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## Treading on Sacred Land: First Amendment Implications of ICE's Targeting of Churches

Gabriella M. D'Agostini  
*University of Michigan Law School*

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## NOTE

### TREADING ON SACRED LAND: FIRST AMENDMENT IMPLICATIONS OF ICE'S TARGETING OF CHURCHES

Gabriella M. D'Agostini\*

*In the last few years, Immigration and Customs Enforcement (ICE) has begun to target religious institutions—specifically churches—as a means to find and arrest undocumented immigrants. This technique is in legal tension with the First Amendment rights of free exercise of religion and free association. It is unclear, however, how these legal rights protect those most affected by this targeting tactic: undocumented immigrants. Undocumented immigrants may lack standing to challenge ICE's tactics on their own and may require the help of related parties to protect their interests.*

*This Note explores a potential solution to the ambiguity surrounding undocumented immigrants' protection under the First Amendment. Specifically, this Note argues that while undocumented immigrants may be barred from filing suits challenging the constitutionality of ICE raids on religious institutions, U.S. citizens who worship alongside these immigrants can and should bring such suits and demand injunctions to end the practice. These citizens not only have the undisputed legal rights to bring such potential claims but also may use those rights to provide a legal and practical shield for undocumented immigrants who seek to attend church without government intrusion.*

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#### INTRODUCTION

On a brisk February day in Alexandria, Virginia, several Hispanic men were crossing the street—leaving Rising Hope Methodist Church to go to a nearby shopping center—when they were ambushed by Immigration and Customs Enforcement (ICE) agents.<sup>1</sup> Emerging from unmarked cars along the street, the agents bombarded the men, pinning them up against nearby walls.<sup>2</sup> Without explanation or warning, ICE agents shackled the men with handcuffs and interrogated them about their immigration status.<sup>3</sup> After roughly half an hour of questioning, the agents shoved the majority of the men into a van and headed toward an immigration detention facility.<sup>4</sup>

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1. See Julie Carey, *ICE Agents Arrest Men Leaving Fairfax County Church Shelter*, NBC WASH. (Feb. 15, 2017, 6:17 PM), <https://www.nbcwashington.com/news/local/ICE-Agents-Arrest-Men-Leaving-Alexandria-Church-Shelter-413889013.html> [<https://perma.cc/MY8J-TJJB>]; Alex Emmons, *Targeting a Sanctuary*, INTERCEPT (Feb. 27, 2017, 12:46 PM), <https://theintercept.com/2017/02/27/after-ice-stakes-out-a-church-homeless-shelter-charities-worry-immigrants-will-fear-getting-help/> [<https://perma.cc/5L3W-7EAU>]; see also Lauren DeMarco, *Sen. Tim Kaine Sends Letter to ICE Seeking Info About Enforcement Operation Near Va. Church*, FOX 5 DC (Feb. 17, 2017, 7:14 PM), <http://www.fox5dc.com/news/local-news/sen-tim-kaine-sends-letter-to-ice-seeking-info-about-enforcement-operation-near-va-church> [<https://perma.cc/UU6N-PDZS>].

2. Emmons, *supra* note 1.

3. *Id.*

4. See *id.*

The location of the raid was no accident. For over fifteen years, Rising Hope Methodist Church had served as a spiritual sanctuary and shelter for the needy and homeless, many of whom were Hispanic immigrants.<sup>5</sup> But for the witnesses amassed outside the church, the spectacle brought on feelings of shock, terror, and confusion.<sup>6</sup> Rising Hope pastor Rev. Keary Kincannon described what happened in succinct terms: “[The ICE agents] were waiting until the Hispanic men came out of the church. And they rounded them all up. They didn’t question the blacks. They didn’t question the whites. They were clearly going after folks that were Latino.”<sup>7</sup> Although the Rising Hope raid gained significant media attention,<sup>8</sup> it is only one example of a larger pattern of recent ICE enforcement actions that purposefully target churches connected to immigrant communities.<sup>9</sup>

ICE’s practice of targeting particular religious institutions based on their racial or ethnic makeup violates the First Amendment rights to free exercise of religion and free association.<sup>10</sup> Undocumented immigrants’ protection under the First Amendment, however, remains unclear,<sup>11</sup> meaning that undocumented immigrants may have no legal recourse against ICE’s escalating encroachment on practices traditionally protected under the Constitution.<sup>12</sup> The impact of ICE’s policy extends beyond the undocumented immigrants targeted by the raids. For church staff and fellow parishioners, ICE’s tactics present unannounced and uninvited intrusions into their places of worship.<sup>13</sup> While undocumented immigrants themselves may not be able to find refuge under the Constitution, there may nevertheless be creative ways to find legal relief.

Scholarship and litigation have primarily focused on the constitutionality of ICE raids in the context of Fourth Amendment protections against unlawful searches and seizures.<sup>14</sup> Because ICE’s church raids are a relatively

5. *Id.*

6. *See id.*

7. *Id.*

8. *See id.*

9. *See infra* note 21 and accompanying text.

10. *See infra* Section I.B & Section I.C.

11. *See infra* Section II.A.1.

12. *See infra* Section II.A.1.

13. *See* Nick Pinto, *No Sanctuary*, INTERCEPT (Jan. 19, 2018, 12:18 PM), <https://theintercept.com/2018/01/19/ice-new-sanctuary-movement-ravi-ragbir-deportation/> [<https://perma.cc/8JPP-227A>] (describing the ongoing fear within the church community after ICE raids).

14. *See, e.g.*, Katherine Evans, *The ICE Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561 (2009) (arguing that ICE home raids violate the Fourth Amendment); Harriet Sinclair, *Government Being Sued over ICE Raids that Allegedly Targeted Women and Children*, NEWSWEEK (Dec. 11, 2017, 5:36 PM), <https://www.newsweek.com/government-sued-over-ice-raids-allegedly-targeted-women-and-children-744844> [<https://perma.cc/S2N7-B2SY>].

recent phenomenon,<sup>15</sup> the First Amendment implications of such actions have not yet been rigorously explored. While the First Amendment may provide a new avenue for relief, undocumented immigrants still face potential standing problems.<sup>16</sup> To overcome this barrier, this Note articulates a novel strategy for using alternative claimants to challenge the constitutionality of ICE raids at churches under the First Amendment.

Specifically, this Note argues that U.S. citizen parishioners,<sup>17</sup> bearing undisputed constitutional rights, have standing to bring First Amendment challenges to ICE's racially and religiously targeted incursions on their places of worship. Such lawsuits could impede government invasions of religious institutions and simultaneously provide a legal and practical shield for undocumented immigrants who seek to peacefully practice their religious beliefs. Part I explores the history of ICE's practice of targeted raids at churches as well as aspects of First Amendment doctrine that serve as the basis for potential claims against ICE. Part II discusses current doctrinal and practical obstacles that undocumented immigrants may face in bringing these claims themselves. Part III explains how U.S. citizen-driven litigation may be the most effective means for overcoming roadblocks inherent to claims brought by undocumented immigrants.

#### I. TARGETED ORIGINS: FACTUAL AND LEGAL BACKGROUND

Before delving into the First Amendment issues raised by ICE's unconventional approach to immigration enforcement, it is important to contextualize ICE's growing practice within the agency's historical and legal background. This background situates ICE's role as an immigration enforcement agency as well as its intersection with the First Amendment. Understanding ICE's history is important because it reveals a trajectory of increasingly aggressive and brazen tactics to detain undocumented immigrants, with the recent incursions into places of worship as the culmination of that approach. This Part briefly explores ICE's history and actions as an agency, examines the evolution of the free exercise and freedom of associa-

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15. See, e.g., Pinto, *supra* note 13 (describing numerous ICE church encroachments within the last two years).

16. See, e.g., Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 556 (2008) (describing difficulty in establishing standing for suits concerning Fair Housing Act violations for undocumented immigrants); cf. Stephen L. Nelson et al., *States Taking Charge: Examining the Role of Race, Party Affiliation, and Preemption in the Development of In-State Tuition Laws for Undocumented Immigrant Students*, 19 MICH. J. RACE & L. 247, 280–81 (2014) (describing difficulty in establishing standing for suits challenging laws granting in-state tuition to undocumented immigrants).

17. There is a large and diverse spectrum of noncitizen immigration statuses, such as lawful permanent residents, individuals with temporary protected status, and refugees or asylees. For clarity, this Note will only focus on the claims of U.S. citizens who worship alongside undocumented immigrants.

tion doctrines, and discusses how ICE's targeted raids at churches give rise to claims under these two doctrines.

#### A. ICE and Its Targeting of Churches

Following the September 11 terrorist attacks, Congress formed ICE by passing the Homeland Security Act of 2002.<sup>18</sup> The Act authorized ICE with identifying, apprehending, and removing noncitizens from the United States when they violate U.S. immigration law. To carry out its responsibilities, ICE has increasingly turned to immigration raids, also known as immigration sweeps, to apprehend large groups of undocumented immigrants at certain locations.<sup>19</sup>

A change in administration led to new immigration priorities.<sup>20</sup> By early 2017, ICE had implemented a large-scale practice of conducting immigration raids at Christian churches.<sup>21</sup> For example, ICE's Rising Hope raid in February 2017 occurred after the church had been providing food and shelter to undocumented immigrants in the area.<sup>22</sup> The incident at Rising Hope Church is not an isolated event.<sup>23</sup> This type of racial and religious targeting has occurred across the country.<sup>24</sup> In May 2017, ICE agents waited in the parking lot of a Sacramento church, in what they later described as a "targeted enforcement action," to apprehend undocumented parishioners after the

18. Homeland Security Act of 2002, 6 U.S.C. § 252 (2012); *Celebrating the History of ICE*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/features/history> [<https://perma.cc/4A4U-FHMH>]; *Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/about> [<https://perma.cc/3UZZ-NWQ8>]. Through this Act, ICE, along with United States Citizenship and Immigration Services (USCIS) and Customs and Border Protection (CBP), replaced the Immigration and Nationality Service (INS). *Did You Know?: The INS No Longer Exists*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 13, 2011), <https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists> [<https://perma.cc/82FF-T452>].

