

LEGAL MEMORANDUM

Understanding the Federal Offenses of Harboring, Transporting, Smuggling, and Encouraging under 8 U.S.C. § 1324(a)

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Introduction

With the Trump Administration adopting harsh anti-immigrant policies and the Attorney General Jeff Sessions prioritizing immigration-related prosecutions, there is growing concern that federal law enforcement could expansively interpret the criminal statutes penalizing harboring, transporting, smuggling, and encouraging codified at 8 U.S.C. § 1324(a) and use the federal investigation and prosecution process to chill and retaliate against immigrant organizing, know-your-rights initiatives, and political dissent.

This memorandum analyzes legal authority on harboring, transporting, smuggling, and encouraging under 8 U.S.C. § 1324(a), paying particular attention to the harboring provision under 8 U.S.C. § 1324(a)(1)(A)(iii).¹ The goal of this memorandum is to provide lawyers, legal workers, organizers, and community-based organizations with general legal knowledge about these federal criminal offenses, their consequences, and the federal investigation and prosecution process.²

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¹ We note that there are other federal offenses not covered in this memorandum that may be relevant and warrant further examination such as 18 U.S.C. § 1001 (false statements to federal agents) and 18 U.S.C. §§ 111, 752, 1512 (impeding and obstructing federal officers, parties, and witnesses). Those looking into the workplace context should also examine 8 U.S.C. § 1324a relating to the employment of noncitizens.

² Special thanks to NIPNLG legal intern Annie Flanagan for conducting research and proofreading for this memorandum.

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I. Definition of Harboring, Transporting, Smuggling, and Encouraging

United States law makes it a federal crime to bring in, harbor, transport, or encourage the entry of a “noncitizen”³ person in the United States. *See* 8 U.S.C. § 1324(a). This criminal statute, 8 U.S.C. § 1324, defines **five** subcategories of criminal conduct, which this advisory discusses separately below with particular attention provided to 8 U.S.C. § 1324(a)(1)(A)(iii).

A. What Is the Definition of Harboring under 8 U.S.C. § 1324(a)(1)(A)(iii)?

To convict someone of harboring under 8 U.S.C. § 1324(a)(1)(A)(iii) (herein “harboring provision”), the government must establish the following three elements:

- (1) the noncitizen came, entered or remained in the United States in violation of the law,
- (2) the defendant **knew or recklessly disregarded** that the noncitizen entered or remained in the United States in violation of the law,
- (3) the defendant **concealed, harbored or shielded from detection the noncitizen** in any place, including any building or any means of transportation.

See 8 U.S.C. § 1324(a)(1)(A)(iii) (emphasis added). First, the noncitizen must have actually come to, entered or remained the U.S. in violation of federal law. Second, the defendant must have assisted the noncitizen through concealing, harboring or shielding the noncitizen from detection. Third, the defendant must have known or recklessly disregarded that the noncitizen entered or remained in the U.S. in violation of the federal law.

Overall, courts have interpreted the harboring provision in favor of criminal liability, although some Federal Circuit Courts have limited the definition of harboring on occasion.

The following sections explain what it means to conceal, harbor, or shield a noncitizen from detection, and what it means to know or recklessly disregard that the noncitizen violated the law in entering or remaining in the U.S.

³ For the purposes of this legal advisory, we use the term “noncitizen” where the Government makes reference to an immigrant individual who is present in the United States in violation of immigration law.

i. What Does It Mean to Have “Concealed, Harbored, or Shielded from Detection”?

The statute itself does not define “conceal,” “harbor,” or “shield from detection.” As a result, federal courts have taken on the challenge of defining these terms.

Generally, courts hold that each term has an independent, albeit similar, meaning. *See e.g. United States v. Ye*, 588 F.3d 411, 414 (7th Cir. 2009) (noting that “‘conceal,’ ‘harbor,’ and ‘shield from detection’ have independent meanings, and thus a conviction can result from committing (or attempting to commit) any one of the three acts”).

(1) “*Conceal*” by its plain language means to engage in some clandestine activity. It should be taken in the simple sense of hiding and preventing discovery of a noncitizen persons. *United States v. Costello*, 666 F.3d 1040, 1048 (7th Cir. 2012); *Susnjar v. United States*, 27 F.2d 223, 224 (6th Cir.1928). For example, hiding a noncitizen in the basement when federal agents show up to the house with a search warrant seeking the individual may constitute “concealing”. *See e.g. United States v. Costello*, 666 F.3d at 1052.

(2) “*Shield from detection*” means “the use of any means to prevent the detection of illegal aliens in the United States by the government.” *See e.g. United States v. Ye*, 588 F.3d 411 (7th Cir. 2009). Courts have interpreted “shielding” more expansively than “concealing.” The conduct of shielding does not require the use of a physical barrier. For example, making false statements or falsifying documents may constitute shielding a noncitizen from detection.⁴ Another example is failing to submit proper employment and tax documents for a noncitizen employee who does not have work authorization. *See Id.* at 417.

Furthermore, “shield from detection” does NOT require the use of a trick or artifice. At least one court held that conveying information to the targeted noncitizens about an imminent raid by Immigration and Naturalization Service (INS) and the location of the agents known to be looking for them constituted shielding from detection. *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1072 (5th Cir. 1982).

(3) “*Harbor*” encompasses broader conduct than concealing or shielding but courts are not uniform on their definition.⁵ The Federal Circuit Courts of Appeal have ruled differently on the definition of harboring. ***See infra Appendix I for decisions***

⁴ *See e.g. U.S. v. Shum*, 496 F.3d 390, 392 (5th Cir. 2007) (Court found that the employer shielded noncitizens employees from detection by providing false identifications to facilitate false background checks and did not file social security paperwork on his noncitizen workers); *United States v. Su*, 633 F. App'x 635 (9th Cir. 2015), *cert. denied*. 136 S. Ct. 1702, 194 L. Ed. 2d 763 (2016) (same).

⁵ Note that, unlike “concealing” or “shielding from detection,” harboring does not require an effort to secret or conceal an individual. *See United States v. Lopez*, 521 F.2d 437, 441 (2d Cir 1975), *cert. denied*, 423 U.S. 995 (1975) (helpful explanation of conduct constituting harboring but not constituting concealing or shielding from detection); *see also U.S. v. Rushing*, 313 F.3d 428, 434 (8th Cir. 2002) (harboring does not require proof of secrecy or concealment).

organized by the Circuit Courts of Appeal. We summarize major differences in its definition across Circuits below:

- Some courts have interpreted “harboring” as akin to providing affirmative assistance to an undocumented individual—most commonly shelter. For example, in *Acosta De Evans*, the Court convicted a landlord for providing shelter to noncitizen individuals passing through the area. The Court noted the strong indicia that the defendant was using her home to provide temporary shelter to recent border crossers on their way to more interior locations of the U.S. Though defendant argued that she did not engage in any activities to conceal or obscure the detection of individuals (the residents were in plain sight), the Ninth Circuit held that mere sheltering was sufficient to prove harboring.⁶ See *United States v. Acosta De Evans*, 531 F.2d 428, 430 (9th Cir. 1976), *cert. denied*, 429 U.S. 836 (1976).
- Some courts have taken harboring to require something more than simple aid and assistance to a noncitizen. See e.g. *U.S. v. Costello*, 666 F.3d 1040 (7th Cir. 2012) (defendant did not commit harboring when she picked up her noncitizen boyfriend from the bus terminal and provided housing to him). That being said, these Courts have a hard time delineating the additional affirmative act, intent or test. The Seventh Circuit in *Costello* made its best attempt when explaining that harboring meant “materially to assist an alien to remain illegally in the United States without publicly advertising his presence but without needing or bothering to conceal it.” *Id.* at 1050.
- Some courts have adopted a “substantially facilitate” standard which could be likened to an effect-based test on whether defendant’s conduct constitutes harboring. As Appendix I explains, the utility of this test appears limited as Courts have broadly found liability even where the facilitation is minimal.
- Some courts criminalize mere verbal advice while other courts have limited liability in such cases. The Third Circuit decision in *U.S. v. Ozcelik* makes the best attempt to summarize the current case law.⁷ Please note

⁶ See also *U.S. v. Rushing*, at 434 (8th Cir. 2002) (while defendant did not engage in concealment of the noncitizen person, the Court found liability based on defendant assistance in providing shelter, employment, medical care, and banking privileges); *United States v. McClellan*, 794 F.3d 743, 755 (7th Cir. 2015) (“[t]o harbor an alien means to provide a known alien with a secure haven, a refuge, or a place to stay where it is unlikely that the authorities will be seeking him.”)

⁷ “Convictions under § 1324 generally involve defendants who provide illegal aliens with affirmative assistance, such as shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations. In contrast, we have found no cases in which a defendant has been convicted under this statute for merely giving an alien advice to lay low and to stay away from the address on file with the INS, obvious information that any fugitive would know.” *U.S. v. Ozcelik*, 527 F.3d 88, 101 (3d Cir. 2008).

Ozcelik distinguishes between verbal advice regarding the general investigatory practices of federal immigration agents, such as staying away from the address on file with ICE, and verbal advice given to directly interfere with an ongoing or imminent agent action targeting a specific individual or location. See *U.S. v. Ozcelik*, 527 F.3d 88, 101 (3d Cir. 2008) (holding that an individual’s conduct did not constitute harboring because “he merely passed along general information to [noncitizens] and made no suggestions regarding falsifying documents.”)

ii. What Does It Mean to Have Knowledge or Reckless Disregard that an Immigrant Entered or Remained in U.S. in Violation of the Law?

To be convicted under the harboring provision, the government must demonstrate that the defendant knew or was “in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law...” 8 USC § 1324(A)(1)(a)(iii). Again here, courts have liberally interpreted the knowledge requirement in favor of liability.

The Eleventh Circuit, for example, defined “reckless disregard of the fact” to mean “deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully.” *U.S. v. Perez*, 443 F.3d 772, 782 (11th Cir. 2006).

In the Eleventh Circuit case *Perez*, the Court held that the facts and circumstances of defendant’s action were sufficient to prove reckless disregard where (1) defendant Mr. Perez had a prior conviction for smuggling; (2) Mr. Perez allowed the passengers to board the boat after their boat became stranded; (3) Mr. Perez did not try to help/assist the captain of the first boat after the boat broke down or to report that it was still stranded; (4) when Mr. Perez asked them where in Miami they wanted to go, the passengers simply indicated they wanted to reach land; (5) Mr. Perez acted nervously and failed to reveal the presence of the passengers in the boat before the police officer discovered them; (6) there was no indication that the passengers on the boat had been fishing like Mr. Perez indicated. *U.S. v. Perez*, 443 F.3d 772 (11th Cir. 2006).

As an evidentiary matter, courts have held that *circumstantial evidence* alone can establish a defendant’s knowledge or reckless disregard that the individuals harbored were unlawfully in the country. See e.g. *U.S. v. Rubio-Gonzalez*, 674 F.2d 1067, 1071-72 (5th Cir. 1982) (finding that defendant’s knowledge of the individual’s immigration status could be inferred from circumstantial evidence where, immediately after the immigration officer released defendant, he rode his motorcycle to the base of hill where two undocumented immigrants were working and told them that “immigration” was there, the immigrants were from defendant’s home state in Mexico, and the defendant’s brother also was an undocumented immigrant working at the site).

