TRUMP V. HAWAII – HOW TRUMP'S MUSLIM BAN IS CONSIDERED CONSTITUTIONAL, EVEN THOUGH IT SHOULD NOT BE, DUE TO THE COURT'S FAILURE TO INCLUDE TRUMP'S PRIOR STATEMENTS IN ITS LEGAL ANALYSIS

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I. INTRODUCTION

Within days of beginning his presidency, Donald Trump issued an Executive Order that effectively banned Muslims from entering the United States. After numerous court battles, this EO eventually became Proclamation No. 9645, which gave rise to *Trump v. Hawaii*. Due to the Supreme Court's prior history of giving the president extreme deference for matters relating to immigration, the Court held that the Proclamation did not violate the Establishment Clause contained in the Frist Amendment and declared the ban constitutional. However, the Court declined to look at prior statements made by Trump and his advisors regarding the true intent and purpose of the Proclamation. Such statements like, a campaign promise that called for a "total and complete" ban against Muslims entering the country or numerous tweets that show his clear anti-Muslim animus. The Court should have used these statements, made by the president himself, as evidence of the true intent of Proclamation No. 9645, also known as the "Travel Ban" or in Trump's own words, the "Muslim Ban." Had the Court used these statements in its legal analysis, it would have been obvious that the Proclamation was motivated by anti-Muslim animus and should have been declared unconstitutional, as it violates of the First Amendment of the Constitution of the United States. This decision has had significant effects on immigration to the United States and shows the continued reliance by the Court on precedence that allows the president to do basically whatever he wants when it concerns immigration or national security.

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II. BACKGROUND – EXECUTIVE ORDERS AND PROCLAMATION THAT CREATE THE "TRAVEL BAN"

Executive Order No. 13769 (EO-1), titled Protecting the Nation from Foreign Terrorist Entry into the United States, was issued by President Donald Trump on January 27, 2017.[1] This order lowered the number of refugees to be admitted into the United States in 2017 to 50,000, suspended the U.S. Refugee Admissions Program for 120 days, and suspended entry of Syrian refugees indefinitely. [2] Additionally, EO-1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States.[3] Pending that review, EO-1 suspended entry for 90 days of nationals from seven countries – Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen.[4] The countries had previously been identified by Congress a posing heightened terrorism threat.[5]

By February 3rd the District Court for the Western District of Washington issued a nationwide restraining order that blocked the entry restrictions from being implemented.[6] The Court of Appeals for the Ninth Circuit denied the government's request to stay that order and refused to reinstate the entry restrictions, holding that the restrictions violate due process rights without sufficient national security justification.[7] Because of this, President Trump revoked EO-1 and replaced it with Executive Order No. 13780 (EO-2).[8] EO-2 also implemented a worldwide review, citing need to diminish the risk that dangerous persons would enter the U.S. without adequate vetting.[9] EO-2 also temporarily restricted entry to foreign nationals for 90 days pending the complete of the worldwide review, this time from six countries – Iran, Libya,

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[1] Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Steve Almasy & Darran Simon, *A Timeline of President Trump's Travel Bans*, CNN (Mar. 30, 2017), https://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/index.html.
[7] Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).
[8] Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).
[9] *Id.*

Somalia, Sudan, Syria and Yemen.[10] These countries were selected because they are "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones."[11]

Again, this Order was challenged in court.[12] The District Courts for Maryland and Hawaii entered nationwide preliminary injunctions which barred enforcement of the entry suspension.[13] Both respective Courts of Appeals upheld the injunctions.[14] The Court of Appeals for the Fourth Circuit (Maryland) held that the Order violated the Establishment Clause because its primary purpose was religion, based on evidence that the Order was motivated by Trump's desire to exclude Muslim from coming to the United States.[15] Thus, allegations of harm to national security interests did not outweigh the competing harm of the likely constitutional violation.[16] The Court of Appeals for the Ninth Circuit (Hawaii) held that President Trump exceeded his authority by excluding nationals of specified countries because there was no adequate findings that entry of those nations would be detrimental to the interest of the United States, that the present vetting standards were inadequate or that without improved vetting procedures there would be harm to the national interests.[17] Additionally, the Ninth Circuit also held that the Order improperly suspended entry of nationals based on their country of origin because it functioned as a discriminatory ban on the basis of nationality.[18]

The Supreme Court granted certiorari and stayed the injunctions, which allowed the entry suspensions to be enforced.[19] The 90-day entry restrictions expired before the Court took any