19. See, e.g., Kristine Phillips, *ICE Arrests Nearly 150 Meat Plant Workers in Latest Immigration Raid in Ohio*, WASH. POST (June 20, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/06/20/ice-arrests-nearly-150-meat-plant-workers-in-latest-immigration-raid-in-ohio/> [<https://perma.cc/7YYX-F4R7>]; see also sources cited *infra* note 21 (demonstrating that ICE has conducted increased immigration sweeps in different locations in the last few years).

20. See Exec. Order No. 13,768, 3 C.F.R. 268 (2017) (describing the Trump Administration's policy of zero-tolerance enforcement of U.S. immigration laws).

21. See, e.g., Emmons, *supra* note 1 (describing ICE agents' targeting of Rising Hope United Methodist Church in Virginia); Pinto, *supra* note 13 (describing ICE agents' targeting of St. Peter's Lutheran Church, St. Jacobi Lutheran Church, Advent Lutheran Church, and other Christian churches in New York); Veronica Rocha, *After ICE Agents Appear at a Sacramento Church, Pastor Tries to Calm His Flock's Deportation Fears*, L.A. TIMES (May 19, 2017, 2:00 PM), <http://www.latimes.com/local/lanow/la-me-ln-sacramento-church-ice-deportation-fears-20170519-htlstory.html> [<https://perma.cc/D3CS-KC3B>] (describing ICE agents' targeting of Vida Church Sacramento in California).

22. See Emmons, *supra* note 1.

23. See *supra* note 21 and accompanying text.

24. *Id.*

service.<sup>25</sup> Similarly, in December 2017, upon hearing a rumor of “a large Hispanic celebration going on,” ICE agents attempted to enter a Lutheran Church in New York City during services.<sup>26</sup> When a senior pastor confronted the ICE agents and asked whether they were looking for a specific person or had a warrant, the ICE agents simply answered, “no.”<sup>27</sup> ICE agents have also surveilled churches through more clandestine methods, including attending church services in plain clothes or standing outside the church doors when services let out to ask congregants “where they were from.”<sup>28</sup>

ICE internal policy states that officers should avoid apprehending undocumented immigrants at “sensitive locations,” such as schools, hospitals, places of worship, or places of civil ceremonies.<sup>29</sup> But no statute or regulation explicitly prevents ICE officers from doing so.<sup>30</sup> Regardless, ICE’s intrusive enforcement at churches raises serious questions about the constitutional legitimacy of their tactics.<sup>31</sup>

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25. Rocha, *supra* note 21.

26. Pinto, *supra* note 13.

27. *Id.*

28. *Id.*; see also Meredith Hoffman, *US Immigration Sting on Church Breaks with Policy on ‘Sensitive Locations,’* VICE NEWS (Feb. 17, 2016), [https://news.vice.com/en\\_us/article/d3949m/us-immigration-sting-on-church-breaks-with-policy-on-sensitive-locations](https://news.vice.com/en_us/article/d3949m/us-immigration-sting-on-church-breaks-with-policy-on-sensitive-locations) [<https://perma.cc/RYQ8-8S2Q>] (recounting an incident where ICE agents arrested an undocumented immigrant by luring him to leave a church building and pretending to be his cousin).

29. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft, to Field Office Dirs., Special Agents in Charge & Chief Counsel (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> [<https://perma.cc/9J5Y-Z2CE>] (“The sensitive locations covered by this policy include, but are not limited to, the following: schools . . . ; hospitals; churches, synagogues, mosques or other institutions of worship, such as buildings rented for the purpose of religious services; the site of a funeral, wedding, or other public religious ceremony; and a site during an occurrence of a public demonstration, such as a march, rally or parade.”). Nevertheless, ICE maintains an exigent circumstances exception to this general rule, which traditionally would cover impending threats such as hot pursuit, imminent destruction of evidence, present risk of danger, or critical matters of national security. *Id.*

30. Daniel González, *Can ICE Arrest Undocumented Immigrants Living in Sanctuary Churches?*, ARIZ. REPUBLIC (Feb. 17, 2018, 6:00 AM), <https://www.azcentral.com/story/news/politics/immigration/2018/02/17/ice-immigration-customs-enforcement-arrest-undocumented-immigrants-living-sanctuary-churches/339281002/> [<https://perma.cc/E7RC-RN8N>].

31. ICE’s practice of targeting *potential* undocumented immigrants at churches is distinct from the practice of apprehending *specific individuals* who agents know are located at a church. A simple hypothetical can illustrate this difference. In Scenario 1, ICE agents receive a list of undocumented individuals who ICE wants to apprehend. Person X is on that list. ICE agents travel to Person X’s house to apprehend him but, when they arrive, he is not there. Person X’s brother, who is living at the house, tells agents that he is at church. As a result, the agents travel to the church and ask congregants if they know where Person X is. Upon finding Person X, they apprehend him—and only him—and leave the church property. In Scenario 2, ICE agents do not have any prior list of specific undocumented individuals. Instead, they know that there are certain locations that might be “hubs” of potential undocumented immigrants. One agent suggests looking at Church A, which is a Christian church that has a large Hispanic population. The agent hypothesizes that there are likely to be Hispanic congregants who do not have legal documentation, so they decide to stand outside the church doors and ask each His-

## B. Free Exercise Doctrine

ICE's practice of targeting churches implicates the First Amendment's Free Exercise Clause because it interferes with the constitutionally protected right to freely exercise one's religious beliefs without governmental intrusion.<sup>32</sup> The Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>33</sup> Since the inception of the First Amendment, the Court has developed a complex free exercise jurisprudence.<sup>34</sup>

Three features of the doctrine are most relevant to assessing the constitutionality of ICE's raids. First, the Free Exercise Clause protects religious beliefs and often religious practices, but it does not provide protections for practices that violate the law.<sup>35</sup> For example, the Court upheld a federal prohibition of polygamy even though it interfered with a Mormon plaintiff's ability to practice.<sup>36</sup> The Court reasoned that while the Free Exercise Clause protects religious beliefs and often religious practices, it does not necessarily provide protections for religious *practices* that violate federal law.<sup>37</sup>

Nearly a century later, the Supreme Court introduced a balancing test into free exercise doctrine, weighing individual free exercise interests against governmental interests.<sup>38</sup> In *Wisconsin v. Yoder*, a group of Amish plaintiffs argued that a state law requiring high school attendance interfered with their ability to exercise their religion, which dictated that children of the faith should not attend school beyond the eighth grade.<sup>39</sup> The Court held that the state law unduly burdened the plaintiffs' religion because the interest in ex-

panic-looking congregant where they are from and if they can show proof of legal status in this country. If an individual cannot provide this documentation, the agents separate them, interrogate them further, and apprehend them on the spot. Compare Trevor Bach, *ICE Has Trapped This Immigrant in a Church for Three Months*, VICE (Apr. 19, 2018, 8:37 PM), [https://www.vice.com/en\\_us/article/ne9mn7/ice-has-trapped-this-immigrant-in-a-church-for-three-months](https://www.vice.com/en_us/article/ne9mn7/ice-has-trapped-this-immigrant-in-a-church-for-three-months) [https://perma.cc/VQ5R-WBTE], with *supra* note 21.

32. See U.S. CONST. amend. I.

33. *Id.*; accord *Reynolds v. United States*, 98 U.S. 145, 162 (1878).

34. See *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1068 (D. Haw. 2002) (quoting *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 824 (10th Cir. 1988) (describing the Free Exercise Clause's "fluid precedent")); see also *A Delicate Balance: The Free Exercise Clause and the Supreme Court*, PEW RES. CTR. (Oct. 24, 2007), <http://www.pewforum.org/2007/10/24/a-delicate-balance-the-free-exercise-clause-and-the-supreme-court/> [https://perma.cc/RU4D-3H69].

35. *Reynolds*, 98 U.S. 145.

36. *Id.* at 166.

37. *Id.*

38. *Wisconsin v. Yoder*, 406 U.S. 205 (2012), employed the *Sherbert* test from *Sherbert v. Verner*, 374 U.S. 398, 403–04 (1936), in which the Court analyzed whether the law had imposed an undue burden on the free exercise of religion. If so, the Court weighed the governmental interest in serving the law against the claimant's interest in exercising his or her religion. *Id.* at 406–07. If the governmental interest was sufficiently compelling and narrowly tailored to meet that interest, the law was upheld. *Id.* at 407.

39. 406 U.S. at 208–09, 211.

pressing their religious identity through Amish community participation outweighed the state interest in mandating school attendance.<sup>40</sup>

Third, in 1991, the Court limited the applicability of *Yoder's* balancing test in *Employment Division v. Smith*.<sup>41</sup> The plaintiffs, who belonged to a Native American church, argued that an Oregon law banning the use of peyote violated their First Amendment rights.<sup>42</sup> The Court held that “neutral laws of general applicability” do not violate the Free Exercise Clause merely because, in practice, they burden a particular religious practice.<sup>43</sup> If the law was neutral on its face, meaning it could theoretically be applied to all populations equally, it did not violate the Free Exercise Clause.<sup>44</sup>

Modern free exercise doctrine is a fluid combination of the reasoning in *Yoder* and *Smith*.<sup>45</sup> Courts focus their analysis on whether a law or governmental action is neutral and generally applicable, rejecting free exercise claims when a law or action is deemed neutral but upholding the validity of claims where there is even a “subtle departure[] from neutrality” on matters of religion.<sup>46</sup> If the law or action is not neutral or generally applicable, courts theoretically will not have to delve into a *Yoder* balance-of-interests analysis because the law or action is facially discriminatory.<sup>47</sup> Facially neutral laws

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40. See *id.* at 235–36.

