

## An Overview of Potential Legal Issues and Potential Liabilities for Minnesota Congregations Providing “Sanctuary” to Undocumented Immigrants

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*with contributions from the Minnesota/Dakotas Chapter of the American Immigration Lawyers Association (AILA)<sup>1</sup>*

A NOTE on Sanctuary: Sanctuary is an ancient, religious custom; not a modern legal defense. Nevertheless, it has been – and still is – United States policy not to enforce immigration violations inside places of worship and other “sensitive locations,” such as hospitals, schools, places of public demonstrations, and places where a religious ceremony is taking place, such as weddings and funerals.<sup>2</sup> For this and other political and public relations reasons, providing sanctuary may deter the federal government from arresting an undocumented immigrant who is inside a church or other congregation building. However, even though enforcement activities at sensitive locations should be avoided under the policy, the policy leaves discretion in the hands of Immigration and Customs Enforcement (ICE) officers. If an ICE officer has written prior approval from an appropriate authority or determines that there exist exigent circumstances, including “a national security or terrorism matter,” the ICE officer may proceed at a sensitive location. The Sensitive Locations Policy is subject to revision or revocation at any time. Moreover, it does not make an undocumented immigrant, or someone providing assistance to an undocumented immigrant, *immune* from prosecution under federal immigration laws.

The following chart sets out the kinds of activities a congregation providing “sanctuary” to an undocumented immigrant might take and evaluates, in very general terms, the potential likelihood that action would violate the law, the potential likelihood the violation would be enforced, what the potential penalties could be, who would likely be held liable, and the potential effect on a congregation’s tax-exempt status. The purpose is to help provide general guidance on where providing assistance to undocumented immigrants might cross the line into unlawful activity, creating risks of potential legal liability for the congregation providing sanctuary services.

#	Potential Action	Likelihood Illegal	Likelihood Enforced	Potential Liability	Persons Potentially Liable	Risk to Non-Profit Status
1	Directly employing individuals without work authorization.	Definitely illegal. § 274A of the Immigration and Nationality Act, 8 U.S.C. 1324a.	Highly likely, Immigration and Customs Enforcement (ICE) regularly audits employers to enforce this aspect of immigration law.	Department of Homeland Security (DHS) may impose civil penalties of not less than \$539 and not more than \$4,313 for each unauthorized alien and criminal penalties of up to \$3,000 per employee or up to 6 months imprisonment for engaging in	Employers are held liable. The term “employer” in this context includes the owner of the corporate entity, the chief executive, and the	Because employing individuals without work authorization is definitely illegal, doing so <i>could</i> potentially jeopardize a congregation’s non-profit status. Factors considered are: whether a court found the congregation knowingly violated the law; the scale of illegal activity relative to

<sup>1</sup> The analysis was originally prepared for the Catholic Community of St. Thomas More in St. Paul, Minnesota, and only addresses federal immigration law as applied in Minnesota and the Eighth Circuit and no other jurisdiction. Dorsey partner Rebecca Bernhard and associates Phil Steger, Betsy Sellers, and Steve Curry prepared this analysis in March 2017, with contributions by John Medeiros of the Faith-Based Advocacy Group of the Minnesota/Dakotas Chapter of AILA.

<sup>2</sup> Memorandum from John Morton to Field Office Directors, Special Agents in Charge, and Chief Counsel re Enforcement Actions at or Focused on Sensitive Locations, October 24, 2011, available at <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>. An update to the Department of Homeland Security website made on February 21, 2017, stated this policy remains in effect.

