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THE CATHOLIC CHURCH’S OBLIGATION TO SERVE THE STRANGER IN DEFIANCE OF STATE IMMIGRATION LAWS

YSMAEL D. FONSECA*

INTRODUCTION

Religious freedom was so important to the founders of our nation that they enshrined the right to free exercise in the First Amendment of the Constitution. Today, in the minds of most Americans, this freedom allows their religious beliefs to inform the decisions and actions of everyday life, particularly when they believe strongly in the Christian obligation to be a Good Samaritan. So it is alarming to think that, despite this basic and most sacred right, actions based on religious convictions have the prospect of creating criminal liability. But that is precisely the risk that the Catholic Church is facing with state illegal immigration laws that seek to criminalize the most minimal efforts of providing basic services in the disadvantaged immigrant communities of America. These laws place the Catholic Church in a position that forces a decision between serving the stranger and complying with the restrictive laws of a state.

In late 2005, the House of Representatives passed bill H.R. 4437 in response to the growing population of undocumented immigrants.1 The bill, if enacted, would have required checking the immigration status of people seeking services from charitable organizations and churches, and would have, potentially, made criminals of the people that served undocumented immigrants.2 Cardinal Roger Mahony3 opposed the mandate of H.R. 4437 and wrote an open letter to President George W. Bush explaining that the Catholic Church would not, and could not, verify legal status before serving people in need.4 Cardinal Mahony

3. Cardinal Roger Mahony’s pastoral work has focused on the immigrant community since he was ordained a priest in 1962. Cardinal Mahony is a leader in the Hispanic community and an outspoken supporter of immigrant rights. His call to disobey H.R. 4437 to follow a “higher law” was the inspiration for this Note.
4. See Letter from Cardinal Roger Mahony to President George W. Bush, supra note 2, at 1. The terms “Catholic Church” and “Church” in this Note refer to the
explained that the bill would make churches "quasi-immigration enforcement officials" when the only "underlying basis for our service to others, especially the poor, is the example, words, and actions of Jesus Christ in the Gospels."\(^5\)

In his letter to President Bush, Cardinal Mahony also declared that the restrictions of H.R. 4437 on service to immigrants would be "impossible to comply with."\(^6\) Not only would the restrictions be a logistical nightmare, they would severely threaten the Church's ability to provide a variety of services to immigrant communities. Then, in his 2006 Lenten message to the Archdiocese of Los Angeles, Cardinal Mahony pronounced an express directive that allowed, and encouraged, priests in the Archdiocese to disobey the proposed law.\(^7\) His words were a call for civil disobedience that hundreds of religious leaders around the country would answer.\(^8\) The directive was moot, however, when H.R. 4437 failed to pass the Senate.\(^9\)

Congress since has been unsuccessful in adopting comprehensive reform to solve the growing problem of illegal immigration, bringing the issue of immigration to the forefront of national attention and stirring the passion of the American electorate. The federal government's failures combined with Americans' calls for immigration reform have resulted in dozens of proposed laws in state legislatures that criminalize conduct "in furtherance of the illegal presence" of immigrants.\(^10\) In the State of Oklahoma, one such proposal succeeded with the adoption of the Oklahoma Taxpayer and Citizen Protection Act of 2007, which makes it a felony "to transport, move, or attempt to transport," or "conceal, harbor, or shelter from detection" an undocumented immigrant.\(^11\) Many states are following Oklahoma's example.\(^12\)

These state proposals raise, once more, Cardinal Mahony's call for civil disobedience in the face of criminal liability when serving immigrant

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5. Id.
6. Id.
10. OKLA. STAT. ANN. tit. 21, § 446(A) (West 2007).
11. Id. § 446(A)—(B).
12. E.g., Alabama, Florida, Missouri, and Rhode Island. This Note will focus on the proposed laws of these states because they have enacted Religious Freedom Restoration Acts which will be discussed in Part III.
communities. These state proposals are so far-reaching that they would criminalize the basic services that many churches offer, such as shelters and transportation for religious services. So in light of the potential criminalization of basic services offered by the Catholic Church, religious and lay faithful must heed Cardinal Mahony's original directive and the Catholic Church's teaching, and join the call for civil disobedience in defiance of state illegal immigration laws. As Catholic teaching makes clear, the Church owes its duty to a higher law in welcoming and caring for immigrants; Cardinal Mahony's call for solidarity with immigrants thus lays the foundation for the Catholic Church to declare its commitment to the protection of immigrants and to their pastoral care regardless of the consequences of restrictive state laws.

Fortunately, the Catholic Church may resort to legal exemptions from potential criminal liability under state illegal immigration statutes, and not rely simply on civil disobedience to carry out its mission. The Church may either seek a constitutional exemption from the laws under the Free Exercise Clause or seek an exemption in states with Religious Freedom Restoration Acts. The Catholic Church can avoid criminal liability by proving that the states lack a compelling interest in burdening the services the Church offers when fulfilling its obligation to serve the stranger.

Part I of this Note will explore the basis of the Catholic Church’s obligation to serve immigrants and why this obligation supersedes the Church’s duty to obey the law of a state. Part II will then discuss states’ illegal immigration laws as a response to the federal government’s failure to enact comprehensive reform and how these laws are a threat to the Catholic Church. Part III will then analyze viable legal solutions that the Catholic Church may seek under the Free Exercise Clause of the Constitution and under the Religious Freedom Restoration Acts of particular states.

I. THE OBLIGATION OF THE CATHOLIC CHURCH TOWARD IMMIGRANTS

Jesus told His disciples that the Kingdom of Heaven was prepared for those that fed the hungry, gave drink to the thirsty, clothed the naked, and welcomed the stranger. This message of service became the mission of the Church when Jesus directed His apostles to “make disciples of all nations . . . teaching them to observe all that [He had] commanded.” The Catholic Church, as the keeper of this message, has the obligation of teaching this message and of providing for the people of God, specifically, for the care of strangers in a foreign land. For the

Catholic Church, this obligation toward immigrants supersedes any obligation to the state.

A. Christ the Foreigner and the Mission of His Pilgrim Church

From Mary’s pilgrimage to Bethlehem for His birth to His glorious entrance into Jerusalem for His death, Jesus was a migrant. Shortly after His birth in Bethlehem, Jesus left for Egypt to return years later to Nazareth in Galilee; the native of Judea would be called a Nazorean. Jesus then left His home in Nazareth to preach the Good News to those beyond Galilee and the Jordan River; Jesus traveled from town to town proclaiming the Word of God and revealing the Kingdom of Heaven with “nowhere to rest His head.” Jesus understood what it meant to be a stranger in a foreign land and He made sure that His Church recognized the plight of migrants and the need to serve them. His message is clear: “What you did not do for one of these least ones, you did not do for [God].” And these will go off to eternal punishment, but the righteous to eternal life.