B. What is the Definition of Transporting under 8 U.S.C. § 1324(a)(1)(A)(ii)?

The statute punishing the transportation of noncitizens who are unlawfully present states:

Any person who ... 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 such violation of law....*

8 U.S.C. § 1324(a)(1)(A)(ii) (emphasis added). Therefore, to convict someone of transporting under Subsection 1324(a)(1)(A)(ii), the government must establish the following four elements, (1) the noncitizen was unlawfully present in the United States; (2) the defendant knew or recklessly disregarded the fact that the noncitizen was in violation of the law; (3) the defendant knowingly transported or moved, or attempted to transport or move, the noncitizen by any means of transportation or otherwise; and (4) the transportation was done in furtherance of the noncitizens unlawful presence in the United States.

It is important to note that willful transportation of a noncitizen is not, by itself, a violation of the statute, for the law prohibits such conduct only when transportation is in furtherance of the individual's unlawful presence.

For example, the Ninth Circuit has held that there “must be a direct or substantial relationship between that transportation and its furtherance of the alien's presence in the United States.” *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977). Other courts require a factual finding of “specific intent” that the purpose of the transportation was to further the violation of law. *See United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir. 1989); *United States v. Moreno-Duque*, 718 F. Supp. 254, 259 (D. Vt. 1989) (finding that the government must prove that the defendant specifically intended by means of the transportation to advance or assist the noncitizen's violation of law, not merely that the effect of the transportation was to allow the noncitizen to remain in the United States.) The Fifth Circuit has adopted a mixed approach which uses the “direct or substantial relationship” test, but also focuses on the defendant's intent to further the unlawful presence of the noncitizen. *See e.g. United States v. Merkt*, 764 F.2d 266, 272 (5th Cir. 1985). Similar to the Sixth Circuit, the Seventh Circuit holds that a defendant's knowledge that his transportation furthers a noncitizen's unlawful presence in the United States is an essential element of the crime. *See United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994). The Tenth Circuit does not employ a clear approach but examines all circumstances. A factfinder may consider any and all relevant evidence bearing on the “in furtherance of” element: time, place, distance, reason for trip, overall impact of trip, defendant's role in organizing and/or carrying out the trip. *See United States v. Hernandez*, 327 F.3d 1110, 1114 (10th Cir. 2003).

Regardless of the standard or test, courts generally conduct a fact-based, circumstantial analysis. For example, the court may examine whether the defendant was compensated for the transportation and what efforts the defendant took to conceal or harbor individuals. *See e.g. United States v. Perez-Gomez*, 638 F.2d 215, 218-19 (10th Cir.1981); *United States v. Parmelee*, 42 F.3d at 391 (holding that, in meeting the *mens rea* requirement, the government may prove the defendant's knowledge by reference to the facts and the circumstances surrounding the case). A court may also consider whether the noncitizen was a friend, co-worker, or companion of the defendant, or treated more like human cargo that was being shipped. *See Salinas-Calderon*, 585 F.Supp. 599, 602 (D. Kansas 1984). Geographical proximity to the U.S. border and time passage since last entry into the U.S. are significant circumstantial factor in this fact-based analysis. *United States v. Franco-Lopez*, 709 F. Supp. 2d 1152, 1160 (D.N.M. 2010), *aff'd*, 687 F.3d 1222 (10th Cir. 2012); *see also United States v. Rodriguez-Rodriguez*, 840 F.2d 697, 699 (9th Cir. 1988) (finding liability where defendants were paid \$750 to drive noncitizen individuals from San Ysidro, city on the border with Mexico, to Los Angeles after they had freshly crossed the border).

The following are examples of conduct for which the Court found liability for transporting under 8 U.S.C. § 1324(a)(1)(A)(ii):

- Defendant convicted of transporting where individual directly arranged for the transportation of noncitizens in an aircraft and earned financial profit from the transportation, even where the defendant employed someone else to fly the aircraft. *United States v. Alvillar*, 575 F.2d 1316 (10th Cir. 1978).
- Defendant convicted of transporting where Government presented evidence that he, having lost his job because of his immigration status, planned, organized, and attempted to carry out a trip so that he and the two noncitizens who were undocumented could look for work. The Court examined circumstantial evidence that the defendant used a pickup with a camper shell with darkened windows, that defendant drove through the night, and that other noncitizens paid defendant for the trip. *U.S. v. Barajas-Chavez*, 162 F.3d 1285 (10th Cir. 1999), *cert. denied* 528 U.S. 826.
- Defendant convicted of transporting where evidence presented that defendant organized the noncitizens' journey, including the purchasing of the transportation vehicle, picking people up, and driving the noncitizens across country from California, rather than merely participating in the journey as a "car-pooler." *U.S. v. Velasquez-Cruz*, 929 F.2d 420 (8th Cir. 1991).

The following are examples of conduct for which the Court declined to find liability for transporting under 8 U.S.C. § 1324(a)(1)(A)(ii):

- Court found that defendant's transportation of noncitizens was part of his ordinary and required course of his employment as a foreman, and therefore

was only incidentally connected to the furtherance of violation of law, if at all, and was too attenuated to come within boundaries of the “transporting” provision of this section. *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977).

- Court declined to find liability based on reasoning that furthering a noncitizen’s presence involves more than transporting the undocumented worker to his or her place of employment. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 305 (D.N.J. 2005), *aff’d sub nom. Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527 (3d Cir. 2012); *System Mgmt., Inc. v. Loiselle*, 91 F.Supp.2d 401, 411 (D. Mass. 2000); *United States v. Moreno–Duque*, 718 F.Supp. 254, 258–59 (D.Vt. 1989) (finding that allegations of merely transporting noncitizens to work are insufficient for the purposes of stating a claim of transporting); *see also United States v. Chavez–Palacios*, 30 F.3d 1290, 1294 (10th Cir.1994) (stating that “mere transportation of an illegal alien is, without more, insufficient as a matter of law to support a conviction under this statute”).
- Court found that the requisite intent was not present based on the following evidence: the drivers were not being compensated; they made no attempt to hide the passengers or conceal the fact that they were noncitizens; the noncitizens were traveling in hopes of finding employment rather than to evade detection; and the noncitizens were friends and relatives of the drivers. *United States v. 1982 Ford Pick-Up*, 873 F.2d 947 (6th Cir.1989) *distinguished by United States v. Perez-Gonzalez*, 307 F.3d 443, 446 (6th Cir. 2002) (finding the requisite intent based on the fact that defendant driver was compensated; van was tinted to conceal the interior; passengers were only allowed to leave the vehicle for short intervals; van drove at night and avoided traffic routes more monitored by immigration; driver did not know any of the passengers and treated them like human cargo).

C. What is the Definition of Smuggling under 8 U.S.C. § 1324(a)(2)?

The relevant statutory provisions on smuggling are at 8 U.S.C. § 1324(a)(2) and 8 U.S.C. § 1324(a)(1)(A)(i).⁸ 8 U.S.C. § 1324(a)(2) states:

Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, **brings to or attempts to bring** to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien....

⁸ 8 U.S.C. § 1324(a)(2) is similar to 8 U.S.C. § 1324(a)(1)(A)(i) in that they both prohibit the bringing or the attempt to bring a noncitizen into the United States. One difference is that 8 U.S.C. § 1324(a)(2) extends punishment even to individuals who bring noncitizens to a designated port of entry while 8 U.S.C. § 1324(a)(1)(A)(i) explicitly exempts such ports of entry. Another difference is the penalty provisions.

8 U.S.C. § 1324(a)(2) (emphasis added). Therefore, the elements of smuggling in violation of 8 U.S.C. § 1324(a)(2) are (1) that the defendant knowingly brings or attempts to bring a noncitizen to the United States; and (2) that the defendant knew or was in reckless disregard of the fact that the noncitizen had not received prior official authorization to come to or enter the United States.

Note: this criminal statute could apply to individuals in the U.S. who facilitate the unlawful entry of a family member into the U.S., either directly or indirectly such as paying a human trafficker. Such a scenario is particularly relevant considering that DHS memoranda state that the agency plans to investigate parents and family members of noncitizen minors who enter the country without inspection in order to combat the smuggling and trafficking of minors.⁹ ICE has already targeted noncitizen sponsors of minors for detention and deportation.¹⁰

One court has found liability for smuggling under 8 U.S.C. § 1324(a)(2) when a defendant asked noncitizens in his vehicle to lie down after loading them into a van and driving to a border checkpoint. *U.S. v. Monreal-Miranda*, 2004 WL 1238270 (9th Cir. 2004)

It is important to understand that criminal exposure for “smuggling” is limited to actions that assist or aid in the travel of a noncitizen into the United States from another country. The statute does not apply to aid and assistance of a noncitizen once the individual is in the U.S. Albeit, subsequent acts of aid and assistance in the U.S. could be punished under other Subsections of 1324(a). For example, in *United States v. Lopez*, the Ninth Circuit overturned a conviction for smuggling where defendant picked up a dozen or so hitchhikers on the highway near San Diego, one of which was experiencing a medical emergency, reasoning that the offense of smuggling noncitizens “to the United States” terminates when the initial transporter drops off the noncitizen at a location inside United States. *See United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007). This is distinguished from the scenario where the Court views a defendant as the U.S. arm of a smuggling ring and the defendant aids a noncitizen upon entry into the U.S. and knows the time and location of his entry. *See e.g. Smith v. United States*, 24 F.2d 907, 907 (5th Cir.1928) (finding liability for smuggling where Court found that defendant acted in concert with the smugglers and waited in the woods with an automobile for noncitizens arriving from Cuba and then transported them to Tampa, Florida).

⁹ Memorandum from DHS Sec’y John Kelly, Implementing the President’s Border Security and Immigration Enforcement Improvements Policies (February 20, 2017), at 11 § M, *available at* https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

¹⁰ Caitlin Dickerson, *Trump Administration Targets Parents in New Immigration Crackdown*, N.Y. TIMES, July 1, 2017, *available at* <https://www.nytimes.com/2017/07/01/us/trump-arrest-undocumented-immigrants.html>.

D. What is the Definition of Encouraging or Inducing under 8 U.S.C. § 1324(a)(1)(A)(iv)?

Subsection 1324(a)(1)(A)(iv) makes it a criminal offense for any person to encourage or induce a noncitizen to come to, enter, or reside in the United States, in knowing or in reckless disregard of the fact that it would be a violation of law for the noncitizen to do so. *See* 8 U.S.C. § 1324(a)(1)(A)(iv).

Conduct that “encourages or induces” a noncitizen to come to, enter, or remain in the U.S. is not explicitly defined within the statute and has been left to federal court interpretation. The Third Circuit has held that a conviction for encouragement or inducement under Subsection 1324(a)(1)(A)(iv) requires “substantial” support, akin to “an affirmative act that served as a catalyst for aliens to reside in the United States in violation of immigration law when they might not have otherwise” and “not just general advice.” *DelRio-Mocci v. Connolly Properties Inc.*, 672 F.3d 241, 248-49 (3d Cir.2012). In *DelRio-Mocci*, a civil RICO case claiming encouraging as the predicate offense, the Third Circuit found that the property manager’s conduct of knowingly renting apartments to noncitizens was not an affirmative act that served as a catalyst for noncitizens to reside in the U.S., reasoning that the plaintiff had provided no evidence that the noncitizens would not or could not have resided somewhere else in the U.S. *Id.*; *see also Zavala v. Wal-Mart Stores, Inc.*, 691 F.3d 527, 542 (3d Cir. 2012) (holding that Wal-Mart’s employment of noncitizens was not affirmative assistance because there was no evidence that noncitizen would not or could not have resided in the U.S. without having been employed by Walmart); *but see United States v. Henderson*, 857 F. Supp. 2d 191, 210 (D. Mass. 2012) (holding that Defendant’s employment of the noncitizen as a house cleaner combined with verbal advice to remain in the U.S. while the noncitizen resolved her immigration proceedings could constitute encouragement under Section § 1324(a)(1)(A)(iv) but also ordering a new trial due to improper jury instructions).