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#	Potential Action	Likelihood Illegal	Likelihood Enforced	Potential Liability	Persons Potentially Liable	Risk to Non-Profit Status
				<p>a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens.</p> <p>Penalties may dramatically increase for multiple offenses.</p> <p>Civil penalties of not less than \$216 and not more than \$2,156 may be imposed for each noncompliant I-9.</p>	<p>person responsible for compliance with immigration laws.</p>	<p>the congregation’s other ministries; the number of persons benefiting from the illegal activity; whether the illegal activity posed a threat to public safety; the extent to which the illegal activity was motivated by religious beliefs.</p>
2	<p>Providing housing to an undocumented immigrant targeted for deportation.</p>	<p>Currently not explicitly illegal; but potentially could be found to be so.</p> <p>It is a federal immigration crime to “harbor” an undocumented immigrant. The test is whether the activity <u>substantially facilitates</u> the alien remaining in the United States illegally.<sup>3</sup></p> <p>So far, no court with direct authority over Minnesota has decided that providing housing alone is illegal “harboring.” Most other courts have decided providing housing alone is <i>not</i> illegal harboring, as long as there is no intent to conceal or profit from the immigrant guest.<sup>4</sup></p>	<p>Unlikely as long as the Sensitive Locations Policy is adhered to. It is theoretically possible that the Trump Administration could decide to order US Attorneys to pursue prosecution of congregations providing sanctuary in the form of housing to undocumented immigrants. Some churches, including pastors, providing sanctuary were prosecuted in the 1980s, resulting in convictions.</p> <p>However, because housing</p>	<p>Violation of federal anti-harboring laws is a felony-level offense. 8 U.S.C. § 1324(a)(1)(B)(ii) provides that, “for each alien in respect to whom [a violation of the harboring provision] occurs,” a defendant shall “be fined under title 18, imprisoned not more than 5 years, or both.” Penalties could be:</p> <ul style="list-style-type: none"> <li>• Up to 10 years, if harboring was for the church’s commercial gain;</li> <li>• Up to 20 years, if the harbored person causes</li> </ul>	<p>The congregation may face criminal penalties. Whether any individual faces criminal liability may depend on whether the individual committed any prohibited acts and the legal relationships between the individual and the congregation.<sup>7</sup></p> <p>The Congregation</p>	<p>For housing to create a risk to tax-exempt status, the law would need to clearly make such conduct illegal. If the law were to change, including as the result of a successful prosecution of the congregation, the IRS would consider the following factors:</p> <ul style="list-style-type: none"> <li>• whether a court found the congregation <i>knowingly</i> violated the law;</li> <li>• the scale of illegal activity relative to the congregation’s other ministries;</li> <li>• the number of persons benefiting from the illegal activity;</li> </ul>

<sup>3</sup> *United States v. Gomez*, 2008 U.S. Dist. LEXIS 114801, at \*13 (W.D. Mo. July 29, 2008) (collecting cases from United States Courts of Appeal, (2d, 5th, 6th, and 9th Circuits) and explaining that courts “have been fairly consistent in holding that ‘harboring’ encompasses language to the effect of ‘substantially facilitating’ an alien’s remaining illegally in this country or to afford shelter to an improperly admitted alien”).

<sup>4</sup> *U.S. v. McClellan*, 794 F.3d 743 (7th Cir. 2015) (when the basis for the harboring conviction is housing there must be evidence that the defendant intended to safeguard the person from authorities); *U.S. v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. 2013) (“harboring” means more than “sheltering”). In an early precedent-setting case, the United States Court of Appeals for the Ninth Circuit held that merely providing shelter, with knowledge of a person’s illegal presence, is sufficient to constitute the crime of harboring. *U.S. v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976)

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		<p>Therefore, it is almost certainly illegal to house an undocumented immigrant <i>with the intent to conceal the immigrant from detection or enforcement by immigration officials.</i></p> <p>However, if the congregation were ever charged with harboring on the basis of providing housing alone, then publicizing the presence of the guest will not necessarily protect the guest or the congregation from legal liability. In a case involving more than just providing housing, the 8<sup>th</sup> Circuit rejected the argument that a defendant must conceal an undocumented immigrant in order to be convicted of harboring.<sup>5</sup></p>	<p>alone has not been defined in statute or Minnesota case law as illegal “harboring,” initiating a prosecution against a congregation providing sanctuary would contain significant legal and political risks for the US Attorney’s Office in the Minnesota.</p>	<p>serious bodily harm or places the life of any person in jeopardy;</p> <ul style="list-style-type: none"> <li>Up to life imprisonment, if the harboring results in the death of a person.</li> </ul> <p>In addition, civil forfeiture may apply when there is a “substantial connection between the property and the offense.”<sup>6</sup></p>	<p>could face civil liability, but its employees would not.<sup>8</sup></p>	<ul style="list-style-type: none"> <li>whether the illegal activity posed a threat to public safety; and</li> <li>the extent to which the illegal activity was motivated by religious beliefs.</li> </ul> <p>There is also a risk that tax-exempt status could be revoked on “public policy” grounds. In other words, the Trump Administration could threaten tax-exempt status for congregations providing housing to undocumented immigrants on grounds it is against public policy, regardless of whether doing so is actually illegal. Because this is very broad, and not very well-understood, doctrine, the risk is difficult to evaluate.</p>
3	Driving an undocumented immigrant to appointments,	Probably not illegal. It is a felony to “transport” an undocumented immigrant. However, 8th Circuit case law has clarified that the act of	Driving an undocumented immigrant to the hospital, or similar appointment, is not illegal and therefore not	Violation of federal anti-transporting laws is a felony-level offense.	The person or persons providing transportation in violation of	See Row 2 above.