The Early Church made sure that Christians understood Christ’s message to care for one another and to welcome the stranger for the greater glory of God. From the time of Moses, God had commanded Israel to treat the alien in its midst “no differently than the natives;” God asked His people to “have the same love for [the alien] as for [themselves]; for [they] too were once aliens.” The Fathers of the Church continued emphasizing the importance of being open to strangers by asking Christians for their hospitality and even for their support of a stranger’s journey. In spreading the message of Christ, the Church also made sure that Christians understood that they must act in accordance with His message, for “faith of itself, if it does not have works, is dead.” The Church’s teaching makes clear that to answer Christ’s call to holiness all Christians must welcome and serve each other.

Jesus called for a world without differences, where all are united in Him. It is with this vision that the Fathers of the Church asked Chris-

15. Id. 2:13–14, 19–23.
16. Id. 2:23.
17. Id. 4:23–25.
18. Id. 8:20; see also id. 9:35; Luke 13:22.
24. See Ephesians 2:13 (“But now in Christ Jesus you who once were far off have become near by the blood of Christ.”).
tians to look past differences\(^\text{25}\) and to welcome each other so that people from around the world can "recline at table in the kingdom of God."\(^\text{26}\) Service to immigrants, regardless of who they are and what their legal status is, is part of Jesus Christ's mission for the Church and its faithful.

**B. Understanding Christ's Directive to Serve the Stranger\(^\text{27}\)**

Understanding Jesus Christ's directive to serve the stranger, on August 1, 1952 Pope Pius XII promulgated the apostolic constitution *Exsul Familia Nazarethana* to give guidance to the Church on the pastoral concerns of the increasing migrant populations in the world.\(^\text{28}\) Through this *magna carta* on migration, Pope Pius XII noted that "the Church had to look after [refugees and migrants] with special care and unremitting aid."\(^\text{29}\) *Exsul Familia Nazarethana* also provides an account of the Church's activities throughout history to carry out its sacred ministry to the stranger; in fact, Pope Pius XII says that "there never has been a period during which the Church has not been active in behalf of migrants, exiles and refugees."\(^\text{30}\) Pope Pius XII's words trace the mission of the Church toward immigrants and show that "Holy Mother Church, impelled by her ardent love of souls[,] has striven to fulfill the duties inherent in her mandate of salvation for all mankind, a mandate entrusted to her by Christ."\(^\text{31}\)

Following *Exsul Familia Nazarethana*, Pope Paul VI continued to guide the Church on the issue of migration through the Instruction *De Pastorali Migratorum Cura*.\(^\text{32}\) The Instruction centered its message on the respect due migrants and the unfortunate rejection of migrants by host societies as it provided more concrete instructions on the pastoral duties for their care.\(^\text{33}\) The Pope made clear that the belief in the One Body required action from the Church and not passive bystanders.\(^\text{34}\) In 1970, Pope Paul VI continued the Church's commitment to serving the stranger by establishing the Pontifical Commission for the Pastoral Care of Migrants and Itinerant People, *Erga Migrantes Caritas Christi* para. 27 (2004) [hereinafter *Erga Migrantes*] ("[A] careful study of the documents and directives on migration so far issued by the Church clearly brings to light certain important theological and pastoral findings that have been acquired. . . . These documents also illustrate the pastoral dimension of work for migrants.").

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\(^{25}\) *See Colossians* 3:11.


\(^{27}\) *See Pontifical Council for the Pastoral Care of Migrants and Itinerant People, Erga Migrantes Caritas Christi* para. 27 (2004) [hereinafter *Erga Migrantes*] ("[A] careful study of the documents and directives on migration so far issued by the Church clearly brings to light certain important theological and pastoral findings that have been acquired. . . . These documents also illustrate the pastoral dimension of work for migrants.").

\(^{28}\) *See Pope Pius XII, Exsul Familia Nazarethana* (1952).

\(^{29}\) *Id.* para. 3.

\(^{30}\) *Id.* para. 18.

\(^{31}\) *Id.* para. 5.

\(^{32}\) *Congregation for Bishops, De Pastorali Migratorum Cura* (Nemo Est) (1969).

\(^{33}\) *See generally id.*

\(^{34}\) *See generally Pope Paul VI, Pastoralis Migratorum Cura* (1969).
of Migration and Tourism, which was entrusted with overseeing the progress of Bishops' Conferences in their pastoral care programs for migrants.  

In 1989, the Pontifical Commission for the Pastoral Care of Migration and Tourism became the Pontifical Council for Pastoral Care of Migrants and Itinerant People under Pope John Paul II. The re-organized Council reflected Pope John Paul the Great's keen awareness and understanding of Christ's message of serving the stranger, and, in 2004, with the approval and leadership of John Paul the Great, the Council issued the Instruction Erga Migrantes Caritas Christi. Through this Instruction, the Pope and the Council sought to underscore the growing problem of migration and to remind the Church and its faithful of its obligation to act in service of migrants.

The Instruction Erga Migrantes puts Pope Pius XII's words in the context of the modern world and more clearly defines the mission of the Church to live out Christ's directive to serve the stranger. In Erga Migrantes the Church points to the increasing displacement of people around the world due to war and poverty, and states that "today's situation thus requires . . . of the Church, loving attention to 'people on the move' and to their need for solidarity and fellowship." The Instruction recalls the teachings of the Church in its early years, reminding Christians that they should make no distinction between peoples of different nations and that "a sense for hospitality [should be] natural to them." In Erga Migrantes, the Church insists that Christians promote a "culture of welcome," that Christians "[w]elcome one another then, as Christ welcomed [all], for the glory of God."

Based on God's directive to the early Church, the Catholic Church and its Magisterium ask for signs of fraternity and the practice of solidarity "in response to the emergencies that come with migrations: canteens, dormitories, clinics, economic aid, reception centres." According to the Church, Christians should make every effort to help migrants toward

35. Pontifical Council for the Pastoral Care of Migrants and Itinerant People, The Instruction Erga Migrantes Caritas Christi: A Response of the Church to the Migration Phenomenon Today para. 8 (People on the Move, No. 97, Apr. 2005).
36. Id.
37. I join many Church leaders, theologians, academics, and lay faithful throughout the world in recognizing the great legacy of the servant of God, Pope John Paul II.
38. ERGA MIGRANTES, supra note 27.
39. See generally id. The Instruction also provides juridical pastoral regulations for the Conferences of Bishops around the world.
40. Id. para. 11.
41. Id. para. 16.
42. Id. para. 39.
43. Id. para. 40 (quoting Romans 15:7).
44. ERGA MIGRANTES, supra note 27, para. 43.
integration and self-sufficiency.\textsuperscript{45} Specifically, the Church points to a particular commitment to "family unification, education of children, housing, work, associations, promotion of civil rights and migrants' various ways of participation in their host society."\textsuperscript{46} The Church teaches that it is the responsibility of Christians to help their brothers and sisters in Christ to live life to the fullest.