Other courts have adopted similar definitional tests for encouragement and inducement that require more substantial acts. In *United States v. Thum*, the Ninth Circuit held that the defendant did not encourage or induce a noncitizen to remain in country “merely by escorting that alien from a fast food restaurant near the border to a nearby vehicle” and that defendant must “take some action to convince the alien to stay in this country or to facilitate the noncitizens ability to live in the country indefinitely” citing substantial actions such as falsifying government documents. 749 F.3d 1143, 1144 (9th Cir. 2014); *see also Henderson*, 857 F. Supp. 2d at 210 (granting new trial because jury was not properly instructed that they must find that Defendant’s conduct constitutes “affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise might have been.”) However, earlier decisions of some Circuit Courts adopted a more expansive interpretation of encouragement or inducement albeit in cases where defendants engaged in substantial assistance. *See e.g. U.S. v. Lopez*, 590 F.3d 1238, 1249–52 (11th Cir. 2002) (reading “encouraging or inducing” to be synonymous with “helping,” where Lopez captained a boat, picked up noncitizens, and navigated the boat to the United States); *United States v.*

He, 245 F.3d 954, 960 (7th Cir. 2001) (“to encourage” means “to inspire with courage, spirit, or hope ... to spur on ... to give help or patronage to,” where defendant helped falsify citizenship documents) (internal citations omitted).

Subsection 1324(a)(1)(A)(iv) is often used to prosecute the production of fraudulent government documents that could assist noncitizens in remaining in the U.S. without fear of detection and deportation. *See e.g. United States v. Ndiaye*, 434 F.3d 1270, 1298 (11th Cir. 2006); *United States v. He*, 245 F.3d 954, 956 (7th Cir. 2001) (defendant convicted for altering a U.S. passport in order to assist a noncitizen to enter the country); *United States v. Oloyede*, 982 F.2d 133, 135(4th Cir.1992); *cf. Edwards v. Prime, Inc.*, 602 F.3d 1276, 1295 (11th Cir. 2010) (reversing lower court dismissal of a RICO claim under § 1324(a)(1)(A)(iv) where “the defendants had knowingly supplied the aliens with jobs and with social security numbers to facilitate their employment.”)

Additionally, it appears that Subsection 1324(a)(1)(A)(iv) and Subsection 1324(a)(1)(A)(iii) (harboring provision) are sometimes brought to charge and punish similar conduct. *See e.g. U.S. v. Batjargal*, 302 Fed.Appx. 188, 191 (4th Cir. 2008) (defendant convicted of both § 1324(a)(1)(A)(iii) and § 1324(a)(1)(A)(iv) for providing noncitizen with a place to live, an automobile, a cell phone, auto insurance and gym membership); *DelRio-Mocci v. Connolly Properties Inc.*, 672 F.3d 241 (3d Cir.2012) (alleging violations of both statutory subsections where property managers rented housing to noncitizen individuals). This makes sense considering the line of cases in the harboring context which similarly extend liability for conduct akin to affirmative assistance to noncitizens, hold that to shield from detection does not require a physical barrier, and that verbal statements warning a targeted noncitizen of an imminent enforcement action could constitute harboring. *See Point I.A.i.* Indeed, some courts have expressed concern with reading Subsection 1324(a)(1)(A)(iv) so broad as to make the remaining subsections of 8 U.S.C. 1324(a)(1)(A) redundant or superfluous. *See DelRio-Mocci*, 672 F.3d at 249 (“[i]ndeed, reading the encouraging or inducing subsection of the statute too broadly risks rendering the remaining subsections of 8 U.S.C. § 1324(a)(1)(A) redundant or superfluous”); *Thum*, 749 F.3d at 1146 (9th Cir. 2014).

At least the Ninth Circuit has questioned whether Subsection 1324(a)(1)(A)(iv) raises First Amendment and Due Process concerns. *See U.S. v. Sineneng-Smith*, Cr. Case No. 15-10614 (9th Cir. September 18, 2017) (ordering amici briefing on whether the statutory provision is overbroad or likely overbroad under the First Amendment, whether provision is void for vagueness under the First or Fifth Amendment, whether the provision contains an implicit *mens rea* element which the Court should enunciate).

II. Examples of Cases and Conduct of Harboring

In this section, we provide further briefing on the harboring provision as this section of 8 U.S.C. § 1324(a) may be more susceptible to expansive interpretation. This is in part because Congress enacted legislation to punish the harboring of noncitizens without defining this term within the statute. As such, the work of defining what

constitutes “harboring” has been left to the courts which have varying interpretations.

Given that “harboring” is not defined within statute and subject to differing court jurisprudence, a practical assessment of harboring liability involves an examination of the facts and circumstances around these cases. Below, we highlight a number of key facts for which Courts have repeatedly found liability and list case facts for which Courts have or have not found liability. Additionally, in Appendix I, we summarize the definition of “harboring” employed across each of the federal Circuit Courts of Appeal.

A. Common Facts in Harboring Prosecutions

Reviewing the fact narratives in these decisions reveal that Courts were often preoccupied with the additional unscrupulous activities of defendants. While these additional bad acts are not always relevant to the criminal elements of harboring, they appear to influence the outcome of cases. We note that many of these facts arise in the employment setting.

The following set of facts are recurring in cases where defendants are found guilty of harboring and related crimes:

- Running a business operation that appears related to smuggling noncitizen individuals and keeping them in the U.S. *See e.g. United States v. Lopez*, 521 F.2d 437, (2d Cir. 1975), *cert. denied*, 423 U.S. 995 (1975) (defendant Mr. Lopez owned at least six homes in New York, where immigration authorities found twenty-seven undocumented individuals; Mr. Lopez knew that the people staying in his homes were undocumented; each person paid Mr. Lopez \$15 per week to live in his houses; in many cases, people received the address for a particular house before they left their home countries, and, upon crossing the border without authorization, they proceeded directly to the house; Mr. Lopez also helped these individuals obtain jobs by completing work applications and transporting them to and from work and arranged sham marriages for many so that they could appear to be in the U.S. in lawful status); *United States v. Xiang Hui Ye*, 588 F.3d 411 (7th Cir. 2009) (defendant Mr. Ye advised undocumented workers to purchase fake documents, kept them off payroll records, provided them with transportation to work, and provided them with housing by entering into lease agreements and making rent payments).
- Knowingly employing undocumented workers and helping them obtain or encouraging them to obtain fraudulent immigration papers or use false names or social security numbers; continuing to employ workers after immigration authorities flagged them as having suspect documents; benefiting financially from the employment of undocumented workers. *See e.g. United States v. Kim*, 193 F.3d 567 (2d Cir. 1999) (defendant Mr. Kim instructed at least one worker to bring in new papers with a different name that would indicate that she had work authorization, later instructed the same worker to change her name and remain in

his employment a second time, even though her name appeared on a suspect document list served on him by the Immigration authorities); *United States v. Shum*, 496 F.3d 390 (5th Cir. 2007) (defendant Mr. Shum provided false identification to his workers to facilitate the background checks required for them to clean government buildings); *United States v. Xiang Hui Ye*, 588 F.3d 411 (7th Cir. 2009) (defendant Mr. Ye advised undocumented workers to purchase false documents, kept them off payroll records, provided them with transportation to work, and provided them with housing by entering into lease agreements and making rent payments).

- Attempting to intervene or delay an impending immigration investigation by, for example, hiding or disguising the noncitizen. See e.g. *U.S. v. Cantu*, 557 F.2d 1173 (5th Cir. 1977) (defendant Mr. Cantu, a restaurant owner, refused immigration agents admission to his restaurant until they could provide a warrant and while the immigration authorities waited outside for the warrant, Mr. Cantu made arrangements with at least two of his patrons to drive some of his noncitizen employees from the premises and also arranged for some of his employees to pretend to be customers and leave the restaurant like customers); *United States v. Varkonyi*, 645 F.2d 453 (5th Cir. 1981) (defendant Mr. Varkonyi interfered with Customs and Border Protection agents' actions by forcibly denying them entry to his property through physical force); *U.S. v. George*, 779 F.3d 113 (2nd Cir. 2015) (defendant hired the noncitizen and allowed her to reside in her home for five years, never filed any tax forms, instructed the noncitizen to not discuss her immigration status, and requested that the noncitizen identify herself as visiting family friend, and attempted to stall authorities from interviewing the noncitizen once she was discovered).

B. Actions that Courts Have Deemed to Be Harboring

Below is a non-exhaustive list of cases, and relevant facts that have been held to violate the harboring statute under 8 U.S.C. § 1324:

- Warning noncitizens of the presence of immigration agents by running up to them and verbally warning them that officers were on the premises to arrest them. See *U.S. v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 (5th Cir. 1982). The court found that the jury could rationally find that the defendant's warning to other workers that immigration was present at the worksite was evidence that he knew that they were in the U.S. unlawfully, and moreover that the defendant's knowledge of the immigration system and processes (based on his own prior deportations, unlawful entries, and application for permanent resident status) was used as circumstantial evidence of his guilty state of mind in warning the workers that INS agents were present. *Id*; but see *U.S. v. Ozcelik*, 527 F.3d 88, 101 (3d Cir. 2008).
- Installing a security system and method of alerting noncitizens to an imminent immigration raid and yelling "immigration" several times to warn noncitizens of

- the their presence was sufficient conduct to constitute harboring. *United States v. Herrera*, 584 F.2d 1137, 1142-5 (2d Cir. 1978). Defendants also instructed noncitizens on where to go and how to escape in the event of the raid and instructed a noncitizen to lie about her citizenship.
- Using radio scanners in transportation vehicles to tune into border control frequencies in order to avoid border patrol on the highways was strong evidence that individuals committed harboring and transporting. *United States v. Fierros*, 692 F.2d 1291, 1295 (9th Cir. 1982). Court also examined circumstantial evidence that the defendants were labor recruiters that ran an extensive labor recruitment business bringing noncitizen workers from Mexico to the U.S.
 - Instructing unlawful immigrants to lie down after assisting in loading them into a van is enough to show conspiracy for harboring and transporting. *U.S. v. Monreal-Miranda*, 2004 WL 1238270 (9th Cir. 2004). The Court also examined circumstantial evidence that the defendant in *Monreal-Miranda* had picked up the undocumented individuals when they were dropped off by smugglers in Nogales, Arizona, drove them to a Motel 6, provided them shelter, brought the undocumented individuals lunch and, after all of that conduct, loaded the undocumented individuals into the van and told them to lie down to evade detection.
 - Making false statements of legal status or U.S. citizenship. *See U.S. v. Rodriguez*, 493 F. Supp.2d 833 (W.D. Tex. 2007) (defendant, the driver, made false statements to a CBP officer that a car passenger was a U.S. citizen and a relative in order for them to gain entry); *US v. Smith*, 112 F.2d 83, 84 (2d Cir. 1940) (employer instructed a worker to tell no one that she was a noncitizen and say she was from Brownville, NY, ‘if the Law come in’).
 - Providing noncitizens with permanent housing, transportation, sham marriages, and assisting them in obtaining employment. *See e.g. U.S. v. Lopez*, 521 F.2d 437 (2d Cir. 1975). In finding that defendant’s sheltering of individuals known by him to be unlawfully present in the US amounted to harboring, the court in *Lopez* relied on evidence that there was a substantial number of noncitizens sheltered by him (27), some entered from El Salvador with the addresses of his house in hand, they traveled directly to these houses after their entry, he assisted them in obtaining employment for them and transporting them to and from their jobs, he arranged sham marriage ceremonies to United States citizens for the purpose of enabling the noncitizens to claim citizenship, and he assisted in preparation of their applications for citizenship. *Id.* at 441.
 - Employer, knowing that noncitizens were not authorized to work in the U.S., did not require the noncitizens to fill out job applications or tax forms, did not keep time cards for noncitizen workers, paid noncitizen workers in cash and leased apartments for noncitizen workers. *U.S. v. Ye*, 588 F.3d 411 (7th Cir. 2009). *See*

also *U.S. v. McClellan*, 794 F.3d 743 (7th Cir. 2015) (defendant provided workers with free utilities and housing which minimized the workers' detection and prevented them from engaging in commercial transaction that could have exposed their unlawful status).

