

## Welcome and the law:

### When offering rides, providing safe-haven, or employment could be prosecuted

As people of faith, we know ourselves as strangers. We were once, too, strangers in the land of Egypt<sup>1</sup> and we are to treat newcomers among us as we, ourselves, wish to be treated. We also know that, second to loving God, we are to love our neighbors as ourselves.<sup>2</sup> What does that mean when 11 million of our neighbors are at risk of deportation? When some of the newcomers in our midst have become so marginalized that they are no longer able to meet their basic needs or stay together as a family without assistance?

As Presbyterians, we believe that “God alone is Lord of the conscience.”<sup>3</sup> We are to reckon our behavior with the will of God. At times our denomination, through statements of the General Assembly, has recognized that this allegiance to God first and country second can cause tension in the lives of Christians. In 1966, the General Assembly of the United Presbyterian Church in the United States of America urged, “... every citizen conscientiously to obey the law and to support policies of [the] government; but when impelled by conscience, to advocate alternatives to the law, to criticize and to dissent from laws and policies, to remonstrate, to seek modification and change, and only as a last resort to practice conscientious disobedience, realizing the serious responsibility placed upon those who disobey, and, accepting the legal consequences of such civil disobedience.”<sup>4</sup>

The following is offered not to encourage or discourage behavior, but to make sure that the people of God know what could be viewed as disobedience and the serious responsibility and legal consequences that comes with those acts as mid councils, congregations, and members discern how to be the church to all of God’s children. Please also take note that in the information below, law is quoted and followed by a list of the various ways different courts have interpreted the law. This means that, in some circumstances, the meaning of the law and what behavior it prohibits is not settled or could be applied one way in one circuit and another way in a different circuit.

The materials in this document are not intended to be legal advice, do not create an attorney-client relationship, and are not to be relied upon in lieu of consultation with appropriate legal advisors in your own state and jurisdiction. The application and impact of laws can vary widely based on the specific facts involved. You should contact your attorney to obtain advice with respect to any particular issue or problem. Please use this document to begin a conversation with your ministry members and local legal counsel to get the best advice for your plans and jurisdiction.

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<sup>1</sup> Exodus 22:21.

<sup>2</sup> Matthew 22:34–40.

<sup>3</sup> *Book of Order: The Constitution of the Presbyterian Church (U.S.A.), Part II*, F-3.0101.

<sup>4</sup> *Minutes*, UPCUSA, 1966, Part I, p. 396).

## What is your jurisdiction?

| If you live here  | your Circuit Court is |
|---|-----------------------|
| Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico  | First Circuit         |
| Vermont, New York, Connecticut  | Second Circuit        |
| Pennsylvania, New Jersey, Delaware, Virgin Islands  | Third Circuit         |
| West Virginia, Virginia, District of Columbia, Maryland, North Carolina, South Carolina                         | Fourth Circuit        |
| Texas, Louisiana, Mississippi   | Fifth Circuit         |
| Michigan, Ohio, Kentucky, Tennessee   | Sixth Circuit         |
| Wisconsin, Illinois, Indiana  | Seventh Circuit       |
| North Dakota, Minnesota, South Dakota, Iowa, Nebraska, Missouri, Arkansas                                       | Eighth Circuit        |
| Washington, Idaho, Montana, Oregon, California, Nevada, Arizona, Alaska, Hawaii, Guam, Northern Mariana Islands | Ninth Circuit         |
| Wyoming, Utah, Colorado, Kansas, New Mexico, Oklahoma   | Tenth Circuit         |
| Alabama, Georgia, Florida   | Eleventh Circuit      |

### Bringing Undocumented Immigrants into the U.S.

The **Immigration and Nationality Act 274(a)(1)(A)(i)** makes it a felony when:

*“knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization so come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien”*

- **Bringing** is not defined in the statute. The courts have defined it as:
  - **Ninth Circuit**—Physical transport, leading, escorting, guiding to an airplane headed to the U.S.<sup>5</sup>
  - **Sixth Circuit**—Merely accompanying or assisting does not constitute bringing.<sup>6</sup>
- **Bringing Undocumented Immigrants into the U.S. at a Place Other Than a Port of Entry**

Assisting an immigrant to evade inspection at a port of entry, regardless of their documentation or your knowledge of their legal status, is a violation.

<sup>5</sup> *United States v. Yoshida*, 303 F.3d 1145, 1151–1152 (9th Cir. 2002).

<sup>6</sup> *McFarland v United States*, 19 F.2d 805 (6th Cir. 1927).