The Catholic Church’s teachings and guidance on the issue of migration have also been codified in the \textit{Codex Iuris Canonici}. The \textit{Codex} is the code of governing law for the Church and its faithful, and the obligations delineated by the canons in the \textit{Codex} bind all baptized Catholics of the age of reason.\textsuperscript{47} Two canons are of particular importance to the pastoral care of migrants: the first, Canon 529, directs parish priests to "seek out . . . those exiled from their country, and similarly those weighed down by special difficulties;"\textsuperscript{48} and the second, Canon 568, asks dioceses, whenever possible, to appoint chaplains to care for those who "are not able to avail themselves of the ordinary care of pastors because of the condition of their lives, such as migrants."\textsuperscript{49} Furthermore, in Canon 222, the \textit{Codex} obliges the lay faithful to assist with what is necessary for the "works of the apostolate and of charity;" the lay faithful "are also obliged to promote social justice and, mindful of the precept of the Lord, to assist the poor from their own resources."\textsuperscript{50} The canonical norms in the \textit{Codex} of the Catholic Church delineate the requirements of fulfilling the Word of God and being a part of the Body of Christ; the canonical norms simply codify the teachings of Jesus Christ and the guidance of the Catholic Church. Thus, the Church and the lay faithful have an obligation to care for their migrant brothers and sisters.

\textbf{C. Executing Christ's Directive to Serve the Stranger in the United States}

The United States Conference of Catholic Bishops is committed to following the Church’s \textit{Magisterium} and has made sure that the Church in the United States understands the problem of migration through the lens of faith and in the context of the American problem of illegal immigration.\textsuperscript{51} To this end, on January 22, 2003, the U.S. Conference of

\begin{thebibliography}{9}
\bibitem{45} Id.
\bibitem{46} Id.
\bibitem{47} See \textit{1983 CODE} cc.11, 12.
\bibitem{48} Id. c.529, § 1.
\bibitem{49} Id. c.568.
\bibitem{50} Id. c.222; see also id. c.225 (binding the Christian faithful to make "known and accepted" the Gospel and bear witness).
\bibitem{51} The United States Conference of Catholic Bishops has responded to the directives of the Catholic Church’s \textit{Magisterium} and established the Committee on Migration and the office of Migration and Refugee Services, which assist parishes across the nation in their pastoral needs for the care and service of migrants. See U.S. Conf. of Cath.
Catholic Bishops joined the Conference of the Mexican Episcopate to issue a pastoral letter concerning migration, titled *Strangers No Longer: Together on the Journey of Hope*. In this letter, the Bishops gave the Church pastoral instruction on the care of immigrants in the United States by reflecting on the “mysterious presence of the crucified and risen Lord in the person of the migrant.”

Through this joint pastoral letter, the Bishops urged the Church and the lay faithful to listen carefully to Christ’s call and to recognize the dignity of migrants. The Bishops’ analysis of Catholic teaching points to five emerging principles which should guide the Church:

1. **Persons have the right to find opportunities in their homeland.**

2. **Persons have the right to migrate to support themselves and their families.**

The Church recognizes that all the goods of the earth belong to all people. When persons cannot find employment in their country of origin to support themselves and their families, they have a right to find work elsewhere in order to survive. Sovereign nations should provide ways to accommodate this right.

3. **Sovereign nations have the right to control their borders.**

4. **Refugees and asylum seekers should be afforded protection.**

5. **The human dignity and human rights of undocumented migrants should be respected.**

Regardless of their legal status, migrants, like all persons, possess inherent human dignity that should be respected. Often they are subject to punitive laws and harsh treatment. Government policies that respect the basic human rights of the undocumented are necessary.

Though the Bishops recognize the sovereignty of states in controlling migration, they are clear in stating that the right of sovereignty is not absolute.

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53. *Id.* para. 3.

54. *Id.* paras. 34–38.

55. See *id.* para. 39.
The U.S. Conference of Catholic Bishops and the Conference of the Mexican Episcopate also acknowledged the Church’s responsibility to build a “culture of welcome” and to promote a spirit of hospitality. For that reason, they declared:

- We call upon pastors and lay leaders to ensure support for migrant and immigrant families.
- We urge communities to offer migrant families hospitality, not hostility, along their journey.
- We commend church communities that have established migrant shelters that provide appropriate pastoral and social services to migrants.
- We encourage Catholics and all people of good will to work with the community to address the causes of undocumented migration and to protect the human rights of all migrants.
- We call on the local church to help newcomers integrate in ways that are respectful, that celebrate their cultures, and that are responsive to their social needs, leading to a mutual enrichment of the local church.
- We ask that special attention be given to migrant and immigrant children and youth as they straddle two cultures, especially to give them opportunities for leadership and service in the community and to encourage vocations among them.
- The Church on both sides of the border must dedicate resources to provide pastoral care for migrants who are detained or incarcerated. The presence of the Church within detention facilities and jails is an essential way of addressing the human rights violations that migrants may face when they are apprehended.
- We encourage local dioceses to sponsor pertinent social services for migrants and immigrants, particularly affordable legal services.
- In many rural dioceses, the primary site of pastoral outreach for farm workers is the migrant camp, usually at a significant distance from the parish church. In this context we encourage local parishioners to be prepared as home missionaries and the migrants themselves to be prepared as catechists and outreach workers.

The Bishops were clear in what was expected of the Church and its members in dealing with the difficult issue of migration, especially with the growing problem of illegal immigration in the United States. The Bishops’ message is a call for action, as informed by the religious tradition of the Church.

57. Strangers No Longer, supra note 52, para. 42.
Throughout the centuries the Church has remained true to Christ's directive to serve the stranger, and its leaders have made every effort to "[k]eep watch over . . . the whole flock of which the Holy Spirit ha[d] appointed [them] overseers." As followers of Christ and in communion with the Church, Catholic leaders and lay faithful must place their duties to the Body of Christ above all else as directed by Jesus and the Church. As Pope John Paul the Great said,

In the Church no one is a stranger, and the Church is not foreign to anyone, anywhere. As a sacrament of unity and thus a sign and a binding force for the whole human race, the Church is the place where illegal immigrants are also recognized and accepted as brothers and sisters. It is the task of the various Dioceses actively to ensure that these people, who are obliged to live outside the safety net of civil society, may find a sense of brotherhood in the Christian Community. Solidarity means taking responsibility for those in trouble.59

The Church in the United States must show solidarity and fulfill its obligation to Christ and His people by serving immigrants regardless of their legal status and in spite of the threat of criminal prosecution.60

II. Failed Immigration Reform and the States' (Threatening) Response

Considering the Christian obligation to serve the migrant, it is of no surprise that many religious leaders were concerned with the success of the Sensenbrenner-King Bill, H.R. 4437, which would criminalize many types of assistance to undocumented immigrants.61 Among those leaders is Cardinal Roger Mahony, Archbishop of Los Angeles, who protested H.R. 4437's seeming threat to criminalize the services offered by the Catholic Church in immigrant communities. Cardinal Mahony called for solutions that focused on the plight of immigrants instead of laws that dehumanized the illegal immigration problem and created


60. The Catholic Church's belief in the message of Christ is intricately connected with the actions of service threatened by the state illegal immigration statutes, and "[t]he Court is not empowered to question the validity of that belief." Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 884 (D. Md. 1996).

greater criminal liability.\textsuperscript{62} Cardinal Mahony’s stance stirred religious leaders and civil rights activists into joining their voices in support of undocumented immigrants, and, on March 27, 2006, many of these leaders came together to lobby Congress for a more compassionate immigration reform.\textsuperscript{63} Though Congress failed to meet their demands, it did reject H.R. 4437.\textsuperscript{64} At the very least, the religious leadership and immigrant advocacy groups in America had succeeded in making immigration a political priority in the United States.\textsuperscript{65}

In the summer of 2007 Congress finally heeded the call to take on the issue of immigration and began debating legislation for comprehensive reform; however, after months of partisan wrangling, Congress failed.\textsuperscript{66} Many were disheartened, but Congress’ failure was especially poignant as state officials sought stricter laws against those that, seemingly, propagated the illegal immigration problem by hiring undocumented immigrants.\textsuperscript{67} To these state officials, the failure of Congress and the beginning of the presidential election process meant that the problem of illegal immigration would be shelved indefinitely, so various state legislators undertook the issue of immigration and began looking for solutions.