- Employer instructing an employee to use a false name, obtain fraudulent identity documents or engage in some form of deception to evade detection. See e.g. *U.S. v. Kim*, 193 F.3d 567 (2d Cir. 1999); *U.S. v. Ndiaye*, 434 F.3d 1270 (11th Cir. 2006) (assisting noncitizen to obtain a fraudulent Social Security card that allowed him to work in the United States); *U.S. v. Cantu*, 561 F.2d 83 (5th Cir. 1977) (finding liability where employer dressed up the workers as customers to evade arrest by immigration authorities. Even though the undocumented workers walked through the restaurant's main door, in full view of law enforcement agents, the court stated that the defendant had nonetheless shielded the noncitizen from detection through deception).

C. Actions that Courts Have Declined to Deem as Harboring

Below is a non-exhaustive list of cases and relevant acts by defendants that have been held NOT to violate 8 U.S.C. § 1324 or its predecessor statutes relating to harboring noncitizens.

Please note that in all the cases below, despite the successful outcomes, the U.S. government still investigated, arrested, and prosecuted each defendant. In many of the cases, the court convicted the defendant in the first instance, and many of the individuals served time until a higher appellate court vindicated their arguments. This means that such conduct will not necessarily be consequence-free.

- Defendant informing noncitizen to generally keep a low profile and not draw attention to himself, and stating that it was good that he lived at a different address than the one on file with INS did not constitute harboring, concealing, or shielding the noncitizen, where the defendant did not know about any imminent threat to the noncitizen's immigration status and the noncitizen already had changed his address before he even spoke to defendant. *U.S. v. Ozcelik*, 527 F.3d 88 (3d Cir. 2008), cert. denied 555 U.S. 1153.
- Defendant's conduct in taking noncitizens to a lawyer shortly after their arrival to help them go through immigration asylum processing did not substantially facilitate noncitizens to escape from detection. *United States v. Dominguez*, 661 F.3d 1051, 1063 (11th Cir. 2011); see also *cf. U.S. v. Merkt*, 764 F.2d 266 (5th Cir. 1985), rehearing denied 772 F.2d 904 (person intending to assist noncitizen in obtaining legal status is not acting "in furtherance of alien's illegal presence" in the U.S. within meaning of 8 U.S.C. § 1324(a)(2)).

- Defendant conferring with immigration authorities on behalf of noncitizens who sought entry was an act directed toward obtaining a lawful result by lawful means and in no way connected to or in furtherance of conspiracy to attempt to smuggle noncitizens, and could not support a conspiracy conviction. *U.S. v. Driscoll*, 449 F.2d 894 (1st Cir. 1971) *cert. denied* 405 U.S. 920.
- Defendant allowing her Mexican boyfriend to live with her after he returned to the U.S. without authorization did not amount to harboring. Defendant picked him up at a bus terminal and drove him to her home, where they had lived together during his previous time in the country; he then lived there more or less continuously until his subsequent arrest; there was no evidence that defendant concealed her boyfriend or shielded him from detection, and she was not trying to encourage or secrete a noncitizen. *U.S. v. Costello*, 666 F.3d 1040 (7th Cir. 2012).
- Defendant, apartment complex property managers, simply renting apartments to individuals who lacked formal immigration documents, did not commit the crime of harboring. *Del Rio-Mocci v. Connolly Properties Inc.*, 672 F.3d 241 (3d Cir. 2012).
- Agent's testimony was insufficient to establish that defendant was harboring individuals where he went to defendant's apartment to search for the noncitizen who failed to report for deportation, and as he approached apartment he heard a door slam and bushes break, but the agent never saw the noncitizen. *See United States v. Silveus*, 542 F.3d 993 (3d Cir. 2008) (the Court however still convicted the defendant of transporting for helping stow away Haitian noncitizens on his boat).

III. Understanding Law Enforcement Investigations into Harboring, Smuggling, Transporting, and Encouraging

It is important to understand that federal investigations can be long and protracted. While an investigation does not necessarily result in prosecution, the federal investigation itself can seriously disrupt everyday life and have a significant chilling impact on organizational activities. The stigma around federal investigations can have collateral political and economic ramifications. As such, the federal investigation can sometimes exact the same degree of harm as actual prosecution. Below we describe the applicable agencies and law enforcement tactics employed during federal investigations.

A. Law Enforcement Agencies Involved

ICE Homeland Security Investigations (HSI) is the primary agency within the interior of the U.S. which investigates immigration-related federal criminal offenses. This includes the harboring, transporting, and smuggling offenses under 8 U.S.C. § 1324. Specifically, HSI has around 26 field offices across the country and 67 attaché offices across 47 countries. HSI agents investigate crimes ranging from reentry, harboring, drug

trafficking to cyber security and counterfeiting. Agency officers often do international rotations, particularly in Central America.¹¹

U.S. Customs and Border Patrol and ICE Enforcement and Removal Operations (ERO) can also be the investigating agency, particularly Border Patrol for activities near the Southern or Northern border and ERO for individuals arrested in the course of civil enforcement actions. Other federal agencies such as the U.S. Marshalls, FBI, and IRS could be secondary or referring agencies.

Regardless of the federal law enforcement agency, the officer will work in close collaboration with the U.S. Attorney's office which makes the ultimate call on whether to prosecute an individual for a federal offense.

Once an individual is charged with a federal criminal offense, the U.S. Marshalls, an agency within the DOJ, generally shares or takes exclusive custody of the individual. Detainees are often held in local jails with a contract with the U.S. Marshalls awaiting resolution of their criminal proceedings. Pre-trial defendants have the opportunity to seek bail and other detention determinations in federal criminal proceedings. *See* 18 U.S.C. §§ 3142-3156. If and when an individual is convicted and sentenced for an offense, they are often transferred to the custody of the Bureau of Prisons (BOP), a department within the DOJ, to serve their sentence at a BOP facility or contracted private prison.

** Please note that ICE and DOJ organizational structures and responsibilities could shift given the new Administration.

B. Investigative Methods Used by Law Enforcement

i. Anonymous Tips

Criminal investigations can often start with anonymous tips. *See e.g. U.S. v. Garcia-Nunez*, 709 F.2d 559 (9th Cir. 1983) (police officers had reasonable suspicion to stop car being driven by suspect who was later charged with conspiracy to conceal and transport noncitizens where police received an anonymous tip identifying suspect's car as one involved in smuggling individuals in and out of a specified house and where police observed suspect leaving house and appearing to look around for signs of trouble, and four men walking hurriedly from the house to his car.)

ii. Confidential Informant and Recording Devices

A common investigatory tactic is ICE recruitment of confidential informants. *See e.g. U.S. v. Ramirez-Arellano*, Cr. Case No. 16-mj-00141 (W.D.N.Y. filed October 17,

¹¹ *See Homeland Security Investigations*, ICE (last visited August 19, 2017), <https://www.ice.gov/hsi>; *Homeland Security Investigation Principal Field Offices*, ICE (last visited Aug. 19, 2017), <https://www.ice.gov/contact/hsi>; *HSI International Operations*, ICE (last visited Aug. 19, 2017), <https://www.ice.gov/contact/hsi-international-ops>.

2016) (noncitizen was charged with reentry after confidential informant identified her photo in a line-up in connection to a workplace harboring prosecution). Often times, law enforcement uses noncitizens themselves as the confidential informants.

The investigating agency may outfit the confidential informant with recording devices or wires in order to record conversations with targets that can later be used as evidence to prosecute the individual. For example, in *U.S. v. Manzano-Huerta*, the government used recorded telephone calls from a confidential informant as evidence of harboring and obstruction of justice. *See* 809 F.3d 440 (8th Cir. 2016).

Government informants were used in the harboring prosecutions of faith leaders for assisting Central American asylum seekers during the sanctuary movement of the 1980s. *See e.g. United States v. Aguilar*, 883 F. 2d 662, 690 (9th Cir. 1986) (chronicling U.S.’ use of informants to infiltrate the sanctuary movement); *see also* Nat Hentoff, “Undercover Agents Go to Church,” *THE WASHINGTON POST* (June 14, 1985) (describing government infiltration program Operation Sojourner).

iii. Surveillance and Interview Requests

Generally, ICE engages in heavy surveillance when investigating targets for federal crimes. This includes the recruitment of confidential informants as referenced above. It also includes surveillance of the target entity, individuals, and employees. For example, ICE HSI agents will follow workers from their residents to their workplaces. ICE agents may approach individuals at random with questions or make a more formal request that they come to the ICE office for an interview. Such encounters can be unannounced. For example, agents may question individuals at their ICE supervision check-ins, approach them outside their homes or near their places of employment.

iv. Judicial Search Warrant

U.S. Attorneys can obtain a search warrant from a federal court if the judge finds probable cause, based on the evidence presented by the government, that the target has committed a federal offense. For example, in *U.S. v. Oloyede*, the Court held that the search warrant executed on the office of an attorney accused of aiding noncitizens in obtaining false identity documents had probable cause, thereby justifying the seizure of all business and client records. *U.S. v. Oloyede*, 982 F.2d 133 (4th Cir. 1992). The Court relied on evidence from the affidavits of two confidential informants that outlined the procedures associated with the defendant’s operation, and 26 files involving clients of the attorney. *Id.*

v. Grand Jury Investigation and Subpoena

A grand jury subpoena is an order issued by a federal judge and sought by a grand jury investigating a federal crime that compels an individual to testify about information

in one's knowledge (subpoena ad testificandum) or produce records in one's possession related to the investigation (subpoena duces tecum).

Evidence could include decryption of data files that are not protected by legal privilege. *In re Boucher*, No. 2:06-MJ-91, 2009 WL 424718, at *4 (D. Vt. Feb. 19, 2009) (directing defendant to provide an unencrypted version of his storage drive for review by ICE.)

If a judge issues a subpoena, an individual has a legal right to challenge the subpoena through a motion to quash and may have a legal right to refuse to answer questions. Note: if law enforcement threatens to obtain or serves a subpoena, we recommend contacting a lawyer right away and before responding to the law enforcement request. If an individual speaks without a lawyer, she may be subpoenaed anyway, and anything one tells law enforcement agents may lead them to ask more questions later.

