No. 22-1660

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSE REYES, ET AL.,
Plaintiffs-Appellants,

v.

WAPLES MOBILE HOME PARK LIMITED PARTNERSHIP, ET AL.,
Defendants-Appellees.

On appeal from the United States District Court for the Eastern District of Virginia, No. 1:16-cv-00563

BRIEF OF FORMER HUD ASSISTANT SECRETARY FOR FAIR HOUSING AND EQUAL OPPORTUNITY JOHN D. TRASVIÑA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Cameron L. Davis
cdavis@huntonak.com
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
500 West 5th Street, Suite 1350
Austin, TX 78701
(512) 542-5000

Trevor S. Cox
J. Pierce Lamberson
tcox@huntonak.com
plamberson@huntonak.com
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

Counsel for Amicus Curiae

September 15, 2022

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1660 Caption: Jose Reyes, et al v. Waples Mobile Home Park LP, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

John D. Trasviña, Former HUD Assistant Secretary for Fair Housing and Equal Opportunity
(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Trevor S. Cox Date: 9/15/2022

Counsel for: Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is an immigration and housing policymaker and lawyer and former government official. Having taught immigration law and led the federal government's efforts to enforce the Fair Housing Act, the anti-discrimination provisions of the Immigration Reform and Control Act ("IRCA"), and other immigration laws, he has developed considerable expertise in these areas.

From 1993 to 1997, *Amicus* served as Deputy Assistant Attorney General for Legislative Affairs, representing the Department of Justice ("DOJ") (including the former Immigration and Naturalization Service) before Congress on immigration, civil rights, and other related legislative areas. In 1997, President Clinton appointed him Special Counsel for Immigration-Related Unfair Employment Practices at the DOJ. From 2009 to 2013, he served as Assistant Secretary for Fair Housing and Equal Opportunity ("FHEO") in the U.S. Department of Housing and Urban Development—the office that enforces the Fair Housing Act and promulgates regulations and issues guidance related to the Act—and worked to advance FHEO's mission of eliminating housing discrimination, promoting economic opportunity, and achieving diverse, inclusive communities. Following a

[1] *Amicus curiae* John D. Trasviña ("*Amicus*") files this brief with the consent of all parties. No party or its counsel, or any person other than *Amicus* and his counsel, authored this brief in whole or in part, or contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

term as Dean of the University of San Francisco School of Law, in 2021 *Amicus* served as Principal Legal Advisor to the Director of U.S. Immigration and Customs Enforcement ("ICE") at the U.S. Department of Homeland Security.

Amicus has a professional and personal interest in preventing housing discrimination on the basis of race or national origin, and in ensuring that federal laws, including the Fair Housing Act and the Immigration and Nationality Act, are fairly applied. Drawing on his experience and perspective as an immigration lawyer and former government official, he writes to highlight the district court's error in accepting Defendants-Appellees' contention that screening all adults seeking to live in a mobile home park for their immigration status constitutes a "business necessity" under the Fair Housing Act.[2]

SUMMARY OF ARGUMENT

This brief offers three points relevant to the Court's resolution of this appeal.

First, contrary to the district court's assumption, a landlord does not expose himself to criminal liability under 8 U.S.C. § 1324(a)(1)(A)(iii) simply for entering into a lease agreement with an undocumented individual. Both requirements for liability—a culpable *mens rea* and a criminal *actus reus*—are absent from such a transaction. As numerous other courts have held, the statute requires an element of

[2] *Amicus* supports reversal but takes no position on the other issues raised in this appeal.

concealment for liability to be imposed. That necessary element is missing from a run-of-the-mill commercial arrangement like that between the landlord and tenants here.

Second, the federal government's extensive regulation of immigrants' employment in the United States contrasts starkly with the lack of regulation over their housing. Whereas employers must comply with a detailed system of requirements or face serious repercussions, no similar expectation exists in the housing industry. The absence of any government-issued compliance guidance to private landlords; the government's expectation, as reflected in its own policies, that undocumented individuals may be tenants; and its practice of not using census and tax data for enforcement purposes against undocumented individuals all dispel the conclusion that landlords face criminal liability if they fail to police renters' immigration status themselves.

Third, the district court's conclusion that landlords may be held criminally liable for renting to undocumented individuals or their families, if correct, would have severe practical consequences. Under the district court's reading of the statute, millions of undocumented individuals across the country would face eviction and homelessness, and those who provide housing to undocumented individuals would also face criminal liability.