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[10] *Id.*
[11] *Id.*
[12] Richard Wolf, *Travel Ban Timeline: 17 months, Three Versions, Two Appeals Courts, One Supreme Court* USA TODAY (Apr. 25, 2018), https://www.usatoday.com/story/news/politics /2018/04/25/trump-travel-ban-timeline-supreme-court/547530002/.
[13] *Id.*
[14] *Id.*
[15] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 594 (4th Cir. 2017).
[16] *Id.* at 604.
[17] Hawaii v. Trump, 859 F.3d 741, 755 (9th Cir. 2017).
[18] *Id.* at 756.
[19] Wolf, *supra* note 12.

action and vacated the lower court decisions as moot.[20] After the completion of the worldwide review, President Trump issued Proclamation No. 9645, titled Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, on September 24, 2017.[21] This Proclamation aimed to improve vetting procedures by identifying deficiencies in the information provided by foreign countries needed to assess whether nationals of particular countries present a public safety threat.[22] In addition, the Proclamation placed entry restrictions on nationals of the eight countries whose systems for managing and sharing information about their nationals with the United States that the president deemed inadequate.[23]

The Department of Homeland Security (DHS) developed a standard for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States.[24] The test included three parts – identity-management information, disclosure of criminal history or possible terrorist links, and indicators of national security risk (whether country is affiliated with terrorist organizations).[25] DHS reviewed date from all foreign governments and identified 16 countries with deficient information-sharing practices and 31 countries that were "at risk" of failing to meet the standard.[26] After a 50-day period used to encourage all foreign governments to improve their information-sharing practices, eight countries did not meet the standard set by DHS – Chad, Iran, Libya, North Korea, Syria, Venezuela and Yemen.[27] Entry restrictions were placed on the nationals of these counties to "prevent the entry of those foreign nationals about whom the United States government lacks sufficient information."[28] Trump justified the restrictions by claiming they would be the "most likely to encourage cooperation…protecting the United states until such time as improvements occur."[29]

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[20] Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017); Trump v. Hawaii, 138 S. Ct. 377 (2017).
[21] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).
[28] *Id.*
[29] *Id.*

The Proclamation exempts lawful permanent residents and foreign nationals who have already been granted asylum. [30] Additionally, it provides waivers to be decided on a case-by-case basis for foreign nations who can demonstrate undue hardship, that his entry is in the national interest and would not pose a threat to public safety. [31] DHS is to continually assess whether entry restrictions should be modified or continued and report to the president every 180 days.[32] After the completion of the first 180 days, Chad had improved its information-sharing practices and the entry restrictions were lifted.[33]

III. IMMIGRATION LAW PRECEDENT THAT GRANTS EXTREME DEFERENCE TO THE PRESIDENT FOR MATTERS REGARDING IMMIGRATION

The Chinese Exclusion Case showed that the government is allowed to exclude anyone it wants in order to protect itself and it will be considered constitutional because it is an exercise of the nation's sovereign powers.[34] In *Chae Chan Ping v. United States*, Chae Chan Ping was a Chinese laborer who immigrated to the United States in 1875.[35] In 1882, Congress suspended all future immigration of Chinese laborers but allowed those who had been living in the United States since 1880 to leave and return, provided they obtained certificates evidencing their rights to return.[36] Chae Chan Ping obtained a certificate and left to visit China in 1887.[37] During his return to the U.S. Congress passed a law that discontinued the certificate program and prohibited the return of all Chinese laborers.[38] When Chae Chan Ping arrived back in the U.S., one week after the new statute was passed, he was not allowed in.[39]

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[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).
[34] Ping v. United States, 130 U.S. 581 (1889).
[35] *Id.*
[36] *Id.*
[37] *Id.* at 589.
[38] *Id.*
[39] *Id.*

Chae Chan Ping attacked the validity of the statute, claiming that it violated the Constitution.[40] The Court stated that the government possesses powers to protect and secure the nation and that it is allowed to exclude persons that are a threat to that security.[41] The Supreme Court held the power of the government to exclude foreigners from entering the country, whenever it is the interest of the public, has been asserted repeatedly and never denied by the executive or legislative departments.[42] Because the power of exclusion of foreigners is given to the government as part of the sovereign powers granted by the Constitution, it cannot be granted away or restrained by anyone, not even the Supreme Court.[43] Thus, this case is just the first of many to display the extreme deference given to the government concerning all immigration matters.

