further independent investigation. U.S.C.A. Const.Amend. 4.

31. Criminal Law ⇐394.1(3)

Evidence resulting from Government's investigation of "sanctuary movement" which smuggled, transported, and harbored illegal aliens from Central America was not poisonous fruit of an illegal search of defendant; although Government used the illegally seized information to initiate an investigation of the entire organization, it did not use the information to target defendant individually; Government's undercover informer who testified against defendant was not given access to the illegal evidence and was directed only to make contact with a third party; thus, the illegally seized information did not direct the Government to evidence admitted at trial against defendant. U.S.C.A. Const.Amend. 4.

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Donald M. Reno, Jr., Sp. Asst. U.S. Atty., Seattle, Wash., for plaintiff-appellee.

Appeal from the United States District Court for the District of Arizona.

Before HALL, WIGGINS and THOMPSON, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Appellants were convicted of masterminding and running a modern-day underground railroad that smuggled Central American natives across the Mexican border with Arizona.[1] Beginning in Mexico,

1. Maria del Socorro Pardo Viuda de Aguilar ("Aguilar"): count 1 charging conspiracy to vio-

various appellants directed illegal aliens to several Arizona churches that operated as self-described sanctuaries. From Arizona, appellants sent many of these illegal aliens to Chicago, Illinois, where they were subsequently dispersed throughout the United States to so-called safehouses. Appellants were sentenced to varying terms of probation; none received jail terms.

Appellants contend that the aliens they smuggled, transported, and harbored are bona fide political refugees entitled to political asylum in the United States pursuant to the Refugee Act of 1980, Pub.L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1982)). Yet appellants counseled the aliens to avoid American immigration authorities at all costs and to lie to them if apprehended. Appellants' disdain for federal immigration law is perhaps best evidenced by an episode at the Sacred Heart Church in Nogales, Arizona. Appellant Anthony Clark had arranged for a government informant to transport to Phoenix several illegal aliens. Two of these aliens had been intercepted and released by American immigration officials. The authorities had issued documents to these aliens requiring them to appear before an immigration judge. Clark took these documents and tore them up, instructing the aliens that they had erred by truthfully identifying themselves as Salvadoran citizens.

Appellants offer two explanations to justify their avoidance of Immigration and Naturalization Service (INS) officials. First, appellants contend that the INS improperly failed to approve the meritorious political asylum applications of aliens who applied at official ports of entry. The INS's misfeasance, according to appellants, necessitated a course of deliberate avoidance of INS officials during and after an alien's entry into the United States. But appellants also seek to justify their policy of discouraging an alien from presenting himself to the INS on the basis that appellants were mistaken as to the necessity of such presentment. Appellants state that they believed the 1980 Refugee Act did not require either an alien's formal presentment to the INS or an application for political asylum in order for an alien to be legally entitled to reside here.

The tension between appellants' mistake of law explanation and their deliberate avoidance explanation is patent, and it permeates this entire case. On the one hand, appellants acknowledge a detailed understanding of and familiarity with the INS' procedures for the filing of applications for political asylum. But appellants also profess naivete and ignorance of the critical

late 8 U.S.C. § 1324, and count 2 charging bringing in alien Ana Trinidad Martel-Benavidez in violation of section 1324(a)(1).

2. Anthony Clark ("Clark"): count 20 charging harboring alien Jose Ruben Torres in violation of section 1324(a)(3).

3. Philip M. Conger ("Conger"): count 1 charging conspiracy to violate section 1324, count 6 charging aiding and abetting the unlawful entry of aliens Angel Mejia, Edwin Chavez, and Mervin Chavez in violation of 1324(a)(2), and count 26 charging aiding and abetting the unlawful entry of alien Alejandro Rodriguez in violation of 1325.

4. John M. Fife ("Fife"): count 1 charging conspiracy to violate section 1324, count 4 charging aiding and abetting the unlawful entry of aliens Angel Mejia, Edwin Chavez, and Mervin Chavez in violation of 1324(a)(2), and count 5 charging aiding and abetting the unlawful transportation of alien Elba Teresa de Lopez in violation of 1324(a)(2).

5. Peggy Hutchison ("Hutchison"): count 1 charging conspiracy to violate section 1324.

6. Wendy LeWin ("LeWin"): count 16 charging unlawful transportation of aliens Joel Morelos-Lopez and Gabriela Ruiz de Morelos in violation of 1324(a)(2).

7. Darlene Nicgorski ("Nicgorski"): count 1 charging conspiracy to violate section 1324, count 10 charging aiding and abetting the unlawful transportation of aliens Jose Antonio Nieto Nunez, Sandra Nieto Nunez, and Francisco Nieto Nunez in violation of 1324(a)(2), count 11 charging aiding and abetting the unlawful transportation of alien Elba Teresa Lopez in violation of 1324(a)(2), count 18 charging harboring aliens Frederico Cruz-Antonio, Joel Morelos-Lopez, and Gabriela Ruiz de Morelos in violation of 1324(a)(3), and count 19 charging harboring aliens Jose Antonio Nieto Nunez, Sandra Nieto Nunez, and Francisco Nieto Nunez in violation of 1324(a)(3).

8. Ramon Dagaberto Quinones ("Quinones"): count 1 charging conspiracy to violate section 1324, and count 28 charging aiding and abetting the unlawful entry of alien Jose Ruben Torres in violation of 1325.

role of such presentment and application as a prerequisite to an alien's legal status.

I

Appellants sought and received extensive media coverage of their efforts on behalf of Central American aliens. Eventually, the INS accepted appellants' challenge to investigate their alien smuggling and harboring activities. The INS infiltrated the sanctuary movement with several undercover informers and agents who tape recorded some meetings. The record developed at trial is mountainous, and the following factual account seeks only to capture some of the more significant events relevant to this appeal.

A

On March 19, 1982, appellant John M. Fife, in an interview published by a Tucson, Arizona newspaper, announced that he and his church, the Southside Presbyterian Church, "can no longer cooperate with or defy the law covertly as we have done." He challenged the United States government to arrest him as a felon in violation of the immigration laws. Indeed, Fife wrote to the Attorney General of the United States on March 23, 1982, to protest "[t]he current administration of United States law [which] prohibits us from sheltering these refugees from Central America."

The following day, several hundred people rallied at the Federal Building in Tucson to protest the government's failure to grant political asylum to Central American aliens. The protesters then marched to Fife's church and, once there, Fife hosted a news conference at which he introduced a person he described as an undocumented Salvadoran alien who was staying at the church.

Defendant James A. Corbett, acquitted below, was featured in a six-page article in the August 9, 1982, issue of *People* magazine. He described the smuggling of a Salvadoran family across the Mexican border and their reception at Fife's church. In the September 13, 1982, issue of the magazine *U.S. News & World Report*, Fife was featured in an article describing his smuggling activities. The magazine quoted Fife as saying he was "willing to suffer the consequences" of his smuggling.

Appellants' smuggling operation received continuing publicity. On December 12, 1982, the CBS television program *60 Minutes* broadcast a segment featuring Corbett. Before a national television audience, Corbett boasted of having smuggled 250 to 300 illegal aliens from Central America. Later that same month, Fife was featured in a Tucson newspaper article, and again in a February 7, 1983, article. Corbett was interviewed for an article appearing on August 1, 1983 in a Phoenix newspaper. Noting that stepped-up INS border enforcement efforts had proven more effective, Corbett stated that the sanctuary movement had advised aliens to cross the border at different points.

B

The government initiated an undercover investigation of appellants' smuggling activities on March 27, 1984, when undercover agent Jesus Cruz ("Cruz") contacted appellant Ramon Dagoberto Quinones at Quinones' church office in Nogales, Sonora, Mexico. Cruz told Quinones that he supported the sanctuary movement and that he wished to volunteer. Cruz next met Quinones on April 16, 1984, when he accompanied Quinones to the Mexican federal prison in Nogales, where Mexico detains Central Americans who have violated Mexican immigration laws. Quinones introduced Cruz to Maria del Socorro Pardo Viuda de Aguilar ("Aguilar"), and the three entered the prison to meet with Central Americans who Mexico was set to deport.

Quinones counseled the Nogales prisoners that if they planned to reattempt their journey to the United States, they should contact certain persons in Mexico who would instruct them on how to avoid Mexican immigration authorities. Quinones also told the prisoners that if they should reach the United States border they should avoid INS officials. He said that if they were apprehended by INS officials, they should lie and claim to be Mexican citizens,

as this would avoid their formal deportation to Central America.

From this introduction to the sanctuary movement, Cruz quickly became appellants' trusted and valued colleague. Cruz met Philip M. Conger on May 3, 1984, in Nogales, Mexico. Cruz accompanied Conger as he drove the Rodriguez family to a hilltop overlooking the United States border. Once there, Conger identified a hole in the border fence and the steeples of the Sacred Heart Church, where he advised the family to go. Conger assured the family that the church would provide them sanctuary. Conger also asked Cruz to give the family a brief history of Mexico so that they could pretend to be Mexicans if apprehended. The family made their way to the church later that week.

Cruz also became involved in Aguilar's and Quinones's plan to smuggle Julio and Ana Benavidez, both Salvadoran citizens, into the United States. On Aguilar's orders, Cruz obtained an envelope from Quinones which contained an immigration document. Cruz gave Aguilar this document, and she instructed Ana to memorize the name, age, and address of the person identified on the document. Aguilar dressed Ana to look like the person portrayed on the document. Cruz, Aguilar, and Ana then went to the Nogales Port of Entry where Aguilar walked 13–year–old Ana through the checkpoint.

Quinones took Julio and Miguel Mejia, another Salvadoran, to the border fence to identify the hole they were to enter through. He told them that if they were caught by the INS they should lie and say they were from Mexico. Julio and Miguel crossed the border in this manner the morning before Aguilar brought Ana through the Nogales checkpoint. Cruz later met with both Julio and Ana at the Sacred Heart Church, and as instructed by Aguilar, Cruz took them to their mother's residence in Phoenix.

Conger and Aguilar also arranged for Cruz and John Nixon, another undercover agent, to drive Miguel and two other illegal aliens, Edwin Chavez and Mervin Chavez, to Los Angeles, California. Nixon discussed these plans with Fife, who suggested a route which he said was not patrolled by the United States Border Patrol. Nixon expressed nervousness to Fife, who assured him: "It's a piece of cake."

Quinones took several aliens, including Jose Ruben Torres, to the familiar hole in the border fence in Nogales, Sonora, Mexico. Torres had told Quinones that he was a Salvadoran who wanted to enter the United States to find work. Quinones told Torres and the others that Clark would assist them once they reached the church. On June 18, 1984, Torres crossed the border alone and soon made his way to Clark's church. Once there, he met Clark and told him that he was from El Salvador and wanted to find a job in the United States.

Clark was also informed that Aguilar had sent Torres. Clark told Torres he would be sheltered in a guest house adjoining the church, and he gave Torres the room key. Clark also assured Torres that he would be given meals. Subsequently, Aguilar instructed Cruz to take Torres and the others from Clark's church to Phoenix. Clark walked them to the cars and said good-bye.

Aguilar assisted Joel Morelos and his wife Gabriela in entering the United States illegally. Gabriela attempted an illegal entry on June 26, 1984, but she was immediately apprehended and returned to Mexico. Joel attempted to enter the same day, but he was also immediately arrested. After being held at a detention facility, he lied to an immigration judge about his nationality, forsaking his Guatemalan citizenship and claiming to be Mexican. He was returned to Mexico by the INS on July 2, 1984. He stayed at Aguilar's house just before attempting a second illegal entry into the United States, this time successfully. Shortly after Joel reached the Sacred Heart Church on July 6, 1984, Conger and Aguilar asked Cruz to transport Joel to Conger's church in Tucson.

Gabriela Morelos and her child had also made their way across the border to reunite with Joel. On July 11, 1984, the three arrived at Darlene Nicgorski's apartment in Phoenix. There was another alien fami-

ly staying at the apartment when they arrived, and Nicgorski asked Cruz to take the other family elsewhere so the Morelos family could be sheltered. Joel told Nicgorski about his initial apprehension by the INS and his subsequent return to Mexico. He also told her about his recent successful crossing the week before. Later that day, Nicgorski arranged for the Morelos family to leave her apartment and to be harbored at another location. Nicgorski had two other Central Americans staying with her at that time.

Joel told Nicgorski that he wished to be transported to Santa Fe, New Mexico, or Philadelphia, Pennsylvania. Cruz met with Nicgorski on July 20, 1984, at the Alzona Lutheran Church in Phoenix. Photographers were present taking pictures, and television interviews were being conducted for later broadcast. Nicgorski told Cruz that the Morelos family and another family were set to be transported to the northern part of the United States. The aliens were wearing handkerchiefs covering their faces.

Cruz also met Wendy LeWin, who was designated to drive the Morelos family. The family loaded their luggage into LeWin's vehicle, and then left for Santa Fe, New Mexico. During the fourteen-hour trip, Joel shared his experiences in Guatemala with LeWin and expressed his belief that he was entitled to political asylum. Joel testified that he did not remember telling LeWin about his two recent illegal entries into the United States. He also testified that so many different persons drove his family from Santa Fe to Philadelphia, he could not recollect any of their names.

Francisco Nieto and his family, Salvadorans, crossed from Mexico to Arizona in July, 1984, with the assistance of sanctuary movement workers. After crossing, they were driven to the Southside Church in Tucson where they met Fife and Nicgorski. Several days later they were driven to Phoenix to be with Nicgorski. Cruz saw Nicgorski and LeWin at the Alzona Church in Phoenix on July 22, 1984. LeWin introduced Cruz to the Nieto family, whom she described as having arrived from El Salvador. Later on, Nicgorski asked Cruz to drive some members of the Nieto family in his car to a trailer in South Phoenix. Nicgorski drove the others in her car and Cruz followed.

Nicgorski kept the family at the South Phoenix trailer for one week. She asked Cruz if he would transport the Nieto family to Albuquerque, New Mexico, and he agreed. On July 26, 1984, Cruz and other undercover agents, including Nixon, arrived to drive the family to Albuquerque, as requested. Nicgorski gave Cruz $100 for expenses. She also gave Nixon a card with names and telephone numbers of persons to contact after they arrived in Albuquerque.

Because of their considerable contribution to the sanctuary movement, Cruz, agent Nixon, and another undercover informer, Soloman Graham, were invited to join meetings of the movement's inner circle at the Southside Church. They attended such a meeting at the church on August 27, 1984. Appellants Fife, Conger, and Corbett participated, along with several other sanctuary movement members.

The discussion initially focused on a group of four Salvadoran children and a woman, Elba Teresa, who were in Mexico City, Mexico, and sought assistance crossing the United States border. Fife expressed concern that if these aliens were not moved promptly, it would interfere with their efforts to smuggle 23 Guatemalans across the border. Corbett suggested that innovative methods were necessary to aid the Guatemalans, such as concealing them in cars or using remote border crossing points. Conger suggested using a border graveyard in Douglas, Arizona. Finally, Fife stated that they had to sell or trade four vehicles because they operated in border areas so frequently that the INS probably linked them to smuggling.

Cruz attended another meeting on September 4, 1984, with Fife, Conger, Nicgorski, Peggy Hutchison and Corbett. Conger said that he had an argument with Quinones about smuggling the 23 Guatemalans who, in any event, already had made

their way independently to Colorado. On September 10, 1984, Cruz was invited to attend his third meeting at the Southside Church. Conger, Fife, Hutchison, and others were present. The topic of discussion was how to smuggle the Elba Teresa group across the Mexican border. They debated who amongst them was most qualified to go to Mexico City to assist the aliens, but no decision was reached. Hutchison opposed sending two new recruits to the sanctuary movement, as they were too inexperienced.

Hutchison and Fife subsequently brought the Elba Teresa group across the border. On October 29, 1984, Cruz and Graham were at Nicgorski's apartment in Phoenix when the group arrived. Nicgorski asked them to drive the group to Canoga Park, California. A sanctuary worker from Seattle, Washington, came along and covered most of the trip's expenses. Cruz attended his last meeting at the Southside Church on November 26, 1984. Nicgorski, Conger, Hutchison, and others discussed plans to smuggle three separate groups of Central Americans across the border.

II

On January 10, 1985, the government filed an indictment that ultimately led to the conviction of appellants. Along with the indictment, the government brought a motion *in limine*, which essentially sought to exclude evidence that appellants believed that the 1980 Refugee Act entitled the Central American aliens to enter or reside in the United States lawfully. The government contended that appellants' sincere belief that the aliens were refugees under the Refugee Act would not, as a matter of law, negate the specific intent that appellants had to bring the aliens surreptitiously into the United States without INS inspection. According to the government, the mere fact that appellants sought to transport the aliens into the United States without inspection satisfied the specific intent requirement under 8 U.S.C. § 1324 (1982). Consequently, pressed the government, "[w]hatever status to which the [appellants] concluded these aliens were entitled under the Refugee Act is irrelevant."

[1] On October 28, 1985, the district court granted the government's *in limine* motion. The lower court excluded from trial "evidence of [appellants'] belief that those aliens involved in the charges were refugees" based on their interpretation of the immigration laws. We review the district court's decision to preclude a mistake of law defense under the nondeferential de novo standard. *United States v. Scott*, 789 F.2d 795, 797 (9th Cir.1986).

A

[2] Appellants place principal reliance on the Supreme Court's decision in *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), for their contention that they were entitled to present evidence to the jury about their interpretation of section 1324 and the 1980 Refugee Act. Section 1324 makes it a crime to knowingly or willfully smuggle, transport, or harbor an alien "not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens...."[2] Because this

2. Section 1324(a) states in full:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

statute contains a legal element as part of its definition—"lawfully entitled to enter or reside within the United States"—appellants contend that *Liparota* permits a mistake of law defense.

Liparota involved a prosecution under 7 U.S.C. § 2024(b), which provides criminal sanctions for anyone who "knowingly uses, transfers, acquires, alters, or possesses [food] coupons ... in any manner not authorized by ... the regulations." The government argued that defendant "violated the statute if he knew that he acquired or possessed food stamps and in fact that acquisition or possession was in a manner not authorized by statute or regulations." *Liparota*, 471 U.S. at 423, 105 S.Ct. at 2087. Stated differently, the government's position was that the second half of the statute contained no *mens rea* requirement. Defendant urged a different reading of section 2024(b)(1), claiming that the crime requires both knowledge that he acquired or possessed the stamps and knowledge that he had done so in an unauthorized manner. *Id.* The Court confronted the issue, therefore, whether Congress intended this statute to contain this *mens rea* requirement. The Court addressed this question strictly from the perspective of statutory interpretation. *Id.* at 423, 424 n. 6, 105 S.Ct. at 2087 n. 6.

B

The government in the present case does not take issue with appellants' characterization of the *mens rea* element of section 1324. Nevertheless, appellants cite to a footnote in *Liparota* for the proposition that section 1324 permits a mistake of law defense. The *Liparota* majority inserted the following footnote to defend against the dissent's accusation that it was creating a mistake of law defense:

> Our holding today no more creates a "mistake of law" defense than does a statute making knowing receipt of stolen goods unlawful. In both cases, there is a legal element in the definition of the offense. In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the "use, transfer, acquisition," etc. were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It *is*, however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a § 2024(b)(1) violation that one did not know that one's possession was unauthorized.

Id. at 425 n. 9, 105 S.Ct. at 2088 n. 9 (citations omitted).

This language establishes that appellants were entitled to assert as a defense to their indictment under section 1324 that they did not know that the aliens in question were unlawful. From this entitlement, appellants take the unsupported leap that they may introduce any evidence at all that would advance this defense. The meaning of *Liparota* does not stretch this far; it states no more than that defendant was entitled to a defense that attempted to negate an element of the crime. That case never even purported to establish *the type*

> (4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—
> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.
>
> All references made to, and analysis of, section 1324 are to this version. In 1986 section 1324 was revised. 8 U.S.C. § 1324(a) (Supp. IV 1986).

of evidence that may be used to support a defense that a mental element defined in a criminal statute is lacking. Instead, we are guided by the prudent and deep-rooted principle of *ignorantia legis non excusat* and the case law. We conclude that appellants may not establish a mistake of law defense by proffering evidence of their misunderstanding of the aliens' status which is based on their statutory construction.

1

It is axiomatic that ignorance or mistake of law is no defense. *See United States v. Fierros,* 692 F.2d 1291, 1294 (9th Cir.1982), *cert. denied,* 462 U.S. 1120, 103 S.Ct. 3090, 77 L.Ed.2d 1350 (1983); *Liparota v. United States,* 471 U.S. 419, 441, 105 S.Ct. 2084, 2096, 85 L.Ed.2d 434 (White, J., dissenting); *see also United States v. Sherbondy,* 865 F.2d 996, 1002 (9th Cir.1988) ("[T]here are few exceptions to the rule that ignorance of the law is no excuse."). Legal scholars have postulated that this ancient doctrine developed out of pragmatic concerns that criminals otherwise would avoid conviction by resorting to the defense of mistake or ignorance of law as a sanctuary. "Both commentators and courts have argued that such a defense would become a shield for the guilty because ... defendant's claim of ignorance could not ordinarily be refuted." W. LaFave & A. Scott, Substantive Criminal Law § 5.1, at 586 (1986). Additionally, a defendant, in presenting this defense, easily could convert a trial into a protracted and unruly proceeding. *Cf. id.* In sum, then, at least two practical considerations underpin the doctrine disallowing a defense of ignorance or mistake of law: (a) the difficulty of refuting this defense and (b) trial management. These considerations, as applied to this case, will be addressed in reverse order.

a

Appellants' attempt to admit evidence concerning their understanding of section 1324, in particular, and that section's interaction with other immigration laws, both national and international, in general, cuts to the heart of the concern about trial management. Appellants claim the 1980 Refugee Act as the primary source for their interpretation of "lawfully entitled to enter or reside in the United States." In demonstrating their understanding of how the Refugee Act applies to their case, appellants intended to provide a series of minitrials as to each alien's well-founded fear of persecution. The record makes plain that appellants, in essence, sought to overwhelm the trial judge with a barrage of evidence that would have included graphic descriptions of horrifying torture and human rights abuses in Central America. For example, counsel for appellants instructed the judge that he must "listen[ ] to the [aliens'] testimony ... as to whether or not these folks are unlawfully here." This must be done, appellants continued, for "each and every alien" in order to "prove that defendants knew that these [aliens] were not entitled to be here under the 1980 Refugee Act." Appellants also rely on international law for their understanding of the immigration laws. In their memorandum in opposition to the government's *in limine* motion, they argued that they believed that international law rendered the aliens lawfully entitled to enter or reside here. At the hearing on this motion, the government's counsel informed the court that one objective for the motion was to avoid "cross-examining all these aliens about let me hear your life history from the time that you were first born and grew up in San Salvador." Appellants' utter silence in the face of this concern is revealing; they did nothing to assuage the government's fears.

b

It is clear, therefore, that a rule which would allow appellants essentially to put Reagan Administration foreign policy on trial would be foolish. A trial as appellants envisaged not only would have been interminable, but also would have placed an intolerably difficult burden on the government—to refute appellants' claim of their mistaken understanding of the law.

The Court in *Liparota* was mindful of the importance of not placing "an unduly

heavy burden on the Government in prosecuting violators" of federal crimes, 471 U.S. at 434, 105 S.Ct. at 2092, but concluded that it had not transgressed its own admonition. The government in that case, for example, could "introduce[ ] evidence that petitioner bought food stamps at a substantial discount from face value ...[,] that he conducted part of the transaction in a back room of his restaurant ...[,] and that [the] food stamps themselves are stamped 'nontransferable.'" *Id.* at 434 n. 17, 105 S.Ct. at 2093 n. 17. In contrast, it is hard to imagine what evidence the government in this case could have mustered to rebut appellants' purported understanding of section 1324 and the Refugee Act of 1980; this would be tantamount to requiring the government to prove a negative.

2

The case law also supports the conclusion that appellants could not introduce evidence of their alleged mistaken view of the immigration laws. Preliminarily, it is useful to reexamine the types of possible fact situations that troubled the Court in *Liparota.* The Court worried that "[a] strict reading of the statute with no knowledge-of-illegality requirement would thus render criminal a food stamp recipient who, for example, used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp recipients." *Liparota,* 471 U.S. at 426, 105 S.Ct. at 2088–89. The hypothetical food stamp recipient, no doubt, should be allowed to introduce evidence that he was unaware that the store charged exorbitant prices. *Liparota,* therefore, sanctioned a defense that would negate the *mens rea* component defined in the statute by permitting factual evidence of the circumstances as the defendant perceived them to be.[3]

This interpretation of *Liparota* is consistent with our decision in *United States v. Fierros,* 692 F.2d 1291 (9th Cir.1982), where we analyzed the ignorance or mistake of law defense in the context of a section 1324 prosecution. *See also United States v. Sherbondy,* 865 F.2d 996, 1002 (9th Cir.1988) (citing *Fierros's* entire ignorance of law discussion for the proposition that "ignorance of law is no defense to charge of knowingly or willfully harboring an alien in violation of 8 U.S.C. § 1324(a)"). Specifically, we examined the very claim made in *Liparota*—that defendant was "ignorant of an independently determined legal status or condition that is one of the operative facts of the crime."[4] *Fierros,* 692 F.2d at 1294.

We began our examination in *Fierros* with a discussion of *United States v. Petersen,* 513 F.2d 1133 (9th Cir.1975):

> In that case defendant was charged with embezzlement or theft of federal property in violation of 18 U.S.C. § 641, a crime requiring proof of specific intent. We

3. The Court in *Liparota* was candidly uneasy about criminalizing unremarkable behavior. *Liparota,* 471 U.S. at 426, 105 S.Ct. at 2088. This concern is simply not raised by the defense appellants wish to present.

4. Before discussing this exception, the *Fierros* panel was careful to state the general rule that ignorance or mistake of law is no defense to specific intent crimes. The panel noted: "A moment's thought is enough to refute the general proposition that ignorance of law is a proper defense to any crime requiring a specific intent." *Fierros,* 692 F.2d at 1294; *see also American Surety Co. v. Sullivan,* 7 F.2d 605, 606 (2d Cir.1925) (Judge Learned Hand cautioned that "[t]he word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.").

This proposition causes us to reject *United States v. Rhone,* 864 F.2d 832 (D.C.Cir.1989). The D.C. Circuit in *Rhone* permitted defendant in a prosecution for fraudulently claiming state unemployment benefits to present a defense of ignorance or mistake of law. The criminal statutes in question required a specific intent. Based on this fact alone, the court believed that an ignorance of the law instruction, in effect, would remove this element of the crime. The court found the following fault in the jury instruction: "[I]f ignorance of the law is no excuse, then appellant is guilty regardless of whether she knew she was violating the law."

The *Rhone* court then doubted in dicta that an objectively reasonable limitation on an ignorance or mistake of law defense would be proper. This observation also conflicts with language in our *Fierros* opinion; and for reasons articulated in the following footnote, we disagree with this dicta.

held there that Petersen was entitled to an instruction on his defense that he reasonably believed that the person from whom he bought the property was legally authorized to sell it. *In such a case, the mistake of the law is for practical purposes a mistake of fact.*

Fierros, 692 F.2d at 1294. Applying the teaching of *Petersen* to a case in which a defendant is accused of violating section 1324, we then illustrated the type of defense that properly could be presented. "This type of defense would have been available to appellants in this case if, for example, they had asserted reasonable grounds to believe [5] that the workers were not aliens or that they had been legally admitted to the United States." *Id.* Significantly, these illustrations depict defendant's understanding of the *factual* events that formed the basis for prosecution. If the facts were as defendant supposed, he would not have the requisite culpability prescribed by the statute.[6]

5. The qualification "reasonable grounds to believe" in *Fierros* contemplates that a defense of ignorance or mistake of law is available only if the ignorance or mistake is objectively reasonable. *See also United States v. Kelley*, 539 F.2d 1199, 1204 (9th Cir.1976) ("Neither civil disobedience *nor unreasonable and bad faith mistakes of law should constitute a defense to a prosecution.*") (emphasis added). We express no opinion about whether this limitation exists when a defendant seeks to proffer evidence that his perception of factual events negatives the *mens rea* provided in the statute; we are not confronted with such a claim in this case. Similarly, we are not called upon to decide whether this limitation applies to cases in which the ignorance or mistake of law defense is allowed because a criminal statute imposes an affirmative legal duty on defendant. *See Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (ignorance of law claim permitted to defend against prosecution under statute imposing affirmative duty upon felons to register); *see also United States v. Golitschek*, 808 F.2d 195 (2d Cir.1986); *United States v. Burton*, 737 F.2d 439 (5th Cir.1984).

We note, however, that the pragmatic considerations discussed earlier make such a qualification essential were we to adopt appellants' position that they should be allowed to demonstrate their construction of the immigration laws. We note further that appellants' contention that they understood the Refugee Act of 1980 to permit them surreptitiously to smuggle, transport, and harbor aliens while studiously avoiding presentment to the INS is entirely unreasonable. We conclude as an alternative holding, therefore, that the district court did not err in granting the government's *in limine* motion because appellants' mistake of law defense was objectively unreasonable.

6. Section 2.04 of the Model Penal Code ("Code") proposes a very general statute that would allow a defense for "ignorance or mistake as to a matter of fact or law." *Accord* W. LaFave & A. Scott, Substantive Criminal Law § 5.1, at 577 (1986). The comment to the Code counsels against distinguishing between mistake of law and mistake of fact. Model Penal Code § 2.04 comment 1, at 270 n. 2 (1985). Many states, nevertheless, permit only a mistake of fact defense. *See id.* at 280.

The Code itself recognizes that it is putting forth a "general principle" concerning the defense of ignorance or mistake of law. Model Penal Code § 2.04 explanatory note. The problem with a proposal that sweeps so broadly, such as section 2.04, is that it may fail to anticipate all possible circumstances or, as in this case, all possible defenses. Nothing in the Code, including the statutory text, the explanatory note, and the comment, indicates that it anticipated the defense appellants present in this case. Appellants intended to assert a unique defense—that based on their study of the immigration laws, they misapprehended the laws' reach.

This sort of defense raises novel concerns not addressed by the Code. The Code recognizes that the touchstone consideration for allowing both a mistake of law and mistake of fact defense is that both eliminate culpability equally. For that reason the Code concludes that any distinction is unwarranted. However, in the unique circumstances of this case, the basis for this conclusion is undermined. Appellants were well aware of the laws regulating their conduct. Indeed, they were provided with a clear articulation of the potential legal consequences of their underground movement, if prosecuted. In "Sanctuary: A Justice of Ministry," the Chicago Religious Task Force on Central America clearly and emphatically warned that "*those who provide help to Salvadoran and Guatemalan refugees are subject to prosecution under the Immigration and Nationality Act.*" (emphasis in original). This informational manual even detailed the precise charges on which violators would be prosecuted and the possible term of imprisonment that each carried. Despite this knowledge and warning of possible legal ramifications, appellants decided to form a sanctuary movement that smuggled, transported, and harbored numerous illegal aliens. Their conduct in the face of their knowledge is itself blameworthy. *See* Note, *Ignorance of the Law as an Excuse*, 86 Colum.L.Rev. 1392, 1413 (1986). Moreover, as previously indicated, strong policy concerns require us to resist appellants' attempt to make a mockery out of the trial proceedings by conducting a series of mini-trials.

Our holding, which prevents appellants from offering evidence of mistake premised on an erroneous construction of the immigration laws, is also consistent with established Fifth Circuit authority. *United States v. Merkt*, 764 F.2d 266 (5th Cir.1985) (*Merkt I*) is squarely on point. There defendant was charged with transporting illegal aliens in violation of section 1324(a)(2). Defendant proffered the defense that she lacked the requisite knowledge that the aliens were "in the United States in violation of the law." Similar to appellants in the present case, she claimed a good faith belief in the legality of the aliens based on the Refugee Act. The court rejected this defense.[7] *Id.* at 273; *see also United States v. Merkt*, 794 F.2d 950, 965 n. 18 (5th Cir.1986) (reaffirmation by different panel of *Merkt I's* rejection of this defense), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1603, 94 L.Ed.2d 789 (1987). We come to the same conclusion.[8]

III

[3] Appellants contend that the district court erred in instructing the jury that an alien is not lawfully entitled to enter or reside in the United States as a political refugee unless the alien has filed an application for political asylum. The court granted appellants' requested jury instruction that "the Government must prove beyond a reasonable doubt that an alien was not lawfully entitled to enter or reside within the United States as defined in this instruction." But the court rejected appellants' additional requested instruction that "a person who is a 'refugee' within the meaning of the Refugee Act of 1980 is entitled to enter and reside in the United States."

A

Essentially, the court instructed the jury that a person may not lawfully enter the United States unless he is duly admitted by an immigration officer. Significantly, however, the court provided for the possibility that an alien may be lawfully entitled to reside here subsequent to an illegal entry if he has filed an application for political asylum and has been released pending a final ruling on his application.

The court instructed the jury that "once an alien has been processed by an [INS] agent and released from custody, *following an unlawful entry* he may reside in the [United States] pending further order." (emphasis added). The court specifically instructed the jury to find appellants not guilty on charges of transportation or harboring if an alien had been previously "processed and released by the [INS]."[9] But

Appellants' proffered defense is more analogous to one that attempts to negate the mental element of a crime through reliance on advice of private counsel. In both instances defendant resorts to a studied interpretation of the law as the basis for action. The Code cautions against permitting this type of defense. *See* Model Penal Code § 2.04 comment 3, at 280; *see also* W. LaFave & A. Scott, *supra*, at 595 (noting that case law uniformly rejects such a defense and that the Code is in accord).

7. It is important to emphasize that appellant in *Merkt I* was not raising a mistake of law defense based on a factual misperception. *Merkt I*, 764 F.2d at 273 (recognizing that "a mistake of fact may constitute a valid defense"). She did not, for instance, "assert[ ] reasonable grounds to believe that the workers were not aliens or that they had been legally admitted to the United States." *Fierros*, 692 F.2d at 1294. Instead, like appellants in this case, she attempted to present a defense that relied on her interpretation of the immigration laws.

8. In their discussion about the illegal transportation convictions, appellants reassert their contention that the district court erred in excluding evidence of their alleged good-faith belief in the aliens' lawful status as political refugees. This evidence, they claim, would have negated the "in furtherance of" element of section 1324(a)(2). This contention is meritless in light of our conclusion.

9. Appellants mischaracterize the jury instructions, describing them as having "made the manner of an alien's entry the only factual component of the entitlement issue, limiting aliens legally entitled to enter or reside to those 'duly admitted.'" They argue that the instructions improperly state that a person who entered the United States illegally because he was not "duly admitted" can never be regarded as lawfully entitled to reside here. The instructions, however, do not state the law in this manner. Quite the contrary, the instructions explicitly provide for the possibility of legal status following an "unlawful entry" where the alien has been "processed and released" by an

the court also instructed that prior to an alien's having "file[d] an asylum application," the alien was not lawfully entitled to reside in the United States.

B

The district court's instruction was proper. Section 1324 prevents the bringing in, transporting, or harboring of any alien "not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the [United States] under the terms of this chapter or any other law relating to immigration." Appellants' requested instruction, that refugees are lawfully entitled to enter and reside in the United States, improperly implies that an alien is entitled to enter and reside here without complying with the procedural formalities of the immigration laws.

1

Since its amendment by the 1980 Refugee Act, the Immigration and Nationality Act has provided two distinct methods for an alien claiming political persecution in his home country to avoid deportation, one discretionary and the other mandatory. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 423, 107 S.Ct. 1207, 1208-09, 94 L.Ed.2d 434 (1987); *Vilorio-Lopez v. I.N.S.,* 852 F.2d 1137, 1140 (9th Cir.1988). Section 208(a) of the Act, 8 U.S.C. § 1158(a), authorizes the Attorney General, in his discretion, to grant asylum to an alien having a well-founded fear of persecution in his home country. This section permits the Attorney General to grant an asylum application based upon the alien's subjective fear of persecution where this fear "has enough of a basis that it can be considered well-founded." *Vilorio-Lopez,* 852 F.2d at 1140. The alien need not demonstrate that it is more likely than not that he will be subject to persecution if deported. *Cardoza-Fonseca,* 480 U.S. at 450, 107 S.Ct. at 1222.

Section 243(h) of the Act, 8 U.S.C. § 1253(h), prohibits the Attorney General from deporting an alien "who demonstrates that his 'life or freedom would be threatened' on account of one of the listed factors if he is deported." *Cardoza-Fonseca,* 480 U.S. at 423, 107 S.Ct. at 1209. This section is a mandatory limitation of the Attorney General's power to deport an alien demonstrating that it is more likely than not that he will be subject to persecution in the country to which he would be deported.

There are important procedural and substantive differences between sections 208(a) and 243(h). An application for asylum pursuant to section 208(a) has no necessary relationship to deportation proceedings. An alien can file an application for asylum pursuant to section 208(a) before deportation proceedings have begun. *Bolanos-Hernandez v. I.N.S.,* 767 F.2d 1277, 1281 (9th Cir.1984) (citing 8 C.F.R. § 208.3(a)(2) (1983)). Indeed, an alien can file a section 208(a) asylum application after deportation proceedings have terminated. *See* 8 C.F.R. § 208.11 (1984). By contrast, an alien can only seek to invoke section 243(h)'s mandatory prohibition against deportation in the course of a deportation proceeding, although such an application is also treated as a request for discretionary asylum under section 208(a). *See* 8 C.F.R. § 208.3(b).

While the Attorney General cannot deport an alien making out a successful case under section 243(h), the alien is clearly far better off if he also receives a favorable ruling on his section 208(a) application for discretionary asylum. *Bolanos-Hernandez,* 767 F.2d at 1288 n. 19. For instance, a successful section 208(a) applicant may seek permanent residency after one year,

INS official. But the instructions properly emphasize an alien's obligation to present himself to the INS and file an application for asylum subsequent to an illegal entry in order to be lawfully entitled to reside here. Consequently, appellants are mistaken in arguing that the instructions made being duly admitted a prerequisite to the alien's ability to reside lawfully here after an illegal entry without due admittance.

The 1980 Refugee Act, 8 U.S.C. § 1158(a), expressly permits an alien to apply for asylum as a political refugee either if already "physically present in the United States or at a land border or port of entry." The court correctly instructed the jury that while such an application is pending, an alien is lawfully entitled to remain in the United States irrespective of his initial illegal entry.

while no such entitlement is available to an alien who only has obtained a favorable section 243(h) ruling. *See* 8 C.F.R. § 209.2.

2

Appellants' principal argument is that no asylum application is necessary to render an alien lawfully entitled to enter or reside in the United States. "Thus, a person's status as a refugee does not depend on whether that status has received official acknowledgment; an alien is a refugee under the law before he is officially granted asylum." The district court relied on Fifth Circuit precedent to reject this proposition. In *United States v. Pereira-Pineda*, 721 F.2d 137, 139 (5th Cir.1983), the court held that "[t]he mere possibility that [an alien] may file asylum applications at some point in the future, and thus be allowed to remain at liberty under bond or parole while their right to asylum is determined, does not make them—from the moment they enter this country—entitled to 'reside' here for the purpose of section 1324(a)(2)." The district court below, as noted, instructed the jury that where an alien had filed an application for asylum and had been processed and released, appellants could not be convicted of transporting or harboring because the alien was lawfully entitled to reside in the United States.

3

None of the aliens relevant to this case had filed political asylum applications prior to appellants' arrests. Nonetheless, appellants contend that the jury instructions were improper because "[t]he overall structure of U.S. refugee law presupposes that bona fide refugees *are* lawfully entitled to enter this country, by whatever means, and apply for asylum." As support, they cite the 1980 Refugee Act, which changed the law by permitting undocumented aliens already in the United States to file asylum applications. *See Cardoza-Fonseca*, 480 U.S. at 433, 107 S.Ct. at 1214 ("Prior to the 1980 amendments there was no statutory basis for granting asylum to aliens who applied from within the United States."). Appellants reason that this change acknowledges an alien's right to cross our borders without due presentment.

That Congress created a mechanism for those illegal aliens already inside this country to apply for political asylum hardly amounts to granting illegal aliens a license to cross our borders without being duly admitted. Congress has simply recognized that large numbers of undocumented aliens are in fact within our borders and established an administrative procedure to cope with this reality. It did not proclaim that anyone considering himself the victim of political persecution can cross our borders by stealth and then studiously avoid the authorities in perpetuity. Even a successful asylum applicant remains subject to criminal prosecution for previous immigration law violations, such as failing to have been duly admitted to the United States pursuant to section 1325. *See* 8 C.F.R. § 208.12 (1984).

4

In *United States v. Rodriguez-Rodriguez*, 840 F.2d 697 (9th Cir.1988), the court examined the element of section 1324 requiring the alien to be in the United States in violation of law.[10] Defendants in *Rodriguez* were convicted of transporting undocumented aliens under section 1324. The court rejected their contention that the aliens' mere eligibility for an adjustment of status pursuant to the Immigration Reform and Control Act of 1986 [11] rendered the aliens lawfully entitled to reside in the United States.

The *Rodriguez* court found that as the aliens had not filed applications for an ad-

10. Although the indictment in *Rodriguez* proceeded under the new amended section 1324, both versions require proof that the alien was present in the United States in violation of law.

11. This Act provides that an illegal alien may file an application to have his status adjusted to that of a legal resident if he entered the United States illegally before January 1, 1982, and has resided continuously in the United States in an unlawful status since that date. 8 U.S.C. § 1255a(a)(2)(A). Appellants do not contend that this section renders the aliens they transported and harbored legal residents.

justment of status, their mere ability to have done so did not render them lawfully entitled to reside in the United States. The court specifically relied upon the analogous *Pereira–Pineda* case and described it as having "held that the possibility that aliens might apply for asylum, allowing them to remain at liberty while their rights were determined, did not mean the aliens resided lawfully in the United States before applying for asylum." [12] *Rodriguez*, 840 F.2d at 700. We adopt the *Pereira–Pineda* court's holding that an alien must file an application for political asylum in order to be lawfully entitled to reside in the United States pending a final ruling.

5

Appellants argue that the *Pereira–Pineda* decision incorrectly focuses only upon the role of a discretionary application for asylum pursuant to section 208(a). Appellants argue that section 243(h) provides an independent explanation of why the aliens they assisted were legally entitled to reside in the United States. As the government cannot deport any alien demonstrating a likelihood of persecution, an alien facing such a likelihood is legally entitled to reside here from the moment he crosses into the United States, according to appellants.

Appellants' argument, however, as with their suggested construction of the application provisions of section 208(a), overlooks the procedural formalities of the immigration laws. An alien must file an asylum application under *either* section 208(a) or 243(h). *See* 8 C.F.R. §§ 208.3(b) & 208.10(a) (1984).[13] While a section 243(h) application provides a defense to a deportation proceeding and can only be filed subsequent to the institution of such proceedings, the application is nonetheless necessary in order for an alien to be able to invoke relief under section 243(h). Appellants' contention that section 243(h) renders all undocumented aliens legal residents until the government proves differently at a deportation hearing has no support in logic or precedent, and we reject it.

C

Finally, the court rejects appellants' contention that international law entitled the aliens to reside in the United States without presenting themselves to immigration authorities and filing applications for political asylum. Appellants succinctly describe their international law claim: "[V]iolations by the United States of its obligations under the 1967 [U.N. Refugee] Protocol excused the refugees being assisted by appellants from presenting themselves to the INS and established 'good cause' for their illegal entry and presence."

Appellants offer no authority for this court's ability to force the government to conform to supposed international law obligations. "[I]n enacting statutes, Congress is not bound by international law . . . [;i]f it chooses to do so, it may legislate [contrary to] the limits posed by international law." *United States v. Pinto-Mejia*, 720 F.2d

12. In the alternative, the *Rodriguez* court stated that "[e]ven if mere eligibility for adjustment of status did mean the aliens remained in the United States lawfully, defendants still would have violated 8 U.S.C. 1324 . . . because the aliens had 'entered . . . the United States in violation of law.'" 840 F.2d at 700. This statement implies that a person violates section 1324 by transporting or harboring an alien *lawfully entitled to reside* in the United States simply because the alien originally had entered the United States in violation of law. Applied to this case, that would mean that appellants could be guilty of harboring and transporting aliens *even if the aliens had applied for political asylum*, simply because the aliens had originally effected an illegal entry. The district court specifically rejected this reasoning, and instructed the jury that, to the contrary, appellants should be *acquitted* of all charges of harboring and transporting if the aliens had pending applications for political asylum, because this renders the aliens lawfully entitled to reside in the United States irrespective of their manner of initial entry. To the extent that the *Rodriguez* decision implies that section 1324 is violated where a person harbors or transports an alien who has a pending application for political asylum, the district court's instruction to the contrary did not prejudice appellants. Accordingly, we need not confront the wisdom of the *Rodriguez* court's dicta.

13. "A request for asylum made in exclusion or deportation proceedings shall be made on Form I–589." 8 C.F.R. § 208.10(a).

248, 259 (2d Cir.1983), *modified on other grounds*, 728 F.2d 142 (2d Cir.1984).

For appellants' argument to have any coherence, they must contend that the Executive Branch has refused to comply with binding international law obligations. The question then arises whether any such obligations have the force of law. Appellants note that section 1324 provides that an alien is judged to be lawfully entitled to enter or reside in the United States "under the terms of this chapter or any other law relating to the immigration or expulsion of aliens." Appellants contend that the "any other law" language incorporates international law. Indeed, the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(17), defines law as "all laws, conventions, and treaties of the United States relating to immigration, exclusion, deportation or expulsion of aliens."

The only relevant convention or treaty appellants identify is the United Nations Protocol Relating to the Status of Refugees, to which the United States is a party. Congress intended the definition of "refugee" in the 1980 Refugee Act to be interpreted in conformance with the Protocol. *Cardoza-Fonseca*, 107 S.Ct. at 1216. The United Nations has produced a Handbook which provides "significant guidance in construing the Protocol, to which Congress sought to conform." *Id.* at 1217 n. 22 (referring to the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979)). But neither the Handbook nor the Protocol have the force of law, as "the determination of refugee status ... is incumbent upon the Contracting State in whose territory the refugee finds himself." *Id.* (quoting the Handbook). The Protocol was not intended to be self-executing. *INS v. Stevic*, 467 U.S. 407, 428 n. 22, 104 S.Ct. 2489, 2500 n. 22, 81 L.Ed.2d 321 (1984).

[4] As the Protocol is not a self-executing treaty having the force of law, it is only helpful as a guide to Congress's statutory intent in enacting the 1980 Refugee Act. Consequently, the district court correctly concluded that the Protocol is not "other law" under section 1324. Furthermore, the Protocol provides no evidence that Congress intended to permit aliens to reside in the United States without presenting themselves to immigration authorities. Quite the contrary. Indeed, appellants acknowledge that the Protocol, incorporating Article 31(1) of the 1951 Convention, requires that an alien refugee present himself to immigration authorities "without delay" following illegal entry into a foreign land. The district court therefore properly rejected appellants' argument that the Act does not require presentment following an illegal entry.

Finally, appellants argue that the international law norms of temporary refuge, humanitarian initiative, and nonrefoulement are self-executing and binding sources of law justifying appellants' actions. First, the Immigration Act's definition of "law" does not include international norms; only conventions and treaties. Second, these norms have nothing whatsoever to say about presentment following illegal entry, which the Protocol expressly requires. Appellants' position on these matters is meritless.

IV

Aguilar contests her conviction under section 1324(a)(1) for "bringing in" Ana Benavidez on May 24, 1984. The trial court instructed the jury that each substantive count of the indictment required the government to prove that the alien had made an entry into the United States. The court defined "entry" as "a crossing into the territorial limits of the United States in either: One, inspection and admission by an immigration officer; or two, an actual and intentional evasion of inspection." Aguilar argues that the district court erred by rejecting appellants' proposed instruction on the definition of "enter."

A

The government does not dispute that a section 1324(a)(1) "brings into" conviction requires the alien to enter the United States. In *United States v. Bunker*, 532

F.2d 1262, 1265 (9th Cir.1976), the court stated "[w]e agree that an illegal entry has been at the core of essentially all prosecutions under [section 1324(a)(1)]."

As the government correctly notes, Aguilar's statement of the facts essentially concedes that she obtained a fraudulent entry document and gave it to Benavidez for the purpose of effecting Benavidez' illegal entry into the United States. She helped Benavidez use make up and hair rollers to change her appearance to that of the picture on the fraudulent entry document, and she coached Benavidez how to lie to immigration officials at the border. Aguilar walked in front of Benavidez through the check point and then the two joined up and walked to the Sacred Heart Church. Benavidez returned the fraudulent entry document to Aguilar along the way.

1

[5] Appellants requested the following jury instruction:

> There is no violation of the statute making it a crime to bring an illegal alien into the United States unless the alien has "entered" this country. To accomplish an "entry" within the meaning of the statute, an alien must be present in the United States and be free of official restraint. Thus, unless you find that the alien a defendant is alleged to have brought in was free of official restraint at the time of the acts charged in the Indictment, you must acquit defendant.

In *United States v. Oscar*, 496 F.2d 492 (9th Cir.1974), the court reversed defendant's conviction for aiding and abetting two aliens attempting to enter the United States by eluding inspection under section 1325. Section 1325 makes it a misdemeanor for an *alien* to effect an illegal entry into the United States, while section 1324(a)(1) makes it a felony to bring in an alien making an illegal entry. As defendant in *Oscar* was charged with aiding and abetting the entry of aliens, the court's resolution of the central issue whether the aliens actually had entered the United States applies equally to section 1324, which also requires proof of an entry.

The *Oscar* court accepted defendant's theory that an entry "has not been accomplished until physical presence is accompanied by freedom from official restraint." *Id.* at 493. The court found that the aliens defendant was accused of aiding and abetting had not entered the United States, although "they physically crossed the international border upon arrival at the Port of Entry." *Id.* The aliens were never free from official restraint because immigration inspectors were suspicious from the outset and arrested them at a secondary inspection area.

The critical aspect of the *Oscar* decision is its adoption of the definition of "entry" derived from deportation cases. In the deportation setting, an alien is entitled to certain procedural protections once he has entered the United States. Illegal aliens who technically had crossed the international border but were in the constructive custody of immigration authorities at that time are not said to have entered the United States. Continuous surveillance by immigration authorities can be sufficient to place an alien under official restraint.[14]

The *Oscar* court held that the definition of entry in the deportation context applies with equal force to a criminal prosecution under section 1325. "It is unlikely that Congress would define a term in § 1101 for use throughout Chapter 12 if it intended the term to have different meanings in different sections of the chapter." [15] *Oscar*, 496 F.2d at 494.

14. The government does not dispute appellants' description of the freedom from official restraint doctrine as it applies to the deportation context. Aguilar cites a Board of Immigration Appeals statement that "[t]here is no entry when the alien is under official restraint [taking] the form of surveillance, unbeknownst to the alien...." *Matter of Pierre*, BIA Interim Decision # 2239 (October 5, 1973).

15. "The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860, 106 S.Ct. 1600, 1606, 89 L.Ed.2d 855 (1986).

The district court clearly did not accept this definition of entry. In rejecting appellants' requested instruction, the court stated "[a]nd I also believe that the official restraint with respect to a smuggling case, using that term with respect to 1324 issues, is not the law."

The government argues that appellants' requested instruction "illustrates the inappropriate application of the official restraint doctrine as developed in civil deportation/exclusion hearing issues to the criminal feature of 'entry' in 1324(a)(1)." But the *Oscar* decision is the law of this circuit and we are bound by it. The government also fails to establish that *Oscar* is in conflict with either *United States v. Harding,* 432 F.2d 1218 (9th Cir.1970), or *United States v. Martin-Plascencia,* 532 F.2d 1316 (9th Cir.), *cert. denied,* 429 U.S. 894, 97 S.Ct. 255, 50 L.Ed.2d 177 (1976).[16]

2

"A trial court must instruct the jury on a defendant's theory of the case only if the evidence sufficiently supports the theory and the theory is supported by the law." *United States v. Sommerstedt,* 752 F.2d 1494, 1496 (9th Cir.), *amended,* 760 F.2d 999 (9th Cir.), *cert. denied,* 474 U.S. 851, 106 S.Ct. 149, 88 L.Ed.2d 123 (1985). As demonstrated above, the *Oscar* decision amply supports appellants' legal theory. But the question remains whether the district court "properly rejected [the proposed instruction] as not applicable to the facts of this case." *United States v. Cervantes,* 542 F.2d 773, 778 (9th Cir.1976) (quoting *United States v. Makekau,* 429 F.2d 1403, 1404 (9th Cir.), *cert. denied,* 400 U.S. 904, 91 S.Ct. 143, 27 L.Ed.2d 141 (1970)).

Aguilar contends that she established facts sufficient to warrant her freedom from official restraint instruction. She cites informer Cruz's transportation of Aguilar and Benavidez to the border crossing and his observation of the two entering the United States. Cruz also had alerted border control agents, through filing control load sheets, "of the tentative smuggling activities ... in order that the aliens would not be intercepted by the agents." These control sheets alerted border area law enforcement officials that Aguilar and Benavidez were connected to an ongoing investigation and were not to be arrested.[17]

The government argues that Aguilar must demonstrate that Benavidez "was under official restraint before *and at all times after her illegal entry.*" (emphasis added). The aliens in *Oscar* were "*never* free from the official restraint of the customs officials" because they were arrested at the border. *Oscar,* 496 F.2d at 493 (emphasis added). Similarly, the Board of Immigration Appeals statement concludes that surveillance prior to an arrest is official restraint because the alien "lacks the freedom to go at large and mix with the population." *Matter of Pierre,* BIA Interim Decision # 2239 (October 5, 1973). By contrast, Benavidez stayed at her parents' home from shortly after her entry with Aguilar on May 24, 1984, until her arrest on January 14, 1985.

[6] The government is correct that, pursuant to our *Oscar* decision, an alien must be under official restraint at all times dur-

16. In *Harding,* the court rejected defendant's argument that his convictions for bringing in and transporting under section 1324 were not supported by the evidence. Defendant was discovered at the port of entry to have five illegal aliens in the trunk of his car. The court stated that "the only question is whether he then knew they were concealed in his car." *Id.* at 1219. While *Harding* may have been an opportune case for defendant to argue that his convictions were invalid due to the failure of the aliens to effect an entry free from official restraint, no such argument was made.

In *Martin-Plascencia,* the court never questioned the fundamental validity of the *Oscar* decision. Rather, the court found the facts of the case before it to be "manifestly distinguishable" because the alien had "surreptitiously bypassed the questioning and inspection areas and, out of the view of the immigration officials, crawled through an opening in a six foot chain link fence." 532 F.2d at 1317. The court found that the alien was free from official restraint at the time of his entry, "exercising his free will, youthful enterprise, and physical agility in evading fixed physical barriers." *Id.*

17. It is ironic that Aguilar contends the authorities' decision *not* to interfere with her smuggling placed the aliens under official restraint.

ing and subsequent to physical entry in order to void a section 1324 conviction.[18] Consequently, the question is whether there was any evidence from which a jury could find that Benavidez was under official restraint during the seven months she resided in the United States before her arrest.