All three points support an overarching theme: if the Defendants' position and the district court's interpretation were right, then relevant government, industry, and community practices would have been established long ago. If the unforgiving rules envisioned by the Defendants existed, landlords would know and follow them. But they do not exist, and this Court should say so.

ARGUMENT

I. Entering into a lease agreement with an undocumented individual, without more, does not invite criminal liability under 8 U.S.C. § 1324(a)(1)(A)(iii).

The district court ruled the Defendants' documentation policy was justified by the need to avoid prosecution under 8 U.S.C. § 1324(a)(1)(A)(iii), the anti-harboring statute. But entering into a lease agreement with an undocumented individual, without more, does not invite potential criminal liability under that statute because both the culpable *mens rea* and criminal *actus reus* are lacking.

A. *Mens rea*: Signing a lease agreement cannot supply the culpable mental state that the anti-harboring statue requires.

It is a "universal and persistent" principle in our legal system that "wrongdoing must be conscious to be criminal." *Elonis v. United States*, 575 U.S. 723, 734 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 250, 252 (1952)). This essential consciousness of wrongdoing, or culpable mental state, is commonly referred to as "'scienter,' which means the degree of knowledge necessary to make a person criminally responsible for his or her acts." *Ruan v.*

United States, 142 S. Ct. 2370, 2377 (2022). So strong is the concept of scienter in our criminal jurisprudence that, in the absence of an express *mens rea* requirement, courts generally will presume "that criminal statutes require the degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act or omission." *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019). "Only when the statute indicates, expressly or through implication, that Congress intended to 'dispense with *mens rea* as an element of a crime' is it appropriate to treat the statute as setting out a strict liability offense." *United States v. Mast*, 938 F.3d 973, 975–76 (8th Cir. 2019) (quoting *Staples v. United States*, 511 U.S. 600, 606 (1994)).

Section 1324(a)(1)(A)(iii) is no exception to the law's preference for scienter. A person cannot commit an offense under that statute simply by concealing, harboring, or shielding from detection an undocumented individual. Rather, a person must take one of those actions *and* either know, or recklessly disregard the fact, that the undocumented individual is illegally in the United States. *See* 8 U.S.C. § 1324(a)(1)(A)(iii). By requiring knowledge or recklessness, § 1324(a)(1)(A)(iii) expressly conditions an offense under the statute upon the existence of a culpable mental state.

Caselaw analyzing convictions under § 1324(a)(1)(A)(iii) firmly supports this unambiguous statutory requirement. In case after case affirming such

convictions, the defendant's conduct demonstrated some knowledge, or at least reckless disregard, that an alien was not authorized to be in the United States. For example, in *United States v. Monreal-Miranda*, the defendant instructed an undocumented individual, whom he had set up in a hotel the previous night, to lie down when entering a vehicle to leave the next day. 103 F. App'x 83 (9th Cir. 2004). In *United States v. Rubio-Gonzalez*, the defendant ran up to an undocumented individual at a job site and notified him that immigration officers were present, whereupon the worker dropped his tools and ran. 674 F.2d 1067, 1070 (5th Cir. 1982). In *United States v. Fierros*, the defendant transported undocumented individuals using a bus that was equipped with a scanner tuned to the border patrol's radio frequency. 692 F.2d 1291, 1292 (9th Cir. 1982). In *United States v. Herrera*, the defendants installed a security system and used alarm signals to warn undocumented individuals who were working at the premises that immigration officers or police were conducting a raid. 584 F.2d 1137, 1141–42 (2d Cir. 1978). And in *United States v. Lopez*, the defendant provided lodging to "large numbers" of undocumented individuals "with knowledge of their illegal entry" in the country, and "assisted many of them in other ways designed to facilitate their continued unlawful presence in the United States," including by arranging for sham marriages. 521 F.2d 437, 439 (2d Cir. 1975). In each of these cases, the defendants were implicated in efforts to employ a person who was known to be an

undocumented individual and to hide that person from authorities so that he or she could continue to work for an employer.