## Transporting Undocumented Immigrants Within the U.S.

The **Immigration and Nationality Act 274(a)(1)(A)(ii)** makes it a felony to:

*“knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of the such violation of law”*

- What makes an act “in furtherance of” the immigrants’ unlawful entry into or presence in the U.S.?
  - Eighth and Ninth Circuits—For transportation to not be in furtherance of unlawful entry, it must be only incidentally connected to entry or status. To be a violation, there must be a direct and substantial relationship between transportation and furtherance of the undocumented immigrants’ violation of law. Factors in analysis: time, place, distance, and overall impact.<sup>7</sup> Examples:
    - a. Transporting undocumented immigrants from one worksite to another **is not** a violation of federal law.
    - b. Transporting an undocumented immigrant to a hospital following an injury **does not appear to** violate federal law.
    - c. Transporting undocumented immigrants on a fourteen-hour road trip in an effort to shelter them from immigration authorities **is** a violation of federal law.
    - d. Pooling money to purchase a car and meeting undocumented immigrants at a safe house to transport them between states **is** a violation of federal law.
  - Sixth Circuit—Does not apply the test above and, instead, examines the intent or purpose of the person who transports.<sup>8</sup> Examples:
    - a. Transport by relatives and friends of immigrants to maintain well-being and existence **may not** constitute transport.
    - b. Transport that is open and obvious and for no financial gain **may not** constitute transport.
    - c. Transport to promote illegal presence in the U.S. **does** constitute transport and creates **criminal liability**.
  - Fifth Circuit—Examines both direct and substantial evidence and intent. Example, transporting undocumented immigrants to the then Immigration and Nationality Service office to file asylum papers **is not** a violation of federal law.<sup>9</sup>
  - Seventh Circuit—Looks to the facts and circumstances of each case.<sup>10</sup> In this case, the court examined whether the transporter received compensation for transport, concealed undocumented immigrants, transported relatives and friends or human cargo.

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<sup>7</sup> *United States v Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977); *United States v. Velasquez-Cruz*, 929 F.2d 420 (8th Cir. 1991).

<sup>8</sup> *United States v Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir. 1989); *United States v. Perez-Gonzalez*, 307 F.3d 443 (6th Cir. 2002).

<sup>9</sup> *United States v Merkt*, 764 F.2d 266 (5th Cir. 1985).

<sup>10</sup> *United States v. Parmelee*, 42 F.3d 387 (7th Cir. 1994).

- Tenth Circuit—Considers any and all relevant evidence, including time, place, distance, and reason for trip. Transportation that helps advance or promote illegal entry or continued illegal presence in the U.S. **may** violate federal law. In this case, transport for which the driver was compensated, between states, in a vehicle commonly associated with illegal transport (ex. darkened vehicle windows), for purposes of helping an undocumented immigrant get employment **is** a violation of federal law.<sup>11</sup>

## Harboring

The **Immigration and Nationality Act 274(a)(1)(A)(iii)** makes it a felony to:

*“knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation”*

- This is the statute most commonly utilized in prosecuting some individuals involved in the sanctuary movement. When discerning sanctuary, it is important to know that there is no law protecting this act of conscience nor does the presence of any individual within a place of worship guarantee their protection from immigration authorities. The protection to the individual in sanctuary is twofold. First, it comes from a policy memo written under a previous administration that limits enforcement in certain sensitive areas, including places of worship.<sup>12</sup> This policy memo is not law, cannot be used as a defense, can be easily superseded by a new memo under a new administration and has exceptions. Secondly, the protection comes from the hesitancy of immigration authorities to enter a house of God and the ill will such an act would create in the community and in the media. The act of offering shelter to a person at risk of deportation in a place of worship is more an act of faith and hope than it is rooted in the law. Congregations hold out the hope that by lifting up the story of an individual, the public will see them as God sees them and hearts and minds will be changed in the local community and in the halls of power in the federal government.
- Harbor is not defined in the statute. The courts, while differing on many key issues, all agree that one does not have to be part of an active smuggling operation to violate the statute. The courts have, otherwise, defined it as:
  - Second Circuit—Helping undocumented immigrants obtain employment, transporting them to jobs, and arranging for sham marriages violates federal law and constitutes

<sup>11</sup> *United States v. Barajas-Chavez*, 162 F.3d 1285 (10th Cir. 1999).

<sup>12</sup> Immigration and Customs Enforcement, John Morton, October 24, 2011. <https://www.ice.gov/doclib/publicadvocate/pdf/10029.2-policy.pdf>.

conduct that substantially facilitates an undocumented immigrant remaining in the U.S. illegally.<sup>13</sup> Harboring requires facilitating illegal presence and concealment.<sup>14</sup>