[7] Aguilar argues that Benavidez *was* under official restraint during her entire residency in the United States due to alleged daily visits to her house by Cruz. Yet the rationale for the official restraint doctrine does not support a finding that such brief visits constitute official restraint. The doctrine is premised on the theory that the alien is in the government's constructive custody at the time of physical entry. By contrast, where an alien is able to exercise his free will subsequent to physical entry, he is not under official restraint. *Martin-Plascencia,* 532 F.2d 1316.

[8] It is clear that Benavidez exercised such free will in the seven months she lived with her parents. Cruz's short visits were insufficient to prevent her from escaping. Neither was she free on bond pending a formal immigration hearing, a form of constructive custody. In short, there was no evidence from which a jury could find that Benavidez was under official restraint during her entire residency in the United States. Consequently, the district court did not err in rejecting appellants' requested instruction.[19]

B

[9] Finally, Aguilar's motion for judgment of acquittal, contends that the evidence does not support a finding that she brought Benavidez into the United States within the meaning of section 1324. Aguilar relies almost exclusively upon a 1927 Sixth Circuit decision. *McFarland v. United States,* 19 F.2d 805 (6th Cir.1927). Defendant in *McFarland* met with his son in Canada and provided him with another person's entry documents. The two then crossed into the United States by ferryboat where defendant proceeded through immigration. The court concluded that section 1324 was "distinctly inappropriate, although not necessarily inapplicable, to one who persuades or aids the immigrant to take himself by public conveyance up to the inspection line for examination." *Id.* at 806.

McFarland was decided under the predecessor to the section 1324(a)(1) at issue in this case. That section emphasized that "bringing in" included being brought in "by vessel or otherwise." The court in *United States v. Washington,* 471 F.2d 402, 405 n. 2 (5th Cir.1973), *cert. denied,* 412 U.S. 930, 93 S.Ct. 2759, 37 L.Ed.2d 158 (1973), distinguished *McFarland* on the basis that the statute was amended to read "by any means of transportation or otherwise." This amendment made "an interpretation which limits the meaning of 'or otherwise' to only certain forms of transportation an unreasonable reading of the statute." *Id.*

The court in *Washington* upheld the conviction of defendant under section

18. Aguilar argues to the contrary, citing *Vitale v. INS,* 463 F.2d 579 (7th Cir.1972), for the proposition that where an alien's original crossing was under official restraint, "subsequent escape from authorities is insufficient as a matter of law to effectuate entry." In *Vitale,* defendant was apprehended upon his attempted illegal entry at the airport, but then released on parole pending a full inspection the following day. The court found that the alien's one week delay in appearing for the full inspection did not constitute a subsequent entry because his parole status placed him in constructive custody the entire time. *Vitale* does not establish that an alien cannot become free from official restraint subsequent to physical entry under such restraint; only that an alien in constructive custody has not entered the country.

19. Aguilar also argues that the district court erred by not granting her motion for judgment of acquittal on count 2. In judging a Rule 29(c) motion for acquittal, a reviewing court must take the evidence in the light most favorable to the government. *United States v. Sharif,* 817 F.2d 1375, 1377 (9th Cir.1987). Cruz testified that he visited Benavidez's home a "few times" during the seven months she lived with her parents. In accord with the discussion in this subsection, Aguilar has failed to establish as a matter of law that she was under official restraint for this seven month period.

1324(a)(1). He purchased airline tickets for the aliens and supplied them with fraudulent identification papers. He traveled with them by plane from the Bahamas to Ft. Lauderdale, Florida. This conduct is similar to Aguilar's conduct. She procured false papers for Benavidez and coached her to lie to immigration authorities. Cruz drove Aguilar and Benavidez to the border, where Aguilar walked ahead of Benavidez through immigration. The two met up immediately thereafter and walked to the church. The *Washington* court was satisfied that the aliens did not "t[ake] themselves" to the border. Surely the same can be said for Benavidez, a thirteen-year-old girl.[20]

V

[10] Conger was convicted in count 26 of aiding and abetting Alejandro Rodriguez's illegal entry into the United States. Defendant Quinones was convicted in count 28 of aiding and abetting Jose Ruben Torres's illegal entry into the United States. Conger and Quinones appeal the district court's refusal to give the jury an "official restraint" instruction regarding the entries of Rodriguez and Torres. We conclude in the preceding section that while an entry requires freedom from official restraint, the evidence must warrant such an instruction. The issue is whether there was evidence from which a jury could find that Rodriguez and Torres were under official restraint during their entire stay in the United States.

A

Appellants contend that the evidence shows that these aliens never entered the United States. In both cases Cruz knew the date and time of the planned crossings, and he alerted INS border officials to ensure that they would not be apprehended. In contrast to Aguilar, however, Cruz did not conduct surveillance of the aliens as they crossed the border. In addition, these aliens crossed through a hole in the border fence, rather than the official port of entry Benavidez used. The aliens were not subject to constant surveillance subsequent to their initial physical entry.

Appellants rely entirely upon the INS's advance notice of the crossing as warranting the requested official restraint instruction. But as the aliens did not cross at an official port of entry, they were not in close proximity to immigration officials at the point of physical entry. Instead, immigration officials in the general area of the illegal entries were alerted. This distinction in the proximity of immigration authorities is important because the official restraint inquiry centers upon an alien's freedom from official scrutiny.

In addition, as with Benavidez, Rodriguez and Torres were in the United States for about eight months prior to their eventual arrests. Conger does not even allege that these aliens were under INS scrutiny for their entire stay in the United States. Under these circumstances, we hold that the evidence was insufficient to warrant an official restraint instruction.

B

[11] Quinones and Conger also argue that the district court improperly rejected their proposed jury instruction on the first amendment. The court instructed the jury that it must determine whether appellants performed the alleged substantive offenses with the intent to violate the law or "merely joined together for the purpose of engaging in activities protected by the First Amendment." But appellants desired an instruction that their expression was protected unless it was intended and likely to produce or incite an imminent lawless act.

Appellants rely upon *United States v. Freeman*, 761 F.2d 549 (9th Cir.1985), *cert. denied*, 476 U.S. 1120, 106 S.Ct. 1982, 90 L.Ed.2d 664 (1986), in which defendant was

20. Aguilar also argues in conclusion that the district court improperly restricted her attorney's cross-examination of Benavidez. Aguilar sought to elicit testimony that Benavidez was in need of protection and that Aguilar was her protector. This testimony would only be relevant if a necessity-type defense was appropriate. As we reject a necessity defense, *infra*, the trial court did not err in this regard.

charged with aiding and abetting violations of the tax laws by counseling noncompliance with the tax laws at various seminars he conducted. The court found that "[w]here there is some evidence ... that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment is a legitimate matter for the jury's consideration." *Id.* at 551. Based upon the trial court's failure to give such an instruction, the court reversed defendant's convictions connected with the counts alleging only counseling.[21] The *Freeman* decision established as a threshold for a first amendment jury instruction that there be "some evidence" that defendant's purpose or the likely effect of his words was "remote" from the commission of the crime. Appellants argue that the evidence against Quinones and Conger shows "that they did nothing more than point out a church on the other side of the border and a hole in the international border fence; a hole that 'a lot of people go through.' " The government responds that there was no evidence that these two defendants intended their actions to be remote from the commission of a crime.

Conger drove Rodriguez to a hilltop and told him "there is the hole where you can go through, and those steeples or towers that you can see there is the Church of the Sacred Heart in Nogales, Arizona. That's the way you have to walk to get to the church.... Once you get to the church, you will have no problems with being arrested." Conger asked Cruz to give Rodriguez a history of Mexico so that he could pass himself off as a Mexican if apprehended. Conger told Cruz that "they" were going to smuggle Rodriguez into the United States. Rodriguez admitted that Conger told him he would help him enter the United States.

When Quinones met Torres he took him to Aguilar's house. The next day he drove him to the hilltop to identify the sanctuary church across the border. He also identified the hole in the border fence. Finally, he gave Torres the name of a contact at the church.

Under these circumstances, Quinones and Conger have failed to produce "some evidence" that their expression was "remote" from the commission of a crime. These appellants instructed illegal aliens on how and where to cross the border and supplied them with sanctuary contacts in the United States. Their speech was inextricably intertwined with actions that facilitated the aliens' illegal entry. *Freeman* does not require a first amendment instruction under these circumstances.[22]

VI

Appellants challenge the convictions under section 1324(a)(2) for transportation of illegal aliens. Three arguments are advanced to support this challenge: (1) The

21. The *Freeman* court affirmed defendant's two aiding and abetting convictions which charged that he counseled and *assisted* in the filing of false tax returns. Defendant had prepared a draft false tax return for a taxpayer and reviewed the taxpayer's returns. The court found that the first amendment jury instruction was not necessary for these counts. "Even if the conviction on these counts rested on spoken words alone, the false filing was so proximately tied to the speech that no First Amendment defense was established." *Id.* at 552. Where defendant's actions move far beyond advocacy to participation in the unlawful activity, the first amendment is no bar to prosecution. *See United States v. Moran,* 759 F.2d 777, 785 (9th Cir. 1985), *cert. denied,* 474 U.S. 1102, 106 S.Ct. 885, 88 L.Ed.2d 920 (1986) (challenging sufficiency of the evidence on first amendment grounds); *United States v. Little,* 753 F.2d 1420, 1434 (9th Cir.1984) (seeking acquittal on first amendment grounds).

22. In their attack on the conspiracy counts, appellants cite another example of conduct allegedly warranting a clear-and-present danger instruction: "Sister Darlene Nicgorski's conversations with refugees, in which she offered assistance in finding lawyers and explained the process of applying for political asylum, and stated that 'based upon her experiences the Immigration Office in Arizona was not following the law'...." However, as the government indicates, this example omits the fact that Nicgorski's discussion with Nieto was not intended to direct him to a lawyer for the purpose of being presented to INS officials. Consequently, this activity is not "remote" from the commission of the crime of conspiracy, and appellants were not entitled to a first amendment instruction.

evidence was insufficient to support Wendy LeWin's (LeWin) conviction; (2) the jury was improperly instructed about the "in furtherance of" element; and (3) the district court committed reversible error in excluding evidence of their religious motivation.

A

[12] LeWin was convicted of illegally transporting aliens Joel and Gabriela Morelos (the Moreloses) in violation of section 1324(a)(2). LeWin transported the Moreloses from Phoenix to Santa Fe, a fourteen-hour road trip. As part of its burden of proof, the government must show that she transported them "knowing or having reasonable grounds to believe that [their] last entry into the United States occurred less than three years prior thereto." 8 U.S.C. § 1324(a)(2). At trial, LeWin moved under Fed.R.Crim.P. 29(c) for a judgment of acquittal, claiming that the government failed to establish that she had such knowledge. She now argues that the district court erred in rejecting her motion.

Our review of LeWin's claim is limited; we must inquire "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Lewis*, 787 F.2d 1318 (9th Cir.1986). The evidence required for purposes of sufficiency may be direct or circumstantial. *See United States v. Loya*, 807 F.2d 1483, 1486 (9th Cir.1987).

While there is no direct evidence that LeWin knew about the recent illegal status of the aliens, there is sufficient circumstantial evidence. A number of significant events were revealed at trial. First, Joel admitted that during the road trip he freely discussed his experiences in Guatemala and his intention to assert refugee status, although he denied informing LeWin of his recent illegal entry into the United States. The jury reasonably could have disbelieved Joel and concluded that he did tell LeWin about his entry. Second, in Phoenix the Moreloses, in the presence of LeWin, were interviewed on television wearing masks. Joel testified that they wore the masks only to avoid being detected by Guatemalan officials, fearing that their family members in Central America would be tortured. However, the jury was free to reject Joel's testimony and conclude that the Moreloses really sought to avoid INS detection because of their illegal entries. Finally, there was evidence indicating that LeWin was generally aware of a plan to smuggle aliens who recently entered the United States illegally. The jury reasonably could have found it incredible that under these circumstances LeWin would not have known, even if she was not told, that the Moreloses were recent illegal aliens.

Viewing this circumstantial evidence in the light most favorable to the government, a reasonable jury could have concluded that LeWin knew or had reasonable grounds to know that the aliens entered the United States within the last three years.

B

[13] Appellants contend that the district court improperly rejected their requested jury instruction defining the "in furtherance of" element on the transportation convictions and the aiding and abetting transportation convictions. Appellants requested the court to instruct the jury that "[a] person intending to assist an alien in obtaining legal status is not acting 'in furtherance of' the alien's illegal presence in this country." While this language is taken verbatim from the *Merkt I* case, 764 F.2d at 272, that decision does not support appellants' requested instruction.

The trial court in *Merkt I* had improperly instructed the jury that they must find that defendant intended to take the aliens to the *nearest* INS office for presentment. Defendant contended that she did not *willfully* act in furtherance of the aliens' illegal presence in this country because she was driving them to an INS office for presentment at the time she was arrested. The district court, however, rejected her defense because there was an INS office closer than the one she had in mind.

The appellate court found that the trial court's instruction improperly constituted a directed verdict on the willfulness element of section 1324(a)(2). "This amounts to an instruction that, if Merkt intended to take the aliens to any INS office other than the nearest one, they were to find that she had acted with the requisite intent to support a conviction under section 1324(a)(2)." 764 F.2d at 271. The court simply concluded that "the statute is not violated by the act of transporting an alien to an immigration office merely because that office is not geographically closest to the place where transportation begins." *Id.* at 272.

The trial court instructed the jury that it must find that defendant "transported or moved ... an alien ... in order to further the aliens [sic] unlawful presence in the United States." This instruction is all that was required. Appellants' requested instruction fails to acknowledge that defendant's act of transporting the alien must itself assist the alien in obtaining legal status. This was clearly the case in *Merkt I,* where defendant's transportation of the aliens was directly and substantially related to assisting the alien in obtaining legal status. As the government correctly, notes, however, appellants made no effort to present any aliens to the INS, and they were hardly apprehended while en route to an INS office.

[14] Appellants also argue that the trial court erred by rejecting their suggested jury instruction that "[t]ransporting a person who one knows to be an illegal alien out of purely humanitarian concern is not a crime." Appellants cite *United States v. Moreno,* 561 F.2d 1321 (9th Cir.1977), as authorizing this instruction.

In *Moreno,* the court held that a foreman of an agricultural concern, transporting illegal aliens as part of his ordinary and required duties, was only remotely acting in furtherance of violation of the law. The *Moreno* court emphasized that the act of transportation must be directly and substantially related to furthering the illegal alien's presence. The court hypothesized that "[b]ased upon purely humanitarian concern, the transportation of a known undocumented alien to a hospital following an injury or illness does not appear to come within the purview of § 1324(a)(2)." 561 F.2d at 1322 n. 3.

Nothing in the *Moreno* court's dicta suggests that it is proper to instruct the jury that humanitarian initiative is a complete defense to a transportation charge. Instead, the court sought to identify another instance of transportation which was only incidentally related to furthering the alien's presence in this country. Appellants' various acts of transportation are hardly incidentally related to furthering the aliens' illegal status. Appellants transported the aliens throughout the country as part of their plan to shelter illegal aliens out of the INS's grasp.[23]

C

[15] Appellants next argue that their religious motivation in transporting the illegal aliens would negate the requisite intent to directly or substantially further the alien's presence in the United States. They conclude: "Proof that the [appellants'] transportation was not intended to further the alien's illegal presence, but to fulfill the [appellants'] religious commitment to assist those in need, would thus constitute a defense to [section 1324(a)(2)]."

Appellants are confusing intent and motive. So long as appellants intended to directly or substantially further the alien's illegal presence, it is irrelevant that they did so with a religious motive. *See United States v. Moylan,* 417 F.2d 1002, 1004 (4th Cir.1969), *cert. denied,* 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970).

VII

[16] Conger and Nicgorski argue that their convictions for aiding and abetting the transportation of illegal aliens should be reversed. Appellants state that the

23. Appellants also contend that their religious motivation is a complete defense to the in furtherance element. This is nothing more than another attempt to obtain a first amendment exemption for their criminality. We reject such an exception, *infra.*

"primary" reason for reversal is that "the substantive crime defendants are alleged to have aided and abetted was not committed." The reason no substantive crime was committed according to appellants is that government agents transported the aliens in each count.

A

Appellants contend that these circumstances are analogous to the case of *United States v. Barnett*, 667 F.2d 835 (9th Cir.1982), in which the court overturned a defendant's conviction for aiding and abetting the manufacture of PCP because the government agent whom defendant instructed never actually manufactured the drug. In this case, however, the government agents *did* transport the aliens.

The government first notes that appellants' argument has no application to Fife's conviction on count five, as no government agent transported that alien. The government then demonstrates that the mere fact that government agents did the actual transportation in the other counts is of no consequence. In *United States v. Norton*, 700 F.2d 1072 (6th Cir.), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1885, 76 L.Ed.2d 814 (1983), the court rejected defendants' contention that their convictions for transporting stolen explosives in interstate commerce were invalid because government agents transported the explosives. The court noted that the aiding and abetting instruction permitted defendants' convictions as principals irrespective of the role of the government agents.

The government also cites *United States v. Ordner*, 554 F.2d 24, 29 (2d Cir.), *cert. denied*, 434 U.S. 824, 98 S.Ct. 71, 54 L.Ed.2d 82 (1977), in which the court rejected defendant's argument that his conviction for aiding and abetting the unlawful possession of firearms should be reversed because "it is not illegal for a government agent to possess an unserialed firearm obtained while collecting evidence against an accused[;] it cannot be illegal for the accused to 'cause' that 'possession.'" The court held that defendant was liable as a principal for aiding and abetting, "regardless of the fact that the Government agents were themselves immune from criminal responsibility." *Id.* We find the reasoning of the *Ordner* and *Norton* decisions persuasive.

B

[17] Appellants assert an alternative argument. They note that the government agents filed control load sheets for each of these aliens to alert law enforcement officers that the aliens were connected to an undercover operation and therefore should not be intercepted. They assert that no substantive crime was committed due to the advance knowledge of INS officials through the control load sheets. Appellants contend that under these circumstances "the transportation did not further the Central Americans' illegal presence here" as a matter of law. Appellants argue that the INS' advance knowledge of the aliens' transportation means that their illegal presence could not be "furthered" as a matter of law.

Appellants state that "because the [control] forms provided the INS with control over and information about the refugees, their existence rendered it impossible for any person to further the aliens' illegal presence in the United States." But we reject in section IV, *supra*, the proposition that INS officials' mere knowledge of the aliens' movements rendered them under "official restraint" during their entire presence in the United States. The same reasoning compels the conclusion that these aliens were not under such INS control that no person could further their illegal presence in the United States.

VIII

Some of appellants were convicted under section 1324(a)(3) for harboring illegal aliens. Various claims of error are made in urging the reversal of these convictions. Two of these claims lack merit in light of our conclusions in other parts of this opin-

ion.[24] We turn to the contentions that Clark's harboring conviction was unsupported by sufficient evidence, and that the district court erroneously excluded evidence bearing on whether appellants intended to evade INS detection.

A

[18] Appellant Clark contends that his conviction under section 1324(a)(3) for harboring illegal alien Jose Ruben Torres ("Torres") must be reversed because the government failed to establish that Clark knew that Torres's entry into the United States was illegal. We must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Lewis*, 787 F.2d 1318 (9th Cir.1986).

The government details various items of circumstantial evidence that satisfy the *Lewis* standard. Significantly, Torres testified that he left El Salvador, his native country, for Mexico on his way to the United States. In Mexico he met Quinones, who was to help him get into the United States. Quinones showed Torres a hole in the international border fence, through which Torres illegally entered the United States. Torres went directly to the Sacred Heart Church and met a church secretary named Mary K. Espinosa, who introduced Torres to Clark, saying, "Socorro [Aguilar] sent him." There is evidence in the record indicating that Clark knew about Aguilar's sanctuary work. Torres then told Clark that he was from El Salvador and came to this country to find a job. During their conversation, Clark invited Torres to have lunch with them and to stay in an apartment behind the church.

While at the church, two other illegal aliens arrived. Torres and these other two aliens were going to leave the church and go to Phoenix, Arizona. Torres testified that Clark read documents that these two aliens were given by the border patrol and then tore them up. Torres also testified that he overheard Clark advising the two aliens that if stopped in transit, they should lie to the INS agents and claim to be Mexican nationals. Cruz, the government informer who came to the church to transport all three aliens, testified that Clark had informed him that "these boys were picked up by Immigration."

This evidence amply supports the inference that Clark was aware of Torres's illegal status. Clark contends, however, that this panel must give no credit to this evidence, since the jury apparently rejected it. As proof that the jury discarded this evidence as incredible, Clark notes that the jury acquitted Clark and Espinosa of charges of conspiracy. He concludes that if the jury found this testimony to be credible, then it would have convicted them of conspiracy.

We disagree. The evidence is not inconsistent with an acquittal on the conspiracy charge. The jury could have believed all this evidence, but have acquitted on the conspiracy count because the prosecution failed to establish the existence of an agreement between Clark and Espinoza beyond a reasonable doubt.

B

[19] Any person who "willfully or knowingly conceals, harbors, or shields from detection" an unlawful alien violates section 1324(a)(3). The district court instructed the jury that acts of concealing or shielding consisted of conduct "tending to directly or substantially facilitate an alien's remaining in the United States unlawfully with the intent to prevent detection by the Immigration and Naturalization Service." The court then told the jury that while harboring included "conduct tending to directly or substantially facilitate the alien's remaining in the United States in violation of law," it did not require an intent to aid the unlawful alien for the purpose of evading INS detection. Appellants contend that it was reversible error to strip "harboring" of an intent to evade detection. The refus-

24. Parts VI and XI of the opinion hold that appellants were not entitled to a first amendment defense. Consequently, it was not error to exclude evidence of appellants' religious beliefs.

al to provide a requested instruction is reviewed for an abuse of discretion. *United States v. Makhlouta,* 790 F.2d 1400, 1405 (9th Cir.1986).

In *United States v. Acosta de Evans,* 531 F.2d 428 (9th Cir.), *cert. denied,* 429 U.S. 836, 97 S.Ct. 103, 50 L.Ed.2d 101 (1976), this court rejected the very claim that appellants are making in this case. The court examined the legislative history of section 1324(a) and case law from other circuits that already had addressed this issue, concluding that the word "harbor" means "to afford shelter to" and does not require an intent to avoid detection. *Id.* at 430. Appellants enumerate several reasons why we should "reconsider" *Acosta de Evans.*[25]

Even if *Acosta de Evans* were incorrectly decided, the appellants' claim would fail given the facts of this case. It is clear beyond any doubt that Clark and Nicgorski, the two appellants convicted under section 1324(a)(3), intended to help the aliens in question to evade INS detection. Indeed, in appellants' proffer for a necessity defense, they candidly acknowledge that their religious beliefs caused them to avoid the INS. *See* Offer of Proof, *United States v. Aguilar,* 85-008-PHX-EHC (May 24, 1985).

Appellants next contend that even if harboring does not require an intent to evade government officials, it is undisputably a requirement for "concealing" and "shielding," alternative grounds for prosecution under section 1324(a)(3). Consequently, they allegedly were entitled to introduce evidence to establish their belief in the legality of the aliens, "since a defendant who believes an alien to be legal would not logically act to conceal that alien from detection by the INS."

This argument misstates appellants' position at trial. They candidly explained their belief that they could not present the aliens to the INS because the INS consistently disobeyed the Refugee Act. In their proffer for a necessity defense, appellants stated: "Given this information regarding the almost automatic deportation of refugees who applied for asylum, religious workers realized that their religious beliefs *precluded them from presenting the refugees whose lives were in danger, [sic] to the INS. Id.* Thus, appellants' argument is a red herring. When they contend that they believed in the legality of the aliens, they mean only that they thought the aliens were entitled to refugee status under the law. Appellants do not mean that they had no reason to fear the INS. Any claim to the contrary is belied by their proffer.

IX

Six defendants were convicted of conspiring to violate section 1324. The jury specified that the convictions were based on section 1324, a felony, rather than on 8 U.S.C. § 1325, a misdemeanor. The jury did not indicate, however, under which subsection(s) of section 1324 these convictions were based.

A

Appellants contend that the trial court's failure to require the jury to specify the precise subsection(s) upon which the conspiracy convictions were based requires reversal. They argue that reversal is required because (1) an erroneous instruction as to one subsection would render the conviction invalid even if the jury might have convicted under the other subsections; and (2) the conviction may not have been unanimous.

[20] Essentially, appellants fault the trial judge for not providing a special verdict. However, "it has long been the law that 'it is not the practice of the Federal Courts in criminal cases to call for special verdicts.' " *United States v. Jones,* 425 F.2d 1048, 1057 (9th Cir.) (quoting *Anderson v. United States,* 273 F. 677, 679 (9th Cir.1921)), *cert. denied,* 400 U.S. 823, 91 S.Ct. 44, 27 L.Ed.2d 51 (1970). While a special verdict is the exception and not the

25. Appellants overlook the fact that a panel not sitting en banc has no authority to overturn Ninth Circuit precedent.

rule, there may be cases in which it is appropriate. *Id.* It is counsel's duty, though, to request a special verdict in order to record the jury's thinking for purposes of appeal. *Id.* Failure to make a request to the trial court waives any error (except plain error) premised on the lack of a special verdict. *Id.*

Appellants attempt to distinguish *Jones.* In that case Jones was charged in counts two through six of mail fraud and in count one of conspiracy to violate the mail fraud statute. The conspiracy count charged that one of the objects of the conspiracy was to commit the mail fraud scheme alleged in counts two through six. The jury convicted on all six counts. On appeal, this court rejected Jones' claim that lack of a special verdict required reversal, holding that Jones waived any error by failing to request a special verdict at the trial court. Appellants in the present case construe *Jones* to have addressed only the contention that the mere failure to use a special verdict constituted reversible error. In comparison, appellants contend, their

> point is *not* that the failure to use a special verdict alone caused them prejudice requiring [reversal]. Rather, they argue that if—unlike in *Jones*—this Court finds that the jury was *incorrectly* instructed regarding the essential elements of any subsection of 1324(a), then this Court must reverse the conspiracy convictions.

Appellants' reading of *Jones* strips it of any meaning. While not stated explicitly in the opinion, it is evident that Jones did not argue that "the failure to use a special verdict alone caused [him] prejudice." Instead, he was arguing that this failure "resulted in" prejudice to him. *Jones,* 425 F.2d at 1057. Specifically, he complained that the court's instructions permitted conviction without a unanimous verdict.

Jones is consistent with the rule in the Fifth Circuit. In *Williams v. United States,* 238 F.2d 215, 218–19 (5th Cir.1956), *cert. denied,* 352 U.S. 1024, 77 S.Ct. 589, 1 L.Ed.2d 596 (1957), the court held that defendant's failure to request a special verdict precluded his raising on appeal the possibility of error underlying the verdict. The indictment charged defendant with conspiring to violate seven separate provisions of the liquor laws. Six of the provisions were felonies, while one was a misdemeanor. The trial judge advised the jury that the government need only prove that defendant committed one of the seven overt acts as the object of the conspiracy. On appeal, defendant argued that a general verdict left open the possibility that the jury's conspiracy conviction was premised on the violation of the misdemeanor statute. The court concluded that defendant failed to preserve this issue for appeal by failing to call this concern to the trial court's attention by requesting a special verdict. *Id.* at 219. Defendant was sentenced under the conspiracy count to three years imprisonment, although the misdemeanor's maximum penalty was 30 days imprisonment and a $1,000 fine.

[21] Under the authority of *Jones* and *Williams,* appellants cannot base any errors on the lack of a special verdict, which they failed to request. This requirement is grounded in judicial efficiency and fairness. *See Jones,* 425 F.2d at 1057. Appellants should not be allowed to set aside a conviction because of the speculative possibility of error, when they could have avoided that speculation merely by requesting a special verdict. Consequently, any of appellants' contentions that seek to impugn the verdict based on possible error concerning a particular subsection fails for lack of preservation, unless they can show plain error. This disposes of their nonunanimous verdict claim.[26] It also procedurally bars their argument that the district judge incorrectly defined "encourage" and "induce" for purposes of section 1324(a)(4).[27] Appellants have not demonstrated plain error.

26. In any event, the district court emphasized that the government had to prove that appellants conspired to commit one of the offenses under section 1324(a) or section 1325, and the jury had to "unanimously agree." The court later repeated this unanimity requirement.

27. The wisdom of this procedural bar is highlighted in the context of this last claim. Appel-

B

[22] Quinones argues that his conviction for conspiracy violates principles of extraterritoriality. Although unclear, his argument appears to be that the district court lacked subject matter jurisdiction. This claim lacks merit.

In *United States v. Castillo-Felix*, 539 F.2d 9 (9th Cir.1976), this court held that defendant's conviction under section 1324(a)(4) for inducing aliens to enter the United States was not invalid simply because the criminal acts were committed in Mexico. In its discussion, the court quoted *United States v. Bowman*, 260 U.S. 94, 98, 43 S.Ct. 39, 41, 67 L.Ed. 149 (1922), which observed:

> [Some criminal statutes] are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for [crimes] as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

The court then concluded that the *Bowman* rule was "particularly applicable" to section 1324(a)(4) and thus "[c]rimes punishable under the laws of the United States were committed." *Castillo-Felix*, 539 F.2d at 13.

Castillo-Felix stands for the proposition, therefore, that a United States court can punish a defendant for violating section 1324(a)(4) when the criminal acts are committed outside our borders. The court emphasized that these crimes negatively affect the United States even when the conduct takes place outside the country: "[I]n terms of regulation of immigration, it is unimportant where acts constituting the crime occur." *Id.* at 13. This reasoning would extend jurisdiction to each subsection in section 1324, making violation of each a punishable crime even though the criminal acts occurred outside the borders of the United States.

Appellant asserts that the district court had no jurisdiction over him because he is not a U.S. citizen or resident, unlike defendant in *Castillo-Felix*. *Castillo-Felix* never discussed defendant's residence or citizenship in analyzing the jurisdictional issue; and appellant fails to show the relevancy of this distinction. He also complains that he was not alleged to have entered the United States as part of the conspiracy, and that the jury was not required to find that his conduct had a negative impact in the United States. Once again, appellant fails to show that these facts are significant.

X

[23] Appellants claim that the district court erred in granting the government's motion to preclude evidence attempting to establish a necessity defense. This court reviews de novo a district judge's decision to bar a necessity defense. *United States v. Williams*, 791 F.2d 1383, 1388 (9th Cir.), *cert. denied*, 479 U.S. 869, 107 S.Ct. 233, 93 L.Ed.2d 159 (1986).

It is well established in this circuit that a district judge may preclude a necessity defense by granting a motion *in limine*. *See, e.g., United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir.1985); *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir.1984); *United States v. Lowe*, 654 F.2d 562, 566–67 (9th Cir.1981). "The sole question presented in such situations is whether the evidence, as described in the offer of proof, is insufficient as a matter of law to support the proffered defense." *Dorrell*, 758 F.2d at 430.

lants are speculating that the jury may have used section 1324(a)(4) as the object of the conspiracy conviction. They then allege error associated with that subsection, which they contend requires reversal of the entire conspiracy conviction because this court cannot discern the basis of the conviction. However, since the jury acquitted all accused of violating this subsection, it is unlikely that it used this subsection as the object of the conspiracy conviction. In any event, appellants could have avoided this speculation by requesting a special verdict.

[24] As a matter of law, a defendant must establish the existence of four elements to be entitled to a necessity defense: (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law. *Id.* at 430–31. The *Dorrell* test is stated in the conjunctive; thus, if defendants' offer of proof is deficient with regard to any of the four elements, the district judge must grant the motion to preclude evidence of necessity.

[25] In the present case, appellants' offer was legally deficient in at least one respect: They failed to establish that there were no other legal alternatives.[28] The proffer emphasizes that the INS continuously has frustrated the present legal way of obtaining refugee status. In addition, the immigration judges purportedly deny the due process rights of those granted an asylum hearing and make incorrect determinations of credibility concerning the danger faced in the aliens' homelands. Defendants thus made the following decision:

> Given this information regarding the almost automatic deportation of refugees who applied for asylum, religious workers realized that their religious beliefs precluded them from presenting the refugees whose lives were in danger, [sic] to the INS. Their goal was to protect those from danger, and the results of the asylum process had demonstrated that that process was not only futile, but also extremely dangerous to those who filed and lost.

According to defendants, they established the sanctuary movement only after trying "all these other methods" and concluding that there was "no other safe alternative." The only "other methods" referred to in the proffer were "attempts at working with and through the INS." After purportedly finding that the proper legal channels were futile, appellants resorted to an underground movement.

As the district judge correctly concluded, however, appellants failed to appeal to the judiciary to correct any alleged improprieties by the INS and the immigration courts.[29] In fact, by successfully suing the INS, Salvadorans already have effected changes in INS detention and asylum procedures involving Salvadorans in California. *See Orantes–Hernandez v. Smith,* 541 F.Supp. 351 (C.D.Cal.1982) (granting provisional injunctive relief); *Orantes–Hernandez v. Meese,* 685 F.Supp. 1488 (C.D. Cal.1988) (granting permanent injunction).

28. We also doubt the sufficiency of the proffer to establish imminent harm. The offer fails to specify that the particular aliens assisted were in danger of imminent harm. Instead, it refers to general atrocities committed by Salvadoran, Guatemalan, and Mexican authorities. The only indication that appellants intended to show that the aliens involved in this action faced imminent harm was their proffer that they adopted a process to screen aliens in order to assure themselves that those helped actually were in danger. This allegation fails for lack of specificity. *See Armour And Co. v. Ward,* 463 F.2d 8, 12 (8th Cir.1972) ("offer of proof must be specific"); *see also Hennings v. Grafton,* 523 F.2d 861, 864 (7th Cir.1975) (affirming district court's exclusion of evidence based on nonspecific and conclusory proffer). Moreover, even a specific proffer would establish only appellants' *deliberative assessment* that certain aliens faced imminent harm, and not that these aliens in fact were in danger. In other contexts, perhaps this proffer would be sufficient. In the immigration area, however, allowing this showing to establish a necessity defense essentially would result in sanctioning the creation of religious boards of review to determine asylum status. The executive branch, not appellants, is assigned this task.

29. Appellants contend that "while legal challenges to the activities of the INS, including appeals from denials of political asylum applications, are 'options' for Central Americans who are in the United States, they are not options for those still in Mexico." However, section 1158 provides that "[t]he Attorney General shall establish a procedure for an alien physically present in the United States *or at a land border or port of entry*...." 8 U.S.C. § 1158. Appellants' attempt to circumvent this barrier is deceptive. They argue that *Orantes–Hernandez v. Meese,* 685 F.Supp. 1488 (C.D.Cal.1988), the only federal case directly on point, expressly found otherwise. Reply Brief of Appellants 81 n. 48 (providing only a *supra* cite to that case). That citation only supports the notion that the INS was failing to comply with section 1158, and not that appellants legally could not present aliens at the border for asylum consideration.

Appellants of course do not dispute this; rather, they conclude that "to the extent the legal alternative of a civil suit could be pursued, it was." In the meantime, they continue, many years had passed between filing of the complaint and granting of the permanent injunction, and newly arriving refugees needed immediate help. This argument overlooks the potential for a provisional remedy, such as was provided soon after the complaint was filed in *Orantes-Hernandez v. Smith.* Moreover, to the extent that aliens were arriving prior to the filing of a class action, appellants themselves could have initiated an action on behalf of the aliens, seeking initial provisional relief and ultimate permanent relief. Since this legal alternative nullifies the existence of necessity for all the underlying crimes stated in section 1324, appellants claim of district court error fails.[30]

XI

[26] The first amendment to the Constitution provides in part that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend. I. Appellants contend that this amendment prevents their conviction under sections 1324 and 1325 because their sincere religious beliefs inspired them to commit the forbidden conduct. In analyzing their claim of a first amendment exemption, appellants urge the following examination: (1) the magnitude of burden these laws impose on their religious beliefs; (2) the compelling nature of the government's interest; and (3) the possibility of accommodating a religious exemption without impeding the government's interest. Brief of Appellants 269 (citing *EEOC v. Fremont Christian School,* 781 F.2d 1362, 1367 (9th Cir.1986); *Callahan v. Woods,* 736 F.2d 1269, 1273 (9th Cir.1984)). The government, on the other hand, presses for a less stringent test, arguing that "[t]he Supreme Court has never extended the *Yoder*-type balancing analysis beyond the context of essentially regulatory legislation." The Court in *Wisconsin v. Yoder,* 406 U.S. 205, 230, 92 S.Ct. 1526, 1540, 32 L.Ed.2d 15 (1972), notes the government, emphasized that its ruling did not involve a case in which any harm "to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." We need not determine the degree of scrutiny that properly should be applied to this case. Even applying the most exacting scrutiny, appellants' first amendment claim cannot withstand analysis.

In *United States v. Merkt,* 794 F.2d 950 (5th Cir.1986) (*Merkt II*), *cert. denied,* 480 U.S. 946, 107 S.Ct. 1603, 94 L.Ed.2d 789 (1987), the Fifth Circuit confronted the claim of a first amendment exemption to sections 1324(a)(1) and (a)(2). After initially doubting the need to apply a form of strict scrutiny to defendants' constitutional claim, the court nonetheless engaged in such an analysis and concluded that the claim lacked merit. 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.* at 956. Second, the court found that the government had a compelling need to uniformly enforce its border control laws:

> The statute under which [defendants] were convicted is part of a comprehensive, essential sovereign policy. We cannot engraft judicial exceptions to the illegality of transporting undocumented El Salvadorans without thereby de facto revising, for the unique benefit of El Salvadorans, the legal conditions under which

30. The government argues that appellants should have to proffer that they presented the aliens to government officials immediately after their entry into the United States before a trial court can instruct the jury as to the necessity defense. *Cf. United States v. Bailey,* 444 U.S. 394, 415, 100 S.Ct. 624, 637, 62 L.Ed.2d 575 (1980). Because we find the district court properly precluded appellants' necessity defense, we need not reach the question whether a presentment proffer should be a precondition for the defense of necessity.

they may abide in this country. This would create [chaos].

Id.[31] Third and finally, the court was unpersuaded that deportation of the aliens or confiscation of the transporters' vehicles were less restrictive alternatives that would allow a first amendment accommodation. These alternatives, the court concluded, "would reduce [the government's] efforts to a pitiful farce." *Id.* at 957.

The reasoning in *Merkt* persuasively disposes of appellants' constitutional claim in the present case. Unadorned, appellants' assertions are no different from those rejected by the Fifth Circuit. Even assuming that appellants have proved that the enforcement of sections 1324 and 1325 interfered with their religious beliefs, they cannot escape the government's overriding interest in policing its borders.

Appellants repeatedly assail the government for failing to provide evidence to show that it has an overriding interest that cannot accommodate a first amendment exemption. The proposition that the government has a compelling interest in regulating its border hardly needs testimonial documentation. The Court "has long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 210, 73 S.Ct. 625, 628, 97 L.Ed. 956 (1953); *see also Oceanic Navigation Co. v. Stranahan,* 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013 (1909); *Fiallo v. Bell,* 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977).

In fact, appellants really do not contest the strength of the government's interest. *See* Brief of Appellants 290 ("As a general rule, the government has a strong interest in enforcing the immigration laws."). Rather, they claim that a limited exemption under the particular facts of this case is appropriate. First, appellants invite us to analyze their first amendment claim by focusing on smuggling, transporting, and harboring individually, requiring the government to demonstrate an overriding interest with respect to each. *Id.* at 281. We decline this invitation. The government's interest is in controlling immigration, and Congress has determined that this requires penalizing not only smuggling but also transporting and harboring to discourage illegal aliens from crossing the U.S. borders. As the government indicates, one of the aliens involved in this case declared that he was motivated to emigrate to the United States because "he learned that many congregations were giving assistance to refugees." Brief of Appellee 164 n. 47 (quoting testimony of Joel Morelos, R.T., v. 55, at 8555). In short, each part of section 1324 "represents but one facet of the comprehensive legal framework governing entry into the United States and admission to its citizenship." *Merkt II,* 794 F.2d at 955. Second, appellants request that we examine only the facts of this case in determining whether an exemption would be feasible.[32] Even on appellants' own terms, it seems clear that a religious exemption for these particular appellants would seriously limit the government's ability to control immigration. In the introduction to their first

31. Defendants argued that past unsuccessful border control demonstrates a lack of a compelling interest to prosecute violators. This argument was "emphatically reject[ed]." As the court persuasively reasoned, this contention would deny a compelling state interest in enforcing criminal drug laws. *Merkt II,* 794 F.2d at 956.

32. Appellants' request is unrealistic. If we were to grant an exemption to these defendants, surely many other religious groups would have a similar entitlement. Courts cannot realistically determine that some religious groups are worthy of an exemption while others are not. In fact, this sort of distinguishing among groups might violate the equal protection clause. As appellants argue in their brief, "[t]o allow expression of religious views by some and deny the same privilege to others ... is a denial of equal protection of the law forbidden by the Fourteenth Amendment." Brief of Appellant 300 (quoting *Niemotko v. Maryland,* 340 U.S. 268, 284, 71 S.Ct. 328, 333, 95 L.Ed. 280 (1951) (Frankfurter, J., concurring)). And since many religions undoubtedly require their adherents to be charitable and to help the needy and the persecuted, the bounds of this exemption ultimately would be without definition. *See United States v. Elder,* 601 F.Supp. 1574, 1579 (S.D.Tex. 1985) ("moral obligation to assist others crosses religious and denominational lines").

amendment argument, appellants identify four religious groups that purportedly require their adherents to engage in sanctuary activity—the Catholic Church, the United Methodist Church, the Presbyterian Church, and the Unitarian Universalist Association. The combined membership of these four groups is incalculable. Appellants cannot seriously contend that they demand a limited exception to the immigration laws.[33] Addressing a similar first amendment claim, one court observed:

> If the Government attempted to accommodate into its immigration policy [appellants'] religious beliefs, the Government's efforts would result in no immigration policy at all. As testimony from [appellants'] witnesses indicated, the moral obligation to assist others crosses religious and denominational lines. These widely-held beliefs allow adherents to exercise considerable discretion and would permit religious individuals to form personal immigration policies.

United States v. Elder, 601 F.Supp. 1574, 1579 (S.D.Tex.1985).

In conclusion, appellants' free exercise claim is without merit. The government's interest in controlling immigration outweighs appellants' purported religious interest,[34] and an exemption would not be feasible.[35] As a result, the district court did not err in denying appellants' motion to dismiss the charges.

XII

[27] The government stipulated at trial that it had used undercover agents and informants since March of 1984 to infiltrate various church meetings and activities. Many of these activities occurred outside the physical boundaries of the church, and the meetings on church property routinely were open to the public and attended by the news media. The government agents observed and tape recorded appellants' activities without a warrant; the absence of a warrant issued by a neutral magistrate is appellant's principal objection.[36]

The government introduced three tape recordings of church meetings during trial,

33. Appellants, no doubt, would like the analysis to be even more focused. They would urge this panel to view only these particular appellants without reference to their religious groups. This is unreasonable. Courts cannot possibly grant an exemption to certain members of a group while denying it to others of that same group. The only basis for distinction would be the sincerity of the member's belief, a standard which is ill-suited for adjudication. *See United States v. Ballard*, 322 U.S. 78, 87, 64 S.Ct. 882, 887, 88 L.Ed. 1148 (1944) (counseling against entering the "forbidden domain" of testing the sincerity of religious beliefs).

34. Nonetheless, appellants contend that the harboring convictions must be set aside. The government allows an employment exemption to the crime of harboring. Appellants conclude from this that it would be invidious discrimination to disallow a religious exemption. This argument is meritless. Both *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951), and *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), the cases cited by the appellants, are concerned about state discrimination among various groups that are trying to engage in protected activity. The state cannot constitutionally squelch unpopular points of view. *See Niemotko*, 340 U.S. at 284, 71 S.Ct. at 333. These two cases, therefore, would support their claim if, for example, the government allowed a religious exemption for Jews but not for Catholics. Since employment is not expressive activity, appellants' argument is specious. According to appellants' argument, lawmakers would be severely restricted in tailoring criminal laws in fear that a limited legislative exemption ultimately may become a judicially crafted gaping hole.

35. The only less restrictive alternative offered by appellants is that the government can provide a limited exemption. Since an exemption is infeasible, this proffered alternative fails.

36. Appellants do not contend that the first amendment required the government to have had reasonable suspicion of criminal activity before placing undercover agents inside the sanctuary movement. *See* Comment, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L.Rev. 976, 1018 (1983) (advocating a reasonable suspicion prerequisite). Accordingly, we do not reach this issue. Appellants' failure to urge a reasonable suspicion standard is hardly surprising. Their argument for suppression depends solely upon the absence of a warrant; they say not one word about the government's probable cause to obtain a warrant. As a reasonable suspicion search does not require a warrant or judicial supervision, a reasonable suspicion standard would not accrue to appellants' benefit. *See Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968).

and the government informants testified extensively. The government conceded at trial that if the information derived from these informants was obtained illegally, its entire case would be tainted and dismissal unavoidable. While the government instructed its undercover agents and informants not to tape record overtly religious services, the government conceded at trial that the undercover agents and informants gathered information at religious events.

The critical aspect of appellants' suppression argument is their suggestion that the first amendment and the fourth amendment necessarily are intertwined in the context of an informer's infiltration of a church. Based upon first amendment principles, appellants contend that society is prepared to recognize as reasonable churchgoers' expectations that "they could meet and worship in church free from the scrutiny of federal agents and tape recorders." A churchgoer need not "assume[] the risk that apparent fellow worshipers are present in church not to offer homage to God but rather to gain thirty pieces of silver."

Appellants' theoretical premise is that the first amendment provides them with an additional expectation of privacy beyond that afforded by the fourth amendment. The first amendment requires this heightened expectation of privacy because a "community of trust" is the essence of a religious congregation and the ability of a person to express faith with his fellow believers "withers and dies when monitored by the state." Appellants argue that government "spying" on religious activities necessarily chills a person's ability to exercise freely his religious faith.

Appellants' first amendment argument relies upon the principle that under certain circumstances the government's investigation of a political organization may impermissibly burden first amendment rights. In *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 466, 78 S.Ct. 1163, 1174, 2 L.Ed.2d 1488 (1958), the Court concluded that the state could not compel a politically active organization to disclose its private membership lists because such disclosure would have a "deterrent effect on the free enjoyment of the right to associate." In a similar context, the Court has stated that where "an investigation ... intrudes into the area of constitutionally protected rights of speech, press, association and petition," "an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights." *Gibson v. Florida Legislative Investigative Committee*, 372 U.S. 539, 546, 557, 83 S.Ct. 889, 892, 899, 9 L.Ed.2d 929 (1963).

Although we agree with appellants that the first amendment is relevant to our inquiry in this case, "appellant[s'] allegation that evidence admitted against [them] should have been suppressed is a *Fourth* Amendment claim, rather than a First." *Abell v. Raines*, 640 F.2d 1085, 1087 (9th Cir.1981). The constitutional issues raised herein are reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.1984) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

A

The government justifies its placement of the informants under the so-called "invited informer" or "misplaced confidence" cases, the cases permitting consensual recording of conversations without warrants. *See United States v. Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). These cases assume that a defendant would have had a legitimate expectation of privacy in his words but for the informer's presence. *Hoffa*, 385 U.S. at 301, 87 S.Ct. at 413 ("A hotel room can be the object of Fourth Amendment protec-

tion as much as a home or an office."); *Lewis,* 385 U.S. at 211, 87 S.Ct. at 427 ("Without question, the home is accorded the full range of Fourth Amendment protections."); *White,* 401 U.S. at 749, 91 S.Ct. at 1125 (defendant's home).

1

In *Hoffa,* for example, a government informer met with defendant in his hotel suite and elsewhere. He subsequently testified about the substance of these conversations at trial. The Court found a warrant unnecessary because the informer "was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence." *Hoffa,* 385 U.S. at 302, 87 S.Ct. at 413. In short, the Court held that the fourth amendment does not "protect[] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.*

In *White,* the government informer discussed illegal narcotics transactions with defendant in defendant's home, the informer's car, and a restaurant. Agents monitored these conversations using a radio receiver. The Court described *Hoffa* as having held that "however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with authorities." 401 U.S. at 749, 91 S.Ct. at 1125. Accordingly, the Court upheld denial of defendant's motion to suppress.

2

Once it is determined that it applies, "[t]he chief remaining limitation on the 'misplaced confidence' doctrine appears to be that the agent or informer may not search for evidence not voluntarily revealed by the unsuspecting criminal." *Jones v. Berry,* 722 F.2d 443, 447 (9th Cir.1983), *cert. denied,* 466 U.S. 971, 104 S.Ct. 2343, 80 L.Ed.2d 817 (1984). In *Hoffa,* the Court emphasized that "every conversation which [the informer] heard was either directed to him or knowingly carried on in his presence." *Hoffa,* 385 U.S. at 302, 87 S.Ct. at 413. While appellants strenuously object to the application of this doctrine, they do not suggest that the undercover "agents in this case heard or saw anything that the [appellants] did not intend them to hear or see." *Jones,* 722 F.2d at 447 n. 6.

3

The invited informer doctrine is part of a greater principle of fourth amendment jurisprudence: "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland,* 442 U.S. 735, 743–44, 99 S.Ct. 2577, 2581–82, 61 L.Ed.2d 220 (1979). In *Smith,* the Court cited *Hoffa, White,* and *Lopez,* to support its holding that the police do not need a warrant to install a pen register to record the telephone numbers dialed from a person's private residence. *Id.* 442 U.S. at 744, 99 S.Ct. at 2582. The Court reasoned that in using the telephone, a person "voluntarily convey[s] numerical information to the telephone company and 'expose[s]' that information to its equipment in the ordinary course of business." *Id.* Consequently, a person "assume[s] the risk that the [telephone] company would reveal to the police the numbers he dialed." *Id.*

Smith also relied heavily on the Court's prior decision in *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), where the Court held that a person has no legitimate expectation of privacy in financial information "voluntarily conveyed to ... banks and exposed to their employees in the ordinary course of business." *Id.* at 442, 96 S.Ct. at 1623. Once again, the Court reiterated the rule that a person "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* at 443, 96 S.Ct. at 1624. This is so, reasoned the *Miller* Court, "*even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.*" *Id.* (emphasis added). Most recently, the

Court has held that the government can retrieve a person's trash without a warrant because he voluntarily turns it over to garbage workers for collection. *See California v. Greenwood,* 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988).

Given this unwaivering line of precedent, it is clear that appellants' argument that they had a legitimate expectation of privacy *against state scrutiny* is inimical to established fourth amendment doctrine. The Supreme Court consistently has rejected such arguments.

B

In this case, appellants demand the core protection afforded by the fourth amendment—a search warrant issuable only upon probable cause—despite the fact that the fourth amendment does not even characterize the government's use of undercover informers as a "search" because it does not intrude upon a legitimate expectation of privacy. They argue that the first amendment context of this case makes all the difference.

1

The Supreme Court has addressed the interplay between the fourth and first amendments in various contexts.[37] The Court has noted that seizures of articles protected by the first amendment may "invoke[] ... Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden v. Kentucky,* 413 U.S. 496, 504, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757 (1973). "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Id.* at 501, 93 S.Ct. at 2800.

In *Roaden,* the Court overturned the conviction of a drive-in theater manager for exhibiting an allegedly obscene film, because at the time of the defendant's arrest, the arresting officers violated the fourth amendment by seizing without a warrant a film then showing at the theater.[38] Crucial to the Court's decision were two factors: first, that the seizure of a film then being exhibited to the general public worked an impermissible "prior restraint of the right of expression," *id.* at 504, 93 S.Ct. at 2801, and second, that the judgment of the arresting officer alone was insufficient to insure that the film was contraband obscenity, *id.* at 506, 93 S.Ct. at 2802.

Roaden is part of a line of Supreme Court cases addressing the seizure of alleg-

37. The cases relied upon by appellants, particularly *N.A.A.C.P. v. Alabama,* are of marginal assistance because "[e]ach deals with a form of governmentally compelled disclosure of information" that is not involved where the government gleans information through noncompulsory means. *United States v. Gering,* 716 F.2d 615, 619 n. 2 (9th Cir.1983); *see also Reporters Committee v. American Telephone & Telegraph,* 593 F.2d 1030, 1055 n. 82 (D.C.Cir.1978), *cert. denied,* 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979). In contrast, the invited informer doctrine is founded on the principle that the organization's disclosure of otherwise confidential information essentially is consensual. In addition, *N.A.A.C.P. v. Alabama* did not address the interplay between the fourth and first amendments. It certainly did not hold that the organization's first amendment privacy interests were greater than those under the fourth amendment. Finally, in one of *N.A.A.C.P. v. Alabama's* progeny, the *Gibson* case, the Court simply held that there must be a substantial relationship between the government's investigation and a compelling state interest. The state in *Gibson* conceded that the propriety of its investigation "hinge[ed] entirely on the question of whether the evidence before the Committee [was] ... sufficient to show probable cause or nexus between the [NAACP] and Communist activities." *Gibson,* 372 U.S. at 546, 83 S.Ct. at 893. In this case, appellants do not challenge the government's probable cause to investigate the sanctuary movement, and they concede that "[a]s a general rule, the government has a strong interest in enforcing the immigration laws."

38. *Roaden,* however, does not support the proposition that the first amendment always justifies procedural protections greater than those offered by the fourth amendment. For instance, *Roaden* does not mean that the first amendment mandates a higher standard of probable cause for the issuance of a warrant to seize books or films. *See New York v. P.J. Video, Inc.,* 475 U.S. 868, 875 n. 6, 106 S.Ct. 1610, 1615 n. 6, 89 L.Ed.2d 871 (1986). Instead, "an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally." *Id.* at 875, 106 S.Ct. at 1615.

edly obscene materials. These cases recognize that endemic in obscenity is a definitional problem. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *United States v. Sherwin,* 572 F.2d 196, 200 (9th Cir.1977), *cert. denied,* 437 U.S. 909 (1978) (quoting *Speiser v. Randall,* 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)).