It was decided in *Ekiu v. United States*, that the Supreme Court cannot overrule lawful and constitutionals immigration measures enacted by the legislative and executive branches.[44] Nishimura Ekiu, a Japanese citizen, arrived in the United States and told the immigration inspector that her husband had been living in the United States for a year and she was going to meet him at a prearranged hotel.[45] She did not know his current address and only possessed $22[46] in cash.[47] The immigration inspector did not believe her, so he excluded her on the statutory ground that she was likely to become a public charge.[48]

Inherent in sovereignty, and essential to self-preservation, is the right to forbid the entrance of foreigners.[49] This power is vested in the national government, as the Constitution granted the entire control of international relations.[50] It is not within the power of the judiciary to order that foreigners who have not become citizens or

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[40] *Ping*, 130 U.S. at 589.
[41] *Id*. at 606.
[42] *Id.* at 606-07.
[43] *Id*. at 609.
[44] Ekiu v. United States, 142 U.S. 651 (1892).
[45] Ekiu v. United States, 1892 U.S. LEXIS 1999, at *1 (1892).
[46] *See* Ian Webster, *$22 in 1892 is Worth $607.37 in 2018*, CPI INFLATION CALCULATOR, https://www.officialdata.org/1892-dollars-in-2018?amount=22 (demonstrating $22 in 1892 is equivalent in purchasing power to $610.29 in 2018, a difference of $588.29 over 126 years).
[47] *Ekui*, 1892 U.S. Lexis 1999, at *2.
[48] *Id*. at *4.
[49] *Ekiu*, 142 U.S. at 659.
[50] *Id*.

even admitted to the U.S. shall be allowed to enter, in opposition of constitutional measures of the legislative and executive branches.[51] Therefore, decisions by executive or administrative officials acting within the powers conferred by Congress, are due process of law.[52] The decision of the immigration inspector is final and cannot be challenged by the Supreme Court.[53]

The petitioner in *Fong Yue Ting v. United States* challenged the constitutionality of a statute that required all Chinese laborers to produce one credible white witness in order to obtain a certificate of residence that will allow them to stay in the United States.[54] Three Chinese laborers were arrested for failure to possess the required certificate.[55] All three claimed to have been living in the United States when the statute was enacted but none could produce a white witness who could attest to his residence.[56]

The Court stated that because Congress has the right to expel aliens of a particular class, it also has the right to provide a system of registration and identification of members of that class and may take any proper means to carry out that system.[57] Because deportation is not a criminal punishment, the immigrants are not entitled to a criminal hearing or trial.[58] Thus, they have not been deprived of life, liberty or property without due process so the Court decided they do not have jurisdiction over this matter, "…the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."[59] The white witness requirement was not considered unconstitutional, Congress had the full discretion to decide whether the aliens would be permitted to remain in the United States and the Supreme Court could not or would not intervene.[60]

A person who has never "entered" the United States and is stopped at the border is not entitled to any statutory or

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[51] *Id.* at 660.
[52] *Id.*
[53] *Id.*
[54] Ting v. United States, 1893 U.S. LEXIS 2340, at *2-6 (1893).
[55] *Id.*
[56] *Id.*
[57] Fong v. United States, 149 U.S. 698, 714 (1893).
[58] *Id.* at 730.
[59] *Id.* at 731.
[60] *Id.*

constitutional right.[61] *Shaughnessy v. United States ex rel. Mezei*, involved an immigrant, Mezei, permanently excluded on security grounds.[62] However, Mezei was left stranded on Ellis Island because no other countries would take him back.[63] Mezei had lived in the United States for 25 years before he left the country to visit his dying mother in Romania.[64] He was denied entry into Romania, so he remained in Hungary for 19 months whilst trying to get a visa to return to the United States.[65] Eventually he obtained a visa but upon his return he was temporarily excluded and pending a hearing he was held at Ellis Island.[66] After hearing the evidence, the Attorney General ordered the temporary exclusion to become permanent, without giving Mezei a hearing.[67] Mezei remained on Ellis Island because the U.S. would not let him re-enter and all other countries refused him.[68]

Mezei sought relief through habeas corpus proceedings asserting unlawful confinement.[69] The district court ruled any further detention after 21 months was excessive and only justifiable by affirmative proof of the Mezei's danger to public safety.[70] The Attorney General refused to reveal any evidence, so the district court ordered Mezei's conditional parole.[71] However, Congress mandated that shelter ashore Ellis Island should not be considered a landing in the U.S., therefore, being on Ellis Island does not avail an alien to the same rights as those in the United States i.e. due process guaranteed by the constitution.[72] Thus, because the alien was not protected by the Constitution it cannot be said that any of his rights were violated but the indefinite detention.[73]