41. 494 U.S. 872, 901 (1990) (O'Connor, J., concurring); see Kenneth Marin, Note, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1431, 1470 (1991) (“In *Employment Division v. Smith*, the United States Supreme Court severely limited the scope of the free exercise clause. . . . Although the Court did not explicitly overrule *Yoder*, it assigned the case a new meaning—one which the Court in *Yoder* did not intend.”); Roald Mykkeltvedt, *Employment Division v. Smith: Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603, 621 (1991) (describing courts’ dismay at *Smith's* limiting of the *Sherbert* analysis). But see Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1500 (2010) (“*Smith* not only declined to overrule *Yoder* and its kin, but went further and explicitly affirmed their continued vitality.”).

42. *Smith*, 494 U.S. at 874–75.

43. *Id.* at 878–82.

44. See *id.* Although *Smith* was superseded by the passage of a later federal statute, it remains good law when applied to the states. See *Holt v. Hobbs*, 135 S. Ct. 853, 859–60 (2015) (holding that the passage of the Religious Freedom Restoration Act (RFRA) superseded the holding in *Smith* that “neutral, generally applicable laws” do not violate the Free Exercise Clause). But see *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (holding that RFRA was unconstitutional when applied to the states because its creation exceeded Congress’s authority under Section 5 of the Fourteenth Amendment). Congress responded to *Flores* by passing the Religious Land Use and Institutionalized Persons Act (RLIUPA), but RLIUPA did not address free exercise claims beyond the context of religious land use and institutionalized detention. See 42 U.S.C. §§ 2000cc–cc–1 (2012).

45. See *supra* note 34.

46. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)).

47. See *Locke v. Davey*, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting) (explaining that in cases of facially discriminatory actions, the Court should “not pause to investigate whether [the government is] actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen’s rights have been infringed.”). Instead, courts often uphold the validity of

can also be struck down under the Free Exercise Clause if they are applied in a discriminatory manner.<sup>48</sup> As a result, a free exercise claim can be brought as either a facial or an as-applied challenge.<sup>49</sup>

This doctrinal backdrop gives rise to several free exercise challenges to discriminatory targeting of specific churches based on the race or religion of the parishioners. Because ICE is targeting churches, many undocumented immigrants fear that attending church services may result in their arrest.<sup>50</sup> As a result, ICE's actions deter undocumented immigrants from attending weekly religious services, an act of faith fundamental to most Christian denominations.<sup>51</sup> Although ICE's policy of raids is neutral on its face, its disproportionate effect on Christian churches may be evidence of a discriminatory application.<sup>52</sup> This fundamental intrusion into a foundational religious practice is inconsistent with the notion that people are free to exer-

free exercise claims on the grounds that “[t]he Constitution ‘commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.’” *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)).

48. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–40 (1993); *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 167 (3d Cir. 2002); see also *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).

49. See *supra* note 48.

50. See, e.g., Zaira Cortés, *ICE Raids Spur Fear, Activism in NYC Churches*, VOICES OF NY (Apr. 10, 2017), <https://voicesofny.org/2017/04/ice-raids-spur-fear-activism-in-nyc-churches/> [<https://perma.cc/N767-8F77>]; *Fear of Immigration Raids Partially to Blame for 100-Year-Old Church’s Closure*, CBS NEWS (Dec. 30, 2017, 11:31 PM), <https://www.cbsnews.com/news/fear-of-immigration-raids-partially-to-blame-for-100-year-old-churchs-closure/> [<https://perma.cc/Q2GR-EVWD>].

51. See 1 *Corinthians* 16 (New Int’l Version) (suggesting that Christian churches in Corinth met for worship services every Sunday because they met for collections “on the first day of every week”); *Exodus* 20:8–10 (New Int’l Version) (“Remember the Sabbath day by keeping it holy. Six days you shall labor and do all your work, but the seventh day is a sabbath to the Lord your God.”); see also *Catechism of the Catholic Church*, n.2042, HOLY SEE, [http://www.vatican.va/archive/ENG0015/\\_P75.HTM](http://www.vatican.va/archive/ENG0015/_P75.HTM) [<https://perma.cc/69K8-9LMP>] (“The first precept . . . ‘[y]ou shall attend Mass on Sundays and holy days of obligation[,]’ . . . requires the faithful to participate in the Eucharistic celebration when the Christian community gathers together on the day commemorating the Resurrection of the Lord.”).

52. Many different places of worship are participating in the resurgence of the sanctuary movement to help undocumented immigrants. See, e.g., Steve Large, *Advocates Preparing for Large ICE Raid in California*, CBS13 SACRAMENTO (Jan. 17, 2018, 11:26 PM), <https://sacramento.cbslocal.com/2018/01/17/immigration-raid-california/> [<https://perma.cc/34SA-FN3T>] (stating that B’nai Israel Synagogue in Sacramento includes a sanctuary space for undocumented immigrants); Kimberly Winston, *Ohio Mosque Is First to Join Sanctuary Movement*, RELIGION NEWS SERV. (Jan. 23, 2017), <https://religionnews.com/2017/01/23/ohio-mosque-is-first-to-join-sanctuary-movement/> [<https://perma.cc/P392-ED9U>] (stating that Clifton Mosque in Ohio joined the sanctuary movement). My research of reports has shown, however, that ICE has only targeted Christian churches that associate with undocumented immigrants, not other places of worship. See *supra* note 21 and accompanying text.

cise their religion without burdensome and discriminatory government encroachment.

Churches have been at the center of a free exercise and immigration debate before: In the 1980s, religious institutions made a similar free exercise claim when Christian churches were charged for harboring undocumented immigrants as part of the national “sanctuary movement.”<sup>53</sup> The churches argued that the charges interfered with the leaders’ religiously ordained duties to practice charity and good works, which they argued were hallmarks of the Christian faith.<sup>54</sup> The courts rejected this free exercise argument, stating that nothing “suggested that devout Christian belief mandate[d] participation in the ‘sanctuary movement.’”<sup>55</sup> But ICE’s targeting of churches during Sunday services is distinguishable from the 1980s sanctuary cases because the raids at issue here involve direct disturbances of Sabbath Day services—where attendance and participation is required, not suggested, in the Christian faith.<sup>56</sup>

### C. Freedom of Association Doctrine

ICE’s practice of targeting churches also runs afoul of the right to free association. Although the First Amendment does not explicitly mention a “freedom of association,” the Supreme Court has found that this right is so fundamental to free speech that it exists under the First Amendment.<sup>57</sup> The freedom of association protects, in part, expressive association.<sup>58</sup> Expressive association refers to the right to associate with others who engage in “activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”<sup>59</sup>

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53. See Joseph Darrow, Note, *Criminalizing Love of Thy Immigrant Neighbor? The Conflict Between Religious Exercise and Alabama’s Immigration Laws*, 26 GEO. IMMIGR. L.J. 161, 167 (2011); see also Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 600–01 (2008).

54. See *United States v. Aguilar*, 883 F.2d 662, 694 (9th Cir. 1989); see, e.g., Glenn Obenberger, *Created in Christ Jesus for Good Works: How Christian Charity Serves to Engage Others with Jesus*, EVANGELICAL LUTHERAN SYNOD (2012), <https://els.org/resources/document-archive/convention-essays/essay2012-obenberger/> [<https://perma.cc/J469-DPCM>].

55. *Aguilar*, 883 F.2d at 694; accord *United States v. Merkt*, 794 F.2d 950, 956 (5th Cir. 1986).

56. See *supra* note 51 and accompanying text.

57. See *Bates v. City of Little Rock*, 361 U.S. 516, 528 (1960) (Black & Douglas, JJ., concurring) (“First Amendment rights are beyond abridgment either by legislation . . . or by suppression or impairment through harassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right.”).

58. There are two types of protected association: intimate association and expressive association. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984). Intimate association refers to the right to engage in and maintain “certain intimate human relationships” without government intrusion. *Id.*

59. *Id.* at 618.

But like most rights, the right to association has its limits.<sup>60</sup> The government can legally infringe upon expressive association if it can show that its policy serves a compelling governmental interest that cannot be carried out through less restrictive means.<sup>61</sup> Under this strict scrutiny analysis, courts consider the individual's right to freely associate and the governmental interest in restricting it, determining whether the government policy is narrowly tailored to achieve the government's purported compelling interest.<sup>62</sup>

ICE's racially and religiously targeted raids punish undocumented immigrants' choice to associate with a particular church. Because the Supreme Court has already held that churches are expressive associations,<sup>63</sup> ICE's targeting tactics violate undocumented immigrants' right to associate with the churches. Whether they are parishioners seeking a place to worship<sup>64</sup> or homeless members of the community seeking refuge,<sup>65</sup> these immigrants maintain a strong association with their church. These two groups overlap, as temporary church residents often participate in spiritual help offered by the church, such as prayer and religious ministry.<sup>66</sup> ICE's church intrusions therefore implicate issues of free association, but affected undocumented immigrants may not have the legal foundation to challenge these actions.

## II. THE WHO: LEGAL AND PRACTICAL OBSTACLES TO BRINGING A FIRST AMENDMENT CLAIM

Although First Amendment doctrine may theoretically provide an avenue for undocumented immigrants to challenge ICE's discriminatory raids, legal and practical obstacles stand in the way. This Part explores the undefined relationship between undocumented immigrants and the First Amendment and discusses the practical barriers that impede and deter constitutional challenges by undocumented immigrants.

60. See *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973) ("Neither the right to associate nor the right to participate in political activities is absolute in any event.").