One of the states that dealt with the issue of immigration directly was Oklahoma. Even before Congress’ squabble with comprehensive immigration reform, the State of Oklahoma enacted the Oklahoma Taxpayer and Citizen Protection Act of 2007, which states, in part:

(A) It shall be unlawful for any person to transport, move, or attempt to transport in the State of Oklahoma any alien knowing or in reckless disregard of the fact that the alien has come to,


\textsuperscript{63} See \textit{The New Sanctuary Movement}, supra note 8.

\textsuperscript{64} See GovTrack.us, supra note 9.

\textsuperscript{65} Across America, millions took to the streets demanding that undocumented immigrants be able to adjust their immigration status and that they be treated with dignity and respect. The chorus of these protests recalled the immigrant heritage of the United States and pointed to the importance of the labor that undocumented immigrants provide the country. In the spring of 2006 immigration advocacy groups and civil rights leaders even called for a boycott, asking all immigrants to stop working for a day and asking advocates and supporters not to buy American products that same day. For over a year the issue of immigration rattled Americans who awaited the leadership of the federal government to take action. See, e.g., Shannon D. Harrington, \textit{U.S. Immigration Protests Fill Streets, Seek Reforms}, BLOOMBERG.COM, Apr. 10, 2006, http://www.bloomberg.com/apps/news?pid=10000086&sid=aB3uF0y5. Hfs (reporting on the April 10 rallies, the date with the largest turnout nationwide).


\textsuperscript{67} See id.
entered, or remained in the United States in violation of law, in
furtherance of the illegal presence of the alien in the United States.

(B) It shall be unlawful for any person to conceal, harbor, or shel-
ter from detection any alien in any place within the State of
Oklahoma, including any building or means of transportation,
knowing or in reckless disregard of the fact that the alien has come
to, entered, or remained in the United States in violation of law.

(C) Nothing in this section shall be construed so as to prohibit or
restrict the provision of any state or local public benefit described
in 8 U.S.C., Section 1621(b), or regulated public health services
provided by a private charity using private funds.

(D) Any person violating the provisions of subsections A or B of
this section shall, upon conviction, be guilty of a felony punisha-
table by imprisonment in the custody of the Department of Correc-
tions for not less than one (1) year, or by a fine of not less than
One Thousand Dollars ($1,000.00), or by both such fine and
imprisonment.68

The statute, the first of its kind among the states, has two key
aspects: 1) the criminalization of transporting, harboring, or sheltering an
undocumented immigrant, and 2) the exemption of general and emer-
gency health care providers from criminal liability. Oklahoma's two
main provisions are included in the proposals of at least four other states
that are considering illegal immigration statutes as a result of Congress'
failure to take decisive action against illegal immigration.69

However, as well-intentioned as these states may be in trying to
address the concerns of illegal immigration, the state illegal immigration
statutes present serious obstacles for the Catholic Church's mission of
service to immigrant communities. These statutes are a threat to church
communities in the states because of the far-reaching implications of
their language. The Catholic Church in Oklahoma has already expressed
its concerns because of the apparent restrictions on the assistance it pro-

68. OKLA. STAT. ANN. tit. 21, § 446 (West 2007); cf. H.R. 4437, 109th Cong.

(Ala. 2008); H.B. 73, 2008 Leg., Reg. Sess. (Fla. 2008); H.B. 1346, 94th Gen. Assem.,
Note will focus on Alabama, Florida, Missouri and Rhode Island, in addition to
Oklahoma, because these are the only states where the Church may seek exemptions from
illegal immigration laws under the Religious Freedom Restoration Acts these states have
enacted; see infra Part III.B.
vides to immigrants,\textsuperscript{70} concerns that are similar to those voiced by Cardinal Mahony after the passage of H.R. 4437.\textsuperscript{71}

On its face, a state illegal immigration statute would criminalize the transportation of undocumented immigrants to participate in church services or to seek medical and legal services; it would criminalize giving an undocumented immigrant an opportunity to sleep in a church shelter; and it would criminalize allowing undocumented immigrants to gather in a building to receive food, water, clothing, or medical or legal services.\textsuperscript{72} Any of these services could fall under the definitions of “transportation,” “harboring,” or “sheltering;” and the churches’ activities could be seen as furthering the immigrants’ “illegal presence” because the services provided would facilitate their continued presence in the United States.\textsuperscript{73} The churches would also satisfy the illegal immigration statute’s “reckless disregard” element because they provide public services without regard for the legal status of the people they serve—especially when churches provide services to Spanish-speaking persons that would likely be undocumented in certain communities.\textsuperscript{74} The broad language of the state illegal immigration statutes criminalizes “treating undocumented migrants with the same humanity and generosity offered to others, because the activities not only provide material assistance but engender

\textsuperscript{70} Greg Horton, \textit{Could State Immigration Law Send Church Workers to Jail?}, \textit{Sooner Cath.}, May 27, 2007, at 1. Many dioceses across the country should share the concern of the Diocese of Oklahoma City. Some of the services dioceses offer extend beyond the provision of food, clothing, and shelter. Many times parishes or community centers run by the diocese may offer free legal services and free transportation for people that require medical services. Most parishes across the nation also raise St. Vincent de Paul funds that are disbursed at the discretion of the parish for things such as electricity bills, prescription medication, and even rent. All these services are provided under the Church’s obligation to serve and could, potentially, expose priests and volunteers to criminal liability under state illegal immigration statutes.

\textsuperscript{71} See text accompanying notes 2–7 supra.


\textsuperscript{73} See supra note 69; cf. O’Rourke, supra note 72, at 203 (“Given the words’ ordinary meanings, [H.R. 4437’s] most reasonable interpretation suggests that critics are correct in alleging that House Bill 4437 prohibits altruistic and non-discrimination-based assistance to undocumented migrants. Activities designed to improve someone’s health or living conditions clearly amount to assistance and doubtless increase that person’s ability and desire to remain in the United States.”).