(“harbor” means to afford shelter to” and does not require the intent to avoid detection). However, more recent case law out of the 9th Circuit suggests that the ruling of *Acosta* may no longer be in effect, and that harboring requires proof of intent to violate the law. *U.S. v. You*, 382 F.3d 958 (9th Cir. 2004) (holding that knowledge and criminal intent are both required, and that acting with the purpose of avoiding the aliens’ detection by immigration authorities is synonymous with having acted with the necessary intent).

<sup>7</sup> *E.g., United States v. Acambaro Mexican Rest., Inc.*, 631 F.3d 880, 882-83 (8th Cir. 2011) (affirming imposition of fines pursuant to plea agreement when statute also provided for forfeiture of profits, land, and buildings, and declining to pierce the corporate veil to impose criminal liability on the defendant company’s sole shareholder).

<sup>5</sup> *United States v. Rushing*, 313 F.3d 428, 434 (8th Cir. 2002) (“They argue that they did not try to hide Ms. Zhong, and that she was working in Mr. Ma’s restaurant in plain view. We reject that argument.”) (citing *United States v. Evans*, 531 F.2d 428, 428 (9th Cir. 1976)); *see also infra* Row 4 and n.10.

<sup>6</sup> *United States v. Two Hundred Fifty-Six Thousand Two Hundred Thirty-Five Dollars*, 691 F. Supp. 2d 932, 939 (N.D. Ia. 2010) (citing 18 U.S.C. § 983(c)(3)). We are aware of cases involving forfeiture of money derived from harboring activities and vehicles used to transport immigrants in the United States unlawfully.

<sup>8</sup> Minn. Stat. § 181.970 (“An employer shall defend and indemnify its employee for civil damages, penalties, or fines claimed or levied against the employee, provided that the employee: (1) was acting in the performance of the duties of the employee’s position; (2) was not guilty of intentional misconduct, willful neglect of the duties of the employee’s position, or bad faith; and (3) has not been indemnified by another person for the same damages, penalties, or fines.”).

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	school, work, etc.	<p>transporting must be made in “furtherance of” the immigrant remaining in the United States illegally.<sup>9</sup> Driving an undocumented immigrant to appointments likely does not further the immigrant remaining in the United States illegally.</p> <p>However, it likely would be illegal “transport” to drive an undocumented immigrant away from the congregation in order to avoid detection by immigration enforcement officers.</p>	<p>likely to be enforced.</p> <p>We currently do not have any data to support an analysis whether enforcement of illegal transporting of an undocumented person in furtherance of the immigrant’s illegal presence is likely to be enforced.</p>	See Row 2 above.	<p>federal transporting law could be held liable.</p> <p>The congregation could be held liable for illegal transporting if it can be proved the transporting was arranged by the congregation or on the congregation’s behalf.</p>	
4	Providing <u>all</u> of the following together: employment, housing, access to medical care, and banking services.	<p>The 8th Circuit has held that providing all these services together is “more than enough” to support a “harboring” conviction.<sup>10</sup> However, it has not decided what activities or collection of activities is “just enough” to support a “harboring” conviction.</p> <p>Taken individually, it is less clear whether each activity is a violation. The test is whether the activity <u>substantially facilitates</u> the alien</p>	Historically highly unlikely to be enforced in a congregation setting. There could be greater risk of enforcement against a congregation by the current Administration than by previous Administrations. However, as of this writing, the current Administration still follows a policy of not enforcing immigration law in “sensitive areas,” like places	See Row 2 above.	See Row 2 above.	See Row 2 above.

<sup>9</sup> U.S. v. Hernandez, 913 F.2d 568 (8th Cir. 1990).

<sup>10</sup> Rushing, 313 F.3d 428 at 434 (“The evidence reasonably justified a finding that Mr. Ma, knowing that Ms. Zhong had entered the country illegally, gave her a job and a place to live. There was also sufficient evidence, if believed, that Mr. Jones, with the same knowledge, helped Ms. Zhong receive medical care and banking privileges. These activities are more than enough to support a conviction for harboring an illegal alien.”).