61. See *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124–25 (1981).

62. *Id.* at 125–26.

63. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200–01 (2012) (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.").

64. See Rocha, *supra* note 21 (describing how the pastor of Vida Church Sacramento pleaded with its parishioners to return to church despite ICE targeting).

65. See Emmons, *supra* note 1 (describing how the Rising Hope Methodist Church served as a shelter for undocumented immigrants).

66. See *Quick to Listen: Why Undocumented Immigrants Are Flocking to This Evangelical Church*, CHRISTIANITY TODAY (Mar. 23, 2017), <https://www.christianitytoday.com/ct/2017/march-web-only/undocumented-immigrants-flocking-evangelical-church.html> [https://perma.cc/4BW2-VHJG].

### A. Legal Considerations

#### 1. Uncertain Protection Under the First Amendment

Whether undocumented immigrants receive protection under the First Amendment is a threshold question.<sup>67</sup> The Supreme Court has never explicitly awarded undocumented immigrants protection under the First Amendment, leaving a conflicted jurisprudence.<sup>68</sup> A few judicial opinions have found that the First Amendment covers undocumented immigrants, arguing that denying them this protection contravenes the intent behind the Equal Protection principle.<sup>69</sup> But the Supreme Court has at least implied that the First Amendment does not apply to undocumented immigrants<sup>70</sup> by inter-

67. Compare *infra* note 69 and accompanying text (collecting opinions that have suggested that undocumented immigrants receive protection under the First Amendment), with *infra* note 70 and accompanying text (collecting opinions that have found that certain constitutional protections are reserved for U.S. citizens). See also *Zadvydas v. Underdown*, 185 F.3d 279, 289 (5th Cir. 1999) (“Indeed, the Court has accepted collateral damage to the constitutional rights of citizens as an acceptable price to pay in deference to the plenary power over aliens of the political branches of the national government.”).

68. See Steve Vladeck, *What’s Missing from Constitutional Analyses of Donald Trump’s Muslim Immigration Ban*, JUST SECURITY (Dec. 10, 2015), <https://www.justsecurity.org/28221/missing-constitutional-analyses-donald-trumps-muslim-immigration-ban/> [<https://perma.cc/N2RQ-KGFF>] (“[R]eligious discrimination also implicates the Free Exercise and Establishment Clauses — two provisions that have seldom, if ever, shown up in the Supreme Court’s plenary power jurisprudence.”). This uncertainty stems, in part, from the Supreme Court’s reluctance to make constitutional rulings regarding noncitizens. See Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 498 (2018) (“Since the first enactment of the modern INA in 1952, the Supreme Court has applied the canon [of constitutional avoidance] to avoid serious constitutional concerns posed by immigration provisions in several cases.”). The Court often employs the “constitutional avoidance doctrine” to evade answering the question of whether noncitizens are entitled to certain constitutional protections. See, e.g., *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (resolving a statute using statutory interpretation rather than addressing due process concerns); *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (resolving a mandatory detention statute using statutory interpretation rather than addressing due process concerns); *INS v. St. Cyr*, 533 U.S. 289, 305 (2001) (resolving a jurisdiction-stripping statute using statutory interpretation rather than addressing due process concerns); *United States v. Witkovich*, 353 U.S. 194, 201–02 (1957) (resolving a deportation supervision statute using statutory interpretation rather than addressing due process concerns). But see *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (holding that statutory interpretation is not appropriate for a detention statute because it is not ambiguous).

69. See *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (arguing that noncitizens are protected by the First, Fifth, and Fourteenth Amendments); *Am.-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1081 (C.D. Cal. 1989) (“[I]t is impossible to adopt for aliens a lower degree of First Amendment protection solely in the deportation setting without seriously affecting their First Amendment rights outside that setting.”), *rev’d on other grounds*, 970 F.2d 501 (9th Cir. 1991); cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 276 (1990) (Kennedy, J., concurring) (arguing that the Fourth Amendment’s use of the phrase “the people” might not limit their protections to only U.S. citizens).

70. See *Verdugo-Urquidez*, 494 U.S. at 265 (“[An] [e]xcludable alien is not entitled to First Amendment rights, because ‘[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law’” (quoting

preting the text of “the people” in certain amendments as meaning strictly U.S. citizens.<sup>71</sup>

Despite this interpretation, the Supreme Court has hinted at a potential avenue for noncitizens to overcome this constitutional barrier.<sup>72</sup> In *Verdugo-Urquidez*, the Court held that a noncitizen who was extradited to the United States to face drug charges did not enjoy constitutional rights because he did not have a “significant voluntary connection with the United States.”<sup>73</sup> Implicitly, the Court seemed to acknowledge that a “significant voluntary connection” could be sufficient to attain constitutional protection in some cases.<sup>74</sup> The Court, however, has only referenced the standard once since its creation, when it found that a lower court erred in determining that there was no “significant voluntary connection.”<sup>75</sup> Given the limited case law using the significant voluntary connection standard, and understanding that applying the standard would potentially create significant constitutional protections for 11.7 million people, it is hard to predict whether the Court would read its limited precedent so expansively.<sup>76</sup>

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United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904)). Since *Verdugo* cited a 1904 case to state this proposition, it is unclear how the Court would address this language in the present day. See Mathilda McGee-Tubb, Comment, *Sometimes You’re In, Sometimes You’re Out: Undocumented Immigrants and the Fifth Circuit’s Definition of “The People”* in United States v. Portillo-Muñoz, 53 B.C. L. REV. E-SUPPLEMENT 75, 79–80 (2012) (explaining that *Verdugo-Urquidez*’s precedential value is ambiguous because the Supreme Court did not command a majority with respect to its substantial connections test).

71. See District of Columbia v. Heller, 554 U.S. 570, 580–81 (2008) (holding that “the people” in the context of the Second Amendment means U.S. citizens). *But see* Justine Farris, Note, *The Right of Non-Citizens to Bear Arms: Understanding “The People” of the Second Amendment*, 50 IND. L. REV. 943, 945 (2017) (arguing that constitutional protection under the Second Amendment should be given to all noncitizens).

72. See *Verdugo-Urquidez*, 494 U.S. at 271.

73. *Id.*

74. See *id.* Further, the Court in *Johnson v. Eisentrager* stated:

The alien . . . has been accorded a[n] . . . ascending scale of rights as he increases his identity with [American] society. . . . Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

339 U.S. 763, 770 (1950).

75. See *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017); *cf.* *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (“An American individual . . . that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. . . . But when it comes to refugees who lack any such connection to the United States, . . . the balance tips in favor of the Government[.] . . .”).

76. David H.K. Nguyen, #ICEOffOurCampus: *The Liability and Responsibility of Colleges and Universities for the Educational Attainment of DREAMers*, 5 BELMONT L. REV. 151, 154 (2018).

## 2. Problems with Remedy

Even if the Supreme Court were to find that undocumented immigrants are entitled to First Amendment protection, the lack of viable remedies for First Amendment violations would pose an additional issue.<sup>77</sup> A finding that one's rights were violated is merely a moral victory if a prevailing undocumented immigrant is rewarded with a fast track to removal proceedings.<sup>78</sup> Therefore, an adequate remedy must protect the affected undocumented immigrant from deportation proceedings.<sup>79</sup>

One potential remedy could be an application of the exclusionary rule such that evidence obtained in violation of constitutional rights would be inadmissible in civil removal proceedings.<sup>80</sup> In the context of ICE's church raids, this would require that evidence obtained during an unconstitutional targeted arrest at a church be excluded from any subsequent removal proceedings.<sup>81</sup> This remedy is of dubious use, however, because the Court held in 1984 in *INS v. Lopez-Mendoza* that the exclusionary rule does not generally apply to civil removal hearings.<sup>82</sup>

While the Court did carve out two exceptions, the applicable exception is narrow and difficult to establish.<sup>83</sup> This exception requires showing an "egregious" violation of a constitutional amendment by immigration offic-

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77. See generally Peter Margulies, *Noncitizens' Remedies Lost?: Accountability for Overreaching in Immigration Enforcement*, 6 FIU L. REV. 319 (2011) (concluding that remedies for noncitizens whose rights are infringed by the government are often ineffective or even unavailable).

78. An immigrant who publicly reveals herself as undocumented might invite the government to initiate removal proceedings. See 8 U.S.C. § 1229 (2012) (initiation of removal proceedings); see also John Burnett, *Immigration Advocates Warn ICE Is Retaliating for Activism*, NPR (Mar. 16, 2018, 10:29 AM), <https://www.npr.org/2018/03/16/593884181/immigration-advocates-warn-ice-is-retaliating-for-activism> [<https://perma.cc/F8CW-DXKK>] (explaining how immigrant activists who have criticized ICE's policies have subsequently been arrested and placed in removal proceedings).

79. Cf. Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 682 (2015) ("[B]y the time [noncitizens] reach removal proceedings, their best chance to avoid removal has already passed." (quoting Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 556 (2013))).

80. See generally Michael J. O'Brien, Comment, "Widespread" Uncertainty: The Exclusionary Rule in Civil-Removal Proceedings, 81 U. CHI. L. REV. 1883 (2014) (arguing for a more expansive reading of the "widespread" exception to allow the exclusionary rule to apply in civil removal proceedings).

81. See *id.*

82. 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not apply in the deportation context because the balance of interests weighs in favor of INS over undocumented immigrants).