\textsuperscript{74} More than 50% of people in Spanish-speaking communities are undocumented immigrants. This increases the possibility of catering to undocumented immigrants in Spanish-speaking communities, which, in turn, increases the possibility of acting with “reckless disregard” under the law. See Jeffrey S. Passel, Pew Hispanic Ctr., \textit{Estimates of the Size and Characteristics of the Undocumented Population} 2 (Mar. 21, 2005), http://pewhispanic.org/files/reports/44.pdf.
an atmosphere of social acceptance and fellowship that encourages or enables undocumented migrants to remain in the United States.\textsuperscript{75}

Some may argue that the state illegal immigration statutes would not target churches and religious organizations even though the language of the law seems to apply to the services a church may offer to the immigrant communities. Oklahoma State Representative Randy Terrill, who drafted the Oklahoma illegal immigration statute, explained that the statute targeted employers that hired undocumented immigrants and agencies that used taxpayer money to provide “education, health care, housing and basic subsistence” to undocumented immigrants.\textsuperscript{76} Representative Terrill stated that few organizations would be affected by the law because of the limited scope of the statute, and that church organizations, like Catholic Charities, would only be among those targeted by the statute if they received taxpayer funds.\textsuperscript{77} But, while he addressed the intent of the statute’s scope, Representative Terrill did not address the problem of the statute’s language, which does not specify that criminal liability attaches to a church or religious organization only when taxpayer funds are used in “furtherance of the illegal presence” of immigrants. In fact, the statute only exempts health care and emergency service providers from criminal liability, no one else.\textsuperscript{78} The scope of the statute’s language is not narrow, but, rather, quite broad;\textsuperscript{79} the statute leaves churches, priests, and lay faithful vulnerable to the whims of state governments.

State laws that mirror Oklahoma’s illegal immigration law would allow the prosecution of men and women that provide the services facilitated by the Catholic Church for immigrant communities. Though it may be reasonable for states to enact legislation in response to the perceived encouragement or inducement of illegal immigration, the legislation must not prohibit the services of the Catholic Church and its Good Samaritans. Legislation that has the potential of criminalizing the Catholic Church’s obligations to serve the people of God regardless of their immigration status creates a religious hardship that cannot, and should not, be constitutional.

III. SOLUTIONS FOR THE CHURCH UNDER RESTRICTIVE STATE IMMIGRATION LAWS

It is unsettling to believe that the Catholic Church may be criminally liable for following the Word of God and serving the stranger. However, even with the prospect of criminal prosecution, the Catholic Church must remain true to the message of God and serve the needs of

\textsuperscript{75} O’Rourke, supra note 72, at 203.
\textsuperscript{76} Horton, supra note 70.
\textsuperscript{77} Id.
\textsuperscript{78} See infra notes 118–20 and accompanying text.
\textsuperscript{79} Cf. O’Rourke, supra note 72, at 204.
the immigrant communities in America. But civil disobedience is not
the only solution to the conflict between the Church’s obligation to
immigrants and the state illegal immigration laws. The Catholic Church
can avail itself of two viable legal solutions under the restrictive regu-
larly schemes of state illegal immigration statutes: 1) to seek a constitu-
tional exemption from the laws under the Free Exercise Clause of the
Constitution, or 2) to seek an exemption from the laws under the Relig-
ious Freedom Restoration Acts of particular states. Either solution will
protect the Catholic Church when providing basic services to undocu-
mented immigrants.

A. Free Exercise of Religion Exemptions Under the First Amendment

The First Amendment to the U.S. Constitution prohibits govern-
ment from regulating the free exercise of religion.\textsuperscript{80} The Supreme Court
has held that the Free Exercise Clause of the First Amendment affords an
absolute protection of religious opinions and prohibits government legis-
lation from targeting particular religious creeds.\textsuperscript{81} This absolute protec-
tion, however, does not apply to religious conduct.\textsuperscript{82} Nonetheless, the
Court has recognized that conduct and belief may be intricately con-
nected and has “rejected the idea that religiously grounded conduct is
always outside the protection of the Free Exercise Clause.”\textsuperscript{83} The recog-
nition of this connection is particularly important in the Catholic tradi-
tion because the Church considers “[t]he protection of conduct . . .
essential to the religious adherent since a religious faith not expressed in
conduct would be regarded as inauthentic.”\textsuperscript{84}

Prior to 1990, the Supreme Court’s jurisprudence in free-exercise
claims looked at whether state laws burdened the exercise of religion
under a strict scrutiny standard. The Court’s test for free-exercise chal-

\begin{itemize}
\item \textsuperscript{80} U.S. CONST. amend. I, cl. 1.
\item \textsuperscript{81} See Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (recognizing that
the freedom of belief is “absolute”); Sherbert v. Verner, 374 U.S. 398, 402 (1963) (“The
door of the Free Exercise Clause stands tightly closed against any governmental regulation
of religious beliefs as such.
\item \textsuperscript{82} See generally United States v. Reynolds, 98 U.S. 145 (1878) (recognizing the
distinction between belief and conduct).
\item \textsuperscript{83} Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972).
\item \textsuperscript{84} Mark E. Chopko & Michael F. Moses, Freedom to be a Church: Confronting
Challenges to the Right of Church Autonomy, 3 GEO. J.L. & PUB. POL’Y 387, 399 n.75
(2005) (citing \textit{James 2:14–17} (“What good is it . . . if someone says he has faith but does
not have works? . . . [F]aith of itself, if it does not have works, is dead.”)).
\item \textsuperscript{86} Id. at 407.
\end{itemize}
the government failed to meet this standard, the Court would find a constitutional exemption to the challenged law.87 This strict scrutiny standard balanced the interests of the government and the claimant to protect conduct that was informed by a particular religious belief, such as the Amish belief that compulsory attendance at a public high school would endanger the salvation of their children.88 However, the Supreme Court seemed to move away from this approach to free-exercise claims.

In 1990, the Supreme Court's decision in Employment Division v. Smith made a marked departure from a century of First Amendment jurisprudence89 by holding that a "generally applicable" law did not violate the Free Exercise Clause when its "incidental effect" burdens the free exercise of religion.90 The Court's reasoning explained that religious conduct had been exempted under the "compelling interest" test in the past only because other constitutional rights were at stake.91 Thus, the Court set aside the strict scrutiny standard of the "compelling interest" test for free-exercise claims and, instead, established a rule that upholds laws that are "neutral" and "generally applicable" even if they burden the free exercise of religion.92

The Court clarified Smith in Church of the Lukumi Babalu Aye v. City of Hialeah93 and made clear that it was not overruling the "compelling interest" standard that had been used in prior free-exercise decisions.94 The Court established that the analysis of free-exercise claims required that a law first be examined under a neutral and general applicability test and then, if the law failed, that a compelling government interest be shown by the state.95 The Court used this approach for the first

88. See generally Yoder, 406 U.S. 205.
91. Justice Antonin Scalia, speaking for the Court, explained that the only time the Court actually applied a "compelling interest" test was in the context of unemployment benefits, which was the issue in Sherbert. Scalia went on to say that the other decisions, purportedly, applied a "compelling interest" test when the case involved another constitutional right, such as freedom of speech or association. Scalia continued by listing, at length, decisions that denied exemptions based on a free-exercise claim alone. See Smith, 494 U.S. at 878–88; see also Stuart, supra note 89, at 401.
92. Smith, 494 U.S. at 878–79.
94. Id. at 531–32.
95. Id.
time in *Lukumi* and provided (limited) guidance for lower courts in examining future free-exercise claims.