No similar culpable mental state exists when a landlord enters into an ordinary lease agreement with a person who, unbeknownst to the landlord, happens to be an undocumented individual. A lease agreement is a "contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration, usu[ally] rent." *Lease*, Black's Law Dictionary (7th ed. 1999). This everyday transaction establishes a meeting between two minds for one to occupy and use the other's residential or commercial property, not any knowledge about the immigration status of the lessee. To learn that information, a lessor would have to either acquire it from a third party or go out of its way to make that inquiry, which is what happened here. Defendants claimed that they instituted their documentation policy to avoid prosecution under § 1324(a)(1)(A)(iii). JA1522. But, paradoxically, it was the Defendants' own policy that would have imparted knowledge of the female Plaintiffs' immigration status, not the lease agreements that the Defendants had executed.

Influenced by *United States v. Aguilar*, 477 F. App'x 1000 (4th Cir. 2012), the district court found that the Defendants would possess the requisite *mens rea* required for prosecution under § 1324(a)(1)(A)(iii) were they to not "take affirmative steps to verify the authorization of" the tenants. JA1524. But while the

defendant in *Aguilar* "took no steps to ascertain the status of her tenants," that was so only "after repeatedly being warned by officials that numerous of her tenants were not properly documented," *id.* at 1003—something that cannot be said of the Defendants, who implemented their policy "in response to an incident at another trailer park," JA1513.

The district court also found that the Defendants would possess the requisite *mens rea* required for prosecution under § 1324(a)(1)(A)(iii) by accepting rental payments from the Plaintiffs in exchange for housing. *See* JA1522–23. But rental payments are an express condition of *every* lease agreement, and it is hard to see how complying with a standard lease term would impart knowledge of illegality when the act of entering into the lease agreement would not. The district court appeared to rely upon § 1324(a)(1)(B)(i)'s "commercial advantage or private financial gain" language, but those are statutory requisites for assessing a punishment of not more than 10 years for violating § 1324(a)(1)(A)(ii), (iii), or (iv), not some sort of definition aimed at clarifying the *mens rea* requirement in § 1324(a)(1)(A)(iii).

The act of entering into a lease agreement with a person who a landlord does not otherwise know is an undocumented individual simply cannot supply the *mens rea* required by § 1324(a)(1)(A)(iii).

B. *Actus reus*: A landlord does not "harbor" an undocumented individual simply by executing a lease agreement with the individual.

Looking to the plain meaning of the term "harbors" ("the act of affording lodging, shelter, or refuge to a person"), the district court decided that the Defendants "could face criminal liability" under the anti-harboring statute because when they lease to the Plaintiffs, they are "housing and collecting rent from unauthorized aliens." JA1524. But statutory interpretation performed correctly often involves more than just considering the plain meaning of a term. It also requires an examination of the surrounding circumstances. "Context matters." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006).

As the context surrounding the term "harbors" makes clear—and as the DOJ and multiple appellate courts agree—a landlord does not "harbor" an undocumented individual simply by executing a lease agreement with an undocumented individual. A landlord "harbors" an undocumented individual when the landlord prevents the individual from being detected, discovered, or apprehended by authorities—a fact pattern that prototypically occurs when an undocumented individual is intentionally hidden from authorities so that the individual can continue working for an employer.

1. The district court's interpretation conflicts with the statutory context.

Courts presume that a legislature "says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992), so the starting point for any issue of statutory interpretation is, of course, the plain meaning of the statute itself, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). But dictionary definitions alone cannot determine legislative intent or ambiguity. *Yates v. United States*, 574 U.S. 528, 537 (2015). The "plainness or ambiguity of statutory language is [also] determined . . . by the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (cleaned up). This is because, "[i]n law as in life, . . . the same words, placed in different contexts, sometimes mean different things." *Id.* Or, as Justice Learned Hand eloquently described it, "Words are not pebbles in alien juxtaposition . . . ." *N.L.R.B. v. Federbush Co.*, 121 F.2d 954, 957 (2nd Cir. 1941). Instead, "they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ." *Id.* The construction of "harbors" here is no exception.

The first contextual clue that Congress did not intend "harbors" to cover a landlord who simply enters into a lease agreement with an undocumented individual is the terminology found immediately before and after "harbors": "conceals" and "shields from detection." 8 U.S.C. § 1324(a)(1)(A)(iii). A person

conceals something when she "prevents or hinders the discovery of" that thing. *Concealment*, Black's Law Dictionary (7th ed. 1999). That is no different than "shield[ing something] from detection"—the third term in § 1324(a)(1)(A)(iii)'s list of verbs. If the first and third terms in the list are both meant to convey the act of preventing disclosure, then under the doctrine of *noscitur a sociis*—the principle that "a word is known by the company it keeps"—Congress logically must have intended "harbors" to be given a similar meaning. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Absent an intent to the contrary, a landlord who simply enters into an ordinary lease agreement with an undocumented individual does not do so to prevent or hinder that individual's discovery by authorities.