To insure that unconditionally protected speech is not wrongfully seized and suppressed, exceptions to the warrant requirement, perhaps acceptable in other contexts, are unacceptable for the seizure of allegedly obscene material. "Otherwise, police officers could seize any publication or film they deem unprotected by the First Amendment...." *United States v. Hale,* 784 F.2d 1465, 1469 (9th Cir.), *cert. denied,* 479 U.S. 829, 107 S.Ct. 110, 93 L.Ed.2d 59 (1986). For example, as *Roaden* itself holds, the first amendment requires an exception to "the general rule under the Fourth Amendment ... that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances)...." *Fort Wayne Books, Inc. v. Indiana,* — U.S. —, 109 S.Ct. 916, 927, 103 L.Ed.2d 34 (1989). In addition, the plain view doctrine cannot be used to seize allegedly obscene materials not specified in a warrant. *See Hale,* 784 F.2d at 1469; *Sherwin,* 572 F.2d at 200.

The first amendment insists upon a "procedure 'designed to focus searchingly on the question of obscenity.' " *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964). Such judicial oversight is necessary in light of the core first amendment interest against the suppression of protected speech. Indeed, the first amendment generally prohibits the seizure of all available copies of an allegedly obscene film without a judicial determination of the obscenity issue in an adversary proceeding. *Heller v. New York,* 413 U.S. 483, 491, 93 S.Ct. 2789, 2794, 37 L.Ed.2d 745 (1973).

Another core first amendment value is at work in many of these cases. "It is '[t]he risk of prior restraint, which is the *underlying basis* for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials' that motivates this rule" requiring judicial oversight. *Fort Wayne,* 109 S.Ct. at 928 (emphasis added). Where the police seize books and films from a public bookstore or theater they necessarily effect a prior restraint of speech. Of course, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against constitutional validity." *New York Times Co. v. United States,* 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1971).

The Supreme Court also has acknowledged that first amendment interests may justify scrupulous adherence to the fourth amendment's warrant requirements in contexts other than obscenity, *see Stanford v. Texas,* 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965), although it has rejected claims of procedural protections over and above those provided by a warrant, *see Zurcher v. Stanford Daily,* 436 U.S. 547, 565, 98 S.Ct. 1970, 1981, 56 L.Ed.2d 525 (1978).[39]

2

In *Maryland v. Macon,* 472 U.S. 463, 468–69, 105 S.Ct. 2778, 2781–82, 86 L.Ed.2d

39. A recent opinion of this court addresses *Zurcher* in the context of a related civil case. In *The Presbyterian Church (U.S.A.), et al. v. United States of America,* 870 F.2d 518 (9th Cir.1989), the churches that INS agents infiltrated during the course of this criminal investigation brought a civil lawsuit. They claimed that the government violated the first and fourth amendments by attending and surreptitiously tape recording various church services without a search warrant. The court held that these churches had alleged sufficient injury in fact to give them standing to proceed with their claims. *Id.* at 524–35. While the court did not reach the merits of the churches' claims, it did discuss the government's contention that the individual government agents were entitled to qualified immunity because they did not violate clearly established constitutional rights. The court agreed with the government that the agents were entitled to qualified immunity, finding that the *Zurcher* decision "cannot be said to clearly settle the Fourth Amendment issue in this case." *Id.* at 527.

370 (1985), the Supreme Court distinguished the cases mandating "special constraints on searches for and seizures of presumptively protected [first amendment] material" where the fourth amendment was not even triggered. "Absent some action taken by government agents that can properly be classified as a 'search' or a 'seizure,' the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply." *Macon*, 472 U.S. at 468–69, 105 S.Ct. at 2781–82.

In *Macon*, undercover detectives entered an adult bookstore and purchased two magazines. 472 U.S. at 465, 105 S.Ct. at 2778. After concluding that the magazines were obscene, the detectives returned to the bookstore and arrested the clerk for selling obscenity. The Court rejected the defendant's argument that the magazines should have been suppressed as the product of a warrantless search and seizure. In doing so, the Court distinguished *Roaden* and similar cases on the basis that there unquestionably had been a "search" or "seizure" under the fourth amendment in these previous cases calling for consideration of the first amendment context. Thus, the Court rejected the relevance of the first amendment context altogether where the fourth amendment was not triggered.

The *Macon* Court reasoned that the police officers did not search the bookstore within the meaning of the fourth amendment merely by entering the store and examining its wares as would any other customer. The Court employed the logic of the invited informer cases: "The mere expectation that the possibly illegal nature of a product will not come to the attention of the authorities, whether because a customer will not complain or because undercover officers will not transact business with the store, is not one that society is prepared to recognize as reasonable." 472 U.S. at 469, 105 S.Ct. at 2782. In addition, the Court concluded that the officers did not seize the magazines within the meaning of the fourth amendment, because the clerk "voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon receipt of the funds." *Id.* The Court found helpful a citation to *Lewis*, an invited informer case.

The *Macon* decision obviously distinguishes *Roaden* and like cases mandating first amendment procedural protections greater than those provided by the fourth amendment. As in *Macon*, a traditional fourth amendment inquiry in this case yields the conclusion that the police do not conduct a "search" when they use an undercover agent who operates at the defendant's invitation. The *Macon* Court recoiled against the notion that a defendant would be entitled to the core fourth amendment protection, a search warrant issued upon probable cause, although the fourth amendment itself was not even implicated. We also find this sentiment highly persuasive, although we do not end our analysis with the *Macon* case.[40]

We reached a result similar to that of the *Macon* case in *United States v. Gering*, 716 F.2d 615 (9th Cir.1983). In *Gering*, we rejected a claim that the first amendment invalidated a police investigation conducted without a warrant where the investigation clearly was permissible under the fourth amendment. In *Gering*, an ordained minister was convicted of mail fraud by soliciting donations for needy children and missionary work and diverting these funds to other uses. The government learned the names of many contributors through a so-called mail cover operation, where investigators maintained a record of the information on the outside of mail received by the defendant at his house and church. *Id.* at 618.

The propriety of a mail cover investigation under the fourth amendment was set-

40. Arguably, the *Macon* decision is dispositive of appellants' claim, because no fourth amendment search or seizure occurred when the undercover informers observed sanctuary activities. We do not rest on *Macon*, however, because to do so would require a holding broader than strictly necessary on the facts of this case. Specifically, we can and do reject appellants' suppression argument without deciding that the first amendment is wholly irrelevant to the government's penetration of an organization engaging in protected first amendment activities by undercover informers posing as adherents.

tled,[41] but the defendant argued that his first amendment free exercise rights were violated by the mail cover operation. Consequently, *Gering* is directly analogous to this case, because the defendant argued that the first amendment created an expectation of privacy in his religious activities, although the fourth amendment alone granted no such expectation of privacy. The *Gering* court rejected the defendant's first amendment argument, explaining that the defendant had "failed to show that the mail covers were improperly used and burdened his free exercise or associational rights." *Id.* at 620. Accordingly, the *Gering* court rejected the defendant's suggestion that the free exercise clause afforded him an expectation of privacy where the fourth amendment did not.[42]

In *Reporters Committee v. American Telephone & Telegraph,* 593 F.2d 1030 (D.C.Cir.1978), *cert. denied,* 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979), the court rejected various newspapers' and reporters' challenge to the telephone company's practice of releasing telephone billing records of reporters' long-distance toll calls to government agents investigating felonies. The reporters claimed that the first and fourth amendments required that they be given notice of the government's request and a judicial hearing prior to the release of their billing records. *Id.* at 1038.

Anticipating *Smith,* the *Reporters Committee* court easily dismissed the appellants' fourth amendment claim on the authority of *Miller* and similar cases supporting the principle that "[t]o the extent an individual knowingly exposes his activities to third parties, he surrenders Fourth Amendment protections...." *Id.* at 1043. Concerning the first amendment, the reporters argued that disclosure of their long-distance billing records would undermine their information-gathering activities, and that even if other citizens had no expectation of privacy in their billing records, the first amendment itself demanded such protection for a reporter's long distance telephone billing records. The *Reporters Committee* court concluded, however, that the first amendment did not justify the reporters' prayer for an injunction requiring prior notice of any disclosures. While the reasoning of the court was divided between two opinions, both judges concluded that the first amendment afforded the reporters no protection against good faith criminal investigations and that the threat of bad faith investigations was wholly speculative. *Id.* at 1064, 1075.

C

Appellants assert that privacy, trustworthiness, and confidentiality are at the very heart of many instances of free association and religious expression and communication. We do not take issue with appellants' premise. Yet, simply precluding application of the invited informer doctrine does not assure confidentiality. Even if the government were unable to plant an undercover agent, "[t]he risk of being overheard by an eavesdropper or betrayed ... is probably inherent in the conditions of human society." *Hoffa,* 385 U.S. at 303, 87 S.Ct. at 414. Nothing would prevent a law abiding church-goer from telling the police that

41. *See United States v. Choate,* 576 F.2d 165, 175 (9th Cir.), *cert. denied,* 439 U.S. 953, 99 S.Ct. 350, 58 L.Ed.2d 344 (1978), *aff'd after remand,* 619 F.2d 21 (9th Cir.), *cert. denied,* 449 U.S. 951, 101 S.Ct. 354, 66 L.Ed.2d 214 (1980). Indeed, the *Choate* court also rejected the defendant's claim that the mail cover investigation impermissibly chilled his first amendment rights. 576 F.2d at 180–81.

42. Where constitutional interests other than privacy are at stake, however, other amendments to the Constitution may very well provide protections which the fourth amendment does not. This explains why appellants' citation to *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), does not advance their argument. In *Massiah,* a government informer placed a radio transmitter in his car during conversations with defendant subsequent to defendant's arraignment on drug charges. The Court held that admission at trial of incriminating statements obtained in this manner violated defendant's sixth amendment right to the assistance of counsel. *Id.* at 205, 84 S.Ct. at 1202. Assuming that such an investigative technique is permissible under the fourth amendment, the sixth amendment's insistence that a defendant be afforded his counsel's assistance at all critical periods provided a rationale for reversal completely apart from privacy concerns.

his church was being used for illegal purposes, and unless the informant's conduct is fairly attributable to the government, the Constitution is not even implicated. *See United States v. Miller*, 688 F.2d 652, 657 (9th Cir.1982).

In addition, a fair reading of the invited informer cases teaches that their rationale inherently imposes a rather significant burden on first amendment free association rights. In approving this investigative technique, the Supreme Court unmistakably declared that persons have no expectation of privacy or confidentiality in their conversations and relations with other persons, no matter how secretive the setting. The Court has recognized that legitimate law enforcement interests require persons to take the risk that those with whom they associate may be government agents.

1

In *Lopez*, for example, an Internal Revenue Agent told the defendant that he was investigating his business for possible tax evasion. On one of the agent's visits to the business, the defendant gave the agent $420 to drop the investigation. The agent informed his superiors of the bribery attempt and they urged him to "pretend to play along with the scheme" by returning to the business with a concealed tape recorder. 373 U.S. at 430, 83 S.Ct. at 1383. He did so, and the Court upheld the admission of the tape recording because "[i]t was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself." *Id.* at 439, 83 S.Ct. at 1388.

In dissent, Justice Brennan criticized the majority for failing to recognize that "freedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office." *Id.* at 470, 83 S.Ct. at 1404. He cited several cases, including *N.A.A.C.P. v. Alabama*, for the proposition that "First Amendment freedoms may include the right, under certain circumstances, to anonymity," *id.*, and he chastised the majority for failing to heed this principle, *id.* at 471, 83 S.Ct. at 1405. The *Lopez* majority, however, was unmoved by this first amendment argument.

The argument that the invited informer rationale was incompatible with the first amendment again fell on deaf ears in the *White* case, where the Court upheld the testimony of agents who had listened to a radio transmitter worn by an undercover informant as he spoke with the defendant in the defendant's home. Justice Douglas' dissent argued that the first amendment precluded the agents' testimony. His reasoning, which bears a striking resemblance to the arguments appellants make in this case in the free exercise context, merits reproduction in full. Justice Douglas stated as follows:

> Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance. Free discourse liberates the spirit, though it may produce only froth. The individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others. He remains the sole judge as to what must be said and what must remain unspoken. This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth.

White, 401 U.S. at 762–63, 91 S.Ct. at 1131–32.

Finally, it is significant that this court has not limited the reach of the invited informer rationale in a way that protects privacy and associational interests. For instance, it has been proposed that the doctrine should apply only where the undercover agent proposes an illegal transaction in the first instance, because "th[is] limit is one which is likely to free innocent persons from intrusions into their privacy." 3 W. LaFave, *Search and Seizure* § 8.2(m), at 225–26 (1987). Nonetheless, in *United States v. Miller*, 688 F.2d 652, 659 (9th Cir.1982), the court upheld an undercover

agent's entry onto private property on the pretext that he was interested in buying a trailer, a wholly innocent inquiry. In *Jones,* the undercover agents only vaguely hinted at possible illegality in their first meeting with the defendant. 722 F.2d at 445.

2

The courts have recognized the implicit first amendment aspect of the invited informer doctrine in the context of political association. For instance, in *United States v. Oaks,* 527 F.2d 937, 938 (9th Cir.1975), *cert. denied,* 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1191 (1976), the defendant was "a leading member of a tax rebellion group," the Tax Rebellion Committee, who explained his failure to file an income tax return on the basis that "he had been paid in Federal Reserve Notes 'which are not lawful money.'" The Committee's meetings were open to the public, and undercover agents conducted surveillance of "the participants [who] were openly advocating the willful violation of Internal Revenue laws." *Id.* at 941.

The *Oaks* court stated that "[t]he risk of surveillance of meetings of this type must be assumed." *Id.* Citing *Hoffa,* the court held that "[n]o interest legitimately protected by the First and Fifth Amendments is involved." *Id.* The *Oaks* court explained that "[w]hile *Hoffa* involved an alleged violation of the Fourth Amendment, we find the reasoning of the Court equally applicable to the First and Fifth Amendments under the facts of this case." *Id.* at 941 n. 7.

Another case of significance is *Socialist Workers Party v. Att'y General,* 419 U.S. 1314, 95 S.Ct. 425, 42 L.Ed.2d 627 (1974), where Justice Marshall, acting alone as Circuit Justice, refused to stay the Court of Appeals' reversal of a district court injunction that had barred undercover government informants from attending the national convention of the Young Socialist Alliance, the youth organization of the Socialist Workers Party. Justice Marshall found it significant that the convention was open to any member of the public under the age of 29, the government had promised not actively to disrupt the convention, and that the government's conduct "[wa]s entirely legal, and if relief were granted [to the YSA], the potential injury to the FBI's continuing investigative efforts would be apparent." *Id.* at 1320, 95 S.Ct. at 428.[43]

The Tenth Circuit's recent decision in *Pleasant v. Lovell,* 876 F.2d 787 (10th Cir. 1989), is also informative. In *Pleasant,* the government used an undercover agent to infiltrate the National Commodity and Barter Association (NCBA), an organization advocating organized opposition to the federal income tax laws. The 145 members of the NCBA filed a lawsuit alleging first and fourth amendment violations by the government agents in the Criminal Investigation Division of the IRS who received information from this undercover agent.

The *Pleasant* court concluded that these government agents were entitled to qualified immunity for the information they received from the undercover agent that was obtained within the scope of the agent's duties as an NCBA employee. The court reasoned that the invited informer cases were applicable to the situation at hand, because "[t]he government may resort to artifice and stratagem to disclose violations of the law." *Id.* at 802. The *Pleasant* court concluded that the key limitation on the government's conduct was that the undercover agent must adhere scrupulously to the scope of her invitation. 876 F.2d at 803–04. In other words, the court found that the defendants were only entitled to qualified immunity for information the undercover agent obtained with the full knowledge of the NCBA targets. The court rejected the plaintiffs' contention that "the lawfulness of the consensual monitoring activities under the fourth amendment is immaterial for purposes of their first amendment claim." *Id.* at 805.

43. The SWP ultimately prevailed at trial on its claim that the government was liable under the Federal Tort Claims Act for invading the organization's privacy by the use of undercover informers. *See Socialist Workers Party v. Attorney General of U.S.,* 642 F.Supp. 1357, 1422–23 (S.D. N.Y.1986).

D

[28] We take the lesson of these cases to be that the government did not have to obtain a warrant to use undercover informers to investigate the sanctuary movement. These cases establish that there are two limitations on the government's use of undercover informers to infiltrate an organization engaging in protected first amendment activities. First, the government's investigation must be conducted in good faith; i.e., not for the purpose of abridging first amendment freedoms. *See Reporters Committee,* 593 F.2d at 1061 ("journalists would have an effective remedy if bad faith harassing subpoenas were employed against them.") (relying upon *Branzburg v. Hayes,* 408 U.S. 665, 707, 92 S.Ct. 2646, 2669, 33 L.Ed.2d 626 (1972)); *cf. Gering,* 716 F.2d at 620 (mail covers were not used "improperly"). As we reject appellants' selective investigation and prosecution claim, *infra,* there is no issue in this case as to the government's good faith in undertaking this investigation.

Second, the first amendment requires that the undercover informers adhere scrupulously to the scope of a defendant's invitation to participate in the organization. *See Pleasant,* at 803–04. That requirement is satisfied in this case; appellants do not even suggest that the undercover informers strayed beyond the scope of their invitation.

Relevant to our decision is the sentiment expressed in *United States v. Rubio,* 727 F.2d 786, 791 (9th Cir.1983), that "[w]e strongly disagree with any inference that criminal investigation is somehow prohibited when it interferes with ... First Amendment interests." A search warrant requirement for undercover government agents to investigate an organization concededly engaging in protected first amendment activities indeed would prohibit law enforcement officials from using an indispensable method of criminal investigation appropriate in any other circumstance. "The use of undercover officers is *essential* to the enforcement of vice laws." *Macon,* 472 U.S. at 470, 105 S.Ct. at 2782 (emphasis added). In many cases, a search warrant prerequisite would be tantamount to prohibiting a criminal investigation in its entirety, because the information learned from undercover government agents is often the basis for probable cause. The Constitution does not impose this high cost in the present case.

XIII

[29] Appellants contend that the district court improperly denied their request for an evidentiary hearing and discovery on their motion for dismissal based upon selective prosecution. The motion was filed subsequent to jury selection and the government objected to it as untimely.[44] Appellants contend they were singled out for prosecution because of their "vocal opposition to U.S. refugee and asylum policy and to U.S. foreign policy in Central America."

A

There is a split in this circuit as to whether the appropriate standard of review is abuse of discretion or clearly erroneous. *United States v. Moody,* 778 F.2d 1380, 1385 (9th Cir.1985). The *Moody* court did not choose between these standards because defendant satisfied neither. Similarly, as we find that appellants have failed to demonstrate that the district court erred under either standard, we need not resolve the conflict.

B

"To establish impermissible selective prosecution, a defendant must show that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive." *United States v. Lee,* 786 F.2d 951 (9th Cir.

44. The defense of selective prosecution is waived unless properly raised before trial. *United States v. Oaks,* 508 F.2d 1403, 1404 (9th Cir.1974); *United States v. Taylor,* 562 F.2d 1345, 1356 (2d Cir.1977), *cert. denied,* 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083 (1977). Nonetheless, we do not address the applicability of these cases because of the government's failure to pursue this issue on appeal.

1986). Claims of selective prosecution are to be judged under ordinary equal protection standards. *Wayte v. United States,* 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985).

Appellants claim that theirs are the only section 1324 prosecutions in Arizona not involving economic or physical exploitation of aliens. In the three years prior to this prosecution, appellants assert that the indictments in this case represent 100% of the "non-economic/non-exploitative" substantive and conspiracy indictments under section 1324, and 80% of the harboring prosecutions under section 1325. By contrast, "on facts similar to this case," growers and ranchers employing illegal aliens had not been prosecuted in the previous ten years, according to appellants.

In short, appellants contend that they are similarly situated to these growers and ranchers because neither exploits the aliens physically or economically. Appellants must demonstrate as a prerequisite to an evidentiary hearing that similarly situated persons "are generally not prosecuted for the same conduct." *United States v. Wilson,* 639 F.2d 500, 503 (9th Cir.1981). This first prong of the selective prosecution prima facie showing insures that the government has at least conducted selective prosecutions; if similarly situated persons are being prosecuted then appellants fail to make the required showing.

C

The goal of identifying a similarly situated class of law breakers is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group. The control group and defendant are the same in all relevant respects, except that defendant was, for instance, exercising his first amendment rights. If all other things are equal, the prosecution of only those persons exercising their constitutional rights gives rise to an inference of discrimination. But where the comparison group has less in common with defendant, then factors other than the protected expression may very well play a part in the prosecution.[45]

1

Our task is to identify an appropriate control group. Absent a similarly situated control group, the government's prosecution of a defendant exercising his constitutional rights proves nothing. For example, in the case of *Attorney General v. Irish People, Inc.,* 684 F.2d 928 (D.C.Cir.1982), *cert. denied,* 459 U.S. 1172, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983), defendant, a newspaper publisher, claimed that it was selectively prosecuted for failing to register as a foreign agent because of the paper's editorial support for the Irish Republican Army. The court rejected defendant's argument, reasoning that "[d]iscrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Id.* at 946. "[A]s the district court found, there was no one to whom defendant could be compared in order to resolve the question of selection[;] it follows that defendant has failed to make out one of the elements of its case." *Id.* at 946.[46]

2

In tax protest cases, all those who refuse to pay taxes are generally treated as being

45. *See, e.g., Lee.* In the *Lee* decision, the court rejected defendant's claim that the Air Force's differing treatment of civilian and military traffic law offenders constituted selective prosecution. The Air Force referred civilians to the U.S. Attorney for prosecution in federal court, while it retained jurisdiction over military personnel for prosecution in military courts. The court found that military personnel and civilians were not similarly situated because of the military's distinct needs and policies, and it therefore rejected defendant's selective prosecution claim. 786 F.2d at 957–58.

46. The district judge below apparently employed this reasoning in rejecting appellants' selective prosecution claim: "I suppose at some time, arguably, a case comes along that is *sui generis,* it simply doesn't have any counterpart."

As indicated *infra,* we find that organized smuggling rings provide the appropriate control group; thus, we do not depend on the ultimate analysis employed in *Irish People.* Instead, *Irish People* is relevant to show the significance of locating a control group.

similarly situated. *See United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir.1975), *cert. denied*, 424 U.S. 955, 96 S.Ct. 1431, 47 L.Ed.2d 361 (1976). Consequently, were the government only to prosecute vocal opponents of the tax laws, an inference of selective prosecution would arise. Similarly, all persons refusing to complete census forms are considered similarly situated, so that prosecution only of persons expressing vocal opposition to the census gives rise to a claim of selective prosecution.[47]

3

If all persons breaking the immigration laws were considered similarly situated, then appellants' argument would fail. The government clearly prosecutes persons for immigration law violations who do not vocally oppose United States policy in Central America. The government demonstrates that in the District of Arizona in the three years preceding this indictment, 1983, 1984 and 1985, there were 102 persons charged with conspiracy to violate section 1324, 460 persons charged with substantive offenses under section 1324, and 1,274 persons charged with violating section 1325. These statistics indicate that many persons *are* generally being prosecuted for violating the immigration laws. Appellants do not contend that all of these prosecutions were against vocal opponents of the government.

Realizing that their selective prosecution claim fails if all persons who violate the immigration laws are considered similarly situated, appellants urge the court to fashion a definition of similarly situated to include only those persons not profiting economically or physically exploiting aliens. Indeed, appellants' argument hinges on their assertion that they are similarly situated to ranchers and farmers but not to organized smuggling rings operating for profit. Using this definition, appellants contend that agricultural growers and farmers are similarly situated law breakers that the government does not prosecute.[48]

Appellants' definition of similarly situated fails because it does not insure that all distinctions extraneous to the first amendment expression are removed. The government argues that appellants are similarly situated to "well-organized and structured alien smuggling conspiracies that were smuggling high volumes of aliens." Agent Rayburn testified that immigration authorities had never uncovered a similar conspiracy by Arizona farmers or growers to transport illegal aliens outside the State of Arizona. The United States Attorney testified that the office's focus was upon organized smuggling rings.

Appellants' suggested definition of similarly situated excludes the one class of immigration law violators with whom they are most analogous: organized smugglers operating for financial gain. This group is unlikely to have a political motivation for their conduct and is consequently unlikely to be a vocal opponent of United States foreign policy. They represent the perfect control group because they present a similar threat to immigration policy in terms of the numbers of aliens they smuggle, but they do not engage in the expression that appellants' claim motivated this prosecution.

Appellants do not contend that the government generally does not prosecute organized alien smugglers. Their suggested focus exclusively upon agricultural employers seeks to distract attention away from the fact that the government generally *does* prosecute organized alien smugglers, albeit organized smugglers following the dollar instead of the cross. We reject

47. In the case of *United States v. Steele*, 461 F.2d 1148 (9th Cir.1972), the court found that defendant successfully had identified similarly situated persons. Defendant identified six other persons who also "completely refused on principle to complete census forms," but who were not the subjects of prosecution. *Id.* at 1151. Unlike defendant, however, these six other persons were not vocal advocates of public noncompliance with the census laws, giving rise to an inference that defendant was prosecuted because of his vocal opposition.

48. Even were the court to adopt appellants' suggested definition of similarly situated, nothing before the court allows us to say that agricultural growers and farmers fall within it. Certainly employers using illegal alien labor profit economically.

appellants' suggested definition of the similarly situated class and thus their selective prosecution claim.

D

Nevertheless, appellants cite the case of *United States v. Kerley*, 787 F.2d 1147, 1150 (7th Cir.1986), for the proposition that a defendant need not make a full prima facie showing in order to be entitled to discovery in connection with a selective prosecution claim. The *Kerley* case establishes a lower threshold for discovery than for the evidentiary hearing. The D.C. Circuit has rejected a lower threshold for discovery. *Irish People*, 684 F.2d at 948. In any event, the court below did set a hearing in which appellants cross-examined two United States Attorneys and the case agent. This provided them with sufficient discovery on this issue.[49]

XIV

Defendant Conger argues that the district court improperly denied his motion to suppress all evidence of his participation in the sanctuary movement. Conger previously was arrested on March 7, 1984, after INS agents stopped the vehicle in which he was transporting four illegal aliens. Conger was indicted for that offense, but that court suppressed all evidence resulting from the stop because it found the vehicle stop was not based upon founded suspicion. The INS had seized Conger's backpack, which included the names, addresses, and telephone numbers of almost all defendants charged in this indictment, and Conger's personal calendar which recorded meetings with refugees in the Nogales jail. None of the previously suppressed evidence was introduced against Conger in this case, but he argues that all of the evidence of his sanctuary participation is a fruit of the illegal stop on March 7, 1984. This was the first evidence linking Conger to the sanctuary movement.

The district court found that agent James Rayburn's second application for a covert investigation on April 24, 1984, relied upon the materials illegally seized from Conger in March. The INS did not authorize the undercover investigation until May of 1984. The court also found that the government continued to use copies of these suppressed documents subsequent to the suppression order, although the originals were returned to Conger. Nonetheless, the district court concluded that the government established that the evidence of Conger's sanctuary involvement was not subject to suppression.

The threshold inquiry is whether the government's evidence against Conger was the fruit of his illegal stop. The test for whether evidence is the fruit of prior illegal conduct is as follows:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

Wong Sun v. United States, 371 U.S. 471, 487–88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963).

In this case, the question is whether the evidence produced by the government's subsequent undercover investigation of the sanctuary movement is sufficiently distinguishable to have been purged of the government's illegal seizure of Conger's papers. The court in *United States v. Cales*, 493 F.2d 1215 (9th Cir.1974), addressed a similar issue. An illegal wiretap trig-

49. Appellants desire to take discovery of all those persons who attended a Washington meeting on whether to go forward with an indictment. The district court received documents pertaining to the indictment decision under seal. These documents (still under seal) reveal that the government investigated alternatives to prosecution, but these options were rejected because they were judged inadequate to stop appellants' smuggling activities. There is not the slightest indication in these documents that this prosecution was brought other than reluctantly and with a view to treating all law breakers equally.

gered an investigation which had long been dormant. *Id.* at 1215. The revived investigation produced evidence that prompted the government to seek defendant's conviction for income tax evasion.

The *Cales* court stated that "[e]vidence need not be suppressed merely because it would not have come to light but for the illegal wiretap." *Id.* The court concluded that the critical issue is "what kind of direction and impetus the illegal wiretap gave to the ... investigation: did anything seized illegally, or any leads gained from that illegal activity, tend significantly to direct the investigation toward the specific evidence sought to be suppressed?" *Id.* at 1215–16. The court held that even if the illegally seized evidence was a factor in the decision to "target" defendant for investigation, the government must be allowed to demonstrate that the evidence it obtained from the investigation was obtained independently from the original illegality. *Id.* at 1216.

Under this standard, Cruz's testimony against Conger was properly admitted at trial. While the *Cales* court concluded that it was not improper to target a particular individual, the government did not even use the illegal evidence to target Conger for investigation. The government's undercover informer Cruz was not given access to the illegal evidence and was directed only to make contact with Quinones. On his third meeting with Quinones, Quinones and Aguilar introduced Cruz to Conger. This is critical, as the *Cales* court emphasized the necessity for the illegal evidence to *direct* the government to evidence admitted at trial.

[30] Conger's ultimate contention is that the government could not use the evidence it illegally seized from his car to initiate the undercover investigation of the sanctuary movement. But the *Cales* court was absolutely correct to reject the proposition that law enforcement officials are precluded from initiating an investigation after they become aware of illegal conduct through an unconstitutional search. Where the government stumbles upon illegality, albeit through an improper search, the law breaker is not somehow insulated forever thereafter from further independent investigation.

[31] Here, the government used the illegally seized information to initiate an investigation of an entire organization, not to target Conger individually. The natural progress of this investigation resulted in the government discovering additional evidence of Conger's criminality. Under these circumstances, we hold that the evidence resulting from the investigation is not poisonous fruit.

XV

The appellants have advanced numerous arguments in challenging their convictions for violating the United States immigration laws. We have reviewed each challenge carefully and conclude that none has merit. Accordingly, the judgment is

AFFIRMED.

Kenneth FARLEY, Plaintiff–Appellant,

v.

Daniel E. HENDERSON, Defendant–Appellee.

Arnold K. RILEY; Carolyn B. Riley; Tamara Riley; Robert J. Wright, Plaintiffs–Appellants,

v.

Daniel E. HENDERSON; aka Dan Harris; James Lowell; Jerry Borsch; Tom Honte; Randy Jones; Mervin Lakin; Sandra Ramsey; Board of Medical Examiners, Defendants–Appellees.

Nos. 87–1771, 87–2275.

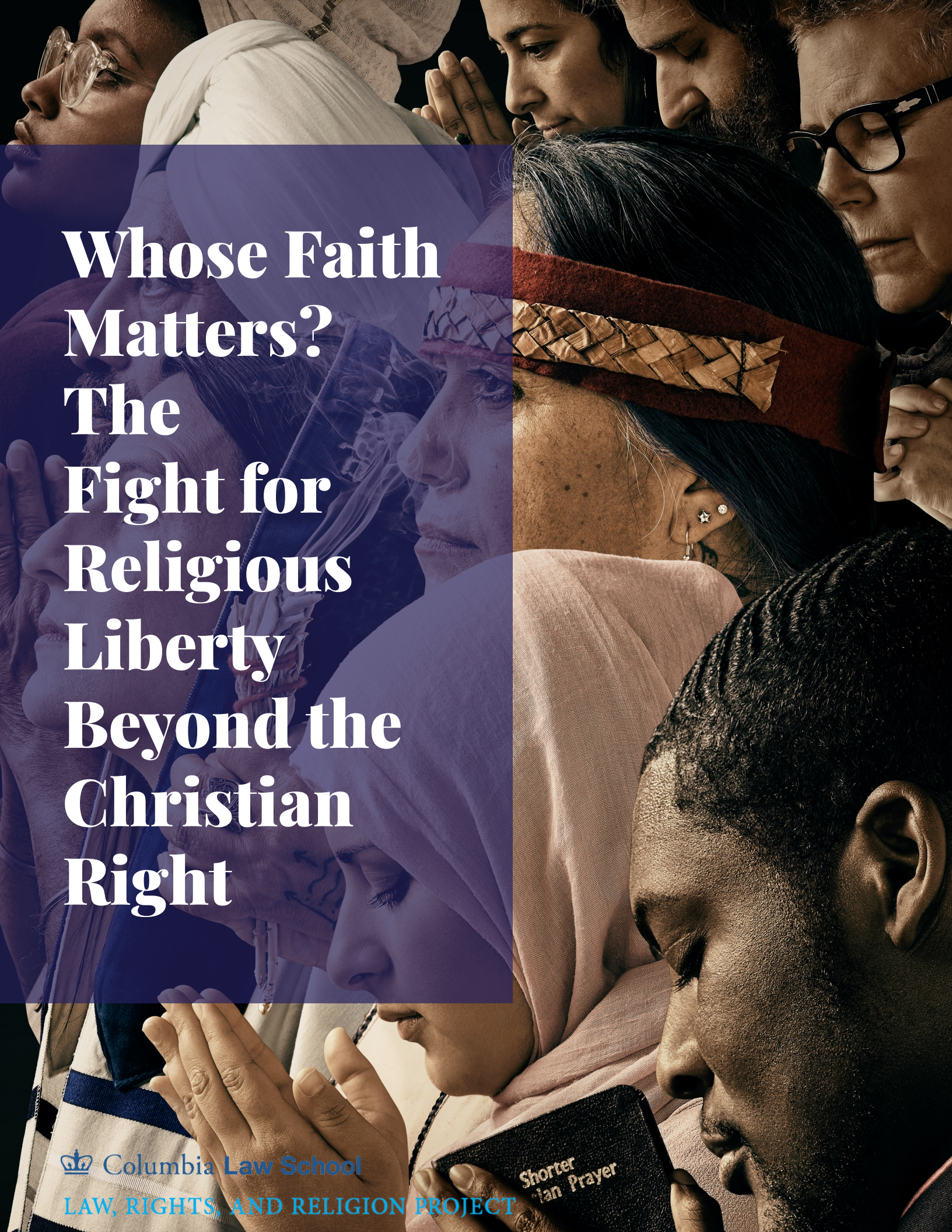
United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 14, 1989.

Decided May 17, 1989.

As Amended Aug. 29, 1989.

Church members brought two civil rights actions alleging that arrest of "psy-



Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right

Columbia Law School
LAW, RIGHTS, AND RELIGION PROJECT

November 2019

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Note

Much of the litigation described in this report is ongoing. We therefore apologize for any legal developments that occurred after our editing process was finalized, but before the report was released.

Cover Image

For Freedoms (Hank Willis Thomas and Emily Shur in collaboration with Eric Gottesman and Wyatt Gallery of For Freedoms), Freedom of Worship, 2018. Archival pigment print, 42 x 52.5 in.

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Contents

Executive Summary

Interfaith clergy bless an abortion clinic in the Rio Grande Valley, Texas, 2019. Photograph by Jeff Antons.

Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right seeks to correct two widespread misconceptions: that the political left has abandoned the fight for "religious liberty," seeing religion as a threat to its values, and that Christian conservatives are resolutely dedicated to protecting religious liberty.

The battle over "religious liberty" in the U.S. is far more complex than many journalists, advocates, and politicians would have you believe. Far from abandoning this fundamental right, people of faith outside the conservative movement have taken up the fight for religious freedom in a wide variety of contexts. And while the Christian right has positioned itself as the sole defender of "religious liberty," this movement's strategy is to substitute the beliefs of a narrow band of conservative Christians for the nation's broad and pluralistic religious traditions. Right-wing Christians' troublingly successful capture of "religious liberty" has resulted in the rapid erosion rather than protection of this right, as policymakers have enshrined particular theological beliefs into U.S. law and policy while erasing or even denigrating other religious traditions.

This report first documents the many contexts in which people of faith engaged in humanitarian and social justice work have fought for the right to exercise their religion. In recent years, members of many different religious groups have fought for the right to act out their faith by providing food and shelter to immigrants, performing marriages for same-sex partners, accessing abortion, protesting war and the death penalty, and protecting the environment—despite federal and state laws that sometimes restrict these activities. This rich history debunks the notion that religious liberty rights primarily advance the interests of right-wing conservative Christians.

Second, the report illuminates an underappreciated truth about the right's investment in defending religious liberty: in fact, this movement ardently supports the free exercise of religion only for parties who hold conservative views regarding sexuality, marriage, reproduction, or the family. Thus, the kind of religious liberty its members promote is often antagonistic to the liberty rights of people in other faith traditions.

By offering a sweeping account of religious liberty activism being undertaken by numerous progressive humanitarian and social justice movements, and uncovering how right-wing activists have fought for conservative Christian hegemony rather than "religious liberty" more generally, this report challenges the leading popular narrative of religious freedom.

It is not difficult to understand how the two misconceptions described above have developed. The Christian right has spent vast resources positioning itself as the leading defender of religious freedom against a hostile, secular left. In particular, it has advanced the idea that the expansion of reproductive and LGBTQ rights—two hugely important progressive social movements of the past half century—represent an existential threat to the right to religious liberty. In response to this alleged attack, its members have proposed laws and policies that purport to protect "religious liberty," though typically such laws only protect people of faith who hold conservative views regarding sex, sexuality, marriage, and reproduction.

Unfortunately, some supporters of LGBTQ and reproductive justice have accepted this idea of a zero-sum conflict between religious liberty and the right to equality. Instead of seeing how the policies proposed by the Christian right in fact erode, rather than defend religious freedom, some advocates on the left have limited their arguments to the idea that antidiscrimination laws should take precedence over any asserted right to religious liberty. For example, the commonly held position that "religious liberty should not be a license to discriminate" seems to accept at face value the notion that carve-outs from antidiscrimination law for religious conservatives do in fact protect religious liberty in the first instance. As we explain in this report, the very opposite is true: weakening civil rights law necessarily weakens religious freedom. Ceding the domain of "religious liberty" to the Christian right overlooks the ways in which equality and religious freedom are mutually reinforcing rights, each dependent on the other.

The popular media, too, have enabled and reinforced the Christian right's capture of "religious liberty." The vast majority of reporting on religious liberty issues has been limited to discussions of the ways in which sexual and reproductive rights threaten the beliefs of conservative Christians. Meanwhile, dozens of religious liberty rights lawsuits brought by people of faith who seek a right to assist immigrants, offer harm reduction services to drug users, resist government surveillance, or engage in other forms of humanitarian or social justice work, have been largely overlooked or framed as matters of political opinion rather than religious freedom.

Together, advocates, legislators, courts, and journalists have contributed to a climate in which only the religious liberty claims of conservative people of faith "count" as religious, while the claims and rights of progressive people of faith are dismissed or ignored as "merely" political in nature. That said, it is important to acknowledge that not all religious beliefs may be fully or fairly described in political terms, and that the report's references to religious "progressives," "conservatives," "left," and "right" may not be terminology that all people of faith identify with or embrace.

Section I of this report provides a concise history of the right to religious liberty in the U.S. over the past two and a half centuries. It outlines how the meaning of this right has evolved several times over since the very first religious freedom laws were enacted by colonial governments even prior to the founding of the United States. For those unfamiliar with contemporary religion law, it offers important context for understanding the legal theories and arguments discussed in sections II and III.

Section II provides a detailed overview of the many people of faith engaged in humanitarian and social justice work who have gone to court seeking the right to exercise their religious beliefs. Examples include:

- Humanitarian aid workers who are being prosecuted by the federal government for providing food, water, and other aid to migrants in southern Arizona, allegedly in violation of U.S. immigration and other laws, and who have defended their actions as an exercise of their religious liberty;
- "Mary Doe," who argued that her religious belief in bodily autonomy should permit her to access abortion services without having to undergo a state-mandated ultrasound and 72-hour waiting period, and;
- Safehouse and the Church of Safe Injection, interfaith religious nonprofits that are seeking to open supervised injection sites for drug users—notwithstanding federal drug laws that may prohibit such sites—as part of their religious mission.

Section II also contains a short discussion envisioning additional religious liberty arguments that might be made in other contexts. It offers a clear rebuttal to the claim that conservatives are the only contemporary advocates for religious liberty in the public square.

Section III provides a brief account of the various legislative, administrative, and litigation activities of the modern Christian right, including the ways in which these campaigns aim to enact into law conservative religious views about sex, sexuality, marriage, reproduction, and the family—all in the name of "religious liberty."

Finally, **Section IV** provides a set of overarching guidelines for how to assess the extremely diverse "religious liberty" claims that have been made across the theological and political spectrums. It provides a framework for understanding how we might best protect the

fundamental right to religious liberty—not for some religious believers, but for everyone. It also explains how the protection of those rights need not undermine other fundamental rights, such as the right to equality.

The report concludes with a call to rethink how the fundamental right to religious liberty in an increasingly pluralistic nation is understood, discussed, and protected.

Introduction

Photo Courtesy of Columbia University Law School.

Over the past several years, immeasurable ink has been spilled examining the clash between conservative Christianity and sexual and reproductive liberty. Media coverage of "religious liberty" issues has been overwhelmingly dominated by articles dissecting the impact of marriage equality and reproductive rights on conservative Christian practitioners. As one report on religion in the media put it: "[t]hrough the use of their own media outlets, but perhaps even more so through the assertive presentation of their viewpoints in the mainstream media, conservative evangelical spokespeople have positioned themselves as the voice of Christianity—if not religion as a whole—in the public square."[1] This limited focus on the religious beliefs and practices of social conservatives paints a deeply misleading portrait of both religion and religious freedom. For one, it ignores the fact that there are many today whose religious beliefs compel them to act in ways that would be labeled liberal or progressive.

The three most closely watched Supreme Court religious liberty cases since 2014 have all been brought by socially conservative Christian claimants seeking to be exempted from laws intended to protect reproductive health and LGBTQ civil rights. During this same time, however, people of faith across the country have brought religious liberty lawsuits involving the right to seek an abortion, perform same-sex marriages, protest the death penalty, protect refugees within the U.S., fight nuclear proliferation, provide harm reduction services to drug users, shelter the homeless, prevent environmental degradation, and resist ethnic and religious profiling.

Scott Warren receives a blessing from clergy before his trial. Photograph by Ash Ponders, courtesy of the Unitarian Universalist Service Committee.

"My conscience…is what drives me to act. It's what drives me to show up fully for those who are suffering."

~Scott Warren

Take Scott Warren, who was arrested in 2018 for providing food and water to two migrants in the Arizona desert and charged with several felonies for "harboring" undocumented immigrants. Warren has argued in federal court that he has a religious right to provide humanitarian aid to migrants at the U.S. border. In Georgia, Martha Hennessy was among a group of Catholics arrested the same year for breaking into and symbolically disarming a nuclear facility. Like

Warren, Hennessy has brought a legal defense based on her right to religious liberty. And in Arkansas, after state judge and Baptist minister Wendell Griffen was barred from hearing death penalty cases in 2017 because of his religious opposition to capital punishment, he argued that this bar amounted to a violation of his religious liberty. These three claimants are far from the only religious practitioners that defy the narrative of religious freedom fighter as conservative Christian.

Thus, faith-based values are not the sole province of social conservatives, and conflicts between individuals' religious practices and the mandates of the law are far more diverse and nuanced than the popular media would suggest. By discussing free exercise claims brought by religious minorities and people of faith outside the Christian right, this report will confront and challenge the largely successful campaign to conflate "religious liberty" with conservative Christianity, and to paint those outside the right as irreligious or "anti-faith."[2]

The report will also take a critical look at the ways in which "religious liberty" has been used as a cover for laws and policies that in fact weaken religious freedom by elevating the beliefs and practices of conservative Christians above all other religious and secular rights. While the overwhelming popular focus on how laws affect conservative Christians is misrepresentative, government actors' intentional efforts to conflate "religious liberty" with conservative Christianity is far more troubling. Policymakers at the federal, state, and local levels in recent years have actively sought to redefine "religious liberty" in conservative Christian terms, elevating and providing special legal protections to the rights and beliefs of the religious right. At the same time, many of these same actors, including the current presidential administration, have been hostile towards the issues most important to progressive religious communities and religious communities of color, including economic inequality, racism, and harsh immigration policies.[3] The same Justice Department that, under President Donald Trump, has pledged to protect religious freedom "to the greatest extent practicable and permitted by law"[4] is criminally prosecuting some religious adherents for their faith-based activities that challenge U.S. government policies. And the administration has targeted religious minorities, particularly Muslims, with inflammatory rhetoric and discriminatory policies.

The report will conclude by offering a set of free exercise principles intended to ensure that, rather than treating "religious liberty" as a right exclusive to socially conservative Christians, we treat the religious beliefs and practices of all faith practitioners—including those of no religious faith—with the respect and neutrality that the Constitution demands.

I An Overview of Religious Liberty Law

Photograph by Joe Brusky via flickr.

Before detailing the broad array of religious liberty activism and litigation that has arisen out of social justice, humanitarian, and progressive movements, the report provides a basic background on religious liberty law. Below is a timeline demonstrating how religious liberty rights—including the right to religious exemptions—have evolved over time.

Religious Liberty Law Timeline

Pre-Revolutionary War: Several colonies adopted some of the very first religious exemption laws—conscientious objector statutes, which exempted Quakers and other religious pacifists from militia service.[1]

1791: First Amendment to the U.S. Constitution was ratified, including the two "religion clauses"—the "Establishment Clause" and the "Free Exercise Clause," which together state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

1879: In the first Supreme Court religious exemption case, *Reynolds v. United States*,[2] a Mormon man argued that the Free Exercise Clause barred the federal government from prosecuting him under a law that criminalized bigamy, because polygamy was an essential requirement of his religious faith. The Supreme Court disagreed, finding that the Free Exercise Clause protects religious belief, but not "actions which were in violation of social duties or subversive of good order." The Court voiced the concern that granting a faith-based exemption from the law "would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become

What is a "Religious Exemption"?

A religious exemption is a legal right to avoid compliance with a government law, regulation, or policy because it substantially burdens your religious beliefs and/or practices.

Religious exemptions range from the modest and relatively uncontroversial (say, an exemption from a public school's no-hats policy for a Jewish student to wear a yarmulke) to the hotly contested (an exemption from a state mandatory vaccination law).

Religious exemptions may be explicitly guaranteed under a federal, state, or local law or administrative policy. Or they may be granted as part of a lawsuit. Examples include:

Congress exempts Native Americans who use peyote during religious rituals from compliance with a federal law criminalizing peyote use.

A city police department exempts observant Muslim and Sikh officers from a policy requiring officers to be clean-shaven.

The federal government files discrimination charges against a religious school for firing a teacher with a disability. The Supreme Court finds that the Free Exercise Clause exempts the school from compliance with the Americans with Disabilities Act with regards to the selection of its 'ministers," including the teacher.

a law unto himself." This rejection of a constitutional right to religious exemptions held sway for nearly 100 years—though during this time, legislators were free to pass religious exemption laws, like those protecting conscientious objectors to military service.

1961: In a series of decisions starting in the 1960s, the Supreme Court, led by Chief Justice Earl Warren, began to construe the Free Exercise Clause in broader terms than it had previously. In the 1961 case *Braunfeld v. Brown*, for example, an Orthodox Jewish business owner sought the right to open his store on Sundays, despite a state law requiring businesses to close on Sundays.[3]

While the Court ruled against the shopkeeper, it noted that upholding any law that burdens religious practice, so long as it applies generally to all people, would be a "gross oversimplification."[4]

It is worth noting that during this era, the Warren Court decided numerous other landmark cases expanding individual rights, including *Loving v. Virginia*[5] (striking down anti-miscegenation laws as unconstitutional), *Gideon v. Wainwright*[6] (recognizing a right to a free attorney for criminal defendants), and *Griswold v. Connecticut*[7] (recognizing a right to privacy, including the use of contraceptives).

1963: In *Sherbert v. Verner,*[8] the Supreme Court departed from its interpretation of the Free Exercise Clause in *Reynolds v. United States*, ruling that South Carolina violated the Free Exercise Clause when it denied unemployment insurance benefits to a Seventh Day Adventist because she refused to work on Saturdays, her Sabbath. Thus, the Court introduced for the first time the constitutional requirement that religious believers be exempted from government laws and policies that burden their faith—even if the laws or policies do not intentionally target religious believers—where the government cannot show a compelling reason for imposing such a burden.

1964: Congress passed the Civil Rights Act, which prohibited religious discrimination in public accommodations and employment.[9] The Act was amended in 1972 to require employers to reasonably accommodate the religious practices of their employees.[10]

1960s-1990: *Sherbert* was expanded upon in a series of decisions that interpreted the Free Exercise Clause far more broadly than under the earlier *Reynolds* standard. These decisions allowed people of faith, in some circumstances, to violate laws that conflicted

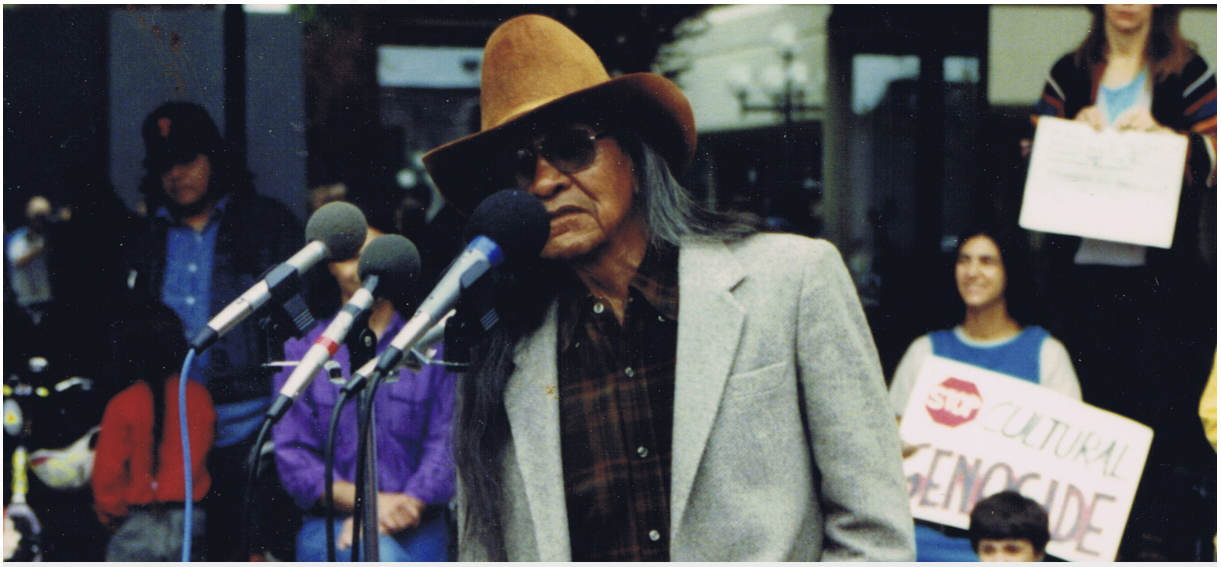
with their religious practice. Most notably, in the 1972 case *Wisconsin v. Yoder*,[11] the Supreme Court ruled that Amish families who wanted to remove their children from public school after 8th grade, despite a state law requiring school attendance until 16 years of age, should be permitted to do so without facing punishment.

In these cases, the Supreme Court established the principle that where a law or government policy, even if generally applicable to all people regardless of their faith, imposes a substantial burden on a person's sincerely held religious practice, the person may claim an exemption from the law or policy—unless the government can demonstrate that enforcing the law is necessary to accomplishing an important state interest.

The Court's Free Exercise opinions during this period drew a connection between the protection of religious liberty and principles of nondiscrimination. In *Sherbert v. Verner*, for instance, the Court grounded its constitutional standard of review for religious liberty claims in the standard of review honed in Fourteenth Amendment equal protection cases.[12]

Thus, religious liberty rights and rights to equality were understood to be mutually reinforcing values. During this period, the Court granted faith-based exemptions from generally applicable laws to members of minority Christian sects, including Jehovah's Witnesses,[13] Seventh Day Adventists,[14] and the Amish.[15] That said, even during this time, many exemption claims—including cases brought by Native American religious practitioners and Jews—were denied.[16]

1990: Less than three decades after *Sherbert*, the Supreme Court reversed course again in *Employment Division v. Smith*.[17] This case involved two Native American men who were denied unemployment benefits because they had been fired for illegally smoking peyote as part of a religious ritual, which the state of Oregon considered "misconduct." Rather than find that their religious beliefs justified an exemption from the law, as the Court had ruled in *Sherbert*, the Court upheld Oregon's decision to deny them benefits.[18] In language very similar to the 1879 *Reynolds* case, the Court emphasized the difference between religious belief and religious practice, and said "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law" conflicts with his religious observance.[19] Justice Antonin Scalia, the author of the Court's majority opinion, even claimed that the Court had "never held that an individual's religious beliefs excuse him from compliance



Al Smith speaking after the Supreme Court's decision in Employment Division v. Smith.
Courtesy of Jane Farrell-Smith.

with an otherwise valid law prohibiting conduct that the State is free to regulate."[20]

While *Smith* greatly reduced the circumstances under which the Free Exercise Clause entitled people of faith to religious exemptions, it did not eliminate such exemptions entirely. For example, the Supreme Court has since held that under the Free Exercise Clause, religious institutions should be exempt from certain employment laws with respect to their employment of ministers.[21] And nearly every scholar of religion law would agree that the First Amendment protects the performance of most religious rites according to terms set by the religion—even if those terms might conflict with secular legal rules, such as laws prohibiting discrimination. Thus, a woman cannot sue the Catholic Church to be ordained as a priest on the grounds that the church is discriminating on the basis of sex, and a same-sex couple cannot sue an Orthodox rabbi to marry them on the grounds that the congregation is discriminating on the basis of sexual orientation.

1993: *Employment Division v. Smith* proved to be a highly unpopular decision, and provoked Congress to pass the Religious Freedom Restoration Act (RFRA). This law recreated the robust right to religious exemptions outlined in *Sherbert v. Verner* and *Wisconsin v. Yoder*.[22] RFRA was passed with the support of a broad coalition of advocates from across the political spectrum—from the deeply conservative TraditionalValues Coalition to the liberal American Civil Liberties Union (ACLU)[23]—and was signed into law by President Bill Clinton.

RFRA was initially understood by many advocates and policymakers to be a civil rights law intended to prevent unintentional discrimination against religious minorities. In 1992, Senator Orrin Hatch, an ardent supporter of RFRA, called the bill "a civil rights bill for religious belief."[24] A Senate report on the bill stated that it was necessary because "State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths."[25] In fact, only three Senators voted against the bill, two of whom, Senators Jesse Helms and Robert Byrd, had previously filibustered civil rights legislation.[26] Many supporters of

President Bill Clinton signing RFRA. Courtesy of the U.S. National Archives.

the bill argued that religious exemptions were essential for the protection of small or unpopular religious groups, whose beliefs and practices were unintentionally restricted by numerous laws and policies that failed to consider or understand their faiths.[27]

Considering that anti-abortion groups have since benefited greatly from RFRA, it is worth noting that the passage of RFRA took several years in significant part due to opposition from religious groups opposed to abortion. The U.S. Catholic Conference and the National Right to Life Committee were concerned that RFRA could establish a religious right to

abortion that could be used in the event that *Roe v. Wade* was overturned.[28] RFRA was eventually signed into law three years after the Supreme Court's decision in *Employment Division v. Smith*.