*Lukumi* helps to explain *Smith*'s neutrality requirement by looking at several factors. First, the Court requires that a challenged law, at a minimum, be nondiscriminatory on its face; that is, that the law not "refer[] to a religious practice without a secular meaning discernible from the language or context."96 Second, the Court looks at the effects of the law and its objective to make sure that it does not target a religious practice—though the Court states, "To be sure, adverse impact will not always lead to a finding of impermissible targeting."97 Finally, the Court considers whether the objective of the law could have been achieved through narrower regulation.98 If a law fails to be neutral, then it fails the *Smith* test and requires a compelling government interest.99 However, if a law is found to be neutral under a free-exercise claim, the Court asks that a law be generally applicable.100

*Lukumi* gave an insight into what the "generally applicable" requirement meant, although it sidestepped the opportunity to provide a specific definition or factors to consider and, instead, limited itself to finding that the ordinances at issue fell below the minimum standard of the Free Exercise Clause.101 The Court’s apparent focus was on the underinclusiveness of the ordinances in *Lukumi*, stating that they did not advance or accomplish the interests they set out to achieve.102 In *Lukumi*, the Court seems to say that "[a] law that is underinclusive in the sense of failing to restrict certain ‘nonreligious conduct that endangers’ state interests, ‘in a similar or greater degree’ than the restricted religious conduct[,] is not generally applicable, at least when the ‘underinclusion is substantial, not inconsequential’."103 Beyond this, *Lukumi* does not give courts much guidance on what the general applicability requirement means under the Free Exercise Clause. It is clear, however, that if a court finds that the challenged law fails the general applicability requirement, the government must prove, under the pre-*Smith* strict scrutiny standard, that there is a compelling state interest to protect.104

So how do *Smith* and *Lukumi* affect a possible free-exercise challenge of state illegal immigration laws? Cases in the lower courts and the

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96. *Id.* at 533.
97. *Id.* at 535.
98. *See id.* at 539.
99. *See id.* at 531–32.
100. *See id.*
101. *See id.* at 543.
102. *Id.*
analysis of the current free-exercise jurisprudence point to the possibility of a constitutional exemption for the Catholic Church and the services it offers. Though at first glance the Supreme Court seems to have raised the bar to the success of a free-exercise claim, lower court decisions suggest that when a law has a secular exemption—and is, thus, not generally applicable—then a claimant can receive a religious exemption. This reasoning is based on the view that the courts will “ensur[e] equal status with any protected interest. . . preserving considerable room for religious liberty within an ‘equal treatment’ approach.” A court could create a religious exemption when the law is underinclusive and “fails to pursue [its intended] interest against other conduct that causes similar damage to that government interest.” It is in the categorical exemptions of state illegal immigration laws that the Catholic Church can seek a religious exemption from potential criminal liability when it serves undocumented immigrants.

Three particular cases following Lukumi highlight the possibility of religious exemptions when challenged laws have secular exemptions. The first is Keeler v. Mayor of Cumberland, where the court held that the system of exemptions created by the city’s zoning laws required that the city government assert a compelling interest against the demolition of a monastery. The second is Rader v. Johnston, where the court held that a university’s requirement of on-campus residency was not generally applicable when the “system of ‘individualized government assessment[s]’ of . . . students’ requests for exemptions” allowed for exceptions. The third is Fraternal Order of Police v. City of Newark, where the court held that the police department could not treat religious exemptions to its “no-beard” policy any differently than medical exemptions.

The courts in these cases allowed a religious exemption to different situations based on Smith and Lukumi, noting that “in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason.” The state’s laws or requirements in these cases allowed for individualized, secular exemp-

107. Id. at 195.
108. Duncan, supra note 103, at 868.
110. 924 F. Supp. at 1553 (quoting Smith, 494 U.S. at 884).
111. 170 F.3d 359, 365 (3d Cir. 1999), cert. denied, 528 U.S. 817 (1999).
112. Lukumi, 508 U.S. at 537 (quoting Smith, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)))) (internal quotations omitted). All three courts cited to this passage in support of their decision.
tions, contravening the general applicability requirement under Smith. This allowed the courts to look at the interest of the state in regulating the conduct at issue, and, ultimately, to find that the reasons in all three instances were not compelling enough to tolerate a burden on the religious practice of the claimants.

The Catholic Church should follow the example of the claimants in Keeler, Rader, and Fraternal Order of Police, and challenge state illegal immigration laws to receive a religious exemption. The state illegal immigration statutes that threaten the Catholic Church with criminal liability are similar to the regulatory schemes in Keeler, Rader, and Fraternal Order of Police in that they create a secular exception from criminal liability and are, thus, not generally applicable. Under the Smith/Lukumi standard, the states would then have to show a compelling interest in regulating services the Catholic Church provides to undocumented immigrants; the states would fail and would be required to grant a religious exemption.

113. It is important to note Judge, now Justice, Samuel Alito's response to the argument that a medical exemption was not an individualized exemption:

While the Supreme Court did speak in terms of “individualized exemptions” in Smith and Lukumi, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

Fraternal Order of Police, 170 F.3d at 365 (citing Lukumi, 508 U.S. at 542). See also supra notes 106–07 and accompanying text.

114. See Rader, 924 F. Supp. at 1552 n.23 ("[C]ourts and commentators generally agree that a pattern of individualized exemptions undercuts applicability of the broad [general applicability] rule in Smith.") (citations omitted). The “individualized exemptions” in these cases included limited exceptions to an on-campus residency requirement, circumstances that suspend a zoning commission's obligation to reject a demolition, and a medical exemption from a police department's "no-beard" policy. See generally Keeler, 940 F. Supp. 879; Rader, 924 F. Supp. 1540; Fraternal Order of Police, 170 F.3d 359.

115. See Lukumi, 508 U.S. at 531–32.

116. In these cases the interests the courts found non-compelling were historic preservation, required on-campus residency for college freshmen, and uniformity of appearance. See generally Keeler, 940 F. Supp. 879; Rader, 924 F. Supp. 1540; Fraternal Order of Police, 170 F.3d 359.

117. This Note focuses on the general applicability requirement of Smith and not the neutrality requirement because, considering the factors outlined in Lukumi (see supra notes 96–100 and accompanying text), the only argument bearing on the neutrality of state illegal immigration statutes is that they could be more narrowly tailored; this argument is more appropriately discussed in terms of general applicability. See Lukumi, 508 U.S. at 531 ("Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.").
State illegal immigration laws have in common the exception from criminal liability found in subsection (C) of Oklahoma's illegal immigration statute: "Nothing in this section shall be construed so as to prohibit or restrict the provision of any state or local public benefit described in 8 U.S.C., Section 1621(b), or regulated public health services provided by a private charity using private funds." This language allows the government to exempt benefits provided by the state or local governments that may breach the prohibitions of the statutes, such as health care services, emergency medical services, emergency disaster relief, and other services "necessary for the protection of life and safety." In the state illegal immigration statutes "individualized exemptions from a general requirement are available, [thus] the government may not refuse to extend that system to cases of religious hardship without compelling reason."