- Fifth Circuit—Prohibits instructing undocumented immigrants on how to evade immigration officers and interfering, beyond demanding the production of warrant<sup>15</sup>, with an intent to protect undocumented migrants from immigration officers.<sup>16</sup> Conduct tending to substantially facilitate a migrant remaining in the U.S. illegally violates federal law. Making an undocumented immigrant’s presence in the U.S. substantially easier or less difficult by employing and shielding their identities is in violation of the law.<sup>17</sup>
- Sixth Circuit—To clandestinely shelter, protect, and provide succor to undocumented immigrants. Harboring requires that the violator help undocumented immigrants remain in hiding.<sup>18</sup>
- Seventh Circuit—Harboring is not simple sheltering. It requires providing or offering a known undocumented immigrant secure haven, a refuge, a place to stay in which authorities are unlikely to be seeking them. Harboring must have the effect of concealment.<sup>19</sup> Churches can be convicted of harboring.
- Eighth Circuit—Conviction for harboring does not require proof of secrecy or concealment. Example: providing undocumented immigrants with jobs, a place to live, and help to receive medical care and banking privileges violates federal law.<sup>20</sup>
- Ninth Circuit—Harboring can include simple sheltering.<sup>21</sup>

#### Encouraging or Inducing Undocumented Immigrants to Come to, Enter, or Reside in the U.S.

The **Immigration and Nationality Act 274(a)(1)(A)(iv)** makes it a felony if one:

*“encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of the law”*

- Fourth and Eleventh Circuits—Providing fraudulent immigration or work documents is a violation.<sup>22</sup>

<sup>13</sup> *United States v. Lopez*, 521 F.2d 437 (2nd Cir. 1975).

<sup>14</sup> *United States v. Vargas-Cordon*, 733 F.3d 366 (2nd Cir. 2013).

<sup>15</sup> Asking for a warrant is protected under the Fourth Amendment of the Constitution of the United States.

<sup>16</sup> *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977); *United States v. Varkonyi*, 645 F. 2d 453 (5th Cir. 1981).

<sup>17</sup> *United States v. Shiu Sun Shum*, 496 F.3d 390, 2007 U.S. App. LEXIS 19104 (5th Cir. 2007).

<sup>18</sup> *Sunsjar v. United States*, 27 F.2d 223, 224 (6th Cir. 1928); *United States v. Belevin-Ramales*, 458 F. Supp.2d 409, 411 (E.D.Ky. 2006).

<sup>19</sup> *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012).

<sup>20</sup> *United States v. Rushing*, 313 F.3d 428, 434 (8th Cir. 2002).

<sup>21</sup> *United States v. Acosta De Evans*, 531 F.2d 428 (9th Cir. 1976).

<sup>22</sup> *United States v. Oloyede*, 982 F.2d 133 (4th Cir. 1992); *United States v. Ndiaye*, 434 F. 3d 1270 (11th Cir. 2006).

- Seventh Circuit—The fact that a person knowingly helped or advised the undocumented immigrant can make behavior a violation.<sup>23</sup>
- This statute **does not** require friends, family members, private citizens, or fellow church members to report a person’s immigration status to immigration authorities.

## Employment

- Prohibitions
  - It is a violation to employ undocumented immigrants unlawfully present in the United States.
  - It is a violation to employ immigrants who do not have government issued work authorization documents. Reviewing these documents is part of the I-9 review process at hire.
  - It is a violation to hire for employment in any twelve-month period at least ten individuals with knowledge that they are undocumented immigrants or have been brought to the U.S. in violation of federal law.<sup>24</sup>
- Religious Denomination Exemption
  - It is an affirmative defense to an employment violation accusation if a bona fide nonprofit, religious organization in the United States can show that they, encouraged, invited, called, allowed, or enabled a migrant **who is present** in the U.S. to perform the vocation of a **minister or missionary** for the denomination as a **volunteer**<sup>25</sup> who is **not compensated as an employee**. This volunteer minister/missionary **may** be compensated with room, board, travel, medical assistance, and other basic living expenses. This volunteer **must** have been a **member** of the denomination **for at least one year** preceding this volunteer minister/missionary arrangement.<sup>26</sup>
- Prior-Authorized Permission to Work
  - Temporary Nonimmigrant Religious Worker Visa<sup>27</sup>

<sup>23</sup> *United States v. Fuji*, 301 F.3d 535, 540 (7th Cir. 2002).

<sup>24</sup> Immigration and Nationality Act 274(a)(3).

<sup>25</sup> As recommended by the General Assembly in the Presbyterian Church (U.S.A.) Sexual Misconduct Policy and Its Procedures (2013)

[http://www.pcusa.org/site\\_media/media/uploads/oga/publications/sexual\\_misconduct\\_policy\\_and\\_its\\_procedures\\_approved\\_by\\_coga\\_october\\_2013\\_after\\_nfog\\_changes\\_\(00020308\).pdf](http://www.pcusa.org/site_media/media/uploads/oga/publications/sexual_misconduct_policy_and_its_procedures_approved_by_coga_october_2013_after_nfog_changes_(00020308).pdf), and Presbyterian Church (U.S.A.) Child/Youth/Vulnerable Adult Protection Policy and Its Procedures (2016) (*Minutes*, 2016, Part I, pp. 181ff, Item 03-14).