Under RFRA, whenever a federal law, policy, or action substantially burdens a person's sincere religious exercise, they have the right to an exemption unless the government can show that the religious objector's compliance with the law is necessary to further a compelling government interest. For example, in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,[29] a church whose members used hoasca (a substance made illegal under federal law) during religious services argued that it was entitled to a RFRA exemption from federal enforcement of the Controlled Substances Act (CSA). The Supreme Court agreed, holding that the government had failed to show that enforcing the CSA against the church was necessary to furthering any compelling government interest.

RFRA, 42 U.S. Code § 2000bb–1

(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

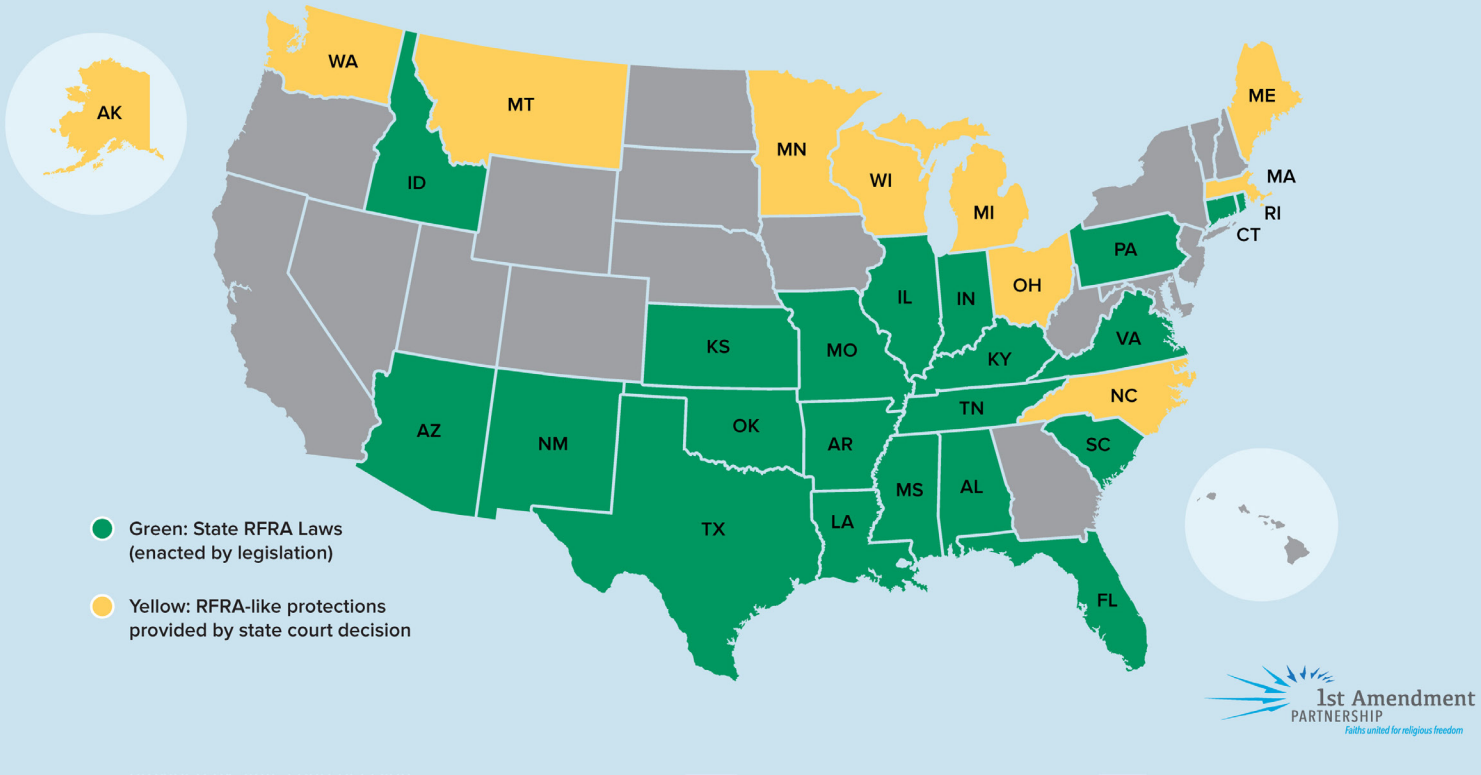
(2) is the least restrictive means of furthering that compelling governmental interest.

1997-Present: In the 1997 decision *City of Boerne v. Flores*,[30] the Supreme Court held RFRA to be unconstitutional as applied to state laws and policies. After this decision, RFRA only provides religious exemptions from federal laws and policies. In response to *City of Boerne*, many states passed their own RFRA laws, or "mini-RFRAs," which apply the RFRA standard to state and local activities. Today, nearly half the states have such laws.[31] In addition, several states have a right to religious exemptions under their state constitutions, thus providing broader protections for religious practices than the U.S. Constitution after *Smith*.[32]

2000: Three years after City of *Boerne v. Flores*, Congress passed another significant religious liberty law, the Religious Land Use and Institutionalized Persons Act (RLUIPA).[33] This law applied the RFRA test to state and local actions in two specific contexts—land use regulations that burden religion (such as the use of zoning laws to prevent the construction of a house of worship), and regulations on persons being held in state institutions (such as jails and public psychiatric facilities). RLUIPA is commonly used to

ensure that detained and incarcerated people have access to religious necessities like kosher or halal food, religious books, devotional practices, and clothing.

State Religious Freedom Restoration Acts (RFRA)



2014-Present: In response to the marriage equality movement and policies that have increased access to contraception, religious conservatives have initiated a wave of religious exemption lawsuits, several of which have succeeded before the Supreme Court. In the 2014 decision *Burwell v. Hobby Lobby*,[34] the Court held that RFRA provides a religious exemption to for-profit businesses that object to providing their employees with insurance coverage for contraceptives, as required by the Affordable Care Act (ACA). The Court's decision to grant large corporations religious liberty rights was highly controversial among religion scholars and the broader public. Two years later, in *Zubik v. Burwell*, an eight-person Court declined to rule on the question of whether requiring nonprofit organizations to submit a form opting out of the contraceptive mandate also violated RFRA.[35]

In the 2018 case *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*, the Supreme Court dismissed a civil rights case that the State of Colorado had brought against a bakery for refusing to make a wedding cake for a same-sex couple, in violation of the state's antidiscrimination law.[36] The Court declined to hold that companies have a constitutional right to an exemption from compliance with civil rights laws, instead finding that the state human rights commission had not given the bakery owner an impartial hearing, and had expressed bias towards his religious views. The question of whether religious adherents are entitled to any constitutional exemption from antidiscrimination laws is likely to come back before the Supreme Court soon.

In addition to these cases, many other lawsuits requesting similar exemptions from health and civil rights laws have been brought in state and federal courts across the country.[37] Moreover, in July 2019, an appeal was filed to the Supreme Court asking the Court to revisit its holding in *Employment Division v. Smith*.[38] While the case does not involve reproductive or LGBTQ rights, it could create a sea change in Free Exercise law.

Rally outside the Supreme Court in support of Hobby Lobby. © 2014 American Life League via flickr.

In summary—today, most religious exemptions are secured through legislation rather than the Free Exercise Clause of the U.S. Constitution. In addition to RFRA and RLUIPA, there are hundreds if not thousands of more discrete religious exemptions within federal, state, and local law—from those exempting religious objectors from state vaccine laws to those exempting Jehovah's Witnesses and others from certain oath requirements. While the initial decision to pass RFRA was largely motivated by a concern for religious minorities, several recent Supreme Court cases have led to a widespread focus on claims brought by Christian conservatives. However, as will be discussed in the following section, the Christian right by no means holds a monopoly on contemporary religious liberty rights.

II

Sikhs and Satanists, Sanctuary and Safe Drug Use: Religious Liberty Law Beyond the Christian Right

Scott Warren receives a blessing from clergy before his trial. Photograph by Ash Ponders, courtesy of the Unitarian Universalist Service Committee.

Long before U.S. courts began to grant religious exemption claims under the Free Exercise Clause, many early progressive and social justice movements were led by people of faith and inspired by religious beliefs. In the 18th century, members of the Religious Society of Friends, also known as Quakers, were some of the first organized abolitionists, believing that slavery violated Christian principles, including their belief that all were equal in the eyes of God. Religion was also an inspiration for many Black abolitionists: Frederick Douglass was an ordained minister of the African Methodist Episcopal Zion Church, and Harriet Tubman, nicknamed "Moses" during her lifetime for her fearless leadership of the Underground Railroad, was guided by dreams and visions that she considered to be messages from God. Later movements of the Progressive Era, including the settlement house movement and the temperance movement, also had significant religious factions.[1]

Perhaps most famously, religious leaders including Rev. Dr. Martin Luther King, Jr.—who according to one biographer "fused the political promise of equal votes with the spiritual doctrine of equal souls"[2]—were key organizers of the civil rights movement of the 1950s and 60s. Notably, the primary tactic of the civil rights movement was civil disobedience, which required activists to accept the mandated punishment for violating segregation and other laws rather than to request religious or other legal exemptions. This approach, echoing a kind of religious martyrdom, was used to draw attention to the laws' immorality, not just as applied to those of particular religious faiths, but to everyone. Some civil rights activists even adopted a "jail, no bail" approach, choosing to stay behind bars rather than pay into a corrupt legal system. Thus, these early social justice movements, though closely intertwined with religious faith, sought to transform laws rather than gain individual, faith-based exemptions from compliance with the law.

Since religious exemption litigation became more prevalent in the 1960s, however, it has been used as a tool by many faith-based social justice movements. From the right to "welcome the stranger" to the right to protect sacred land, religious practitioners have turned to the courts seeking protection for faith-based activities in an enormous variety of contexts.

Unfortunately, the diversity of beliefs represented in current religious liberty litigation is not often well-reflected in mainstream reporting and political commentary on religion, resulting in a public discourse that collapses "religious liberty" into a discussion about conservative Christian beliefs. As political scientist Laura Olson wrote in her examination of religious progressives, since the 1980s "[t]he right benefited from the fact that the media focused a great deal of attention on its conservative brand of faith-based politics, to the virtual exclusion of religious progressivism.

The religious left, to the extent that it has remained visible at all, seems largely to have been perceived as a dinosaur."[3] Similarly, history professor Timothy J. Williams has reflected "since the 1970s, it is the Christian right that has set the discourse about religion in America."[4]

Even the titles of recent news articles—such as "You Know the Religious Right. Here's the Religious Left" and "The Christian Left—Possibly the Most Interesting Group You've Never Heard Of" underscore the lack of attention that has been paid to religious movements outside the Christian right.[5] And while some observers have noted a modest uptick in coverage of religious progressives over the past year, even this reporting often fails to acknowledge those outside the Christian tradition.[6] This intense focus on the beliefs and practices of conservative Christians in the press has been, unsurprisingly, absorbed by media consumers. A 2016 study found that "religious and political conservatives who follow the news closely perceive [religious] freedoms as increasingly under assault."[7]

The discussion of religious liberty advocacy that follows seeks to correct this narrow focus on the religious beliefs and practices of conservative Christians by shining a spotlight on religious liberty advocacy that has been largely forgotten, overlooked, or mistakenly described as secular rather than religious.[8]

Religious Minority Rights

Before addressing more cutting-edge religious liberty litigation, it is important to note the ways in which religious liberty laws have been used to secure significant but typically modest religious exemptions for members of minority faiths. Prior to the enactment of RFRA, nearly every Supreme Court case involving the Free Exercise Clause was brought by a religious minority, including Seventh Day Adventists, the Amish, Jews, and members of Native American religions. Religious exemptions continue to be a critical legal tool for ensuring that the faith practices of religious minorities are not unintentionally restricted by government policies.

RFRA was passed with support from many progressive groups precisely because the beliefs and practices of religious minorities—unlike mainstream Christians—are not already incorporated into U.S. law. Federal and state RFRA laws have been used, for example, to ensure that members of the military can wear religious headwear,[9] male Native American schoolchildren can wear their hair in traditional braids,[10] Santería practitioners can perform ritual animal sacrifice,[11] and Sikh federal employees can carry a kirpan (a small, blunt, ceremonial knife) to work.[12] In addition to RFRA, federal antidiscrimination law requires

most employers to accommodate the religious beliefs of their employees unless this would cause a significant hardship.[13] For example, in *E.E.O.C. v. Abercrombie & Fitch*, the Supreme Court found that a clothing store could not deny a job to Samantha Elauf, a Muslim woman, because her headscarf violated their dress code requiring an "All American look."[14]

Samantha Elauf. Courtesy of Samantha Elauf Mustapha.

"Wearing a headscarf every day, it's a reminder of my faith."

~Samantha Elauf, litigant in *EEOC v. Abercrombie & Fitch*.

These protections are especially important for people in prison and immigration detention, where other rights and liberties are severely restricted. Countless inmates have relied on the protections afforded by RLUIPA and RFRA to secure access to kosher and halal food, exemptions from prison clothing and grooming rules, access to sweat

lodges and other religious rituals and services, and permission to keep religious books and other materials in their living spaces. In the Supreme Court's 2015 opinion in *Holt v. Hobbs*, for example, the Court held that RLUIPA guaranteed a Muslim inmate's right to grow a short beard, notwithstanding a state prison rule that prohibited facial hair.[15]

While exemption laws have undoubtedly been helpful to many religious minorities, it is worth mentioning that the vast majority of RFRA claims are unsuccessful.[16] A sampling of rejected RFRA claims includes a number of appellate court opinions which deny Native American religious practitioners an exemption from laws banning the collection of eagle feathers;[17] a Seventh Day Adventist mail carrier who was denied the right to take Saturdays, his Sabbath, off work;[18] and Orthodox Jewish children who were denied an exemption from having to testify against their parents contrary to their religious beliefs.[19]

In 2019, the Supreme Court received widespread condemnation when it refused to suspend the execution of a Muslim man on death row so that he could pursue a religious liberty claim.[20] The Alabama Department of Corrections had refused to allow the man's imam to join him in the execution chamber, despite the fact that it allowed a Christian chaplain who was a prison employee to enter the chamber for other inmates. The man argued that this violated his rights under RLUIPA and the U.S Constitution. In a dissent, Justice Elena Kagan called the majority's decision "profoundly wrong."[21] Only weeks later, perhaps in response to the public outcry, the Court halted another execution so that a Buddhist inmate in Texas could pursue a religious liberty claim with nearly identical facts.[22]

Thus, while RFRA, RLUIPA, and other exemption laws have been used to protect the religious exercise of many minority practitioners, such claims have by no means been universally successful.

Immigration & Immigrants' Rights

For decades (if not centuries), people of faith have been moved to provide support to refugees and other migrants as part of their religious practice—in some cases guided by the Bible's repeated calls to "love the stranger."[23] In the U.S., some of these activities, such as the provision of food, water, transportation, and shelter to undocumented people, have occasionally triggered prosecution by the federal government under criminal laws including the prohibition on "bringing in and harboring certain aliens."[24] This has led people of faith to seek religious exemptions as a means of protecting their work with and for migrants.

The first significant wave of religious liberty litigation in the immigration context occurred in the 1980s. After the Reagan administration denied refugee status to thousands of people escaping violence in Central America, church leaders as well as religious and secular activists created an underground network to help refugees cross the border and provide them with shelter and assistance. At its peak, this "sanctuary movement" included more than 500 congregations of many different denominations, who by some estimates aided up to 500,000 migrants.[25] Eventually, the Federal Bureau of Investigation (FBI) launched a covert investigation of several sanctuary communities using paid informants. Two groups of sanctuary volunteers were subsequently charged with violations of federal law for conspiracy, "bringing in and landing," "transporting," "harboring," and "aiding and abetting the unlawful entry of aliens."[26] The arrests led to two "sanctuary trials."[27] In both cases, the volunteers argued that they should be entitled to a religious exemption from federal harboring laws. None of their claims succeeded.

In *U.S. v. Merkt*, the Fifth Circuit Court of Appeals held that the Free Exercise Clause did not entitle the volunteers to an exemption because, according to the court, "[i]n this case, the claims of conscience must yield to the twin imperatives of evenhanded enforcement of criminal laws and preservation of our national identity."[28] Similarly, in *U.S. v. Aguilar*, the Ninth Circuit found that "a religious exemption for these particular appellants would seriously limit the government's

"[T]here is no question that faith communities will continue to provide sanctuary whenever refugees need protection from government officials, that many of these communities consider sanctuary to be an essential part of what it means for the church to be the church..."

~Jim Corbett, Defendant in *U.S. v. Aguilar*

Jim Corbett helps a woman climb a border fence in Arizona. Photo by Ron Medvescek, © 1984 Arizona Daily Star.

ability to control immigration."[29] Other cases of the sanctuary movement era—including a case brought by religious nonprofits that sought permission to hire undocumented immigrants in violation of the Immigration Reform and Control Act (ICRA)—were also unsuccessful.[30]

Now, thanks to the more expansive right to religious exemptions created by RFRA—as well as increasingly aggressive federal policies related to migrants and those who assist them—religious practitioners are again turning to the courts to protect their faith-based commitment to serving immigrants.[31] In 2018, volunteers working with the Unitarian-affiliated organization No More Deaths/No Más Muertes in Arizona were criminally charged for providing food, water, and shelter to migrants in the Arizona desert.[32] While the volunteers were of varying religious backgrounds, all considered their work with No More Deaths to be motivated by their religious and spiritual commitments.

One of the volunteers, geographer Dr. Scott Warren, was charged with two felony counts of harboring and one count of "conspiracy to commit harboring" after he provided food and

Courtesy of No More Deaths.

water to two men he encountered in the desert—charges that could have resulted in up to a 20-year prison sentence. Dr. Warren sought to have the charges dismissed based on RFRA. He argued that assisting the migrants was motivated by his sincerely held religious views, including the responsibility to "do unto others as we would want to have done unto us," and as such he was entitled to a religious exemption from prosecution.[33] In his legal papers and at trial, Dr. Warren and the other No More Deaths volunteers emphasized the perils of crossing the desert, explaining that "in the deadly border region in which at least 412 individuals died in 2017 alone, Dr. Warren could not, consistent with his conscience, turn away two exhausted, injured men seeking food, water, and shelter."[34] It is worth mentioning that much of the media coverage surrounding Dr. Warren's trial neglected to discuss his religious liberty defense, and even news sources specializing in religion issues referred to him as a "border activist" rather than a person of faith.[35]

In June 2019, Dr. Warren's trial resulted in a hung jury, with eight jurors who wished to acquit him and four who voted to convict.[36] The government will retry Dr. Warren for harboring, but is dropping the conspiracy charge.[37]

Eight additional No More Deaths volunteers were charged with misdemeanors for entering a national wildlife refuge without a permit and discarding property (jugs of drinking water) in the refuge. All of the volunteers brought defenses based on RFRA and four were tried before a magistrate judge (appointed to assist district court judges) in January 2019. Only hours after the non-jury trial ended, the judge issued an opinion finding the volunteers guilty. The opinion openly demeaned the volunteers' RFRA claim, calling it "a modified Antigone defense, in that they are acting in accordance with a higher law."[38] As noted by a group of religious scholars responding to the judge, RFRA is, of course, not a "higher law" but a federal statute that requires judges to undertake a complex multi-step analysis.[39] Instead, the judge treated the claim as little more than a whim and refused to offer even cursory scrutiny of the RFRA defense. While the volunteers faced up to six months in prison, they were ultimately sentenced to fifteen months of probation as well as monetary fines.[40] They have appealed the decision to the District Court.[41] In February 2019, charges against the other four volunteers were dropped after they pled to civil infractions.[42]

In addition to the No More Deaths cases, in May 2019 the District Court of Nebraska adopted a magistrate judge's recommendation rejecting a claimant's argument that the government's prosecution of him for "harboring" violated his religious liberty rights under RFRA and the Free Exercise Clause. The claimant had argued that his actions were a "living expression of sincerely held religious convictions as espoused by The United Methodist Church."[43] The

Zaachila Orozco-McCormick. Photograph by/courtesy of Mary Orozco.

"I have a strong and abiding moral, ethical and spiritual belief that every person has a right to basic human necessities such as food and water and shelter, regardless of their status, even if that means taking the shirt off my back or the food off my plate."

~ Zaachila Orozco-McCormick, No More Deaths volunteer and litigant.

magistrate, relying on pre-RFRA cases of the sanctuary movement era, held that "[a] judicially created religious exemption to the uniform application and enforcement of border security laws would fatally undermine the alien residency requirements promulgated and enforced pursuant to the Immigration and Nationality Act of 1952."[44]

The two ongoing No More Deaths cases will be closely watched by members of what has been deemed the "new sanctuary movement." Inspired by the sanctuary movement of the 1980s, over the past decade clergymembers and people of faith, as well as secular activists, have embraced a range of tactics to resist immigration laws, including providing physical shelter to people at risk of deportation. This movement has grown enormously since the 2016 presidential election; there are now dozens of people who have publicly gone into sanctuary in houses of worship to escape deportation orders. Furthermore, hundreds of houses of worship—as well as individuals, hospitals, schools, and other institutions—have expressed willingness to offer sanctuary to migrants. This puts them at risk of prosecution for harboring as well as other punishments, such as loss of 501(c)(3) tax-exempt status. Many are, therefore, considering

bringing RFRA defenses in the event that they are targeted for their faith-based sanctuary activities. Moreover, given that the No More Deaths volunteers were prosecuted for little more than providing food to migrants, religious facilities including homeless shelters and soup kitchens may similarly turn to RFRA defenses if they are prosecuted for providing assistance to undocumented people.

One leader of the new sanctuary movement has already brought a RFRA claim challenging the harassment she has suffered from the U.S. government on account of her ministry to migrants. Kaji Douša, a Christian pastor and co-chair of the New Sanctuary Coalition in New York City, filed a case in federal district court in July 2019 arguing that she was being subject to government harassment and surveillance because of her religiously motivated activities on behalf of migrants, in violation of the First Amendment and RFRA.[45] As she explains in her legal papers, Pastor Douša has been "called to pray with and protect refugees, asylum seekers, and other migrants."[46] As a means of answering this call, she was a lead organizer and participant of several "sanctuary caravans" beginning in 2018 that brought religious leaders to Tijuana, Mexico to minister to Central American migrants seeking refuge in the U.S.[47]

Upon reentering the U.S. after a trip to the border in January 2019, Pastor Douša was detained and interrogated by border agents, and her access to expedited border crossing was revoked.[48] The interrogation revealed that the government had been surveilling and collecting information about her pastoral work in New York. Pastor Douša later learned that a migrant whose marriage had been blessed by another member of the sanctuary caravan was subsequently interrogated by immigration officials about her relationship to Pastor Douša.[49]

Pastor Kaji Douša. Courtesy of Park Avenue Christian Church.

"My faith teaches me to see Jesus Christ in those who suffer as he suffered… I am thus called to pray with and protect refugees, asylum seekers, and other migrants—remembering that Jesus, too, was received as a refugee in Egypt."

~ Pastor Kaji Douša

Douša is arguing that this type of surveillance and questioning thwarts her religious exercise, in part by making it impossible for her to provide pastoral guidance, including the rites of confession and absolution, with a guarantee of confidentiality.[50]

Religious organizations whose tenets motivate them to assist in resettling refugees have also made claims under RFRA. In 2016, a group of clergymembers filed an amicus brief in *Texas Health & Human Services Commission v. U.S.*[51] arguing that Texas' attempt to prevent the U.S. government from settling refugees in the state violated their rights under the Texas state RFRA. This case did not explicitly involve a state RFRA claim. Rather, the state of Texas filed a complaint against the federal government arguing that the U.S. was resettling Syrian refugees without consulting the state, in violation of the Refugee Act of 1980. Texas religious leaders' amicus brief in support of the federal government argued that the faith groups had a religious right to serve Syrian refugees.[52] A federal court dismissed Texas' lawsuit without discussing the organizations' religious liberty claim.[53]

The Trump administration's efforts to build a wall along the U.S.–Mexico border as a method of immigration control has also been subject to RFRA challenges. In 2018, the federal government filed a condemnation suit to conduct surveying for the planned construction of a border wall on land owned by a Roman Catholic diocese in Texas and containing the historic La Lomita chapel. The diocese responded with an argument based on RFRA.[54] The Church raised several objections: the border wall would chill their congregants' religious practice; it would prevent the Church from ensuring that its property is used "in a manner that protects rather than injures human life"; and it would "stand as a counter-sign to the Church's teachings on the universal nature of humanity."[55]

The Church explained that some of its members were undocumented, and that even documented Latinx worshipers might cease coming to La Lomita Chapel if doing so required crossing a border wall, for fear of being stopped or detained. Even for those willing to cross a barrier to visit the chapel, the Church argued that turning the property into an immigration enforcement zone—"cleared of vegetation, lighted, and subjected to surveillance cameras"[56] —would impair the chapel's identity as a sacred space. Further, the Church argued that it had "a moral obligation to adhere to and uphold Catholic social teaching in all of its actions, including in its stewardship of Church-owned lands," and therefore it could not consent to a use of its land that "threatens life and limb."[57] Lastly, the Church explained that "[u]niversality—the understanding that all people share a common humanity and dignity" was a key element of Catholic faith, and that "[t]he proposed border wall is the antithesis

La Lomita Chapel in Mission, Texas. © 2008 Anthony Acosta via flickr.

"I consider a border wall likely to increase human suffering in the local community and in the world, in contravention of Catholic moral principles. The foundation of Catholic social teaching is that all human life is sacred."

~Daniel E. Flores, Bishop of Brownsville, Texas

of this message of universality."[58] Thus, it explained, "the Diocese cannot consent to the erection of a physical symbol of division and dehumanization on its Property."[59]

In February 2019, a district court judge allowed U.S. government surveyors initial entry onto the land to conduct surveillance.[60] Shortly thereafter, however, Texas Representative Henry Cuellar secured language in an appropriations bill that prohibited funding for construction of a wall on La Lomita and several other locations.[61] While this has provided some temporary protection to the chapel, President Trump's subsequently issued Declaration of Emergency and continuing efforts to secure money for the border wall leave the fate of La Lomita, and its RFRA claim, unclear.[62]

In a recently filed amicus brief, a group of 75 religious organizations argued that Trump's appropriation of funds for the border wall threatened their religious liberty. They argued that the President had "on multiple occasions drawn a connection between the supposed threat of Islam and the need for a border wall," and that "when the president can redirect funds at will—even in the face of congressional opposition—nothing stands in the way of using such funds to surveil, harass, and sanction disfavored religious groups."[63]

Finally, RFRA has been used to directly challenge the deportation of immigrants and help migrants to secure legal status. In *Rodriguez et al v. Sessions,* the U.S. citizen wife and daughter of undocumented Salvadorian immigrant Juan Rodriguez brought a claim arguing that his deportation violated their rights under RFRA.[64] As Seventh Day Adventists, they argued that family unity is essential to their religious belief and practice, and that therefore deporting their husband and father to El Salvador would infringe on their religious exercise.[65] The claim was dismissed when the government agreed to allow Mr. Rodriguez to remain in the country to pursue his asylum claim.[66]

In *Odei v. DHS*, Ghanaian pastor Ernest Odei was prevented from entering the U.S. by border patrol agents at O'Hare Airport because he lacked a proper visa.[67] Odei had planned to visit Spirit of Grace Outreach, a religious organization of which he was a founding member, speak at churches, perform missionary work, and meet with his academic advisors at the Christian university where

Juan Rodriguez family. Marie D. De Jesús/ ©Houston Chronicle.

"Just as David defeated Goliath and had faith, so my father and my family will defeat our Goliath with the help of God."

~Kimberly Rodriguez, youngest daughter of Juan Rodriguez

he was a Ph.D. candidate. Following his return to Ghana, Odei and Spirit of Grace Outreach challenged the decision not to admit him on several grounds, including RFRA, arguing that denying Odei entry to the U.S. burdened both the pastor's and the organization's religious exercise.[68] In September 2019, the Seventh Circuit rejected his claim, holding that a provision of the Immigration and Nationality Act barred courts from having the jurisdiction to review an order of removal, and that "[n]othing in the Religious Freedom Restoration Act overrides [this] jurisdictional bar."[69]

While neither Rodriguez's nor Odei's RFRA claims were fully litigated, immigrants have won more limited RFRA claims brought within immigration proceedings. In 2005, Chukwuezue Henry Nworu, a Nigerian man who was married to a U.S. citizen, was exempted under RFRA from the requirement to submit to a blood test in order to become a legal permanent resident of the U.S.[70] Nworu was a member of the Faith Tabernacle Congregation, which rejects medical interventions, including drawing blood. While an immigration judge initially claimed that he lacked the authority to interpret RFRA, the Board of Immigration Appeals and Attorney General reversed this decision, finding that requiring Nworu to take a blood test "was not the 'least restrictive means' of furthering [the government's] compelling interest as there exist other reasonably accurate methods of determining whether [Nworu] is suffering from a communicable disease."[71]

Similarly, an Old Order Amish couple sued the federal government in 2018 for a RFRA exemption from the requirement that they submit photographs as part of the wife's application for permanent residency.[72] The couple "believe that photographs of people are graven images prohibited by the Second Commandment." Despite the administration's alleged commitment to religious liberty, the Department of Homeland Security repeatedly refused to grant them an exemption from the requirement.[73] The case eventually settled.[74] In *Sabra v. Pompeo*, U.S. citizen Mohammed Sabra brought a RFRA claim against the State Department after it refused to recognize his daughter's citizenship and admit her into the U.S. for medical treatment. The Department requested additional evidence of paternity including photos of Sabra's wife during pregnancy—photos that "for religious reasons, the family is unwilling to provide as she is less than fully attired.[75] This case is ongoing.[76]

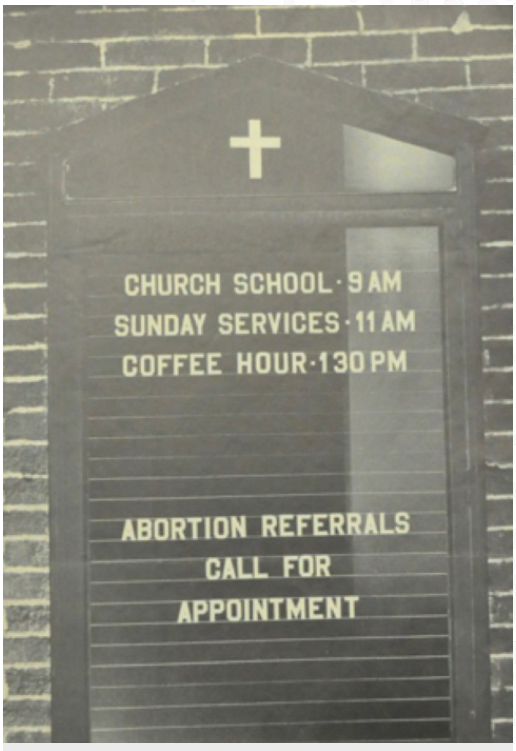
People of faith have sought to use RFRA and other exemption laws to protect both immigrants and those who are committed to providing them with spiritual and material assistance. This trend is likely to continue in the face of the federal government's ever-harsher immigration policies.

Reproductive Rights

Conversations around the intersection of religious liberty and reproductive rights typically equate people of faith with opposition to abortion and other reproductive healthcare. However, people of faith and religious denominations hold a wide and often quite nuanced range of views on bodily autonomy and the right to reproductive healthcare. Several religious denominations even hold that the right to make decisions about one's reproductive healthcare is an essential aspect of religious freedom.

For example, in a 2019 Statement on Reproductive Freedom, The Rabbinical Assembly, an international association of Conservative Jewish rabbis, stated that "Denying a woman and her family full access to the complete spectrum of reproductive healthcare, including contraception, abortion-inducing devices, and abortions, among others, on religious grounds, deprives women of their Constitutional right to religious freedom."[77] Acknowledging the spectrum of views on abortion held by its members, the Evangelical Lutheran Church in America (ELCA) has stated that "[f]or some, the question of pregnancy and abortion is not a matter for governmental interference, but a matter of religious liberty and freedom of conscience protected by the First Amendment."[78]

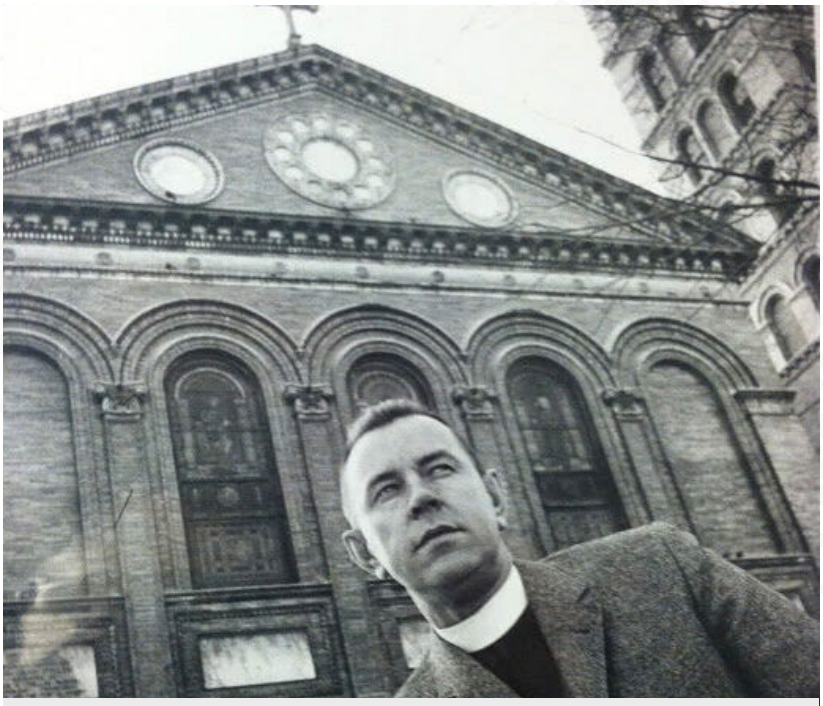
A number of large denominations, including the Presbyterian Church,[79] Reform[80] and Conservative[81] Judaism, the United Church of Christ,[82] and the Unitarian Universalist Association,[83] support the right of individuals, based on their personal circumstances and beliefs, to make their own decisions regarding abortion in most or all circumstances. Other denominations, including the ELCA,[84] United Methodist Church,[85] and the Episcopal Church,[86] have expressed some ambivalence about abortion, but nevertheless oppose absolute legal restrictions on the procedure. Perhaps unsurprisingly, given the large number of denominations supportive of reproductive rights, religious leaders, healthcare providers, and patients have all brought religious liberty claims as a means of protecting the right to obtain or provide reproductive healthcare.



Courtesy of Susan Brownmiller.

Prior to the legalization of abortion nationwide in 1973, a group of faith leaders established the Clergy Consultation Service (CCS), an underground network of ministers, rabbis, and other faith leaders who helped tens (or by some estimates, hundreds) of thousands of people nationwide access safe abortion.[87] Only three clergymembers ever faced formal legal charges for their activities, one of whom defended himself on the grounds that he had a constitutional right to provide such counseling—though this was based on the Free Speech rather than Free Exercise Clause.[88] None of the clergy were ultimately convicted.

In addition to these defensive suits, CCS member Rev. Jesse Lyons brought an affirmative lawsuit, *Lyons v. Lefkowitz,* challenging New York State's prohibition on abortion. Rev. Lyons, a Methodist clergymember, argued that the ban "restricted his right to offer pastoral counseling



Rev. Howard Moody. Courtesy of Judson Memorial Church.

"My understanding of free choice is that the right to choose is a God-given right with which persons are endowed…Freedom of choice is what makes us human and responsible. And for women, the preeminent freedom is the choice to control her reproductive process."

~Rev. Howard Moody, Co-founder of the Clergy Consultation Service

Religious Exemptions After *Roe*

The current makeup of the Supreme Court has renewed concerns that *Roe v. Wade* may be overturned in the coming years. If this comes to pass, religious liberty laws, including state RFRAs, could provide potential avenues for medical providers, activists, clergy, and patients to preserve abortion care.

Many healthcare providers have noted that their decision to offer abortion care is motivated by, not in spite of, their religious beliefs.[246] And it is likely that in the event *Roe* is overturned, a new version of the Clergy Consultation Service will arise to assist patients in accessing abortion.

Thus, healthcare providers, faith leaders, and patients could use RFRA as a defense to potential criminal prosecution for performing, coordinating, or receiving an abortion. Such defenses may become more common even if *Roe* is not explicitly overturned, as increasingly severe restrictions on abortion may make it all but impossible to access the procedure legally in some states, leaving illegal abortion as the only or most affordable option.

that referred women to qualified physicians."[89] The state legislature legalized abortion in New York before any of the multiple challenges to the law were decided, and New York's branch of CCS subsequently opened an abortion clinic.

In *Landreth v. Hopkins*, two CCS members in Florida similarly challenged a state law that prohibited advising on, advertising, or distributing printed material about abortion, arguing that it violated their rights to free speech and free exercise of religion.[90] The suit was dismissed on procedural grounds.[91]

After *Roe* but before RFRA, in the 1973 case *Watkins v. Mercy Medical Center,* Dr. Wilfred E. Watkins sued a Catholic hospital for denying his medical staff privileges after he refused to abide by the hospital's prohibition on sterilization and abortion.[92] Dr. Watkins claimed that the denial violated his First Amendment Free Exercise rights. The Ninth Circuit ruled against him because the hospital was private and constitutional claims can only be brought against the government. (Now, however, RFRA might be used in similar circumstances in a circuit that has found RFRA to apply in suits between private parties.[93])

Since the passage of RFRA and state mini-RFRAs, people of faith have sought to use these laws to preserve access to reproductive healthcare. In fact, as mentioned in Section I, the ability to use the federal RFRA to protect abortion rights was contemplated even before the law was enacted: in the early 1990s, the U.S. Conference of Catholic Bishops opposed RFRA on the grounds that advocates of abortion rights were using religious freedom as a justification for—not against—a person's right to choose whether to terminate a pregnancy.[94]

Most recently, the City of Baltimore brought a RFRA claim challenging a federal regulation promulgated by the Trump administration that prohibits doctors within the Title X program—a federal grant program that provides individuals with family planning and related

services—from offering their patients information about or referrals to abortion services.[95] Baltimore argued that this "Gag Rule" "violates rights of religious conscience recognized by [RFRA] by prohibiting physicians from counseling patients on comprehensive reproductive health services even when their religious exercise requires them to engage in such counseling."[96]

Interestingly, the complaint alleges that the rule violates the religious rights of doctors who both support and oppose abortion rights. It explains that the rule burdens "health care providers whose religious beliefs require them to inform patients of their religious views against abortion as well as [those] whose religious beliefs require them to inform patients of information necessary for patients to make informed decisions about their health care in light of the importance certain faiths place on individual self-determination."[97] The complaint also notes that the rule contains no exemption for "patients whose religious exercise would be substantially burdened by the inability of their physician to provide honest counseling."[98]

In September 2019, Baltimore's RFRA complaint was dismissed without prejudice by a district court judge, who found that the city had "done little more than allege conclusory statements with no support to demonstrate any religious belief or how it has been substantially burdened."[99] The court held that "[t]hese allegations are insufficient to state a plausible claim that the Final Rule violates the RFRA."[100]

Finally, several cases brought by members of The Satanic Temple (TST) in Missouri have sought religious exemptions under that state's RFRA from state-mandated abortion requirements that conflict with their belief in bodily autonomy and respect for science.[101] The law at issue required patients seeking an abortion to, among other things, undergo an ultrasound at least seventy-two hours before the procedure and certify receipt of a booklet that states "[t]he life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being."[102]

In *Doe v. Greitens* (later *Doe v. Parson*), plaintiff Mary Doe, a member of the Satanic Temple, brought a case in Missouri state court requesting an exemption from these mandates under the Missouri RFRA. Doe also argued that the law violated her Free Exercise rights under the First Amendment, as well as the Establishment Clause—which requires separation of church and state. As to the Establishment Clause argument, Doe argued that the law "unconstitutionally fosters an excessive government entanglement with religion" as "the sole purpose of the law is to indoctrinate pregnant women into the belief held by some, but not all, Christians that a separate and unique human being begins at conception."[103]

After a trial, the Supreme Court of Missouri issued an opinion in February 2019 finding that the state law did not impose a substantial burden on Mary Doe's religious exercise in violation of the state RFRA, since the law did not "require a woman seeking an abortion to read the booklet containing the objected-to [statement] much less to agree with it."[104] The Court also found that the law did not contravene the Establishment Clause.

Despite this loss, Doe's case was successful on at least one front: during oral argument, Missouri's Solicitor General told the court that the challenged law did not in fact legally require patients to undergo an ultrasound as a prerequisite for receiving an abortion. Previously, "abortion clinics in Missouri had interpreted the law as requiring an ultrasound for the purposes of hearing a fetal heartbeat in order for an abortion to be performed."[105] The Missouri Supreme Court relied on the Solicitor General's statement in finding that it "need not determine whether requiring Ms. Doe to have an ultrasound [or] to listen to the fetal heartbeat…would have constituted a restriction on her religious freedom, for the statute imposes no such requirements."[106] This new interpretation of the state statute, which may not have been clearly adopted by the state absent Doe's lawsuit, will reduce one barrier to abortion care in Missouri.

A similar challenge to the Missouri law brought on Free Exercise and Establishment Clause grounds was initiated by a different Satanic Temple member, called Judy Doe, in federal court.[107] In February 2019, a district court judge dismissed her claim, finding among other things that the statements "'[t]he life of each human being begins at conception' and that '[a]bortion will terminate the life of a separate, unique, living human being' are not facially religious," and therefore do not violate the Establishment Clause.[108] The opinion has been appealed to the Eighth Circuit.[109] TST has also threatened to challenge an Indiana law requiring the burial or cremation of fetal remains as a violation of its members' religious freedom.[110]

LGBTQ Rights

As in the reproductive rights context, the public too often conflates "religious liberty" with opposition to LGBTQ rights and marriage equality, despite the fact that people of faith hold a wide variety of views about sex, sexuality, and marriage, and many people of faith identify as LGBTQ. Several commentators have noted the media's tendency to overlook LGBTQ people of faith,[111] and one study of mainstream media articles about LGBTQ issues found that "[t]hree out of four of the messages with some religious identification were communicated by people affiliated with faith groups that have formal church policy, religious decrees or traditions opposing the

rights of LGBT people."[112] The study concluded that a "'gays versus religion' frame is present in the news" and that when media "use religious sources in news stories on LGBT issues, they tend to choose sources from more conservative Christian backgrounds – sources who voice negative messages about LGBT people and their rights. Conversely, pro-gay sources, or openly LGBT people…are predominantly presented without any religious affiliation noted in the story."[113]

Not every religious liberty litigant has opposed LGBTQ rights, however. Before the Supreme Court case *Obergefell v. Hodges* established a constitutional right to marry for same-sex couples,[114] a group of interfaith clergy whose faith instructed that same-sex couples should be allowed to marry, and members of their congregations who wished to marry, filed a suit arguing that a North Carolina law that criminalized performing a same-sex marriage violated their religious beliefs and practices.[115] This case, *General Synod of the United Church of Christ v. Reisinger*, was argued under the Free Exercise Clause, as the federal RFRA does not apply to

Nancy Petty. Courtesy of Campaign for Southern Equality.

"North Carolina's ban on marriage equality has placed a burden on my ability to minister to all of my congregants as equals. It violates my belief that all people are created equal and that God blesses all of our faithful relationships."

~Rev. Nancy Petty, *United Church of Christ v. Reisinger* claimant

state law and North Carolina has not passed a state RFRA. *Obergefell* was decided before the case could be fully litigated.

In a recent law review article, "The Case of the Religious Gay Blood Donor," Professor Brian Soucek argues that RFRA could be used to challenge the U.S. Food and Drug Administration's prohibition on blood donations from sexually active men who have sex with men. Such a case could be initiated by a man who is religiously obligated to donate blood, but is prohibited from doing so. He posits that such a case "would either produce a major victory for gay rights or, as likely, would force courts to clarify and curtail some of the most controversial aspects of recent, mostly conservative, religious freedom efforts."[116]

Interestingly, the inclusion of protections for LGBTQ-affirming faith practitioners helped to prevent the enactment of a broad religious exemption bill originally intended to benefit religious conservatives. The First Amendment Defense Act was first proposed in Congress in 2015, and its original text explicitly protected only the religious beliefs that marriage is "the union of one man and one woman," and that sex should only take place within such a marriage. Possibly out of concern that this could violate the Establishment Clause by advancing a particular religious belief about marriage, a later version of the bill added protections for the belief that marriage is "the union of one man and one woman, or two individuals as recognized under Federal law." In response to this change, some religious right groups pulled their support for the bill.[117]

Economic Justice

Providing food and shelter to the poor has long been a way for many faith practitioners and religious institutions to act out their religious beliefs. In fact, almost every faith tradition has providing aid to the poor or needy as one of its central tenets.[118] In the face of health, zoning, and other laws and policies that regulate such forms of charity, faith leaders and churches have relied extensively on religious liberty laws to defend their faith-based practices on behalf of people who are poor, hungry, and/or homeless.[119] Several of these claims have succeeded under the Free Exercise Clause of the federal and state constitutions as well as the federal and state RFRAs.

In 1983, prior to the passage of RFRA, a Lutheran church in Hoboken, New Jersey successfully relied on the federal Free Exercise Clause to prevent the municipality from shuttering the church's homeless shelter under its zoning laws. In ruling in the church's favor, a county judge held that "[i]n view of the centuries old church tradition of sanctuary for those in need of shelter and aid, St. John's

and its parishioners in sheltering the homeless are engaging in the free exercise of religion."[120] It then held that Hoboken could not use its zoning authority to prohibit that religious exercise.[121]

In 1994, a federal district court found a Presbyterian church's food distribution program to be protected religious exercise, calling it "a form of worship akin to prayer" and noting that "the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions."[122] The court further held that a zoning board decision which would prevent the church from creating such a program at their new location substantially burdened its right to free exercise of religion in violation of the First Amendment and RFRA.

Other successful religious liberty claims brought by faith-based institutions in support of their efforts to feed the hungry or shelter the homeless include a Richmond, Virginia parish that won the right to run a "Meal Ministry" under RFRA;[123] a New Orleans church that defended its soup kitchen from closure using religious liberty protections in the federal and Louisiana constitutions;[124] a Fort Lauderdale homelessness advocate who convinced a trial judge that the Florida RFRA required the city to provide him with an alternative site for his food distribution program;[125] a New York City church that relied on the Free Exercise Clause to obtain a permanent injunction preventing the City from dispersing homeless persons sleeping on the Church's property;[126] a Washington State church that forced the city of Woodinville to consider its permit request to host a tent city under the state constitution;[127] ministries in Dallas that won exemptions from food safety regulations under the Texas RFRA to serve food to the homeless;[128] Philadelphia churches that won an injunction under the Pennsylvania RFRA preventing the

Joan Cheever. Photograph by/courtesy of David Martin Davies.

"You are taught at an early age to take care of your neighbor and be a good Samaritan and help those in need."

~ Joan Cheever, Founder of The Chow Train in San Antonio

city from enforcing its ban on food distribution in public parks;[129] and a woman in Texas—Joan Cheever—who used the threat of a state RFRA suit to pressure the city of San Antonio into allowing her to serve free food from a non-permitted vehicle called the "Chow Train."[130]

Not all claims have succeeded, however.[131] In 2010, for example, the Eleventh Circuit found that a local regulation that placed limits on a religious organization's food distribution program did not violate the Florida RFRA.[132] Specifically, it held that the regulation did not impose a burden on the organization's free exercise of religion, because it did "not forbid the Church and its members from engaging in their religious exercise; at most, the Ordinance imposes some inconvenience by requiring relocation outside the District."[133] While the court acknowledged that moving a food distribution program outside the downtown park district "might result in some extra transit time for the Church's members," it determined that "needing to travel some extra distance is insufficient to establish a substantial burden."[134]

While not universally successful, reliance on religious liberty laws to protect soup kitchens, homeless shelters, and similar programs has been one of the most effective uses of these laws outside of the Christian right context.

Religious Drug Use

From the ceremonial consumption of wine by Catholics and Jews to the use of peyote during Native American religious ceremonies, the use of psychoactive substances within spiritual practice is common to many faith traditions, notwithstanding laws that regulate or prohibit their ingestion. Yet despite the fact that RFRA was enacted in response to the Supreme Court's 1990 decision in *Employment Division v. Smith*—a case involving the religious use of an otherwise illegal substance—requests for RFRA exemptions from criminal drug laws have been almost universally unsuccessful.

The notable exception to this trend is *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,[135] an early RFRA case in which the Supreme Court granted a religious exemption from the Controlled Substances Act to a church that engaged in ritual use of hoasca, a hallucinogenic tea. The Court held that exempting the small number of church members from the law criminalizing hoasca would not undermine the government's overall interest in preventing the sale of illegal drugs.[136] Notably, the Court ruled that the government could not rely on a "slippery slope" argument in denying a RFRA exemption. It explained, "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have

Hoasca brewing. Photograph by Apollo via flickr.

"The communion with Hoasca creates an enhanced state of consciousness, capable of amplifying one's perception of his/her essentially spiritual nature, bringing about positive development in the moral and intellectual aspects of a human being."

~Statement of Centro Espírita Beneficente União do Vegetal

to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'"[137]

The Court's holding in *O Centro*, however, has not appeared to help other religious practitioners gain exemptions from criminal drug laws. Claimants ranging from Rastafarians to practitioners of Native American religions to new religious groups like the "First Church of Cannabis" have been denied RFRA exemptions from laws criminalizing the possession and distribution of marijuana on a variety of grounds. In a few cases, claimants were judged

to be insincere, or motivated by money rather than religious faith.[138] In other cases, judges found no substantial burden on a claimant's religious belief, arguing that marijuana use or distribution is not actually required by the claimant's religion[139] (notably, in *Hobby Lobby*, the Supreme Court deferred almost entirely to the plaintiffs on the question of whether requiring contraceptive coverage in their employee health plans imposed a substantial burden on the business's religious beliefs).[140] Still other judges have ruled that, even if there is a substantial burden on the claimant's sincere exercise of religion, prosecuting even a single individual's personal marijuana use is narrowly tailored to advancing a compelling government interest.[141] This determination is somewhat absurd in light of the holding of *Gonzales v. O Centro Espírita,* which found that exempting an entire religious group from the prohibition of a hallucinogenic drug (albeit a drug far less popular than marijuana) would not undermine any compelling government interest. These cases have all been decided by lower courts; should another RFRA claim involving drug use be taken up by the Supreme Court, it is not obvious how the Court would rule.

Harm Reduction Services

In addition to faith practitioners who use controlled substances, other people of faith feel called upon to minister and provide services to people who use drugs. In 2018, a group of people in Philadelphia, including the president of a seminary and a church evangelist, founded an organization called Safehouse whose mission "is to save lives by providing a range of overdose

Ronda Goldfein, Vice President of the Board of Directors of Safehouse.
Photograph by Natalie Piserchio.

"At the core of our faith is the principle that preservation of human life overrides any other considerations. As witnesses to great losses of life in our community, we are compelled by our religious beliefs to take action to save lives."

~ Letter from Safehouse directors to a federal prosecutor

prevention services."[142] The group has been engaged in efforts to open a safe injection site, where drug users would be able to bring in controlled substances purchased elsewhere to use under the supervision of trained staff, who could provide them with medical assistance if necessary as well as referrals for drug treatment. The organization's website states that the "leaders and organizers of Safehouse are motivated by the Judeo-Christian beliefs ingrained in us from our religious schooling, our devout families and our practices of worship. At the core of our faith is the principle that preservation of human life overrides any other considerations."[143]

In February 2019, the federal government filed a civil suit against Safehouse seeking a judicial declaration that its attempt to open a safe injection site violated the Controlled Substances Act (CSA).[144] Safehouse's board members responded by arguing that the lawsuit violated their religious liberty under RFRA. They explained that their "religious beliefs obligate them to take action to save lives in the current overdose crisis, and thus to establish and run Safehouse in accordance with these tenets."[145] Specifically, they "believe that the provision of overdose prevention services effectuates their religious obligation to preserve life, provide shelter to our neighbors, and to do everything possible to care for the sick."[146] By pressuring the board to cease its efforts to open a safe injection site, the government's suit, Safehouse argued, burdens their religious exercise and is not necessary to any compelling government interest. The Department of Justice has aggressively disputed Safehouse's claim, arguing that the founders' "true motivation is socio-political or philosophical—not religious—and thus not protected by RFRA."[147] In October 2019, the district court ruled, without considering the organization's RFRA claim, that "there is no support for the view that Congress meant to criminalize projects such as that proposed by Safehouse."[148] The government has promised to appeal.[149]

Similarly, Jesse Harvey, a peer addiction recovery coach in Maine, founded the Church of Safe Injection in October 2018. The Church of Safe Injection is a non-denominational, interfaith religious organization whose mission, according to its website, is "to spread the gospel of harm reduction, to serve the least among us, and to support the well-being of marginalized communities."[150] The church holds the "sincere religious belief that People Who Use Drugs (PWUD) should not die preventable deaths," and its members consider it their moral obligation to minister to and serve this population.[151] To that end, church members act on their faith by distributing Naloxone (an overdose reversal medication), sterile needles, sterile water, rubber tourniquets, alcohol swabs, fentanyl testing strips, food, hand warmers, and other materials to people who use drugs, as a means of reducing overdose deaths and the transmission of HIV/AIDS and other illnesses. Harvey has stated publicly that the church will be applying for an exemption from federal drug statutes under RFRA so that it can open a safe injection site.[152]

Jesse Harvey. Photograph by/courtesy of Yoon S. Byun.

"If syringes had been around in Jesus' day, He would have supported safe injection, and He would have made sure that the people He hung out with had access to sterile supplies."