The second contextual clue that the term "harbors" has no application on these facts is Congress's use of descriptive language to differentiate between terms with potentially overlapping meanings. Take subsection (a)(1)(B)(i), which establishes a term of imprisonment of not more than 10 years when certain offenses were done for "*commercial* advantage or *private* financial gain." 8 U.S.C. § 1324(a)(1)(B)(i). No reasonable person would dispute that financial gain represents a type of advantage. Congress included the italicized terms to clearly distinguish between the act of using an undocumented individual to further a *business* objective and the act of using an undocumented individual to acquire *personal* wealth. Congress took no steps to differentiate "conceals, harbors, or

shields from detection" from one another, indicating that they're meant to convey the same thing: actions taken to prevent detection or discovery.

The third contextual clue that Congress did not intend the term "harbors" to include a standard landlord-tenant relationship is the nature of the statute in which the term is included, and the location of that statute in the overall statutory scheme. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). 8 U.S.C. § 1324 is one of a handful of statutory provisions that establish criminal penalties related to certain activities involving undocumented individuals, including, for example, unlawful employment, document fraud, and importation for "immoral purpose." *See* 8 U.S.C. §§ 1321–1330. Lease agreements are a lawful form of contract, executed every day, everywhere. Without some intent to prevent an undocumented individual's detection, a landlord does not violate the anti-harboring statute by doing something that he or she legally does every day.

The last contextual clue that "harbors" does not entail an ordinary lease agreement is the canon against absurdities, which applies "where the result of applying the plain language would be, in a genuine sense, absurd." *See Small v. United States*, 544 U.S. 385, 404 (2005) (Thomas, J., dissenting). Congress's intent in § 1324(a)(1)(A)(iii) is manifest: assess punishment against a person who, with

knowledge, or in reckless disregard of the fact, that an undocumented individual is in the United States "in violation of law," engages in certain conduct aimed at preventing an undocumented individual from being detected, apprehended, or both by authorities. Construing "harbors" only to mean "affording lodging, shelter, or refuge" does not coincide with this legislative intent because landlords generally do not sign lease agreements to thwart authorities from discovering individuals who are in the United States illegally. To avoid the absurdity that would flow from strictly construing "harbors" according to its plain meaning, the term must be construed to mean that an undocumented individual is being hidden or sheltered so as to prevent the individual's discovery by authorities. *See Matter of Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d 1125, 1128 (7th Cir. 1998) ("When context is disregarded, silliness results.").

2. The district court's interpretation conflicts with the interpretation of the Department of Justice and other circuit courts.

Several other significant authorities interpret "harbors" to mean hidden from detection: the DOJ and multiple federal courts of appeals.

8 U.S.C. § 1324(a)(1)(A)(iii) is not the only provision in the United States Code that uses the term "harbors." 18 U.S.C. § 1072, another penal statute, does so, too. Titled "Concealing escaped prisoner," § 1072 provides, "Whoever willfully harbors or conceals any prisoner after his escape from the custody of the

Attorney General or from a Federal penal or correctional institution, shall be imprisoned not more than three years." *Id.* The DOJ's Criminal Resource Manual defines "harbors" to mean aiding a person "in avoiding detection and apprehension."[3] The Court should give considerable weight to the DOJ's interpretation, considering that it is responsible for federal law enforcement throughout the country.

Several circuit courts similarly construe "harbors" to require more than just "affording lodging, shelter, or refuge to a person." JA1524. The Second Circuit recently confirmed that "harboring," as used in 8 U.S.C. § 1324, is "conduct which is intended to facilitate an alien's remaining in the United States illegally and to prevent detection by the authorities of the alien's lawful presence." *Kearns v. Cuomo*, 981 F.3d 200, 208 (2d Cir. 2020) (quoting *United States v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir. 2013)). The Fifth Circuit interprets the words "harbor, shield, or conceal" to mean that "something is being hidden from detection." *Cruz v. Abbott*, 849 F.3d 594, 600 (5th Cir. 2017) (quoting *United States v. Varkonyi*, 645 F.2d 453, 459 (5th Cir. 1981)); *see Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 529 (5th Cir. 2013) (reaffirming interpretation). And the Seventh Circuit has explained that "harboring

[3] *See* Harboring – 18 U.S.C. § 1072 – Second Element – Concealing, U.S. Dept. of Justice Criminal Resource Manual 1838, https://tinyurl.com/36bru86.