<sup>26</sup> Immigration and Nationality Act 274(a)(1)(A)(v)(II)(C).

<sup>27</sup> Presbyterian Church (U.S.A.) congregations and mid councils may contact the Office of Immigration Issues for advice about calling a pastor from another country to serve the denomination in the U.S.

[Teresa.Waggner@pcusa.org](mailto:Teresa.Waggner@pcusa.org).

- The Department of Homeland Security, U.S. Citizenship and Immigration Services defines a Temporary Nonimmigrant Religious Worker Visa (R-1) as follows:
  - An R-1 is a foreign national who is coming to the United States temporarily to be employed as a minister or in another religious vocation or occupation at least part time (average of at least twenty hours per week) by:
    - A nonprofit religious organization in the United States;
    - A religious organization that is authorized by a group tax-exemption holder to use its group tax exemption; or
    - A nonprofit religious organization, which is affiliated with a religious denomination in the United States.
  - This visa program is intended for religious workers whose lives are dedicated to religious practices and functions, as distinguished from secular members of the religion.
  - To qualify, the foreign national must have been a member of a religious denomination having a bona fide nonprofit religious organization in the United States for at least two years immediately before the filing of the petition.

<https://www.uscis.gov/working-united-states/temporary-workers/r-1-temporary-religious-workers/r-1-temporary-nonimmigrant-religious-workers>

- Special Immigrant Religious Worker Visa<sup>28</sup>
  - The requirements for a Special Immigrant Religious Worker Visa are complex and are detailed by the Department of Homeland Security here: <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4/special-immigrant-religious-workers>

#### Behavior Protected by the U.S. Constitution

- All who are on U.S. soil, regardless of immigration status, have a **First Amendment Right** to write, call, visit, or peaceably assemble to make clear to members of the administration and your representatives your desire to advocate regarding an individual case or to change laws and policies for all who are affected.
- All who are on U.S. soil, regardless of immigration status, have a **Fourth Amendment Right** to be secure in their home, papers, and effects, from unreasonable search and seizure. Demanding a warrant is not interfering with an investigation. This right is,

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<sup>28</sup> Presbyterian Church (U.S.A.) congregations and mid councils may contact the Office of Immigration Issues for advice about calling a pastor from another country to serve the denomination in the U.S. [Teresa.Waggner@pcusa.org](mailto:Teresa.Waggner@pcusa.org).

however, measured according to the reasonableness of your expectation of privacy given how and where you manage and keep such records.

- All who are on U.S. soil, regardless of immigration status, have a **Fourth Amendment Right** to be secure in their person and cannot be arrested or held without either a warrant or probable cause. This includes migrants who are being held in local jails under a detainer from Immigration and Customs Enforcement.<sup>29</sup>
- All who are on U.S. soil, regardless of immigration status, have a **Fifth Amendment Right** to remain silent and to due process; this includes the right to an attorney. This right to an attorney is not extended to people in immigration proceedings, however, because immigration proceedings are civil, not criminal. People in immigration court have the “privilege” of seeking counsel and will **not** be provided with an attorney if they cannot afford an attorney.<sup>30</sup> This is the case even though many immigration proceedings involve detention and, often, hinge on whether a person will be killed, tortured, or persecuted if returned to their home country. If you disagree with this limitation on the right to counsel, use your First Amendment right to contact your representatives and let them know you support the Fair Day in Court for Kids Act of 2016<sup>31</sup> and other legislation that extends the right to counsel to people in immigration court.
- All who are on U.S. soil, regardless of immigration status, have a **Sixth Amendment Right**, in criminal cases, to a speedy public trial by a jury of their peers, wherein they are notified of the charges against them, are allowed to confront and call witnesses, and are allowed to be represented by an attorney.
- Most who are on U.S. soil have an **Eighth Amendment Right** to be free from excessive bond and cruel and unusual punishment. This right is not extended to migrants who fall under the mandatory detention and expedited removal laws within the Immigration and Nationality Act.<sup>32</sup>
- U.S. citizens, whether by birth or naturalization, have the **Fifteenth Amendment Right** to vote.

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<sup>29</sup> *Ice Detainers and the Fourth Amendment: What Do Recent Federal Court Decisions Mean?*, [https://www.aclu.org/sites/default/files/assets/2014\\_11\\_13\\_-\\_ice\\_detainers\\_4th\\_am\\_limits.pdf](https://www.aclu.org/sites/default/files/assets/2014_11_13_-_ice_detainers_4th_am_limits.pdf)

<sup>30</sup> Immigration and Nationality Act 240(b)(4).

<sup>31</sup> <https://www.congress.gov/bill/114th-congress/house-bill/4646>.

<sup>32</sup> INA 236(c) and INA 235(b).