SANCTUARY CORPORATIONS:
SHOULD LIBERAL CORPORATIONS GET RELIGION?

By

Liz Brown, Assistant Professor, Bentley University, and
Inara Scott, Assistant Professor, College of Business, Oregon State University

SANCTUARY CORPORATIONS:
SHOULD LIBERAL CORPORATIONS GET RELIGION?

Introduction

In the first few months of the Trump Administration, the federal government took steps that caused many immigrants to fear for their safety. These steps included more severe punishments for immigrants, including a broader approach to deportation.[1] President Trump signed an Executive Order paving the way for greater scrutiny of the H-1B visa program that authorizes highly skilled, foreign-born people to work in the United States.[2] Since January 2016, arrests by Immigration and Customs Enforcement (ICE) have increased by nearly forty percent.[3] ICE has increased its detention capacity and declared that all violations of immigration law, including driving without a license, may be grounds for deportation.[4] Following a campaign promise to triple the number of ICE agents, President Trump signed an Executive Order authorizing the hiring of an additional 15,000 immigration control personnel.[5]

In many parts of the United States, a growing "sanctuary movement" offered support and refuge to this increasingly vulnerable immigrant population.[6] Religious institutions led the way, offering sanctuary spaces to immigrant families.[7] Church leaders affirmed their religious obligations to stand with the persecuted and oppressed.[8] Some cities and states declared themselves to be sanctuaries as well, taking a variety of steps to increase the safety of their immigrant residents from federal intervention.[9] Driven by concern for the safety of their students and faculty, some universities also joined the sanctuary movement.[10]

---

[1] *See e.g.*, Michael D. Shear and Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, NY TIMES (Feb. 21, 2017) (describing new immigration policies that, inter alia, expand definition of criminal aliens and speed up deportation), https://www.nytimes.com/2017/02/21/us/politics/dhs-immigration-trump.html; Alicia A. Caldwell, *Illegal Immigration Targeted in New Trump Plan*, U.S. NEWS (Feb. 22, 2017) (providing detail about new immigration policy memos and likely effects), https://www.usnews.com/news/politics/articles/2017-02-22/trump-admin-lays-out-new-approach-to-illegal-immigration.

[2] Glenn Thrush, Nick Wingfield and Vindu Goel, *Trump Signs Order That Could Lead to Curbs on Foreign Workers*, N.Y.TIMES (Apr. 18, 2017), https://www.nytimes.com/2017/04/18/us/politics/executive-order-hire-buy-american-h1b-visa-trump.html?_r=0.

[3] Stephen Dinan, *Immigration Arrests Up 38 Percent Under Trump*, WASH. TIMES (May 17, 2017), http://www.washingtontimes.com/news/2017/may/17/immigration-arrests-38-percent-under-trump/.

[4] U.S. DEPT. HOMELAND SECURITY, Q&A: DHS IMPLEMENTATION OF THE EXECUTIVE ORDER ON BORDER SECURITY AND IMMIGRATION ENFORCEMENT (Feb. 21, 2017), https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement.

[5] EXECUTIVE ORDER 13768, ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united

[6] *See infra* Part I.B-C.

[7] *See infra* notes 39-40, 45, 47-48 and accompanying text.

[8] *See infra* note 45, 47.

[9] Jasmine C. Lee, Rudy Omri and Julia Preston, *What are Sanctuary Cities?*, NY TIMES (Feb. 6, 2017) (identifying sanctuary cities and states, and describing basic identifying characteristics), https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html; Darla Cameron, *How Sanctuary Cities Work, and How Trump's Stalled Executive Order Might Affect Them*, WASH. POST (Apr. 26, 2017), https://www.washingtonpost.com/graphics/national/sanctuary-cities/.

[10] Joe Heim, *Calls for 'Sanctuary' Campuses Multiply as Fears Grow Over Trump Immigration Policy*, WASH. POST (Feb. 6, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/02/06/calls-for-sanctuary-campuses-

The immigrants potentially targeted by recent upticks in immigration law enforcement policy play an important role in the United States economy.[11] There are more than 11 million unauthorized immigrants, representing 3.4% of the population.[12] Two-thirds of them have lived in the United States for at least a decade.[13] Unauthorized immigrants are most likely to live in some of the most economically vital areas of the country. Fifty-nine percent of them live in just six states, including New York, New Jersey and California.[14] These unauthorized workers are part of a larger community of foreign-born people, including refugees, immigrants admitted legally, and temporary residents and workers. Overall, there are 27 million foreign-born people in the United States, making up nearly 17 % of the workforce.[15] This percentage is increasing; in 2013, in contrast, foreign-born workers comprised only 13% of the workforce.[16] This rise in workforce participation suggests that immigrants have a significant impact on business in the United States.

Business owners, compelled by their beliefs, may want to join the sanctuary movement in order to protect those affected by increased restrictions on immigrants and immigration. Imagine, for example, a closely-held company whose workforce is comprised of U.S. citizens, visa holders, and undocumented immigrants. The software company may oppose the increased enforcement of immigration laws, which could lead to the deportation of certain employees and their family members. Although the company, like all U.S. employers, must comply with federal immigration law, it may claim that its religious beliefs encompass a moral compulsion to shelter its employees and their families from the increasingly draconian force of federal immigration policy. For that reason, it may refuse to verify its employees' right to work or refuse to cooperate with federal immigration agents because those refusals help the company to provide sanctuary. The company may argue that the Religious Freedom Restoration Act (RFRA) effectively excuses it from complying with federal immigration laws that conflict with its sincerely held religious beliefs in sanctuary provision.

Does federal law support the idea of a sanctuary corporation? This Article explores the extent to which recent case law, including *Burwell v. Hobby Lobby Stores* ("*Hobby Lobby*"),[17] suggests that corporations may have a constitutional right to object to certain immigration enforcement policies that conflict with their religious beliefs.

---

multiply-as-fears-grow-over-trump-immigration-policy/; Tim Goral, *Can Sanctuary College Campuses Survive?*, UNIV. BUS. (Feb. 15, 2017) (describing forces pushing colleges and universities for and against the sanctuary designation), https://www.universitybusiness.com/article/can-sanctuary-college-campuses-survive.

[11] The extent to which this economic impact is positive or negative is debated among economists, though recent studies suggest it is positive. *See, e.g.*, Adam Davidson, *Do Illegal Immigrants Actually Hurt the U.S. Economy?*, NY TIMES MAGAZINE (Feb. 12, 2013), http://www.nytimes.com/2013/02/17/magazine/do-illegal-immigrants-actually-hurt-the-us-economy.html; Andrew Soergel, *The Economic Costs of Immigration*, U.S. NEWS (Sept. 23, 2016), https://www.usnews.com/news/articles/2016-09-23/study-examines-immigrations-economic-costs; REPORT OF NAT'L ACADEMIES SCIENCES, ENGINEERING, AND MEDICINE, THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION (FRANCINE D. BLAU AND CHRISTOPHER MACKIE, EDS.) (Sept. 22, 2016), https://www.nap.edu/read/23550/chapter/1.

[12] 5 FACTS ABOUT ILLEGAL IMMIGRATION IN THE U.S., PEW RESEARCH CENTER: FACTTANK (Apr. 27, 2017) http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/.

[13] *Id.*

[14] *Id.*

[15] Press Release, Dep't of Labor, Foreign-Born Workers: Labor Force Characteristics (May 18, 2017), https://www.bls.gov/news.release/pdf/forbrn.pdf.

[16] *Id.*

[17] 134 S. Ct. 2751 (2014).

In Part I, we discuss the history and religious basis of the sanctuary movement. In Part II, we describe employers' obligations under relevant immigration law—obligations that form the basis of a potential conflict if an employer were to offer sanctuary to employees. In Part III, we examine recent case law, including *Hobby Lobby*, to determine whether employers may refuse to comply with federal immigration law if doing so would violate a sincerely held religious belief. In Part IV, we conclude and offer suggestions for future research.

I. Sanctuary: The Evolution of a Concept

The notion of sanctuary has a long history, dating back to ancient Greeks and Romans.[18] In recent years, and often in connection with threats to immigrants or increased restrictions on immigration to the United States, providing sanctuary to people under threat has taken several forms. As described below, the most recent revival of a sanctuary movement is strongly rooted in both legal and religious traditions.

A. The Historical Origins of Sanctuary

In its earliest form, sanctuary referred to the legal and physical authority of religious institutions to protect individuals[19]--including slaves[20] and outlaws[21]--on or within church grounds from persecution by government officials, or from private citizens seeking vengeance under traditional laws of bloodfeud.[22] The protection of the individual could extend some distance from the actual church grounds[23] and in some English cases also included secular jurisdictions controlled by local lords who were not subject to the legal authority of the crown.[24] Sanctuary might provide a short term period in which the individual could settle his debts before

[18] *See* Jorge L. Carro, *Sanctuary: the Resurgence of an Age-old Right of a Dangerous Misinterpretation of an Abandoned Ancient Privilege*, 54 U. CIN. L. REV. 747, 749-753 (1986) (describing both Biblical and non-Biblical origins of sanctuary); LINDA RABBEN, GIVE REFUGE TO THE STRANGER 55-69 (2011) (describing history of sanctuary from 4th century C.E.); REV. J. CHARLES COX, THE SANCTUARIES AND SANCTUARY SEEKERS OF MEDIAEVAL ENGLAND 2-33 (1911) (providing history of laws supporting religious sanctuary in England).

[19] For a legal history of sanctuary under English common law, see generally Pope, *Sanctuary: The Legal Institution in England*, 10 PUGET SOUND L. REV. 677 (1987). A compilation of primary source narratives of individual sanctuary seekers can be found in Charles Cox, *The Sanctuaries and Sanctuary Seekers of Yorkshire*, 68 ARCHAEOLOGICAL JOURNAL 273 (1911).

[20] Slaves were given sanctuary as early as the 3rd and 2nd centuries C.E. *See* Rabben, *supra* note 18, at 49.

[21] IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 142 (1985) (describing practice of outlawry); KARL SHOEMAKER, SANCTUARY AND CRIME IN THE MIDDLE AGES: 400-1500 (2011) (regarding interaction between laws regarding outlawry and legal reforms of sanctuary). A historical compilation of individual sanctuary seekers can be found in Charles Cox, *The Sanctuaries and Sanctuary Seekers of Yorkshire Journal Title*, 68 ARCHAEOLOGICAL JOURNAL 273 (1911).

[22] Bloodfeud refers to the practice of permitting personal vengeance for harms done to individuals by the victim or his/her relatives. RABBEN, *supra* note 18, at 59; BAU, *supra* note 21, at 135. The legal right of sanctuary appears to have been related to efforts by Anglo-Saxon kings to mitigate systems of private vengeance. Carro, *supra* note 18, at 754-757.

[23] Cox, *supra* note 19, at 273. According to one account from the Middle Ages, the sanctuary seeker would have to reach an area defined as "all the Church yard, and all the circuyte thereof." Pope, *supra* note 19, at 688 (citations omitted).

[24] Bau, *supra* note 21, at 140.

returning to society,[25] or could allow the fugitive a limited period of time in which to safely plead guilty to his crime(s) prior to leaving the country for good.[26]

As a legal matter, the practice of sanctuary began to be abolished in the sixteenth century in France and England, and its remnants were formally abolished in 1624.[27] Little evidence of the formal legal concept of sanctuary exists in early American history. [28] Though early colonists may have viewed America as a type of sanctuary from religious persecution, they did not appear to adopt the legal concept into their common law, and even churches that were active in the Underground Railroad did not claim any legal privilege for their actions.[29]

B. Developing the New Sanctuary Movement

In the 1980s, a sanctuary movement grew up in the United States around the plight of refugees from Central America fleeing extreme violence and persecution.[30] Numerous individuals and religious institutions took up the sanctuary cause as a religious obligation originating from the Christian commitment to help those in need.[31] While arising out of an expressly religious tradition, this notion of sanctuary was distinct from the ancient Greek, Roman, and common law traditions, focusing on the religious obligation of the individual to provide assistance.[32] Although some individuals associated with the movement sought refuge in churches, the historic legal basis for sanctuary was generally not invoked as part of the movement.[33] Rather, the religious basis for providing sanctuary became the foundation of a legal

---

[25] M. H. Ogilvie, *Sanctuary: Common Law and Common Sense*, 83 CANADIAN BAR REV. 229, 237 (2004).