This case set the precedent that any alien, regardless of if they have been to the United States before, who has not entered and was stopped at the border is not entitled to protection under the United States' Constitution. The Court held that "…respondent's

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[61] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).
[62] *Id.* at 207.
[63] *Id.*
[64] *Id.* at 208.
[65] *Id.*
[66] *Id.*
[67] *Shaughnessy*, 345 U.S. at 208.
[68] *Id.* at 209.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 210.
[73] *Shaughnessy*, 345 U.S. at 213.

right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." [74] Accordingly, the district court's decision was overturned and Mezei was not released on parole[75] because the continued confinement was considered justifiable.[76]

In *Landon v. Plasencia*, a lawful permanent resident ("LPR") left the U.S. for a two-day visit to Mexico.[77] When she returned she was ordered excluded under the charge that she had assisted other noncitizens to enter the U.S. unlawfully.[78] Plasencia challenged the statutory exclusion claiming that it violated due process.[79] The Court held that an alien seeking initial admission into the United States has no constitutional right regarding her application because admission into the country is a privilege and not a right.[80] The government has the power to admit or exclude aliens as its sovereign prerogative without judicial interference.[81]

Once again relying on the sovereign nature of the power to exclude aliens and stare decisis, the Court held in *Fiallo v. Bell*[82] that the congressional power to exclude aliens is "largely immune from judicial control."[83] However, the Court conceded "…acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens…"[84] Though it is unclear was limited judicial responsibility involves. In *Fiallo*, a statute refusing to recognize a relationship between a father and his child born out of wedlock was challenged, with immigrants claiming that it violates the equal protection included in due process.[85] The application of "limited

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[74] *Id.* at 216.
[75] Mezei eventually obtained relief from the Board of Immigration Appeals (BIA). After four years of detention and extreme national publicity that put pressure on the government, Mezei was paroled into the United States.
[76] *Id*. at 215.
[77] *Landon v. Plasencia*, 459 U.S. 21, 23 (1982).
[78] *Id*. at 24-25.
[79] *Id*. at 25.
[80] *Id*. at 32.
[81] *Id*. at 34.
[82] *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).
[83] *Id*. In *Fiallo*, the Court admitted that the statute at issue created a "categorical" entry classification that discriminated on the basis of sex and legitimacy, but the Court concluded that "it is not the judicial role in case of this sort to probe and test the justifications of immigration policies."
[84] *Id*. at 805.
[85] *Id*. at 790.

judicial responsibility" was to ensure rationality of the stature.[86] In *Fiallo*, the rationale was the potential of fraudulent paternity claims to gain entry into the United States.[87]

In *Kleindienst v. Mandel*, a noncitizen was excluded under a statute that barred entry of those who advocated, or published works advocating, the doctrines of communism.[88] The Attorney General, who had the discretion to waive the bar to entry, declined to grant the waiver.[89] United States citizens brought sued the government, claiming a deprivation of their First Amendment rights to receive the noncitizen's ideas.[90] The Court held that the Attorney General could constitutionally deny a waiver whenever there was a "facially legitimate and bona fine reason"[91] for doing so.[92] Consequently, there was no need to balance that reason against the First Amendment interests of the American citizens.[93] This decision rested totally on the plenary nature of Congress' power to regulation immigration.[94] Therefore, as long as there is a facially legitimate and bona fide reason for an exclusion, then that exclusion is valid under the Constitution and requires no further analysis.

IV. TRUMP V. HAWAII

Plaintiffs, State of Hawaii and Muslim Association of Hawaii, challenged Proclamation No. 9645 on several grounds –that it contravenes provisions of the Immigration and Nationality Act (INA) and that it violates the Establishment Clause included in the First Amendment.[95] They argue that the Proclamation was not motivated

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[86] *Id*. at 791.
[87] *Id*. at 799.
[88] *Kleindienst v. Mandel*, 408 U.S. 753, 759 (1972).
[89] *Id.*
[90] *Id.* at 759-60.
[91] *Id*. In *Mandel*, the Court limited its review to whether the President gave a "facially and bona fide reason" reason for his action. The Court held, "given the authority of the pollical branches over admission [immigration], when the executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the asserted constitutional interests of U.S. citizens."
[92] *Id.* at 769-70.
[93] *Id*. at 770.
[94] *Kleindienst*, 408 U.S. at 769.
[95] *Trump*, 138 S. Ct. at 2406.