83. The two exceptions that allow for the exclusionary rule in civil removal proceedings apply when (1) a violation of the individual's constitutional rights was "egregious" or (2) a violation of the Fourth Amendment has become "widespread" among immigration officers. See *id.* at 1050–51 (plurality opinion). The second exception is inapplicable in this case because it only applies to Fourth Amendment violations.

ers.<sup>84</sup> Courts have explained, however, that different constitutional standards apply to different amendments to show “egregiousness.”<sup>85</sup> And the Second Circuit declined to apply the exclusionary rule exceptions to First Amendment violations altogether, finding that these violations do not make obtained evidence any less reliable, which means they lack sufficient basis to warrant application of the exclusionary rule.<sup>86</sup> It is therefore unlikely that the exclusionary rule would provide sufficient protection to undocumented immigrants already deterred from bringing constitutional challenges.<sup>87</sup>

Undocumented immigrants then have two main options for remedies: monetary damages or injunctive relief. Damages would not provide lasting relief to parishioners because government agents would be shielded by immunity.<sup>88</sup> An injunction, by comparison, is not limited by immunity and would provide proactive, reliable relief.<sup>89</sup> An effective injunction would forbid ICE agents from conducting targeted immigration raids at the affected churches.<sup>90</sup> An injunction would also promote accountability and have a broad, immediate impact. Since government immunity does not protect federal agencies that violate injunctions from liability, ICE and its agents could

84. *Cf. id.* (“Finally, we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”).

85. *See Oliva-Ramos v. U.S. Att’y Gen.*, 694 F.3d 259, 276 (3d Cir. 2012) (“[T]he difference between reviewing [the government’s] actions under the reasonableness standard of the Fourth Amendment or the shocks the conscience standard of the Fourteenth Amendment may be determinative.” (quoting *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 171 (3d Cir. 2001))).

86. *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997) (holding that the exclusionary rule should not apply because violations of the First Amendment do not “affect the fairness or reliability of the deportation proceeding”).

87. *See O’Brien, supra* note 80, at 1889. *But see* Stella Burch Elias, “Good Reason to Believe”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1115 (“[P]rinciples of fundamental fairness and concern for the rule of law that animated the *Lopez-Mendoza* majority’s widespread-violation exception in 1984 now counsel the reintroduction of the exclusionary rule in immigration proceedings.”).

88. Claims against governmental agencies often mean that some form of governmental immunity is triggered, barring a monetary damages suit against the agencies. *See* 28 U.S.C. § 2679(b) (2012).

89. *See* 5 U.S.C. § 702 (2012) (“An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.”). To obtain a permanent injunction, a plaintiff must show that (1) it suffered an irreparable injury, (2) available remedies at law are inadequate to compensate for the injury, (3) a balance of hardships analysis shows that a remedy in equity is warranted, and (4) the public interest would not be disserved by the injunction. *EBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

90. *Cf. Memorandum in Support of Motion for Class Certification, L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D. Cal. Mar. 9, 2018) (No. 18-428) (advocating for a nationwide injunction prohibiting ICE from separating families).

be held in contempt of court for violating such an injunction.<sup>91</sup> Further, a nationwide injunction would have an even broader impact than a party-specific injunction, protecting not only the plaintiffs involved but also future targets of ICE raids at churches across the country.<sup>92</sup> Permanent injunctions are only granted once plaintiffs have been successful in proving their case and only then in extraordinary circumstances.<sup>93</sup> But given ICE's blatant and repeated targeting of churches, the merits of a potential First Amendment claim are strong and the case would likely constitute an extraordinary circumstance.

### B. Practical Considerations

Beyond the legal obstacles that undocumented immigrants face when bringing First Amendment claims, there are also practical considerations that affect their ability to seek relief. The fear of deportation looms large. Despite potentially strong First Amendment claims, undocumented immigrants are unlikely to risk exposure to hostile governmental authorities.<sup>94</sup> This fear of exposure runs deep for undocumented immigrants, often deterring them from reporting even violent crimes, such as assaults, rapes, or burglaries.<sup>95</sup> Understandably, undocumented immigrants may refrain from bringing litigation against ICE agents who enforce the law against them. Weighing their short-term priority of survival against their long-term priority of stability in the United States, undocumented immigrants are disincentivized from bringing First Amendment claims that would jeopardize their presence in the country.<sup>96</sup>

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91. See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 697 (2018) (noting that contempt findings have a "substantial if imperfect deterrent power").

92. Cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2446 n.13 (2018) (Sotomayor, J., dissenting) ("Given the nature of the Establishment Clause violation and the unique circumstances of this case, the imposition of a nationwide injunction was 'necessary to provide complete relief to the plaintiffs.'" (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994))); see also *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.").

93. See, e.g., *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156, 165 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.").

94. Cf. Debra J. Robbin, *When Undocumented Immigrants Don't Report Crimes, We All Suffer*, WBUR (Sept. 22, 2017), <http://www.wbur.org/cognoscenti/2017/09/22/undocumented-immigrants-report-crimes-debra-j-robbin> [<https://perma.cc/49TG-5K8J>].

95. *Id.*

96. Cf. *New ACLU Report Shows Fear of Deportation Is Deterring Immigrants from Reporting Crimes*, ACLU (May 3, 2018), <https://www.aclu.org/news/new-aclu-report-shows-fear-deportation-deterring-immigrants-reporting-crimes> [<https://perma.cc/MHC2-RLEB>] ("[F]ear of deportation is stopping immigrants from . . . participating in court proceedings."). Undocumented immigrants are also less likely to file civil claims because of fear of exposure. See Roxana Mondragón, Note, *Injured Undocumented Workers and Their Workplace Rights: Advocating for a Retaliation Per Se Rule*, 44 COLUM. J.L. & SOC. PROBS. 447, 456 (2011) (stating that

Finally, many undocumented immigrants simply lack the knowledge necessary to assert constitutional violations.<sup>97</sup> Significant financial and language barriers, such as lack of funds to hire an attorney or lack of English fluency, make it difficult to obtain such information.<sup>98</sup> In practice, these barriers prevent undocumented immigrants from gaining meaningful familiarity with U.S. legal institutions.<sup>99</sup> But those barriers aside,<sup>100</sup> the legal community is also uncertain about the protections afforded to undocumented immigrants under the First Amendment.<sup>101</sup> Taken together, these obstacles make it difficult for undocumented immigrants to initiate these challenges.<sup>102</sup>

### III. STANDING AND ALTERNATIVE CLAIMANTS FOR FIRST AMENDMENT CLAIMS

Given the significant practical and legal obstacles deterring undocumented immigrants from challenging First Amendment violations, this Note advocates for a more effective solution: U.S. citizens whose constitutional rights are infringed upon by these targeted raids should bring First Amendment claims against ICE.

U.S. citizens affected by ICE's targeted raids are substantially more likely than undocumented parishioners to prevail in a First Amendment suit.<sup>103</sup>

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undocumented immigrants are less likely to file workers compensation claims); Jagdeep S. Bhandari, *Strange Visions of Alien Shadows*, 13 SW. J.L. & TRADE AM. 63, 66 (2006) (stating that undocumented immigrants are less likely to file tort suits).

97. See, e.g., Maura Ewing, *As Immigration Arrests Rise, Advocates Warn Immigrants to Know Their Rights When Agents Show Up*, PRI (Apr. 12, 2018, 4:00 PM), <https://www.pri.org/stories/2018-04-12/immigration-arrests-rise-advocates-warn-immigrants-know-their-rights-when-agents> [<https://perma.cc/37U2-5873>]; cf. Sirenia Jimenez, Comment, *The Route of Death for Central and South American Illegal Immigrants Can Come to an End with a Change in the United States' Policy*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 447, 455 (2012) (stating that Central American migrants do not know their rights or do not exercise them because of fear of exposure).

98. THE ADVOCATES FOR HUMAN RIGHTS, MOVING FROM EXCLUSION TO BELONGING 75–91 (2014), [https://www.theadvocatesforhumanrights.org/uploads/chapter\\_2\\_access\\_to\\_justice.pdf](https://www.theadvocatesforhumanrights.org/uploads/chapter_2_access_to_justice.pdf) [<https://perma.cc/3Y TZ-5Z9S>].

99. See *id.*

100. Fortunately, with the advent of bilingual legal advertisements and immigration-specific legal aid clinics, this obstacle is becoming easier to overcome. See, e.g., *About Us*, LEGAL AID SOC'Y OF CLEVELAND, <https://lasclv.org/about-us/overview/> [<https://perma.cc/A3X9-XSJ9>] (advertising immigration-specific legal aid services in multiple languages).

101. See *supra* Section II.A.1. The unique challenges that undocumented clients face demonstrates the importance for the legal community of being aware of the race and ethnicity of their clients as it may affect their immigration proceedings. Cf. Alan J. Gocha, Note, *A Call for Realism in the Justice System: Why Criminal Defense Attorneys Should Take Race into Account When Advising Clients*, 28 GEO. J. LEGAL ETHICS 547 (2015).

102. See Ewing, *supra* note 97.

103. It is undisputed that U.S. citizens have protection under the First Amendment. See U.S. CONST. amend. I; *Reynolds v. United States*, 98 U.S. 145 (1878). It is unclear, however, whether noncitizens, both lawful and undocumented, have parallel constitutional rights. The

Churches with an undocumented population usually have U.S. citizens in the congregation as well.<sup>104</sup> These U.S. citizen parishioners—specifically the parishioners who regularly attend weekly services at churches targeted by ICE for immigration raids—may be the strongest yet most overlooked plaintiffs to bring free exercise and freedom of association claims. To succeed in a First Amendment claim, U.S. citizen parishioners would have to establish standing and then prevail on the merits. This Part discusses each of these obstacles in turn.