~ Jesse Harvey, Founder of the Church of Safe Injection

Government Surveillance, Profiling, & Discrimination

RFRA and the Free Exercise Clause have occasionally been deployed as a means of challenging government surveillance and profiling of Muslims. Rather than revolving around a specific religious practice, these claims share the common theme of using religious liberty arguments to challenge government laws, policies, and practices—particularly within the criminal justice, counter-terrorism, and immigration contexts—that target Muslims. For example, *Tanvir v. Tanzin*[153] involves a claim by several Muslim men who refused to become FBI informants because doing so would have contradicted their religious beliefs. In response to their refusal, the federal government retaliated against them by having their names placed on the government's "No Fly List"—a list created by the FBI's Terrorist Screening Center that severely limits people's ability to leave or return to the U.S. The men argued that this constituted government punishment for acting

Litigants Awais Sajjad, Jameel Algibhah, and Naveed Shinwari from Tanvir v. Tanzin. Photograph by Ibraham Qatabi/courtesy of the Center for Constitutional Rights.

on their religious beliefs, and therefore violated RFRA. In May 2018, the Second Circuit allowed the case to proceed, though this procedural decision has been appealed to the Supreme Court and no substantive RFRA decision has yet been made.[154]

In *Hassan v. City of New York*,[155] a group of Muslim people and organizations brought a lawsuit arguing that a secret police program that monitored Muslims in and around New York City violated their religious liberty under the First Amendment. The program included the placement of cameras outside mosques and undercover officers that infiltrated—without any indication of criminal activity—Muslim houses of worship, student organizations, and businesses. The plaintiffs argued that this intense surveillance violated their constitutional right to free exercise of religion by chilling their religious activity. They explained, for example, that mosques had noted a decline in attendance during the police program as "their congregants can no longer worship freely knowing that law-enforcement agents or informants are likely in their midst."[156] Another organization stated it had "changed its religious and educational programming to avoid controversial topics likely to…attract additional NYPD attention."[157] The parties eventually settled outside of court.[158]

Other lawsuits in this vein, all of which have been unsuccessful, include religious liberty challenges to: the government's practice of extensively questioning Muslim Americans about their religious beliefs as they enter the country;[159] government border stops of everyone who had attended an Islamic conference in Canada in 2004;[160] and the detention of two Muslim men following trips to Saudi Arabia and Morocco.[161] A Free Exercise Clause and RFRA challenge to an FBI surveillance program targeting Muslims in California is ongoing.[162] In addition, following the enactment of President Trump's Executive Order barring immigration from certain Muslim-majority countries (the "travel ban" or "Muslim ban"), several people and groups brought lawsuits challenging the ban on a number of grounds, including RFRA.[163] However, the Supreme Court did not address these RFRA claims when it upheld the ban in *Trump v. Hawaii* in 2018.[164]

Environmental Justice

While some sacred spaces take the form of a church, temple, or other building, natural structures such as rivers, mountains, or forests are also considered holy by some faith traditions. In particular, holy sites are an important part of many Native American religions.[165] As these spaces have faced rapidly increasing public and private development, pollution, and other threats over the past several decades, faith communities have repeatedly sought to protect them through the use of religious liberty litigation.

In the 1988 case *Lyng v. Northwest Indian Cemetery Protective Association,*[166] three tribes in California—the Yurok, Karok, and Tolowa—challenged the federal government's plan to construct a road through the Six Rivers National Forest, a holy site essential to their religious practice. The Court held that while the government's action undoubtedly burdened the tribes' free exercise of religion, it did not constitute the type of burden prohibited by the Free Exercise Clause, because it did not place any legal demands or prohibitions on the tribes' own religious actions or activities. The Court stated that while the road "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," it would not coerce the tribes "into violating their religious beliefs; nor would [it] penalize religious activity."[167]

Despite the fact that *Lyng* and other pre-RFRA environmental Free Exercise claims were unsuccessful, Native American individuals and tribes and other religious practitioners have continued to use religious exemption claims in an effort to protect sacred or holy land,[168] or fend off environmental degradation. The Supreme Court has yet to explicitly adopt the holding of *Lyng*—limiting a "substantial burden" to instances when the government coerces religious practitioners to change their own behavior—in the RFRA context, though several lower courts have done so, limiting tribes' ability to use RFRA to protect sacred sites.[169]

Protest of the proposed G-O road through the Six Rivers National Forest. Courtesy of Northcoast Environmental Center.

For example, in *Navajo Nation v. U.S. Forest Service*,[170] the Navajo Nation, Hopi Tribe, and numerous other tribes and nonprofit

Criticism of *Lyng*

The reasoning of *Lyng* has been criticized by many scholars and advocates. For example, Michael McNally, author of several books on Native American religious practice, has argued that the court's reference to individual "spiritual fulfillment" was rooted in a lack of understanding and respect for the tribes' religious beliefs, and the "romanticized view that Native Americans, particularly when it comes to sacred land, are spiritual, not religious."[247]

Similarly, Alex Tallchief Skibine, a law professor and member of the Osage Tribe, said the opinion "seem[ed] to equate Indians' religious exercises at sacred sites with Western yoga-like practices…portray[ing] Native religious activities at sacred sites as only about spiritual peace of mind."[248] In fact, he explains, the "importance of sacred sites to Indian tribes and Native practitioners is less about individual spiritual development and more about the continuing existence of Indians as a tribal people."[249]

In his dissent, Justice William J. Brennan decried the "cruelly surreal" result of the opinion, that "governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion."[250]

organizations brought a lawsuit arguing, among other things, that the Forest Service's decision to authorize the use of recycled wastewater to make artificial snow for a commercial ski resort located in a national park considered sacred by the tribes violated their rights under RFRA. The Ninth Circuit, relying on *Lyng*, disagreed, ruling that the Forest Service's actions did not impose a "substantial burden" on the tribes: "[l]ike the Indians in *Lyng*," the court explained, "the Plaintiffs here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment." It held that RFRA cannot be interpreted to require the government to change its own activities so as to advance or protect particular religious practices. In 2009, the Supreme Court declined to hear an appeal.[171]

Religious freedom was also an integral part of the multiyear fight over the construction of the Dakota Access Pipeline (DAPL) in the Standing Rock Indian Reservation. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*,[172] Native American tribes filed a RFRA motion to stop the flow of oil through the pipeline, which ran under the bed of Lake Oahe. They argued that the presence of oil would render water in the lake unsuitable for use in religious practices, as some of the plaintiffs believed that the oil was "the fulfillment of a Lakota prophecy of a Black Snake that would be coiled in the Tribe's homeland and which would harm … [and] devour the people."[173] The D.C. District Court denied the claim, finding that the tribe had waited too long to bring it.[174] The court additionally found that *Lyng* applied, and the tribes could not use RFRA to protect holy land.[175] The plaintiff's appeal was dismissed by the circuit court in 2017.[176]

While many of the most significant religious liberty claims in the environmental justice context have been brought by Native American claimants, a few have been brought by Christian practitioners. In *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*,[177] a group of Catholic nuns challenged a government agency's order granting a

Photograph by/courtesy of Robert Wilson.

"Clean, pure water is an essential part of the Lakota way of life that Creator has taught us. Clean, pure water is necessary for the rites and sacraments that comprise our religion."

~ Steven Vance, Cheyenne River Sioux Tribal Historic Preservation Officer

private company an easement to construct a natural gas pipeline through the nuns' property. The nuns explained that their "religious practice includes protecting and preserving creation, which they believe is a revelation of God."[178] For example, their complaint noted that they "exercise their religious beliefs by, *inter alia*, caring for and protecting the land they own as well as actively educating and engaging on issues related to the environment, including the current and future impact on the Earth caused by global warming as the result of the use of fossil fuels."[179] Thus, forcing the Adorers to use their land to accommodate a fossil fuel pipeline "places a substantial burden on [their] exercise of religion" in violation of RFRA. [180] The nuns lost on procedural grounds, and in 2019 the Supreme Court declined to hear their appeal.[181]

Members of the Adorers of the Blood of Christ and their supporters. Photograph by/ courtesy of Dave Parry, Outside the Image.

"As religious women of the Catholic Church, our faith impels us to stand up when the principles we hold sacred are compromised on the very land that is ours…This is not a political statement but a spiritual stand as people of faith."

~ Sister Janet McCann, Adorers of the Blood of Christ (wearing a red scarf)

In *Gelburd v. Christiansen,*[182] a Christian doctor filed a complaint against the U.S. Forest Service after he was prevented from providing medical assistance to a woman protesting the construction of a pipeline through a national forest in Virginia. The protester was occupying a small pod atop a pole in the forest, and the Forest Service was seeking to flush her out by cutting off her access to food, water, communication, and medical care. After hearing about the protester, Dr. Gelburd "attempted to reach her and conduct a medical examination of her to determine whether she…require[d] attention and treatment," but was stopped by Forest Service employees.[183] As he explained in his legal complaint, Dr. Gelburd's actions were motivated by his religious beliefs, which "compel him to use his knowledge and skills as a physician to assist persons in need of medical assistance, particularly the poor and disadvantaged."[184] In preventing

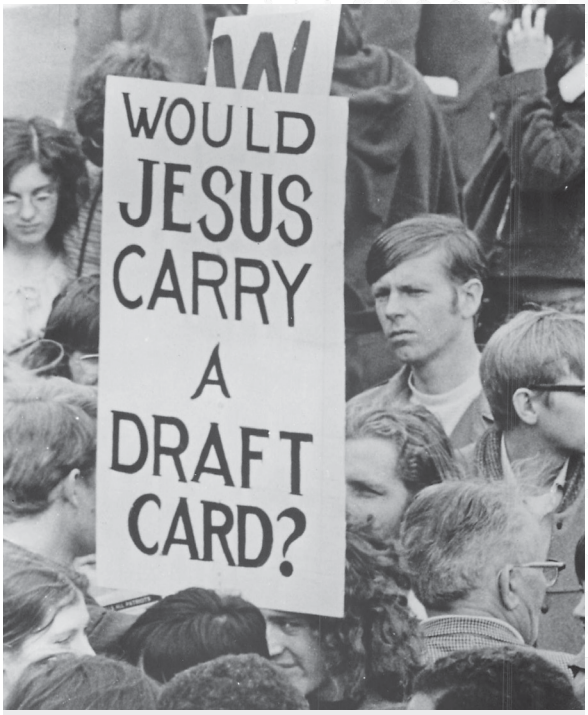
him from administering care, Dr. Gelburd argued that the government was burdening his religious exercise in violation of RFRA and the Free Exercise Clause. He withdrew the lawsuit after the woman ended her protest.[185]

While rarely successful, religious liberty claims have consistently been used as a legal tool, both before and after the passage of RFRA, to challenge environmental destruction, including the destruction of holy sites.

Conscientious Objection & Anti-War Activism

Many religious practitioners, most prominently Quakers, have religious objections to participation in violence and war. As mentioned in the religious liberty timeline above, laws exempting conscientious objectors (those who oppose serving in the armed forces for religious or conscience-based reasons) from military service are some of the most longstanding religious exemption laws in the U.S.[186] The current Selective Service requirements mandate that conscientious objectors who are drafted perform some alternative form of public service—unlike exemptions that permit religious objectors to disregard a law or policy entirely.[187]

Not all people of faith are covered by existing conscientious objector laws, however. In 1971, the Supreme Court held that those who had religious objections to serving in the Vietnam War—but not all wars—were not entitled to an exemption from military service under the Military Selective Service Act.[188] Further, the Court held that the Free Exercise Clause did not mandate that such objectors be exempted from service. In rejecting a constitutional exemption for those opposed specifically to the Vietnam War, the Court held that there existed "governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars."[189] Specifically, the Court pointed to "the Government's interest in procuring the manpower necessary for military purposes."[190]



Courtesy of Religion News Service.

Two other important cases of the Vietnam era were more favorable to religious objectors. In *United States v. Seeger*[191] and *Welsh v. United States*,[192] the Supreme Court ruled that persons with nontraditional religious beliefs—including those who did not even describe their beliefs as "religious"—could be entitled to a religious exemption under the Selective Service Act. The Court noted that this construction of the Act "embraces the ever-broadening understanding of the modern religious community."[193]

Some conscientious objectors are opposed not only to fighting wars, but to paying taxes that will be used to support the military. Those who object to paying for wars, however, have not succeeded in gaining religious exemptions under the Free Exercise Clause or RFRA. Pacifists who have argued that their religious beliefs permit them to withhold or divert all or part of their tax payments have consistently lost in court.[194] In *Adams v. C.I.R.*,[195] for example, a devout Quaker stated that she "sincerely believes that participation in war is contrary to God's will, and hence, that the payment of taxes to fund the military is against the will of God."[196] She therefore "declared herself exempt from taxation, so no federal income tax would be withheld from her pay."[197] The Third Circuit denied her claim, holding that granting an exemption would be impossible because of the "practical need of the government for uniform administration of taxation, given particularly difficult problems with administration should exceptions on religious grounds be carved out by the courts."[198]

Finally, some religious practitioners' anti-war beliefs require them to do far more than refrain from fighting in, or financially supporting, wars. Some people of faith—members of the historic "Peace Churches" (including Quakers and Mennonites), as well as Catholics, Jews, and many other religious practitioners—have been motivated by their beliefs to engage in anti-war protest and organizing. While there was some anti-war activity during WWI and WWII, the Vietnam War was a particularly active time for such religiously motivated protest.

In the late 1960s and early 70s, those opposed to the Vietnam War, including many priests, reverends, brothers, nuns, and other people of faith, participated in dozens of draft board raids in which participants entered government offices and destroyed Selective Service records.[199] In 1968, for instance, a group of nine Catholics, including six current or former priests, brothers, or nuns, seized several hundred draft records from a Selective Service office in Catonsville, Maryland and burned them with homemade napalm.[200] After burning the records they held hands and recited the Lord's Prayer.[201] Two of the nine were, at the time, on bail after having been arrested the previous year for entering a draft board office in Baltimore, distributing Bibles, and pouring blood on draft records.[202]

The Milwaukee Fourteen burning draft records. Courtesy of Jim Forest.

"It seemed to me one of the tragedies of history that Christians, since the age of Constantine, had rarely put their obedience to Christ ahead of their obedience to the state."

~Jim Forest, member of the Milwaukee Fourteen (fourth from left)

Other draft board raid participants during this period included the "Milwaukee Fourteen" (including six Catholic clergymembers and a minister of the Church of Scientology), who held a religious service and recited from the Gospels of John and Luke while burning draft records;[203] the "D.C. Nine" (including five priests and two nuns), who broke into and poured blood on office files at the Dow Chemical Company, a weapons manufacturer;[204] the "Camden Twenty-eight" (including four Catholic priests, a Lutheran minister, and 23 Catholic laypeople);[205] the "Chicago Fifteen" (including two priests);[206] the "New York Eight" (including three priests);[207] and the "Boston Eight" (including two priests and a nun).[208]

A number of these raids resulted in high-profile trials. While the draft board raiders do not appear to have raised a legal defense explicitly based on the Free Exercise Clause, they defended their actions in several cases by explaining that they had acted out of sincere religious conviction, and in accordance with God's higher law. This argument was soundly and repeatedly rejected. The trial judge in the D.C. Nine case, for example, "emphatically denied the existence of a 'legal defense' based on 'sincere religious motives' or a belief that action was justified by 'some higher law.'"[209] An opinion in the Catonsville Nine trial, while it admitted that the sincerity of the protestors was "beyond question," explained that "the exercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity from punishment for breach of the law."[210] The opinion in a Baltimore draft raid case quoted a 1943 religious liberty case brought by a draft refuser: "[o]ne is criminally responsible who does an act which is prohibited by a valid criminal statute, though the one who does this act may do it under a deep and sincere religious belief that the doing of the act was not only his right but also his duty."[211] It further explained that "[n]o civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief."[212]

Another wave of religious anti-war protests began in the 1980s, with the birth of the Plowshares movement, a Christian pacifist movement that takes its name from the vision expressed in the Book of Isaiah: "Nations shall beat their swords into plowshares and their spears into pruning hooks; one nation shall not raise the sword against another, nor shall they train for war again."[213] The Plowshares movement advocates active resistance to war and originated with a 1980 protest in which eight Christians, including several priests and a nun, entered a General Electric facility, hammered on missile components, and poured blood on security documents.[214] For the past four decades, its members have engaged in nonviolent, often symbolic forms of protest at military and weapon manufacturing facilities. While typically relying on secular legal defenses, on occasion Plowshares members have harnessed their religious beliefs as a defense to prosecution—albeit with little success.

For example, three Plowshares members who were prosecuted in 2013 for a protest at a nuclear facility in Tennessee argued in federal court that they "must be able to present evidence on their religious, moral, and political beliefs because that evidence is needed to" demonstrate that they did not act with an illegal intent to harm the U.S.[215] The court held that their religious motives were "irrelevant."[216]

More pointedly, in 2018, a group of seven Catholic Plowshares members broke into and staged a protest at a U.S. nuclear submarine naval base in Georgia. Using spray paint and

containers of their own blood, they "symbolically disarmed the building and its surroundings."[217] As they later explained, the protesters considered this to be a "prophetic action to raise the consciousness of society about the immorality" of nuclear weapons.[218] The action was motivated by their religious commitment "to practice peaceful activism to carry forth the prophet Isaiah's command to 'beat swords into plowshares' in its effort to promote peace and prevent nuclear war."[219] Many of those arrested were affiliated with the Catholic Worker movement—a decentralized religious group, unaffiliated with the official Catholic Church, whose members seek to "serve the poor, and resist war and social injustice."[220]

The "Kings Bay Plowshares Seven," as they came to be known, were arrested and charged with conspiracy, trespass, destruction of property, and "depredation" of property.[221]

Members of the Kings Bay Plowshares and supporters outside a federal courthouse. Courtesy of Kings Bay Plowshares.

"The idolatry of these nuclear weapons and the government which protects their massive destructive power, leave me no choice, I must follow my conscience and my faith."

~ Elizabeth McAlister, Plowshares protester

In response, they sought to have the charges dismissed under RFRA. Among other defenses, the Seven argued that their protest was a form of sincere religious exercise, and that prosecuting them was not necessary to achieve any compelling government interest.[222]

In August 2019, the district court judge held that the charges against the Seven should not be dismissed.[223] The judge found the defendants to be both religious and sincere[224] —despite the federal government's claim that their protest "reflect[ed] an effort to propagandize and obtain secular public policy revisions tinged with post-hoc religious justification."[225] While the judge found that there was a substantial burden on the protestors' religious exercise, she held that application of the criminal laws to the defendants was the least restrictive means of furthering the government's "compelling interests in the safety of those on Kings Bay Naval Submarine Base, the security of the assets housed there, and the smooth operation of the base."[226] In October 2019, the protesters were found guilty of all charges.

Capital Punishment

People of faith from a range of different traditions oppose capital punishment on religious grounds. This has led some to engage in protest against the practice or to refuse to participate in death penalty trials as a judge, juror, or witness. In 2017, for example, Wendell Griffen, an Arkansas state judge as well as an ordained Baptist minister, participated in an anti-death penalty rally and prayer vigil on Good Friday outside of the Governor's mansion.[227] In response, the Arkansas Supreme Court and its judges barred him from presiding over death penalty cases. Judge Griffen then brought a complaint against the Court, arguing that the bar violated

"Premeditated and deliberate killing of defenseless persons—including defenseless persons who have been convicted of murder—is not morally justifiable."

~Judge Wendell Griffen

Photograph by/courtesy of Brandon Markin.

the Arkansas RFRA and chilled his religious exercise in violation of the Free Exercise Clause of the First Amendment.

The Eighth Circuit found against Judge Griffen, and upheld the bar on his participation in death penalty cases. Addressing the Free Exercise claim, it held that the order "does not prohibit Judge Griffen's free exercise of religion…Rather, the order reflects neutral principles applicable to all judges who exhibit potential for bias."[228] Regarding the state RFRA claim, the court held that even if the order did burden the judge's exercise of religion, "Arkansas has compelling interests in the impartiality of the judiciary and in public perception of an impartial judiciary" and Judge Griffen "does not allege any less restrictive means of furthering this compelling interest."[229] In September 2019, the Arkansas Supreme Court refused to restore Judge Griffen's ability to hear capital cases.[230]

Religious Exemptions & Government Employees

The reasoning of the Eighth Circuit's decision against Judge Griffen—that the state has a compelling interest in ensuring that certain state actors are perceived as impartial—could prove useful to advocacy groups fighting religious exemption requests brought by anti-LGBTQ government employees such as Kim Davis, the Kentucky county clerk who refused to issue marriage licenses to same-sex couples in the wake of *Obergefell v. Hodges*.[251]

On the other hand, it seems intuitively unfair and disingenuous to prevent judges who oppose the death penalty for religious reasons, but not those who support the death penalty for religious reasons, from hearing capital cases. Moreover, as Judge Griffen himself has noted, there are many other instances in which judges who hold particular religious beliefs are permitted to hear cases that pose a risk of bias, or the appearance of bias—such as judges with a history of anti-choice religious activism who are nevertheless permitted to hear disputes involving abortion.[252]

Another recent case that made the news involved Greta Lindecrantz, a Mennonite woman who was held in contempt of court and imprisoned after she refused to testify in a Colorado death penalty case because of her religious opposition to capital punishment.[231] Lindecrantz, who had worked as an investigator on the defense team of the man facing the death penalty, agreed to testify only after the criminal defense attorneys in the case "said her stance was adversely affecting [the defendant's] legal position."[232]

Atheists' Rights & Church-State Separation

Finally, religious liberty laws have been used by people of faith, Humanists, and atheists[233] to fight for the rights of nonbelievers and for church-state separation. While traditionally the Establishment Clause has been the vehicle for such challenges, litigants have increasingly turned to Free Exercise and religious exemption-based claims.

For example, some groups—in particular The Satanic Temple (TST)—have openly attempted to use religious freedom demands by their members as a kind of poison pill to limit the scope of government religious activities and exemptions. TST has relied on a "nuclear option for church/state separation"[234] that one commentator has deemed "Lucien's Law" after TST co-founder Lucien Greaves. The "law" states that "governments will either (1) close open forums when The Satanic Temple asks to speak, or (2) censor The Satanic Temple, thereby opening itself to legal liability."[235]

In some circumstances this tactic has proven quite effective. When the state of Oklahoma placed a statute of the Ten Commandments outside of its state capitol, TST announced its intention to donate a statue to "complement" it: a representation of Baphomet, a goat-headed deity that has been adopted by occult and satanic groups.[236] The Oklahoma Supreme Court later held that the Ten Commandments statute violated the Oklahoma Constitution. Similarly, TST has requested to give Satanic invocations before state legislatures that open meetings with prayer,[237] started "After School Satan" clubs in public schools that permit religious afterschool programs, and distributed Satanic coloring books in public schools that allow the distribution of religious literature.[238]

In addition, atheists and others have brought claims arguing that government acts that embrace or promote religious precepts violate their religious beliefs (or lack thereof). In *New Doe*

Statue of Baphomet in front of the Arkansas state capitol building for the Satanic Temple's Rally for the First Amendment in 2018. Courtesy of Magnolia Pictures.

Child #1 v. Congress of United States, a group of atheist, Humanist, and Jewish claimants argued that laws requiring the inscription of the national motto "In God We Trust" on currency violated their RFRA rights. They argued that the inclusion of this religious message on government-issued money "cause[d] them to bear, affirm, and proselytize an objectionable message in a way that, for the Atheist and Humanist Plaintiffs, violates their core religious beliefs, and, for the Jewish Plaintiff, renders him complicit in the sins of superfluously printing God's name and destroying God's printed name."[239] The Sixth Circuit found no substantial burden on their beliefs, as the plaintiffs were not legally required to use cash and RFRA "does not require the Government to permit Plaintiffs to use their preferred means of payment."[240]

In *Barker v. Conroy*, Evangelical-preacher-turned-atheist-activist Dan Barker sued the U.S. House of Representatives after he was denied the opportunity to be a guest chaplain and deliver a secular invocation to legislators in lieu of an opening prayer.[241] He claimed that, in addition to violating the Establishment Clause, the government was infringing on his rights under RFRA by forcing him to choose between receipt of a government benefit—serving as the guest chaplain—and following his religious beliefs by giving secular remarks.[242] For context, the Supreme Court had previously held that legislative prayer programs, if neutral, do not violate the Establishment Clause.[243] The district court of D.C. rejected Barker's claim in part because it found that "the opportunity to serve as a guest chaplain is not the type of benefit covered by RFRA."[244] While the case was appealed, the D.C. Circuit Court ruled only on Barker's Establishment Clause, not his RFRA claim.[245]

Dan Barker. Photograph by Sam via flickr.

"I cannot invoke a spirit or supernatural agency before this esteemed body. But I can invoke the 'spirit'... of Thomas Jefferson, [a] nonChristian deist, who stated that our Constitution 'erects a wall of separation between church and state.'"

~Dan Barker's proposed secular invocation to Congress

The cases outlined above represent a wide sampling of the religious liberty claims that have—or could be—brought outside of the "culture war" context. There are countless additional religious liberty claims that could be used to gain exemptions in the public health, criminal justice, voting rights, economic justice, gun control, animal welfare, and other areas. Examples might include:

* * *

An oncologist requests an exemption under the federal RFRA from the Controlled Substances Act. She argues that the Act prevents her from acting on her religious obligation to sell or administer marijuana to patients who would benefit from the drug.

An employee of the federal government who is responsible for enrolling people in public benefit programs is fired for enrolling all applicants that she believes need financial assistance into the programs, regardless of whether or not they are eligible under the law. She brings a RFRA claim, arguing that she was acting on her religious belief that denying benefits to people in need is immoral.

An Immigration and Customs Enforcement agent affirmatively sues the Department of Homeland Security seeking an exemption from any job duties that would require his participation in separating families, which would violate his religious beliefs.

A resident of public housing requests an exemption under a state RFRA from a state rule barring persons with felony convictions from public housing. He argues that this rule coerces him into violating his religious obligation to care for family members in need, including those with felony convictions.

A person with a felony conviction requests an exemption under a state RFRA from a state law barring persons with felony convictions from voting. She argues that this rule prevents her from fulfilling her religious obligation to vote.

A professor at a public university is disciplined for prohibiting her students from carrying firearms into her classroom or office, despite a state "campus carry" law allowing guns on public university campuses. The professor brings a state RFRA claim, arguing that teaching in a classroom with guns would violate her religious beliefs.

An animal rights activist requests an exemption under a state RFRA from a state "ag-gag" bill, which limits the ability of whistleblowers to expose health, safety, and animal

rights violations in the agriculture industry. The objector argues that this rule prevents him from fulfilling his religious obligation to expose animal abuse.

The religious exemption claims that might be brought by people of faith engaged in humanitarian and progressive social movements are nearly endless. As is evident from the examples discussed above, however, religious liberty claims brought by those who engage in social justice work as a form of religious exercise have only rarely succeeded. In contrast, the Christian right has made enormous gains in securing religious exemptions in recent years before the courts, in state legislatures, and especially within the current federal administration.

III The Christian Right and the Redefinition of "Religious Liberty"

Photo courtesy of Columbia University School of Law.

As the prior section demonstrates, no single group or ideology has had a monopoly on religious faith, or religious liberty litigation. Nevertheless, the Christian right has been enormously successful at conflating popular understandings of "religious liberty" with particular conservative religious views around sex, sexuality, marriage, and reproduction. Through strategic legislative, administrative, and litigation campaigns—as well as aggressive media coverage—the religious right has come to dominate the ways in which we talk about, and enshrine into law, religious liberty protections. This dominance has pushed other important religious liberty developments, such as the increasing criminal prosecution of faith practitioners discussed above, out of the spotlight.

When courts, the media, and politicians give prominent attention to the religious liberty claims made by socially conservative actors, while comparatively ignoring claims made by socially progressive actors, the effect is to reinforce the notion that socially conservative religious traditions are more deserving of constitutional and statutory religious freedom protections. Indeed, this dynamic can create and/or reinforce a belief that conservatives are legitimately religious while progressives' beliefs are—as the Department of Justice argued in the Safehouse case—merely "socio-political" rather than religious.[1]

Perhaps the most troubling aspect of this phenomenon, however, is that many of the religious exemption proposals advanced by the right do not actually protect "religious liberty" at all, but rather advance the cause of conservative Christian hegemony. They do so in at least three ways:

First, by providing enormously broad and absolute legal protections for particular conservative religious beliefs—protections that are designed to override every other relevant secular and religious right with which they may conflict—the exemptions improperly put the government's stamp of approval on certain religious beliefs.

Second, by requiring third parties to bear the costs of religious exemptions for those with conservative religious beliefs about sex and sexuality—beliefs that these third parties do not themselves hold—many exemptions actually infringe on the religious liberty rights of more people than they protect.

Third, many of the proposed religious exemptions would erode antidiscrimination laws that protect people of faith, and especially religious minorities, from bias and persecution on account of their faith.

This section will provide a brief overview of the legislative, administrative, and judicial activism undertaken by the Christian right in the name of "religious liberty." It will also touch upon the ways in which these efforts actually undermine religious liberty.

Legislative Efforts

Over the past several years, conservative policymakers have introduced and passed dozens of religious exemption laws that are billed as protecting "religious freedom" in general, but in reality only benefit those with anti-LGBTQ or anti-choice religious beliefs. Since 2015, exemption laws that protect those opposed to LGBTQ rights have been passed in Indiana,[2] Florida[3], Tennessee[4], Kansas[5], Kentucky[6], Alabama[7], South Dakota[8], Texas,[9] and Oklahoma.[10] In the most recent 2018-2019 legislative session, several states passed bills aimed at allowing student clubs at public universities to restrict their membership based on religion, sexual orientation, or gender identity.[11] Many of these proposed and enacted state bills are outlined in "Project Blitz," a detailed legislative playbook authored by the Congressional Prayer Caucus and other groups that contains model bills on a range of issues, including the insertion of religious symbols and classes into schools, bills that would "define public policies of the state in favor of biblical values concerning marriage and sexuality," and religious exemptions from antidiscrimination and other laws.[12]

Examples of proposed and enacted laws advanced by the Christian right include:

- Mississippi's H.B. 1523, passed in 2016, creates a sweeping exemption from compliance with state law if the law conflicts with one of three specific religious beliefs: that "(a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."[13] This exemption is absolute. In other words, the State must grant exemptions to persons who hold those three religious beliefs, rather than weighing the possible benefits and costs of a requested exemption and then deciding whether to grant it.

- If passed, the federal First Amendment Defense Act, or FADA,[14] would limit enforcement of a wide range of health, labor, and antidiscrimination protections to

the extent that they conflict with religious opposition to sex between unmarried parties or LGBTQ identities.[15] Again, this exemption would be absolute, regardless of any harm it imposes on others.

- The federal government and nearly every state have enacted laws that allow doctors, insurers, and hospitals to refuse to provide abortion and other reproductive healthcare based on religious or moral objections to these services, regardless of the religious beliefs of their patients.[16] These laws almost never protect the religious beliefs of medical providers who support reproductive rights.[17] While hospitals may not infringe on the beliefs of anti-choice providers, they may require those who feel morally obliged to provide comprehensive care—like Dr. Wilfred E. Watkins, who unsuccessfully challenged his employer's prohibition on sterilization and abortion in 1973—to violate their consciences. In addition, the exemptions do not always have clear exceptions for medical emergencies.

- Alabama's S.B. 185, passed in 2017, extended the state's religious refusal law to cover "[a]ny individual who may be asked to participate in any way in a health care service."[18] It defines "health care service" somewhat confusingly as "[p]atient medical care, treatment or procedure that is limited to abortion, human cloning, human embryonic stem cell research, and sterilization, and is related to: Testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, *or any other care or treatment rendered or provided by health care providers*." In 2019, Indiana similarly expanded its religious refusal law to cover additional medical providers, including pharmacists.[19]

Administrative Efforts

The Christian right has encouraged administrative agencies—especially at the federal level—to promulgate rules, policies, and guidance that offer special legal protections for those with conservative religious ideologies. Many of these rules protect only conservative religious beliefs, often at the expense of the rights (religious and otherwise) of others, including women, LGBTQ people, and religious minorities. To give just a brief overview, the Trump administration has thus far:

- Issued an executive order instructing the Attorney General to issue policy guidelines on religious liberty,[20] as well as subsequent guidelines suggesting that RFRA should be interpreted to exempt religious objectors from antidiscrimination laws and policies.[21] The administration then created a "Religious Liberty Task Force" to implement the guidance;[22]

- Signed an executive order eliminating language from an earlier executive order that protected beneficiaries of government grants from unwanted religious coercion and proselytizing;[23]

- Expanded the circumstances under which federal contractors can claim a religious exemption from antidiscrimination requirements, undermining civil rights protections for workers—especially religious minorities;[24]

- Issued a rule to cease enforcing a prior bar on contracting with religious organizations to provide federally funded educational services to private schools;[25]

- Proposed a rule, under review by the Office of Management and Budget as of November 2019, that is reported to allow religiously affiliated homeless shelters to turn away transgender people;[26]

- Issued rules allowing employers and universities to cut off access to birth control coverage for their employees and students—regardless of their own religious beliefs— if allowing this coverage would violate the religious or moral beliefs of the employer/university;[27]

- Issued a rule expanding the ability of healthcare providers, insurers, and employers with religious objections to sexual and reproductive healthcare to deny access to such care to patients and employees;[28]

- Issued a rule which encourages medical providers that place religious restrictions on the provision of reproductive healthcare to nevertheless participate in the Title X national family planning program;[29]

- Proposed a rule inserting broad religious exemptions into a nondiscrimination provision of the Affordable Care Act;[30]

- Issued a directive allowing religious displays and symbols in Veterans Affairs facilities;[31]

- Granted a request from South Carolina Governor Henry McMaster to allow foster care agencies in the state to violate antidiscrimination laws while remaining eligible for federal funding.[32]

- In contrast, the administration has not made any efforts to accommodate religious beliefs that run contrary to its political priorities. For instance, in response to public comments expressing concern that a proposed "public charge" rule—which would allow the government to withhold legal permanent resident status from immigrants who use public programs like food stamps and Medicaid—would harm religious workers, the U.S. Citizenship and Immigration Services (USCIS) declined to insert a religious exemption into the final rule.[33] In explaining its denial, the agency claimed that "RFRA does not create a wholesale 'exemption' to a generally applicable regulation" but rather requires "a case-by-case determination."[34]

  Notably, this assertion explicitly conflicts with the administration's own religious liberty guidelines discussed above, which state that "[i]n formulating rules, regulations, and policies, administrative agencies should…proactively consider potential burdens on the exercise of religion and possible accommodations of those burdens," and that the decision to "consider requests for accommodations on a case-by-case basis rather than in the rule itself" requires the agency to "provide a reasoned basis for that approach."[35] It is also worth mentioning that since publishing the rule, but before its effective date, the Administrative Appeals Office of USCIS has denied at least two RFRA claims made by immigrants seeking to be classified as religious workers.[36]

- The administration also threatened to withdraw federal grant funding from two university Middle East Studies programs because, according to the administration, they place "a considerable emphasis…on the understanding the positive aspects of Islam, while there is an absolute absence of any similar focus on the positive aspects of Christianity, Judaism or any other religion."[37]

Judicial Efforts

Finally, lawsuits involving anti-LGBTQ and anti-choice religious exemption claims have proliferated over the past several years. The growth in these cases has been, in large measure, the result of the growth of well-funded conservative religious liberty groups such as the Alliance Defending Freedom, Liberty Counsel, and the Becket Fund, who have brought the majority of these cases. In addition to *Burwell v. Hobby Lobby*[38] and *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission,*[39] discussed in the religious liberty timeline, there have been dozens of additional claims filed by conservative religious adherents seeking exemptions from health, antidiscrimination, and related laws and policies.[40] In September 2019, the Supreme Court of Arizona became the first high court to grant a religious exemption from sexual orientation antidiscrimination law to a for-profit company. The ruling, *Brush & Nib Studio v. City of Phoenix*, was predicated on the state constitution's free speech provision and state RFRA. The court ruled that a local civil rights ordinance could not be applied to require a small stationery and printing business to "create custom wedding invitations celebrating same-sex wedding ceremonies in violation of their sincerely held religious beliefs."[41] Many other cases are still being litigated.

Over the past two years, the U.S. Department of Justice has also filed a large number of friend-of-the-court briefs in federal lawsuits involving religious liberty issues—largely in support of conservative Christian claimants, including a bakery that refused to serve a same-sex couple and an anti-abortion clinic that objected to certain state health regulations.[42]

As is evident from the examples discussed above, many of the "religious liberty" policies embraced by the Christian right 1) provide broad and absolute protections only for a narrow set of conservative religious beliefs and fail to protect those with alternative religious views; 2) require LGBTQ people, women, and others to forgo their own rights (for example, to equal employment opportunities or healthcare access) in order to accommodate the religious beliefs of others, and/or; 3) would permit discrimination against religious minorities. Such religious exemptions do not enhance, but instead undermine religious liberty. Rather than protecting a particular set of religious believers at the expense of others, religious freedom has been traditionally understood by the framers of the Constitution and by the courts to mean religious freedom for everyone. This means, in contemporary terms, including the non-religious, religious minorities, LGBTQ people of faith, and those with progressive religious beliefs.

IV Charting a Path Forward: Protecting Religious Liberty for Everyone

Rally in support of LGBTQ rights before the Supreme Court, 2019. Courtesy of the Center for American Progress.

When and how religious practitioners should be exempted from secular laws and policies is undoubtedly a complicated question. How do we protect religious liberty for everyone—from the conservative Christian to the Satanist—while also protecting other fundamental rights and values? When are exemptions necessary to preserve a diverse and pluralistic society, and when do they become so overbroad or widespread that they threaten others' rights—or the democratic process itself? While there may not be a single test that applies to every situation, courts have, over time, developed a number of rules and guidelines that are helpful in assessing which religious exemptions advance our constitutional commitments to liberty and equality, and which threaten them. This section outlines the fundamental values that are necessary to protecting religious freedom, not for some but for all.

Religious Liberty Must Be Neutral

One of the most foundational rules of religious liberty law is that it must apply neutrally to people of all faiths—from Jack Phillips, the owner of Masterpiece Cakeshop, to Scott Warren, the No More Deaths volunteer. Neutral application of religious liberty protections is mandated by both religion clauses of the First Amendment—as the Supreme Court has repeatedly held: "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion."[1] Justice Elena Kagan has called this "the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian."[2]

Among other things, the neutrality rule prevents the government from singling out certain theological communities or beliefs for special persecution *or* special protection. This principle was reaffirmed most recently in the Supreme Court's decision in *Masterpiece Cakeshop*. Written by Justice Anthony Kennedy, the opinion repeatedly stressed the government's duty to be respectful of all religious beliefs, and noted that the First Amendment "bars even 'subtle departures from neutrality' on matters of religion."[3] Unfortunately, it must be acknowledged that the Court quickly abandoned this commitment to religious neutrality in its opinion in *Trump v. Hawaii*, the Muslim travel ban case, wherein the Court refused to acknowledge the very clear evidence that the ban was motivated by animus against Muslims.[4]

Many exemption laws and policies advanced by the Christian right fail the religion clauses' neutrality requirement. Rather than protecting religious practices related to marriage or reproduction generally, they instead single out anti-LGBTQ or anti-choice religious beliefs for exclusive, extraordinary protection from the enforcement of any other civil law or policy,

regardless of the consequences. They therefore put the government in the position of taking a theological stance on what religious beliefs entitle one to stand above the law. As a group of religion law scholars wrote about Mississippi's H.B. 1523, for example, the anti-LGBTQ bill:

> **"[D]id not address the subjects of marriage, sexuality, and gender, and attempt evenhandedly to accommodate religious beliefs and practices. Rather, it singled out only specific religious viewpoints on these subjects as worthy of legal sanctuary. Those with different religious views on the very same questions receive no protection… Mississippians who hold the Enumerated Beliefs receive extraordinary legal benefits, while those with a different viewpoint on the exact same questions of faith receive nothing."[5]**

Similarly, most religious exemption laws and policies related to healthcare that are embraced by the right provide extraordinarily broad protections to those opposed to abortion, sterilization, or other reproductive care but fail to protect the many healthcare providers whose religious faith motivates them to provide comprehensive sexual and reproductive healthcare. As discussed in Section II, people of faith who support the right to reproductive healthcare access—including Dr. Wilfred E. Watkins, "Mary" and "Judy Doe," and members of the Clergy Consultation Service—have also had little success in court.

Even if some religious adherents may benefit from a proposed exemption, religious exemption laws and policies that clearly prefer one religious belief over others actually violate religious liberty principles. The government may not weigh in on highly contested theological disputes by singling out certain views for special and absolute protection, essentially placing the government's seal of approval on a select set of religious beliefs.

Just as the legislative and executive branches must respect the neutrality rule in *promulgating* religious exemptions, *applying* religious exemption laws neutrally is a daunting but essential task for the judiciary and anyone charged with enforcing such laws. The RFRA test in particular contains many nuanced components: courts are tasked with determining whether a particular claimant is sincere; whether their articulated beliefs are "religious" in nature; whether these beliefs are being substantially burdened; and whether the burden is nevertheless necessary to advance a compelling government interest. The complexity of the RFRA test provides many opportunities for conscious or unconscious bias—for example, assuming the sincerity of incarcerated plaintiffs to be more suspect than those outside prison; treating established faiths as more obviously "religious" than newer or smaller ones; or determining

that creating an exemption for a doctor opposed to performing abortions is more practical or necessary than one for a doctor who wants to provide abortions.

In one notable example, the plaintiffs challenging the contraceptive mandate of the ACA were universally accepted as being motivated by their sincere religious rather than political beliefs—despite the fact that some plaintiffs had in fact included coverage for contraceptives in their insurance plans prior to the ACA's enactment, and only removed this coverage after being contacted by law firms seeking to bring a lawsuit.[6] Even attorneys representing the government in those cases declined to challenge the companies' religiosity or sincerity.

In contrast, DOJ attorneys have argued that the Kings Bay Plowshares protestors' RFRA claim "reflect[ed] an effort to propagandize and obtain secular public policy revisions tinged with post-hoc religious justification."[7] The DOJ has also rigorously challenged the religious beliefs of the Safehouse board members and humanitarian aid workers like Scott Warren. As one commentator has noted, "[w]hen you pay close attention to the litigation strategy pursued by the federal government's lawyers, what you see is that this administration is not committed to an overarching principle of religious liberty—or even rights for Christians, in general…but rather only for those who share the administration's political perspective."[8]

Judges have not generally accepted the government's recent attempts to label progressive people of faith as irreligious or insincere. However, in one opinion, a magistrate judge belittled several of the No More Deaths volunteers' RFRA arguments as a "modified Antigone defense,"[9] prompting scholars of law and religion to publicly comment:

> **"[T]he defense raised in this case, unlike in Sophocles' play *Antigone*, does not stage a tragic conflict between written positive law and unwritten, abstract morality. The law appealed to by the defendants is not outside of or above the laws of the state. Instead, the defendants ask the court to interpret a written, legislatively created right to religious liberty. The magistrate judge's failure to offer a careful analysis of their RFRA defense reflects a mistake of law, passing under cover of a clever parry to Greek tragedy, that should be corrected on appeal."[10]**

Moreover, many media stories about the volunteers' cases have framed their activities as primarily political in nature, frequently ignoring their deep-seated spiritual commitments and even failing to mention their RFRA defense.[11]

In order to preserve religious freedom, it is critical that courts rise above this challenge and neutrally apply religious exemption laws to all faith practitioners—regardless of whether their beliefs may be deemed common or unusual, conservative or progressive. Of course, this does not mean that all religious exemptions should succeed or fail together. Exemptions that would harm others or reduce overall religious liberty and plurality should be treated with caution. Similarly, exemption claims that would threaten a larger government program or undertaking—such as tax collection—will be granted far less frequently than those that can be easily accommodated. However, courts must be conscious of the risk of bias when performing the RFRA test, and make a concerted effort to apply religious exemption laws with the neutrality that the Constitution's religion clauses, and a national commitment to religious plurality, require.

Religious Liberty Must Be Noncoercive

The purpose of religious liberty protections are, of course, to allow individuals to follow their own consciences in determining which religious tenets, practices, and communities to embrace. Thus, religious exemptions may not have the effect of conscripting others into supporting religious beliefs or practices that they have not freely chosen. Another way to understand this principle is that religious exemptions reach their constitutional limit when they protect the religious liberty of one party by requiring another party to bear the cost of protecting those rights. The government cannot force a person to give up any legal or constitutional right, or change their behavior, in order to accommodate religious beliefs that they do not themselves hold.[12] In *Hobby Lobby*, for instance, the Supreme Court emphasized that "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief."[13] This absence of third-party costs for the accommodation of religion is crucial to protecting everyone's religious freedom, not just those seeking a religious exemption.

Many of the exemptions proposed and enacted by the religious right require a third party—someone other than the religious objector—to bear the cost of the exemption. For example, an exemption allowing doctors to withhold medical information from their patients if they think this might lead them to seek an abortion eliminates patients' ability to make their own medical decisions, impacting not only their health but their personal religious and moral autonomy. A newly proposed federal rule that would exempt government contractors from antidiscrimination policies, allowing them to condition employment on "acceptance of or adherence to religious tenets as understood by the employer,"[14] would put a large chunk of the labor force at risk of losing their job if they do not adopt the faith-based practices of their employers.

The First Amendment Defense Act would "accommodate" the religious beliefs of individuals and companies opposed to marriage equality by eliminating many health, labor, and antidiscrimination provisions that protect workers. For instance, while employers who deny health insurance coverage to their employees' dependents would normally be subject to tax penalties, FADA would prevent the government from punishing employers who withhold coverage to the children of same-sex parents because of their religious beliefs. How would losing health insurance for one's child burden a worker's religious rights? It is obvious that losing this legal benefit imposes a significant *economic* hardship. The fact that the worker is losing the benefit because of an identity characteristic—her sexual orientation—imposes an additional *dignitary* harm. However, when the government eliminates someone's legal rights in order to accommodate someone else's theological beliefs, this also imposes a *religious* harm. It essentially requires the worker to subsidize religious beliefs that violate her own conscience.

Too often, religious exemption disputes are framed as pitting one person's right to religious liberty against another's right to secular equality. This is an important concern, but it obscures the fact that losing rights or benefits to accommodate another person's religious beliefs is also an assault on their religious freedom.

Policymakers and judges should reject religious exemptions that push the economic, social, or legal costs of a religious belief onto those who do not hold that belief. Any exemption that requires people to subsidize religious beliefs they do not share—or even, in some cases, beliefs they do share—diminishes religious liberty for everyone.

Religious Liberty Must Be Nondiscriminatory

Laws prohibiting religious discrimination are indispensable to religious liberty and plurality, and any attempt to narrow the scope of such laws should be rejected. For over 50 years, the overwhelming public consensus has held that access to employment, housing, education, and public accommodations should not be restricted on account of certain identity characteristics, including religion. Civil rights laws banning religious discrimination have reduced religious segregation and protected religious minorities from state-sanctioned marginalization and persecution. Now, efforts to carve out religion-based exemptions from antidiscrimination law threaten to challenge this consensus.

Antidiscrimination laws are, of course, especially important to religious minorities, including

Muslims, Sikhs, Jews, and atheists. Both the Federal Bureau of Investigation and the Department of Justice consistently report a disproportionately high number of discriminatory incidents, including hate crimes, against Muslims and Jews.[15] In the wake of the September 11th attacks in 2001, the Equal Employment Opportunity Commission (EEOC) witnessed a 250% increase in the number of religious discrimination charges involving Muslims.[16] While this number has gone down somewhat since then, religious minorities continue to bring claims of discrimination at wildly disproportionate rates as compared with people from majority religious traditions. Despite making up only one percent of the population, over 25% of the EEOC charges of religious workplace discrimination in 2015 related to Muslims.[17] The number of assaults against Muslims in recent years has actually surpassed the modern peak of 2001.[18] Nonprofit organizations that track religious discrimination have also noted a recent rise in anti-Semitic incidents against Jews.[19]

A 2016 report issued by the DOJ noted that in recent years, "[c]ommunities reported an uptick in attacks and threats against mosques, gurdwaras, and other houses of worship, as well as acts of bullying, harassment, and violence against children and adults who are—or are perceived to be—Muslim."[20] Muslims themselves report high levels of discrimination: nearly half of U.S. Muslims report having experienced at least one incident of discrimination in the past year, and half say it has become harder to be Muslim in the U.S. in recent years.[21] In recognition of the disproportionate rates of discrimination faced by religious minorities, the EEOC's strategic enforcement plan for the years 2017-2021 listed discrimination against Muslims and Sikhs as an emerging priority issue.[22]

Despite rising levels of religious discrimination, many exemptions advocated by the Christian right explicitly permit discrimination against religious minorities by narrowing the scope of civil rights laws. For example, Texas's H.B. 3859 allows religious foster care agencies to refuse to place children in non-Christian families, regardless of any state or local laws that prohibit such discrimination. Similarly, the Trump Administration's decision to exempt Miracle Hill Ministries and other federally funded foster care agencies from antidiscrimination regulations allows such agencies to reject foster parents based on religion. Miracle Hill is currently being sued for turning away a Catholic foster parent, and it has refused to work with Jewish families.[23] In *Masterpiece Cakeshop*, the attorney for the bakery explicitly argued before the Supreme Court that the Free Exercise Clause should be interpreted to allow for-profit businesses to violate laws prohibiting religious discrimination—not just discrimination based on sexual orientation. In other words, not only should bakeries be allowed to deny wedding cakes to same-sex couples, they should also be allowed to deny them to Muslims, Jews, interfaith couples, or atheists.

While a small group of religious practitioners may benefit from being allowed to violate antidiscrimination laws, the overall impact of such a regime would be devastating to religious liberty and plurality more generally. Laws prohibiting religious discrimination have been a crucial factor in ensuring that people of all faiths are able to fully participate in civil society. If protections against religion-based discrimination may be ignored without consequence, adherents of minority religions will be chilled in exercising their faith for fear of experiencing bias in public accommodations, employment, housing, and in other sectors of public and private life.

Just as antidiscrimination laws protect religious liberty, religious liberty laws can shield people of faith—especially religious minorities—from discrimination. For example, Iknoor Singh successfully used RFRA to challenge a university Reserve Officer Training Corps program's claim that allowing him to maintain his long hair, beard, and turban, as required by his Sikh faith, would "have an adverse impact on unit cohesion and morale because uniformity is central to the development of a bonded and effective fighting force."[24] Of course, such "uniformity" is modeled on Christian, rather than Sikh, norms of dress and grooming. Thus, at least for religious minorities, religious liberty and equality rights are mutually enforcing values, each dependent on the other.

Protest of the Muslim travel ban before the Supreme Court, 2018. Photograph by Victoria Pickering via flickr.

RFRA was originally understood to be a civil rights law, promulgated in order to reduce unintentional discrimination against religious minorities. Using exemptions in order to expand religious discrimination turns the purpose of such laws on their head. In order to protect religious liberty, we must protect religious communities' civil rights, including their fair and equal access to housing, employment, education, and public accommodations. Any attempt to advance religious liberty by allowing religious discrimination will ultimately destroy the very right it seeks to protect.

Religious Liberty Cannot Be Absolute

No constitutional right is absolute. Where the government has important policy considerations, or the legal or constitutional rights of others are at risk, limits on the individual right to free exercise, free speech, and even liberty are permissible, and sometimes required.

Some religious exemption laws embraced by the Christian right are written in absolute terms, leaving no room for consideration of the impact the exemption would have on others. The First Amendment Defense Act, for example, would place an absolute barrier on the enforcement of an enormous range of laws and policies on certain religious objectors, regardless of the consequences this would have on larger considerations of civil rights, labor, health, and tax policy. Such an unconditional exemption stands in stark contrast not only with RFRA, which requires consideration of important government interests, but with Supreme Court precedent. In *Cutter v. Wilkinson*, the Court upheld RLUIPA in part because it was clear that the law would not require the adoption of religious exemptions that "become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution."[25]

Courts have not hesitated to deny religious exemptions to religious minorities as well as members of humanitarian and social justice movements where they have found compelling government interests at stake—from the early sanctuary movement volunteers to Rastafarians seeking to use marijuana for religious practice to Catholic nuclear war protestors. They should similarly ensure that they take careful account of competing individual and government interests in assessing claims brought by conservative Christians seeking exemptions from health, labor, and antidiscrimination laws.

This report posits that conflicts between religious exercise and other rights—specifically equality rights—are often misunderstood and over-emphasized in the current dialogue regarding

religious liberty. Nevertheless, when religious liberty rights do conflict with other legal or constitutional rights, courts and legislatures must make every effort to thoughtfully balance the competing interests, without awarding absolute and unconditional deference to any one constitutional value.

Religious Liberty Must Be Democratic

Pushed to their limit, religious exemptions have the potential to undermine democratic governance in serious ways. There is some truth to the Court's early warning in *U.S. v. Reynolds* that allowing unrestricted religious exemptions "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[26] This concern for democratic lawmaking was echoed again in *Employment Division v. Smith* in 1990. In his majority opinion rejecting the right to religious exemptions under the Constitution, Justice Scalia wrote that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[27] Both decisions warn of the possibility that law will become ineffective if it cannot be applied to those who oppose it.

This concern for maintaining a functioning democracy may appear overblown when it comes to religious exemptions that require only modest accommodations, or apply to a small minority group. Permitting Sikhs in the military to wear a turban, or a small sect to use hoasca, will have little larger impact on the government's ability to pass and enforce laws. Typically, such exemptions are necessary because in promulgating the underlying law or rule, policymakers did not take into consideration the religious beliefs or practices of the community requesting an exemption. Allowing exemptions in the context of small or disfavored religious communities may therefore mirror other constitutional doctrines that seek to correct for democratic failure, such as the constitutional suspicion that is required when the state acts in a disfavored way toward discrete and insular minorities that do not have the power to avail themselves of the political processes that would otherwise protect their interests.[28]

However, increasingly, religious exemption litigation is being brought on behalf of extremely large faith groups—such as conservative Evangelical and Catholic Christians—and in contexts in which the groups' religious beliefs were already extensively considered and debated, and an exemption was ultimately rejected in favor of other government priorities. In these contexts, we would not conclude that the democratic process has somehow failed these communities,

rather the democratic process produced a result with which they do not agree. The ordinary, democracy-respecting response to such a moment is to return to democratic institutions and seek a change in the law, rather than claim that the law does not, or should not, apply to them.

For example, in the case of Hobby Lobby's RFRA challenge to the contraceptive mandate of the ACA, the federal government had already engaged in extensive negotiations among religious, health, and other advocates, and had decided to adopt a religious accommodation to the mandate that applied to religious nonprofits, but not to for-profit corporations.[29] In successfully gaining a religious exemption through litigation after being denied an exemption by the executive administration, the for-profit claimants were able to essentially override the careful compromise that had been negotiated through the regular democratic process. Religious objectors are, of course, free to challenge such compromises if they believe them to be in violation of the Constitution or federal law. Nevertheless, it is worth considering as part of the debate over the scope of religious exemption law how such challenges may be used to give even large and politically powerful religious constituencies a second opportunity to win policy battles that they have lost at the legislative or administrative levels.

In hearing RFRA and other exemption claims, judges should be cognizant of the scale of the exemptions that are requested, and whether they might have a larger impact on the ability of policymakers to make and enforce law.