C. How to Tell if You Are Being Investigated

Generally, it is difficult to confirm whether and to what extent a federal agency is investigating an individual or entity. Federal agencies can assert law enforcement and national security privilege, amongst other privileges, over such records and evidence in order to withhold information. In the FOIA context, federal agencies may issue a "Glomar" response, in which the agency asserts that it can neither confirm nor deny the question of fact such as whether an individual is a subject of a pending investigation.¹²

Increased surveillance and law enforcement encounters are signs that a federal investigation may be underway. Examples include door knocks at an individual's residence by local or federal law enforcement, the presence of undercover law enforcement at your community meeting, or noncitizen community members questioned about their political activities at an ICE check-in.

One affirmative step to consider is filing a FOIA request. The pros and cons of filing such a public records request should be weighed in consultation with legal counsel.

IV. Consequences of Investigation, Prosecution and Conviction

A. Prison Sentence

The harboring statute sets out the maximum criminal penalties that can be imposed including for terms of imprisonment and/or fines. 8 U.S.C. § 1324(1)(B). Additionally, federal judges consult the Guidelines Manual issued by the U.S. Sentencing Commission (herein "Sentencing Guidelines") when sentencing federal defendants. Most

¹² See e.g. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60 (2d Cir. 2009); *Am. Civil Liberties Union v. Office of the Dir. of Nat. Intelligence*, 2011 WL 5563520 (S.D.N.Y. Nov. 15, 2011); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

recently published in November 2016, the Sentencing Guidelines provides baseline sentences and specific guidance on sentencing based on conduct involved in a case. *See* U.S. SENT'G COMM'N GUIDELINES MANUAL (herein "USSG") (U.S. SENT'G COMM'N Nov. 2016); *see also* OFF. OF GEN. COUNS., U.S. SENT'G COMM'N, PRIMER: IMMIGRATION GUIDELINES 1-15 (March 2017). The Sentencing Guidelines are now voluntary, meaning a judge is not obligated to follow them.¹³

Conduct potentially affecting a defendant's sentencing includes the defendant's criminal history, the number of persons involved, age, and criminal and immigration history of any of the noncitizen individual(s) involved in the crime, whether person(s) harbored was the spouse or child of the defendant or an unaccompanied minor; whether weapons, prostitution, coercion or threats were involved, whether there was commercial advantage or private financial gain, and whether bodily injury or death occurred. 8 U.S.C. §§ 1324(1)(B)(i)-(iv); USSG § 2L1.1.

Below are some examples of sentencing ranges to provide context. Please note that courts often do not sentence defendants to the statutory maximum:

- The offense of transporting, harboring, or encouraging entry has a statutory 5-year *maximum* penalty if committed without financial gain or commercial advantage.¹⁴
- Under the Sentencing Guidelines, 4 to 10 months is the baseline sentence suggested for the offense if committed without financial profit or if the offense involves the defendant's spouse or child.¹⁵
- A defendant who causes serious bodily injury or places another person in jeopardy in the commission of the underlying offense is subject to an increased statutory maximum of 20 years.¹⁶
- A defendant who aids and abets another in the commission of the underlying offense is subject to a 5-year statutory maximum.¹⁷

As noted above, these Sentencing Guideline baselines are subject to upper and downward departure based on the circumstances of each case (i.e. the defendant's criminal history, immigration, whether weapons, coercion or threats were involved, etc.). ** Sentencing practices may change under the current administration as the make-up of the U.S. Sentencing Commission shifts.

¹³ *United States v. Booker*, 543 U.S. 220 (2005).

¹⁴ 8 U.S.C. § 1324(a)(1)(B)(ii).

¹⁵ The Sentencing Guidelines set violations of 8 U.S.C. § 1324 at a base offense level of 12. USSG § 2L1.1(a)(3). A downward departure of 3 levels applies to offenses committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child, or a base offense level of 9. *See* USSG § 2L1.1(b)(1). This correlates to a baseline sentence of 4-10 months. USSG § 5A (sentencing table).

¹⁶ 8 U.S.C. § 1324(a)(1)(B)(iii).

¹⁷ 8 U.S.C. § 1324(a)(1)(A)(v)(II); 8 U.S.C. § 1324(a)(1)(B)(ii).

Note: the number of noncitizens involved may significantly increase the sentence. The Sentencing Guidelines provide for enhanced penalties when the offense involves six or more noncitizen individuals. *See* USSG § 2L1.1(b)(2). Additionally, Courts have treated each noncitizen as a separate violation under 8 U.S.C. § 1324(a)(2) (smuggling statute) and in determining the maximum sentence under 8 U.S.C. § 1324(a)(2)(B)(ii). *See e.g. United States v. Tsai*, 282 F.3d 690, 697 (9th Cir. 2002).

B. Fines

Fines are guided by the Sentencing Guidelines and capped by statute. *See* 8 U.S.C. § 1324(a)(1)(B); 18 U.S.C. § 3571. For example, a violation of the harboring provision under § 1324(a)(1)(A)(iii) or transporting under § 1324(a)(1)(A)(ii), not involving serious bodily injury or a financial purpose, amounts to a Class D felony under 18 U.S.C. § 3559(a). Under the statute, if any person or organization derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process. *See* 18 U.S.C. § 3571(d). If no pecuniary gain or loss arises from the offense, the fine per violation is capped at \$250,000 for individual defendants or \$500,000 for an organizational defendant. *See* 18 U.S. Code § 3571(b)(3), (c)(3).

The Sentencing Guidelines provide for a baseline fine of \$2,000 minimum to \$20,000 maximum per offense for individual defendants, and \$25,000 per offense for organizational defendants at base offense level 9. *See* USSG §2L1.1, §5E1.2; §8C2.4. These baselines are however subject to multiple variations based on the circumstances of each case.

C. Asset Seizure and Forfeiture

The harboring statute provides for the seizure and forfeiture to the government of any vehicles, monetary proceeds and any property traceable to such conveyance or proceeds. *See* 8 U.S.C. § 1324(b)(1) (“Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.”)

In practice, this means that those being investigated for harboring may have property seized or assets frozen and, in the event of conviction, that such property may be forfeited to the government.

A harboring conviction subjects a defendant to the mandatory forfeiture of “any property real or personal” that was “used to facilitate ... the commission” of that crime. 18 U.S.C. § 982(a)(6)(A) (stating that “court, in imposing sentence ... shall order that the person forfeit to the United States ...”). Excessive forfeitures can be challenges as a

violation of the Eighth Amendment's prohibition on excessive fines. *See* U.S. Const. amend. VIII; *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (holding forfeiture imposed at the culmination of a criminal proceeding, which requires conviction of underlying felony, to be punishment subject to the Excessive Fines Clause). That being said, Courts have upheld significant forfeiture amounts in the harboring context. *See e.g. United States v. George*, 779 F.3d 113, 122 (2d Cir. 2015) (upholding district court order of the forfeiture of defendant's home).

VI. Miscellaneous Questions and Answers

A. Defenses and Exceptions within 8 U.S.C. § 1324(a)

Below is a non-exhaustive list of relevant defenses against criminal liability.

Lack of knowledge: knowledge or reckless disregard that an individual is a noncitizen who entered or remained in the U.S. in violation of law is required for criminal liability under 8 U.S.C. § 1324(a). We previously discussed this statutory element and how Courts can take into account wide ranging circumstantial evidence in making this determination on *mens rea*. *See* Point I.A. Nonetheless, in exploring defenses, it is important to assess to what extent the defendant had prior knowledge that the individual was a noncitizen who entered or remained in the U.S. in violation of law.

Individual was not in violation of U.S. law: Criminal liability under 8 U.S.C. § 1324(a) for harboring or transporting requires that “an alien has come to, entered or remains in the United States in violation of law.” *See* 8 U.S.C. § 1324(a)(1)(A)(ii), (iii). Though this statutory requirement may appear obvious, legal status and citizenship can be a complicated determination at times. Some individuals, particularly those with a U.S. citizen parent, may even be U.S. citizens and not know it. *See* 8 U.S.C. § 1401. In exploring defenses, it is important to confirm whether or not the individual whom the Government alleges the defendant harbored or transported was actually in violation of U.S. immigration law.

Faith based activities: 8 U.S.C. § 1324 does exempt some limited faith activities from prosecution. 8 U.S.C. § 1324(1)(C) clarifies that it is not a violation of the harboring and transporting provisions of the statute for a religious denomination having a bona fide non-profit organization in the U.S. “to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.” 8 U.S.C. § 1324(1)(C).

However, participation in religious practices is not a blanket defense. For example, the free exercise of religion clause of the First Amendment did not preclude the prosecution of defendant, a Roman Catholic who felt a charitable Christian commitment

to assist those fleeing violence in El Salvador. *See United States v. Elder*, 601 F. Supp. 1574 (S.D. Tex. 1985); *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986) (convictions of defendants for transporting El Salvadoran immigrants in violation of border control laws were not barred by the First Amendment, although defendants contended that they were religiously motivated in conducting the “sanctuary” activities for El Salvadorans); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989); *cf. AFSC v. Thornburgh*, 961 F.2d 1405 (9th Cir. 1992).

Legal service delivery: employees or consultants working on a removal case under the supervision of an attorney should not be subject to prosecution. This is not a defense explicitly listed in the statute, but a feature of the ethical duties in representing clients to the fullest extent of the law. Speech or conduct that informs people of their legal rights is constitutionally protected because the First Amendment protects not only abstract discussion but also vigorous advocacy against governmental intrusion.¹⁸

Selective prosecution: selective prosecution is an affirmative criminal defense which requires a defendant to show that the prosecutor brought the charge for reasons prohibited by the Constitution such as based on race, religion, or political belief. *See United States v. Armstrong*, 517 U.S. 456 (1996). One court has dismissed a criminal indictment for harboring after finding that the government engaged in selective prosecution based on defendant’s ethnic heritage. *See United States v. Correa-Gomez*, 160 F. Supp. 2d 748 (E.D. Ky. 2001), *aff’d*, 328 F.3d 297 (6th Cir. 2003). In *Correa-Gomez*, the Court found that the prosecution of defendant, a Hispanic business owner, for encouraging and inducing seven noncitizens to enter the United States and harboring them during their time as employees at his restaurants constituted unconstitutional selective prosecution. The Court found that the defendant was not extended the benefit of rebuttable presumption which was extended to non-Hispanic business owners of good faith compliance with the prescribed verification procedures, and the government’s admission that at the time the decision to prosecute was made, it was believed to be the defendant’s first offense, and government’s prosecutorial policy demonstrated that something other than the allegation of his employment of undocumented workers motivated the government’s decision to prosecute defendant. *Id.* at 752-54.

B. Who and Which Entities Can Be Prosecuted for Harboring

The harboring statute can apply to everyone, including corporations, organizations, and human persons, even other noncitizen individuals. As interpreted by the courts, harboring can apply to *any person* who knowingly harbors a noncitizen. *See*

¹⁸ *In re Primus*, 436 U.S. 412, 429 (1978); *NAACP v. Button*, 371 U.S. 415, 429 (1963); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *cf. United States v. Dominguez*, 661 F.3d 1051, 1063 (11th Cir. 2011) (Defendant’s conduct to take noncitizens to a lawyer shortly after their arrival did not substantially facilitate noncitizens to escape from detection); *U.S. v. Merkt*, 764 F.2d 266 (5th Cir. 1985), *rehearing denied* 772 F.2d 904 (person intending to assist noncitizen in obtaining legal status is not acting “in furtherance of alien’s illegal presence” in the U.S. within meaning of 8 U.S.C. § 1324(a)(2)); *U.S. v. Driscoll*, 449 F.2d 894 (1st Cir. 1971).