'connot[es] . . . deliberately safeguarding members of a specified group from the authorities, whether through concealment, movement to a safe location, or physical protection.'" *United States v. McLellan*, 794 F.3d 743, 751 (7th Cir. 2015) (quoting *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012)).

But perhaps the most relevant case on point comes from the Third Circuit. In *DelRio-Mocci v. Connolly Properties Inc.*, it held that the defendant property managers "cannot be said to have committed the crime of harboring" insofar as "they simply rented apartments to aliens not lawfully present." 672 F.3d 241, 246 (3d Cir. 2012). The court quoted language from an earlier opinion as support:

> "harboring" requires some act of obstruction that reduces the likelihood the government will discover the alien's presence. It is highly unlikely that a landlord's renting of an apartment to an alien lacking lawful immigration status could ever, without more, satisfy this definition of harboring. Renting an apartment in the normal course of business is not in and of itself conduct that prevents the government from detecting an alien's presence.

Id. (quoting *Lozano v. City of Hazleton*, 620 F.3d 170, 223 (3d Cir. 2010), *vacated on other grounds*, *City of Hazleton v. Lozano*, 563 U.S. 1030 (2011)).

The Court should join these persuasive authorities and construe "harbors" in § 1324(a)(1)(A)(iii) to require an element of concealment.

II. The government's extensive regulation of immigration status in employment, compared with the lack of such regulation in housing, strongly suggests that the anti-harboring statute does not apply to landlords.

Defendants insist that the anti-harboring statute *compels* millions of landlords across the country to police the immigration status of each and every one of their tenants. But the practices of the housing industry in the United States would look much different if that understanding were correct.

When the federal government regulates activity that stands to impact a vast swath of private citizens across an entire sector of American life, and attaches criminal liability to non-compliance, it does so explicitly. It "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001). On such a scale—with implications so broad and stakes so high—the government must clearly articulate *what* behavior violates the law and *how* private parties can comply with it.

The Court need not look beyond immigration policy for a ready illustration—this is precisely how the government has proceeded when regulating employment. For over 35 years, IRCA has required employers to vet the immigration status of their employees or else face potential civil fines or criminal penalties. *See* 8 U.S.C. § 1324a. Congress spoke clearly on that liability, and the government has provided extensive guidance to employers on the steps they must take to avoid sanctions. The Department of Homeland Security supplies a standard

form that employers use to confirm the identity and work-authorization status of their employees. And the executive branch maintains an electronic, cross-agency database for the sole purpose of allowing employers to verify the information that employees volunteer.

Tellingly, no similar framework of scrutiny and liability exists in the housing context. The federal government's own policies accept that undocumented individuals may be tenants, and do not compel private landlords, under threat of criminal liability, to turn them away.

A. The government provides employers with extensive guidance on policing the immigration status of employees.

In the context of employment, Section 1324a clearly lays out what constitutes unlawful activity. It speaks directly to employers and forbids them from "hir[ing] . . . for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A). It then defines "unauthorized alien" to mean "that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." *Id.* § 1324a(h)(3). If an employer "engages in a pattern or practice" of violating the statute's provisions, it "shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both." *Id.* § 1324a(f)(1).

The statute proceeds to outline a detailed system of compliance that employers can follow to avoid sanctions. It mandates an "employment verification system," pursuant to which an employer examines employee documents, attests under penalty of perjury to each employee's status, and retains records for a certain period of time. *Id.* § 1324a(b). It also describes the parameters for documents that suffice to establish employee identity and work-authorization status. *Id.* In exchange for good-faith attempts to abide by these provisions, employers receive a presumption of compliance, *id.* § 1324a(b)(6), and may assert such efforts as an affirmative defense to any prosecution, *id.* § 1324a(a)(3).

