AMERICAN CIVIL LIBERTIES UNION FOUNDATION

April 14, 2025

Open Letter to Federal Magistrate Judges Within the Fourth Circuit on Section 1324 Warrants[1]

We write to address significant questions that may arise in the context of applications for warrants to search for evidence of violations of 8 U.S.C. § 1324, which prohibits, *inter alia*, concealing, harboring, or shielding from detection a noncitizen who is unlawfully present, when done with knowledge or reckless disregard of that person's immigration status.[2] Because consideration of such applications occurs *ex parte* and often on an expedited basis, and because novel and aggressive invocations of Section 1324 may arise in the coming months, we are publishing this open letter to help inform the decisionmaking of members of the federal bench.[3]

As explained below, a number of arguments the government may advance in support of warrants to search for evidence of violations of Section 1324 lack merit, either because they do not satisfy the elements of a statutory violation, or because they rely on privileged conduct, such as assertion of Fourth Amendment rights, that cannot establish criminal liability.

Background

On March 13, 2025, U.S Immigration and Customs Enforcement (ICE) officials entered and searched Columbia University residence halls pursuant to a search warrant issued by a magistrate judge in the Southern District of New York.[4] The warrant was issued to search for evidence of violations of Section 1324 by Columbia.[5]

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[1] The ACLU has published this letter for the general information of judges. This is not a communication concerning any pending proceeding or matter.

[2] 8 U.S.C. § 1324(a)(1)(A)(iii). 8 U.S.C. § 1324 prohibits several categories of activity that help people violate immigration law: (1) Bringing noncitizens into the country between ports of entry, *id.* § 1324(a)(1)(A)(i); (2) transporting noncitizens within the United States, while "knowing or in reckless disregard" of their unlawful status, and "in furtherance of such violation of law," *id.* § 1324(a)(1)(A)(ii); (3) harboring noncitizens, or concealing them, while "knowing or in reckless disregard" of their unlawful status, *id.* § 1324(a)(1)(A)(iii); and (4) encouraging or inducing people to enter or stay in the country in violation of immigration law, which requires intentional solicitation or aiding and abetting, *id.* § 1324(a)(1)(A)(iv).

[3] The ACLU welcomes invitations to provide amicus support in such matters, and will endeavor to advise courts as amicus unless resource constraints, potential conflicts, or other barriers preclude it.

[4] Jonah E. Bromwich & Hamed Aleaziz, *Columbia Student Hunted by ICE Sues to Prevent Deportation*, N.Y. Times (Mar. 24, 2025), https://www.nytimes.com/2025/03/24/nyregion/columbia-student-ice-suit-yunseo-chung.html.

[5] *See* Search & Seizure Warrant (issued Mar. 13, 2025), attached as Ex. K to Decl. of Sonya Levitova, *Chung v. Trump*, No. 25-cv-2412 (S.D.N.Y.) (ECF No. 9-11).

Reports indicate, however, that ICE's actual purpose in seeking entry into Columbia dorms was to arrest one or more students for alleged violations of civil immigration law. In response to these students' First Amendment-protected speech and advocacy concerning Palestine and Israel, Secretary of State Rubio had asserted that he had reasonable grounds to believe the students' continued presence "would have potentially serious adverse foreign policy consequences for the United States"; ICE, in turn, was seeking to arrest and deport the students based on Secretary Rubio's designation. *See* 8 U.S.C. § 1227(a)(4)(C)(i). ICE issued at least one administrative immigration warrant for a Columbia student's arrest on this ground. But critically, ICE's administrative warrants, which are signed by an agency official instead of a judge, do not authorize entry into homes or other constitutionally protected spaces, and so ICE cannot enter such spaces to make arrests unless they have valid consent or a Fourth Amendment-compliant search warrant.[6] The search warrant enabled ICE to gain entry into Columbia residence halls not open to the public.