[26] The process of confession and permanently exiting the country was known as "abjuration," and was a practice often associated with sanctuary. *See* RABBEN, *supra* note 18, at 62-63; SHOEMAKER, *supra* note 21, at 113; Oglivie, *supra* note 25, at 236.

[27] SHOEMAKER, *supra* note 21, at 170; Oglivie, *supra* note 25, at 229-230 (noting that while the legal practice of sanctuary was formally abolished in England 1624, scattered references to the practice continued thereafter).

[28] *See* Bau, *supra* note 21, at 158-159; Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 CAP. U.L. REV. 583, 594-597 (2014) (describing history of sanctuary in early America).

[29] Kathleen L. Villarruel, *The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values*, 60 CAL. L. REV. 1429, 1433 (1987) (noting early Dutch and English settlers in North America "declared the new land to be a sanctuary from religious oppression"); Davidson, *supra* note 28, at 595; Villarruel, *supra* note 29, at 1437-1440 (providing legal foundations for the Underground Railroad and history of prosecutions under the Fugitive Slave Act).

[30] BAU, *supra* note 21, at 9-21 (describing development of sanctuary movement in the United States for Central American refugees); *see generally* Hector Perla and Susan Bibler Coutin, *Legacies and Origins of the 1980s US-Central American Sanctuary Movement*, 26 REFUGE 7 (2009); Lane Van Ham, *Sanctuary Revisited: Central American Refugee Assistance in the History of Church-Based Immigrant Advocacy*, 10 POLITICAL THEOLOGY 621 (2009).

[31] Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 915-28 (describing religious foundation of U.S. sanctuary movement in the 1980s); Davidson, *supra* note 28, at 603 ("Eventually, the sanctuary movement boasted over 300 churches serving as sanctuaries, with as many as 2,000 additional churches providing logistical support."). Lane Van Ham places this advocacy within a longer tradition of "church-based immigration advocates" basing their activism on scripture and Biblical grounds. Van Ham, *supra* note 30, at 622-623.

[32] *See* Carro, *supra* note 18, at 767-772 (contrasting arguments of sanctuary proponents in the 1980s with the historical, legal tradition of sanctuary). Some have suggested the religious basis for the movement grounds it in a tradition of civil disobedience, rather than the more ancient notion of sanctuary. Paul Wickham Schmidt, *Refuge in the United States: The Sanctuary Movement Should Use the Legal System*, 15 HOFSTRA L. REV. 79, 94-95 (1986).

[33] Indeed, a Memorandum Opinion from the Department of Justice's Office of Legal Counsel concludes, "[C]hurch sanctuary for criminal offenses was abolished by statute in England in 1623 and thus did not enter the United States as part of the common law…We doubt that the court would be willing, even in the face of sympathetic facts, to hold

defense under the Free Exercise clause[34] for individuals providing assistance to undocumented immigrants in contravention of immigration laws.[35] Thus, for example, in *United States v. Elder*,[36] ministers from the Roman Catholic, American Baptist, Presbyterian, Lutheran, and United Methodist Churches all testified that offering sanctuary to those fleeing violence was "an appropriate expression of the Christian gospel,"[37] and this testimony formed the foundation for a First Amendment defense.[38]

The "New Sanctuary Movement" (NSM), which publicly launched in May 2007,[39] refers to the practice of providing immigrants with shelter, assistance, and protection from possible deportation by federal authorities.[40] Those involved with the movement include churches, private citizens, businesses, cities, and even entire states.[41] Though it shares similar roots with the sanctuary movement of the 1980s, NSM is notably different in that it focuses not on the extreme violence and danger the deported would face if returned to their home countries, but on the tearing apart of families and uprooting of people from communities and lives that they had built in the United States.[42] Many of the public stories about the NSM have focused on parents being separated from children, or individuals brought to the country as children themselves who face deportation to a country with which they have little or no connection.[43] Another key difference between the two movements lies in the movement practices: in the 1980s, sanctuary activists focused on short-term protection and transportation for vulnerable individuals; the NSM's broader base of activities includes political activism, advocacy for individuals in legal proceedings, and support for reform of national immigration laws.[44] Like the earlier sanctuary

---

that they were no longer able to enforce the country's laws in the church sanctuaries." Office of Legal Counsel, *Church Sanctuary for Illegal Aliens*, 7 op OLC 168, 170 (1983), available at https://www.justice.gov/olc/file/626831/download. Though not legally required, state and federal authorities have displayed a reluctance to make arrests on church grounds. *See* Davidson, *supra* note 28, at 616-617.

[34] U.S. CONST., amend I.

[35] *See* Villarruel, *supra* note 29, at 1455-1457; Carro, *supra* note 18, at 772-774 (rejecting free exercise argument in support of sanctuary in light of fundamental importance of Congressional control over immigration). *See infra* Part II.A, describing cases involving free exercise claims.

[36] 601 F. Supp. 1574 (S.D. Tex. 1985).

[37] *Id.* at 1577. The direct quote was attributed to Bishop Fitzpatrick of the Roman Catholic Church, but the court notes that "the conclusion also holds true" in the other denominations. *Id.*

[38] 601 F. Supp. at 1576.

[39] *See* Pamela Begaj, *An Analysis of Historical and Legal Sanctuary and a Cohesive Approach to the Current Movement*, 42 J. MARSHALL L. REV. 135, 145 (2008) (describing birth of the NSM).

[40] Marta Caminero-Santangelo, *The Voice of the Voiceless: Religious Rhetoric, Undocumented Immigrants, and the New Sanctuary Movement in the United States*, in SANCTUARY PRACTICES IN INTERNATIONAL PERSPECTIVES 92-105, 92 (RANDY K. LIPPERT & SEAN REHAAG, EDS.) (2013); David Gushee, *An Ethical Analysis of the 'New Sanctuary Movement'*, Religion News Service (Mar. 19, 2017) (describing religious basis of NSM, as well as how churches can participate), http://religionnews.com/2017/03/19/analysis-new-sanctuary-movement/; Puck Lo, *Inside the New Sanctuary Movement That's Protecting Immigrants from ICE: Can a Network of Churches Fight Deportations?*, THE NATION (May 6, 2015) (describing actions of churches involved in NSM), https://www.thenation.com/article/inside-new-sanctuary-movement-thats-protecting-immigrants-ice/.

[41] *See supra* note 9, 38.

[42] Marta Caminero-Santangelo, *The Voice of the Voiceless: Religious Rhetoric, Undocumented Immigrants, and the New Sanctuary Movement in the United States*, in SANCTUARY PRACTICES IN INTERNATIONAL PERSPECTIVES 92-105, 96-97 (RANDY K. LIPPERT & SEAN REHAAG, EDS.) (2013).

[43] Caminero-Santangelo, *supra* note 40, at 97-98.

[44] Grace Yukich, *'I didn't know if this was sanctuary,' Strategic Adaptation in the US New Sanctuary Movement*, in SANCTUARY PRACTICES IN INTERNATIONAL PERSPECTIVES 106-117, 108 (Randy K. Lippert & Sean Rehaag, Eds.) (2013).

movement, however, the NSM's roots include explicitly religious grounds, with movement leaders often pointing to Biblical scriptures that exhort Christians to care for "the stranger."[45]

C. Reviving Sanctuary in the Trump Era

After the 2016 election of Donald Trump, whose campaign was marked by significant antipathy toward illegal immigrants, particularly those entering the country from Mexico,[46] the number of religious institutions in the sanctuary movement doubled.[47] In March 2017, more than 800 religious congregations in the United States were engaged in the NSM, compared with approximately 400 before the election. At the same time, the NSM encompasses a wide and growing secular component. As the Trump administration increases the rate of deportation and widens the scope of vulnerable individuals to include those who have committed no serious crime and may have young children and large families in the United States,[48] activism on behalf of immigrants has increased.[49] High profile efforts include sanctuary cities, which limit

---

[45] Caminero-Santangelo, *supra* note 40, at 99 (citing Leviticus 19:34, "But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt"); *see also* Donna Schaper, *Sanctuary Movement Sees Post-Election Resurgence. Here's How to Get Involved*, Sojourners (Dec. 5, 2016) (citing Matthew 25:34-36 and Hebrews 13:2), https://sojo.net/articles/sanctuary-movement-sees-post-election-resurgence-heres-how-get-involved. *See also* SANCTUARY MOVEMENT, RESOURCES, http://www.sanctuarynotdeportation.org/resources.html (providing links to statements on sanctuary from the Episcopal Diocese of Los Angeles, the Oregon Lutheran Syond, the U.S. Presbyterian Church, the Unitarian Universalist Association and United Church of Christ, the United Methodist Church, and the Religious Action Center of Reform Judaism); Rose Cuison Villazor, *What is Sanctuary?*, 61 SMU L. Rev. 133, 144-147 (2008) (describing the role of churches in the development and operation of the NSM).

[46] *See* Carroll Doherty, *5 Facts About Trump Supporters' Views of Immigration*, PEW RESEARCH CENTER (Aug. 25, 2016) (finding that 66% of Trump supporters view immigration as a "very big problem" in the U.S., 79% support building border wall with Mexico, and majority of those forced to choose between border security and creating a path for undocumented immigrants to become citizens choose stronger enforcement and security), http://www.pewresearch.org/fact-tank/2016/08/25/5-facts-about-trump-supporters-views-of-immigration/; Nacha Cattan and Eric Martin, *'I Feel the Hatred.' Mexicans Reel in Shock After Trump Victory*, BLOOMBERG (Nov. 9, 2016) ("Trump's campaign, like Britain's Brexit vote before it, rode an anti-immigrant wave, with the Republican blaming foreign workers in the country and free-trade agreements for taking American jobs."), https://www.bloomberg.com/news/articles/2016-11-09/-i-feel-the-hatred-mexicans-reel-in-shock-after-trump-victory; *see also* Julie Hirschfeld David, David E. Sanger, and Maggie Haberman, *Trump to Order Mexican Border Wall and Curtail Immigration*, NY TIMES (Jan. 24, 2017) (noting that the proposed border wall between the U.S. and Mexico was a "signature promise" of Trump's campaign), https://www.nytimes.com/2017/01/24/us/politics/wall-border-trump.html; For a recap of Trump's most notable quotes about Mexico, see Tal Koplan, *What Donald Trump has said about Mexico and Vice Versa*, CNN (Aug. 31, 2016), http://www.cnn.com/2016/08/31/politics/donald-trump-mexico-statements/

[47] Dwyer Gunn, *The Sanctuary Movement: How Religious Groups Are Sheltering the Undocumented*, THE GUARDIAN (Feb. 8, 2017), https://www.theguardian.com/us-news/2017/feb/08/sanctuary-movement-undocumented-immigrants-america-trump-obama.

[48] Peter Baker and Ron Nixon, *Trump Proposal Would Deport More Immigrants Immediately*, NY TIMES (Feb . 19, 2017) (describing change from Obama policies, which focused on "removing serious criminals" and Trump directives, which include an expansion of "expedited removals" to anyone who had been in the country for up to two years), https://www.nytimes.com/2017/02/19/us/politics/trump-immigration-deportations.html?action=click&contentCollection=Politics&module=RelatedCoverage&region=EndOfArticle&pgtype=article; Brian Bennett and Amy Fiscus, *What you need to know about the Trump Administration's New Immigrant Rules*, L.A. TIMES (Feb. 22, 2017), http://www.latimes.com/politics/la-na-pol-trump-immigration-explained-20170222-story.html.