Religious Liberty Must Be Pluralistic

The majority of the rules outlined above are targeted primarily at those in government charged with promulgating, enforcing, and applying religious liberty laws. However, these are not the only actors responsible for the increasingly lopsided understanding of "religious liberty" in the U.S. Advocates, journalists, and others have played an essential role in shaping the way we discuss and protect religious liberty. Too often, this has meant focusing public attention on "religious liberty" rights as defined by those with a select set of conservative religious beliefs about sex, sexuality, and marriage.

To remedy this, advocates of religious liberty for all must cease conflating "religious liberty" with the Christian right, even if unintentionally. Legal measures that would in fact threaten the religious liberty of certain faith communities, or of non-practitioners, should not be referred to as efforts to advance "religious liberty." Indeed, such laws must be understood as an attack on religious neutrality and equality.

Specifically, it is critical that writers and advocates as well as policymakers reject a "religion vs. LGBTQ/reproductive rights" framework for understanding and describing religious liberty claims. For many people—like members of the Clergy Consultation Service who provided abortion referrals prior to *Roe*, and the clergymembers in *United Church of Christ v. Reisinger* who sought a religious right to perform same-sex wedding ceremonies—religious freedom is not in conflict with reproductive justice and LGBTQ equality. Positioning the protection of religion and other fundamental rights as a zero-sum conflict erases the experiences of many faith communities, including LGBTQ people of faith. Exemptions that protect anti-choice or anti-LGBTQ religious views may offer protections to certain religious believers, but they do not protect all—or even most—people's right to religious liberty.

Protestors Waiting for the Burwell v. Hobby Lobby decision outside the Supreme Court, 2014. © 2014 American Life League via flickr.

As part of this commitment to respecting all religious beliefs, atheists and the nonreligious must be included among those in need of religious liberty protection. A large and growing percentage of the U.S. population identifies as unaffiliated with any religious group, though a slight majority (55%) of this population—often called the "nones"—still describe themselves as religious or spiritual.[30] Despite this trend towards non-affiliation, nonreligious people and atheists

continue to face widespread prejudice in the United States.[31] This bias against atheists can have material consequences; studies have found that atheists are vulnerable to discrimination in a range of settings, including when seeking employment and running for office.[32] In fact, while unenforceable, there are still laws or constitutional provisions on the books in eight states barring atheists from holding public office.[33]

Those who think, speak, and write about religious liberty must take care to present a pluralistic view of religion and religious freedom, rather than essentializing "religious liberty" as an issue for conservative Christians. Moreover, they should acknowledge that religious liberty rights must apply to the nonreligious, or they are meaningless.

Conclusion

Religious liberty means many things to many people. To some, like Samantha Elauf—who lost a job opportunity because of her headscarf—it means the ability to practice one's religion openly without fear of discrimination or persecution. To others, like atheist activist Dan Barker, it means the right to access government institutions, such as public schools and courthouses, that are free from religious prayer or symbols. To others still, like Scott Warren—who continues to face significant prison time for providing food and shelter to migrants—it means the right to act out their faith, even if doing so may conflict with criminal or civil statutes. And finally, to some, religious liberty means no less than the ability to enshrine their own personal beliefs into U.S. law, and impose these beliefs on others.

Legislators and courts cannot protect every individual's own private understanding of religious liberty. While free exercise of religion is a fundamental right, it is not an unlimited one. Like the right to free speech, it must sometimes yield to larger governmental or public concerns—including rights of others to follow their own consciences. While no one would argue that the United States' religious liberty doctrine has been a model of consistency and clarity, there have been a few longstanding guiding principles that have served us well: the responsibility to treat all religious communities and beliefs—including a lack of religious belief—with neutrality; the refusal to require that people subsidize religious beliefs they do not hold; and a commitment to nondiscrimination and religious plurality.

Unfortunately, both advocates and government actors are now attempting to rewrite the meaning of religious liberty in a way that favors only a subset of religious believers. While people of faith have been called by their religious beliefs to feed the hungry, welcome the stranger, serve

those who use drugs, protect our environment, symbolically disarm weapons of war, celebrate same-sex commitments, and protect the right to abortion, these acts have been purposefully overlooked in favor of a theory of "religious liberty" centered on opposition to sexual liberty and equality rights. This is an affront to the values that made the free exercise of religion and church-state separation two of the foundations of our constitutional democracy.

This report is not intended to offer an opinion on how each of the religious liberty cases discussed therein should be decided. Rather, it is intended to shine a spotlight on the ways in which conversations about religious liberty in the U.S. have focused almost exclusively on one religious community, to the detriment of other faith groups. By providing a reminder of the vast diversity of religious beliefs and believers that must be protected equally under the law, we hope to reclaim a deeper understanding of religious liberty and preserve this fundamental constitutional right for people of all faiths and none.

Endnotes, Introduction

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Endnotes, Section I: An Overview of Religious Liberty Law

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3 *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961).

4 *Id*. at 607.

5 *Loving v. Virginia*, 388 U.S. 1 (1967).

6 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

7 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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11 *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972).

12 *Sherbert,* 374 U.S. at 403 ("If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'").

13 *Thomas v. Review Bd. of the Indiana Emp't Sec. Div.*, 450 U.S. 707, 719 (1981).

14 *Hobbie v. Unemp't Appeals Comm'n of Fla*., 480 U.S. 136, 146 (1987).

15 *Yoder*, 406 U.S. at 234.

16 *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying an Orthodox Jew's request for an exemption from a military regulation prohibiting headwear so that he could wear a yarmulke); *Bowen v. Roy*, 476 U.S. 693 (1986) (denying a claim brought by Native American parents requesting that their daughter not be assigned a social security number, as this would violate their religious beliefs); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (denying an exemption request from three tribes seeking to prevent the construction of a road on holy land essential to their religious practice).

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25 S. Rep. No. 103-111, at 8 (1993).

26 R. Laurence Moore and Isaac Kramnick, Godless Citizens in a Godly Republic: Atheists in American Public Life 147 (2018); Rob Boston, *Past Due Bill: Religious Freedom Restoration Act Finally Becomes Law*, Church & State 7-8 (Dec. 1993), https://www.au.org/sites/default/files/2018-11/RFRA%20Dec.%201993.pdf.

27 *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 22 (1990), https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/05/hear-150-1990.pdf (statement of Rep. Lamar Smith) ("For over 40 years we have condemned Communist countries for…persecution of religious minorities…We have to practice what we preach."); *id.* at 20 (statement of Rep. Stephen J. Solarz) ("Even today, Jews from the Soviet Union, Buddhists from Southeast Asia, Catholics from Northern Ireland, Bahais from Iran, and many more, willingly

renounce their homelands and risk their lives for the 'luxury' of religious freedom. Respect for diversity, and particularly religious diversity, was one of the fundamental principles that guided the framers of the Constitution."); *id.* at 66 (statement of American Jewish Congress) ("Some may question why federal legislation to undo the Smith decision is considered so essential. But that is to underestimate the role of the courts in protecting the rights of religious minorities."). *See also Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 54-55 (1992), https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/hear-99-1992.pdf (Statement of Rep. Craig Washington) ("It is the people who are in the minority…on the question of religion, who need the protection the most, so they can practice it"); *id.* at 25 (statement of Elder Dallin Oaks) ("The worshipers who need its [The Bill of Rights'] protections are the oppressed minorities, not the influential constituent elements of the majority"). *See also* 139 Cong. Rec. 7, 9677 (1993) (statement of Rep. Karen F. Shepherd); *id.* at 9686 (statement of Rep. Bruce Vento) ("Today the balance is tipped against the exercise of religion and especially against those that are minorities in our society, either ethnically, as my colleagues mentioned, the native Americans groups, the Hmong… and/or other minority religious groups"; *id.* at 9687 (statement of Rep. Bob Franks) ("Its [Smiths'] implications are especially burdensome for those whose beliefs lie within the religious minority"); 137 Cong. Rec. 16, 23376 (1991) (statement of Rep. Glenn M. Anderson) ("the illogical refusal to examine any State infringements on religious practices is disastrous to those religious practices which may not conform to general law and do not have the popular support to find politically granted exceptions"); 137 Cong. Rec. 12, 17036 (1991) (statement of Rep. Stephen J. Solarz) ("The test strikes an appropriate balance between the needs of the majority and the rights of religious minorities").

28 *See, e.g.*, *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary,* 102nd Cong. 129-35 (1992) (Statement of Mark Chopko, General Counsel, United States Catholic Conference) ("The Conference has legitimate concerns that S. 2969 will be utilized to attempt to promote the destruction of innocent unborn human lives"); *id.* at 206-37 (Statement of James Bopp, Jr., General Counsel, National Right to Life Committee, titled "Why the Religious Freedom Restoration Act Must Expressly Exclude a Right to Abortion.").

29 *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

30 *City of Boerne v. Flores*, 521 U.S. 507 (1997).

31 *State Religious Freedom Restoration Acts*, Nat'l Conf. of St. Legislatures (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

32 *See State RFRA Map*, Protect Thy Neighbor (last visited Mar. 9, 2019), http://www.protectthyneighbor.org/rfra (noting RFRA-like protections under state constitutions in Alabama, Alaska, Maine, Massachusetts, Minnesota, Ohio, New York, and Wisconsin).

33 42 U.S.C. § 2000cc *et seq.*

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

35 *Zubik v. Burwell*, 578 U.S. __, 136 S. Ct. 1557 (2016).

36 *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n*, 584 U.S. __, 138 S. Ct. 1719 (2018).

37 For a list of additional litigation, *see infra* Section III note 40. In addition, two other religion cases were recently heard by the Supreme Court. In one, the Court held that the state of Missouri violated the Free Exercise Clause of the Constitution when it withheld a grant to a church-affiliated preschool because of a state ban on funding religious institutions. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S.__, 137 S. Ct. 2012 (2017). In the other, the Court found that a 40-foot Latin cross dedicated to soldiers killed in WWI, built in 1925 and displayed on government-owned land, did not violate the Establishment Clause. *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. _, 139 S. Ct. 2067 (2019).

38 *Ricks v. State Contractors Bd.*, 435 P.3d 1 (Idaho Ct. App. 2019) *appeal docketed*, No. 19-66 (U.S. Jul. 12, 2019).

Endnotes, Section II: Sikhs and Satanists, Sanctuary and Safe Drug Use: Religious Liberty Law Beyond the Christian Right

1 Jeffrey Scheuer, *Origins of the Settlement House Movement,* Virginia Commonwealth U. (last visited Sept. 25, 2019) *available* at https://socialwelfare.library.vcu.edu/settlement-houses/origins-of-the-settlement-house-movement/; Margaret E. Berry, Settlement Movement: 1886-1986, Virginia Commonwealth U. (last visited Sept. 25, 2019) *available* at https://social-welfare.library.vcu.edu/settlement-houses/settlement-movement-1886-1986/; Alice W. Campbell, The Temperance Movement, Virginia Commonwealth U. (last visited Sept. 25, 2019), https://socialwelfare.library.vcu.edu/religious/the-temperance-move-ment/.

2 Taylor Branch, *Globalizing King's Legacy,* N.Y. Times (Jan. 16, 2016), https://www.nytimes.com/2006/01/16/opinion/globalizing-kings-legacy.html.

3 Laura R. Olson, *The Religious Left in Contemporary American Politics*, 12 Pol., Religion & Ideology 271, 287 (2011).

4 Timothy J. Williams, *Evangelical Christians Are on the Left, Too*, Religion News Service (Oct. 18, 2016), https://religionnews.com/2016/10/18/evangelical-christians-are-on-the-left-too/. Williams continued, "What has remained unrecognized is the important role the Christian left has played during the last 50 years." *Id.*

5 Holly Meyer, *You Know the Religious Right. Here's the Religious Left (And It's Fired Up)*, Usa Today (Apr. 15, 2017), https://www.usatoday.com/story/news/nation-now/2017/04/15/tough-times-deeper-faith/100491902/; Michelle Tang, T*he Christian Left—Possibly the Most Interesting Group You've Never Heard Of*, Huffington Post (Dec. 6, 2017), https://www.huffingtonpost.com/michelle-tang/the-christian-leftpossibl_b_8270596.html.

6 Harmeet Kamboj, *The Media's 'Religious Left' Is Erasing Marginalized Communities of Faith*, Sojourners (Feb. 6, 2019), https://sojo.net/articles/media-s-religious-left-erasing-marginalized-communities-faith.

7 Kirby Goidel, Brian Smentkowski, Craig Freeman, *Perceptions of Threat to Religious Liberty*, 49 Pol. Sci. & Pol. 426, 430 (2016).

8 Note that while this section includes litigation brought in the 1960s, 70s, and 80s, the passage of RFRA has created a sea change in religious exemption law; thus, litigation brought prior to its enactment should not be considered controlling authority.

9 *Singh v. McHugh*, 185 F.Supp.3d 201 (D.D.C. 2016).

10 A.A. ex rel. *Betenbaugh v. Needville Indep. School Dist*., 611 F.3d 248 (5th Cir. 2010).

11 *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009).

12 *Tagore v. United States*, 2014 WL 2880008 (S.D. Tex. 2014); Don Byrd, Federal Government Settles Dispute with Sikh Woman Over Kirpan, Baptist Joint Committee For Religious Liberty (Nov. 7, 2014), https://bjconline.org/federal-government-settles-dispute-with-sikh-woman-over-kirpan-110714/. In addition to claims brought under RFRA, religious minorities continue to occasionally succeed in bringing religious liberty claims under the Free Exercise Clause of the U.S. constitution—for example, where a law or policy is found to be under-inclusive and therefore not "neutral." *See, e.g.*, *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012).

13 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

14 *E.E.O.C. v. Abercrombie & Fitch Stores*, Inc., 575 U.S. __, 135 S. Ct. 2028, 2037 (2015). Employers need not accommodate the religious beliefs of employees where doing so would cause an undue hardship. *See, e.g.*, *Finnie v. Lee County, Mississippi,* 907 F.supp.2d 750 (N.D. Miss. 2012) (juvenile detention facility was not required to accommodate an officer's religious beliefs requiring her to wear a skirt.).

15 *Holt v. Hobbs*, 574 U.S. __, 135 S. Ct. 853, 867 (2015). *See also Yellowbear v. Lampert*, 741 F.3d 48, (10th Cir. 2014); *Carter v. Myers*, 2017 WL 3498878 (D.S.C. 2017).

16 Lucien J. Dhooge, *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretive Case Law*, 27 Wm. & Mary Bill Of Rts. J. 153, 205, 207 (2018). Incarcerated plaintiffs have an especially low rate of success; RLUIPA and RFRA claims brought by people in prison are frequently dismissed for a number of procedural and substantive reasons, including failure to exhaust administrative remedies and failure to demonstrate a substantial burden on their religious beliefs. *See, e.g.*, *Parson v. Pierce,* 2019 WL 1004298 (D. Del. Feb. 28, 2019); *Burke v. N.D. Dep't of Corr. and Rehab*., 620 F.Supp.2d 1035 (D.N.D. 2009) *appeal dismissed,* 371 Fed.Appx. 713 (8th Cir. 2010).

17 *United States v. Vasquez-Ramos*, 531 F.3d 987, 993 (9th Cir. 2008), *cert denied*, 555 U.S. 1172 (2009); *United States v. Wilgus*, 638 F.3d 1274, 1296 (10th Cir. 2011); *Gibson v. Babbitt,* 223 F.3d 1256, 1258-9 (11th Cir. 2000); *United States v. Friday,* 525 F.3d 938, 959 (10th Cir. 2008); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001), *but see McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465. 480 (5th Cir. 2014).

18 *Harrell v. Donahue*, 638 F.3d 975, 983-4 (8th Cir. 2011) (the court held that Title VII provided the exclusive remedy for federal employee discrimination claims.).

19 In re Three Children, 24 F.Supp.2d 389 (D.N.J. 1998).

20 *Dunn v. Ray,* 139 S. Ct. 661 (2019).

21 *Id.* at 661.
22 *Murphy v. Collier,* 139 S. Ct. 1111 (2019).
23 22 Bible Verses on Welcoming Immigrants, Sojourners (last visited Sept. 25, 2019), https://sojo.net/22-bible-verses-welcoming-immigrants.
24 8 U.S.C. § 1324.
25 Interview with Alexia Salvatierra, *The Roots and Branch of the Sanctuary Movement,* Christian Century (Feb. 15, 2017), https://www.christiancentury.org/article/roots-and-branches-sanctuary-movement ("More than 500 churches participated over about a ten-year period, sheltering about 500,000 refugees"); Puck Lo, *Inside the New Sanctuary Movement That's Protecting Immigrants From ICE*, The Nation (May 6, 2015), https://www.thenation.com/article/inside-new-sanctuary-movement-thats-protecting-immigrants-ice/ (Today's sanctuary movement is being revived by many of the same communities of faith that in the 1980s transported and sheltered up to 500,000 refugees). Other sources estimate that the number of refugees aided the sanctuary movement was far lower. *See* Clyde Haberman, *Trump and the Batter over Sanctuary in America*, N.Y. Times (Mar. 5, 2017), https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980s-political-asylum.html ("In all, an estimated 2,000 refuge seekers were aided in that latter-day version of the Underground Railroad.").
26 *United States v. Merkt*, 794 F.2d 950, 953-54 (5th Cir. 1986); *United States v. Aguilar*, 883 F.2d 662, 666 fn.1 (9th Cir. 1988).
27 Notably, some sanctuary activists argued that their activities should not be considered illegal, but were in fact efforts to enforce the law in the face of the U.S. government's violations of both international human rights and the county's own immigration laws. *See* Sanctuary Trial Papers U. Ariz. Special Collections (last visited Sept. 25, 2019), https://speccoll.library.arizona.edu/collections/sanctuary-trial-papers ("Jim Corbett, a Quaker, insisted that what they were doing was not 'civil disobedience.' He argued instead that it was 'civil initiative—they were upholding laws regarding treatment of war refugees that the U.S. government refused to enforce.").
28 *Merkt,* 794 F.2d at 957.
29 *Aguilar,* 883 F.2d at 695.
30 *American Baptist Churches v. Meese,* 712 F. Supp. 756 (N.D. Cal. 1989) (sanctuary activists affirmatively sought an exemption from the federal harboring statute); *Intercmty. Ctr. for Justice and Peace v. I.N.S.*, 910 F.2d 42 (2nd Cir. 1990) (religious organization sought exemption from Immigration Reform and Control Act, stating it was religiously compelled to provide employment to persons in need regardless of their immigrant status); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 941 F.2d 808 (9th Cir. 1991) (same); *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) (Churches argued that their religious rights were violated when INS agents entered churches and surreptitiously recorded church services).
31 *See, e.g.*, Manny Fernandez, *She Stopped to Help Migrants on a Texas Highway. Moments Later, She Was Arrested*, N.Y. Times (May 10, 2019), https://www.nytimes.com/2019/05/10/us/texas-border-good-samaritan.html; Nate Raymond, Massachusetts Judge Faces Federal Charges for Blocking Immigration Arrest, Reuters (Apr. 25, 2019), https://www.reuters.com/article/us-usa-immigration-judge/massachusetts-judge-faces-federal-charges-for-blocking-immigration-arrest-idUSKCN1S1260.
32 *United States v. Warren*, No. 4:18-cr-00223-RCC-BPV (D. Ariz. Feb 14, 2018); *United States v. Deighan*, No. 4:17-mj-00340-N/A-BGM (D. Ariz. Dec. 6, 2017); *United States v. Hoffman*, No. 4:17-mj-00339-N/A-BGM (D. Ariz. Dec. 6, 2017).
33 Transcript of Motion Hearing at 45, *United States v. Warren*, No. CR-18-223-TUC-RCC (D. Ariz. May 11, 2018).
34 Defendant's Amended Motion to Dismiss Counts 2 and 3 at 12, *United States v. Warren*, No. 4:18-cr-00223-RCC-BPV (D. Ariz. Feb 14, 2018).
35 *See, e.g.*, Aysha Khan, *Pastor Surveilled After Ministering to Migrants Sues US Government,* Religion News Serv. (July 9, 2019), https://religionnews.com/2019/07/09/pastor-surveilled-after-ministering-to-migrants-sues-us-government/; Anita Snow, Arizona Clergy Call Activists to Support Migrants on Border, Religion News Serv. (Aug. 4, 2018), https://religionnews.com/2018/08/04/arizona-clergy-call-activists-to-support-migrants-on-border/. For a list of news articles that fail to mention Dr. Warren and others' RFRA claims, *see infra* Section IV note 11
36 Samuel Smith, *Religious Freedom Concerns Raised as Trial Over Aid to Illegal Immigrants Ends in Hung Jury*, Christian Post (June 13, 2019), https://www.christianpost.com/news/religious-freedom-concerns-raised-as-trial-over-aid-to-illegal-immigrants-ends-in-hung-jury.html.
37 Bob Ortega, *Prosecutors to Retry Volunteer Worker Who Aided Migrants*, Cnn (July 2, 2019), https://www.cnn.com/2019/07/02/us/scott-warren-migrant-humanitarian-prosecution-invs/index.html; Government's Motion to Dismiss Count 1 of the Indictment, *United States v. Warren*, 18-CR-00223-RCC (DTF) (D. Ariz. July 2, 2019).
38 Verdict, *United States v. Hoffman*, NO. M 17-00339-N/A(BPV) at *2 (D. Ariz. Jan. 18, 2019).
39 Brief for Professors of Religious Liberty as Amici Curiae in Support of Neither Party on Defendants' Motion to Dismiss Under the Religious Liberty Restoration Act, *United States v. Hoffman*, No. 4:19-CR-00693-RM (D. Ariz. Apr. 22, 2019).
40 Rafael Carranza, *Border Aid Volunteers Sentenced to 15 Months of Probation, Must Pay Fines*, Azcentral.com (Mar. 1, 2019), https://www.azcentral.com/story/news/2019/03/01/border-aid-volunteers-sentenced-15-months-probation-must-pay-fines/3006562002/.
41 Defendants' Opening Memorandum in Support of Reversal of Magistrate Judge's Judgment of Conviction, *United States v. Hoffman*, No. 4:19-CR-00693-RM (D. Ariz. Mar. 14, 2014).
42 Order, *United States v. Deighan*, No. M 17-00340-N/A(BPV) (D. Ariz. Mar. 5, 2019).
43 *United States v. Good*, 386 F.Supp.3d 1073, 1090 (D. Neb. 2019) (internal quotations omitted).

44 *Id.* at 1091-92.
45 Matthew Renda, *Pastor Claims Government Targeted Her for Ministering to Immigrants*, Courthouse News Serv. (July 8, 2019), https://www.courthousenews.com/pastor-claims-government-targeted-her-for-ministering-to-immigrants/.
46 Complaint at 7, *Dousa v. United States Dep't of Homeland Sec*., No. 3:19-CV-01255-LAB-KSC, 2019 WL 2994633 (S.D. Cal. July 8, 2019), https://www.courthousenews.com/wp-content/uploads/2019/07/Kaji.pdf.
47 *Id.* at 2.
48 *Id.* at 3.
49 *Id.* at 22-23.
50 *Id.* at 34, 36-38. *See also* Plaintiff's Motion for a Preliminary Injunction, *Dousa v. United States Dep't of Homeland Sec*., No. 3:19-CV-01255-LAB-KSC, 2019 WL 2994633 (S.D. Cal. July 25, 2019).
51 Brief of Seventeen Interfaith Clergy and Religious Leaders as Amici Curiae Supporting Respondents' Opposition to Motion for Preliminary Injunction, *Texas HHS Comm'n v. United States,* (N.D. Tex. 2016), 2016 WL 944289.
52 *Id.*
53 *Texas HHS Comm'n v. United States*, 193 F. Supp. 3d 733 (N.D. Tex. 2016), appeal dismissed 5th Cir. 16-11241 (Oct. 11, 2016).
54 Defendant's Supplemental Brief in Opposition to Plaintiff's Motion for Immediate Possession, *United States v. 65.791 Acres of Land,* No. 7:18-cv-00329 (S.D. Tex. Dec. 31, 2018).
55 *Id.* at 10. Interestingly, like in *Rodriguez v. Sessions* discussed below, the diocese' brief made several passing references to abortion in its brief. It mentioned the Catholic belief that "the lives of the immigrant poor are as sacred as the lives of the unborn" and that the Church's opposition to abortion derived from "[t]he foundation of Catholic social teaching is that all human life is sacred and that the dignity of the human person is the moral foundation for society." *Id.* at 7-8.
56 *Id.* at 11.
57 *Id.* at 8, 10.
58 *Id.* at 7, 8.
59 *Id.* at 8.
60 Order on Plaintiff's Opposed Motion for Immediate Possession, *United States v. 65.791 Acres of Land*, No. 7:18-cv-00329 (S.D. Tex. Feb. 22, 2019).
61 Press Release, Office of Congressman Henry Cuellar, *Rep. Cuellar Secures Key Appropriations Language Protecting Sensitive Areas and Requiring Local Communities and DHS to Reach Mutual Agreements on Barriers* (Feb. 14, 2019), https://cuellar.house.gov/news/documentsingle.aspx?DocumentID=403064.
62 Christine Rousselle, *Emergency Declaration Raises New Questions About Texas Border Chapel*, Catholic News Agency (Feb. 18, 2019), https://www.catholicnewsagency.com/news/emergency-declaration-raises-new-questions-about-texas-border-chapel-71429.
63 Brief of 75 Religious Organizations as Amici Curiae Supporting Petitioners, *State of California, et al v. Donald Trump, et al*., Docket No. 19-16336 (9th Cir. Aug. 22, 2019).
64 *Rodriguez et. al. v. Sessions*, Civ. Act. No. 4:17-cv- 1854 (S.D. Texas, June 19, 2017).
65 It's worth noting that the complaint filed by the family's attorneys in this case repeatedly referred to the Rodriguez family as a "close and wholesome Christian American family," and explicitly contrasted them with the "bad hombres" that, impliedly, could or should be deported. Verified Complaint for Declaratory Judgement and Injunctive Relief, *Rodriguez et. al. v. Sessions,* No. 4:17-cv-1854 at 7-8, 14, 15 (S.D. Tex. June 19, 2017). The brief also, for no clear reason, contained a passing reference to *Roe v. Wade* as a case that "found that the life of an unborn child could be terminated." *Id.* at 15.
66 Olivia P. Tallet, *Immigrant Father in Houston 'Out of Time' Case Given a Reprieve*, Houston Chronicle (Jan. 10, 2018), https://www.chron.com/news/article/Out-of-Time-case-is-given-a-reprive-12487766.php.
67 *Odei v. DHS*, No. 18-3105 (7th Cir. Sept. 10, 2019).
68 Brief for Petitioner-Appellant at 11, *Odei v. DHS*, No. 18-3105 (7th Cir. Oct. 1, 2018).
69 Court Opinion, *Odei v. DHS*, No. 18-3105, 2019 BL 338187 (7th Cir. Sept. 10, 2019). *See also Ashby v. Dep't of State,* No. 1:18CV614, 2019 BL 349755 at 29 (M.D.N.C. Sept. 17, 2019) (finding that a RFRA claim challenging the denial of a visa—brought by a Columbian man seeking religious training in the U.S. and a U.S. citizen who wished to provide that training—was "barred by consular non-reviewability.").
70 *In re Chukwuezue Henry Nworu*, 2005 WL 1104255 (B.I.A. 2005), full case history available at http://www.lexisnexis.com/practiceareas/immigration/pdfs/web789.pdf.
71 *Id.*
72 *Doe v. United States*, No. 4:18-cv-00162-TWP-DML (S.D. Ind. Sept. 5, 2018); Rick Callahan, *Amish Couple Sues 2 Agencies Over Photos Their Faith Forbids*, Associated Press (Sept. 5, 2018), https://www.usnews.com/news/best-states/indiana/articles/2018-09-05/amish-couple-sues-2-agencies-over-photos-their-faith-forbids.
73 *Id.* Notably, the complaint explains that the Does "do not intend to harm anyone for any reason and do not seek to punish anyone for their actions." *Id.* at 4. Their complaint also alleges a violation of, among other things, the couple's right to free speech, free exercise of religion, and freedom of association under the First Amendment.
74 Stipulated Dismissal with Prejudice, *Doe v. United States*, No. 4:18-cv-00162-TWP-DML (S.D. Ind. July 17, 2019).
75 Complaint for Emergency Relief and Petition for Mandamus, *Sabra v. Pompeo*, No. 1:19-cv-02090 (D.D.C. Jul 15, 2019).

76 One other case is worth mentioning, though it also does not involve a religious liberty claim. In *Ragbir v. Homan,* immigration activist Ravi Ragbir, as well as several immigrants' rights organizations, are arguing that Ragbir and other undocumented people have been unjustly targeted for deportation because of their political and speech activities, in violation of the First Amendment's guarantee of free speech. Complaint, *Ragbir v. Homan*, No. 18-CV-1159 (S.D.N.Y. 2018). The complaint seeks a court order restraining the government from deporting and otherwise targeting immigrants' rights activists based on their protected political speech. In November, the Second Circuit issued an order granting a stay of removal to Ravi until the case is litigated. Order of Stay of Removal, *Ragbir v. Homan*, No. 18-1597 (2nd Cir. Nov. 1, 2018). On April 25th, the Second Circuit ruled that Ragbir had made a plausible first amendment retaliation claim. *Ragbir v Homan*, 923 F.3d 53 (2nd Cir. 2019). The case is ongoing. Should any undocumented people be targeted for removal because of their religious beliefs, a similar claim could be brought under the Free Exercise Clause.

77 *Statement on Reproductive Freedom*, Rabbinical Assembly (May 15, 2019), https://www.rabbinicalassembly.org/story/statement-reproductive-freedom.

78 *A Social Statement on Abortion*, Evangelical Lutheran Church In America (Sept. 1991), http://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf.

79 *Report of the Special Committee on Problem Pregnancies and Abortion*, Presbyterian Church (U.S.A.) Off. Of The Gen. Assembly 11 (1992), http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf ("We do not wish to see laws enacted that would attach criminal penalties to those who seek abortions or to appropriately qualified and licensed persons who perform abortions in medically approved facilities.").

80 *Resolution Adopted by the CCAR On Abortion and the Hyde Amendment*, Cent. Conf. Of Am. Rabbis (June 1984), https://www.ccarnet.org/ccar-resolutions/abortion-1984/ (stating that "the Central Conference of American Rabbis has gone on record in 1967, 1975, and 1980 in affirming the right of a woman or individual family to terminate a pregnancy."); *Reproductive Rights*, Union For Reform Judaism (last visited Mar. 13, 2018), https://urj.org/what-we-believe/resolutions/reproductive-rights.

81 *Resolution on Reproductive Freedom*, The Rabbinical Assembly (Feb. 2007), https://www.rabbinicalassembly.org/resolution-reproductive-freedom ("the Rabbinical Assembly urges its members to support full access for all women to the entire spectrum of reproductive healthcare, and to oppose all efforts by federal, state, local or private entities or individuals to limit such access.").

82 *General Synod Statements and Resolutions Regarding Freedom of Choice*, United Church Of Christ (last visited Mar. 13, 2018), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedon-of-Choice.pdf?1418425637 ("for 20 years, Synods of the United Church of Christ have affirmed a woman's right to choose with respect to abortion.").

83 *Right to Choose 1987 General Resolution*, Unitarian Universalist Ass'n (1987), https://www.uua.org/action/statements/right-choose ("the 1987 General Assembly of the Unitarian Universalist Association reaffirms its historic position, supporting the right to choose contraception and abortion as legitimate aspects of the right to privacy.").

84 *A Social Statement on Abortion*, Evangelical Lutheran Church In America, *supra* section II note 78. (opposing "legislation that would outlaw abortion in all circumstances" or "prevent access to information about all options available to women faced with unintended pregnancies.").

85 *The United Methodist Church and the Complex Topic of Abortion*, United Methodist Church (Nov. 3, 2015), http://www.umc.org/what-we-believe/the-united-methodist-church-and-the-complex-topic-of-abortion (expressing a "reluctance to affirm absolute perspectives either supporting or opposing abortion which do not account for the individual woman's sacred worth and agency.").

86 While the Episcopal Church has stated that abortion should be "used only in extreme situations," it has opposed certain legal efforts to restrict abortion rights, such as parental notification laws. *See Oppose Legislation Requiring Parental Consent for Termination of Pregnancy*, The Episcopal Church (1991), https://episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=1991-C037; *see also Religious Leaders Support Maintaining the Status Quo on Abortion in Health Care Reform,* The Episcopal Church (Dec. 4, 2009), https://www.episcopalchurch.org/library/article/religious-leaders-support-maintaining-status-quo-abortion-health-care-reform.

87 *See* Bridgette Dunlap, *How Clergy Set the Standard for Abortion Care*, The Atlantic (May 29, 2016), https://www.theatlantic.com/politics/archive/2016/05/how-the-clergy-innovated-abortion-services/484517/.

88 Doris Andrea Dirks And Patricia A. Relf, To Offer Compassion: A History Of The Clergy Consultations Service On Abortion 82, 98 (Univ. of Wisconsin Press) (2017)..

89 *Id.* at 93

90 *Landreth v. Hopkins*, 331 F. Supp. 920 (N.D. Fla. 1971).

91 *Id.*

92 W*atkins v. Mercy Med. Ctr.*, 364 F.Supp. 799, 803 (D. Idaho 1973), aff'd, *Watkins v. Mercy Med. Ctr.*, 520 F.2d 894, 896 (9th Cir. 1975) (finding that while under the Church Amendment a hospital cannot discriminate against providers who would like to perform sterilizations, it "has the right to adhere to its own religious beliefs and not be forced to make its facilities available for services which it finds repugnant to those beliefs.").

93 For information on when and whether RFRA has been interpreted to apply in suits between private parties, *see Sara Lunsford Kohen, Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties,* 10 Cardozo Pub. L., Pol. & Ethics J. 43 (2011).

94 *See supra* Section I note 28.
95 Complaint for Vacatur of Unlawful Agency Rule and Declaratory and Injunctive Relief, *Baltimore v. Azar,* No. 1:19-cv-01103 (D. Md. Apr. 12, 2019).
96 *Id.* at 8.
97 *Id.* at 52-53
98 *Id.* at 53. The suit also alleges that the rule violates the RFRA rights of Baltimore itself: "RFRA protects not only Baltimore's religiously observant physicians and patients, but also Baltimore itself because corporations are 'person[s]' protected by RFRA…Baltimore has plausibly alleged that the Rule interferes with the religious exercise of Baltimore, its patients, and its physicians." *See* Plaintiff's Response in Opposition to Defendants' Motion to Dismiss at 7, *Baltimore v. Azar*, No. 1:19-cv-01103 (D. Md. Aug. 26, 2019). This is a strange assertion given that it would unquestionably be a violation of the Establishment Clause for a city to adopt any formal religious affiliation or practice.
99 Memorandum Order at 15-16, *Baltimore v. Azar*, No. 1:19-cv-01103 (D. Md. Sept. 12, 2019).
100 *Id.*
101 *Doe v. Greitens*, 530 S.W.3d 571 (Mo. Ct. App. 2017); *Satanic Temple v. Parson*, 735 Fed. App'x. 900 (8th Cir. 2018); *Doe v. Greitens et al*., Docket No. 4:18-cv-00339 (E.D. Mo. Feb 28, 2018).
102 *Greitens*, 530 S.W.3d at 577-78; *see also* Mo. Rev. Stat. § 188.027 (2017).
103 *Greitens*, 530 S.W.3d at 577. Mary Doe also brought a claim in federal court, which the Eighth Circuit dismissed on standing grounds. *Satanic Temple v. Parson*, 735 Fed. Appx. 900 (8th Cir. 2018).
104 *Doe v. Parson,* 567 S.W.3d 625, 630 (Mo. 2019).
105 Jack Denton, *Satanists Just Made it a Little Easier to Get an Abortion in Missouri*, Pac. Standard (Jan. 29, 2018), https://psmag.com/social-justice/satanists-just-made-it-a-little-easier-to-get-an-abortion-in-missouri.
106 *Parson*, 567 S.W.3d at 630.
107 *Doe v. Greitens et al*., Docket No. 4:18-cv-00339 (E.D. Mo. Feb 28, 2018).
108 Opinion Memorandum and Order at 11, *Doe v. Parson,* No. 4:18-cv-00339-HEA (E.D. Mo. Feb. 21, 2019).
109 Appeal from an Order of the United States District Court for the Eastern District of Missouri, (Autrey, J.), dismissing Appellant's complaint pursuant to Fed. R. Civ. Pro. 12(b)(6), *Doe v. Parson*, No. 19-01578 (8th Cir. July 8, 2019).
110 Owen Daugherty, *Satanic Temple Cites Religious Beliefs as Immunity from Supreme Court Abortion Ruling on Fetal Remains*, The Hill (May 29, 2019), https://thehill.com/regulation/court-battles/445997-satanic-temple-cites-religious-beliefs-as-immunity-from-supreme-court.
111 Guthrie Graves-Fitzsimmons, *Commentary: Erasing LGBTQ People of Faith Is Fake News*, Nbcnews.com (July 19, 2017), https://www.nbcnews.com/think/nbc-out/commentary-erasing-lgbtq-people-faith-fake-news-ncna784371; Victoria M. Massie, *LGBTQ Religion Activist: It's Time to Talk About America's Faith-based Homophobia Problem*, Vox (June 15, 2016), https://www.vox.com/2016/6/15/11932454/orlando-shooting-LGBTQ-homophobia-religion ("There's almost an intentional push to continue a media dichotomy between LGBT people and religion. There are so many individuals who are both LGBT and religious. And there are so many individuals who are religious and affirming of LGBT individuals."); Zack Abu-Akeel, *For Answers, Turn to Your Resident Experts: LGBTQ People of Faith*, Geo. U. Ctr. For Religion, Peace & World Aff. (June 20, 2018), https://berkleycenter.georgetown.edu/responses/for-answers-turn-to-your-resident-experts-lgbtq-people-of-faith.
112 Debra L. Mason and Cathy Ellen Rosenholtz, *Missing Voices: A Study of Religious Voices in Mainstream Media Reports* About LGBT Equality at 13, U. Missouri Ctr. On Religion & The Prof. 12 (2012), http://www.glaad.org/files/GLAAD_MissingVoices_2012.pdf.
113 *Id.* at 20.
114 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
115 Gen. Synod of the *United Church of Christ v. Reisinger,* 12 F.Supp.3d 790 (W.D.N.C. 2014). *See also* Phelps v. Dunn, 965 F.2d 93 (6th Cir. 1992) (state prisoner argued that "prison officials violated his rights under the Free Exercise Clause…by denying him participation in prison religious services because he is a homosexual.").
116 Brian Soucek, *The Case of the Religious Gay Blood Donor*, 60 Wm. & Mary L. Rev. 1893 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206854.
117 *Issue Brief: The First Amendment Defense Act Should Not Protect Multiple Views of Marriage*, Fam. Res. Council 1 (July 2016), https://downloads.frc.org/EF/EF16G41.pdf; *Congress's First Amendment Defense Act Loses Supporters*, Liberty Couns. (July 27, 2016), https://www.lc.org/newsroom/details/072716-congresss-first-amendment-defense-act-loses-supporters ("Liberty Counsel can no longer support FADA unless the proposed amendment is abandoned and FADA returns to its original language of marriage being between one man and one woman.").
118 *Why Give? Religious Roots of Charity*, Harv. Divinity Sch., (Nov. 26, 2018), https://hds.harvard.edu/news/2013/12/13/why-give-religious-roots-charity.
119 Kelli Stout, *Tent Cities and RLUIPA: How a New Religious-Land-Use Issue Aggravates RLUIPA*, 41 Seton Hall L. Rev. 465 (2011); Marc-Tizoc González, *Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People Who Share Food in Public?*, 7 U.C. Irvine L. Rev. 291 (2017); *A Dream Denied: The Criminalization of Homelessness in U.S. Cities*, Nat'l Coalition For The Homeless (Jan. 2006), https://www.nationalhomeless.org/publications/crimreport/report.pdf.
120 *St. John's Evangelical Lutheran Church v. City of Hoboken*, 195 N.J. Super. 414, 418, 420 (Super. Ct. 1983).

121 *Id.* at 420.

122 W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F.Supp. 538, 547, 544 (D.D.C. 1994).

123 *Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225 (E. D. Va. 1996) (Stuart Circle Parish in Richmond, Virginia successfully challenged under RFRA a city ordinance that places strict limitations on feeding and housing programs for the homeless within churches. *Id.* The Parish argued that their "Meal Ministry," in which church members provided "worship, hospitality, pastoral care, and a healthful meal to the urban poor of Richmond" every Sunday, was a form of religious exercise protected by RFRA (note that this was before the Supreme Court limited RFRA to apply to only federal laws). *Id.* at 1228. The federal district court granted the Parish a temporary restraining order.

124 *Wilkinson v. Lafranz*, 574 So. 2d 403, 404 (La. Ct. App. 1991) (dismissing as untimely an appeal from a trial court ruling which held, among other things, that "the serving of food to the poor is so integrally and intimately related to the operating of a bona fide church as to protect it constitutionally under the Freedom of Religion." The case involved a challenge by a New Orleans church under the religion protections of the U.S. and Louisiana Constitutions to zoning requirement that limited its ability to operate a soup kitchen.).

125 *Abbott v. City of Fort Lauderdale*, 783 So. 2d 1213 (Fla. Dist. Ct. App. 2001).

126 *Fifth Ave. Presbyterian Church v. City of N.Y.*, 2004 WL 2471406 (S.D.N.Y. Oct. 28, 2004), aff'd 177 Fed. App'x. 198 (2d Cir. 2006).

127 *City of Woodinville v. Northshore United Church of Christ*, 166 Wash.2d 633, 644-45 (2009) ("the City's total moratorium [on all land use permit applications] placed a substantial burden on the Church. It prevented the Church from even applying for a permit. It gave the Church no alternatives…The City failed to show that the moratorium was a narrow means for achieving a compelling goal.").

128 *Big Hart Ministries Assoc., Inc. v. City of Dallas*, 2013 WL 12304552 (N.D. Tex. Mar. 25, 2013).

129 *Chosen 300 Ministries, Inc. v. City of Phila.*, 2012 WL 3235317, at *24 (E.D. Pa. Aug. 9, 2012) (holding that "the ban on sharing food free of charge with three or more members of the public in Fairmount Park substantially burdens plaintiffs' free exercise of religion and that defendants have failed to show by a preponderance of the evidence that the ban is the least restrictive means of furthering their objectives of ending homelessness, feeding the homeless indoors, providing social services to the homeless, increasing the dignity of the homeless, or reducing the trash burden along the Parkway."). The city decided not to appeal and the ban was later overturned. Ronnie Polaneczky, *Kenney Overturns Homeless Feeding Ban on Parkway*, Inquirer (July 2, 2016), https://www.philly.com/philly/news/20160706_Kenney_overturns_feeding_ban_on_Parkway.html.

130 Gilbert Garcia, *Cheever Lawsuit Against City Remains a Possibility*, San Antonio Express-News (July 16, 2015), https://www.expressnews.com/news/news_columnists/gilbert_garcia/article/Cheever-lawsuit-against-city-remains-a-possibility.php (San Antonio dismissed a citation against a woman for feeding homeless people from a non-permitted vehicle after her attorneys submitted a draft complaint they planned to file in federal district court arguing that the ordinance violated the Texas Religious Freedom Restoration Act and the First Amendment of the U.S. Constitution.). *See also, Catholic Worker House and ACLU Team Up to Protect First Amendment Rights*, ACLU West Virginia (Nov. 29, 2017), https://www.acluwv.org/en/press-releases/catholic-worker-house-and-aclu-team-protect-first-amendment-rights. For two religion cases that are still being litigated, see *Layman Lessons Church v. Metro Gov't*, 2019 WL 1746512 (M.D. Tenn. Apr. 18, 2019) (RLUIPA claim); Stephen Paulsen, *Citing the Bible, Federal Lawsuit Challenges Houston's Ban on Feeding the Homeless*, Tex. Observer (May 6, 2019), https://www.texasobserver.org/citing-the-bible-federal-lawsuit-challenges-houstons-ban-on-feeding-the-homeless (First Amendment claim).

131 *See, e.g.*, *First Assembly of God v. Collier Cnty.*, 20 F.3d 419, 423 (11th Cir. 1994) (court held that enforcement of zoning regulations to close a homeless shelter did not violate church's Free Exercise rights because "Even if it is assumed for the sake of argument that sheltering the homeless is a central, essential element of the Christian religion, the fact still remains that the Naples ordinances are neutral and of general applicability."); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1556 (M.D. Fla. 1995) (Denial of permit to church to operate food bank and homeless shelter did not violate church's rights under Federal Constitution or RFRA as provisions were neutral and generally applicable and advanced significant interest of preserving city zoning code and zoning code did not substantially burden church's free exercise rights.); *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978 (N.D. Ill. 2008) (Permit requirement did not violate homeless shelter's rights under the Free Exercise Clause or Illinois Religious Freedom Restoration Act, as the eight-month application process did not rise to the level of a substantial burden); State ex rel. *Scadden v. Willhite*, 2002 WL 452472 (Ohio App. 10 Dist. 2002) appeal not allowed, (96 Ohio St.3d 1469 (2002)) (no RLUIPA or constitutional analysis necessary where appellants had not yet filed for a certificate of zoning compliance); *Westgate Tabernacle, Inc. v. Palm Beach Cnty.*, 14 So. 3d 1027, 1031-32 (Fla. Dist. Ct. App. 2009), reh'g denied, 22 So.3d 539 (Fla. 2009) (Jury found that permitting requirement did not violate church's rights under the Florida RFRA or RLUIPA as "[t]he mere requirement that one apply for a special exception from an ordinance restricting the use of property is not a substantial burden" and because the church "did not show that running a homeless shelter at its specific location was fundamental to its religious exercise.").

132 *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274 (11th Cir. 2010), op. reinstated by 638 F.3d 756 (11th Cir. 2011). The court also found that the regulations were content-neutral and satisfied rational basis review, and thereby did not violate the Free Exercise Clause. *Id.*

133 *Id.* at 1292.

134 *Id.* at 1291. In addition to claims brought under statutory and constitutional religious liberty protections, other cases have been brought—sometimes successfully—arguing for a right to serve the homeless under the Free Speech Clause of the

First Amendment. McHenry v. Agnos, 983 F.2d 1076 (9th Cir. 1993) (Co-founder of Food Not Bombs argued that San Francisco ordinances regulating distribution of food violated his First Amendment free expression protections; ordinances were found to be permissible); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006); *Sacco v. City of Las Vegas,* 2007 WL 2429151 (D. Nev. Aug. 20, 2007); *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274 (11th Cir. 2010); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018) (finding that organization's outdoor food sharing was expressive conduct protected by First Amendment).

135 *Gonzales*, 546 U.S. at 418.

136 *Id.* at 439 ("The courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of hoasca.").

137 *Id.* at 436. The Court further held that the government could not rely on a general interest in uniformity in denying a RFRA exemption without explaining why uniformity was necessary: "the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 421.

138 *See, e.g.*, *United States v. Quaintance*, 608 F.3d 717 (10th Cir. 2010).

139 *See, e.g.*, *United States v. Barnes*, 677 F.App'x. 271 (6th Cir. 2017); *United States v. Martines*, 903 F.Supp.2d 1061 (D. Haw. 2012); *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012 (9th Cir. 2016); *Perkel v. United States DOJ*, 365 F.App'x. 755 (9th Cir. 2010); *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002); *United States v. Bauer*, 84 F.3d 1549 (9th Cir.1996).

140 *Burwell*, 573 U.S. at 725 (2014) ("in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

141 *See, e.g.*, *United States v. Israel*, 317 F.3d 768 (7th Cir. 2003) (finding no violation of RFRA where the state revoked a Rastafarian man's condition of supervised release because he had tested positive for marijuana); *United States v. Brown*, 72 F.3d 134 (8th Cir. 1995) (unpublished opinion); *United States v. Christie*, 825 F.3d 1048 (9th Cir. 2016) *United States v. Lepp*, 446 F.App'x. 44 (9th Cir. 2011); *United States v. Lafley*, 656 F.3d 936 (9th Cir. 2011).

142 Safehouse, https://www.safehousephilly.org/about (last visited May 9, 2019).

143 *Id.*

144 Complaint for Declaratory Judgment, *United States v. Safehouse*, No. 2:19-cv-00519 (E.D. Pa. Feb. 5, 2019).

145 Defendant's Answer, Affirmative Defenses, Counterclaims to Plaintiff's Complaint, and Third-Party Complaint at 40, *United States v. Safehouse*, No. 2:19-cv-00519 (E.D. Pa. Apr. 3, 2019).

146 *Id.* at 40-41.

147 Motion for Judgment on the Pleadings at 24, *United States v. Safehouse*, No. 2:19-cv-00519 (E.D. Pa. June 11, 2019).

148 *United States v. Safehouse*, No. 19-0519, 2019 WL 4858266 at *1 (E.D. Pa. Oct. 02, 2019).

149 Jeremy Roebuck & Aubrey Whelan, J*udge: Philly Supervised Injection Site Proposal Does Not Violate Federal Law*, Phila. Inquirer (Oct. 2, 2019), https://www.inquirer.com/health/opioid-addiction/safehouse-supervised-injection-site-ruling-philadelphia-mchugh-opioids-20191002.html.

150 *The Church of Safe Injection, About Our Church*, Facebook (last visited Nov. 5, 2015), https://www.facebook.com/safeinjection.

151 *Id.*

152 Jesse Harvey, *Maine Voices: Church of Safe Injection Treats Drug Users As Jesus Would Have Done*, Portland Press Herald (Oct. 18, 2018), https://www.pressherald.com/2018/10/18/maine-voices-church-of-safe-injection-treats-addicts-as-jesus-would-have-done/. There are now several Church of Safe Injection branches in Maine, and the church states that it is "[i]n talks with members of our congregation in Philadelphia, Rhode Island and Nepal to start sister churches there as well." *Id.*

153 *Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018), rehearing en banc denied, 915 F.3d 898 (2d Cir. 2019).

154 A significant issue in the dispute has been the question of whether RFRA permits claimants to collect money damages from individual federal officers who have violated their rights under the law. In May 2018, the Second circuit ruled in favor of the claimants, holding that they could collect such monetary damages. *Id.* This ruling has been appealed to the Supreme Court. *Tanvir v. Tanzin*, 894 F.3d 449 (2nd Cir. 2018) appeal docketed, No. 19-71 (July 12, 2019).

155 *Hassan v. City of N.Y.*, 804 F.3d 277 (3d Cir. 2015).

156 *Id.* at 288.

157 *Id.*

158 *Hassan v. City of New York*, Ctr. For Const. Rts. (Apr. 5, 2018), https://ccrjustice.org/home/what-we-do/our-cases/hassan-v-city-new-york.

159 *Cherri v. Mueller*, 951 F.Supp.2d 918 (E.D. Mich. 2013). The claimants argued that by detaining them and "asking them intrusive questions about their religious practices and beliefs," the government "deterred them from freely exercising their religious beliefs." *Id.* at 934. The court determined that the claimants had "not established that being queried about their religious practices and beliefs at the border" burdened their religious exercise. *Id.* at 935. The claimants' Establishment Clause argument was also rejected.

160 *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007). The Second Circuit court found that given some intelligence that persons with known terrorist ties would be attending the conference, the inspection policy was narrowly tailored to a compelling government

interest, and therefore did not violate RFRA. *Id.*

161 *Muhammad v. Ahern,* 350 Fed. App'x. 529, 531 (2d Cir. 2009) (dismissing a claim that border stops violated the claimant's free exercise of religion and RFRA rights because they provided only "conclusory allegations to support these claims.").

162 *Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019).

163 *See, e.g.* Third Amended Complaint for Declaratory and Injunctive Relief, *Hawaii v. Trump*, 2017 WL 6547116 (D. Haw. Oct. 15, 2017) (Trial Pleading) (count VII alleges RFRA violation).

164 *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). The ban is currently facing additional legal challenges. Sirine Shebaya, *A New Muslim Ban Challenge Seeks to Answer the Questions the Supreme Court Didn't Settle*, Atlantic (Feb. 11, 2019).

165 Rosalyn R. LaPier, *Why Native Americans Struggle to Protect Their Sacred Places*, Religion News Serv. (Aug. 14, 2018), https://religionnews.com/2018/08/14/why-native-americans-struggle-to-protect-their-sacred-places/.

166 *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

167 *Id.* at 449. Even before *Lyng*, courts were skeptical of religious liberty claims related to the use of public land. For example, in a 1982 opinion affirmed by the Ninth Circuit and denied cert by the Supreme Court, the District Court of Alaska rejected a claim by the Inupiat people of Alaska's north slope that the federal government's lease of the Beaufort and Chukchi Seas to private companies violated their religious rights by threating to deny them access to sacred sites and potentially disrupting "appeasement ceremonies." Inupiat Community of Arctic Slope v. U.S., 548 F.Supp. 182 (D. Alaska 1982). The court held: "the First Amendment may not be asserted to deprive the public of its normal use of an area." *Id.* at 188.

168 For an analysis on "sacred" vs. "holy" land in the context of RFRA cases brought by Native Americans, *See* Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, *see infra* Section II note 247.

169 *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *cert denied*, 556 U.S. 1281 (2009); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008); *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 239 F.Supp.3d 77 (D.D.C. 2017); L*a Cuna De Aztlan Sacred Sites Protection Circle Advisory Comm. v. Dep't of Interior*, 2014 WL 12597035 (C.D. Cal. June 20, 2014); *S. Fork Band v. United States DOI*, 643 F. Supp. 2d 1192 (D. Nev. 2009), RFRA claim not appealed in 588 F.3d 718 (9th Cir. 2009); *Slockish v. United States FHA*, 2018 WL 2875896 (D. Or. June 11, 2018). For an unusual RFRA land rights claim involving the construction of a highway on the site where a couple's stillborn child was buried, *see Thiry v. Carlson*, 887 F.Supp. 1407 (D. Kansas 1995). For an analysis of how the Supreme Court's decision in *Hobby Lobby* might impact future religious liberty claims brought by Native American religious groups, *see* Edward K. Olds, *Trespass and Vandalism or Protecting That Which Is Holy? The Missing Piece of Religious Liberty Land Use Claims*, 119 Colum. L. Rev. 18 (2019).

170 *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008).

171 *Navajo Nation v. United States Forest Serv.*, 556 U.S. 1281 (2009). After this RFRA claim failed, the Hopi tribe attempted to stop use of wastewater in the park by bringing a new claim arguing that the use of the wastewater was a public nuisance. This attempt to protect the forest was also rejected when the Supreme Court of Arizona held that "environmental damage to public land with religious, cultural, or emotional significance to the plaintiff is not special injury for public nuisance purposes." *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship*, 245 Ariz. 397, 399, 430 P.3d 362, 364 (2018).

172 *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 239 F.Supp.3d 77 (D.D.C. 2017).