### A. Standing

First, U.S. citizen parishioners must establish that they have standing.<sup>105</sup> Article III standing requires that (1) the plaintiff suffered an injury in fact, (2) there was a causal connection between the plaintiff's injury and the challenged conduct, and (3) a favorable decision would likely redress that injury.<sup>106</sup> U.S. citizen parishioners could satisfy each of these elements in a challenge to ICE's targeting of churches.<sup>107</sup>

#### 1. Injury in Fact

A cognizable injury in fact must be both “concrete and particularized” and “actual or imminent.”<sup>108</sup> It requires that the unlawful act actually exists and harms the plaintiff in particular.<sup>109</sup> A violation of one's constitutional rights, as in a free exercise claim, is usually sufficient to show injury in fact.<sup>110</sup> At first glance, the injury to U.S. citizen parishioners may appear too attenuated, because the U.S. citizens are not the target of ICE's policy nor the group most directly harmed by it.<sup>111</sup> In response, U.S. citizen parishioners

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Supreme Court has suggested that the level of constitutional protection increases as the permanency of the status increases. *See, e.g.,* *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”).

104. *See, for example, Rocha, supra* note 21, which states that 60 percent of Vida Church Sacramento's congregation does not have legal status. Conversely, the remaining 40 percent of the congregation must have legal status.

105. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

106. *Id.*

107. *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (holding that white “testers” who were part of a racial housing experiment that discriminated against black renters had standing because the white testers were denied the ability to live in a racially integrated community).

108. *Lujan*, 504 U.S. at 560.

109. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

110. *See id.* at 1549.

111. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (declining to decide whether dignitary harms establish adequate grounds for standing, holding instead that plaintiffs established an injury in fact through familial harm).

could argue that their injury in fact is a metaphysical or spiritual injury,<sup>112</sup> because ICE's targeting of their churches to apprehend potential undocumented immigrants interferes with their ability to worship. A metaphysical or spiritual injury is a harm to an individual's abstract beliefs or spiritual values.<sup>113</sup> Although metaphysical or spiritual injuries to show injury in fact have not been universally adopted,<sup>114</sup> many courts—including the Supreme Court—recognize such an injury as a concrete and particularized type of harm for purposes of Article III standing.<sup>115</sup> In a 1970 case, the Supreme Court explained that “[a] person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause.”<sup>116</sup>

More recently, lower courts have held that a spiritual harm is sufficient for Establishment Clause claims, further solidifying that it is a valid injury to establish standing in religion-based claims.<sup>117</sup> A recent Ninth Circuit case held that a Catholic church's spiritual harm was sufficient to establish standing when a city resolution criticized the church's stance on same-sex adoptions.<sup>118</sup> The court explained that “[t]he concept of a ‘concrete’ injury is particularly elusive in the Establishment Clause context . . . because the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature.”<sup>119</sup> The court reaffirmed that religion-based claims warranted the allowance of spiritual injuries to establish standing.<sup>120</sup> In addition, the Eleventh Circuit recently held in *Kondrat'yev v. City of Pensacola* that a metaphysical or spiritual harm was enough to establish standing under the Establishment Clause.<sup>121</sup> The court

112. *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169, 1173 (11th Cir. 2018) (per curiam) (holding that for Article III standing purposes, “it is enough” that a plaintiff has suffered “‘metaphysical[ ] or . . . ‘spiritual’” harm).

113. *See id.*

114. *Cf. Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding that mere harm to an ideological interest is insufficient to establish standing); *Fordyce v. Frohnmayer*, 763 F. Supp. 654 (D.D.C. 1991) (asserting that a spiritual injury is insufficient to establish standing under the Establishment Clause); David Harvey, Comment, *It's Time to Make Non-Economic or Citizen Standing Take a Seat in “Religious Display” Cases*, 40 DUQ. L. REV. 313, 371 (2002) (“Citizens who harbor this type of generalized grievance against religious displays are directed to seek legislative solutions, not judicial ones. The federal courts are not ‘college debating societies’ designed for the pleasure of would-be Establishment Clause watchdogs.”).

115. *See, e.g., Spokeo*, 136 S. Ct. at 1549 (holding that intangible harms can be sufficiently concrete for purposes of Article III standing); *Kondrat'yev*, 903 F.3d at 1173 (holding that metaphysical or spiritual injuries can be sufficiently particularized).

116. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

117. *See, e.g., Kondrat'yev*, 903 F.3d at 1173; *Catholic League for Religious & Civil Rights v. City of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010).

118. *Catholic League*, 624 F.3d at 1047.

119. *Id.* at 1049 (quoting *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1250 (9th Cir. 2007)).

120. *Id.*

121. 903 F.3d at 1173.

found that a city's maintenance of a thirty-four-foot Christian cross in the public park spiritually harmed individuals who did not practice Christianity because it offended and excluded the individuals who felt that the government preferred one religion over others.<sup>122</sup>

The jurisprudence surrounding metaphysical and spiritual injuries provides a promising path for U.S. citizen parishioners hoping to establish an injury in fact. The spiritual harm would be sufficiently particular to a parishioner that attends a church targeted by ICE. The effects of a raid—disrupted worship ceremonies, reduced church attendance, and a pervasive culture of fear that undermines the sense of community—constitute injuries to the individual parishioner and so confer a personal stake in the litigation.

Furthermore, the metaphysical or spiritual injury would be “actual” because ICE's church raids interfere with U.S. citizen parishioners' ability to worship *on the Sabbath Day*.<sup>123</sup> When ICE targets a church during Sunday services—including apprehending undocumented immigrants on church property or surveilling church services in civilian clothes<sup>124</sup>—it disrupts parishioners' attempts to express their spirituality on their holy day without fear of arrest or surveillance.<sup>125</sup> This interference with parishioners' Sunday worship infringes upon their ability to freely exercise their religion and therefore constitutes an “actual” religious harm.

The impact is palpable. ICE's actions have correlated with a decline in weekly church attendance at the targeted churches.<sup>126</sup> In the Christian faith, weekly worship services on the Sabbath Day are a communal activity, requiring group attendance to effectuate the service's purpose.<sup>127</sup> Undocumented immigrants make up as much as 60 percent of some congregations.<sup>128</sup> By imposing an environment of fear and chaos throughout a congregation, ICE

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122. *Id.* at 1171, 1173.

123. Pinto, *supra* note 13 (describing instances of ICE's targeting of churches during Sunday Mass). In Christianity, the Sabbath Day is celebrated during worship services on Sunday. See, e.g., Joseph A. Pipa, *The Christian Sabbath*, in PERSPECTIVES ON THE SABBATH: 4 VIEWS 119, 149 (Christopher John Donato ed., 2011) (quoting 2 PHILIP SCHAFF, HISTORY OF THE CHRISTIAN CHURCH § 60 (Charles Scribner's Sons ed., 1910) (“The fathers did not regard the Christian Sunday as a continuation of, but as a substitute for, the Jewish Sabbath . . .”).

124. See *supra* notes 25–28 and accompanying text.

125. This type of claim only extends to government action. If another member of a parish commits a tortious act against another that interrupts Sabbath Day services, parishioners do not have standing to sue for spiritual harm. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276–77 (1964) (explaining that the First Amendment only pertains to conduct by federal and state governments).

126. See *supra* note 50 (describing how the fear of ICE raids among communities is a reason for the decline in church attendance).

127. See, e.g., Philip W. Dunham, *The Meaning of Worship*, MINISTRY, Apr. 1968, at 17 (“[W]orship is communion . . . [It] is the ‘supreme aspect of worship.’”); *Glossary of Catholic Terms*, U.S. CONF. OF CATH. BISHOPS, <http://www.usccb.org/about/public-affairs/glossary/index.cfm> [<https://perma.cc/8LNG-2MCV>] (defining “Mass” as “[t]he central act of worship in the Catholic Church”).

128. Rocha, *supra* note 21.

undermines the community aspect of worship. While church attendance may also decline if undocumented immigrants are apprehended and detained in locations other than churches, ICE's actions at churches directly and uniquely deter attendance by placing a bullseye on institutions that engage in protected First Amendment activities under the expressive association doctrine.<sup>129</sup> ICE's targeting tactics transform churches from calming and spiritual places into communities saturated with fear and anxiety—where at any moment, a barrage of armed ICE agents may emerge from the shadows, throw people up against walls, interrogate them, and haul them away to unknown facilities.<sup>130</sup>

To date, no plaintiff has ever asserted a metaphysical or spiritual injury in a freedom of association claim. But ICE's incursion into places of worship may present a unique opportunity for such an argument. Because the claim is related to association with churches, it constitutes a religious claim, and plaintiffs should utilize the same reasoning courts have used to apply such injuries to free exercise cases. Consequently, a metaphysical or spiritual injury could confer standing for a freedom of association challenge as well.

Alternatively, churches themselves may be able to bring claims on behalf of their parishioners using the representational standing doctrine. Under representational standing, an organization may bring a claim on behalf of its members if (1) at least one of its members has standing in his or her own right, (2) the interests it wants to protect are germane to its purpose, and (3) neither the asserted claim nor the requested relief requires the individual members' participation in the lawsuit.<sup>131</sup> Claims on behalf of the undocumented immigrant parishioners would likely be unsuccessful because undocumented immigrants probably would not have standing in their own right.<sup>132</sup>

Instead, churches may bring claims on behalf of the U.S. citizen parishioners who have been injured by ICE's targeting. Churches would presumably have no issues establishing the first element—that at least one of its members has standing in his or her own right—because citizens clearly have full protection under the First Amendment.<sup>133</sup> Next, churches would likely be successful in showing that the interests they seek to protect are germane to its purpose. The interests that the potential claims implicate—the right to

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129. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200–01 (2012) (Alito, J., concurring) (“Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.”); see Pinto, *supra* note 13 (describing the unique fear instilled in the church communities as a result of ICE's targeting tactics).

130. See Emmons, *supra* note 1 (describing the February 2017 Rising Hope Methodist Church ICE raid).

131. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The Supreme Court has since held that the third prong may be abrogated by Congress via statute. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996).