One of the students ICE sought to arrest while executing the March 13 search warrant, Yunseo Chung, is a lawful permanent resident who moved to the United States from South Korea when she was seven years old, and who has now obtained a temporary restraining order barring her detention and deportation on First Amendment grounds.[7] ICE has detained other students on similar grounds, including a lawful permanent resident who was recently a graduate student at Columbia,[8] and a former Fulbright Scholar from Turkey now pursuing her Ph.D. at Tufts University on a student visa, whom ICE arrested in retaliation for publishing an op-ed in her student newspaper addressing the University's response to a student government resolution regarding Gaza.[9] In both cases, courts have issued orders barring ICE from deporting the students.[10]

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[6] *See, e.g.*, *Kidd v. Mayorkas*, 734 F. Supp. 3d 967, 979–80 (C.D. Cal. 2024) ("[A]n [ICE] administrative warrant is insufficient to enter the constitutionally protected areas of a home.").

[7] *Chung v. Trump*, No. 25-cv-2412 (S.D.N.Y. Mar. 25, 2025) (ECF No. 19) (temporary restraining order); *Id.* (ECF No. 8) (brief in support of proposed order to show cause for TRO and preliminary injunction); Santul Nerkar & Jonah E. Bromwich, *Judge Orders U.S. to Stop Attempts to Deport Columbia Undergraduate*, N.Y. Times (Mar. 25, 2025), https://www.nytimes.com/2025/03/25/nyregion/columbia-university-protester-chung-deportation.html.

[8] Michael Wilson et al., *How a Columbia Student Activist Landed in Federal Detention*, N.Y. Times (Mar. 16, 2025), https://www.nytimes.com/2025/03/16/nyregion/mahmoud-khalil-columbia-university.html.

[9] *See* Anemona Hartocollis, *Targeting of Tufts Student for Deportation Stuns Friends and Teachers*, N.Y. Times (Mar. 29, 2025), https://www.nytimes.com/2025/03/29/us/rumeysa-ozturk-tufts-student-detained.html.

[10] *Khalil v. Joyce*, No. 25-cv-1935, 2025 WL 849803, at *2 (S.D.N.Y. Mar. 19, 2025) (continuing prior order barring removal from United States, and transferring case to District of New Jersey); Order, *Khalil*

Although the affidavit in support of the March 13 warrant has not yet been made public, the warrant raises several serious questions that may come up in future warrant applications.

Merely providing housing or other services does not violate Section 1324 and cannot be the basis for a warrant.

As the Fourth Circuit has explained, "*every* precedential appellate decision" to address the issue has held that "renting to an undocumented person, without more," is not harboring under Section 1324.[11] To violate Section 1324, a person must intentionally conceal an undocumented immigrant from authorities, with knowledge or reckless disregard of the person's unlawful status.[12] Thus, a university that merely houses an undocumented student in campus housing on the same terms offered to other students does not satisfy the elements of harboring.[13] This principle applies even more strongly in the case of students who reside in campus housing while they have lawful status—such as a student visa—and then lose such status through action by the government.[14]

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v. Joyce, No. 25-cv-1963 (D.N.J. Mar. 19, 2025) (ECF No. 81) (barring removal); *Öztürk v. Trump*, No. 25-cv-10695, 2025 WL 1009445, at *11 (D. Mass. Apr. 4, 2025) (transferring case to District of Vermont and continuing prior order barring removal from United States "unless and until the transferee court orders otherwise"). The ACLU is counsel in *Khalil* and *Öztürk*.

[11] *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 91 F.4th 270, 277–78 (4th Cir. 2024) (emphasis added). *See also DelRio-Mocci v. Connolly Props. Inc.*, 672 F.3d 241, 247 (3d Cir. 2012) ("We do not know of any court of appeals that has held that knowingly renting an apartment to an alien lacking lawful immigration status constitutes harboring."); *United States v. McClellan*, 794 F.3d 743, 751 (7th Cir. 2015) ("[W]hen the basis for the defendant's conviction under § 1324(a)(1)(A)(iii) is providing housing to a known illegal alien, there must be evidence from which a jury could conclude, beyond a reasonable doubt, that the defendant intended to safeguard that alien from the authorities. Such intent can be established by showing that the defendant has taken actions to conceal an alien by moving the alien to a hidden location or providing physical protection to the alien.").