173 *Id.* at 90 (internal citations omitted). *See also*, *Id.* at 82 ("The Lakota people believe that the pipeline correlates with a terrible Black Snake prophesied to come into the Lakota homeland and cause destruction.... The Lakota believe that the very existence of the Black Snake under their sacred waters in Lake Oahe will unbalance and desecrate the water and render it impossible for the Lakota to use that water in their Inipi ceremony.").

174 *Id.* at 87 ("The Court, accordingly, concludes that Defendants have shown that the Tribe inexcusably delayed in voicing its RFRA objection.").

175 *Id.* at 94 ("Just as the Ninth Circuit and other courts must follow Lyng until the Supreme Court instructs otherwise, this Court must do the same.").

176 *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 2017 WL 4071136 (D.C. Cir. May 15, 2017).

177 *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187 (3d Cir. 2018).

178 Complaint at 1-2, *Adorers of the Blood of Christ v. FERC*, 5:17-cv-03163 (E.D. Pa. July 14, 2017).

179 *Id.* at 5.

180 *Id.* at 2.

181 *Adorers of the Blood of Christ*, 897 F.3d at 190 (finding that the plaintiffs should have raised an administrative objection before the agency instead of bringing suit in federal court); *cert denied*, 139 S. Ct. 1169 (2019).

182 Complaint for Injunctive Relief, *Gelburd v. Christiansen*, 7:18cv215 (W.D. Va. May 16, 2018).

183 *Id.* at 5-6.

184 *Id.* at 5.

185 It is worth noting that while this case does not involve a traditionally "conservative" issue, Dr. Gelburd filed his brief with the right-leaning Rutherford Institute. Previously, the Rutherford Institute filed an amicus brief in support of Hobby Lobby and, despite billing itself as a civil liberties organization, an amicus brief arguing against the decriminalization of sodomy in *Bowers v. Hartwick*. Brief for the Rutherford Institute and the Rutherford Institutes of Alabama, Connecticut, Delaware, Georgia, Minnesota, Montana, Tennessee, Texas, and Virginia as Amici Curiae Supporting Petitioner, *Bowers v. Hardwick*, 478 U.S. 196 (1986), 1985 WL 667943. The Rutherford Institute does not appear to have filed a brief in the later case *Lawrence v. Texas*, which overturned

Bowers and found antisodomy laws to be unconstitutional.

186 Anne M. Yoder, *Conscientious Objection in America: Brief History of Conscientious Objection*, Swarthmore C. Peace Collection (last modified Nov. 2007), https://www.swarthmore.edu/library/peace/conscientiousobjection/co%20website/pages/HistoryNew.htm.

187 *Conscientious Objection and Alternative Service*, Selective Serv. Sys. (last visited Nov. 5, 2015), https://www.sss.gov/consobj ("Two types of service are available to conscientious objectors, and the type assigned is determined by the individual's specific beliefs. The person who is opposed to any form of military service will be assigned to alternative service - described below. The person whose beliefs allow him to serve in the military but in a noncombatant capacity will serve in the Armed Forces but will not be assigned training or duties that include using weapons.").

188 *Gillette v. United States*, 401 U.S. 437 (1971).

189 *Id.* at 461.

190 *Id.* at 462.

191 *United States v. Seeger*, 380 U.S. 163 (1965).

192 Welsh v. United States, 398 U.S. 333 (1970).

193 *Seeger*, 380 U.S. at 180.

194 *See, e.g.*, *Curia v. Commissioner*, 1976 WL 3269, 35 T.C.M. 333 (T.C. Mar. 9, 1976) ("petitioner is not entitled to an 'anti-war tax' credit because of his moral and religious beliefs."); A*utenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. den. 397 U.S. 1036 (1970); *Russell v. Commissioner*, 60 T.C. 942 (1973); *United States v. Malinowski*, 472 F.2d 850 (3rd Cir. 1973), *cert. denied* 411 U.S. 970 (1973); *Browne v. U.S.*, 176 F.3d 25 (2nd Cir. 1999), *cert. denied* 528 U.S. 1116 (2000).

195 *Adams v. Comm'r*, 170 F.3d 173 (3d Cir. 1999).

196 *Id.* at 174.

197 *Id.*

198 *Id.* at 179.

199 For a discussion of Catholic anti-war activism, including the draft raids, *see* Sharon Erickson Nepstad, *Disruptive Action and the Prophetic Tradition: War Resistance in the Plowshares Movement*, 27 U.S. Cath. Historian 97, 102 (2009), https://www.jstor.org/stable/pdf/40468577.pdf?refreqid=excelsior%3Ada221f0f70dc05e2930b3bd1fff9de5f ("While the exact number is unknown, it is estimated that between 53 and 250 raids occurred between 1967 and 1971."). *See also* Francine du Plessix Gray, *The Ultra-Resistance*, N.Y. Rev. Of Books (Sep. 25, 1969), https://www.nybooks.com/articles/1969/09/25/the-ultra-resistance/; Draft Board Raids, http://hillelarnold.com/draft-board-raids/ (last visited May 8, 2019).

200 Fire And Faith: The Catonsville Nine File, http://c9.digitalmaryland.org/page.php?ID=2 (last visited May 8, 2019). For an interview about the protest with Father Daniel Berrigan, *see* Daniel Berrigan on the Catonsville Nine, POV http://archive.pov.org/disturbingtheuniverse/extended-interviews/ (last visited May 8, 2019).

201 Fire And Faith: The Catonsville Nine File, *supra* Section II note 200.

202 *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969); Nepstad, *supra* Section II note 199 at 101-02.

203 Gray, *supra* Section II note 199; Chris Foran, *Our Back Pages: When the Milwaukee 14 Made a Fiery Statement*, Milwaukee J. Sentinel (Sept. 20, 2016), https://www.jsonline.com/story/life/green-sheet/2016/09/20/our-back-pages-when-milwaukee-14-made-fiery-statement/90485014/. The protestors defended themselves at trial. Gray, *supra* Section II note 199. They claimed to follow "a moral law higher than that of any nation" and said that they had been bound to act by their religious consciences. *Id.* For a partial trial transcript, *see* Jim Forest, *Milwaukee 14 At Trial*, http://jimandnancyforest.com/wp-content/uploads/2014/10/Milwaukee-14-abridged-trial-transcript-sm.pdf (last visited May 8, 2019).

204 Gray, *supra* Section II note 199; United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

205 Liz Laribee, *Review: The Camden 28*, Christianity Today (July 27, 2007), https://www.christianitytoday.com/ct/2007/julyweb-only/camden28.html; Donald Janson, 17 of Camden 28 Found Not Guilty, N.Y. Times (May 21, 1973), https://www.nytimes.com/1973/05/21/archives/17-of-camden-28-found-not-guilty-admitted-draftoffice-raidboth.html.

206 Gray, *supra* Section II note 199.

207 *Id.*

208 *'Boston Eight' Surrender in D. C. But FBI Refuses to Arrest Them*, Harv. Crimson (Nov. 17, 1969), https://www.thecrimson.com/article/1969/11/17/boston-eight-surrender-in-d-c/. Several Quakers also participates in the raids, including Suzi Williams (of multiple raids including the "Boston Two") and Water Skinner (of the "Pasadena Three"). *See* Gray, *supra* Section II note 199; Sufferings, 15 Friends J.: Quaker Thought And Life Today 607 (Oct. 15, 1969), https://www.friendsjournal.org/wp-content/uploads/emember/downloads/1969/HC12-50463.pdf.

209 *Dougherty*, 473 F.2d at 1140-41 (Bazelon, C.J., concurring in part).

210 *United States v. Moylan*, 417 F.2d 1002, 1008-09 (4th Cir. 1969). *See also Id.* at 1009 ("To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos.").

211 *United States v. Berrigan*, 283 F.Supp. 336, 338 (D. Md. 1968) (quoting *Baxley v. United States*, 134 F.2d 937, 938 (4th Cir. 1943)).

212 *Id.* at 339.

213 Nepstad, *supra* Section II note 199 at 97.

214 *Id.* at 104-05.

215 *United States v. Walli*, 2013 WL 1838159 at *11 (E.D. Tenn. Apr. 30, 2013).
216 *Id.*
217 Memorandum in Support of Motion to Dismiss at 3, *United States v. McAlister*, No. 2:18-cr-00022-LGW-RSB (S.D. Ga. July 2, 2018).
218 Defendant Elizabeth McAlister Response to the Court's November 28, 2018, Order Directing Supplemental Briefing at 2, *United States v. McAlister*, No. 2:18-cr-00022-LGW-BWC (S.D. Ga. Jan. 16, 1019).
219 *Id.* at 7.
220 *Directory of Catholic Worker Communities*, Cath. Worker Movement, https://www.catholicworker.org/communities/directory-picker.html (last visited Oct. 11, 2019); *Peace Activists Face 25 Years for Action at U.S. Nuclear Submarine Base*, Kings Bay Plowshares 7 (last visited Oct. 1, 2019), https://kingsbayplowshares7.org/.
221 Grand Jury Charges, *United States v. Kelly*, No. 2:18-cr-00022-LGB-RSB (S.D. Ga. May 2, 2018).
222 Memorandum in Support of Motion to Dismiss, *United States v. McAlister*, No. 2:18-cr-00022-LGB-RSB (S.D. Ga. July 2, 2018). Specifically, they claimed that "[s]ince the possession and threatened use of nuclear weapons is illegal it will be impossible for the government to assert it has a compelling governmental interest in that." *Id.* at 24-25.
223 Order, *United States v. Kelly*, 2019 WL 4017424, No. 2:18-cr-00022-LGW-BWC (S.D. Ga. Aug. 26, 2019).
224 *Id.* at *4.
225 *See* Order and Magistrate Judge's Report and Recommendation at 46, *United States v. Kelly*, No. 2:18-cr-00022-LGW-BWC (S.D. Ga. Apr. 26, 2019); Petitioner's Response to the Court's Aug. 15, 2018 Order Directing Supplemental Briefing at 10, *United States v. McAlister*, No. 2:18-cr-00022-LGW-RSB (S.D. Ga. Sept. 5, 2018).
226 *United States v. Kelly*, 2019 WL 4017424 at *6 (S.D. Ga. Aug 26, 2019).
227 *In re Kemp*, 894 F.3d 900 (8th Cir. 2018), *cert denied*, 139 S. Ct. 1176 (2019).
228 *Id.* at 907 (internal citations omitted).
229 *Id.* at 908.
230 Max Brantley, *Supreme Court Again Rebuffs Judge Griffen on Hearing Capital Cases*, Ark. Times (Sept. 19, 2019), https://arktimes.com/arkansas-blog/2019/09/19/supreme-court-again-rebuffs-judge-griffen-on-hearing-capital-cases.
231 Noel Phillips, *Mennonite Investigator to be Released from Jail, Scheduled to Testify Wednesday in Colorado Death Penalty Case*, Denver Post (Mar. 12, 2018), https://www.denverpost.com/2018/03/12/mennonite-investigator-greta-lindecrantz-agreed-testify-remains-jailed/.
232 *Id.*
233 This report capitalizes "Humanist" to denote those who are affiliated with the organized Humanist movement. *See Harvey Lebrun, Humanist with a Capital H*, Amer. Humanist Soc'y (last visited Oct. 1, 2019), https://americanhumanist.org/what-is-humanism/humanism-capital-h/. In contrast, it does not capitalize "atheist," as it denotes those who do not believe in any god(s) but are not affiliated with any formal group or movement.
234 Hemant Mehta, *After Satanists Plan to Give Away Coloring Books, School Board May Change Rules to Block Them*, Friendly Atheist (Nov. 14, 2014), https://friendlyatheist.patheos.com/2014/11/14/after-satanists-plan-to-give-away-coloring-books-school-board-considers-banning-religious-distributions-altogether/.
235 Andrew Seidel, *What I Learned from Fighting Back Against Public School Bible Distributions*, Friendly Atheist (May 5, 2015), https://friendlyatheist.patheos.com/2015/05/05/what-i-learned-from-fighting-back-against-public-school-bible-distributions/.
236 Abby Ohlheiser, *The Satanic Temple's Giant Statue of a Goat-headed God Is Looking for a Home*, Wash. Post (July 1, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/01/the-satanic-temples-giant-statue-of-a-goat-headed-god-is-looking-for-a-home/?utm_term=.fa86ebb30a9d. *See also,* Complaint, *Satanic Temple v. City of Belle Plaine, Minnesota*, No. 0:19-cv-01122-WMW-LIB (D. Minn. Apr. 25, 2019) (challenging a city's withdrawal of a permit to display a Satanic Temple monument on government property.).
237 Complaint, *Satanic Temple et al. v. Scottsdale, City of et al*, Docket No. 2:18-cv-00621 (D. Ariz. Feb 26, 2018).
238 Educatin' With Satan, https://afterschoolsatan.com/ (last visited Nov. 6, 2018).
239 *Doe v. Cong*. of the United States, 891 F.3d 578, 583 (6th Cir. 2018), rehearing en banc denied, (Aug. 8, 2018). *See also Newdow v. Peterson*, 753 F.3d 105 (2d Cir. 2014); *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010); *Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018); *Doe v. United States*, 901 F.3d 1015 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2699 (2019). *See also Freedom From Religion Foundation v. Hanover School Dist.*, 626 F.3d 1 (1st Cir. 2010) *cert. denied*, 564 U.S. 1004 (2011) (Free Exercise Clause challenge to voluntary recitation of the Pledge of Allegiance in public schools).
240 *Cong. of the United States*, 891 F.3d at 591.
241 *Barker v. Conroy*, 282 F.Supp.3d 346 (D.D.C. 2017). *See also Heap v. Carter*, 112 F.Supp.3d 402 (E.D. Va. 2015); *Newdow v. Bush*, 355 F.Supp.2d 265 (D.D.C. 2005).
242 *Barker v. Conroy*, 282 F.Supp.3d at 365.
243 *See Town of Greece v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811 (2014).
244 *Barker v. Conroy*, 282 F.Supp.3d at 365.
245 *Barker v. Conroy*, 921 F.3d 1118 (D.C. Cir. 2019).
246 Comment Letter on Proposed Rule *"Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,"* Public Rights/Private Conscience Project (Mar. 27, 2018), https://www.law.columbia.edu/sites/default/files/microsites/gender-

sexuality/PRPCP/comments_to_hhs.pdf ("Dr. George Tiller, who was murdered by an anti-abortion activist while serving as an usher in his Lutheran Church, referred to his work providing abortion care as a 'ministry.' Two members of Dr. Tiller's staff echoed this view, stating respectively, 'I felt I was doing the Lord's work,' and 'God put me here to do this work.' Dr. LeRory Carhart, an abortion provider and observant Methodist, stated in an interview, 'I think what I'm doing is because of God, not in spite of God.' Dr. Sara Imershein has described providing abortion care as a 'mitzvah' and said that 'No one should be able to step in the way of what I consider to be my moral obligation.' One article on a Jewish website stated that Imershein and four other Jewish abortion providers contacted by the writer all 'described the resonance between their Judaism…and their decision to provide abortion care.' Dr. Curtis Boyd, a Unitarian, first became an abortion provider when he was asked by a minister and member of the Clergy Consultation Service to perform the procedure illegally prior to *Roe v Wade*. Dr. Boyd explained, 'Finally, my work had the larger meaning I'd sought. My religious ideals became immediate and personal.'").

247 *See, e.g.*, Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, 30 J.L. & Religion 36, 53 (2015). *See also* Sarah B. Gordon, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 Yale L.J. 1447 (1985); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 Mont. L. Rev. 13, (1991); Bryan J. Rose, *A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses*, 7 Va. J. Soc. Pol'y & L. 103 (1999).

248 Alex Tallchief Skibine, T*owards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 273 (2012).

249 *Id.*

250 *Lyng*, 485 U.S. at 474 (Brennan, J., dissenting).

251 Alan Blinder and Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. Times (Sept. 1, 2015), https://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html.

252 For example, while Judge Ho of the 5th Circuit has a history of volunteering for the anti-abortion group the First Liberty Institute, he nevertheless participated in a recent case involving a fetal burial rule in Texas. *See* Mark Joseph Stern, *Trump-Appointed Judge Bemoans the "Moral Tragedy" of Abortion, Accuses Lower Court of Anti-Christian Bias*, Slate (July 16, 2018), https://slate.com/news-and-politics/2018/07/judge-james-ho-attacks-abortion-rights-while-accusing-a-lower-court-of-anti-christian-bias.html. *See also*, *THV11, Judge Griffen Speaks on Religious Liberty, Being Barred from Execution Cases*, Youtube (June 9, 2017), https://www.youtube.com/watch?v=fhvk74cu2pM ("There have been Christians who have been judges who have said that abortion is a sin but they weren't sanctioned and they weren't told to get off cases involving abortion.").

Endnotes, Section III: The Christian Right and the Redefinition of "Religious Liberty"

1 Motion for Judgment on the Pleadings at 29-30, *United States of America v. Safehouse,* No. 2:19-cv-00519 (E.D. Pa. June 11, 2019).

2 S.B. 101, 119th Gen. Assemb., Reg. Sess., (Ind. 2015).

3 H.B. 43/S.B. 110, 2016 Leg., Reg. Sess. (Fla. 2016).

4 S.B. 1556/H.B. 1840, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016).

5 S.B. 175, 86th Leg., Reg. Sess. (Kan. 2016).

6 S.B. 17, 2017 Leg., Reg. Sess. (Ky. 2017).

7 H.B. 24, 2017 Leg., Reg. Sess. (Ala. 2017).

8 S.B. 149, 92th Gen. Assemb., Reg. Sess. (S.D. 2017).

9 H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017).

10 S.B. 1140, 56th Leg., 2nd Sess. (Okla. 2018). In 2019, an Idaho lawmaker even introduced a resolution that would condemn what she considers to be "Christian persecution," citing as evidence of such persecution the enforcement of civil rights laws on anti-LGBTQ Christians. *See* Ruth Brown, *Legislator Wants to End What She Calls Christian 'Persecution,' Cites Non-Idaho Examples*, Idaho Statesman (Mar. 15, 2019), https://www.idahostatesman.com/news/politics-government/state-politics/article227854124.html.

11 S.B. 156, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019); S.F. 274, 88th Gen. Assemb., Reg. Sess. (Iowa 2019); H.B. 1087, 2019 Leg. Reg. Sess. (S.D. 2019); H.B. 254, 2019 Leg. Reg. Sess. (Ky. 2019). *See also* S.B. 2320, 66th Leg. Assemb, Reg. Sess. (N.D. 2019).

12 Congressional Prayer Caucus Foundation, National Legal Foundation, and Wallbuilders, *Report and Analysis on Religious Freedom Measures Impacting Prayer and Faith in America* (2018-2019), CPCF (2018), https://www.au.org/sites/default/files/2019-01/Project%20Blitz%20Playbook%202018-19.pdf.

13 Miss. Code Ann. § 11-62-1 *et seq.* (2016). This law was found unconstitutional by a federal District Court judge, but that opinion was overturned on procedural grounds. *Barber v. Bryant,* 193 F.Supp.3d 677 (S.D. Miss. 2016), *overturned by* 860 F.3d 345 (5th Cir. 2017). These bills are designed to affirmatively condone religiously motivated denials of goods, services, and benefits to LGBTQ+ people as well as anyone who has had sex outside of a different-sex marriage, such as unmarried pregnant and parenting people or cohabitating unmarried couples. See *Unmarried and Unprotected: How Religious Liberty Bills Harm Pregnant People, Families, and Communities of Color*, Public Rights/Private Conscience Project (2017), https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/unmarried_unprotected_-_prpcp.pdf.

14 First Amendment Defense Act, S. 2525, 115th Cong. (2018).

15 *First Amendment Defense Act of 2016 Hearing on H.R. 2802 before the H. Committee on Oversight and Government Reform, 114th Cong.* (July 12, 2016) (statement of Katherine Franke, Sulzbacher Professor of Law, Gender, and Sexuality Studies, Columbia Law School), *available at* http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_fada_testimony.pdf.

16 *Refusing to Provide Health Services,* Guttmacher Inst. (May 1, 2019), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services. While the scope of these exemptions is not always clear, some medical providers, including Catholic hospitals, have refused to provide essential medical care even when a patient's life is at risk. Julia Kaye, Brigitte Amiri, Louise Melling, and Jennifer Dalven, *Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threat to Women's Health and Lives*, A.C.L.U. (May 2016), https://www.aclu.org/report/report-health-care-denied?redirect=report/health-care-denied.

17 One notable exception to this is the Church Amendment, passed in 1973, which prohibits certain healthcare entities from discriminating against healthcare personnel because they "performed or assisted in the performance of a lawful sterilization procedure or abortion" or because they refuse to perform these services. 42 U.S.C. § 300a–7.

18 S.B. 185, 2017 Leg. Sess., (Ala. 2017) (emphasis added).

19 S.E.A. 201, 121st Gen. Assemb., Reg. Sess. (Ind. 2019).

20 Exec. Order No. 13798, 82 C.F.R. § 21675 (2017).

21 Memorandum from U.S. Attorney General Jeff Sessions to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty*. (October 6, 2017), *available at* https://www.justice.gov/opa/press-release/file/1001891/download. For example, they state that "The government may be able to meet that standard [that a law be necessary to further a compelling government interest] with respect to race discrimination…but may not be able to with respect to other forms of discrimination." *Id.* at 13a.

22 Jeff Sessions, Attorney General, Remarks at the Department of Justice's Religious Liberty Summit (July 30, 2018), *available at*
https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit.

23 Exec. Order No. 13831, 83 C.F.R.§ 20715 (2018); Melissa Rogers, *President Trump Just Unveiled a New White House 'Faith' Office. It Actually Weakens Religious Freedom*, Wash. Post (May 14, 2018), https://www.washingtonpost.com/

news/acts-of-faith/wp/2018/05/14/president-trump-just-unveiled-a-new-white-house-faith-office-it-actually-weakens-religious-freedom/?utm_term=.43996900803f. It's worth noting that the White House has long awarded significant grants—such as contracts to provide care to unaccompanied minors—to faith based organizations that refuse to provide sexual and reproductive health care to beneficiaries. This practice was unsuccessfully challenged in 2018 as a violation of the Establishment Clause. *See ACLU v. Azar*, 2018 WL 4945321 at *1 (N.D. Cal. Oct. 11, 2018) (holding that "A reasonable person would not view the government, which facilitated access to abortion by transferring unaccompanied minors who want abortions to shelters where they can obtain them, to be endorsing the Conference's anti-abortion views.").

24 U.S. Department of Labor, *Office of Federal Contract Compliance Programs*, Directive (DIR) 2018-03 (Aug. 10, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html; *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 84 C.F.R. § 41677 (2019), https://www.federalregister.gov/documents/2019/08/15/2019-17472/implementing-legal-requirements-regarding-the-equal-opportunity-clauses-religious-exemption.

25 *Title I-Improving the Academic Achievement of the Disadvantaged and General Provisions; Technical Amendments*, 34 C.F.R. § 200, 34 C.F.R. § 299 (2019).

26 Veronica Stracqualursi, *HUD Proposes Rule that Would Roll Back Protections for Transgender Homeless*, CNN (May 24, 2019), https://www.cnn.com/2019/05/23/politics/hud-rule-transgender-homeless-shelters-ben-carson/index.html; *Revised Requirements Under Community Planning and Development Housing Programs*, 24 C.F.R. § 5 (2019).

27 *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 C.F.R. § 57536 (2019); *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 C.F.R. § 57592 (2019). The religious, but not the moral exemption applies to publicly traded companies. *Fact Sheet: Final Rules on Religious and Moral Exemptions and Accommodation for Coverage of Certain Preventive Services Under the Affordable Care Act*, Dep't Health & Hum. Serv. (Nov. 7, 2018), https://www.hhs.gov/about/news/2018/11/07/fact-sheet-final-rules-on-religious-and-moral-exemptions-and-accommodation-for-coverage-of-certain-preventive-services-under-affordable-care-act.html. The rule is currently the subject of numerous legal challenges. Katie Keith, *ACA Litigation Round-Up: Contraceptive Coverage Mandate*, Health Aff. (May 22, 2019), https://www.healthaffairs.org/do/10.1377/hblog20190522.119710/full/; Katie Keith, *Contraceptive Mandate Litigation: Latest Developments*, Health Aff. (Oct. 7, 2019), https://www.healthaffairs.org/do/10.1377/hblog20191007.228426/full/.

28 *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 C.F.R. § 23170 (2019). Several lawsuits have already been filed to challenge the regulation. Sanjana Karanth, *Legal Challenges Pour In Against Trump's Faith-Based Denial-Of-Care Rule*, Huffington Post (June 12, 2019), https://www.huffpost.com/entry/legal-challenges-trump-conscience-protection_n_5d0190a4e4b0985c41978d31.

29 Kinsey Hasstedt, *What the Trump Administration's Final Regulatory Changes Mean for Title X*, Health Aff. (Mar. 5, 2015), https://www.healthaffairs.org/do/10.1377/hblog20190304.267855/full/; *Compliance with Statutory Program Integrity Requirements*, 84 C.F.R. § 7714 (2019).

30 MaryBeth Musumeci and Jennifer Kates, *et al.*, *HHS's Proposed Changes to Non-Discrimination Regulations Under ACA Section 1557*, Kaiser Fam. Found. (July 1, 2019), https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/.

31 *VA Overhauls Religious and Spiritual Symbol Policies to Protect Religious Liberty,* Dep't Veterans Aff. (July 3, 2019), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5279.

32 Letter from Steven Wagner, Principal Deputy Assistant Secretary, HHS Administration for Children and Families, to South Carolina Governor Henry McMaster (Jan. 23, 2019), *available at* https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf. Governor McMaster's request was made on behalf of Miracle Hill Ministries, a government-funded Christian foster care agency that has refused to place children with Jewish, Catholic, and same-sex families. Laura Meckler, *Trump Administration Grants Waiver to Agency that Works Only with Christian Families*, Wash. Post (Jan. 23, 2019), https://www.washingtonpost.com/local/education/trump-administration-grants-waiver-to-agency-that-works-only-with-christian-families/2019/01/23/5beafed0-1f30-11e9-8b59-0a28f2191131_story.html.

33 *Inadmissibility on Public Charge Grounds*, 84 C.F.R. §§ 41292, 41331-32 (2019).

34 *Id.* at 41332.

35 Memorandum from U.S. Attorney General Jeff Sessions to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty*, *supra* Section III note 21 at 7.

36 Matter of T-R-C-C-O-G-V-H-, ID# 3933126 (AAO Sept. 19, 2019); Matter of T-B-C-O-T-U-S-/-C-P-T-, ID# 4194528 (AAO Sept. 25, 2019).

37 Erica L. Green, *U.S. Orders Duke and U.N.C. to Recast Tone in Mideast Studies*, N.Y. Times (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/us/politics/anti-israel-bias-higher-education.html?fbclid=IwAR339xcCGlxaUHV6Umm78Y_C1W4-BPnd9DsQxtJBt8hKcZEFAFfxH4GBRy4.

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

39 *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. __, 138 S. Ct. 1719 (2018).

40 *See, e.g., EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018) (for-profit funeral home sought an exemption under RFRA from federal employment discrimination law after firing a transgender employee), *cert granted on non-RFRA questions in* 139 S. Ct. 1599 (2019); *Buck v. Gordon*, 2019 WL 4686425 (W.D. Mich. Sep. 26, 2019) (preliminary injunction allowing a publicly funded,

religiously affiliated adoption agency to refuse to place children with same-sex couples); *DeOtte v. Azar*, Civil Action No. 4:18-cv-00825-O, 2019 WL 3788545 (N.D. Tex. June 5, 2019) (class action RFRA challenge to contraceptive mandate of ACA); *Torres v. Carter*, No. 5:19-cv-327 (E.D.N.C. July 31, 2019) (Title VII religious discrimination charge brought by state employee fired for refusing to train a female colleague because spending time alone with a woman violated his Christian beliefs); *Indiana Family Inst. v. City of Carmel*, No. 29D01-1512-MI-010207 (Hamilton Sup. Ct. Dec. 11, 2015) (challenge to legislative "fix" to Indiana's RFRA, which prohibited discrimination); *Klein v. Or. Bureau of Labor & Indus.*, 289 Or. App. 507, 410 P.3d 1051 (2017) (bakery sought an exemption under the Free Exercise Clause from state antidiscrimination law after refusing to make a wedding cake for a same-sex couple); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), *appeal docketed,* No. 19-333 (U.S. Sept. 12, 2019) (florist shop sought an exemption under the Free Exercise Clause from state antidiscrimination law after refusing to make wedding flower arrangements for a same-sex couple); *Cervelli v. Aloha Bed & Breakfast*, 142 Haw. 177 (Ct. App. 2018), *cert denied*, 139 S. Ct. 1319 (2019) (bed and breakfast sought an exemption under the Free Exercise Clause from state antidiscrimination law after refusing a hotel room to a same-sex couple); *Telescope Media Grp. v. Lucero*, 2019 WL 3979621 (8th Cir. 2019) (wedding videography company opposed to providing services to same-sex couples sought pre-enforcement exemption under the Free Exercise Clause from state antidiscrimination law); *303 Creative Ltd. Liab. Co. v. Elenis*, 2017 WL 4331065 (D. Colo. Sep. 1, 2017), *appeal dismissed*, 746 Fed. App'x. 709 (10th Cir. 2018) (wedding website design company opposed to providing services to same-sex couples sought pre-enforcement exemption under the Free Exercise Clause from state antidiscrimination law); *Fulton v. City of Phila.*, 922 F.3d 140 (3rd Cir. 2019), *appeal docketed,* No. 19-123 (U.S. Jul. 25, 2019) (foster care agency opposed to working with same-sex couples seeks exemption from city antidiscrimination ordinance under Free Exercise Clause and Pennsylvania Religious Freedom Act); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert denied*, 136 S.Ct. 2433 (2016) (Free Exercise Clause challenge to state rules requiring pharmacies to deliver all prescribed medication, including contraception, regardless of religious belief); *Caring Families Pregnancy Services v. City of Hartford*, No. 3:19-cv-00584 (D. Conn. Apr. 18, 2019) (federal and state constitutional challenge to a local ordinance requiring pregnancy centers to disclose whether or not they have licensed medical providers on site).

41 *Brush & Nib Studio, LC v. City of Phx.*, 2019 WL 4400328 at *1 (Sep. 16, 2019).

42 Adiel Kaplan, David Mora, Maya Miller and Andrew R. Calderon, *Trump Admin Files More Briefs in Religious Liberty Cases Than Obama, Bush*, NBC News (Feb. 24, 2019), https://www.nbcnews.com/politics/justice-department/trump-admin-files-more-briefs-religious-liberty-cases-obama-bush-n974531; Arika Herron, *Justice Department Supports Indianapolis Archdiocese in Firing of Gay Cathedral Teacher*, Indianapolis Star (Sept. 27, 2019), https://www.indystar.com/story/news/education/2019/09/27/justice-department-backs-indianapolis-archdiocese-gay-teacher-firing/3788768002/.

Endnotes, Section IV: Charting a Path Forward: Protecting Religious Liberty for Everyone

1 *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (internal citations omitted). *See also*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226, (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of noreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.").

2 *Town of Greece*, 572 U.S. at 616 (2014) (Kagan, J., dissenting).

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LAW, RIGHTS, AND RELIGION PROJECT

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. SCOTT DANIEL WARREN, Defendant.	No.CR-18-00223-001-TUC-RCC **BRIEF OF AND BY PROFESSORS OF RELIGIOUS LIBERTY AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

Amici Law Professors, all considered to be experts in constitutional law and specifically the law of religious liberty, seek to provide the court with the proper framework

within which to consider Dr. Warren's motion to dismiss grounded in the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1 (hereinafter "RFRA").

This case represents one of the first instances in which a court has had to adjudicate the application of RFRA as a defense to a criminal prosecution under federal immigration law, specifically 8 U.S.C. § 1324(a)(1)(A)(iii) which prohibits harboring and is a criminal law of general application. Given that the issues involved—the enforcement of federal immigration law and the fundamental right to religious liberty—are significant, and that the case presents a question of first impression, it is imperative that the court structure its ruling on the RFRA motion to dismiss in a way that will provide clear guidance to the parties here and to other parties and courts in the future. Particularly because a wide range of religious institutions currently operate homeless shelters, soup kitchens, or other charitable services that provide basic needs such as food, water, shelter, or clean clothes to persons who may be undocumented, it is particularly important that this court provide clear guidance on this matter.

Congress enacted RFRA in 1993 in response to the Supreme Court's holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause of the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (internal quotation marks omitted). With RFRA, Congress sought "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)," that had been altered by the Court in *Smith*. 42 U.S.C. § 2000bb(b)(1). By reinstating as a statutory matter the pre-*Smith* free exercise standard, Congress recognized the fact that laws of

general applicability may, in some cases, impose a substantial burden on the religious exercise of some persons, and when they do, the government must justify such burden on religious exercise as furthering a compelling interest through narrowly tailored means. RFRA aims to provide substantial protection to the free exercise of religion while recognizing that these rights are not absolute, insofar as they must yield where necessary for the government to implement a compelling public interest, or where the rights of third parties, for instance other citizens, are burdened by the overly solicitous accommodation of an individual's religious belief. Further, the First Amendment's Establishment Clause imposes a limit on the extent to which the government may accommodate the religious beliefs of citizens, as the government must ensure that an "accommodation [is] measured so that it does not override other significant interests" and does not "differentiate among bona fide faiths." *Cutter v. Wilkinson*, 544 U.S. 709, 722-23 (2005).

RFRA is a careful balancing test intended to provide discrete religious exemptions to those whose religious activities are inadvertently constrained by neutral laws of general applicability. To receive an exemption under RFRA, a claimant need not demonstrate that the challenged law or policy singles out any particular group for special harm—such a law would be unconstitutional under the Free Exercise and Establishment Clauses of the First Amendment, making a RFRA exemption unnecessary. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Nor need a defendant show that he believes the challenged law cannot exist *at all*. RFRA is not a means of challenging the application of a law or policy generally, but of challenging a particular application to the extent that it conflicts with a particular person's specific religious practices.

Under RFRA, the federal government may not "substantially burden" a person's religious exercise, even where the burden results from a religiously neutral, generally applicable law that might be constitutionally valid under *Smith*, unless the imposition of such a burden is the least restrictive means to serve a compelling governmental interest. The person claiming a RFRA defense, in this case Dr. Warren, must show i) that he holds a belief that is religious in nature; ii) that that belief is sincerely held; iii) that his exercise of religious belief was substantially burdened by a federal law or policy. Once the person claiming a RFRA defense has made out this showing, the burden shifts to the government to show that i) it has a compelling governmental interest; and ii) that interest is being accomplished through the least restrictive means. 42 U. S. C. §§2000bb–1(a), (b).

In this case the government has addressed only three issues in connection with the RFRA motion: it argues that the defendant's religious beliefs were not substantially burdened, that the government has shown a compelling state interest to enforce the law in this case, and that the law is narrowly tailored to accomplish that compelling interest.

The RFRA Prima Facie Case

With respect to the showing required by the party claiming a RFRA exemption, the claimant must first show by a preponderance of the evidence that he holds a belief that is *religious* in nature. This showing requires courts to consider the mixed question of whether, objectively, the claimant's beliefs are "religious" and whether, subjectively, the claimant himself understood the beliefs to be religious. RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S.Ct. 2751, 2762 (2014). RFRA provides protection to a wide

diversity of religious practices, including those that differ significantly from the Abrahamic traditions. Thus, a RFRA claimant need not show that they believe in a singular deity, that their faith includes a house of worship, or that they are a member of a recognizable congregation.[1] "This [] inquiry reflects our society's abiding acceptance and tolerance of the unorthodox belief. Indeed, the blessings of our democracy are ensconced in the first amendment's unflinching pledge to allow our citizenry to explore diverse religious beliefs in accordance with the dictates of their conscience." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). "[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). "Our nation recognizes and protects the expression of a great range of religious beliefs." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1064 (9th Cir. 2008).

In considering whether a system of values or beliefs counts as religious for the purposes of RFRA and similar federal statutes, courts have looked to several key indicia of "religiosity" that implicate "'deep and imponderable matters' … includ[ing] existential matters, such as humankind's sense of being; teleological matters, such as humankind's purpose in life; and cosmological matters, such as humankind's place in the universe." *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829 (D. Neb. 2016), aff'd (8th Cir. Sept. 7, 2016).

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[1] In this respect the Government's questioning of the defendant's father during the evidentiary hearing on whether the defendant attended "church" was irrelevant. Doc. 45, Transcript of Proceedings, May 11, 2018 at 27-28. Similarly, the government's questioning of the defendant about whether he belonged to the Jewish, Mormon, Catholic, Muslim or Bahai faiths was irrelevant. *Id.* at 53.

While the objective question of differentiating religious from other kinds of belief systems may be challenging in some cases, this is not a hard question in this case. Dr. Warren's testimony and that of his father demonstrate that the beliefs that compelled Dr. Warren to provide aid to persons in and around Ajo, Arizona clearly implicated "'deep and imponderable matters,' includ[ing] existential matters, such as humankind's sense of being; teleological matters, such as humankind's purpose in life; and cosmological matters, such as humankind's place in the universe." *Id*.

There remains a subjective factual component to the question of whether a particular RFRA claimant's belief system should be treated as religious: were they considered by the claimant to be religious in nature? The central factual question is "whether they are, *in his own scheme of things*, religious." *Id.* at 157 (quoting *United States v. Seeger,* 380 U.S. 163, 185 (1965) (emphasis added)), with the aim of "differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Isbell v. Ryan*, 2011 WL 6050337 (D. Ariz., December 6, 2011), citing *Patrick v. LeFevre*, 745 F.2d 153, 157.

In this case the factual question of whether the defendant's beliefs were religious in nature is not disputed by the government, nor is it a difficult question to resolve in Dr. Warren's favor given the testimony presented at the evidentiary hearing. Therefore, this element can be resolved in the defendant's favor at this juncture.[2]

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[2] At the evidentiary hearing Dr. Warren's father testified that his son's belief system was not simply ethical, secular belief, and that that "Church of the Natural World" involves a "life force, a soul." Doc. 45, Transcript of Proceedings, May 11, 2018 at 20-21, 33. Dr. Warren testified to his belief that the desert had a soul and a life force, and that providing

Second, the RFRA claimant must show that his religious beliefs are *sincerely held*. *Hobby Lobby*, 134 S.Ct. at 2774 n. 28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere'...."). This element is a question of fact, proven by the credibility of the party asserting a religion-based defense. *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007) (stating that sincerity is "a question of fact"); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2nd Cir. 1984) (the sincerity analysis "demands a full exposition of facts and the opportunity for the factfinder to observe the claimant's demeanor during direct and cross- examination"); *United States v. Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010) ("[S]incerity of religious beliefs 'is a factual matter.'"). *See generally* Kara Loewentheil and Elizabeth Reiner Platt, *In Defense of the Sincerity Test*, in Religious Exemptions 247 (Kevin Vallier & Michael Weber eds., 2018).

Rather than merely reducing this element to a matter of pleading and accepting the RFRA claimant's mere assertion of sincerity, the court must undertake a meaningful assessment of the factual basis for the claim to sincerity, including examination of the claimant's demeanor. At the evidentiary hearing Dr. Warren and his father presented ample credible testimony demonstrating that his religious beliefs were sincere in nature, and the government has not contested the truth of this assertion. Therefore this element can be resolved by the court in the defendant's favor on a motion to dismiss.

Next, the party seeking a RFRA-based exemption must show that the *exercise* of a

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humanitarian aid is a "sacred act" *Id.* at 36-38, 55. Finally, Dr. Warren testified that he considered his belief system religious. *Id.* at 37. Nothing in the record contradicts or draws into question the conclusion that Dr. Warren's belief system is religious in nature.

sincerely held religious belief was *substantially burdened* by government action. This element contains two components: that the government *substantially burdened* the *exercise* of religious belief. Both aspects of this element are questions of law for the court to decide. *See Mahoney v. Doe,* 642 F.3d 1112, 1121 (D.C. Cir. 2011) (stating that judicial inquiry into the substantiality of the burden "prevent[s] RFRA claims from being reduced into questions of fact, proven by the credibility of the claimant"); *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1144–45 (11th Cir. 2016); *Priests For Life v. U.S. Dept. of Health and Human Services*, 772 F.3d 229, 247 (D.C. Cir. 2014), vacated on other grounds and remanded sub nom. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (noting that eight circuits have held that "the question of substantial burden also presents "a question of law for courts to decide."). As Professor Frederick Mark Gedicks has argued persuasively, "[t]he rule of law demands that the determination whether religious costs are substantial should be made by impartial courts." Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 Geo. Wash. L. Rev. 94, 150–51 (2017).

A substantial burden exists when government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). The Ninth Circuit has recognized two ways to understand the notion

of substantial burden in the RFRA context: (1) *forcing* a person to choose between the tenets of their religion and a government benefit, and (2) being *coerced* to act contrary to religious belief by threat of civil or criminal sanctions. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–70 (9th Cir. 2008). The second formulation applies most appropriately in this case, where the threat of imprisonment and significant financial penalties will coerce the defendant to act in a way that is contrary to his religious beliefs. This standard was elaborated upon further by the Ninth Circuit in *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1214 (9th Cir. 2008) where the court described the problem of burden as "a Catch–22 situation: exercise of their religion under fear of civil or criminal sanction."

The Government's Burden in Opposing the RFRA Motion

If the claimant demonstrates a substantial burden on his ability to exercise his sincerely-held religious beliefs, he is entitled to a RFRA exemption unless the government can show that the burden is the least restrictive means of advancing a compelling government interest. A compelling interest must be clearly articulated and specific; "broadly formulated interests justifying the general applicability of government mandates" are not considered compelling. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). Courts should take into account not only the interests of the government itself, but of third parties who stand to be impacted by an exemption. *Cutter v. Wilkinson*, 544 U.S. 709, 720, (2005) ("courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries").

To demonstrate that the application of the challenged law or policy is narrowly

tailored, the government must show that it could not achieve its compelling interest to the same degree while exempting the [party asserting the RFRA claim] from complying in full with the [law]" *U.S. v. Christie*, 825 F.3d 1048, 1061 (9th Cir. 2016). *See also O Centro*, 546 U.S. at 431. This "focused inquiry" requires the government to justify why providing an exemption would be unworkable. *Id.* at 431-32.

Both the compelling interest and least restrictive means analyses are questions of law that can properly be addressed on a motion to dismiss. *See United States v. Friday*, 525 F.3d 938, 949 (10th Cir. 2008) ("We now conclude, as other circuits have, that both prongs of RFRA's strict scrutiny test are legal questions."); *United States v. Christie*, 825 F.3d 1048, 1056 (9th Cir. 2016) ("We review the district court's compelling-interest and least-restrictive-means conclusions de novo"). In our view, the government has not carried its burden on either of these elements.

Objections to the Magisrate's Treatment of Dr. Warren's RFRA Motion:

Our concerns lie largely with the Magistrate's misapplication of RFRA's "substantial burden" test. First, the Magistrate Judge noted "No testimony was presented that the statutes at issue compelled the Defendant to do anything in violation of his religious beliefs. The laws at issue are of a general nature that apply to all and do not single him or any identifiable group into acting in conflict with their religious beliefs. The Defendant is at best told not to violate the laws that apply equally to all." Magistrate's Report and Recommendation (hereinafter R&R) (Doc. 81) at 3.

This characterization of the substantial burden test misstates its meaning in the RFRA context. In noting that the laws "apply to all," the Magistrate Judge overlooked that

this is precisely the context in which RFRA was meant to apply: to laws of general application that impose a substantial burden on the sincerely held religious beliefs of some people. The Magistrate Judge's reading of the legal standard of burden may reflect the constitutional standard of protection for religious liberty recognized by the Supreme Court in *Employment Division v. Smith* (the Free Exercise Clause of the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," 494 U.S. 872, 879 (internal quotation marks omitted)). However, RFRA was enacted specifically to provide greater statutory protection for religious liberty than is now recognized under the First Amendment. *See generally Ruiz-Diaz v. U.S.*, 703 F.3d 483 (9th Circ. 2012) ("RFRA requires the federal government to show that it is advancing a compelling interest through the least restrictive means possible where the government 'substantially burden [s] a person's exercise of religion,' *even where, as here, the burden results from a rule of general applicability*. 42 U.S.C. § 2000bb–1.") (emphasis supplied). Any suggestion that Dr. Warren's RFRA claim is weakened because the law he is charged with violating does not target religion and applies equally to all fundamentally misconstrues RFRA, which expressly applies to and was intended to restrict burdens on religion "even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb–1(a).

Second, the Magistrate Judge reasoned that "[a]t no time during the Defendant's testimony did he claim that his religious beliefs necessitated he aid undocumented migrants, only that he was compelled to aid persons in distress … Nor has he asserted or testified that his beliefs require he assist people illegally in this country to evade

apprehension or reach their ultimate destination." R&R at 4. Based on this reasoning, the Magistrate Judge concludes that the defendant's religious beliefs have not been substantially burdened. This too misstates RFRA doctrine.

The question is not whether defendant's religious beliefs commit him to violate the law, but whether his beliefs commit him to undertake acts that are otherwise treated as illegal by a federal law or by federal agents. For instance, in *Hobby Lobby* the issue was not whether the company's owners' religious beliefs required them to violate the Affordable Care Act, but rather whether their beliefs committed them to offering health insurance to employees but prohibited them from including contraception in that coverage. 134 S. Ct. 2751, 2775-77. Similarly, in *O Centro*, the issue was not whether the beliefs of a religious group with origins in the Amazon rainforest included the violation of the Controlled Substances Act, but rather whether the exercise of their sincere religious beliefs included ingestion of substances otherwise regulated by federal law. 546 U.S. at 425-26, 436.

The mistake that lies at the heart of the Magistrate Judge's reasoning on this issue is insisting that the acts entailed in the exercise of religion be defined in secular legal terms. It is to confuse the *actus reus* for the alleged crime itself. It is as if the government were reading a specific *scienter* requirement into RFRA, that is, that the person seeking an exemption be required to show that they intended to violate the law as an article of their faith, rather than that they intended to engage in faith-based acts that so happened to risk prosecution under the law. RFRA requires that the person requesting an exemption show that their actions were motivated by a religious purpose, not that they were motivated by a

desire to violate the law. To require the latter would undermine the very purpose of RFRA: to provide individualized exemptions from the application of generally applicable laws to persons whose good faith religious exercise presents a conflict with the requirements of the law.

Relatedly, the government's reliance on *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002), and *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996), is misplaced. In both of these cases the Ninth Circuit found as a matter of fact that only certain acts otherwise prohibited by federal drug laws were included in the defendants' Rastafarian belief system (i.e. smoking marijuana), while other acts for which the defendants were also prosecuted (i.e. selling or importing marijuana) were not shown to be part of the defendants' system of beliefs at all. The Ninth Circuit's analyses did not turn on whether the defendants were motivated by an intent to violate the relevant statutory provisions. Instead, the focus of the inquiry in those cases was properly on whether the underlying *acts*—smoking, selling, or importing of marijuana—were elements of the defendants' religious exercise [on the defendants' own terms].

Dr. Warren's religiously motivated activities form the foundation of the government's prosecution under the harboring law. The basis for the charge against Warren as described in the criminal complaint include providing food, water, shelter, and clean clothes to, as well as talking to, two undocumented migrants. (Doc. 1). These activities were clearly motivated by Dr. Warren's religious faith, which requires him to care for people that he believes are in distress. During the evidentiary hearing, Dr. Warren explained "Based on my spiritual beliefs, I am compelled to act. I'm drawn to act. I have

to act when someone is in need." Doc. 45, Transcript of Proceedings, May 11, 2018 at 44. The Magistrate acknowledged this duty, describing his beliefs as "a somewhat modified Golden Rule, in that he has a compulsion to help those in their immediate need, i.e. food, water, and medical aid." R&R at 2.

Despite this, the Magistrate Judge found no substantial burden because Dr. Warren had not "asserted or testified that his beliefs require he assist people illegally in this country to evade apprehension or reach their ultimate destination." R&R at 3. The fact that Dr. Warren did not articulate a religious belief in concealing undocumented people, however, is irrelevant; nothing in the criminal charge includes any mention of Dr. Warren attempting to conceal the migrants from law enforcement. The bases for Dr. Warren's charge are entirely RFRA-protected activities, and his prosecution therefore puts him in the position of violating his religious beliefs or risking criminal prosecution—undoubtedly a substantial burden.

Properly understood, a key element of Dr. Warren's sincerely held religious beliefs included a commitment to help others in distress to the point of being a duty or compulsion to provide them aid even though there was a risk of violating federal law. This is precisely the kind of "Catch-22 situation" that RFRA's notion of substantial burden was intended to capture.

Conclusion.

For the foregoing reasons we believe that Dr. Warren's RFRA motion for dismissal should be granted because all of the elements of the claim case be resolved in his favor either as a matter of law or as a matter of fact based on the facts adduced at the evidentiary

hearing.

RESPECTFULLY SUBMITTED June 21, 2018.

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and
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By */s/ James J. Belanger*
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CERTIFICATE OF SERVICE

I certify that on June 21st, 2018, I, James J. Belanger, electronically transmitted a PDF version of this document to the Clerk of Court using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Scott Daniel Warren,

Defendant.

No. 17-00341MJ-001-TUC-RCC

ORDER

After a bench trial in May of this year, the Court took this matter under advisement after the presentation of evidence and arguments by the parties.

The Court decided that based upon the crowds in the courtroom, the extent of the press coverage of the case, and the fact that the parties would be before the Court the next month in a felony jury trial that it would be advisable to delay its verdict until the conclusion of the felony trial so that the instant verdict would have no impact on the impaneling of a jury or a jury's possible verdict in the felony case.

After the presentation of evidence to the Court, it was clear that the Government had presented sufficient evidence beyond a reasonable doubt to prove the two charges against the Defendant. That being, Count One: Operating a Motor Vehicle in a Wilderness Area, 50 C.F.R. § 35.5; and Count Two: Abandonment of Property, 50 C.F.R. § 27.93. And, make no mistake about it, the Defendant admitted to doing the very acts that the Government charged him with.

The Defendant also presented a defense based upon the Religious Freedom Restoration Act ("RFRA"), which offers an affirmative defense to defendants accused of violating generally applicable federal criminal statutes. 42 U.S.C. § 2000bb-1(c). To present a successful RFRA defense, a defendant must show that (1) he holds a sincerely held religious belief, (2) the conduct for which he is charged is an exercise of his religion, and (3) his activities are "substantially burdened" by the government. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1068 (9th Cir. 2008). If a defendant can show these three elements, the burden shifts to the government to demonstrate that its action is "the least restrictive means" to further a "compelling governmental interest." *Id.*

The Court finds that Defendant's religious beliefs function as a successful affirmative defense against Count Two: Abandonment of Property. While the Government has presented sufficient evidence without a reasonable doubt that Defendant committed the offense, the Court will acquit him based upon his Religious Freedom defense.

It is not the place of the Court to weigh the sincerity or the validity of the Defendant's religious beliefs. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724-25 (2014). Defendant claims his religious beliefs compel him to leave water for individuals crossing the desert – i.e. the Growler Valley, which is located in the Cabeza Prieta National Wildlife Refuge. The Court takes him at his word that he sincerely holds these beliefs and will proceed accordingly. Defendant was obliged to leave water jugs because of his religious beliefs, and the Government's regulation imposes a substantial burden on this exercise of his religion. But enforcing the regulation against abandonment of property is not the least restrictive means to achieve the Government's interest in protecting the pristine state of the wildlife refuge or in securing the border.

However, with regards to Count One: Operating a Motor Vehicle in a Wilderness Area, the Court comes to a different conclusion. The Defendant knew

that he was in a restricted area. He knew because he applied for and received a permit stating that he was prohibited from going into that area and because of the signs he saw while driving to that area. But Defendant's religious beliefs did not compel him to drive his vehicle into the restricted area.

The Court finds that the Government has presented sufficient evidence to overcome the Defendant's RFRA defense for Count One. The Court finds that the Government's actions do not substantially burden the Defendant's religious belief. Defendant's was not forced to enter by vehicle onto restricted land to exercise his religion. Defendant fails to meet his original burden under the RFRA defense, therefore the Government's shifting burden of persuasion need not be addressed. To that end, the conduct of the Defendant with regards to Count One: Operating a Motor Vehicle in a Wilderness Area is against the law and the Court so finds.

Dated this 20th day of November, 2019.

Honorable Raner C. Collins
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Natalie Renee Hoffman, et al.,

Defendants.

No. CR-19-00693-001-TUC-RM

ORDER

I. INTRODUCTION

Defendants Natalie Hoffman, Oona Holcomb, Madeline Huse, and Zaachila Orozco-McCormick (collectively "Defendants") appeal from convictions for violations of the regulations governing the Cabeza Prieta National Wildlife Refuge ("the CPNWR" or "the Refuge"). The violations were committed in the course of leaving supplies of food and water in an area of desert wilderness where people frequently die of dehydration and exposure. Defendants, who are volunteers with a charitable organization affiliated with the Unitarian Universalist Church, admit the factual allegations made by the Government. They entered the Refuge without a permit, drove on a restricted-access road, and left food and water for those in need to find. Defendants argue that those actions, taken with the avowed goal of mitigating death and suffering, were sincere exercises of religion and that their prosecution is barred by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA" or "the Act"). The Court finds that Defendants demonstrated that their prosecution for this conduct substantially burdens their exercise of sincerely held religious

beliefs, and that the Government failed to demonstrate that prosecuting Defendants is the least restrictive means of furthering any compelling governmental interest.

II. FACTUAL BACKGROUND

On August 13, 2017, Defendants entered the CPNWR, drove down a restricted-access road, and left bottles of water and cans of food at several pre-selected locations along foot trails used by people entering the United States unlawfully. Fish and Wildlife ("FWS") Officer Michael West encountered Defendants, who admitted that they did not have a permit to be on the CPNWR. (Reporter's Transcript of Day 1 of Trial ("RT1"), Doc. 170 at 46:20-25, 48:15-18, D. Ariz. Case No. 4:17-mj-00339-BPV.) Officer West directed Defendants to exit the Refuge, which they did. (*Id.* at 51:23-25.) No citations or notices of violation were issued at that time. (*Id.* at 82:15-18.)

Defendants are volunteers with "No More Deaths/No Más Muertes," a "faith-based organization" and "ministry of the Unitarian Universalist Church of Tucson." (RT1 at 201:18-19.) A founding volunteer of that organization testified that No More Deaths is a "humanitarian aid organization" that was founded in 1999 "to provide food and water and medical care in the desert." (*Id.* at 199:18-20.) At that time, increased immigration enforcement in Texas and California began to "funnel the migration pattern right through the Tucson sector of the border," leading to large numbers of unauthorized migrants dying while attempting to cross the remote desert wilderness of southern Arizona on foot. (*Id.* at 199:20-25.) According to the Pima County Medical Examiner, 2,816 sets of "undocumented border crosser remains" were recovered in Arizona between the years 2000 and 2017.[1] (Trial Exhibit ("Tr. Ex.") 226 at 30). No More Deaths began tracking those deaths and leaving jugs of water in areas where human remains had been recovered. (*Id.* at 200:2-10.)