132. See Section II.A.1.

133. See U.S. CONST. amend. I.

freely exercise religion and the right to expressively associate with churches—are foundational to the existence of the church, which serves to be a house for the practice of the Christian religion.<sup>134</sup> Finally, there is no realistic reason why the individual parishioners would need to participate in the lawsuit, as the asserted claim is constitutional and the requested relief is injunctive.<sup>135</sup>

Although churches may have more financial and social resources to bring these claims,<sup>136</sup> they may not be the most effective plaintiffs in this case. First, plaintiff-churches involved in divisive policy issues may unnecessarily politicize the claims.<sup>137</sup> Additionally, any controversies involving individuals who associate with the particular church or its institutional beliefs may be attributed to the church itself and bias a potential jury.<sup>138</sup> U.S. citizen parishioners, in contrast, can avoid these issues because they only speak in their individual capacity and are not required to adhere to a religious agenda.

## 2. Traceability

A plaintiff's injury must also be traceable to the challenged conduct.<sup>139</sup> Here, plaintiffs have two theories of traceability: they are directly disturbed by ICE's actions and indirectly injured by the resulting fear in the overall congregation and declining attendance. First, ICE's intrusion into religious services impermissibly infringes on parishioners' right to peacefully practice

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134. See Matt Slick, *What Is the Purpose of the Church?*, CHRISTIAN APOLOGETICS & RES. MINISTRY, <https://carm.org/what-purpose-church> [<https://perma.cc/9U39-NKE7>] (explaining that the purpose of the church is to provide a space to worship God).

135. Churches have been successful in satisfying all of the elements of representational standing, meaning that individual parishioners did not have to participate in the lawsuit. See, e.g., *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272 (5th Cir. 1981) (holding that a church satisfied the elements of representational standing to bring a civil rights action on behalf of its parishioners).

136. See Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 396 (2009) ("Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." (quoting *Int'l Union v. Brock*, 477 U.S. 274, 289 (1986))).

137. See Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1322–23 (2007) (describing how churches have become increasingly involved in politics and the issues that have arisen from this increase).

138. Cf. Doug Stanglin, *Should Catholics Keep Their Faith? Sex Abuse Scandals Prompt More to Personally Question Ties to Church, Poll Finds*, USA TODAY (Mar. 13, 2019, 10:16 AM), <https://www.usatoday.com/story/news/nation/2019/03/13/catholic-church-sex-abuse-scandals-more-re-examine-church-ties/3149368002/> [<https://perma.cc/Y6XK-9GCZ>] (explaining that the Catholic Church sex abuse scandals have changed the way many Catholics view the church as an institution).

139. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

their religion.<sup>140</sup> Separately, their rights are indirectly infringed upon because the inescapable fear flowing throughout the whole parish substantially impedes communal worship by deterring potentially large portions of the congregations from attending.<sup>141</sup> Because of this fear, services are less able to effectuate their purpose of communal worship, causing the individuals present to suffer a metaphysical or spiritual injury. The traceability argument is straightforward: The attendance drop comes in direct response to ICE's targeting tactics, which chill parishioners' communal expression of their religious faith.<sup>142</sup> Specifically, U.S. citizen parishioners may stop going to the affected churches to simply avoid the chaos that could ensue if ICE raided the church, or they may even change churches because of fear of criminal liability for commingling with potential undocumented immigrants.<sup>143</sup> Taken together, ICE's discriminatory tactics have directly caused clearly identifiable injury to parishioners, citizen and noncitizen alike.

### 3. Redressability

Finally, the redressability element requires a showing that the plaintiff seeks a form of relief that can be redressed by the courts and will likely remediate the precise injury identified.<sup>144</sup> As discussed in Section II.A, the most effective and lasting form of relief for U.S. citizen parishioners would be a permanent injunction.<sup>145</sup> Because injunctive relief is the only form of relief that is not shielded by governmental immunity, an injunction prohibiting ICE agents from conducting targeted immigration raids on church property is necessary to eliminate the environment of fear permeating the

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140. A barrage of ICE agents disrupts parishioners' worship regardless of citizenship status. See *supra* note 129 and accompanying text.

141. See Emmons, *supra* note 1 (describing a naturalized U.S. citizen Latino woman who carries her birth certificate around with her at Rising Hope Methodist Church because she is fearful that ICE will deport her); Pinto, *supra* note 13.

142. Vivian Yee, *Immigrants Hide, Fearing Capture on 'Any Corner,'* N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html> [<https://perma.cc/48Q6-U636>] (describing that some undocumented immigrants have cut out weekly church attendance because of fear of deportation); see *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007) (holding that conduct that merely "contributes" to the harm is sufficient for traceability).

143. These reasons for leaving churches targeted by ICE are speculative, but they are meant to illustrate reasons that would bolster a potential freedom of association claim. There are parishioners who oppose the use of churches as sanctuaries. See Dianna M. Nández, *Why A Phoenix Church that Said No 2 Years Ago Has Voted to Act as Sanctuary for Migrants*, AZ CENT. (Mar. 3, 2017, 6:10 AM), <https://www.azcentral.com/story/news/politics/immigration/2017/03/03/phoenix-church-sanctuary-movement-immigrants/98113336/> [<https://perma.cc/3DFT-CPWN>] (stating that a church congregation, although later changing its position, voted against making the church a sanctuary for undocumented immigrants).

144. *Lujan*, 504 U.S. at 561.

145. See Section II.A.2.

targeted churches.<sup>146</sup> An injunction would effectively redress the injury because it would both act as a preventative measure, eliminating future injury, and also mitigate the current fears of anxious parishioners.

### B. *Constitutional Merits: Winning the Balancing Test*

The merits inquiry of a First Amendment claim by U.S. citizen parishioners would look very similar to one in a case pursued by undocumented immigrants. The significant difference, of course, is that a citizen-filed suit would have the advantage of avoiding questions about whether plaintiffs are entitled to First Amendment protections.<sup>147</sup> Citizen parishioners would argue that ICE agents' targeting of churches violates the Free Exercise Clause because it interferes with their ability to worship at weekly services.<sup>148</sup> They would first show that ICE's targeting is not a neutral and generally applicable action, but rather is targeted toward Christian churches.<sup>149</sup> From the locations of the raids, it seems that ICE agents disproportionately target Christian churches over other places of worship to investigate potential undocumented populations.<sup>150</sup> While other places of worship also have undocumented populations at their institutions, there have been no known reports of ICE targeting potential undocumented immigrants at non-Christian places of worship.<sup>151</sup>

There are instances in which ICE agents have *apprehended* undocumented immigrants at non-Christian places of worship.<sup>152</sup> But these actions targeted specific individuals known to be located on the properties.<sup>153</sup> In contrast, ICE's actions against the aforementioned churches have not been limited to a specific and individual target and have involved the targeting of the entire church populations in search of potential undocumented immigrants.<sup>154</sup>

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146. As discussed in Section II.A.2, this form of relief would be the most effective because it would avoid immunity issues that come with suing a governmental agency or individuals who comprise the agency because immunity does not extend to injunctive relief. *See supra* note 88 and accompanying text.

147. U.S. citizens would also not face many practical barriers that undocumented immigrants would face in these suits, such as language proficiency or awareness of constitutional rights. *See supra* Section II.B.

148. *See* Section III.A.1.

149. While a similar claim could also potentially be brought under the Equal Protection Clause, this Note focuses on the First Amendment claims only.

150. *See supra* note 52.

151. *See supra* note 52. A thorough search of both legal and nonlegal electronic sources did not reveal any instances where ICE has targeted potential undocumented immigrants at non-Christian places of worship.

152. *See, e.g.,* Patrick Walters, *Federal Agents Raid Philadelphia Mosque and Arrest Its Imam*, BOS. GLOBE, May 28, 2004, at A6 (describing an ICE arrest of an imam at his mosque because of an investigation of alleged terrorism connections).

153. *See id.*

154. *See, e.g.,* Pinto, *supra* note 13.

Even if a court were to find that the action was neutral and generally applicable, U.S. citizen parishioners could prevail under the *Yoder*-like balancing test.<sup>155</sup> In order to prevail, U.S. citizen parishioners must show that their interest in exercising their right to freely exercise their faith outweighs the governmental interest served by conducting immigration arrests at churches.<sup>156</sup>

The balancing test between ICE and U.S. citizen parishioners under the free exercise doctrine would likely weigh in favor of U.S. citizen parishioners. ICE could argue that its targeted approach serves a governmental interest in uniformly applying the immigration laws and promoting public safety.<sup>157</sup> But the notion that current ICE policy uniformly enforces the law is incorrect.<sup>158</sup> Immigration officials have placed a large emphasis on discretion when apprehending undocumented immigrants.<sup>159</sup> They have not typically prioritized uniform enforcement over the use of case-by-case analysis in practice.<sup>160</sup> Additionally, ICE's interest in increasing public safety is not particularly advanced by targeting churchgoing populations who have done nothing to cause agents to believe that they pose a unique public safety risk.<sup>161</sup> When agents randomly target undocumented immigrants who likely do not have a violent criminal record and do not show a propensity toward

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155. See *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972); see also *supra* notes 39–41 and accompanying text. The Ninth Circuit recently commented that *Smith* overruled *Yoder*. *Ruiz-Diaz v. United States*, 703 F.3d 483, 486 (9th Cir. 2012). It is the only court that has recognized *Smith* as a total overruling, rather than merely a narrowing of the *Yoder* balancing test. The Supreme Court, however, later held that the *Yoder* balancing test can apply if the governmental policy discriminates against a particular religion. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2015 (2017) (“The Department’s policy expressly discriminates against otherwise eligible recipients . . . solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that riggers the most exacting scrutiny.”).

156. See *Yoder*, 406 U.S. at 235–36.

157. See *United States v. Aguilar*, 883 F.2d 662, 696 (9th Cir. 1989); *United States v. Merkt*, 794 F.2d 950, 956 (5th Cir. 1986); see also Memorandum from John Kelly, Sec’y of the U.S. Dep’t of Homeland Sec., Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) [<https://perma.cc/N6EU-N5BT>].