[49] Lori Weisberg, *Anti-Trump Activists Rally in Support of Immigrants*, SAN DIEGO UNION TRIB. (Feb. 18, 2017), http://www.sandiegouniontribune.com/news/immigration/sd-me-march-immigrants-20170216-story.html; Caitlin

cooperation of local police with federal immigration authorities,[50] and which have been a particular target of the Trump administration.[51]

Within the business community, a group calling itself "sanctuary restaurants" sprang up to provide signage, advice, and networking for likeminded businesses that want to publically declare their support for their often largely immigrant workforce.[52] Meanwhile, the National Health Care Union dubbed itself a "sanctuary union."[53] Another group sought to offer "sanctuary homes" to the variety of employees that may work within private homes, including child care, health care, and housekeeping workers.[54] In May, 2017, Oakland became the first city in the United States to pass a resolution establishing "sanctuary workplaces" in which "workers are respected and not threatened or discriminated against based on their immigration status," though the legal import of that designation is far from clear.[55]

While the NSM retains a strong religious tradition, there is little confidence within the movement that the religious conviction of participants will necessarily translate into legal protection. As a memo from the General Counsel of the United Church of Christ warns, "It is a felony for an organization or individual to conceal, harbor, shield from detection, or transport an undocumented immigrant. . . . Individuals, such as congregation members, who are providing

---

Dickson, *Now We Have a Bogeyman': Trump Helps Immigrant Activists Raise Awareness of Deportation Issues*, YAHOO NEWS (Feb. 18, 2017), https://www.yahoo.com/news/now-we-have-a-bogeyman-trump-helps-immigration-activists-raise-awareness-on-deportation-issues-230331118.html

[50] *See* note 9; Tessa Stuart, *How Sanctuary Cities are Plotting to Resist Trump*, ROLLING STONE (Dec. 1, 2016), http://www.rollingstone.com/politics/features/how-sanctuary-cities-are-plotting-to-resist-trump-w453239; Janell Ross, *6 Big Things to Know About Sanctuary Cities*, WASH. POST. (July 8, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/08/4-big-things-to-know-about-sanctuary-cities-and-illegal-immigration/

[51] *See* note 5; Priscilla Alvarez, *Trump Cracks Down on Sanctuary Cities*, THE ATLANTIC (Jan. 25, 2017), https://www.theatlantic.com/politics/archive/2017/01/trump-crack-down-sanctuary-city/514427/; U.S. DEPT. OF JUSTICE, PRESS RELEASE: ATTORNEY GENERAL JEFF SESSIONS DELIVERS REMARKS ON SANCTUARY JURISDICTIONS (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions. On April 25, 2017, a preliminary injunction blocked Trump's executive order restricting the flow of federal funds to sanctuary cities. *See* Vivian Yee, *Judge Blocks Trump Effort to Withhold Money from Sanctuary Cities*, NY Times (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/us/judge-blocks-trump-sanctuary-cities.html. A link to the preliminary injunction can be found here: http://www.politico.com/f/?id=0000015b-a6d5-de92-a17b-aed55e780001.

[52] Chase Purdy, *'Sanctuary Restaurants' are Popping up in the US to Protect Their Immigrant Workers from Trump*, Quartz (Jan. 26, 2017), https://qz.com/894817/sanctuary-restaurants-in-the-us-are-vowing-to-protect-their-immigrant-workers-from-deportation-under-trump/ ; SANCTUARY RESTAURANTS, http://sanctuaryrestaurants.org/ ; Octavio Blanco, *Sanctuary Restaurants Vow to Protect Undocumented Workers*, CNN (Feb. 21, 2017), http://money.cnn.com/2017/02/20/news/economy/sanctuary-restaurants/.

[53] Dan Cadman, *Healthcare Workers Union Declares Itself a Sanctuary*, CENTER FOR IMMIGRATION STUDIES (Apr. 17, 2017) , http://cis.org/cadman/healthcare-workers-union-declares-itself-sanctuary, Porfirio Quintano, *Health Care Workers Bring Sanctuary Movement into the Union*, LABORNOTES (Apr. 13, 2017), http://labornotes.org/2017/04/health-care-workers-bring-sanctuary-movement-union.

[54] Clio Chang, *Donald Trump and the Rise of the 'Sanctuary Home'*, NEW REPUBLIC (May 4, 2017), https://newrepublic.com/article/142490/donald-trump-rise-sanctuary-home; SANCTUARY HOMES, ABOUT, https://mysanctuaryhome.us/about-1/.

[55] Riley McDermid, *Oakland Passes Resolution Asking Businesses to Create Sanctuary Workplaces*, SAN FRANCISCO BUSINESS TIMES (Apr. 19, 2017), http://www.bizjournals.com/sanfrancisco/news/2017/04/19/oakland-immigration-sanctuary-workplaces.html

sanctuary services on behalf of a church may be prosecuted individually and receive fines and prison sentences."[56]

II. Immigration Laws and Employer Obligations

Federal law broadly prohibits individuals and employers from a variety of interactions with individuals illegally in the country, and imposes obligations on employers to report certain information regarding employee immigration status. In this part, we describe the legal boundaries of these laws, and the expansive way they have been interpreted.

A. Section 274: Harbor, Shelter, and Encourage

Under Section 274(a)(1)(A) of the Immigration and Nationality Act (INA), it is a crime for any person to conceal, harbor, or shield from detection in any place, including any building or means of transportation, any alien who has come to, entered, or remains in the United States in violation of law.[57] This provision includes harboring an alien who entered the United States legally but has since lost legal status. The INA also prohibits "encourag[ing] an alien to reside in the United States, knowing or in reckless disregard of the fact that such residence will be in violation of the law."[58]

The term "harboring" as used in the INA has not been interpreted by the Supreme Court, and the circuit courts remain divided as to the breadth of its scope. The most expansive definition, which has been adopted by the Ninth Circuit, is illustrated in *United States v. Acosta de Evans*.[59] In this case, the court found the plaintiff, Margarita Acosta de Evans, had "harbored" an undocumented relative by allowing the relative to stay with her for a period of two months, during which time de Evans knew that her relative was undocumented and in the country illegally.[60] The court explicitly rejected the proposition that, because de Evans had not made any efforts to conceal her relative from authorities, her act in providing a place to live could not constitute harboring under 8 U.S.C. sec. 1324(a)(3). Relying on dictionary definitions of the term harbor, the court concluded "The purpose of the section is to keep unauthorized aliens from entering or remaining in the country…We believe that this purpose is best effectuated by construing 'harbor' to mean 'afford shelter to'"[61]—a phrase that the court did not believe required intent or effort to conceal or shield the undocumented individual from detection.[62]

---

[56] UNITED CHURCH OF CHRIST OFFICE OF THE GENERAL COUNSEL, MEMO TO CONFERENCE MINISTERS 4 (Jan. 4, 2016), http://www.ctucc.org/files/ct+documents/justice+ministries/legal_risks_sanctuary_2017.pdf. Similar warnings can be found in other toolkits and FAQs intended for individuals and organizations intending to participate in the NSM. *See* CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW, NEW SANCTUARY MOVEMENT LEGAL TOOLKIT 8 ("In short, someone merely providing shelter to an immigrant known to be illegally present could result in a prosecution), http://lynnhopkinsgroup.com/Toolkit1.pdf; AMERICAN CIVIL LIBERTIES UNION, SANCTUARY CONGREGATIONS AND HARBORING FAQ 1 ("Federal courts across the country have approached convicting a person of harboring in different ways, and have applied different standards. Whether or not a certain action places you at risk for a criminal conviction depends somewhat on where you are in the country."). http://www.sanctuarynotdeportation.org/uploads/7/6/9/1/76912017/sanctuary_faq_4_13_2017.pdf.

[57] 8 U.S.C. §1324(a)(1)(A)(ii)-(iv).

[58] 8 U.S.C. §1324(a)(1)(A)(iv).

[59] 531 F.2d 428 (9th Cir. 1976).

[60] *Id.* at 429.

[61] *Id.* at 430.

[62] *Id.*

A narrower definition of harboring was recently adopted by the Seventh Circuit. In *United States v. Costello*,[63] the court considered a case in which a woman was found guilty of harboring because she provided a place for her boyfriend to live for approximately six months, though she knew him to be in the country illegally.[64] The court concluded that interpreting the term "harbor" to include simply providing a place to stay was inconsistent with the legislative history, meaning, and language of the statute.[65] Rather, the term harbor must include something more, such as intent to provide a known undocumented individual with "a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him."[66] Ultimately, without facts tending to show that the defendant had concealed or shielded the undocumented individual from detection, it could not find the defendant had "harbored" him.[67]

Part of the *Costello* court's rationale was that previous cases, including *Acosta de Evans,* that seemingly applied a more expansive definition of harboring, did so under circumstances tending to show a greater pattern of aid to undocumented individuals.[68] Under such fact patterns, providing a place to stay may turn into harboring even if the defendant makes no specific effort to conceal or deceive authorities. This suggests that harboring may be judged according to the court's assessment of the ultimate motive of the defendant: if the defendant had a *desire* to shield an undocumented individual from detection, the court might find her actions to constitute harboring, even if her actions do not reflect such a desire. Thus, a defendant who has a strong moral and/or religious conviction that deportation is wrong, and a professed desire to aid undocumented individuals, could be guilty of harboring even if she announced on national television that she was providing sanctuary to certain individuals in her basement. In such a case, the crime would be the *desire* to assist and moral conviction that the law is wrong, not the conduct, or even the intent to engage in such conduct.[69]

The Seventh Circuit appears to have left open this possibility when it described a hypothetical in which an employer provides cheap housing for its undocumented employees, knowing they are in the country illegally and may be unable to secure their own housing, either because of the cost or their illegal status. This situation *would* constitute harboring, the court notes, because the act of providing a place to stay in these cases is bound up with the employer's knowledge that the employees are illegal immigrants:

---

[63] United States v. Costello, 666 F.3d 1040 (7th Cir. 2011).

[64] *Id.* at 1042.

[65] *Id.* at 1043-47.

[66] *Id.* at 1050.

[67] *Id.* at 1050. Interestingly, in United States v. You, the Ninth Circuit upheld a jury instruction requiring proof that defendants had acted with "*the purpose of* avoiding [the aliens'] detection by immigration authorities," which it equated with a *mens rea* requirement that the defendant had intended to violate immigration laws. *See* 382 F.3d 958, para. 33 (9th Cir. 2004).

[68] *Id.* at 1049-50. For example, in United States v. Zheng, a restaurant owner providing housing for undocumented employees, but also worked them over 70 hours a week, never checked their immigration records, did not pay Social Security or federal taxes for the employees, and under-reported wages, personal income and business income on tax returns. 306 F.3d 1080, 1083 (11th Cir. 2002). In United States v. Kim, the owner of a garment manufacturing business took steps to conceal undocumented workers he employed, including instructing them to obtain false documentation, to testify falsely to the INS, and to submit false I-9 forms. 193 F.3d 567, 574-75 (2d Cir. 1999). The Second Circuit's definition of harboring "encompasses conduct tending substantially to facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence." *Id.* at 574.

[69] Criminalizing the moral *conviction* that deportation is wrong, rather than the intent to conceal or actual conduct to conceal undocumented individuals, looks very much like criminalizing the *religious belief*, rather than its expression. This type of state action would run counter to the very essence of free expression protection.