U.S. v. Zheng, 306 F.3d 1080, 1085 (11th Cir.), *cert. denied*, 538 U.S. 925 (2002).¹⁹ By extension, the harboring statute could arguably be applied to local government entities, school boards, and hospital corporations.

C. Aiding, Abetting, and Conspiracy

An individual who engages in the conduct of aiding and abetting another in committing the offenses of harboring, transporting, smuggling or encouraging can be charged for the criminal offense under 8 U.S.C. § 1324(a)(1) and can face the same criminal penalties as the principal perpetrator. *See* 8 U.S.C. § 1324(a)(1)(v)(I); 8 U.S.C. § 1324(a)(1)(B).

Aiding and abetting is no longer a separate crime under U.S. law. While aiding and abetting might commonly be thought of as an offense in itself, it is not an independent crime under 18 U.S.C. § 2. That statute provides no penalty, and only abolishes the distinction between common law notions of "principal" and "accessory." *United States v. Kegler*, 724 F.2d 190, 200 (D.C. Cir. 1983). Under statute, the acts of the perpetrator become the acts of the aider and abettor and the latter can be charged with having done the acts himself. *Id.* at 200-01. An individual may be indicted as a principal for commission of a substantive crime and convicted by proof showing him to be an aider and abettor. *Id.* An aider and abettor of a crime may be tried and convicted even though the principal is not tried, convicted or identified. *Id.* It should be noted that 8 U.S.C. § 1327 delineates a separate offense with enhanced punishments for aiding or assisting noncitizens with certain types of criminal histories to enter the U.S. *See* 8 U.S.C. § 1327. This statute prescribes a 10-year statutory maximum penalty for knowingly aiding noncitizens previously convicted for aggravated felonies to enter the United States.

Individuals can also be convicted of conspiring, under 8 U.S.C. § 371, to harbor, transport, and bring in a noncitizen. Conspiracy is a separate crime. *See Pinkerton v. United States*, 328 U.S. 640, 643-44 (1946) (holding "conspiracy is a partnership in crime" distinct from the substantive offense). Those convicted under conspiracy to harbor face the same criminal penalties as the principle. *See* 8 U.S.C. § 1324(A)(1)(v)(I); § 1324(a)(1)(B).

D. Statute of Limitations

Charges for harboring, transporting, and smuggling an individual pursuant to 8 U.S.C. §1324(a) are subject to a ten-year statute of limitations. 18 U.S.C. § 3298.

However, courts have held that harboring and smuggling are continuing criminal offenses. *See United States v. Lopez*, 484 F.3d 1186, 1192-93 (9th Cir. 2007) (holding that transporting or bringing to the U.S. a noncitizen can constitute a continuing offense

¹⁹ *United States v. Kim*, 193 F.3d 567, 573-74 (2d Cir. 1999); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 (5th Cir. 1982); *United States v. Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

under 8 U.S.C. § 1324(a)(2)); *United States v. Arce et al*, Case No. 3:11-79-H (W.D. Ky. May 30, 2012) (Doc. 32) (holding that harboring noncitizens under 8 U.S.C. §1324(a)(1)(A)(iii) is a continuing offense); *cf. United States v. Strain*, 396 F.3d 689, 697 (5th Cir. 2005) (holding that, for the purpose of venue selection, harboring a fugitive is a continuing offense). The doctrine of continuing offenses means that individuals may still be prosecuted for conduct that would otherwise be outside of the statute of limitations because the offense is deemed to continue after the completion of the elements of the offense. *See, e.g., United States v. Bailey*, 444 U.S. 394, 413 (1980) (escaping from federal custody).

E. Harboring as a Predicate Act in Civil RICO Cases

In general, it is the government which takes criminal actions against individuals or organizations for harboring, smuggling, and transporting. In some cases, private individuals and organizations can bring civil cases under the Racketeer Influenced and Corrupt Organizations Act (RICO) alleging the harboring of noncitizens as a predicate act. *See* 18 U.S.C. § 1964 (any person injured in “his business or property” by reason of a violation of the enumerated offenses may sue and recover threefold the damages he sustains and the cost of the suit including reasonable attorney’s fees); 18 U.S.C. § 1961(F) (enumerating the offenses under 8 U.S.C. § 1324).

The majority of RICO cases in this context have been brought against employers and property management companies by other workers or tenants and focus on the harboring provision at 8 U.S.C. § 1324(a)(1)(A)(iii). *See e.g. Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 549 U.S. 1260 (RICO complaint sufficiently alleged that employer engaged in a “pattern of racketeering activity” by averring that the employer engaged in an ongoing pattern of harboring noncitizens, in particular, by knowingly hiring at least 10 individuals, with actual knowledge that the individuals were noncitizens during a twelve-month period and helping them evade detection during law enforcement searches of the workplace and that the employment of noncitizens depressed plaintiff’s wages); *Nichols v. Mahoney*, 608 F.Supp.2d 526 (S.D.N.Y. 2009) (former employees who sued construction companies and principal, alleging that employment of undocumented noncitizens depressed their wages, adequately pleaded companies’ commission of predicate act by harboring noncitizens, as required to state claim under RICO; complaint averred that companies hired numerous undocumented noncitizens during four-year period, with knowledge or reckless disregard of their status); *Hernandez v. Balakian*, 480 F.Supp.2d 1198 (E.D.Cal. 2007) (agricultural worker’s complaint which alleged that defendants conspired to provide housing to noncitizens and directed their hiring personnel to obtain such housing, sufficiently alleged a violation of RICO predicate act of harboring noncitizens).

At least one court dismissed a RICO complaint in the property management context. *See Del Rio-Mocci v. Connolly Properties Inc.*, 672 F.3d 241 (3d Cir. 2012) (upholding district court grant of defendant’s motion to dismiss). Here, residents of the apartment complex brought suit against the property owner and managers under RICO

based on the predicate act of harboring noncitizens. The Third Circuit Court of Appeals held that the residents insufficiently alleged that complex's property managers prevented government authorities from detecting noncitizens' unlawful presence. The Court reasoned that while the property managers allegedly exempted noncitizens from background checks and segregated them into specific rental buildings, the property managers had no obligation to require background checks of tenants; moreover, resident did not allege that third party background check screeners would have passed noncitizens' immigration status along to immigration authorities, and by grouping large numbers of noncitizens into specific apartment buildings, property managers arguably made noncitizens more conspicuous. *See Id.* at 246-50.

Further research is needed to determine the possible implications of civil RICO cases on organizations including the possibility of legal action being taken against them by individuals hostile to their policy positions.

F. Impact of Criminal Investigation on Attorney-Client Privilege

Generally, an attorney's files and communications are protected when he is acting as an attorney. There is an exception from this protection when the attorney is the subject of the criminal investigation and communications between the lawyer and client were made "in furtherance of" criminal activity. *See U.S. v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992); *see also e.g., In re Grand Jury Proceedings*, 87 F.3d 377 (9th Cir. 1996); *United States v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992). Additionally, the court in *Oloyede* reasoned that disclosures of clients to attorney were not covered by attorney-client privilege because clients waived privilege by a lack of intent to keep the communications confidential where the information was to be used in INS filings. *Id.* at 141.

APPENDIX I.

The federal crime of harboring under 8 U.S.C. § 1324(a)(1)(A)(iii) has not been interpreted and applied uniformly across the Federal Circuit Courts of Appeal. The following Appendix catalogs the varying decisions organized by the Circuit Courts of Appeal. It is not intended to be an exhaustive list of all harboring cases to date.

U.S. Court of Appeals for the Second Circuit

The Second Circuit recently reexamined its precedents on the meaning of harboring in *U.S. v. Vargas-Cordon* and held that to "harbor" under § 1324, a defendant must engage in conduct that is intended **both to substantially help an unlawfully present noncitizen remain in the United States — such as by providing him with shelter, money, or other material comfort — and also to help prevent the detection of the noncitizen by the authorities.** 733 F.3d 366, 382 (2d Cir. 2013). “The mere act of providing shelter to an alien, when done without intention to help prevent the alien's detection by immigration authorities or police, is thus not an offense under § 1324(a)(1)(A)(iii).” *Id.* The court in *Vargas-Cordon* begins its discussion by finding that there was no precedent binding it to a particular interpretation of "harbors" under § 1324(a)(1)(A)(iii) because Second Circuit case law has been inconsistent in describing the minimum conduct necessary to sustain a harboring conviction under § 1324. *Id.* at 380. In reaching its finding that to be guilty of “harboring” a defendant must do more than “provide shelter,” the court notes that in its decisions arguably applying a broader conception of "harboring" that does not require that a defendant intend to assist a noncitizen in remaining undetected by authorities, such as in *United States v. Lopez*, 521 F.2d 437 (2d Cir 1975) discussed below, the defendants did more than merely provide shelter. *Id.* at 439.

The case of *United States v. Kim* remains instructive on the meaning of harboring, and was recognized in *Vargas-Cordon*, as setting forth the correct interpretation of “harbor” under § 1324(a)(1)(A)(iii). *Vargas-Cordon*, 733 F.3d at 382 *citing United States v. Kim*, 193 F.3d 567 (2d Cir. 1999). In *Kim*, the court stated that harboring within the meaning of Section 1324(a) “encompasses conduct tending substantially to facilitate an alien’s remaining in the U.S. illegally and to prevent government authorities from detecting [the immigrant’s] unlawful presence.” *Id.* at 574 (emphasis added). In this case, Mr. Myung Ho Kim owned and operated a garment-manufacturing business called “Sewing Masters” in New York City. He employed a number of undocumented workers, including Nancy Fanfar. During the course of her employment, Mr. Kim instructed Ms. Fanfar to bring in new papers with a different name that would indicate that she had work authorization. He instructed Ms. Fanfar to change her name and remain in his employ a second time, even while he was under investigation by immigration authorities. According to the circuit court, Mr. Kim’s actions constituted harboring, for they were designed to help Ms. Fanfar remain in his employ and to prevent her continued presence from being detected by the authorities. Thus, his conduct substantially facilitated her

ability to remain in the U.S. “unlawfully” in prohibition of the harboring provision. *Id.* at 574 -575.