To make this system work, the executive branch has developed uniform tools for employer compliance. Perhaps most importantly, as any employee who has started a job in recent decades can attest, U.S. Citizenship and Immigration Services ("USCIS") publishes a standardized form—Form I-9—that employers use to comply with the statute. This takes the guesswork out of employer enforcement of the law. To further aid employers, the government now makes an online system, E-Verify, freely available to them. E-Verify "electronically compares [I-9] information to records available to the U.S. Department of Homeland Security . . . and the Social Security Administration." E-Verify, *About E-Verify*, https://tinyurl.com/2s39fuc7.

Numerous regulations and guidance documents provide further support to employers for navigating legal requirements. A lengthy regulation—8 C.F.R. pt. 274a—fleshes out the provisions of Section 1324a. It specifies, for example, the types of documents that employers may accept as proof of work authorization, *id.* pt. 274a.2, and clarifies the procedures for enforcement actions, *id.* pt. 274a.9. Moreover, government agencies have assembled several public-facing materials that explain Section 1324a's requirements. For example, USCIS publishes an Employer Handbook that walks employers through the I-9 collection process in plain terms. USCIS, *Handbook for Employers M-274* (2020), https://tinyurl.com/yc8z752y. USCIS also offers various forms of training, including webinars and live presentations. *See* USCIS, *I-9 Training*, https://tinyurl.com/3ehd92jh. And numerous government and private websites pool materials for the benefit of employers. *See, e.g.*, USCIS, *I-9 Central*, https://www.uscis.gov/i-9-central; Paycor, *I-9 Compliance FAQs: Everything You Need to Know for 2022* (May 20, 2022), https://tinyurl.com/2k58s8ef.

B. In sharp contrast to the employment context, the government has imposed no system of guidance and compliance to regulate the housing of undocumented individuals.

Nothing like the vast network of guidance and regulations that exists to enforce Section 1324a exists in the housing context—and that void speaks volumes. Where Section 1324a directly addresses employers, the anti-harboring

statute never mentions landlords or housing providers. Where Section 1324a clearly lays out conduct subject to criminal sanction, the anti-harboring statute fails even to define the critical term "harbor." And where Section 1324a specifies a step-by-step process for ensuring compliance, the anti-harboring statute is silent.

And that's just the statute. Unlike in the employment context, where the executive branch supplies a standardized form and cross-agency internet database to support employer-compliance efforts, the government provides no anti-harboring tools to landlords. And in contrast to the comprehensive regulatory and guidance materials that employers can consult, landlords have nowhere to turn with questions about the anti-harboring statute.

This stark contrast strongly suggests that the government does not expect millions of landlords across the country to individually enforce the anti-harboring statute. In employment, the guidance that the government provides to employers ensures the proper functioning of a wide-ranging system touching every sector of the American economy. It supplies a measure of uniformity and fairness to enforcement on a topic that inspires strong opinions. Without such guidance, employers could not be expected to enforce the law—let alone do so in an objective and evenhanded manner.[4]

[4] IRCA's anti-discrimination provisions include robust employer education activities and their own civil and criminal penalties. In enacting the employer sanctions provisions, Congress feared that untrained employers would impose

The same is true for landlords. If the anti-harboring statute required them to consider immigration status in renting decisions, how would they go about inquiring about such status? Should they use a form? If so, what should go on it? What documents suffice to show legal status? How should landlords verify that the documents that tenants provide are genuine? Are there circumstances, as in the employment context, where an undocumented individual is permitted to rent despite a lack of permanent-resident status? Are landlords required to reverify a tenant's status or evict a tenant whose immigration status has expired? What should landlords do with the information they receive? Should they contact ICE? Should they inquire about all tenants or just signatories to the lease? If Defendants' position were correct, the government would supply guidance on these questions and others. The fact that it does not highlights a simple truth: the government does

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restrictions beyond what the law required and deny legitimate employment opportunities to United States citizens and other individuals legally authorized to work because, to the employers, they appeared to be "foreign" or spoke English with an accent or not at all. In carrying out its responsibility to examine the impact of employer sanctions, the General Accounting Office ("GAO") reported to Congress in 1990 that such discrimination had occurred solely as a result of employer sanctions. *See generally* GAO, *Immigration Reform: Employer Sanctions and the Question of Discrimination* (Mar. 1990), Report No. GGD-90-62, https://www.gao.gov/assets/ggd-90-62.pdf.