> The owner is harboring these illegal aliens in the sense of taking strong measures to keep them here. Yet there may be no effort at concealment or shielding from detection . . . .It is nonetheless harboring in an appropriate sense because the illegal status of the alien is inseparable from the decision to provide housing—it is a decision to provide a refuge for an illegal alien because he's an illegal alien.[70]

The court goes on to suggest that the accused in the Costello case offer her boyfriend a place to stay without regard to his legal status, and ultimately provided him little benefit in terms of evading authorities.[71] The hypothetical employer, on the other hand, "provides an inducement" to the employees; while the employer's offer of housing may not reflect an intent to *conceal* the employees, because authorities have limited resources with which to track them down, the employer's conduct is somehow more nefarious. Perhaps more importantly, though the court does not say it directly, the employer's relationship with the employee is presumably based on the employee's illegal status, not his job skills.[72]

The court's hypothetical serves to muddy the waters considerably. It appears to add a *belief* component—not simply *mens rea*, or intent to engage in a forbidden act—to the concept of harboring. Thus, if a relative provides a place for a loved one to stay *because of a concern that he may be deported*, he could be illegally harboring, while indifference to the plight of the loved one could render the same conduct, with the same intent to provide housing for an undocumented individual, legal. Moreover, it calls into question the relationship between the employer and employee. Presumably, if the employer offered a job and housing not knowing that an employee was in the country illegally, it would not be harboring that employee. But what if the employer in the court's hypothetical could show it would have offered the job to the employees whether or not they were in the country illegally? Then would the offer of housing be harboring?

The precise boundaries around the prohibition on "encouraging" an undocumented individual to stay in the United States are similarly unclear. In *United States v. Oloyede*,[73] the Fourth Circuit appears to interpret the term broadly, as it states that encouraging does not require "bringing in, transporting, or concealing" but rather "relates to actions taken to convince the illegal alien to come to this country or to stay in this country."[74] Yet the facts of the case were particularly egregious: the defendants were attorneys who offered to assist individuals who were in the country illegally, charging them a fee to assist in the process of obtaining legal status by falsifying documents to be filed with the Immigration and Naturalization Service (INS) and lying in INS hearings. *United States v. Avila-Dominguez*[75] is similarly unhelpful, as the defendant in that case met the undocumented individuals in Mexico, assisted in arranging their transportation to an illegal border crossing point, "told them he would signal from the other side when it was safe to cross, scouted the vicinity for law enforcement officers, then called, whistled and waved" when it was safe for crossing.[76] He also provided additional support after they crossed the border

[70] *Id*. at 1045.
[71] *Id*. at 1045-1046.
[72] *Id*. at 1046.
[73] 982 F.2d 133 (4th Cir. 1992).
[74] *Id*. at 137.
[75] 610 F.2d 1266 (5th Cir. 1980).
[76] *Id*. at 1272.

for a fee.[77] Taken together, this behavior would constitute encouragement under almost any definition.

B. Employer Reporting Obligations

The Immigration Reform and Control Act of 1986 (IRCA) compels employers to verify that their employees have the legal right to work in the United States through a specific verification process. Employers perform this verification by completing a Form I-9 and following certain recordkeeping requirements established by the INA.[78] They must examine documents provided by the potential new hire and attest that the documentation provides evidence of both that person's identity and employment authorization.[79] There is a specific list of documents that may serve to prove identify, authorization, or both.[80] Under penalty of perjury, the employer must attest that it has verified these documents on part of the I-9 form.[81] Employers must keep the I-9 forms for at least three years from the date of hire or one year after the date the employment ceases, whichever is later.[82]

ICE has the power to conduct audits and inspections to ensure that employers have complied with the I-9 rules.[83] It begins the inspection process by serving of a Notice of Inspection (NOI) upon an employer.[84] The employer then has three business days from the NOI to produce Forms I-9 and other supporting documents, such as payroll information, a list of current employees, Articles of Incorporation and business licenses.[85]

E-Verify, as its name suggests, is an additional online verification system that compares information employees submit in connection with the I-9 form with information maintained by the Social Security Administration and Department of Homeland Security.[86] Some employers use E-Verify as an additional verification measure, either because they are required to by state law or because they choose to do so.[87] These employers sign a contract allowing the E-Verify Monitoring and Compliance Unit to conduct desk reviews and site visits.[88] The Monitoring and Compliance Unit tries to detect and deter employer misuse of E-Verify, and has the authority to share information with other government agencies.[89]

---

[77] *Id.*

[78] P.L. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-et. seq.).

[79] 8 U.S.C. § 1324a(b)(1)(A).

[80] 8 CFR 274a.2(b).

[81] 8 CFR 274a.2(a)(3).

[82] 8 U.S.C. § 1324a(b)(3)(B); U.S. IMMIGRATION AND CUSTOMS ENF'T, FORM I-9 INSPECTION OVERVIEW (June 26, 2013), https://www.ice.gov/factsheets/i9-inspection.

[83] U.S. IMMIGRATION AND CUSTOMS ENF'T, FORM I-9 INSPECTION OVERVIEW (June 26, 2013), https://www.ice.gov/factsheets/i9-inspection.

[84] *Id.*

[85] *Id.*

[86] DEPT OF HOMELAND §, E-VERIFY FACTS AND STATS – ARCHIVE, https://www.uscis.gov/e-verify/e-verify-facts-and-stats-archive (last visited May 21, 2017).

[87] E-Verify is mandatory in Arizona and Mississippi and "encouraged" in South Carolina. In addition, seven states (Colorado, Georgia, Missouri, Nebraska, Oklahoma, Rhode Island, and Utah) require public contractors to use E-Verify. In all of those states plus Idaho, Minnesota and North Carolina, state agencies must also participate in E-Verify. *See id.*

[88] DEPT OF HOMELAND §, E-VERIFY: MONITORING AND COMPLIANCE, https://www.uscis.gov/e-verify/employers/monitoring-and-compliance (last visited May 21, 2017).

[89] Rachel Perez, *Up Against the Wall: New Immigration Measures Impact Employers*, AKERMAN (Mar. 2, 2017), http://www.akerman.com/documents/res.asp?id=2787.

If an employer is found to have knowingly hired or continued to employ unauthorized workers after learning that such workers are not authorized to work in the U.S., the employer may face civil fines ranging from $250 to $10,000.[90] It may also be prevented from participating in future federal contracts and receiving other government benefits.[91] In some circumstances, the employer also may be subject to criminal prosecution and related criminal penalties.[92] These penalties can include fines, imprisonment, and in cases of bringing in and harboring aliens, seizure of their vehicles or property used to commit the crime.[93] There is, however, a good faith defense.[94] A worker who shows his/her employer verification documents that the employee knows to be false does not necessarily put the employer in violation of the law if the employer can establish a good faith belief in the employee's sincerity.[95]

For undocumented employees working for a corrupt employer, the employment verification system can create a dangerous situation in which the employer can threaten to challenge the employee's immigration status if he reports the employer for illegal or dangerous working conditions. In one recent example, a construction company is reported to have alerted ICE to the unauthorized status of one of its employees just after that employee requested workers' compensation for a serious injury he suffered on the job.[96] The employee, who had been living in the United States for seven years with his wife and five children, three of whom were born in the United States, was immediately arrested and held for possible deportation.[97]

III. IS THERE A CORPORATE RIGHT TO OFFER SANCTUARY?

Prior to the passage of the Religious Freedom Restoration Act (RFRA) and *Hobby Lobby*, any religious exemption from immigration laws would have been based on the First Amendment and the Free Exercise clause.[98] Although, as we will discuss, *Hobby Lobby* changed the landscape of religious freedom cases generally,[99] the significant history of immigration and sanctuary cases may nonetheless be extremely relevant to an analysis of a possible corporate sanctuary case. Existing case law is likely to provide the basis for determining the government's interest in the administration of immigration laws. Moreover, because the precise application and scope of the *Hobby Lobby*/RFRA doctrine has yet to be determined, lower courts may look to existing free exercise cases to answer questions of first impression.

In this part, we consider first existing jurisprudence under the First Amendment, particularly cases addressing immigration and sanctuary, and ask how a corporate sanctuary

---

[90] INA § 274A(e)(4)(i)-(iii); 8 U.S.C. § 1324a(e)(4)(A)(i)-(iii).

[91] U.S. IMMIGRATION AND CUSTOMS ENF'T, FORM I-9 INSPECTION OVERVIEW (June 26, 2013), https://www.ice.gov/factsheets/i9-inspection.

[92] INA § 274A(a)(1)(a) or (a)(2), 8 U.S.C. § 1324a(a)(1)(a) or (a)(2).

[93] INA § 274A(f); 8 U.S.C. § 1324a(f); 8 U.S.C. § 1324(a)(1)(B)(i)-(iv); 8 U.S.C. § 1324(b)(1)-(2).

[94] 8 CFR §274a.4.

[95] *Id.*

[96] Shannon Dooling, *An ICE Arrest After a Workers Comp Meeting Has Lawyers Questioning if it Was Retaliation*, WBUR (May 17, 2017), http://www.wbur.org/news/2017/05/17/ice-arrest-workers-comp.

[97] *See id.* Immigration attorneys suggest that this is a change from previous administrations. "'Before, I wouldn't have really had a concern telling someone, 'Yes, you should go ahead to report something like this [worker's compensation claim] and assert your rights,'" a lawyer reports. "'But now we have this added fear that, could an employer in this kind of case just, you know, use someone's immigration situation against them?'" *Id.*

[98] *See infra* Part III.A.

[99] *See infra* notes 133-138 and accompanying text.

claim would be decided under this precedent. Then we turn to RFRA, *Hobby Lobby*, and the potential application of the new corporate religious freedom doctrine to a sanctuary case.

A. Free Exercise of Religion and Sanctuary

The First Amendment to the Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[100] As with most constitutional doctrines, the Court's interpretation of this clause has evolved and meandered over the decades, and even on a case-by-case basis.[101] In the 1960s and 70s, the Court's jurisprudence solidified around a pair of cases, *Sherbert v. Verner*[102] and *Wisconsin v. Yoder*,[103] that applied a strict scrutiny test, in which the court would determine if a government action substantially burdened the claimant's religious freedom, and if so, whether that burden was necessary to serve a compelling government interest.[104]

Though *Sherbert* and *Yoder* accorded significant deference to the religious convictions of the claimants,[105] two subsequent cases narrowed the scope of free exercise protection significantly. In *United States v. Lee*,[106] the Court found that an Amish employer could be required to pay social security taxes even though it violated his religion, because of the government's overriding interest in establishing the social security system and the likelihood that establishing an exception in the Social Security context could later be applied in to income taxes.[107]

---

[100] U.S. CONST. amend. 1.

[101] *See, e.g.*, Mark W. Cordes, *The First Amendment and Religion After Hosanna-Tabor*, 41 HASTINGS CONST. L. Q. 299, 299-314 (2014) (detailing history of free exercise and establishment cases with an emphasis on the shifting principle of neutrality); Victoria J. Avalon, *The Lazarus Effect: Could Florida's Religious Freedom Restoration Act Resurrect Ecclesiastical Sanctuary?*, 30 STETSON L. REV. 663, 678-689 (2000) (summarizing the evolution of Free Exercise jurisprudence and applying to Ninth Circuit sanctuary case United State v. Aguilar); Mark Strasser, *Narrow Tailoring, Compelling Interests, and Free Exercise: On ACA, RFRA and Predictability*, 53 U. LOUISVILLE L. REV. 467, 468-490 (2016) (summarizing Free Exercise jurisprudence prior to *Hobby Lobby* decision). *See also* Julie Magid and Jamie Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191, 204-207 (2005) (providing concise history of free exercise test prior to *Smith* and describing hybrid claims that survive Smith).

[102] 374 U.S. 398 (1963).

[103] 406 U.S. 205 (1972).

[104] The Court in *Hobby Lobby* refers to this as a "balancing test." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014). Marci Hamilton argues that *Yoder* was the outlier in free exercise jurisprudence, and that "[r]outinely, the Court had declined to pick up strict scrutiny." Marci A. Hamilton, *Religious Accommodation in the Age of Civil Rights: The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 129, 135 (2015).

[105] In *Sherbert*, the claimant was a Seventh-Day Adventist who was fired for not working on a Saturday, which would have required her to violate her religious convictions. She subsequently was denied unemployment benefits because she had been terminated from her previous position. The Court concluded that this denial of benefits represented an unlawful burden on her religious beliefs, and that the state had not offered a compelling interest to justify the burden. 374 U.S. 398, 399, 403-404, 406-407. In *Yoder*, the claimants were Amish parents who argued that sending their children to public school after eighth grade would violate their religious beliefs. 406 U.S. 205, 207. Though acknowledging the state's substantial interest in education, the Court found that imposing the state compulsory education law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id* at 219.