[12] *Reyes*, 91 F.4th at 277 (harboring "only applies to those who intend in some way to aid an undocumented immigrant in hiding from the authorities. It involves an element of deceit that is not present in run-of-the mill leases made in the ordinary course of business.").

[13] By contrast, "[e]xamples of harboring include physical concealment, arranging sham marriage ceremonies, and assisting unlawfully present persons in obtaining employment, with knowledge or reckless disregard of their immigration status." *Kearns v. Cuomo*, 981 F.3d 200, 208 (2d Cir. 2020) (citations omitted).

[14] Notably, as the Deputy Attorney General has explained, the search warrant discussed above was pursuant to "an investigation into Columbia University for harboring" in violation of Section 1324 (as opposed to seeking evidence of violations by another individual or entity). Shawn Musgrave, *ICE Got Warrants Under "False Pretenses," Claims Columbia Student Targeted Over Gaza Protests*, The Intercept (Mar. 28, 2025), https://theintercept.com/2025/03/28/ice-warrants-columbia-students-gaza-

Section 1324 liability cannot attach for sheltering a lawful permanent resident or other person with lawful status, even if the government has asserted a ground of deportability.

For Section 1324 liability to attach, the noncitizen in question must "remain[] in the United States in violation of law." This means there can be no criminal liability for "harboring" a person with legal status.

Notably, this includes lawful permanent residents such as Ms. Chung, even if there is a circumstance that allegedly or actually renders them deportable. For example, a person may be deportable because of a criminal conviction, or because of a valid use of the foreign policy bar in U.S.C. § 1227(a)(4)(C)(i), or on other grounds.[15] But even when a lawful permanent resident is deportable on one of these grounds, they maintain their legal status until they receive a final order of removal from an immigration court.[16] Until a final order of removal is issued, they remain lawfully present in the country, and so it is definitionally impossible to "harbor" them in violation of Section 1324.

Section 1324 is similarly inapplicable to student visa holders whose visas are merely revoked. Student visa holders present in the United States do not lose their lawful status upon revocation of their visa. A nonimmigrant visa, including an F-1 student visa, controls a noncitizen's *admission* into the United States, not their continued *stay* once admitted. Once admitted on a visa, a student is granted permission to remain in the United States for the duration of status as long as they continue to meet the requirements governing their visa classification set out in federal regulations, such as maintaining a full course of study and avoiding unauthorized employment.[17] Revocation of a visa after a student has been admitted to the country does not constitute a failure to maintain status, and does not make the student's presence in the country

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protests/ (quoting Deputy Att'y Gen. Todd Blanche). *See also* Search & Seizure Warrant, *supra* note 5 (authorizing search for "residential lease agreements or student occupancy agreements" between the university and Ms. Chung). It seems highly unlikely the government could support probable cause for such a search.

[15] *See* 8 U.S.C. § 1227(a) (grounds of deportability); *id.* § 1227(a)(4)(C)(i) (providing simply that a person subject to the foreign-policy bar "is deportable"). Plaintiffs in the cases mentioned above contend that the government's use of the foreign policy bar is unlawful and unconstitutional.

[16] *See Matter of Gunaydin & Kircali*, 18 I. & N. Dec. 326, 327 (BIA 1982) ("[A]n act which provides the basis for a lawful permanent resident alien's deportability does not itself terminate his status."); *Etuk v. Slattery*, 936 F.2d 1433, 1447 (2d Cir. 1991) ("LPRs who are placed in deportation proceedings do not lose the status of lawful residents and its attendant benefits until a deportation hearing has been conducted . . . and a final deportation order issued."); 8 C.F.R. § 1.2 (status of "permanent residence" only "terminates upon entry of a final administrative order of exclusion, deportation, or removal").

[17] 8 C.F.R. § 214.2(f).

unlawful.[18] DHS can only terminate a student's status in extremely limited circumstances governed by regulation.[19] And while a visa revocation *can* be charged as a ground of deportability in removal proceedings, deportability can be contested in such proceedings.[20] The immigration judge may also even dismiss removal proceedings where a visa is revoked, so long as a student is able to remain in valid status.[21] Only when a judge enters a final order of removal would status be lost.