If upheld, the district court's ruling—which, by expanding the anti-harboring provision to include mere renting, is the equivalent of extending employer sanctions to landlords—would likely lead to similar discrimination even if landlords were provided education (which they currently are not).

not expect landlords to act as immigration enforcement officers. For that reason, we have "employer" sanctions, but not "landlord" sanctions.

Moreover, where the government has spoken on immigration status in housing, it has taken a much more permissive position than the one Defendants advocate here. Indeed, federally funded housing programs specifically contemplate renting to undocumented individuals. For example, programs like the Low Income Housing Tax Credit contain no immigration-based restrictions on participation. *See* 26 U.S.C. § 42(g); *see also* 12 U.S.C. § 1701q (Supportive Housing for the Elderly with units not receiving project-based rental assistance). Others contain provisions allowing for certain types of assistance to "mixed families" that include at least one undocumented individual. *See* 24 C.F.R. § 5.516–5.520 (describing assistance available to mixed families under various Housing and Urban Development programs); *id.* § 5.504(b) (defining "mixed family" as "a family whose members include those with citizenship or eligible immigration status, and those without citizenship or eligible immigration status").

And even though the government possesses extensive data on where unauthorized individuals live, it deliberately chooses not to use that information in enforcing immigration policy. For example, data on undocumented individuals collected through the census is not used to make immigration enforcement decisions. *See* U.S. Census Bureau, *Frequently Asked Questions (FAQs) About*

Foreign Born (Dec. 3, 2021), https://tinyurl.com/5n7afwfb ("The Census Bureau does not share any personally identifiable information with any other agency, including law enforcement."). The same goes for information the government collects via Individual Taxpayer Identification Number ("ITIN") applications. *See* 26 U.S.C. § 6103 (generally prohibiting the disclosure of tax information); American Immigration Counsel, *The Facts About the Individual Taxpayer Identification Number (ITIN)* (Mar. 14, 2022), https://tinyurl.com/29hs8b3f ("[T]he fact that the IRS does not generally share applicants' private information with immigration enforcement agencies is key to tax compliance."). It is implausible that the government would bind itself from acting on immigration-status information it has collected, yet use the threat of criminal liability to coerce private landlords into doing so themselves.

These policies, when combined with the complete dearth of federal guidance for landlords on the anti-harboring statute, confirm that the government does not expect countless landlords across the country to be involved in immigration enforcement by policing immigration status and turning away any family that cannot show that each member possesses authorized status. Not only are landlords not expected to fill such a role, they are hardly equipped to do so, being neither qualified nor trained to make enforcement decisions. It is no wonder that, in the district court, Defendants "could not identify a single corporate landlord that

maintained and adhered to a similar policy" like theirs. Appellants' Br. at 8 (citing JA2185–89).

III. Adopting Defendants' position would have drastic practical consequences.

If true, the district court's conclusion that "any person who *houses* an unauthorized alien knowingly or in reckless disregard of their immigration status" may be held criminally liable, JA1522 (emphasis added), would work a considerable sea change in the lives not only of undocumented individuals in the United States and those who interact with them—but also in the lives of millions of United States citizens and lawful residents who may, for pretextual or other reasons, appear to be foreign to a prospective landlord. The practical consequences of this interpretation would be far-reaching, from the denial of housing to increased fear of potential criminal liability. As explained below, none of these consequences is necessary or warranted.

A. The district court's interpretation would jeopardize housing for untold numbers of undocumented individuals, contrary to governmental interests.

Of the more than 11 million undocumented individuals who live in the United States,[5] only about 3 million reside in homes that are owned, not rented.[6] If the district court were right that landlords face criminal liability simply for renting to an undocumented individual—or to anyone with an undocumented individual in their household—that would send shockwaves through the housing industry. Rental arrangements could be disrupted, unsettling the expectations of tenants and landlords alike and exposing untold numbers of undocumented individuals to homelessness.

This interpretation of § 1324(a)(1)(A)(iii) is as impractical as it is unreasonable. "Common sense, of course," teaches that the government "has absolutely no interest in reducing aliens without legal status to homelessness." *Lozano*, 620 F.3d at 224. "No municipality would benefit from forcing any group of residents ('legal' or 'illegal') onto its streets." *Id.* While "the federal government does not intend for aliens here unlawfully to be harbored, it has never evidenced an

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[5] *See, e.g.*, Bryan Baker, Office of Immigration Statistics, Office of Strategy, Policy, and Plans, U.S. Dep't of Homeland Security, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018* (Jan. 2021), https://tinyurl.com/yeyxhcpc.