[106] 455 U.S. 252 (1982).

[107] *Id.* at 258-260.

> The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. . . . Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.[108]

In an even more divisive case, *Employment Division v Smith*,[109] the court distinguished *Sherbert* and rejected the compelling interest standard completely. In a decisive opinion, Justice Antonin Scalia wrote, "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the state interest is 'compelling' . . . contradicts both constitutional tradition and common sense."[110] Instead, the *Smith* decision held that the rational basis test, rather than any form of heightened scrutiny, would be applied in the case of a neutral, generally applicable law.[111] This decision provoked significant controversy, and ultimately led to the passage of RFRA.[112]

Prior to *Smith*, a handful of federal decisions, arising out of the sanctuary movement of the 1980s, applied the compelling interest test and the principles of *Sherbert* and *Yoder* to individuals expressing a religious commitment to providing sanctuary or assistance to undocumented individuals. In *United States v. Elder*,[113] John Elder operated a shelter intended to provide "sanctuary,"—in a physical and biblical sense—to individuals fleeing violence and unrest in Central America.[114] After providing a place for three undocumented individuals to stay, Elder transported them to a bus station.[115] He was subsequently arrested for unlawful transportation under 8 U.S.C. sec. 1324(a)(2).[116] Accepting his claim that he had provided transportation out of his sincere religious beliefs, the Court concluded without difficulty that the government had demonstrated a compelling interest in protecting "a congressionally-sanctioned immigration and naturalization system designed to maintain the integrity of this Nation's borders."[117] The court went on to hold that the restriction was the least burdensome method that could be used to meet the government's objective, stating, "[T]he Government must retain the sole authority to determine who may cross the borders or travel further within the country. If the Government attempted to accommodate into its immigration policy Elder's religious beliefs, the Government's efforts would result in no immigration policy at all."[118]

---

[108] *Id.* at 260.
[109] 494 U.S. 872 (1990).
[110] *Id.* at 885.
[111] *See* Cordes, *supra* note 101, at 313-314; Smith, 494 U.S. at 885.
[112] *See* note 133; Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 439-440 (1994) (describing the passage and goal of RFRA). *See also* City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (noting RFRA was passed in "direct response" to Smith). The stated declaration of purpose of RFRA was to "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (1994).
[113] 601 F. Supp. 1574 (S.D. Tex. 1985).
[114] *Id.* at 1576.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 1578.
[118] *Id.* at 1579.

The Fifth Circuit upheld this decision and a similar case in *United States v. Merkt*.[119] Though *Elder* applied *Yoder*, in *Merkt* the Fifth Circuit questioned whether a compelling interest balancing test should be applied to a case involving "public safety, peace, and order."[120] Though the court appeared willing to reject this standard in the public safety context, it ultimately concluded it would apply *Yoder* out of an abundance of caution.

The Merkt court, which made no bones about its lack of sympathy for the accused, was clearly bothered by the argument that a religious objection such as the one presented could offer a challenge to a criminal statute. In a strongly worded opinion, the court found "the interest in uniform application of a facially neutral criminal law is acute."[121] It also called into question whether enforcement of immigration laws actually "unduly burden[ed]" the free exercise of religion of the appellants, Elder and Stacey Lynn Merkt, suggesting that they could have found other, legal means to support undocumented individuals.[122] Then, in a stinging rejection of the defense, which could well be brought up in future sanctuary cases, the court concluded:

> 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.[123]

The reasoning in *Merkt* was applied and extended by the Ninth Circuit in *United States v. Aguilar*,[124] a case involving a number of individuals convicted of smuggling undocumented people into the United States.[125] Dismissing the notion that evidence was even *necessary* to prove the government's interest, the court described the right to maintain border security and exclude individuals as a "fundamental sovereign attribute."[126] The court also rejected the argument that it should consider crafting a limited exception for the religious beliefs of the convicted individuals, suggesting that such an exception would seriously undermine immigration policy, due to the plethora of similarly-situated religious groups and individuals.[127]

Finally, in a footnote that foreshadowed the *Hobby Lobby* decision, the Ninth Circuit speculated that the appellants likely wished the court would view their case as limited to just them as individuals, not as part of a much larger religious group.[128] This, the court stated, was unreasonable. "Courts cannot possibly grant an exemption to certain members of a group while

---

[119] 794 F.2d 950, 953 (5th Cir. 1986) (consolidating Elder's case with that of a volunteer from his sanctuary, Stacey Lynn Merkt).
[120] *Id.* at 955.
[121] *Id.* at 956.
[122] The Court suggested that Elder and Merkt, by taking it upon themselves to proactively provide sanctuary and transportation, rather than legal means such as making donations or helping to file legal petitions, were "voluntarily" assuming the burden on their religion, and it was not imposed on them by the government. *Id.*
[123] *Id.* at 957.
[124] 883 F.2d 662 (9th Cir. 1989).
[125] "Appellants were "convicted of masterminding and running a modern-day underground railroad that smuggled Central American natives across the Mexican border with Arizona." *Id.* at 666.
[126] *Id.* at 695.
[127] *Id.* at 696.
[128] *Id.* at 696, fn. 32.

denying it to others of the same group."[129] In fact, RFRA would require future courts to consider the compelling state interest and least restrictive means tests *as applied to the individual*.[130]

Though these are just a few decisions applying the *Yoder* compelling interest framework to a sanctuary claim, they are by no means equivocal in their opinions. Applying *Smith's* weaker rational basis test would render free exercise claims in the sanctuary context all but fruitless. This alone should make any individual or corporation pause before offering sanctuary. When combined with broad definitions of harboring, one could see a tough challenge for corporations that offered employees nothing more than a place to stay, even if it did not conceal them from authorities, or provided undocumented individuals with transportation, even if it made no attempt to evade immigration authorities. The question then becomes how such a sanctuary case would be decided after *Hobby Lobby*, and whether the broad deference granted to religious claimants under RFRA changes the existing sanctuary landscape.

B. *Hobby Lobby*, RFRA, and the Corporate Right to Religious Freedom

As noted above, in *Smith*, the Supreme Court held that a person's religious beliefs do not exempt her from neutral laws of general applicability.[131] Such laws do not have to withstand the strict scrutiny standard because that requirement would create "a private right to ignore generally applicable laws."[132] In so holding, the Supreme Court dramatically narrowed the circumstances under which a person might claim exemption from a law based on the right of free exercise guaranteed by the First Amendment.

In the wake of *Smith*, Congress passed RFRA in 1993.[133] RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "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."[134]

The Supreme Court upheld RFRA in the context of federal statutes, and as applied to nonprofit corporations, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[135] The phrase "exercise of religion," in turn, was defined by the Religious Land Use and Institutionalized Persons Act (RLUIPA), which amended RFRA, to include any exercise of religion "whether or not compelled by, or central to, a system of religious belief."[136] This, in turn, was to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[137] Importantly, this definition omitted any reference to the First Amendment, effecting a separation from First Amendment case law that Justice Alito later noted in his majority opinion in *Hobby Lobby*.[138]

In *Hobby Lobby*, the Supreme Court relied on RFRA in its ruling that closely held for-profit corporations may be exempt from generally applicable rules mandated by the Affordable

---

[129] *Id.*
[130] *See infra* note 219 and accompanying text.
[131] 494 U.S. 872 (1990).
[132] *Id.* at 886.
[133] *See supra* note 91 and accompanying text.
[134] 42 U.S.C. §§2000bb-1(a), (b).
[135] 546 U.S. 418 (2006).
[136] 42 U.S. Code § 2000cc–5(7)(A).
[137] 42 U.S. Code § 2000cc-3(g).
[138] 134 S.Ct. 2751, 2762, 2773 (2014)

Care Act (ACA) that substantially burden their religious practices.[139] The ACA required employers to pay for preventative care for women.[140] Congress authorized a division of Health and Human Services to determine the extent of that care.[141] The resulting guidelines required employers to provide "coverage, without cost sharing" for all contraceptive methods approved by the Food and Drug Administration.[142] Four of those methods, the Court noted, "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus."[143]

The *Hobby Lobby* case was brought by David Green and his family, which own the Hobby Lobby chain of arts and crafts stores and Mardel, a Christian bookstore chain. The Greens contribute to Christian missionaries and "buy hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior.'"[144] Their case was consolidated with another case brought by the Mennonite Hahn family, owners of the Conestoga Wood Specialties furniture company.[145] The Green and Hahn families believe that life begins at the time of conception.[146] They objected to providing the four forms of birth control mandated by the ACA's coverage guidelines that they believed to be abortifacents.[147] The Hahn and Green families argued that the ACA mandate should not apply to them because of both RFRA and their free exercise rights under the First Amendment. Because the Court ruled that the mandate was unlawful under RFRA, it did not reach their First Amendment claims.[148]

The Court applied RFRA's mandate that any government action imposing a substantial burden on religious exercise must serve a compelling interest and be the least restrictive means of satisfying that interest.[149] It assumed, without extensive discussion, that the mandate to provide contraceptive coverage served a compelling government interest.[150] It did not find, however, that the mandate was the least restrictive means of serving that interest.[151] Noting that the Department of Health and Human Services (HHS) had created an alternative system for religious nonprofits with religious objections to the contraceptive mandate, the Court concluded that this alternative system "achieves all of the Government's aims while providing greater respect for religious liberty."[152] Because the contraceptive mandate was not the least restrictive means of serving the government's compelling interest, RFRA excused the respondents from compliance with that mandate.[153]

In the majority opinion, Justice Alito emphasized the "very broad protection for religious liberty" that RFRA was designed to provide.[154] One of his justifications for recognizing the rights of for-profit corporations to exercise religion is that "furthering their religious freedom

---

[139] 134 S.Ct. 2751 (2014).
[140] 42 U.S.C. § 300gg-13(a)(4).
[141] 77 Fed.Reg. 8725-8726 (2012).
[142] 77 Fed.Reg. 8725 (2012).
[143] 134 S.Ct. 2751, 2762-2763.
[144] *Id.* at 2766.
[145] *Id.* at 2764.
[146] *Id.* at 2764, 2766.
[147] *Id.* at 2759, 2766.
[148] *Id.* at 1785.
[149] *Id.* at 2759.
[150] *Id.* at 2780.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 2759-2760.
[154] *Id.* at 2767.

also furthers individual religious freedom."[155] Interestingly, he noted that RFRA allowed religious freedom for a broad range of plaintiffs, and not just those who had brought free exercise claims before *Smith*. He illustrated this point by hypothesizing that a "resident noncitizen" would have rights under RFRA even if they had not litigated earlier: "[W]e are not aware of any pre-*Smith* case in which this Court entertained a free-exercise claim brought by a resident noncitizen. Are such persons also beyond RFRA's protective reach simply because the Court never addressed their rights before *Smith*?"[156]

The Hobby Lobby case did not recognize a right of free exercise for all corporations. It did not, however, rule out that possibility. In response to HHS's objections that it is difficult to determine the sincerely held beliefs of publicly traded corporations such as IBM or General Electric, the Court observed that such corporations were not at issue in the case before it.[157] In addition, the Court noted, "it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims."[158] While the *Hobby Lobby* case concerns the closely-held corporations owned by the Hahn and Green families, the Supreme Court did not rule that only such corporations may use RFRA in the future.