Section 1324 also does not apply in the case of a noncitizen who is in the process of seeking immigration benefits or relief—such as asylum, a visa, or adjustment of status—even if they overstayed a visa or entered the United States without inspection. Such noncitizens are permitted by federal law to remain in the country during their proceedings.[22]

Thus, providing such individuals with assistance cannot violate Section 1324 because they are not in the country unlawfully. In these circumstances, there can be no probable cause of a violation of Section 1324.

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[18] U.S. Dep't of State, Guidance Directive 2016-03, 9 FAM 403.11-3 – Visa Revocation (Sept. 2, 2016), https://j1visa.state.gov/wp-content/uploads/2016/09/2016-03-GD-Visa-Revocation-FINAL-Sept-2016.pdf ("[T]he revocation of their visa does not override the [student] status granted by Customs and Border Protection ("CBP") at the time of their entry or their ability to stay in the United States (except in extremely rare circumstances)."); ICE Policy Guidance 1004-04 –Visa Revocations (June 7, 2010), https://www.ice.gov/doclib/sevis/pdf/visa_revocations_1004_04.pdf ("Visa revocation is not, in itself, a cause for termination of the student's SEVIS record [recording student's maintenance of status].").

[19] 8 C.F.R. § 214.1(d). *See Jie Fang v. Dir. U.S. Immigr. & Customs Enf't*, 935 F.3d 172, 185 n.100 (3d Cir. 2019) ("[T]he ability to terminate an F-1 visa is limited by § 214.1(d). That provision states: '(d) Termination of status. Within the period of initial admission or extension of stay, the nonimmigrant status of an alien shall be terminated by the revocation of a waiver authorized on his or her behalf under section 212(d)(3) or (4) of the Act; by the introduction of a private bill to confer permanent resident status on such alien; or, pursuant to notification in the Federal Register, on the basis of national security, diplomatic, or public safety reasons.'").

[20] *See* 8 USC § 1227(a)(1)(B); 8 U.S.C. § 1201(i) (allowing immigration court review of visa revocation).

[21] 8 C.F.R. § 1003.18(d)(ii)(B).

[22] *See* 8 U.S.C. § 1231(a)(1)(A) (preventing removal until after "an alien is ordered removed" through immigration proceedings); *Id.* § 1229a(b)(5)(A) (requiring noncitizens to attend their immigration hearings in the United States); *Id.* § 1225(b)(1)(A)(ii) (preventing removal while an immigration claim is pending); *id.* § 1158(d)(2) (providing permission to work in the United States while a claim is pending); 8 C.F.R. § 208.7 (same).

Refusal of consent for warrantless entry by ICE agents cannot constitute evidence of harboring.

The government may argue that it has probable cause to believe that a target has violated Section 1324 on the basis that a person or entity (such as a university) has withheld consent for ICE to enter a dorm or other building without a warrant, thus frustrating ICE's attempt to locate a person the agency considers removable. However, declining consent for warrantless entry or search cannot be used as evidence of harboring in violation of Section 1324. Courts uniformly agree that "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing."[23]

This rule holds even if an undocumented person is on the premises and ICE has asserted grounds to detain them. In a closely analogous context, the Ninth Circuit has held that a resident's refusal to consent to a warrantless police entry, when police were trying to arrest a suspect who was hiding in the resident's home, could not constitute harboring in violation of the federal accessory-after-the-fact statute.[24] The court explained that the Fourth Amendment gives the occupant of a home "a constitutional right to refuse to consent to entry and search" when officers lack a warrant.[25] "His asserting [that right] cannot be a crime. Nor can it be evidence of a crime."[26] A university's withholding of consent to ICE entry to residence halls is likewise protected by the Fourth Amendment, and cannot create liability for harboring under Section 1324.[27]

Other provisions of Section 1324 are similarly narrow.