In *United States v. Lopez*, the U.S. Court of Appeals for the Second Circuit went through the legislative history of the harboring provision and stated that the term harbor “was intended to encompass conduct tending substantially to facilitate an alien’s ‘remaining in the United States illegally,’ provided that the person charged has knowledge of the immigrant’s unlawful status.” 521 F.2d 437, 441 (2nd Cir. 1975), *cert. denied*, 423 U.S. 995 (1975). Mr. Lopez owned at least six homes in Nassau County, New York, where he operated safe havens for undocumented individuals. Mr. Lopez knew that the people staying in his homes were undocumented. Each person paid Mr. Lopez \$15 per week to live in his houses. In many cases, people received the address for a particular house before they left their home countries, and, upon crossing the border without authorization, they proceeded directly to the house. Mr. Lopez also helped these individuals obtain jobs by completing work applications and transporting them to and from work. He arranged sham marriages for many so that they could appear to be in the U.S. in lawful status. With a warrant, immigration authorities searched six of Lopez’s homes and found twenty-seven undocumented individuals. He was charged with harboring. Mr. Lopez argued that the mere providing of shelter to undocumented immigrants does not constitute harboring. *Id.* at 439. He argued that to constitute harboring the conduct must be part of the process of smuggling immigrants into the U.S. or facilitating the immigrants’ entry into the U.S. *Id.* The circuit court noted that he essentially argued that to constitute harboring the sheltering would have to be provided either clandestinely or for the purposes of sheltering the immigrants from the authorities. *Id.* The Court rejected these arguments. The Second Circuit held that the statute criminalizes conduct that tends substantially to facilitate a noncitizen’s remaining in the United States without authorization. *Id.* at 441. The Court found that Mr. Lopez’s conduct did just that. It pointed out that Mr. Lopez had a large number of undocumented immigrants living at his houses; they obtained the addresses and, upon entering the U.S., proceeded to those houses; Mr. Lopez provided transportation for them to and from work; and, he helped arrange sham marriages. *Id.* The Second Circuit did not require that Mr. Lopez provide the shelter clandestinely nor that he shield the noncitizens from detection by immigration authorities. *Id.*

U.S. Court of Appeals for the Third Circuit

The Third Circuit has considered what conduct constitutes “shielding,” “harboring,” and “concealing” within the meaning of Section 1324(a)(1)(A)(iii). Like the Second Circuit, it determined that these terms encompass conduct **“tending to substantially facilitate an alien’s remaining in the U.S. illegally and [that] prevent[s] government authorities from detecting the alien’s unlawful presence.”** *U.S. v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008) (emphasis added); *see also Delrio-Mocci v. Connolly Props.*, 672 F.3d 241, 246 (3d Cir. 2012); *U.S. v. Cuevas-Reyes*, 572 F.3d 119, 122 (3d Cir. 2009); *U.S. v. Silveus*, 542 F.3d 993, 1003 (3d Cir. 2008).

In *United States v. Ozcelik*, the defendant knew that the individual remained in the U.S. without authorization and advised him to “lay low” and “stay away” from the address he had on file with the government. 527 F.3d at 100. However, Mr. Ozcelik did not actively attempt to intervene or delay an impending immigration investigation and the Third Circuit held that advising an individual without legal status to stay out of trouble and to keep a low profile does not tend substantially to facilitate their remaining in the country. *Id.* at 100-01. The Court reasserted that **shielding or harboring a noncitizen ordinarily includes affirmative conduct such as providing shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations that facilitates a person’s continuing unlawful presence in the United States.** *See Id.* at 99.

In *United States v. Silveus*, the Third Circuit held that cohabitation, along with reasonable control of premises during an immigration agent’s inquiry regarding the whereabouts of the suspected undocumented individual, does not constitute harboring without sufficient evidence that a defendant’s conduct substantially facilitated the individual’s remaining in the U.S. or prevented authorities from detecting his/her unlawful presence. 542 F.3d at 1002-04. In this case, the agent never saw the suspected undocumented individual, but only heard the apartment door slam, heard some bushes break, and as he approached, saw the defendant shut her front door. *Id.* at 1002. The defendant spoke to the agent through her window and when asked if anybody had run out of her apartment, she said “I don’t know.” *Id.* at 1003. The Court determined that the act of shutting a door as an agent rounded the corner and her subsequent reply to the agent’s question did not establish “harboring” under Section 1324(a) because it only led to speculation as to the suspect’s presence. *Id.* at 1004.

In *United States v. Cuevas-Reyes*, the Third Circuit reaffirmed that shielding a noncitizen requires affirmative conduct (such as providing shelter, transportation, direction about how to obtain false documents, or warnings about impending investigations) that facilitates the person’s continuing presence in the U.S. 572 F.3d at 122. The Court held that the defendant’s actions, taking undocumented people from the U.S. to the Dominican Republic in his private plane, were undertaken for the purpose of removing them from the U.S., not helping them remain in the U.S. *Id.* It noted that the goal of Section 1324 is to prevent noncitizens from entering or remaining in the U.S. by punishing those that shield or harbor. *Id.* It asserted that punishing a defendant for helping individuals without legal status leave the U.S. would be contrary to that goal. *Id.*

More recently, the Third Circuit reiterated that “harboring” requires some act that obstructs the government’s ability to discover the undocumented person and that it is highly unlikely that landlords renting apartments to noncitizens could, without more, satisfy the court’s definition of harboring. *Del Rio-Mocci*, 672 F.3d at 246 (citing *Lozano v. City of Hazleton*, 620 F.3d 170, 223 (3d Cir. 2010)). The Court reiterated that “[r]enting an apartment in the normal course of business is not in and of itself conduct that prevents the government from detecting an alien’s presence.” *Id.*

U.S. Court of Appeals for the Fourth Circuit

The Fourth Circuit has few decisions on harboring. We found the following two unpublished court opinions. In both cases, the Courts held that there was sufficient evidence to convict the defendant of harboring and adopted an expansive interpretation of the harboring statute. In *United States v. Aguilar*, the Court acknowledged the circuit split on the elements of harboring and that the Fourth Circuit had not ruled on whether the offense requires proof of substantial facilitation. 477 F. App'x 1000, 1002 (4th Cir. 2012). The Court avoided a holding on the circuit split by deciding that there was sufficient evidence for conviction in the instant case where defendant charged significant above market rates to numerous noncitizens to live in her apartments. *Id.* at 1003; *see also United States v. Batjargal*, 302 F. App'x 188 (4th Cir. 2008) (finding sufficient evidence of harboring when defendant encouraged noncitizen to stay in the U.S., provided shelter, cell phone, auto insurance, and gym membership).

U.S. Court of Appeals for the Fifth Circuit

The Fifth Circuit's definition of harboring is broader than the one applied by the Second and Third Circuits. The Fifth Circuit rejects the notion that a conviction for harboring requires that defendant's conduct be part of a smuggling operation or involve actions that inhibit law enforcement detection of immigrants. *See De Jesus-Batres*, 410 F.3d 154, 162 (5th Cir. 2005) (specific intent is not an element of the offense of harboring); *see also United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1072 (5th Cir. 1982) (harboring conviction upheld where defendant warned coworkers that immigration agents were at the worksite and warning led coworkers to flee).

An early Fifth Circuit decision, *U.S. v. Cantu* remains informative. 557 F.2d 1173 (5th Cir. 1977). In *Cantu*, immigration agents visited the restaurant owned by Mr. Cantu because they received information that he was employing noncitizen workers. The agents wanted to question the employees. Mr. Cantu refused admission to his restaurant until they could provide a warrant. While the immigration authorities waited outside for the warrant, Mr. Cantu made arrangements with at least two of his patrons to drive some of his noncitizen employees into town. Mr. Cantu also arranged for his employees to sit in the restaurant and then leave the restaurant like customers. As the employees left the restaurant, the immigration agents approached them and questioned them about their immigration status. The agents determined their unlawful status and arrested them. Mr. Cantu argued that, because he did not instruct his employees to "hide," and because the employees left the restaurant in full view of the officers, he could not be charged with shielding immigrants from detection. He also argued that his actions were not connected to any smuggling activity. The Fifth Circuit, relying on the Second Circuit's *Lopez* decision, rejected these arguments, and determined that Mr. Cantu's actions – instructing the employees to act like customers so they could evade arrest – tended to facilitate the immigrants remaining in the U.S. without authorization. *Id.* at 1180.

In another Fifth Circuit case, *United States v. Varkonyi*, the court cited to the

Second Circuit's *Lopez* decision to assert that the harboring statute prohibits "any conduct which tends to substantially facilitate an alien's remaining in the U.S. illegally." 645 F.2d 453, 459 (5th Cir. 1981). Mr. Varkonyi provided a group of noncitizen workers with steady employment at his scrap metal yard six days a week as well as lodging at his warehouse. On previous occasions, he had instructed and aided the men in avoiding detection and apprehension. On the day of their detention, Mr. Varkonyi interfered with Customs and Border Protection agents' actions by forcibly denying them entry to his property through physical force. Here, the Circuit Court found that Mr. Varkonyi's conduct went well beyond mere employment and thus constituted harboring. *Id.* at 459. In this case, the court pointed out that Mr. Varkonyi knew of the immigrants' undocumented status; he had instructed the immigrants on avoiding detection on a prior occasion; he was providing the immigrants with employment and lodging; he interfered with immigration agents to protect the immigrants from apprehension; and he was partly responsible for the escape of one of the immigrants from custody. *Id.* Given these facts, the Court found that Mr. Varkonyi's conduct, both before and after the detention of the immigrants, was calculated to substantially facilitate the immigrants remaining in the U.S. unlawfully. *Id.* at 460.

In 2007, the Fifth Circuit ruled in another employment harboring case that "substantially facilitate" means to make an individual's presence in the United States substantially "easier or less difficult." *United States v. Shum*, 496 F.3d 390, 392 (5th Cir. 2007) (citations and quotation marks omitted). The court noted that Section 1324(a) was enacted to deter employers from hiring noncitizens and it refused to adopt a narrow definition of "substantially facilitate." *Id.* In this case, Mr. Shum was vice-president of an office-cleaning company and he employed janitors without legal status. According to witnesses, he provided false identifications to the workers to facilitate background checks so that the workers could clean government office buildings. Mr. Shum argued on appeal that the government failed to prove that his conduct (employing noncitizen workers) substantially facilitated their ability to remain in the U.S. without authorization. *Id.* at 392. He asserted that their employment made it more likely that they would be detected and deported. *Id.* He also argued that those individuals whom he was charged with harboring remained in the U.S. before and after they were employed by him, and thus his conduct had no bearing on them remaining in the U.S. *Id.* The Fifth Circuit rejected Mr. Shum's arguments. It held that Mr. Shum made it easier for the workers to remain in the United States by employing them and shielding their identities from detection. *Id.* at 392-393. The Circuit Court observed that Mr. Shum not only hired the undocumented workers, but he provided false identification to them to facilitate the background checks required to clean government buildings. *Id.* In addition, the Court remarked that Mr. Shum did not file Social Security paperwork on these workers. According to the Fifth Circuit, this was sufficient evidence to show that Mr. Shum "substantially facilitated" these workers' ability to remain in the United States. *Id.* at 392.

The U.S. Court of Appeals for the Sixth Circuit

The Sixth Circuit's interpretation of the harboring provision differs markedly

from the approach taken by the Fifth Circuit. **The Sixth Circuit construes “harbor” to mean “to clandestinely shelter, succor and protect improperly admitted aliens”** *Susnjar v. United States*, 27 F.2d 223, 224 (6th Cir. 1928). This case, though quite old, remains the precedent in the Sixth Circuit. *See United States v. Belevin-Ramales*, 458 F. Supp.2d 409, 411 (E.D. Ky. 2006) (recognizing that *Susnjar* is a 1928 case and was decided before the Supreme Court ruling in *United States v. Evans*, 333 U.S. 483 (1948) and amendments to the statute; however, because neither the *Evans* case nor the amendments contain language which warrants a holding that *Susnjar* has been abrogated or implicitly overruled, the court cannot ignore *Susnjar*). Thus, in the Sixth Circuit, to be guilty of harboring, a person must harbor the undocumented individual secretly or in hiding. *See Hager v. ABX Air, Inc.*, 2:07-CV-317, 2008 WL 819293, at *6-7 (S.D. Ohio Mar. 25, 2008) (holding that knowingly hiring and employing undocumented immigrants does not establish concealment, harboring, or shielding within the Sixth Circuit because there are no allegations in the complaint that the defendants provided housing or other shelter to the employees and no allegations that the defendants took any steps to shield the employees from detection).