The Court took a broad view of the respondents' religious convictions. Although HHS urged the Court to consider the plausibility of the Hahn and Green families' claims that providing coverage would be inconsistent with their religious beliefs, the Court did not do so.[159] The Court refused to engage in a determination of whether the Hahn and Green families' religious beliefs were "mistaken or insubstantial." [160] In so doing, the Court affirmed that parties need only establish that their religious beliefs are sincere, something the HHS had not challenged in the *Hobby Lobby* case.[161]

Having established that the contraceptive mandate would substantially burden the Hahn and Green families' exercise of religion, and that the government had a compelling interest in the provision of health care, the Court determined that there were less restrictive means of achieving that interest. It framed the "least restrictive" analysis by comparing the provision of health care coverage to the tax system. It recalled the *Lee* case, where the Court denied a free-exercise challenge to the obligation to pay social security taxes. "[I]f the issue in Lee were analyzed under the RFRA framework," the Court noted, "the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes."[162] Allowing people to assert religious objections to paying any portion of their taxes would lead to "chaos."[163]

In sum, the *Hobby Lobby* case established a relatively broad approach to three of the four elements of RFRA: (1) the substantial burden by a federal law on (2) the exercise of religion unless (3) the burden serves a compelling interest. With regard to the fourth element, that the law at issue be the least restrictive means of serving the compelling government interest, the Court adopted a more reserved approach. It may have done so in order to deter a flood of litigants asserting RFRA exemptions to other general laws.

---

[155] *Id.* at 2769.
[156] *Id.* at 2773.
[157] *Id.* at 2774.
[158] *Id.*
[159] *Id.* at 2778.
[160] *Id.* at 2779.
[161] *Id.*
[162] *Id.* at 2784.
[163] *Id.*

C. Using *Hobby Lobby* and RFRA to Provide Immigrant Sanctuary

In *Hobby Lobby*, two relatively conservative Christian families used RFRA to exempt their corporations from providing certain kinds of birth control to their employees. In theory, however, RFRA is neutral as to the kind of religious exercise it protects. Could RFRA, as interpreted in *Hobby Lobby*, be used to justify a corporate practice of providing sanctuary for immigrants, in response to an increasingly draconian immigration policy, if doing so is part of the corporation's religious beliefs? Is sauce for the Evangelical Christian goose also sauce for the more liberal and progressive gander? This part explores how such a RFRA-based argument might work in the context of a corporation's religious sanctuary claim.

1. Corporate Sanctuary Can Take Several Forms

Given the increased enforcement of immigration laws and the contemporaneous growth of the sanctuary movement since the 2016 election, some employers may want to offer sanctuary through their business operations. Such sanctuary could take a variety of forms.

i. Sanctuary Taxis.

One example is the taxicab company owned by Victor Pizarro in Plattsburgh, NY.[164] In January 2017, Mr. Pizarro began to receive requests from passengers to be taken to a specific road near the border between the U.S. and Canada. Pizarro notified U.S. Customs and Border Protection agents when he received these requests so that the agents could meet the cab and check his passengers' documentation. In one instance, however, he drove a mother and her 15-year old son to the border after they had told him that their papers were in order. At the border, the mother was detained and deported because her visa had expired, and Pizarro was told that the son would likely be put in foster care. After that incident, Pizarro changed his practices. He instructed his drivers to help get passengers safely across the border, and to try to ensure that Canadian officials are waiting if the passengers do not have valid visas. "But as far as ripping families apart, we're not in that business anymore," he told a reporter. "It happened once, and that's it. It won't happen again with us."

Pizarro's decision to help passengers safely reach the Canadian border was motivated by President Trump's increased focus on immigrants and Muslims. The administration's change in policy had a direct effect on this part of his business practice. Other taxicab drivers in the same geographic area express similar motivations for helping immigrants cross to Canada outside of the U.S. Border Control process.[165] One driver in the same town who had voted for President Trump explained to a journalist that the immigrants he was helping "are human beings no matter where they came from […] It's not like they're aliens from another world or something."

If these passengers are illegal immigrants who fear the recently increased threat of deportation, then it is likely that these drivers are breaking the law. The drivers may be accused

---

[164] Ashley Cleek, *A Taxi Driver's Mission To Help Refugees Reach The Canadian Border*, NPR (Apr. 12, 2017, 4:32 pm) http://www.npr.org/2017/04/12/522991849/one-taxi-drivers-mission-to-help-refugees-reach-the-canadian-border.

[165] Melissa Fares, *Trump-Voting Taxi Driver Delivers Migrants to Canada Border*, GLOBE AND MAIL (May 10, 2017, 6:22 pm) http://www.theglobeandmail.com/news/world/trump-voting-cabbie-drives-migrants-to-canada-border/article34944219/

of violating Section 274 of INA, which makes it a crime to "conceal, harbor, or shield from detection in any place, including any building or *means of transportation*, any alien who has come to, entered, or remains in the United States in violation of law."[166] By using their taxicabs as a "means of transportation" to help "conceal, harbor or shield" the "alien" passengers from detection by Border Control, the drivers appear to doing what Section 274 prohibits.

If Pizarro, or a similarly situated taxicab company owner, claimed that his exercise of religion compelled him to help provide sanctuary to these passengers, would he have a valid defense under RFRA to a criminal charge under Section 274 or any other immigration law that would otherwise make their practice unlawful? If Pizarro describes the act of helping immigrants to reach the Canadian border safely as part of his company's exercise of religion, and if he can establish that the INA is not the least restrictive means of achieving a compelling federal interest, he may have a colorable RFRA claim. He would be unlikely to succeed on a free exercise claim under the First Amendment, however, given the case law described in Section III(A).

ii. Sanctuary Restaurants.

A second example involves the service industry, which has an unusually high percentage of unauthorized workers.[167] Russell Street Deli, in Detroit, Michigan, found itself at the center of some unwanted attention when an AP News article described it as part of the Sanctuary Restaurant Movement in January 2017.[168] Co-owner Ben Hall has stated that sanctuary restaurants do not harbor undocumented immigrants.[169] Instead, Rusell Street Deli, like other sanctuary restaurants, posts signs alerting their customers to the fact that they welcome all people as customers and workers regardless of their national origin.[170]

Hypothetically, however, we can imagine what might happen if a restaurant chooses not to verify the employment authorization of its workers. Since so many unauthorized immigrants work in the service industry, and there is such high turnover in the hospitality field (71.2% in 2015, compared with 45.9% in the private sector), it is logical to conclude that some restaurants fail to verify work authorization consistently.[171] Our hypothetical restaurant most likely hires lower-wage hourly employees. In reviewing the documentation required by the I-9 form, it may rely on the word of the employee without doing extensive verification or using the E-Verify system, which is only mandatory in a few states.[172] Michigan is not one of them. As a result, the restaurant may have some undocumented workers on its staff without knowingly falsifying any documents or recruiting illegal employees.

---

[166] INA § 274(a); 8 U.S.C. §1324(a)(1)(A)(ii)-(iv)(emphasis added).

[167] According to a November 2016 report, in 2014, 32% of unauthorized immigrants worked in the service industry compared with 17% of U.S.-born workers. PEW RESEARCH CTR., SIZE OF U.S. UNAUTHORIZED WORKFORCE STABLE AFTER GREAT DEPRESSION (Nov. 3, 2016), http://www.pewhispanic.org/2016/11/03/occupations-of-unauthorized-immigrant-workers/.

[168] Sophia Tareen, *Restaurants: The Next Front for the Immigration Debate?* APNEWS (Jan. 25, 2017), https://apnews.com/14f3e37bf9fc45c4a8b79bca3cc6d2fe.

[169] Brenna Houck, *Sanctuary Restaurants Are Redefining the Meaning of Hospitality*, EATER (Mar 22, 2017, 4:02 pm), https://www.eater.com/2017/3/22/15026904/sanctuary-restaurant.

[170] *Id.*

[171] Talia Ralph, *How Restaurants Hire Undocumented Workers*, EATER (Feb. 2, 2017 10:17 am) https://www.eater.com/2017/2/28/14749392/undocumented-workers-restaurant-illegal

[172] DEPT' OF HOMELAND §, E-VERIFY FACTS AND STATS – ARCHIVE, https://www.uscis.gov/e-verify/e-verify-facts-and-stats-archive (last visited May 21, 2017).

A sanctuary restaurant that does not complete the I-9 verification process as required faces the threat of civil penalties, which increase sharply with subsequent offenses.[173] The civil penalties for knowingly hiring or knowingly continuing to employ an unauthorized worker range from more than $500 for a first offense to more than $20,000 for a third or subsequent offense. Criminal penalties may also attach. Sanctions for "engaging in a pattern or practice of hiring" unauthorized workers include fines of up to $3,000 per worker and up to six months of prison time.[174]

The potential price of flawed I-9 paperwork, in particular, has increased dramatically. In August 2016, the Department of Justice announced an increase in all penalties associated with I-9 compliance.[175] The penalty for errors in paperwork increased ninety-six percent, with the maximum penalty per individual jumping from $1,100 to $2,156.[176] With the potential cost of noncompliance soaring, employers may pay closer attention to the way in which they complete the I-9 process. Alternatively, they may find it increasingly worthwhile to seek a religious exemption from such compliance through RFRA.

In a RFRA-based exemption claim, a sanctuary restaurant could assert that it is offering sanctuary in the form of paid work to unauthorized workers, thereby allowing those workers to afford food and shelter. It could assert further that in doing so, it is providing sanctuary as part of its exercise of religion. Like the sanctuary taxicab drivers, its chances of success depend in large part on its ability to establish that the I-9 requirements are not the least restrictive means of achieving a compelling government interest.

iii. Sanctuary Software Companies.

Technology companies have been among the most vocal opponents of the Trump Administration's Executive Orders restricting immigration and travel from several predominantly Muslim countries. In response to the January 2017 Executive Order, dozens of companies including Microsoft, Facebook, LinkedIn, Apple and Uber expressed their opposition in various forms.[177] After the Trump Administration issued a second Executive Order limiting travel and immigration in March 2017, 162 technology companies signed an amicus brief in support of a legal challenge to that order.[178]

A company may be affected by these executive orders in several ways. It may, for example, have employees who hold visas allowing them to work in the United States, but whose family members not similarly authorized to work. For example, Murtadha Al-Tameemi is an Iraq-born software engineer working in Facebook's Seattle office.[179] His family fled the violence

---

[173] DEPT' OF HOMELAND SEC. PENALTIES, https://www.uscis.gov/i-9-central/penalties (last visited May 21, 2017).
[174] *Id.*
[175] FED. REG., CIVIL MONETARY ADJUSTMENTS FOR INFLATION (July 1, 2016), https://www.federalregister.gov/documents/2016/07/01/2016-15673/civil-monetary-penalty-adjustments-for-inflation#h-13.
[176] *Id.*; *Civil Penalties Nearly Double for Form I-9 Violations and Significantly Increase for Other Immigration-Related Violations*; NAT'L L. REV. (Aug 1, 2016).
[177] Frederic Lardinois, Kate Conger, Matthew Lynley and Darrell Etherington, Tech Reacts to Trump's Immigration Ban, TECHCRUNCH (Jan. 28, 2017) https://techcrunch.com/2017/01/28/tech-companies-react-to-immigration-ban/
[178] Brief of Technology Companies as Amici Curiae in Support of Appellees, Int'l Assistance Project v. Trump, No. 17-1351 (4th Cir. Apr. 19, 2017).
[179] Hannah Allam, *How Trump's Immigration Order Affects One Iraqi Family*, MCCLATCHY: DC BUREAU (Jan. 27, 2017), http://www.mcclatchydc.com/news/politics-government/white-house/article129235889.html.

in Iraq and was resettled in Vancouver, three hours away, by a church group.[180] Al-Tameemi visited his mother and younger brother there regularly before the first Executive Order issued.[181] Afterward, however, he feared that if he traveled to Canada, he would not be let back into the United States.[182]

Immigrant employees may be affected in other ways as well. Imagine an Iraqi software engineer who has a visa, but whose husband and 17-year old son do not. Enforcement of the executive orders targeting Iraqi and certain other immigrants would make it increasingly difficult for her family to sustain itself, and for her son to get an education, in the United States. This, in turn, could profoundly affect her and other such employees' willingness to work for the company.

In light of these potential impacts, a hypothetical software company could adopt a religious interest in providing sanctuary to immigrant employees. If ICE requested information about an engineer's address and family, for example, the software company might choose not to comply with that request. It may decide instead that it is more important to shelter employees and their families from detection by ICE than to comply with the letter of Section 274. That law makes it a crime to "harbor, or shield from detection in any place … any alien who has come to, entered, or remains in the United States in violation of law."[183] A court might easily conclude that the company's refusal to provide information pertaining to a potential immigration violation is exactly that kind of "harboring" that Section 274 prohibits.