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		remaining in the United States illegally. <sup>11</sup>	of worship.			
5	Marshalling resources to support individuals and families facing deportation who are being housed in sanctuary spaces – i.e., “sanctuary supporting” congregations.	<p>Currently not explicitly illegal; but potentially could be found to be so.</p> <p>A “sanctuary supporting” congregation <i>could</i> be exposed to potential criminal liability, especially if the sanctuary congregation it is supporting is charged with illegal activity, such as harboring.</p> <p>First, it could be argued that supporting the sanctuary congregation is itself illegal “harboring,” to the extent the support “substantially facilitates” the person’s continued illegal presence in the country.</p> <p>Second, these activities <i>could</i> give rise to criminal liability under a theory of “aiding and abetting,” as well.<sup>12</sup> Generally, courts will look to whether the defendant aided and abetted the <i>hosting congregation</i>,</p>	To the extent these activities do not take place at the church or other sensitive location, they are less likely to be shielded from enforcement by the 2011 policy memorandum.	See Row 2 above. 18 U.S.C. § 2 provides that a person guilty of aiding and abetting is punishable as a principal.	See Row 2 above.	See Row 2 above.

<sup>11</sup> *United States v. Gomez*, 2008 U.S. Dist. LEXIS 114801, at \*13 (W.D. Mo. July 29, 2008) (collecting cases from the 2d, 5th, 6th, and 9th Circuits and explaining that courts “have been fairly consistent in holding that ‘harboring’ encompasses language to the effect of ‘substantially facilitating’ an alien’s remaining illegally in this country or to afford shelter to an improperly admitted alien”).

<sup>12</sup> For the government to prosecute the congregation for aiding and abetting, it would need to prove that “(1) the defendant business associated herself with an unlawful venture; (2) the defendant participated in it as something she wished to bring about; and (3) the defendant sought by her actions to make it succeed.” *U.S. v. Mitchell*, 388 F.3d 1139 (8th Cir. 2004).

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		and not necessarily the person(s) living in the sanctuary space. <sup>13</sup>				
6	Creating an accompaniment team to assist families affected by ICE enforcement actions.	Probably not illegal. To the extent accompaniment of an undocumented person impedes an ICE raid, a court may find the response illegal because such action may “substantially facilitate an alien’s remaining in the U.S. illegally.” <sup>14</sup>  The test is whether the activities <u>substantially facilitate</u> the alien remaining in the US illegally.	To the extent these activities do not take place at the church or other sensitive location, they are less likely to be shielded from enforcement by the 2011 policy memorandum.	See Row 2 above.	See Row 2 above.	See Row 2 above.
7	Participating in rapid response networks to respond to and be present at ICE raids of homes and other institutions.	See Row 6 above.	See Row 6 above.	See Row 2 above.	See Row 2 above.	See Row 2 above.
8	Providing advocacy for positive immigration policy reform	Definitely not illegal.	Not illegal, therefore no risk of enforcement.	Not illegal, therefore no potential legal liability.	Not illegal, therefore no one potentially liable.	A 501(c)(3) tax-exempt congregation <u>may</u> attempt to “influence legislation,” <sup>15</sup> by “contact[ing], or urg[ing] the public to contact, members or employees

<sup>13</sup> *U.S. v. Lopez-Martinez*, 543 F.3d 509 (9th Cir. 2008) (ruling that the prosecution need not demonstrate that the defendant was working for financial gain but only that the principal stood to benefit financially); *U.S. v. Garcia-Paulin*, 627 F.3d 127 (5th Cir. 2010) (an aiding and abetting charge can only be sustained if the defendant is aiding and abetting the principal and not the alien being brought to the United States).

<sup>14</sup> See *United States v. Shum*, 496 F.3d 390, 391-92 (5th Cir. 2007); *United States v. Varkonyi*, 645 F.2d 453, 459-60 (5th Cir. 1981) (upholding conviction for harboring where, among other things, the defendant interfered with immigration agents to protect immigrants from apprehension).

<sup>15</sup> According to the IRS, “[w]hether an organization’s attempts to influence legislation, i.e., *lobbying*, constitute a substantial part of its overall activities is determined on the basis of all the pertinent facts and circumstances in each case.” See “Measuring Lobbying: Substantial Part Test,” available at <https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test>; see also IRS Pub. 1828.

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	and against unjust immigration policy.					of a legislative body for the purpose of proposing, supporting or opposing legislation.”  A congregation’s tax-exempt status will be at risk only if a “substantial part” of its “overall activities” is devoted to “excessive lobbying.” <sup>16</sup>
9	Providing meeting space for organizers, activists, lawyers, and community members to meet.	Definitely not illegal.	Not illegal, therefore no risk of enforcement.	Not illegal, therefore no potential liability.	Not illegal, therefore no one potentially liable.	Not likely, as merely providing meeting space does not rise to an attempt to “influence legislation.”
10	Employees reporting (to church leadership above the congregation or to government authorities) the sanctuary actions of church leadership.	MN employees have the right to report, in good faith, illegal actions taken by their employers. Minn. Stat. § 181.932.	Depends on whether employees would make a report. If they do, the congregation may not retaliate or employees would have a cause of action under Minn. Stat. § 181.932.	Liability under Minn. Stat. § 181.932 is for actual damages and attorneys’ fees.	Employer; no personal liability.	There could be some risk to non-profit status if the activity the employee reports on is found to be illegal.  See row 2 above.