U.S. Court of Appeals for the Seventh Circuit

In *United States v. Xiang Hui Ye*, 588 F.3d 411 (7th Cir. 2009), the defendant was convicted under Section 1324(a)(1)(A)(iii) for employing and shielding undocumented workers. On appeal, defendant Ye argued that “shielding” should not have been defined as “the use of any means to prevent the detection of illegal aliens in the U.S. by the Government,” and cited the Fifth Circuit’s use of “tending substantially to facilitate” as the proper definition through which to examine his conduct. *Id.* at 415. The Circuit Court rejected the use of the phrase “conduct tending substantially to facilitate.” It also affirmed Ye’s conviction, taking note that defendant Ye advised undocumented workers to purchase fake documents, kept them off payroll records, provided them with transportation to work, and provided them with housing by entering into lease agreements and making rent payments. *Id.*

In a recent case, *United States v. Costello*, the Seventh Circuit refused to equate harboring with providing a place to stay through cohabitation. *See* 666 F.3d 1040, 1050 (7th Cir. 2012). In this case, the defendant had a romantic relationship and cohabited with her noncitizen boyfriend who was eventually removed from the U.S. and subsequently returned without authorization. *Id.* at 1042. Sometime after his return, the defendant picked him up at a bus terminal and drove him to her home where he then lived more or less continuously until his arrest. *Id.* The district court judge characterized her actions, including picking the boyfriend up at the Greyhound station, giving him shelter, and coming to his aid after he was arrested, as “substantial assistance” that made his presence in the U.S. easier and helped him avoid detection. *Id.* at 1042. The Circuit Court rejected this characterization and the use of “substantial facilitation.” *Id.* at 1042-3, 1050. Instead, it defined **harboring as providing or offering a known undocumented person a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him.** *Id.* at 1050 (emphasis added). The Seventh Circuit held that cohabitation,

without more, is not harboring. *Id.* The Court also rejected the notion that the primary meaning of harboring is “simple sheltering.” *Id.* at 1049. The Seventh Circuit also concluded that there was nothing in the facts to suggest that defendant Costello induced the entry or planned for the entry and subsequent cohabitation. *Id.* at 1049-50.

U.S. Court of Appeals for the Eighth Circuit

The U.S. Court of Appeals for the Eighth Circuit holds that **a conviction for harboring does not require proof of secrecy or concealment.** *See United States v. Rushing*, 313 F.3d 428, 434 (8th Cir. 2002). In this case, two defendants, Mr. Jones and Mr. Ma, were convicted of harboring a noncitizen, Mrs. Zhong. On appeal, they argued that the evidence was not sufficient, and that the jury instruction was in error, because they did not try to hide Mrs. Zhong; she was working in their restaurant in plain view. *Id.* The Circuit Court rejected their arguments. It noted that the evidence justified a finding that Mr. Ma, knowing that Mrs. Zhong had entered the country without authorization, gave her a job and a place to live. *Id.* It also noted that there was sufficient evidence that Mr. Jones, with the same knowledge, helped her to receive medical care and banking privileges. *Id.* Thus, according to the Court, there was more than enough to support a conviction for harboring. *Id.* While not strictly related to the harboring charges, it bears mentioning that the harboring charges against Mr. Jones and Mr. Ma came about in the context of a visa fraud prosecution against them and others for conspiring to supply false information in order to obtain visas for two Chinese women for the sexual gratification of Mr. Jones (one of which was Mrs. Zhong whose asylum application the government later supported). It therefore appears that more was at stake in the prosecution than the mere employment of Mrs. Zhong at Mr. Ma’s restaurant.

The Court of Appeals for the Eighth Circuit also found sufficient evidence to convict a defendant of harboring in *United States v. Sanchez*. *See* 927 F.3d 376, 379 (8th Cir. 1991). Here the defendant, Mrs. Sanchez, was convicted of, among other things, harboring a noncitizen. The evidence at trial showed that she and her husband met with undocumented immigrants; her husband told the immigrants that he could provide them with falsified immigration documents; her husband rented an apartment for them; Mrs. Sanchez took the undocumented immigrants to the apartment; and, she told an undocumented immigrant that she would give him a paper that would allow him to work. The Eighth Circuit found that these actions were sufficient evidence to support the jury’s finding of guilt for harboring. *Id.*

The U.S. Court of Appeals for the Ninth Circuit

In an early precedent-setting case, the Ninth Circuit **found that the mere provision of shelter, with knowledge of a person’s unlawful presence, constituted harboring.** *See United States v. Acosta De Evans*, 531 F.2d 428 (9th Cir.), *cert. denied*, 429 U.S. 836 (1976). In this case, U.S. Border Patrol agents visited Ms. Acosta De

Evans' apartment after a tip that noncitizens were living there. At the apartment, the Border Patrol found four noncitizens who stated that they were at the apartment in passing. While the Border Patrol questioned these individuals, another individual returned to the apartment from a shopping trip. She was an undocumented relative and had been living in the apartment for approximately two months. Ms. Acosta De Evans knew that her relative was not authorized to be present in the United States and she had met with her previously in Tijuana where they discussed the difficulty of getting immigration papers.

The government charged Ms. Acosta De Evans with harboring noncitizens. She argued that she did not engage in activities to prevent detection of the individuals by law enforcement agents. *Id.* at 429. The Ninth Circuit rejected her argument. It noted that the standard definition of “harbor” includes both concealment and simple sheltering, and stated that the latter appears to be the primary meaning. *Id.* at 430. The Circuit Court also looked at the legislative history of the harboring provision and found that the purpose of the section is to keep unauthorized individuals from entering or remaining in the country, and that this “purpose is best effectuated by construing ‘harbor’ to mean ‘afford shelter to.’” *Id.* One should note that while the *Acosta De Evans* court put forward a broad definition of ‘harbor,’ Ms. Acosta De Evans was acquitted of the charges based on the four individuals initially arrested and was ultimately convicted only based on the conduct relating to her relative whom she had previously met in Tijuana and discussed the difficulty of obtaining immigration paper. While the Court does not suggest that Ms. Acosta De Evans was involved in her entry into the U.S., the court does seem to have viewed that conversation negatively.

As noted above, the court in *Acosta De Evans* concluded that the word “harbor” means “to afford shelter to,” and it does not require that the harboring involve the “intent” to shield an immigrant from detection by the authorities. *See United States v. Aguilar*, 883 F.2d 662, 689-690 (9th Cir. 1989) (harbor means to afford shelter to and does not require an intent to avoid detection) (citations omitted).

However, it is unclear from more recent Ninth Circuit cases if *Acosta De Evans* still remains the standard in the Ninth Circuit or if harboring must involve conduct that gives an undocumented individual shelter with the intent to avoid detection from authorities. For instance, in *United States v. You*, the Ninth Circuit appears to have held that where a defendant is charged with harboring under Section 1324(a), the jury must find that the defendant intended to violate the law. 382 F.3d 958, 966 (9th Cir.), *cert. denied*, 543 U.S. 1076 (2005). In *You*, defendants were charged with violating 8 U.S.C. § 1324(a)(1)(A)(iii) for harboring noncitizens. *Id.* at 962. In a challenge to the jury instructions, the Circuit Court held that the instruction that required the jury to find that the defendant acted with “the purpose of avoiding [the alien’s] detection by immigration authorities” was adequate, and synonymous with having acted with necessary intent. *Id.* at 966; *see also United States v. Latysheva*, 162 Fed. App’x. 720, 727 (9th Cir. 2006) (“harboring of illegal aliens, 8 U.S.C. § 1324(a)(1)(A)(iii), is a specific intent crime”); *see also United States v. Castaneda-Melchor*, 387 Fed. App’x.

767, 769 (9th Cir. 2010) (following *You* as binding precedent). However, the intent requirement was not clear in *Hernandez v. Balakian*, CVF06-1383, 2007 WL 1649911 at *6-8 (E.D. Cal. Jun. 1, 2007), where the court found that agricultural workers sufficiently alleged the RICO predicate act of harboring noncitizens by alleging that defendants conspired to provide housing to noncitizens and directed their hiring personnel to obtain the housing.

U.S. Court of Appeals for the Eleventh Circuit

In *United States v. Khanani*, a case involving the owners and accountant of several garment companies, the Court upheld the sufficiency of jury instructions stating that “[t]o conceal, harbor, or shield from detection includes **any knowing conduct by the defendant tending to substantially facilitate an alien's escaping detection as an illegal alien, thereby remaining in the United States illegally.**” 502 F.3d 1281, 1287 (11th Cir. 2007). The Circuit Court rejected the defendants’ argument that the district court erred in failing to give an instruction stating “that mere employment of undocumented workers cannot support a conviction for harboring” concluding that the instruction properly required the government to prove a level of knowledge and intent beyond mere employment of noncitizens. *Id.* at 1289. The court noted that testimony further established that the defendants created a work environment that was well known in the noncitizen community as being open to and safe for workers not authorized to work in the United States. *Id.* at 1293-94.

Moreover, the evidence established that defendants had shielded their unauthorized workforce from detection, by alerting the noncitizens to the presence of immigration officials in the stores, by instructing workers not to wear name tags, and by sending them home or to other locations undetected. Unauthorized noncitizens enjoyed housing assistance as well. Numerous noncitizens testified that their employment with defendants’ companies helped them continue to reside in the United States. *Id.* at 1294. The evidence further demonstrated that defendants’ Khanani and Portlock instructed another employee to create a separate company in his name to pay unauthorized noncitizens. Additionally, the Court rejected the argument by defendant Portlock, the companies’ accountant, that there was insufficient evidence to convict him of harboring. *Id.* According to the Eleventh Circuit, the jury could reasonably have found that defendant Portlock knew that his efforts in forming the four sham companies furthered the defendants’ actions in harboring immigrants, and that his preparation of tax returns was done with the knowledge that the information in those returns improperly omitted sales that were diverted toward paying unauthorized workers. *Id.*

The Eleventh Circuit revisited the issue of whether knowingly employing noncitizens is enough by itself to constitute a violation of the harboring provision in *Edwards v. Prime Inc.* but did not convict on that basis alone. *See* 602 F.3d 1276 (11th Cir. 2010). In *Edwards*, the Circuit Court examined the statutory evolution of Section

1324(a)(i)(A)(iii) and noted that knowingly or recklessly hiring noncitizens is probably enough by itself to establish concealing, harboring, or shielding from detection under the statute. *Id.* at 1298. However, the Court held that they did not need to decide this exact issue because the allegations in the complaint indicated that the defendants not only knew of the workers' undocumented status, but also that they provided false names, social security numbers, and cash payments in order to prevent detection. *Id.* at 1299 (citing *Shum*, 496 F. 3d at 392; see also *United States v. Kim*, 193 F.3d at 574-75; *United States v. Ye*, 588 F.3d 411, 417 (7th Cir. 2009)).

In a recent Eleventh Circuit case, the Court found that defendant did not substantially facilitate noncitizens escaping detection when defendant “took [the noncitizens] to experienced immigration counsel shortly after they arrived to process them through immigration” and the noncitizens “did not engage in conduct suggesting that they were hiding from or otherwise avoiding immigration officials.” *United States v. Dominguez*, 661 F.3d 1051, 1063 (11th Cir. 2011). That being said, the Court still found liability for smuggling under 8 U.S.C. § 1324(a)(2) where defendant paid a smuggler to bring noncitizens from Cuba to the United States. *Id.* at 1064.