Would the software company have a RFRA defense in this case? As with the taxicab company and the restaurant, the company would need to establish first that its refusal to provide such information is a form of sanctuary that is part of its exercise of religion. It would then need to establish that Section 274 substantially burdens that exercise and that the law is not the least restrictive means of achieving a compelling government interest. Whether it could do so depends in large part on whether courts are willing to hold that not all immigration law, as currently formulated, is carefully designed to serve important national objectives.

2. Using RFRA to Secure Corporate Sanctuary for Immigrants

As noted above, in order to succeed on a RFRA claim, a party must show that a federal law "substantially burdens" the party's "exercise of religion."[184] The government, in order to defeat the claim, must show that the law in question "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[185]

A corporation wishing to provide sanctuary to immigrants, therefore, needs to establish both that (1) the immigration law substantially burdens its provision of sanctuary and (2) the provision of sanctuary is part of its exercise of religion. As discussed below, neither of these will be especially difficult to prove. The more challenging aspect of the RFRA claim concerns strict scrutiny of the immigration law itself. The corporation must prove either that the immigration law at issue does not further a compelling interest or that the law is not the least

[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] INA § 274(a); 8 U.S.C. §1324(a)(1)(A)(ii)-(iv).
[184] 42 U.S.C. §§2000bb-1(a), (b).
[185] *Id.*

restrictive means of furthering that interest. We address the likely merits of each potential argument below.

i) Providing Sanctuary May Be Framed as an Exercise of Religion.

Whether a corporation provides sanctuary for religious or secular reasons is an important threshold question. Many employers may wish to provide sanctuary in one form or another for their employees, customers, or associates in some way without invoking any religious motivation at all. The Sanctuary Restaurant movement, for example, discloses no religious affiliation on its website.[186] Employers may assert a religious motivation for providing sanctuary easily and genuinely. As described in Part I above, the provision of sanctuary is well established as a religious practice in several faiths. In order to claim a religious basis for providing sanctuary, the case law suggests that an employer needs to do relatively little beyond stating one. In *Hobby Lobby*, for example, the Court appeared to be satisfied with the Hahns' "Vision and Values Statement" and its "board-adopted 'Statement on the Sanctity of Human Life'" as evidence of their religious belief.[187] The Court did not question the sincerity of the Hahns' statements in these documents, nor did it consider any alternative rationale the Hahns may have had for adopting religious rhetoric in their corporate documents. It would not be burdensome, therefore, for a corporation considering a RFRA claim to establish a religious motivation for providing sanctuary to immigrants. It may be as simple a matter as drafting a statement of religious concern for sanctuary and ensuring that the board of directors adopts it.

ii) Immigration Laws Substantially Burden This Religious Exercise.

Employers can argue that INA or IRCA "substantially burden" their provision of sanctuary in different ways depending on their circumstances. The sanctuary taxicabs may argue that their practice of safely transporting unauthorized immigrants to the Canadian border is sharply limited by Section 274, which tends to criminalize the practice. The sanctuary restaurants may argue that their refusal to verify their applicants' work authorization status, which they may characterize as a religiously-motivated provision of sanctuary, is rendered all but impossible by the assessment of increasing civil and criminal penalties. As businesses with relatively low profit margins, as a general rule, such restaurants are especially ill equipped to bear the financial and penal consequences of I-9 rule enforcement. Finally, sanctuary software companies may claim that their refusal to comply with ICE investigations of unauthorized immigrants substantially burdens their own provision of sanctuary to employees and their families.

iii) Immigration Laws May Further A Compelling Interest.

RFRA establishes that the government may only substantially burden a person's exercise of religion if it proves that application of the burden "(1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest."[188] In applying RFRA, then, a court should analyze whether the

[186] *See generally* www.sanctuaryrestaurants.org (last visited May 18, 2017).
[187] Hobby Lobby, 134 S. Ct. at 2764.
[188] 42 U.S.C. §§2000bb-1(b).

challenged law's burden on religious freedom furthers a compelling governmental interest, and if so, whether the regulation in question is the least restrictive means of furthering that interest.

There are at least three sets of immigration laws at issue in the current debate over immigration control. The first set stems from the IRCA and includes the requirement to verify employment through the I-9 process.[189] The second is the INA, which makes it a crime to "conceal, harbor, or shield from detection in any place, including any building or means of transportation, any alien who has come to, entered, or remains in the United States in violation of law."[190] A third type of law is the kind of immigration control law typified by the executive orders issued in January and March 2017. These limit entry to and from the United States from certain countries and for certain individuals. While employers cannot enforce or fail to enforce such laws directly, they are substantially affected by their terms to the extent that the employers have hired or are people subject to the immigration control laws. The increasingly restrictive atmosphere exacerbated by these laws may limits employers' ability to attract and retain talented immigrant workers.

Whether these laws, as applied to our hypothetical sanctuary claimants, further a compelling government interest is a challenging legal question. As a historical matter, the Supreme Court has viewed immigration control as essential to national security.[191] As the *Elder* court observed, "[i]n discussing the importance of United States' immigration laws, the Supreme Court has repeatedly emphasized the importance which sovereign nations place upon controlling entry through their borders."[192] The Court has deferred to Congress with regard to immigration controls, noting in *Fiallo v. Bell* that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.[193] In a RFRA-based debate over corporate sanctuary, presumably, the government would argue that each of the immigration laws discussed here further the compelling government interest of protecting our borders from foreign threats.

Much of the case law in which the Court made these observations, however, comes from an era predating the development of many of the most serious current international threats. *Elder* was decided in 1985 and *Fiallo* was decided in 1977, well before the advent of bioterrorism, hacking, or any of the other technology-based threats to global security. Forty years after *Fiallo*, it is reasonable to ask whether the greatest threats to national security can still be controlled by immigration law.[194] Businesses and governments may have more to fear now from cyberthreats, hacking and phishing than from unauthorized immigrants, the vast majority of whom pose no actual threat to their communities or the United States in general. Scholars have pointed out not only the divergence between recent immigration policies and current national security threats, but also the moral and reputational consequences of implementing immigration controls that tend to promote ethnic discrimination.[195]

---

[189] *See supra* discussion at Section II.A.

[190] 8 U.S.C. §1324(a)(1)(A)(ii)-(iv).

[191] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (noting that immigration controls are "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers a power to be exercised exclusively by the political branches of government....").

[192] 601 F. Supp. 1574, 1578 (S.D. Tex. 1985).

[193] Fiallo v. Bell, 430 U.S. 787, 792 (1977).

[194] *See* Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?* 66 EMORY L.J. 669 (2017); *cf.* Arthur L. Rizer III, *The Ever-Changing Bogeyman: How Fear Has Driven Immigration Law and Policy*, 77 LA. L. REV. 243 (2016) (noting appropriate connection between immigration law and national security).

[195] *See, e.g.*, Wadhia, *supra* note 194, at 684-687.

iv) Current Immigration Laws May Not Be The Least Restrictive Means.

Even if current immigration laws further a compelling government interest, it is not clear that they are the least restrictive means of doing so. There is, at a minimum, a legitimate difference of opinion as to whether more recent immigration control measures are an effective means of improving national security at all. Scholars have argued that the anti-terrorism provisions of INA, for example, are too broad to effectively protect national security.[196] Others have argued that the investor visa program is too lax to promote national security.[197] National security might be more effectively addressed through a comprehensive reform of cybersecurity measures, others suggest.[198]

There is also a questionable link between the recent executive orders on immigration and the goals they claim to promote. In February 2017, Judge Leonie Brinkema of the Eastern District of Virginia granted the Commonwealth of Virginia's motion for a preliminary injunction against President Trump's executive order curtailing immigration from several predominantly Muslim countries.[199] President Trump had signed this order on Jaunary 27, 2017, shortly after taking office.[200] In her decision, Judge Brinkema noted that "the 'specific sequence of events' leading to the adoption of the order bolsters [Virginia]'s argument that the order was not motivated by rational national security concerns."[201] Her determination that Virginia was likely to succeed on its claims that the order violated both the First and Fifth Amendments rested on this "sequence of events" as well as what she called the "dearth of evidence indicating a national security purpose" in issuing the order.[202] Although the Trump Administration later revised the order, this decision underscores the fact that federal immigration orders may no longer be based on the kind of central security concerns that animated the decision in *Aguilar*.

Similarly, the Trump Administration's second executive order restricting travel to and from predominantly Muslim countries met with significant resistance in part because it did not serve its stated aim. In the amicus brief opposing that order signed by 162 technology companies, the amici noted that although the second order's "express aim is to protect the Nation from terrorist activities by foreign nationals," the provisions of the order do not serve that interest directly: "Yet the ban applies to literally *millions* of people who could not plausibly be foreign terrorists: hundreds of thousands of students, employees, and family members of citizens who have been previously admitted to the United States, and countless peaceful individuals who are citizens of or born in the targeted countries."[203]

When applied to our individual claimants, the government's least restrictive means may also be on shaky ground. If our sanctuary taxi company was accused of transporting or harboring

---

[196] Jared Hatch, *Requiring a Nexus to National Security: Immigration, "Terrorist Activities," and Statutory Reform*, 2014 BRIGHAM YOUNG U. L. REV. 697, 732 (2014).

[197] Christine Ryan, *Too Porous for Protection? Loopholes in EB-5 Investor Visa Oversight Are Cause for National Security Concern*, 16 SAN DIEGO INT'L L.J. 417 (2015).

[198] *See, e.g.*, Zachary Figueroa, *Time to Rethink Cybersecurity Reform: The OPM Data Breach and the Case for Centralized Cybersecurity Infrastructure*, 24 CATH. U. J. L. & TECH. 433 (2016).

[199] Aziz v. Trump, 2017 U.S. Dist. LEXIS 20889 (E.D. Va, Feb. 13, 2017).

[200] *Id.* at *2.

[201] *Id.* at *24.

[202] *Id.* at *27.

[203] Brief of Technology Companies as Amici Curiae in Support of Appellees, Int'l Assistance Project v. Trump, No. 17-1351 at 22 (4th Cir. Apr. 19, 2017) (emphasis in original.)

because it failed to bring undocumented individuals directly to U.S. security guards, the claimant might suggest there are other, less restrictive means for the government to enforce border security. For example, the government could hire more guards, increase the number of checkpoints, or create roadblocks at known points of entry. It need not conscript individual taxi drivers into service as unpaid border agents.

With regard to our restaurant owner, even if one assumes the government has a compelling interest in restricting the flow of illegal immigration, the fact that the I-9 system furthers that aim is not sufficient. The government must also show the I-9 system is the least restrictive means of achieving that aim. But surely an alternative *is* available to the government—rather than use the I-9 system, it could pour resources into additional security *at the border*, and stem illegal immigration that way. While the I-9 system may be efficient, or preferable because it uses private resource rather than government resources to gather information, it is by no means less restrictive to our restaurant owner than a border security system based on surveillance and restriction of the physical, territorial border.

The same arguments might be applied to our software company. Is an executive order limiting immigration from a short list of majority-Muslim countries the least restrictive means, as applied to our software company, of addressing terrorism? Numerous exemptions to the visa system already exist—could one be created for the families of current employees? Could alternative vetting systems be a less restrictive means than a complete ban on immigration? It seems hard to believe they would not.

3. Sanctuary—A Viable Argument?

The long history of prioritizing national security and rejecting sanctuary claims based on our traditional notion of sovereignty will doubtless prove a significant challenge to sanctuary corporations. Yet for a court honestly and fairly applying *Hobby Lobby* and RFRA, it should at least give significant pause. The introduction of the least restrictive means test fundamentally alters the landscape of religious accommodation. Government regulations based on efficiency and cost-effectiveness may result in shifting burdens from the government to individuals. In so doing, the government has opened itself to RFRA claims. Is the imposition of burdens such as acting as a putative border security agent, or filing paperwork in lieu of adequate border security, really the least restrictive means of achieving government interests?