In failing the general applicability requirement of Smith/Lukumi, the states must then show a compelling reason for the hardship the Catholic Church may suffer as a result of the illegal immigration statutes. The states would fail to show such compelling interest for two reasons. First, there is no compelling reason in prohibiting the Catholic Church from offering the same type of services that state and local governments


119. OKLA. STAT. ANN. tit. 21, § 446(C) (West 2007).

120. 8 U.S.C. § 1621(b) (2000). Note that 8 U.S.C. § 1621(b)(4)(A) exempts services "deliver[ed] in-kind . . . through public or private nonprofit agencies" at the discretion of the Attorney General of the United States. It is unclear if the state illegal immigration laws adopt this exemption by citing to the federal statute and if they would follow an exemption granted by the Attorney General to, in this instance, the services provided by the Catholic Church. The language of the state illegal immigration statutes only mentions public benefits and indicates that the only private service exempted would be from a charity that uses private funds to provide health services; this interpretation of the statute would seem to exclude services from private organizations such as the Catholic Church. Senators in the South Carolina General Assembly recognized the need for explicit exemptions for churches or religious institutions and included explicit language to that effect in their proposed illegal immigration statute. See S.B. 392, 117th Gen. Assem., 2d Reg. Sess. § 9(E) (S.C. 2007). The unanswered questions and potential criminal liabilities that state illegal immigration statutes present make the challenge of these laws an even more pressing issue.

121. Lukumi, 508 U.S. at 537 (quoting Smith, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986))) (internal quotations omitted); see Rader, 924 F. Supp. at 1552 n.23.

122. See Lukumi, 508 U.S. at 531–32. The claimant need not show that the burden was substantial. See Rader, 924 F. Supp. at 1555 (citing Lukumi, 508 U.S. at 544–46); see also Hartmann v. Stone, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (stating that a claimant only needs "a sufficient interest in the case to meet the normal requirement of constitutional standing").
may provide. The Catholic Church may point to the common interest shared between the Church and state governments in protecting life regardless of legal status—as is evident in the exemption of private health care agencies from criminal liability;\(^1\) where the Church shares in the interest of the government for the care of any resident, the state cannot show a compelling reason to legislate against it. A state cannot prohibit, and cannot show that there’s a compelling interest in prohibiting, the care of people in need when the states themselves have shown an interest in the care of their residents through unemployment benefits, health care assistance, and other social programs. Secondly, the state would be hard-pressed in proving a compelling reason to legislate on the issue of immigration when it is an area preempted by the federal government.\(^2\) Considering that the federal government has so dominated the field of immigration, the states’ interest in regulating illegal immigration cannot be compelling; the failure of Congress to enact comprehensive immigration reform cannot excuse invading an area of federal regulation.

The courts should find a constitutional exemption to apply to the Catholic Church’s services to undocumented immigrants because the services it offers are like those that state and local governments provide. The exemptions should protect priests and lay faithful from criminal liability when they provide shelter to undocumented immigrants and when they offer transportation to religious and legal services. The noble cause of helping the stranger and the interest in serving a community in need should drive the challenge of state illegal immigration laws; the statutes that criminalize the efforts of people impelled by the religious belief to serve the stranger cannot stand against the Catholic Church when they contravene the state’s own interest to protect life and assure the most basic necessities of our society: food, water, shelter, religious opportunities, and access to legal counsel.\(^3\)

B. Free Exercise Exemptions Under State Constitutions and SRFRAs

In 1993, after the Supreme Court’s decision in *Smith*, Congress enacted and the President signed the Religious Freedom Restoration Act

\(^{123}\) OKLA. STAT. ANN. tit. 21, § 446(C) (West 2007).

\(^{124}\) See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[A]n Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”) (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)). The Catholic Church may seek relief from criminal liability under state illegal immigration laws by raising a preemption challenge; this Note does not explore this solution for the Church because its focus is on solutions that affirm the connection between religious conduct and belief. For an interesting discussion of federalism, field preemption, and immigration, see Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007).

\(^{125}\) See *Keeler*, 940 F. Supp. at 884 (“[T]he Court is not empowered to question the validity of [the Church’s] belief.”).
The RFRA required that courts, in a free-exercise claim, examine a state’s law under a compelling interest test and not the neutral and general applicability test of Employment Division v. Smith. By giving the courts the discretion to evaluate free-exercise claims under a strict scrutiny standard, Congress reversed what many thought was the eviscerating effect of Smith on the Free Exercise Clause’s protection of religious conduct. However, when the Supreme Court had the opportunity to review the RFRA in City of Boerne v. Flores, the Court held that Congress had exceeded its power in rewriting rather than enforcing the protections of the Free Exercise Clause; the Court held that Congress had impermissibly imposed on the states the weighing of the interests of an individual’s religious faith against the citizenry’s general interests. The Court concluded that in a free-exercise claim it is “[the] Court’s precedent, not RFRA, which must control.”

The Supreme Court’s decision was disappointing to those that looked for greater protection of religious conduct after Smith, so state legislators considered their own solution to protect the free exercise of religion: State Religious Freedom Restoration Acts (“SRFRAs”). While Smith remains the basis of free-exercise jurisprudence under the federal Constitution, many states have rejected the Supreme Court’s decision and have enacted SRFRAs to require their own legislature to prove a compelling governmental interest when burdening the exercise of religion within each state.

The SRFRAs codify the compelling interest standard and allow state courts to interpret the right to free exercise of religion under their own state constitutions; the SRFRAs would then allow states to find more expansive protections of religious conduct. Scholars argue that SRFRAs may help states “interpret state religion clauses in ways that bring into the twenty-first century the principle that government has a limited

(a) Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
(b) Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person
   (1) is in furtherance of a compelling governmental interest; and
   (2) is the least restrictive means of furthering that compelling governmental interest.
129. See id. at 534.
130. Id. at 536.
131. See Berg, supra note 106, at 203.
interest in constraining religious freedom." The SRFRAs can provide states the opportunity of "retaining [the compelling state interest] analysis that was discarded by the Supreme Court" in Smith. The scope of the states' protection of informed religious conduct must then be examined under the free exercise clause of each state's constitution. The analysis requires a close look at the text of these clauses because most states have not interpreted the free exercise rights in their constitutions.

Of the states that have enacted SRFRAs, Alabama, Florida, Missouri, Oklahoma, and Rhode Island have also enacted or are currently considering state illegal immigration statutes. Considering the constitutions of these states and the mandates of their SRFRAs, the Catholic Church may seek exemptions from criminal liability under the states' illegal immigration laws. Through the particular language in state constitutions and SRFRAs, or merely the willingness of the state courts, the Catholic Church may find a legal solution that does not hold it criminally liable for serving the stranger.