[6] Migration Pol'y Inst., *Profile of the Unauthorized Population: United States*, https://tinyurl.com/y4dh87jw.

intent for them to go homeless," *id.*—especially by operation of a policy whose burden would be shared by American-born children who "can affect neither their parents' conduct nor their own status," *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

Indeed, recognizing that undocumented individuals must live *somewhere*, the immigration laws reflect that the government's purposes are served if they reside in a location known to the government. Those actively seeking legal status must inform the federal government of their presence and address. *See, e.g.*, USCIS Form I-485, Application to Register Permanent Residence or Adjust Status. And those subject to removal proceedings must provide the Attorney General "with a written record of an address . . . at which the alien may be contacted respecting [the] proceedings." 8 U.S.C. § 1229(a)(1)(F)(i). It is difficult to conceive how an undocumented individual may comply with these requirements without being "house[d]" somewhere. *Cf. Villas at Parkside Partners*, 726 F.3d at 530 (noting that a "prohibition on renting to non-citizens here contrary to law thus not only fails to facilitate, but obstructs the goal of bringing potentially removable non-citizens to the attention of the federal authorities").

B. The district court's expansive interpretation would extend liability to those who participate in other innocent commercial transactions with undocumented individuals.

The baneful effects of the district court's interpretation begin but do not end with landlord-tenant scenarios like the one presented here. If the district court were right that anyone who knowingly "houses" an undocumented individual may be held criminally liable, then a wide array of businesspeople other than landlords could be inculpated.

To begin with, if knowingly renting a mobile home or other unit to an undocumented individual—or to a family that includes an undocumented individual—violates 8 U.S.C. § 1324(a)(1)(A)(iii), then the same logic should dictate criminal liability for any hotel operator who knowingly allows an undocumented individual to stay the night. While the district court's reasoning appears to compel this conclusion, *see* JA 1522 (noting simply that "harboring" is defined as "the act of affording lodging, shelter, or refuge to a person" (quoting Black's Law Dictionary (9th ed. 2009)), that no doubt would come as a great surprise to operators of the nearly 100,000 hotels around the country.

The court's expansive interpretation of harboring, without requiring any element of concealment, *see* Part I.B, *supra*, produces even more absurd questions—and potentially alarming answers. Would employees at a homeless shelter who take in an undocumented individual face criminal liability? How about

hospital employees who care for an undocumented individual, keeping her overnight in the process? Or a business owner on whose property a homeless undocumented individual sleeps in a tent? Surely Congress did not intend for whole sectors of the economy, and the provision of basic social services, to be disrupted by the threat of criminal liability under 8 U.S.C. § 1324(a)(1)(A)(iii).[7]

CONCLUSION

The Court should reverse the district court's grant of summary judgment and remand for trial.

Respectfully submitted,

/s/ *Trevor S. Cox*

Cameron L. Davis
cdavis@huntonak.com
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
500 West 5th Street, Suite 1350
Austin, TX 78701
(512) 542-5000

Trevor S. Cox
J. Pierce Lamberson
tcox@huntonak.com
plamberson@huntonak.com
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

Counsel for Amicus Curiae

[7] While these examples all involve lodging, under the district court's interpretation, the threat of criminal liability could well attend other commercial transactions where any form of "refuge" or "shelter" is arguably provided to undocumented individuals.

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I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Rules 29(a)(5) and 32(a)(7)(B), because it contains 6,182 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ *Trevor S. Cox*
Trevor S. Cox

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I hereby certify that on September 15, 2022, I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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Trevor S. Cox

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(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

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Hunton Andrews Kurth LLP Firm Name (if applicable)	804-788-8218 Fax Number
Riverfront Plaza, East Tower 951 E. Byrd St., Richmond, VA 23219 Address	tcox@huntonak.com E-mail address (print or type)

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☑ Pro Bono ☐ Government

COUNSEL FOR: John D. Trasviña, Former HUD Assistant Secretary for Fair Housing and Equal Opportunity as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

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Hunton Andrews Kurth LLP Firm Name (if applicable)	804-788-8218 Fax Number
Riverfront Plaza, East Tower 951 E. Byrd St., Richmond, VA 23219 Address	plamberson@HuntonAK.com E-mail address (print or type)

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