Of course, the likely response to these claims is that there must be some government interests that are so vital and significant that regulations *can* burden an individual's religious exercise. This is precisely the jurisprudence that existed prior to RFRA. But RFRA, in one small phrase ("least restrictive means") eliminated these cases and this government defense.

Admittedly, we do not necessarily expect courts to interpret RFRA in such an intellectually honest way. But it is crucial to recognize that RFRA's statutory scheme should make it all but impossible for the government to shift regulatory, legal, or enforcement burdens on individuals, without being prepared to show how it cannot take on those burdens itself.

IV. Conclusion

If corporations can use RFRA, *Hobby Lobby*, and related case law to advance religious exemptions to immigration law, some scholars undoubtedly will express "slippery slope" concerns about the extent to which other liberal concerns may be advanced in a similar way. One

might argue, for example, that any progressive cause – environmental protection, increased school funding, etc. - could be cloaked in religious terms and used to leapfrog over otherwise restrictive regulations using the same procedure. Indeed, scholars have debated the extent to which *Hobby Lobby* might have opened the door to a wider range of religious exemptions from generally applicable laws.[204] Some scholars envision an escalating "culture war" among those seeking religious exemptions.[205]

There certainly are other liberal causes with both religious and secular support, where the former may be used in conjunction with RFRA to achieve ends that the latter may not. For example, the Dakota Access Pipeline, the subject of extensive political controversy, was also the subject of a RFRA claim by two Native American tribes.[206] In February 2017, the Cheyenne River Sioux and the Standing Rock Sioux moved for a temporary restraining order to block construction of the pipeline because such construction would interfere with the exercise of their religion.[207] Invoking RFRA, the tribes claimed that the pipeline's construction would "unbalance and desecrate the water and render it impossible for the Lakota to use that water in their Inipi ceremony."[208] The court denied their motion because it found that the tribes had waited too long to raise their religious concerns.[209] Additionally, some citizens have expressed religious as well as moral objections to getting rid of environmental regulations in general.[210]

Empirical research suggests that liberals and conservatives have different moral foundations and priorities.[211] Whereas liberals prioritize a moral notion of care/harm and fairness/reciprocity, conservatives, while not disregarding these notions, also equally consider loyalty, authority/respect, and purity.[212] This may explain in part the tractability of the so-called "culture wars,"[213] and the role that RFRA has come to play in those wars.[214] If conservatives and liberals act out of different moral foundations, it seems logical that their religious convictions (if they label their moral convictions as "religious") would also vary.

---

[204] *See, e.g.*, Eric Rassbach, *Is Hobby Lobby Really A Brave New World? Litigation Truths About Religious Exercise by For-Profit Organizations*, 42 HASTINGS CONST. L.Q. 625 (2015); Stephen Makino, *Examining Corporate Religious Beliefs in the Wake of Hobby Lobby*, 25 S. CAL. INTERDIS. L.J. 229 (2016).

[205] Douglas Nejaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2520 (2015) ("Faith claims that concern questions in democratic contest will escalate in number, and accommodation of the claims will be fraught with significance, not only for the claimants, but also for those whose conduct the claimants condemn.")

[206] Robinson Meyer, *The Last-Ditch Attempt to Stop the Dakota Access Pipeline*, ATLANTIC (Feb. 10, 2017), https://www.theatlantic.com/science/archive/2017/02/the-dakota-access-pipelines-final-stand/516225.

[207] *Id.*

[208] *Id.*

[209] Britain Eakin, *Tribe Denied Religious Injunction to Dakota Access Pipeline*, COURTHOUSE NEWS SERVICE, (Mar. 7, 2017), http://www.courthousenews.com/tribe-denied-religious-injunction-dakota-access-pipeline/.

[210] Brady Dennis, EPA Asked the Public Which Regulations to Gut — And Got an Earful About Leaving Them Alone, WASH. POST (May 16, 2017 2:45 pm), www.washingtonpost.com/news/energy-environment/wp/2017/05/16/epa-asked-the-public-which-regulations-to-gut-and-got-an-earful-about-leaving-them-alone/?utm_term=.1c2009d1c52c.

[211] *See* Jesse Graham et al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. PERSONALITY SOCIAL PSYCHOLOGY 1029 (2009).

[212] *Id.* at 1029, 1040.

[213] For an overview and history of the culture wars, see ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS (2015).

[214] *See* Frank S. Ravitch, *Be Careful What You Wish for: Why Hobby Lobby Weakens Religious Freedom*, 2016 B.Y.U. L. REV. 55, 58-62 (2016) (arguing that by associating religious freedom with intolerance and discrimination, Hobby Lobby has undermined the case for RFRA and state RFRA statutes, and will likely lead to a retrenchment by courts of protection for religious freedom).

If RFRA is interpreted appropriately, it can serve to protect both liberal and conservative religious values; in doing so, it also sets up the potential for direct conflict between the two. For every conservative corporation that seeks to avoid providing contraception, there may be a liberal corporation-or liberal employee-that feels religiously compelled to offer it. For every conservative corporation that refuses to serve gay couples, there may well be a liberal corporation or employee that is committed to honoring them. Meanwhile, groups that want to legally limit the rights of transgendered people to use certain bathrooms may find themselves squaring off against corporations that are religiously compelled to provide equal access. And finally, what happens if a liberal pharmaceutical company feels religiously compelled to provide marijuana to individuals seeking relief from pain, while a conservative attorney general seeks to cut off access, even in the medical context?

These conflicts are precisely what late Justice Antonin Scalia sought to avoid in deciding *Smith*. As he stated in that case, "[P]recisely because we value and protect…religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[215] This concern also animated his belief that RFRA went beyond constitutional protection for the free expression of religion as intended by the Founders:

> In fact, the most plausible reading of the 'free exercise' enactments…is a virtual restatement of *Smith*: Religious exercise shall be permitted so long as it does not violate general laws governing conflict….This limitation upon the scope of religious exercise would have been in accord with the background political philosophy of the age (associated most prominently with John Locke), which regarded freedom as the right 'to do only what was not lawfully prohibited.'[216]

Though a corporation's RFRA defense to a sanctuary claim may well be denied by a court that prioritizes national security over religious freedom, our analysis of this claim reveals the potential for RFRA to tear at the fabric of civil society. If we must consider the interest of a particular plaintiff in following immigration and employment laws, and can only enforce them if they represent the least restrictive means of carrying out a compelling government mandate, what of the hundreds of laws affecting the basic rules for corporate behavior? While commentators tend to focus on the big ticket laws--particularly discrimination and taxes—what about the less controversial ones? What about laws requiring corporations to meet basic safety standards, or requiring transparency in securities disclosures? Could a RFRA exemption apply to insider trading? What about OHSA regulations on working conditions?

While the *Hobby Lobby* opinion goes out of its way to explain how prohibitions on racial discrimination and the requirement to pay taxes are narrowly tailored to achieve a compelling government interest, commentators have noted that this sweeping proclamation might not, in fact, hold up logically against a challenge to Title VII by religious white separatists,[217] or to tax

---

[215] 494 U.S at 888.

[216] City of Boerne v. P.F. Flores, 521 U.S. 507, 539-540 (1997).

[217] Hanna Martin, *Race, Religion, and RFRA: the Implications of Burwell v. Hobby Lobby Stores, Inc. in Employment Discrimination*, 2016 CARDOZO L. REV. DE NOVO 1, 26-28 (2016) (arguing that Title VII already includes certain exceptions, and an exception for white nationalists would not lead to such a large number of claims as to be impossible to administer).

laws by Quakers.[218] Indeed, given that RFRA requires an individual analysis of the compelling state interest and least restrictive means test *as applied to the particular plaintiff*, it would be impossible for the Court to reject claims based on such a generalization.[219]

In the new RFRA era, religious beliefs have been prioritized over secular, non-religious beliefs and generally applicable civil and criminal law. Simply by labeling a belief religious, a person can avoid any number of statutes and regulations, whereas sincerely held moral beliefs lacking religious foundation have no corresponding protection. If this sounds like an Establishment Clause problem, it might be, except that it does not give preferences to any particular religion—it simply preferences religious people above non-religious people.

Take the case of Apple, which sought in 2016 to avoid an FBI demand that it create a "backdoor" to the iPhone to allow the FBI to access data on the phones of individuals responsible for a terrorist attack in San Bernardino.[220] Prior to the FBI demand, Apple had a history of making privacy a core value of the company—CEO Tim Cook even called privacy a "fundamental human right."[221] He had not called privacy a religious value, but what if he had? Could that have been the basis to avoid the FBI's demand? If so, wouldn't it be prudent for a company such as Apple to designate these deeply held, core values as "religious"? We do not here suggest Apple would have to make a false claim for religious protection. It simply would appropriate a word ("religious") used to refer to one type of deeply held values to refer to a different type of deeply held values.

The Court's jurisprudence when it comes to defining "religion" is less than clear.[222] While the Court has consistently distinguished non-religious values from religious ones, it has nonetheless provided no clear boundaries for determining the difference.[223] In *Torcaso v. Watkins*,[224] the Court made clear that "religion" need not be theistic or include a belief "in the

---

[218] Zachary A. Albun, *Why We Can't be Friends: Quakers, Hobby Lobby, and the Selective Protection of Free Exercise*, 34 LAW & INEQ. 183, 215-216 (2016) (arguing that the least restrictive means analysis may apply to the categorical requirement to pay taxes, but that does not mean an exception cannot be built into the tax code to accommodate religious freedom).

[219] RFRA states, "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 government interest; and (2) is the least restrictive means…" 42 U.S.C. § 2000bb-1. The Court acknowledged the requirement of an individualized analysis in *Hobby Lobby*, noting RFRA required it "'to scrutinize the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraception mandate in these cases." 134 S.Ct. 2751, 2779 (2014) (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006)).

[220] Joel Rubin, *FBI Unlocks San Bernardino Shooter's iPhone and Ends Legal Battle with Apple, For Now*, L.A. Times (Mar. 28, 2016 10:39pm), http://www.latimes.com/local/lanow/la-me-ln-fbi-drops-fight-to-force-apple-to-unlock-san-bernardino-terrorist-iphone-20160328-story.html; Kim Zetter, *Apple's FBI Battle is Complicated. Here's What's Really Going On*, WIRED (Feb. 18, 2016), https://www.wired.com/2016/02/apples-fbi-battle-is-complicated-heres-whats-really-going-on.

[221] *Apple CEO Tim Cook: 'Privacy Is A Fundamental Human Right'*, NPR (Oct. 1, 2015), http://www.npr.org/sections/alltechconsidered/2015/10/01/445026470/apple-ceo-tim-cook-privacy-is-a-fundamental-human-right.

[222] For a discussion of the appropriate definition of religion, see generally Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056 (1978); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 Hofstra L. Rev. 309 (1994); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 Stan. L. Rev. 233 (1989); Christopher D. Jones, *Redefining Religious Beliefs Under Title VII: The Conscience as the Gateway to Protection*, 72 A.F. L. Rev. 1 (2015).

[223] *See* Ingber, *supra* note 222, at 256-264 (tracing changing definitions of religion).

[224] 367 U.S. 488 (1961).

existence of God."[225] The key may lie in the role that a set of beliefs plays for the individual: if it holds a similarly importance place to the individual as might a traditional religion, it may be considered religion.[226] There certainly is no bar in the Court's jurisprudence for a religious belief system based on fundamental human rights, equality, and care, even if it expressly disavows a god. In the end, for liberal corporations seeking to protect fundamental human rights and core values, it may require adopting the language of religion to ensure protection equivalent to that currently enjoyed by white supremacists.

[225] *Id.* at 495 n.11.

[226] United States v. Seeger, 380 U.S. 163, 166, 184 (1965) (permitting conscientious objector relief from military service based on religious exemption, though claimant did not profess a belief in God, and instead claimed a "purely ethical creed").