158. See Memorandum from John Kelly, *supra* note 157, at 4 (explaining that prosecutorial discretion for aliens subject to arrest, criminal prosecution, or removal should be employed on a case-by-case basis). *But see The End of Immigration Enforcement Priorities Under the Trump Administration*, AM. IMMIGR. COUNCIL (Mar. 7, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration> [<https://perma.cc/3P8F-DC5J>].

159. See Memorandum from John Kelly, *supra* note 157, at 4.

160. See *id.*

161. See Anna Flagg, *The Myth of the Criminal Immigrant*, N.Y. TIMES: UPSHOT (Mar. 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html> [<https://perma.cc/CVP5-NK2R>].

violence,<sup>162</sup> ICE's argument that it has a strong interest in blanket arrests at churches is significantly weaker because its actions accomplish no more than slightly greater ease in rounding up a particular type of undocumented immigrants—Christian Hispanics.<sup>163</sup> But even if ICE demonstrates with sufficient particularity that it has a strong interest in arresting undocumented immigrants through church raids, it may not be able to show how the suspension of church raids would cause an adverse effect on their overall enforcement regime.<sup>164</sup>

On the other hand, the right of U.S. citizens to freely exercise their religion is fundamental and embedded in the Constitution.<sup>165</sup> The Framers developed the Free Exercise Clause “to preserve a right to engage in activities necessary to fulfill one’s duty to one’s God.”<sup>166</sup> Attending church is a sacred and visible manifestation of Christians’ religious faith and worship.<sup>167</sup> Interfering with church worship and attendance contravenes the Framers’ intent by casting a governmental shadow over parishioners’ religious practices.

Furthermore, former ICE director John Morton’s 2011 memorandum about “sensitive locations,” which remains the leading authority on ICE’s raid policy, explains that ICE agents shall not facilitate immigration enforcement actions at “sensitive locations” unless exigent circumstances exist

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162. See Alan Gomez, *ICE Arresting More Non-Criminal Undocumented Immigrants*, USA TODAY (May 17, 2018, 4:00 PM), <https://www.usatoday.com/story/news/nation/2018/05/17/ice-arresting-more-non-criminal-undocumented-immigrants/620361002/> [https://perma.cc/FJ82-R4JZ]; see also Julianne Hing, *ICE Is Going After People Who Were Once Off-Limits*, NATION (Jan. 19, 2018), <https://www.thenation.com/article/ice-is-going-after-people-who-were-once-off-limits/> [https://perma.cc/GGG8-V2GP].

163. Cf. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544 (1993) (finding that infringing conduct that does not effectively accomplish stated governmental interests is not sufficient to outweigh individual free exercise rights); see also Kate Shellnutt, *Half of Hispanic Christians Worry About Deportation Under Trump*, CHRISTIANITY TODAY (Feb. 24, 2017, 10:21 AM), <https://www.christianitytoday.com/news/2017/february/half-of-hispanic-christians-worry-deportation-trump-dhs-ice.html> [https://perma.cc/G86U-J6Y2].

164. See *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (“[I]t [is] incumbent on the State to show with more particularity how its admittedly strong interest . . . would be adversely affected by [suspending the behavior.]”); see also *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457 (1988) (recounting the “adverse effect” standard of *Yoder*). Although there is currently no numerical data on how church raids contribute to the overall amount of ICE arrests and deportations, it is unlikely that these raids constitute a substantial part of the enforcement regime. See Emily Ryo, *How ICE Enforcement Has Changed Under the Trump Administration*, GOV’T EXECUTIVE (July 29, 2019), <https://www.govexec.com/management/2019/07/how-ice-enforcement-has-changed-under-trump-administration/158766/> [https://perma.cc/F6V3-4UUB] (explaining that President Obama deported immigrants at higher levels than President Trump without the use of mass raids, such as church raids).

165. See *Church of Lukumi*, 508 U.S. at 576 (Souter, J., concurring in part and concurring in the judgment).

166. *Id.*

167. See SUSAN J. WHITE, FOUNDATIONS OF CHRISTIAN WORSHIP ix (2006) (“[G]oing to church for worship remains one of the most identifiable features of Christianity.”); *supra* note 51.

or prior approval is obtained.<sup>168</sup> The memo specifically lists churches as sensitive locations, highlighting that ICE implicitly repudiates interference with religious worship and recognizes the seriousness of intruding on free exercise rights.<sup>169</sup> Weighing the governmental interest in uniformity and maintenance of public safety against the individual free exercise interest in attending weekly church services, a court could find that U.S. citizens' interest in exercising their constitutional rights is stronger than ICE's inessential interest in conducting blanket church raids when other methods of enforcement are available.

Unlike a free exercise claim, a freedom of association claim must clear an initial constitutional hurdle: whether free association is actually implicated.<sup>170</sup> To do so, U.S. citizen parishioners must show that they are engaged in intimate or expressive activity.<sup>171</sup> The Supreme Court has already recognized that churches are expressive associations.<sup>172</sup> So, U.S. citizen parishioners' freedom of association claim could assert that ICE's targeting tactics violate their right to expressively associate with churches.

The next step would be to balance interests between the government and U.S. citizen parishioners. Unlike the free exercise analysis for neutral and generally applicable actions, the freedom of association analysis would apply strict scrutiny to the governmental interest.<sup>173</sup> The strict scrutiny analysis would also be likely to weigh in favor of U.S. citizen parishioners. Like the free exercise claim, ICE would argue that there is a governmental interest in targeting churches to apprehend undocumented immigrants in order to uniformly apply the immigration laws and increase public safety.<sup>174</sup> But this stated interest would fail to withstand strict scrutiny analysis. ICE's targeting of churches is not a uniform enforcement of immigration laws, as it appears to disproportionately target Hispanics at Christian churches.<sup>175</sup>

Nor is ICE's approach narrowly tailored. U.S. citizen parishioners can show many other effective solutions that would allow ICE to accomplish its

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168. Memorandum from John Morton, *supra* note 29.

169. *See id.* at 2.

170. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984) (holding that only intimate and expressive association is protected by the freedom of association).

171. *See id.*

172. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200–01 (2012) (Alito, J., concurring) (“Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.”); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1871).

173. *See Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124–25 (1981).

174. *See United States v. Aguilar*, 883 F.2d 662, 696 (9th Cir. 1989); *United States v. Merkt*, 794 F.2d 950, 956 (5th Cir. 1986); Memorandum from John Kelly, *supra* note 157, at 2.

175. *See supra* notes 149–151 and accompanying text.

interests without targeting churches.<sup>176</sup> For example, ICE can practice uniform immigration enforcement by apprehending specific undocumented individuals, rather than targeting unidentified church populations. Religious targeting is never uniform, as it possesses a bias for those who attend religious services over those who do not attend or affiliate with a place of worship.<sup>177</sup> Additionally, ICE can more directly address its interest in increasing public safety by prioritizing apprehensions of undocumented immigrants with past criminal convictions, rather than enforcing immigration laws with no discretion.<sup>178</sup>

Finally, the freedom of expressive association claim provides U.S. citizen parishioners with the greatest probability of success on the merits. The parishioners' claims concern the right to associate with institutions that partake in the exercise of religion.<sup>179</sup> When supplemented by a free exercise claim, the expressive association claim would create a double-layered First Amendment protection—protection of the free exercise of religion under the Free Exercise Clause and protection of association for the purposes of freely exercising religion.<sup>180</sup> This double-layered protection would be difficult for the government to overcome.<sup>181</sup> This is because the free exercise claim and expressive association claim, although separate inquiries, together allow citizen parishioners to take two bites at the apple to show that the balance of interests weighs in favor of their First Amendment rights over the governmental interest in uniformity and public safety.<sup>182</sup>

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176. Cf. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (suggesting that the provision of less restrictive alternatives to the infringing conduct invalidates the importance of the governmental interest under strict scrutiny).

177. Cf. Melissa Whitney, Note, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 279 (2008) (explaining that, under a leading theory, bias always exists in racial targeting).

178. See Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enf't, to ICE Emps., Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens to All ICE Employees 1–2 (June 30, 2010), <https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf> [<https://perma.cc/Rf2X-MBYJ>] (prioritizing immigrants who pose a danger to national security or public safety).

179. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984) (stating that expressive association claims involve the right to associate with individuals who engage in “activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion”).

180. See Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 72 (2001) (“[A] newly emerging doctrine defining a right of expressive association could provide substantial protection for the internal activities of religious organizations . . . . Thus, the protection afforded the exercise of religion by clauses other than the Free Exercise Clause is relatively large.”).

181. See *id.*

182. Cf. *id.* at 85 (explaining that an expressive association claim provides an alternative constitutional basis, other than the Free Exercise Clause, for exempting churches from certain state laws). As a result, each claim would allow for a balancing analysis on the merits.

## CONCLUSION

ICE's targeted church raids surely implicate the First Amendment and arguably violate it. Even though undocumented immigrants are the parishioners who are most affected by ICE's discriminatory tactics, legal and practical obstacles prevent them from accessing the rights necessary to challenge ICE's actions. One effective solution is for U.S. citizen parishioners to bring First Amendment claims to challenge ICE's racially and religiously targeted raids, serving in practice to also protect undocumented immigrants from these targeted actions. Beyond the legal issues, ICE's actions have serious human consequences. Undocumented immigrants are terrified of being targeted and arrested in the most sacred spaces that they have. These religious spaces are sanctuaries from the inescapable and pervasive fears and uncertainties of being undocumented. Unless challenged, ICE's actions risk taking away one of the only safe spaces that undocumented immigrants have left.