<sup>16</sup> See IRS Pub. 1828, “Tax Guide for Churches & Religious Organizations,” available at <https://www.irs.gov/pub/irs-pdf/p1828.pdf> (“IRS Pub. 1828”). . The IRS will “consider[] a variety of factors, including the time devoted by both compensated and volunteer worker(s) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial.” *Id.* It is important to note that under the “substantial part” test, the IRS does not weigh lobbying activities in isolation, but against the congregation’s “overall activities.” IRS.gov, “Measuring Lobbying: Substantial Part Test,” available at <https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test> (last checked on March 24, 2017). A congregation’s lobbying would thus only become “excessive lobbying” if it were to reach the point where it comprised a “substantial part” of the sum total of all the congregation’s activities, including preparing for and providing worship services, religious education, care and support activities provided to congregation members, charitable activities, weddings, funerals, etc. A congregation engaging in significant lobbying activity should consult with a tax or non-profit attorney to identify where that point might be reached in its individual case.

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11	Employees refusing to engage in sanctuary activities.	Employees may refuse. Prior to Minn. Stat. § 181.932, MN had a common law whistleblower right and such right also provided for the employee to refuse to engage in the perceived illegal act.	This common law right likely survived the passage of the statute.	Liability for actual damages.	Employer; no personal liability.	See Row 10 above.

**Actions to Reduce Risk**

**Generally**

Factors that could reduce the risk of illegality, enforcement, and penalties with respect to actions taken to assist immigrants in the United States illegally:

- Building a written record demonstrating the extent to which actions were taken based on firmly held religious beliefs; and
- Carefully screening and selecting guests based on need and absence of criminal risk or risk of violence.

*Consult with an attorney before undertaking sanctuary activities such as providing housing or providing material support to congregations providing housing to undocumented immigrants.*

**Employment**

For purposes of immigration law, “employment” is not defined by whether an immigrant is getting paid. The Government will look at a number of factors, including whether the congregation is benefiting from services provided, regardless of whether they are being paid.

Do not accept any service from a guest that provides a benefit to the congregation, unless they have authorization documents and can complete a Form I-9.

**Housing and Support to Other Parties Providing Housing**

The following actions will increase the likelihood that providing housing and material support to another party providing housing crosses over into illegal conduct and therefore should be avoided:

- Attempting to shield the guest from immigration enforcement;
- Obtaining financial benefit from the living arrangement; or
- Providing “other inducements” for the guest to remain in the United States.

**Rapid Response**

If participating in a rapid response at an ICE raid, provide support for those facing potential government actions. Being present helps to ensure that proper procedures are followed by law enforcement and limits the potential for abuses. Do not, however, engage in activity that impedes law enforcement, such as:

- Violent or threatening behavior directed towards law enforcement; or
- Obstructing government officers.

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### Advocacy

Providing space for community members to discuss social issues does not create any legal issues. To avoid any lobbying activities (which are permissible up to the point they become “excessive”, the Congregation should only provide space—that is, do not provide material or financial support for activities that contact, or urge others to contact, members of a legislative body.

It is okay to engage in advocacy, including both for legislative change and for other forms opposing unjust policies. The IRS specifically provides that churches “may... involve themselves in issues of public policy without the activity being considered as lobbying,” including, conducting “educational meetings, prepar[ing] and distribut[ing] educational materials, or otherwise consider[ing] public policy issues in an educational manner.”<sup>17</sup>

### Respect Employees’ Rights

If the church does decide to become a sanctuary or engage in certain sanctuary activities, inform employees of their rights to refuse to participate in sanctuary activities and then permit employees to refuse to participate in sanctuary activities without any adverse employment consequences.

### Know Your Rights

- ICE (and other law enforcement) requires either a warrant or consent to enter and search premises.
- Do not agree to allow ICE or other law enforcement in the door without a warrant signed by a judge. If an official does not have a warrant, you can refuse to consent to a search.
- If an official does have a warrant, ask to read it so that you understand its scope (that is, its limits).
- You must give your name if asked, but then ask to speak with an attorney. Aside from giving your name, you have the right to remain silent.
- You can refuse to sign any document.
- Be polite, calm, and truthful.

<sup>17</sup> IRS Pub. 1828.

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