The constitutions of Florida, Missouri, and Rhode Island have specific provisos that may be interpreted as restricting the burdens on free exercise of religion only to situations affecting public morals, peace, safety, or the rights of others. This is a more expansive view of the

134. Parsell, supra note 133, at 765; see also Nicholas P. Miller & Nathan Sheers, Religious Free Exercise Under State Constitutions, 34 J. CHURCH & STATE 303, 310 (1992). Of the states discussed in this Note, Florida is the only state that has had an opportunity to consider its SRFRA. See infra note 141 and accompanying text.
135. See ALA. CONST., amend. 622; FLA. STAT. ANN. § 761.03 (West 2008); MO. ANN. STAT. § 1.302 (West 2007); OKLA. STAT. ANN. tit. 51, § 253 (West 2008); R.I. GEN. LAWS § 42-80.1-3 (2007); cf Religious Freedom Restoration Act, supra note 126.
137. See Durham, supra note 132, at 369 (States have been willing to depart from federal law in deciding religious establishment issues in some cases because of the specificity of their texts. Giving similar effect to free exercise protections may help to create a more coherent, text-based jurisprudence. . . . State constitutions, with their very specific textual commands, can perhaps provide better navigation in the murky waters that engulf religious establishment and free exercise claims.
) (footnotes omitted).
138. See FLA. CONST. art. I, § 3; MO. CONST. art. I, § 5; R.I. CONST. art. I, § 3; see also Durham, supra note 132, at 367.
freedom of religion found in the First Amendment of the Constitution,139 and allows laws, such as the SRFRA, to require that the state define the interests it regulates under these terms when the regulation burdens a citizen's religious conduct.140 Under the SRFRAs of Florida,141 Missouri, and Rhode Island, the Catholic Church can raise a challenge to state illegal immigration laws because they burden the Church's exercise of religion by restricting the services it provides according to the message of God—substantially burdening142 services that protect life and provide for the poor, and that provide important contributions to society. Under a state free-exercise claim the state courts must then follow the SRFRAs and their constitutions, requiring that the state illegal immigration laws have an interest in regulating public morals, peace, safety, or the rights of others.143 The states would fail to show that such interest exists. The state courts should find that the interest in regulating illegal immigration, whether to protect the economy or prevent illegal immigration, is not compelling enough to burden the Catholic Church's service to immigrant communities.144 Where the Church shares in the interest of the government for the care of any resident, the state cannot show a compelling reason to legislate against it; a state cannot show that there's a compelling interest in prohibiting the care of people in need when the states themselves have shown an interest in the care of their residents through unemployment benefits, health care assistance, and other social programs.

In Oklahoma the Catholic Church's argument must vary because the Oklahoma Constitution does not have a proviso similar to those found in the constitutions of Florida, Missouri, and Rhode Island.145 The only difference, however, is that the Church cannot expect the state courts to limit the compelling interest under the SRFRA to be defined as an interest affecting public morals, peace, safety, or the rights of others.146 Nonetheless, the Catholic Church would be successful in showing that the state lacks a compelling interest in burdening the ser-

140. See Parsell, supra note 133, at 765–66.
141. Florida is the only state discussed in this Note that has considered its SRFRA, and its Supreme Court has found that the compelling interest standard is permissible in free-exercise claims and that it requires a substantial burden to be shown by the claimant. See generally Freeman v. Dep't of Highway Safety and Motor Vehicles, 924 So.2d 48 (Fla. 2006), rehearing denied, review denied, 940 So.2d 1124 (Fla. 2006).
142. All SRFRAs define "substantially burden" as "inhibiting or curtailing religiously motivated practice." See supra note 135.
143. SRFRAs vary on the remedies available to the claimant, but they all provide an affirmative defense or exemption. See supra note 135.
144. See Parsell, supra note 133, at 765–66; cf. supra notes 122–24 and accompanying text.
145. See supra note 138 and accompanying text.
146. See Okla. Const. art I, § 2.
vice to immigrants because, like those provided by the state, the services provided by the Church have the purpose to protect life and serve the poor; furthermore, the Church can show that the state illegal immigration statutes can be more narrowly defined to achieve their objective of curtailing illegal immigration without curtailing the services of the Church. In accepting the SRFRA, Oklahoma courts can grant the Catholic Church exemptions from criminal liability under the state illegal immigration statutes.

A free-exercise claim in the state of Alabama would be an easier battle for the Catholic Church. The State of Alabama decided to enact a SRFRA as an amendment to its Constitution, enshrining the compelling interest standard of review for free-exercise claims. The Church in Alabama must simply point to the burden of the state's illegal immigration statute and how that burden cannot be upheld when the interest of the state in regulating illegal immigration is not compelling; when considering the types of services that the Church offers and that would be inhibited by the state illegal immigration law, the Alabama courts should find that they fail the compelling interest test of the Constitution. This would warrant an exemption from criminal liability.

SRFRAs are a viable, even necessary, alternative to bringing action against state regulation in federal court. State constitutions and SRFRAs may provide the Catholic Church exemptions from criminal liability under state illegal immigration laws so that the Church can continue to serve the stranger. State courts provide an opportunity to seek the expansion of the freedom of religion in the context of a particular state's laws, precedent, and history. In these state constitutions, the Catholic Church may find a more generous understanding of the free exercise of religion; seeking this generous construction of religious freedom is "faithful to the notion of state constitutions as independent

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147. Cf. supra notes 122–24 and accompanying text. Another issue to consider in Oklahoma is the possibility that the state courts may align themselves with the Supreme Court's Smith decision and invalidate the SRFRA because the State Constitution is similar to the Constitution of the United States. However, some scholars believe that there is a strong argument in considering the states as greater guarantors of religious freedom, and, as such, state courts would be persuaded to follow the state legislature's wisdom in the SRFRAs. See generally Durham, supra note 132; Parsell, supra note 133. But see Mary J. Dolan, The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work, 31 Loy. U. Chi. L.J. 153 (2000) (criticizing RFRAs using state constitutional principles).


149. Cf. supra notes 122–24 and accompanying text.

150. See Durham, supra note 132, at 365–66.
sources of liberty that in many instances preceded codification of rights in the federal charter.  

CONCLUSION

The Catholic Church, as the keeper of God’s message of love and hope, has an obligation to serve all people, regardless of immigration status. As Cardinal Roger Mahony stated, the only “underlying basis for our service to others, especially the poor, is the example, words, and actions of Jesus Christ in the Gospels.” In following Christ’s directive to serve all, including the stranger, the Church must be ready to stand against the criminalization of the very essence of its existence. Fortunately, in standing against the state’s effort to curtail or inhibit its services, the Catholic Church can avail itself of the very system that prosecutes its conduct of love and charity.

The Church must continue its work and seek exemptions from the restrictive state illegal immigration laws through a free exercise claim under the First Amendment of the Constitution of the United States or under the State Religious Freedom Restoration Acts and constitutions of particular states. The refusal of such exemptions would offend the jurisprudence of the Free Exercise Clause and the will of the people as reflected in the actions of legislatures. Above all, the failure to grant the Catholic Church an exemption for its love and compassion would offend the Higher Law to which all owe obedience.  


152. Letter from Cardinal Roger Mahony to President George W. Bush, supra note 2, at 1.

153. See Ephesians 2:14–15 (“For He is our peace, He who . . . broke down the dividing wall of enmity, through His flesh, abolishing the law with its commandments and legal claims.”).