In addition to harboring, Section 1324 also criminalizes conduct related to transporting people without lawful status, and encouraging or inducing people to enter or stay in the country

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[23] *Gasho v. United States*, 39 F.3d 1420, 1431 (9th Cir. 1994) (citation omitted). *See also, e.g.*, Wayne R. LaFave, 1 Search & Seizure § 1.13(b) (6th ed.) ("[C]ertainly the Fourth Amendment bars criminal punishment of a mere failure to surrender rights under that Amendment."); *United States v. Massenburg*, 654 F.3d 480, 482 (4th Cir. 2011) ("[R]efusing to consent to a search cannot itself justify a nonconsensual search."); *United States v. Alexander*, 835 F.2d 1406, 1409 n.3 (11th Cir.1988) ("[R]efusal to consent to a search cannot establish probable cause to search. A contrary rule would vitiate the protections of the Fourth Amendment.").

[24] *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978).

[25] *Id.* at 1351.

[26] *Id*.

[27] Moreover, a university has "no authority to consent to or join in a police search [of a student's dormitory room] for evidence of crime." *Piazzola v. Watkins*, 442 F.2d 284, 290 (5th Cir. 1971).

in violation of immigration law.[28] Both provisions are narrow. The transportation provision makes it illegal to transport a person without lawful status within the United States, while "knowing or in reckless disregard" of their status, and "in furtherance of such violation of law."[29] Violation of this section requires "that the specific intent of the person transporting the illegal aliens was 'to deliberately assist an alien in maintaining his or her illegal presence' in this country."[30] Ordinary interactions with undocumented people, like a cab driver taking a passenger to an appointment or a bus driver taking a passenger to work, do not violate Section 1324.[31]

Similarly, in *United States v. Hansen*, 599 U.S. 762 (2023), the Supreme Court interpreted the encourage-or-induce provision to reach "no further than the purposeful solicitation and facilitation of specific acts known to violate federal law."[32] In other words, *Hansen* read in a requirement of specific intent to solicit or aid-and-abet a violation of immigration law.[33] The Court adopted this narrow interpretation in part to avoid the serious First Amendment problems that a broader interpretation would have created. Section 1324 likewise cannot be used to criminalize any speech that is protected by the First Amendment, including abstract advocacy of breaking the law, know-your-rights communications, or expressions of support for individuals who are unlawfully present in the country.

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[28] 8 U.S.C. § 1324(a)(1)(A)(ii), (iv).

[29] 8 U.S.C. § 1324(a)(1)(A)(ii).

[30] *United States v. Stonefish*, 402 F.3d 691, 695 (6th Cir. 2005) (citation omitted); *see also United States v. Khalil*, 857 F.3d 137, 140 (2d Cir 2017); *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977); *United States v. Velasquez-Cruz*, 929 F.2d 420, 424 (8th Cir. 1991).

[31] *See Stonefish*, 402 F.3d at 695 ("This court has determined that there is a 'principled distinction between acts performed with the purpose of supporting or promoting an alien's illegal conduct, and acts which are incidental to or merely permit an individual to maintain his existence.'") (quotation marks omitted); *United States v. Parmelee*, 42 F.3d 387, 390–91 (7th Cir. 1994) (avoiding interpretation that "could penalize purely innocent conduct," like "a cab driver who transports in a routine commercial transaction an individual who announces his illegal alien status during the course of the ride"); *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977) (counseling against broad interpretation that "would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise").

[32] 599 U.S. at 781 (cleaned up).

[33] *Id.* at 782 (explaining that the statute would not "punish the author of an op-ed criticizing the immigration system, a minister who welcomes undocumented people into the congregation and expresses the community's love and support, [or] a government official who instructs undocumented members of the community to shelter in place during a natural disaster").

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In a moment when the government is engaged in immigration enforcement practices that raise grave First Amendment and due process concerns, the importance of magistrate judges' role in enforcing the Fourth Amendment's probable cause requirement cannot be overstated. We appreciate your careful attention to these issues. If we can be of assistance in addressing these or related questions, please do not hesitate to reach out.

Sincerely,

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