The CPNWR, which is in southwestern Arizona, shares a 56-mile border with Sonora, Mexico. (RT1 at 123:12-13.) Visitors are required to obtain permits and sign a

[1] This figure reflects only the number of recovered sets of human remains. Testimony introduced at trial suggested that remains are recovered for as few as one in ten migrants who die in this unpopulated area. (RT1 at 167:3-21; RT2 at 79:16-21.)

hold harmless agreement to enter the Refuge. (*Id.* at 28:17-19.) The hold harmless agreement describes the Refuge as "one of the most extreme environments in North America," and warns that the area "contains no sources of safe drinking water." (Tr. Ex. 2.) The CPNWR contains numerous trails used by migrants, and, according to the Pima County Medical Examiner, 32 sets of human remains were recovered from the CPNWR in 2017 alone. (Tr. Ex. 133.) Those deaths are despite the presence of "rescue beacons" installed and operated by the United States Border Patrol. (RT1 at 39:15-23.) The month before Defendants entered the CPNWR without a permit, the permit application was amended to specifically prohibit the leaving of "water bottles, water containers, food, food items, food containers, blankets, clothing, footwear, [and] medical supplies" on the CPNWR. (RT1 at 74:1-17; Tr. Ex. 2 ¶13.)

III. PROCEDURAL BACKGROUND

On December 6, 2017, Defendants were charged by criminal information with entering the CPNWR without a permit in violation of 50 C.F.R. § 26.22(b) and abandoning property in violation of 50 C.F.R. § 27.93. (Doc. 1.)[2] Defendant Hoffman was also charged with driving in a wilderness area in violation of 50 C.F.R. § 35.5. (*Id.*)

Defendants filed motions to dismiss based on international law (Doc 72), the Administrative Procedures Act (Doc. 70), entrapment by estoppel (Doc. 70), selective enforcement (Doc. 83), and RFRA (Doc 84). Magistrate Judge Bruce G. MacDonald set these motions for a hearing (Doc. 79), but then vacated the hearing and indicated that rulings on the pending motions would issue without argument (Doc. 122). He then recused himself and reassigned the case. (Doc. 132.) His replacement, Magistrate Judge Bernardo P. Velasco, denied all pending motions to dismiss and motions to compel disclosure, but granted Defendants leave to present their RFRA and entrapment by estoppel arguments as defenses at trial. (Doc. 136.)

[2] Unless otherwise noted, docket citations refer to the CM/ECF docket of the underlying proceeding, Case No. 4:17-mj-00339-BPV in the United States District Court for the District of Arizona. All record citations refer to the page numbers generated by the Court's electronic filing system.

After a three-day bench trial, Defendants were convicted of all counts. (Docs. 158-161.) The three-page verdict did not analyze Defendants' RFRA defense. (Doc. 166.) Defendants were ordered to pay fines and sentenced to terms of probation, during which they are banned from entering the CPNWR. (Docs. 183, 184, 185, 186.)

Defendants now appeal their judgments of conviction (Docs. 183-186) and "all prior orders encompassed in those judgments" to the United States District Court for the District of Arizona. (Doc. 189.) Because the Court reverses the Defendants' convictions based on their RFRA defense, the Court does not address the prior orders encompassed in Defendants' judgments of conviction, nor the other affirmative defenses raised by Defendants.

IV. STANDARD OF REVIEW

The parties disagree as to the appropriate standard of review. Defendants argue that the denial of RFRA relief is reviewed *de novo*. (Defendants' Opening Brief ("Def. Op. Br."), Doc. 8 at 14, D. Ariz. Case No. 4:19-cr-00693-RM; Defendants' Reply Brief ("Def. Rep. Br."), Doc. 20 at 9, D. Ariz. Case No. 4:19-cr-00693-RM.) Defendants recognize that factual findings are reviewed on appeal for clear error, but they argue that clear-error review is inapplicable here because the magistrate judge's verdict did not make specific factual findings regarding Defendants' RFRA defense.[3] (Def. Rep. Br. at 9 (citing *United States v. Prieto-Villa*, 910 F.2d 601, 605 (9th Cir. 1990).) The Government similarly recognizes that, following a bench trial resulting in a criminal conviction, conclusions of law are reviewed *de novo* and findings of fact are reviewed for clear error. (Government's Response Brief ("Gov. Br."), Doc. 16 at 7, D. Ariz. Case No. 4:19-cr-00693-RM.) However, the Government argues that this Court should apply the highly deferential

[3] Magistrate Judge Velasco's verdict did not make factual findings or conclusions of law regarding Defendants' RFRA defense. The verdict instead characterized Defendant's RFRA defense as "a modified *Antigone* defense." (Doc. 166.) An Amicus Brief filed in this matter by professors of religious liberty explains that *Antigone* is a Greek tragedy written by Sophocles that explores "a tension between the King's law – a formal edict that prohibited the burial of Antigone's brother Polynices – and the unwritten law of the Gods that mandated a proper burial so as to fulfill a duty to honor and mourn the dead." (Amicus Brief of Professors of Religious Liberty, Doc. 10 at 6, D. Ariz. Case No. 4:19-cr-00693-RM.)

sufficiency-of-evidence standard and ask if, "'viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).)[4]

A person convicted before a magistrate judge has the right to appeal to the United States District Court. 18 U.S.C. § 3402. "The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge." Fed. R. Crim. P. 58(g)(2)(D). An appellate court reviews a trial court's "conclusions of law following a bench trial *de novo* and its findings of fact for clear error." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc) (citing *Lentini v. California Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004)). The Ninth Circuit has indicated that "[w]hether application of a federal law violates RFRA is a question of statutory construction for the court" that is reviewed *de novo*, *United States v. Vasquez-Ramos*, 531 F.3d 987, 990 (9th Cir. 2008), although "any findings of 'historical fact' underlying" the trial court's conclusions are reviewed for clear error, *Christie*, 825 F.3d at 1056.

V. DISCUSSION

RFRA provides "very broad protection for religious liberty" by exempting religious believers from laws that substantially burden the exercise of their religious beliefs. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). The Government must provide such an exemption unless the application of the law to the believer is the "least restrictive means" of furthering a "compelling government interest." 42 U.S.C. § 2000bb-1(b). A RFRA claim may be brought as an affirmative defense to criminal charges. *United States v. Christie*, 825 F.3d 1048, 1065 (9th Cir. 2016).

[4] The Court is not convinced that the sufficiency-of-evidence standard proposed by the Government is applicable here, as Defendants do not challenge whether the Government established the elements of the regulatory violations for which they were convicted but, instead, challenge Magistrate Judge Velasco's rejection of their RFRA defense. To succeed on their RFRA defense, Defendants bore the initial burden of demonstrating that their prosecution substantially burdened their sincere religious exercise. As Defendants bore that burden, the Court cannot evaluate the "sufficiency" of the Government's evidence.

The Act was passed after the Supreme Court held—reversing prior case law—that the Free Exercise Clause of the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). Congress enacted RFRA in response, seeking to "restore" religious exemptions from nondiscriminatory "rule[s] of general applicability." § 2000bb-1(a). RFRA therefore reflected Congress' judgment that "laws [that are] 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." § 2000bb(a)(2).

To succeed on a RFRA defense, a claimant must first make two showings: (1) governmental action burdens a sincere "exercise of religion" and (2) the burden is "substantial." *Navajo Nation*, 535 F.3d at 1068. A RFRA claim that does not establish these two elements fails. *Id.* If a claimant does demonstrate a substantial burden on her sincere exercise of religious belief, a court must find a RFRA violation unless the Government demonstrates that "application of the burden to the person" both (1) "furthers a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling government interest." § 2000bb-1(b).

A. Sincere "Exercise of Religion" under RFRA

To prevail on their RFRA defense, Defendants must first demonstrate that they are being prosecuted for actions that constitute a sincere "exercise of religion." 42 U.S.C. § 2000bb. Although Defendants do not claim to be members of mainstream or traditional congregations, they do argue that their volunteer activities with No More Deaths are exercises of sincerely held religious and spiritual beliefs.

The Supreme Court has long recognized that "a determination of what is a 'religious' belief or practice" is "a most delicate question[.]" *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). The Court's analysis cannot "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Beliefs do not need to be "acceptable, logical,

consistent, or comprehensible to others" to constitute religious beliefs. *Id.* "[R]eligious experiences which are as real as life to some may be incomprehensible to others." *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

In determining whether a set of beliefs should be protected as "religious," the Ninth Circuit has analyzed "whether the beliefs professed … are sincerely held and whether they are, in [a claimant's] own scheme of things, religious." *United States v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1992) (quoting *United States v. Seeger*, 380 U.S. 163, 174 (1965)). "'Religious' beliefs, then, are those that stem from a person's 'moral, ethical, or religious beliefs about what is right and wrong' and are 'held with the strength of traditional religious convictions.'" *Ward*, 989 F.2d at 1018 (quoting *Welsh v. United States*, 398 U.S. 333, 340 (1970)).

In *Ward*, a criminal defendant refused to testify in his defense because he objected on purportedly religious grounds to swearing to tell the "truth." 989 F.2d at 1017. As the court explained, the claimant in that case believed that "honesty is superior to truth" and requested an alternative oath that replaced the word "truth" with "fully integrated honesty." *Id.* The contours of this set of beliefs were not entirely clear, and the court "[did] not attempt to explain" the basis of the claimant's views. *Id.* The Ninth Circuit nonetheless reversed his conviction, explaining that although the claimant did "not describe his beliefs in terms ordinarily used in discussion of theology or cosmology . . . he clearly attempt[ed] to express a moral or ethical sense of right and wrong." *Id.* at 1018.

The Ninth Circuit's approach has been called "a generous functional[5] (and even idiosyncratic)" approach to determining religiosity. *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1537 (9th Cir. 1985) (Canby, J., concurring). This standard draws heavily from *United States v. Seeger*, in which the Supreme Court considered claims brought by individuals who requested draft exemptions based on spiritual, ethical, and philosophical

[5] It is a "functional" approach because instead of relying on a general definition of religion, it looks to whether a set of beliefs serves the same *function* as traditional religion in an individual's life. *See Ward*, 989 F.2d at 1018.

objections to war. 380 U.S. at 164. The *Seeger* Court analyzed whether the claimants' beliefs "occup[ied] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for the exception[.]" *Id.* Applying this test, the Court found conscientious-objector status warranted for, among others, a claimant with a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed . . . without belief in God, except in the remotest sense." *Id.* at 166 (internal quotation marks omitted).

The Government urges this Court to instead apply a multifactor analysis to determine whether Defendants' beliefs are "religious." (Gov. Br. 8-9.) The Ninth Circuit, however, has not adopted this approach to determine what beliefs are worthy of protection under the Free Exercise Clause or RFRA. The Government cites to a case declining to adopt this approach, *United States v. Lepp*, No. CR 04-00317 MHP, 2008 WL 3843283, at *4 (N.D. Cal. Aug. 14, 2008), *aff'd*, 446 F. App'x 44 (9th Cir. 2011). The Court in *Lepp* noted the five factors laid out in *United States v. Meyers*, 95 F.3d 1475, 1475 (10th Cir. 1996), but ultimately "declin[ed] any invitation to define religion" and instead cited to the dissent in *Meyers* for the proposition that "[t]he ability to define religion is the power to deny freedom of religion." *Lepp*, 2008 WL 3843283, at *4 (citing *Meyers*, 95 F.3d at 1489) (Brorby, J., dissenting)).

The Court finds that the proper standard to apply here is whether the beliefs professed are sincerely held and whether they are, in Defendants' own scheme of things, religious. *See Ward*, 989 F.2d at 1018. Defendants here are volunteers with an organization, No More Deaths, which is a "ministry" of the Unitarian Universalist Church of Tucson and a faith-based organization that was founded by religious leaders. (RT1 at 201:11-21.) The body camera footage of the FWS Officer who encountered the Defendants on the CPNWR shows that the Defendants immediately identified themselves as "from the Church in Tucson." (Tr. Ex. 40 at 1:36-1:42.) The truck Defendants were driving was registered to the Unitarian Universalist Church. (RT1 at 82:3-4.)

Reverend John Fife, a retired Presbyterian minister and "founding volunteer" of No

More Deaths, testified that "the life of faith is not simply a matter of belief or creed," but is fundamentally "a matter of what you do in relationship to those who are in most need." (RT1 at 203:2-8.) He explained that this belief flows, in part, from the New Testament parable that describes Jesus' teaching at the Last Judgment that, "I was hungry, I was thirsty, I was naked, I was in prison, I was an alien, and as you do it to least of these, my brothers and sisters, you do it to me." (*Id*. at 202:19-25—203:1.) Volunteers therefore exercise their "faith out there in the desert through No More Deaths" by providing "humanitarian aid directly where most of the death [is] occurring in the desert." (*Id.* at 201:21-25—202:3.) The "faith basis" of No More Deaths and "the spirituality and the spiritual principles that have founded [that] organization and formed that community" is made "very clear" in No More Deaths' volunteer training. (*Id.* at 204:12-19.)

Defendant Holcomb testified that she was familiar with Reverend Fife's beliefs and largely subscribed to those beliefs. (Reporter's Transcript of Day 2 of Trial ("RT2"), Doc. 171 at 149:1-7, D. Ariz. Case No. 4:17-mj-00339-BPV.) Holcomb testified that although sometimes speaking about those beliefs in a different way, she "share[d] the belief that there is . . . for me, I will say, like a deep spiritual need and a calling to do work based on what I believe in the world." (*Id.* at 149:3-7.) She felt "this really spiritual . . . tie to [immigrants crossing the border]" that provoked a "kind of intense feeling" when providing humanitarian aid, "especially when you have found things that people who are migrating have left . . . You can feel their presence . . ." (*Id.* at 172:11-17.) She described the ritualistic taking of moments of silence in the course of No More Deaths' humanitarian aid work, and a "personal altar" that she had constructed at her home, which included "a ring of water bottle[s] that I picked up in the desert." (*Id.* at 173:3-9, 20-22.)

Defendant Huse explained that she "grew up going to church" and that she internalized from that experience values of "love, compassion, and the sanctity of human life." (Reporter's Transcript of Day 3 of Trial ("RT3"), Doc. 172 at 96:11-13, 97:1-5, D. Ariz. Case No. 4:17-mj-00339-BPV.) She "agree[d] with a lot of John Fife's beliefs" and had attended services at various Unitarian Universalist churches in multiple states. (*Id.* at

97:4-8.) Defendant Huse began to volunteer with No More Deaths because of her belief in the "sanctity of human life." (*Id.* at 96:7-13.) She "felt compelled to be there" and "do [her] part as a fellow human being." (*Id.* at 97:12-14.) When volunteering with No More Deaths, she observed a spiritual practice of taking moments of silence "to be present in the moment and think of those who are suffering and just put some love out for them . . ." (*Id.* at 95:18-20.)

Defendant Orozco-McCormick, whose father was Catholic, was raised with a belief "in the sanctity of life and of death." (*Id.* at 14:11-14.) She considered No More Deaths' humanitarian aid activities to be "sacred," because volunteers hike in areas where other humans are facing the possibility of death. (*Id.* at 19:6-8.) "[I]t's very different to be standing on that same ground [where people were dying], and it's to be revered. It's to be respected." (*Id.* at 19:17-20.) Defendant Orozco-McCormick felt compelled to volunteer because of her belief that "everybody [is] connected" and that "water is life." (*Id.* at 15:14-16.) She also described "a sort" of prayer where volunteers would observe "moments of silence for people that have crossed or are currently crossing the desert." (*Id.* at 16:12-16.)

Finally, Defendant Natalie Hoffman testified that she believes that "all life is sacred" because "all life is connected to the earth." (*Id.* at 53:20-25.) Although she didn't "consider [herself] a part of any specific congregation" or of "traditional organized religion," she nonetheless had "a spiritual calling to help other people" and mostly agreed with the views as articulated by Reverend Fife. (*Id.* 55:10-17.) She "felt a spiritual connection" to the humanitarian aid activities because "life is sacred, including human life." (*Id.* at 54:17-25.) She testified to the ritualistic use of moments of silence and explained that she had a practice of draping Rosary Beads over water bottles while volunteering. (*Id.* at 55:20-23, 60:11-14.)

The depth, importance, and centrality of these beliefs caused Defendants to restructure their lives to engage in this volunteer work. Hoffman testified that she moved from Virginia to Tucson, Arizona, to volunteer with No More Deaths (RT3 at 54:3-19); Orozco-McCormick at one point did the same although she no longer lives in Tucson (RT3

at 15:4-7); and Holcomb and Huse have made time to repeatedly travel to Arizona to volunteer (RT2 at 147-48; RT3 at 84).

Importantly, the fact that Defendants do not profess belief in any particular established religion does not bar their RFRA claim. *See Frazee v. Illinois Dept. of Employment Sec.,* 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); *Love v. Reed*, 216 F.3d 682, 688–89 (8th Cir. 2000) ("To suggest that Love's belief-system falls short of being a religion would be to call into question the religious standing of all those who infuse Judaism, Christianity, or other 'traditional' religions with personal interpretation and introspection."); *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) (finding that Wicca could be a "religion" despite being a "conglomeration" of "various aspects of the occult, such as faith healing, self-hypnosis, tarot card reading, and spell casting").

Nor is the Government's argument that Defendants failed to establish their religiosity because they "described their beliefs in the broadest terms" persuasive. (Gov. Br. at 9.) Defendants do not claim to be practiced theologians, and they need not be in order to claim a religious exemption. As the Supreme Court has admonished, this Court may not "undertake to dissect religious beliefs" merely because those "beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Thomas*, 450 U.S. at 715.

Defendants' religiosity is also apparent from their choice to associate themselves with the Unitarian Universalist Church and to adopt elements of Christian faith. In *Callahan v. Woods*, the Ninth Circuit found nontraditional beliefs to be "clearly" religious where they were "closely tied to a theistic belief." 658 F.2d 679, 685 (9th Cir. 1981). In that case, the claimant sought an exemption from a requirement that he obtain a social security number for his daughter, as he believed personal identification numbers were the "mark of the beast" and tools of the Antichrist. *Id.* at 682. Because of their relationship with Christianity, the Ninth Circuit found these beliefs religious rather than philosophical.

Id at 681.

Here, as in *Callahan*¸ Defendants hold views which, although perhaps idiosyncratic, are "closely tied" to traditional Christian beliefs. *Id* at 685. Defendants Holcomb and Hoffman testified that they substantially adhered to the views of the Presbyterian minister John Fife. (RT2 at 149:1-2; RT3 at 55:10-13.) Defendant Orozco-McCormick traced her beliefs in large part to her father's Catholicism. (RT3 at 12:14-18.) Defendant Huse traced her views to her experiences going to church while growing up. (RT3 at 97:2-5.) Moreover, Defendants chose to associate themselves with an organization considered a "ministry" of the Unitarian Universalist Church, and they identified themselves affirmatively as "from the Church" upon encountering the FWS Officer who observed them leaving food and water on the CPNWR. (Tr. Ex. 40 at 1:36-1:42.) Defendants also chose to use distinctly Christian symbolism, including the drawing of crucifixes on bottles of water (RT3 at 20:16); the distribution of rosary beads (*id.* at 60:11-14); the writing of "vaya con Dios," ("go with God,") on bottles of water (RT2 at 171:17-22); and the construction of altars (*id.* at 173:15-22), all of which show that Defendants' beliefs are "closely tied" to traditional Christian beliefs. *Callahan*, 658 F.2d at 685.

The Court concludes that Defendants' beliefs, as described, are religious. The Court must now consider if Defendants' sincerely hold those beliefs. An individual's claim that her belief "is an essential part of a religious faith" is entitled to "great weight" in the "intensely personal area" of religious liberty. *Seeger*, 380 U.S. at 184. The Court's inquiry into sincerity is therefore "limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court[.]" *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014).

The Government's sole argument as to insincerity is that Defendants have merely "recited" religious beliefs "for the purpose of draping religious garb over their political activity." (Gov't Br. at 10.) However, the Government's bright-line distinction between "political" and "religious" motivations fails as a matter of law. It is well established that sincere religious beliefs are no less deserving of protection merely because they may overlap with political or other secular beliefs. *See, e.g., Hobby Lobby*, 573 U.S. at 688-736

(finding RFRA violation in context of politically controversial contraception mandate). The Ninth Circuit has explained that religious beliefs are deserving of protection even when they overlap with secular beliefs:

> [The] coincidence of religious and secular claims in no way extinguishes the weight appropriately accorded the religious one. In *Yoder*, the Supreme Court warned that a belief that is based on 'purely secular considerations' merits no protection under the free exercise clause. It did not limit the scope of the First Amendment to 'purely religious' claims; the area of overlap is presumably protected.

Callahan, 658 F.2d at 684 (internal citation omitted). The same is true here. While the Government points to evidence that could imply that some Defendants may have secular, philosophical, or political beliefs that overlap with their spiritual commitments, the Government points to no evidence that Defendants are informed by "purely secular considerations." *Id.* To the extent that Defendants do hold complementary religious and secular motivations and beliefs, the "area of overlap is presumably protected." *Id.*

The record lacks the type of evidence that has caused other courts to doubt a claimant's sincerity. For example, the Ninth Circuit expressed skepticism as to a RFRA claimant's sincerity in the case of the "Hawaii Cannabis Ministry," a profit-making enterprise whose website "prominently displayed an assurance that members" would escape "conviction of marijuana charges . . . as soon as you sign up." *See Christie*, 824 at 1051. The Ninth Circuit similarly expressed "reservations" about the sincerity of a RFRA claimant who failed to explain why his purported religious beliefs prohibited the drawing of blood for a legally mandated DNA test and yet permitted his tattoos and intravenous drug usage. *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007). Another court expressed skepticism where a criminal defendant allegedly told co-conspirators that he would take sole responsibility for a drug-trafficking conspiracy "so that [he] could 'try out' his religious freedom defense." *Meyers*, 95 F.3d at 1479. Unlike in those cases, there is no reason here to suspect that Defendants are "seeking to perpetrate a fraud on the court[.]" *Yellowbear*, 741 F.3d at 54.

Additionally, the nature of Defendants' conduct itself suggests sincerity.

Defendants were convicted for activities that included hiking food and water into a rugged, unforgiving wilderness during Southern Arizona's extreme August heat. The temperature at the time of the Defendants' conduct was over 100 degrees Fahrenheit.[6] As one Defendant testified, providing aid in this environment was "incredibly straining on the body" because "at that temperature . . . you're dehydrated just by being there" and so "your brain is kind of fuzzy" and it is "hard to think clearly." (RT2 192:11-20.) As another described the heat: "I mean, it's exhausting. It's heavy. Like, it feels like . . . a blanket. There's nowhere to . . . hide from the sun." (RT3 at 17:9-11). As another put it: "[H]iking around in 110 degrees is not what I want to be doing with my time, but I do it because I feel the need to and obligated to be there and do my part." (RT1 at 96:17-21.)

Defendants' willingness to endure hardship for their beliefs is analogous to the defendant's actions in *Ward,* 989 F.2d at 1019. In that case, the Ninth Circuit found that a religious liberty claimant who declined to testify in his own defense because he purportedly had a religious objection to taking an oath of honesty was sincere in his religious beliefs. *Id.* The Court explained that the claimant's choice not to testify in his defense, notwithstanding his professed innocence, suggested "the sincerity of true religious conviction." *Id*. As in *Ward,* Defendants' willingness to suffer for their beliefs likewise suggests such sincerity.

The Government has not identified any evidence in the record that would support a conclusion that Defendants are "patently devoid of religious sincerity[.]" *Callahan,* 658 F.2d at 683 (internal quotation marks omitted). The Court concludes that Defendants' beliefs are sincerely held.[7]

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[6] There was a dispute at trial whether the temperature at the time was 102 degrees or 110 degrees. (*Compare* Tr. Ex. 9 with Tr. Ex. 14.)

[7] Consideration of sincerity, which is a question of fact, should include consideration of Defendants' "credibility and demeanor" while testifying. *United States. v. Zimmerman,* 514 F.3d 851, 854 (9th Cir. 2007). Magistrate Judge Velasco heard testimony from each Defendant as to her beliefs and did not express any reservations about Defendants' sincerity. Because the Court concludes that, on this record, it would find clear error even if Judge Velasco had made an adverse credibility finding and found Defendants insincere, the Court need not remand for additional factual findings.

B. Substantial Burden

To claim an exemption under RFRA, Defendants must demonstrate that enforcement of the CPNWR regulations "substantially burden[s]" the exercise of their religious beliefs. *Navajo Nation*, 535 F.3d at 1068. A substantial burden exists "when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit" or when a believer is "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Id.* at 1070. The substantial burden inquiry must not stray into a judgment as to whether a claimant's beliefs are reasonable. *See e.g.*, *Hobby Lobby*, 573 U.S. at 724 (explaining that "whether the religious belief asserted in a RFRA case is reasonable" is a "very different question that the federal courts have no business addressing"); *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").

Here, enforcement of these regulations against Defendants threatens to "coerce" them, via "criminal sanctions," into abandoning conduct that is an exercise of religion. *Navajo Nation*, 535 F.3d at 1070. The prosecution of Defendants prevents them "from participating in an activity motivated by sincerely held religious beliefs." *Yellowbear*, 741 F.3d at 55. The prosecution of Defendants therefore substantially burdens their religious exercise by placing upon them "considerable pressure to abandon the religious exercise at issue." *Id.*

The Government argues that Defendants cannot demonstrate a substantial burden on their religious exercise because "their only evidence as to substantial burden is that they were required, like all other members of the general public, to comply with the regulations governing the CPNWR." (Gov. Br. at 11.) Those regulations are for "all members of the public, not just the defendants." (*Id.*) This argument ignores the central purpose of RFRA, which is to prevent the Government from substantially burdening "a person's exercise of religion even if the burden results from a rule of general applicability[.]" § 2000bb-1(a). RFRA exists precisely to provide, where appropriate, exemptions from "rules that apply to

all members of the public."

The Government next argues that "the government may take actions on its own land that will virtually destroy an individual's ability to practice their own religion." (Gov. Br. at 11 (internal quotation and citation omitted).) In support of this proposition, the Government cites to *Navajo Nation.* 535 F.3d at 1072. However, the *Navajo Nation* court performed a thorough substantial burden analysis on the claims in that case, determining that a negative effect on the claimants' "subjective, emotional religious experiences" was insufficient to demonstrate a substantial burden in the absence of evidence that claimants would lose a governmental benefit or face criminal or civil sanctions for practicing their religious beliefs. *Id.* at 1070. Here, in contrast, Defendants face criminal sanctions for exercising their religious beliefs, and so *Navajo Nation* is inapposite. *Id.*

The Government also argues that Defendants have not established that their religious beliefs "required" them "to enter the CPNWR without the proper permits, drive on a restricted administrative road, or abandon personal property in violation of the regulations governing CPNWR." (Gov. Br. at 11.) Defendants, the Government argues, had "other locations available for them to place their cache of supplies," outside of the CPNWR. (*Id.*) Since Defendants did not "need" to enter the CPNWR, the Government argues, enforcement of the regulations could not cause a "substantial burden." (*Id.*)

However, Defendants, do not need to show that their beliefs "required" them to conduct their religiously motivated activities on the CPNWR in order to succeed on their RFRA claim. (*Id.*) As amended, RFRA protects "*any* exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." § 2000cc-5(7)(A) (emphasis added). "[A] burden can be 'substantial' even if it does not compel or order the claimant to betray a sincerely held belief[.]" *Yellowbear*, 741 F.3d at 55. Accordingly, Defendants need not establish that their beliefs "required" them to enter the CPNWR. Rather, Defendants must only show that enforcement of the regulations against them causes them "considerable pressure" to abandon *any* exercise of religion. *Id.*

Nonetheless, Defendants did show that their conduct was required by their spiritual

beliefs. Defendants claim that their religious and spiritual commitments led them to volunteer with No More Deaths, the goal of which is to "try and save as many lives as [possible]" by providing humanitarian aid "where most of the death [is] occurring in the desert." (RT1 at 201:21-23.) The evidence introduced at trial showed that 32 sets of human remains were recovered from the CPNWR during 2017 alone. (Tr. Ex. 133.) Defendants are charged with conduct that took place in August, when the chance of death was highest due to the extremely high temperatures. (*Id.* at 180:9-24.) Given Defendants' professed beliefs, the concentration of human remains on the CPNWR, and the risk of death in that area, it follows that providing aid on the CPNWR was necessary for Defendants to meaningfully exercise their beliefs.

Finally, the Government argues that Defendants' admitted failure to obtain a permit bars them from bringing a RFRA challenge. (Doc. 97 at 11.) However, it is undisputed that the amended permit application explicitly prohibited leaving food and water on the CPNWR. (RT1 at 74:1-17.) The regulation that Defendants are charged with violating, 50 C.F.R. 26.22(b), requires a CPNWR entrant to (1) obtain a permit and (2) follow the permit's terms and conditions. Defendants could not have exercised their religious beliefs by leaving food and water on the CPNWR without violating the permitting regulation—either by not obtaining a permit or alternatively by not adhering to the permit's terms and conditions. Because obtaining permits would not have allowed Defendants to lawfully conduct the activities for which they are being prosecuted, Defendants were not required to apply for permits to claim a RFRA exemption. *See United States v. Adeyemo*, 624 F. Supp. 2d 1081, 1085 (N.D. Cal. 2008) ("[W]here it would have been futile to apply for a permit, that person need not apply for a permit to bring a RFRA challenge."); *see also United States v. Hardman*, 297 F.3d 1116, 1121 (10th Cir. 2002).

The Court concludes that the prosecution of Defendants for these actions substantially burdens their religious exercise. As Defendants successfully carried this burden, it fell to the Government to demonstrate that prosecution of Defendants was the least restrictive means of achieving a compelling governmental interest.

C. Compelling Interest

Requiring the Government to "demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The "compelling interest" inquiry requires courts to look past "broadly formulated interests," and to instead "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirta Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

The Government argues on appeal that the burden on Defendants' religious exercise is justified by a "compelling interest" in furthering "the national decision to maintain [the CPNWR] in its pristine nature." (Gov. Br. at 12.) The Government, however, has not established that providing an exemption to Defendants would frustrate that interest. The evidence at trial established that the CPNWR is a former active military bombing range that has unexploded munitions strewn about. (RT1 at 86:17-23). The Refuge is currently both a corridor for unlawful entry into the United States (RT1 at 19:3-4), which produces significant amounts of garbage (RT3 at 59:20-22), and also a site of significant law enforcement activity, which takes its own environmental toll (RT1 at 134:25—135:1-3). In other words, as Magistrate Judge Velasco found, the CPNWR is "littered with unexploded military ordinance, the detritus of illegal entry into the United States, and the on-road and off-road vehicular traffic of the U.S. Border Patrol efforts to apprehend illegal entrants/undocumented immigrants." (Doc. 166 at 1.) Given this context, the Government cannot claim a compelling interest in "maintain[ing]" the CPNWR as "pristine."

The Court agrees the Government has a compelling interest in maintaining the environmental conditions on its public lands. But in the RFRA context, the compelling interest inquiry requires the Government to demonstrate a compelling interest in "the application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." *See Hobby Lobby*, 573 U.S. at 726 (internal quotation marks and citations omitted). Particularly given the conditions on the

CPNWR, the Government has failed to articulate any "marginal" compelling interest, beyond its general interests, in enforcing the CPNWR regulations against these "particular" Defendants. *Id* at 727.

Moreover, the record shows that Defendants' conduct does not have significant negative effects on the environmental conditions of the CPNWR. Any environmental damage caused by the "abandoning" of food and water is mitigated by Defendants' practice of bringing garbage bags and picking up as much trash as possible. (RT2 at 171:1-8; RT3 at 21:12-17, 60:1-2.) As one Defendant explained: "[O]ur packs are empty by the time we get there, and we replace that with the garbage that's around the area, and it's not always necessarily our garbage either." (RT3 at 88:21-24.) Defendants' testimony on this point is supported by FWS Officer West's body camera footage, which shows at least one Defendant removing empty, crushed water bottles from her backpack upon returning to the truck. (Tr. Ex. 40 at 0:54-1:25.)

Nor has the Government shown that Defendant Hoffman's driving on a pre-existing "administrative" road in order to reach a remote area of the Refuge has a significant negative impact on the CPNWR. (RT1 at 135:3-6.) It is not alleged that Defendants ever went off-road in a vehicle. In contrast, Border Patrol and other law enforcement officers go off-road into the wilderness on the CPNWR with some regularity. (RT1 at 131:3-7.) Members of the public are also regularly granted permission to drive on restricted-access roads for research or other purposes. (RT1 at 127:1-3.) Given these exemptions, the Government cannot claim a compelling interest in uniform prevention of access to these roads. *See Gonzalez*, 546 U.S. at 432-33 (finding that exemptions in Controlled Substances Act undercut an asserted compelling interest in uniform application of that law).

No more persuasive is the Government's argument that "permitting an exemption for these four defendants" would "quickly lead" to a flood of religious objections. (Doc. 79 at 15.) The Supreme Court has squarely rejected such "slippery slope" concerns, noting that such concerns "could be invoked in response to any RFRA claim for an exception to a generally applicable law." *Gonzales*, 546 U.S. at 435–36. The slippery-slope argument

fails in the RFRA context, where a "case-by-case" application of the statutory test is required to determine whether, in a particular instance, a law of general applicability must give way to an individual's free exercise of their religion. *Id.*

The Government has also asserted a compelling governmental interest in "enforcing the border and controlling immigration." (RT3 at 168; Doc. 94 at 13.) Although Defendants were not charged with any immigration-related offense, the Government nonetheless claims that Defendants' actions "furthered and encouraged illegal smuggling activity in the CPNWR." (Doc. 94 at 13.) The Government seems to rely on a deterrence theory, reasoning that preventing clean water and food from being placed on the Refuge would increase the risk of death or extreme illness for those seeking to cross unlawfully, which in turn would discourage or deter people from attempting to enter without authorization. In other words, the Government claims a compelling interest in preventing Defendants from interfering with a border enforcement strategy of deterrence by death. This gruesome logic is profoundly disturbing. It is also speculative and unsupported by evidence. As discussed above, 32 sets of human remains were recovered from the Refuge in 2017 alone, and the Government produced no evidence that these fatalities had any effect in deterring unlawful entry. Nor has the Government produced evidence that increasing the death toll would have such an effect.

The Court concludes that the Government failed to demonstrate that it furthered any compelling interest by prosecuting Defendants.

D. Least Restrictive Means

Even if the Government had established a compelling interest, it did not show that it cannot further that interest while accommodating Defendants' religious beliefs.

"The least-restrictive-means standard is exceptionally demanding." *Hobby Lobby*, 573 U.S. at 728. The Government "must demonstrate that 'no alternative forms of regulation' would" suffice to accomplish the Government's compelling interest. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 480 (5th Cir. 2014) (quoting *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)). This "focused inquiry" means that the Court may "not

ease the government's burden by rubberstamping vague or generalized arguments about means and ends." *Christie*, 825 F.3d at 1063.

Defendants have suggested alternative means of maintaining the environmental integrity of the CPNWR while also allowing a religious exemption. (Def. Br. at 15-17.) For example, the Government "could allow these defendants to leave water and food at certain designated points on the refuge, so long as they maintained their practice of removing all trash they encountered on their hikes, including and especially used water bottles and food cans formerly left by No More Deaths volunteers." (*Id.* at 16.) The Government does not explain why such an arrangement would not allow it to achieve its interest in protecting the environmental integrity of the CPNWR. The Government states that Defendants' "suggested alternatives do not address [harm to the CPNWR] in the slightest" (Gov. Br. at 12), but it fails to provide evidence or explanation of why this is so.

The Court concludes that the Government failed to demonstrate that the prosecution of Defendants is the least restrictive means of achieving a compelling governmental interest.

VI. Conclusion

Defendants met their burden of establishing that their activities were exercises of their sincere religious beliefs, and the Government failed to demonstrate that application of the regulations against Defendants is the least restrictive means of accomplishing a compelling interest. Accordingly, the Court finds that application of the regulations against Defendants violates RFRA, and the Court will reverse Defendants' convictions.

Accordingly,

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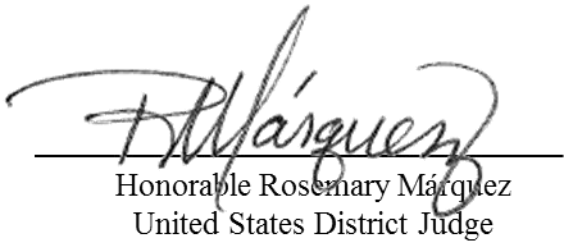
IT IS ORDERED that Defendants' convictions are **reversed**. The Clerk of Court shall randomly reassign this case to a magistrate judge for entry of a judgment of acquittal and vacatur of Defendants' sentences. Any fines or fees paid by Defendants shall be returned to them, and Defendants' probation shall be terminated.

Dated this 31st day of January, 2020.



Honorable Rosemary Márquez
United States District Judge

REBUILDING THE ETHICAL COMPASS OF LAW

*Purvi Shah**

"Each generation must out of relative obscurity discover its mission, fulfill it, or betray it."
- Frantz Fanon[1]

I. THE CURRENT MOMENT

We are in an incredibly challenging moment in U.S. history. Emboldened by the Trump presidency, a racist, anti-immigrant, anti-poor movement is gaining momentum. And while oppression is certainly nothing new, the scale and severity of the current crisis is staggering—millions impacted by: the Muslim Ban, a broken immigration system, the child migrant crisis, mass incarceration, and natural disasters of increasing frequency and intensity. These emergent issues play out on the backdrop of continued impunity for police killings of Black people, threats to reproductive rights for women, entrenched homophobia and transphobia, and insufficient housing, jobs, shelter, food, and healthcare

* Founder and Executive Director, Movement Law Lab; Co-Founder, Law for Black Lives. Prior to that, Purvi served as the founding Director of the Bertha Justice Institute at the Center for Constitutional Rights, the nation's first movement lawyering institute. While there, Purvi trained thousands of emerging lawyers on movement lawyering and helped build a global network of movement lawyers in sixteen countries. Purvi also has significant experience as a civil rights lawyer and policy advocate. In 2006, Purvi co-founded the Community Justice Project of Florida Legal Services, Miami's first movement lawyering shop. For six years, she represented taxi drivers, tenant unions, public housing residents, and immigrants' rights groups. While there, Purvi was also an Adjunct Professor of Law at the University of Miami School of Law, teaching courses on Community Lawyering.

Purvi is best-known for being an effective multiplier and a skilled coach. From lecturing at law schools across the country to advertising dozens of legal organizations on movement lawyering Purvi has been building and training a new generation of movement lawyers. Purvi's work over the last decade has been largely responsible for the reinvigoration of dialogue and momentum around movement lawyering across the United States. Prior to becoming a lawyer, Purvi worked as a community organizer with youth in Mimi, students in India, and families of incarcerated youth in California.

1. FRANTZ FANON, THE WRETCHED OF THE EARTH 206 (Richard Philcox trans., Grove Press 2004) (1963).

for marginalized people and communities. We live in a country where human life and human labor have become increasingly disposable.

While popular culture has advanced a myth of lawyers as the noble guardians of justice and equality, the sordid truth is the vast majority of American lawyers are working to protect the interests of the rich and powerful. According to a recent American Bar Association study, less than three percent of America's 1.3 million lawyers work on issues of justice and poverty.[2] Another study found that low-income people seek lawyers for only twenty percent of their civil legal problems, and when they do, they are denied assistance eighty-six percent of the time.[3] Millions of poor and marginalized Americans are enduring some of life's hardest challenges—discrimination, eviction, violence, deportation, and exploitation—without any assistance from our profession.

Some would argue that the gap between supply and demand is the result of sticky challenges including antiquated service delivery models, shrinking funding, and failure to use technology in creative ways. And while all of that is true, I think something more insidious is to blame for our profession's failure to meet the needs of the most vulnerable in our society.

The legal profession is in crisis of conscience

Our profession largely acts as the private army of corporations, the carceral state, and/or the elites who benefit from both.[4] Sadly, more lawyers are working to preserve injustice rather than transform it. Lawyers serving in these roles—such as prosecutors and law firm partners—are exalted in law schools and elsewhere as the epitome of legal excellence without further critique of the systems they perpetuate. This has long been the case. Historically, lawyers have designed, justified, and advanced some of the most perverse and grotesque practices from slavery, Jim Crow segregation, torture, prolonged arbitrary detention, internment, and war. While every period in history

2. SOC'Y OF AM. LAW TEACHERS, CHOOSING THE RIGHT LAW SCHOOL FOR YOU: A CONSUMER GUIDE FOR THE SOCIAL JUSTICE-MINDED LAW STUDENT (The Soc'y of Am. Law Teachers, ed. 2015), http://consumerguide.saltlaw.org/part-1-chapter-3-understanding-current-models-for-social-justice-lawyering-and-considering-alternatives (finding that one percent of lawyers work in education, one percent in private nonprofits, and one percent work as public defenders or legal aid lawyers).

3. LEGAL SERV. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017).

4. Many attorneys work to promote and advance the carceral state as prosecutors, military lawyers, counsel for prisons, etc. *See* Marie Gottschalk, *Bring it On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 569-70 (2015).

has always had a small minority of lawyers who are deeply committed to social justice, as a profession, lawyers have been silent in the face of some of the most egregious justice issues.

This silence continues to the modern day. I spent the last four years building legal support for communities resisting racialized police violence across the country with and through the broader Movement for Black Lives.[5] I traveled to Ferguson just a week following the killing of Mike Brown, after watching the civil and human rights violations unfolding on live television between police and protesters. As a small group of us attempted to recruit lawyers to assist those arrested, what became immediately clear was that *hundreds* of lawyers in the greater St. Louis area *refused* to get involved in what was happening. We saw that phenomenon happen again in Baltimore, in Charlotte, and in Charlottesville. It took months of organizing and agitating lawyers, combined with a shift in the broader popular narrative around police violence to awaken a sluggish legal sector to respond. The response still falls woefully short of the compounding needs of poor and disenfranchised people.

So what is to blame for our profession's failure to acknowledge its responsibility to address the human suffering we are witnessing on a massive scale?

II. WE CAN'T REAP WHAT WE DON'T SOW

I believe we can attribute this failure to take moral responsibility in our field in part to how lawyers are trained, acculturated, and incentivized. Questions of justice rarely are the focus of required law school curriculums or classes, leaving lawyers with substantial analytical gaps in understanding the nature of oppression, what causes it, and what transforms it. It is hard to be motivated to tackle a problem you aren't aware of or don't understand. Law students interested in these topics have to actively seek out or be lucky enough to have some elective courses or professors with an interest in opening a discourse around justice.

Second, legal education promotes many false myths about law, which become etched into the minds of lawyers and prevent us from being compelled to take action. For example, we are taught "The Law" in the United States is the benevolent guarantor of a fair and just society. Few law school classrooms or lawyers poke holes in this myth. Lawyers are trained to see courts as self-actualizing engines of justice, leaving no

5. *About*, THE MOVEMENT FOR BLACK LIVES, https://m4bl.net (last visited Nov. 10, 2018).

reason for them to be concerned independently with the questions of structural injustice within the law and legal institutions. But history has shown us that law is neither objective nor neutral and that "The Law" has always trailed behind what was just. We must start being honest about the fact that the law is not ethical or moral on its own. We must push it to be so.

A growing sector of lawyers and legal organizations, deeply invested in the questions of justice, have sought to dispel these myths and are using their skills in more proactive and holistic ways. They see their role as that of conscious tacticians—not saviors or bystanders—in support of marginalized people seeking to transform the conditions of their own lives. These lawyers creatively use legal tools to build the power of, make space for, validate, bolster, defend, and protect social movements and the activists and communities within them. Premised on the idea that lawyers and the law are but one piece of social change, this style of lawyering has many names—community lawyering, political lawyering, empowerment lawyering, movement lawyering. Unfortunately, law students and lawyers are not being taught movement lawyering at school or at work. There are few institutions where one can learn how to do meaningful movement lawyering and make a living at it. There are no networks of "elders" or "mentors" lined up to coach budding lawyers to not make the same mistakes over and over again and shepherd a collective body of knowledge.

Finally, I think we can trace this crisis of conscience in the legal field to the failures of how lawyers are taught to think about ethics. The Rules of Professional Conduct, which all lawyers must swear to uphold, offer a baseline standard of legal ethics and professional responsibility for American lawyers.[6] Yet these rules speak primarily about what we should *not* do as lawyers—don't steal our clients' money, don't lie, don't commit fraud, don't disrespect the court. The rules are silent, however, on *what* the *affirmative* role for a lawyer is in society, *which* clients we should represent, *which* circumstances demand our ethical participation, and most importantly, *how* we should work for our clients.[7] The rules say nothing about a larger social responsibility of lawyers. How can we expect lawyers to feel compelled to address the

6. MODEL RULES OF PROF'L CONDUCT pmbl. & scope (AM. BAR ASS'N 2018).

7. *Id.* This is not to say that there are no affirmative duties whatsoever within the Model Rules. *See, e.g.*, *Id.* r. 3.3(a)(1) (defining an affirmative duty to correct a false statement of material fact previously made to a tribunal by an attorney). However, these affirmative duties are limited and do not provide clarity about broader issues of social justice as noted above. It is also important to note that this Article is not proposing a rewrite of the Model Rules but instead advocating to view them as just one blueprint for how lawyers should ethically practice.

questions of injustice when we have created no incentives or responsibility for them to do so?

For the past fifteen years, a group of us,[8] self-described movement lawyers, have worked to make interventions on all these fronts—by designing a robust suite of methodologies to train lawyers on social change, to popularize the concept of movement lawyering, and to build communities of practice where lawyers are encouraged to think deeply about our role in social change. We worked to change law school curriculums and create internship programs to develop a cadre of lawyers who have the skills and moral compass to be involved in the fight for human dignity. Our efforts have been successful, and we have developed a much broader interest in movement lawyering, but we still remain on the margins of the legal field.

In order to meet the demands of the current moment, I believe we must awaken the conscience of a much broader sector of the legal profession. We need thousands of lawyers to feel pulled by the questions of injustice. But how can we get there?

III. CREATING A NEW ETHICAL NORTH STAR

Moments of social unrest offer us an opportunity, if not an imperative, to examine business as usual—to excavate what is rotten, and rebuild something better. Law is no exception. This current moment has exposed so much of the hypocrisy and failure of law. But if we are courageous inside this vulnerable moment, there is an opportunity for transformation. Difficult moments, like the one we are in, can serve as opportunities to innovate, experiment, and shift culture.

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8. These lawyers include myself, Bill Quigley, Charles Elsesser, Meena Jagannath, Alana Greer, Nikki Thanos, Amna Akbar, Marbre Stahly-Butts, Jeena Shah, Pam Spees, Vince Warren, Sameer Ashar, Dorcas Gilmore, Amanda Alexander, Sunita Patel, Jim Freeman, Jennifer Rosenbaum and many others. Our collaborative experiments have included co-designing a "Movement Lawyering 101" workshop that has been given to over 10,000 lawyers and law students across the world, organizing a six session online bootcamp on movement lawyering, creating new organizations and networks like Law for Black Lives, coordinating rapid response to crises when called upon by movement partners in Ferguson, Baltimore, Charlotte, Charlottesville, etc., organizing national conferences on movement lawyering, participating in lectures and conferences at law schools across the country, and running a collaborative, cross-cultural summer legal internship program called the Ella Baker Program through the Center for Constitutional Rights, among other things. To learn more about this work, see CTR. FOR CONST. RTS., https://ccrjustice.org (last visited Nov. 10, 2018); COMMUNITY JUST. PROJECT, http://communityjusticeproject.com (last visited Nov. 10, 2018); DETROIT JUST. CTR., https://www.detroitjustice.org (last visited Nov. 10, 2018); L. FOR BLACK LIVES, http://www.law4blacklives.org (last visited Nov. 10, 2018); MOVEMENT L. LAB, https://movementlawlab.org (last visited Nov. 10, 2018); NEW ORLEANS WORKERS CTR. FOR RACIAL JUST., http://nowcrj.org (last visited Nov. 10, 2018).

If a broader cross-section of lawyers must be activated to respond to the needs within our communities, then we will have to usher in a new era of leadership, activism, and morality among the legal profession. I have always found that the best way to change behavior is to inspire people. For that reason, I believe it is time to write a new code of ethics for lawyers. One that is aspirational and inspirational; an ethical north star versus a bare minimum. This code should be plain and easy to understand and should lay out ten to fifteen simple values to create a new ethical framework on the social responsibility of lawyers. This code should be used to supplement the Rules of Professional Conduct, designed to facilitate conversation, to encourage interrogation of the status quo, and to revive the heart and soul of our profession.

These values should be holistic and disrupt the normative paradigm of professional responsibility.[9] For example, the code could include concepts like "Dignity: honoring the self-determination of our clients;" or "Integrity: an obligation to respond to moments of great injustice;" or "Collectivity: a commitment to use law to aggregate people with similar problems versus atomize them;" or "Collaboration: a commitment to working with other types of change-makers to address oppression."

The code should be a living document that can be tailored to the current moment and incorporate historical lessons of how law and lawyers have advanced oppression. It can be revisited every few years. It should be drafted by the generation of lawyers, who are black and brown and who come from communities that are oppressed. More importantly, it should be drafted alongside our representatives from marginalized client communities, many of whom have the most intimate understanding of the failures of our profession.

This new code could be voluntarily adopted by individuals, organizations, law schools, and law firms. After it gains critical mass, it can create a common framework for analysis and reflection about our ethical successes and failures as a profession. But more than a written document, we have to ensure the code creates a new culture where questions of morality are discussed, wrestled with, and prioritized in the legal profession. To ensure more day-to-day application of these new standards, we will have to be intentional about operationalizing this code of ethics. For example, every law school and legal organization could have a secular ethics chaplain, a person with whom lawyers can discuss

9. Some organizations have adopted similar principles of additional accountability. *See, e.g.*, *Our Mission*, COMMUNITY JUST. PROJECT, https://communityjusticeproject.com/mission (last visited Nov. 10, 2018) (discussing the organization's "guiding principles and values"); *Values*, L. FOR BLACK LIVES, http://www.law4blacklives.org/values (last visited Nov. 10, 2018).

questions of morality and meaning in their work.[10] Alternatively, case review and staff evaluations can incorporate this new code of ethics.[11] The possibilities are endless.

IV. WHY NOW?

The law is built on the concept of precedent. Legal education acculturates lawyers to look backwards, but fails to inspire and encourage us to look forward. Virtually every other field—science, technology, labor, art, journalism, media—has seen widespread innovation during the last fifty years. Yet, legal organizations have remained stagnant, undisturbed by the creative disruptions revolutionizing so many other industries.

We are in an interesting churning moment for numerous professions when it comes to questions of social justice. Over the past few years, social justice oriented professional associations and networks have been popping up such as Law for Black Lives,[12] Data for Black Lives,[13] the Algorithmic Justice League,[14] the Social Medicine Consortium,[15] White Coats for Black Lives,[16] Libraries for Black Lives,[17] etc. The times are provoking people of conscience from many fields to re-examine how injustice is perpetuated and architected through their fields; to redefine what their collective role is in working to dismantle oppression.

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10. For example, the Massachusetts Institute of Technology ("MIT") has recently created a new "humanist chaplain" position for their students. *See* Isabel Fattal, *MIT Now Has a Humanist Chaplain to Help Students With the Ethics of Tech*, ATLANTIC (May 16, 2018), https://www.theatlantic.com/education/archive/2018/05/mit-now-has-a-humanist-chaplain-to-help-students-with-the-ethics-of-tech/560504.

11. It is also worth noting, that to really make it possible for more people to work on questions of justice, we have to bring tuition costs down or eliminate them completely. Melissa Korn, *NYU Makes Tuition Free for All Medical Students*, WALL ST. J. (Aug. 16, 2018, 12:10 PM), https://www.wsj.com/articles/nyu-offers-full-tuition-scholarships-for-all-medical-students-1534433082. Mounting student-debt is a huge barrier for many law students—especially students of color that do not come from any familial wealth. Recently, NYU Medical School eliminated all tuition fees for all students—an idea worth considering in the field of law. *Id*.

12. L. FOR BLACK LIVES, *supra* note 8.

13. DATA FOR BLACK LIVES, http://d4bl.org (last visited Nov. 10, 2018).

14. ALGORITHMIC JUST. LEAGUE, https://www.ajlunited.org (last visited Nov. 10, 2018).

15. SOC. MED. CONSORTIUM, http://www.socialmedicineconsortium.org (last visited Nov. 10, 2018).

16. WHITE COATS FOR BLACK LIVES, http://whitecoats4blacklives.org (last visited Nov. 10, 2018).

17. *Libraries4blacklives.org Launches on Movement for Black Lives' National Day of Action*, BLACK CAUCUS AM. LIBRARY ASS'N, https://www.bcala.org/2016/07/21/libraries4blacklives (last visited Nov. 10, 2018). *See generally* BLACK CAUCUS AM. LIBRARY ASS'N, https://www.bcala.org (last visited Nov. 10, 2018).

We are in an exciting moment where we can think about the question of "What does it mean to have a shared north star of ethics that is *beyond* our profession?" What would it look like if lawyers of conscience, doctors of conscience, and the technologists of conscience worked together to develop an ethical North Star for *all* of our fields? The transformative power of an initiative like that could be astronomical. Not only would we redefine our work within our fields, but we would lay the groundwork for better collaborative problem-solving and solutions to the increasingly complex challenges of our day.

V. CONCLUSION

Shifting norms around legal ethics has the power to transform how lawyers orient themselves to injustice, but can also serve the purpose of transforming the broader, hegemonic understanding of law in society. Through shifting ourselves, we shift our profession. By shifting our profession, we can shift the broader culture of society. It has taken powerful, militant, beautiful movements to transform the law. It took movements to codify, reframe and reimagine what was "just" under the law. When wielded by people of conscience, law has always been a powerful tool for social justice. Lawyers throughout American history have used law as a sword and shield for advancing the causes of the most marginalized in our society. The work of all lawyers in this time is to walk the tightrope of doing our duty to engage valiantly and aggressively in the courts while simultaneously recognizing that law alone won't solve our communities' challenges. Understanding this contradiction and being able to take strategic action despite it, is what it means to be not only a movement lawyer—but an ethical lawyer in the twenty-first century.