by concerns involving national security but actually by animus towards Islam.[96]

A. STATUTORY CLAIM – PLAINTIFFS BELIEVE THE PROCLAMATION EXCEEDS AUTHORTIY GIVEN TO TRUMP BY THE INA

According to the plaintiffs, the president exceeds the authority granted to him by the INA - § 212(f) only confers residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct.[97] INA § 212(f) reads:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[98]

The statute clearly gives deference to the president in every line, which presents the president with the authority to create such a Proclamation. Leading the Supreme Court to conclude that the president has "ample power" to impose entry restrictions in addition to the ones already enumerated in the INA.[99]

However, in order to exercise the authority vested in § 212(f) the president must find that the entry of the excluded aliens "would be detrimental to the interests of the United States." [100] The Supreme Court decided that the president had "undoubtedly fulfilled that requirement," because the president ordered a "comprehensive evaluation" of every single country's compliance with the information-sharing standards.[101] Based on this review, the president then found that it was of national interest – to protect both national security and public safety – to restrict entry of aliens who could not be adequately vetted to the DHS's standards, which

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[96] *Id.*
[97] *Id.* at 2408.
[98] INA § 212(f), 8 U.S.C.S. § 1182.
[99] *Trump*, 138 S. Ct. at 2406.
[100] *Id.*
[101] *Id.*

would hopefully induce improvement on the standards by those countries.[102]

The plaintiffs believe that the Court's findings are not sufficient – specifically they argue that the Proclamation does not provide a persuasive rationale for why nationality alone makes foreign nationals from these countries a security risk to the United States.[103] This argument is grounded on the fact that § 212(f) requires that the president to find that entry would be "detrimental to the interests of the United States," and to explain that finding with sufficient detail to enable judicial review.[104] The Court rejects this argument by accepting the sufficiency of the president's findings.[105] The Proclamation is more detailed than any other proclamation issued under 212(f) before[106], consisting of twelve pages that methodically describe the process, agency evaluations and recommendations.[107] Additionally, the plaintiff's request for an inquiry into the president's justifications is not consistent with the broad statutory text and deference traditionally given to the president in regards to immigration matters.[108] Thus, the proclamation does not exceed any textual limit on the president's authority as granted by INA § 212(f).

B. UNCONSTITUTIONALITY CLAIM – PLAINTIFFS BELIEVE THE PROCLAMATION VIOLATED THE ESTABLISHMENT CLAUSE CONTAINED IN THE FIRST AMENDMENT

The plaintiff argues that Proclamation No. 9645 was created to ban Muslims from entering the United States, which is unconstitutional.[109] The first issue that Court addresses is whether or not the plaintiffs have standing to bring their constitutional challenge. In order to have standing the plaintiff must show that they are "directly affected by the laws and practice against which

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[102] *Id.* at 2409.
[103] *Id.*
[104] *Id.*
[105] *Trump*, 138 S. Ct. at 2409.
[106] *Id*. For example, in Proclamation No. 6958, President Clinton explained in one sentence why suspending members of the Sudanese government and armed forces from entering the country was in the interest of the United States.
[107] *Id.*
[108] *Id.*
[109] *Id*. at 2415.

[his] complaints are directed."[110] This is an issue in this case because the entry restrictions apply to those seeking to enter the country and not to the plaintiffs themselves.[111] The plaintiffs overcame this issue by stating a concrete injury – the fact that the Proclamation would keep separate the plaintiffs from their relatives who seek to enter the country.[112] The Court agreed that a person's interest in being united with his relatives is sufficiently concrete and particularized to form an injury in fact that gives the plaintiffs standing to have their Article III claim heard.[113]

Plaintiffs believe that the Proclamation violates the Establishment Clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[114] Case law recognizes that "the clearest demand of the Establishment Clause is that one religion denomination cannot be officially preferred over another."[115] The plaintiffs believe that the Proclamation violates this singling out Muslims and preventing them from entering the United States and thus, treating Muslims differently from all those of other religions who wish to enter the United States.[116] The plaintiffs call the Proclamation a "religion gerrymander" because most of the countries subject to the travel ban have Muslim-majority populations.[117] Instead of national security, the plaintiffs allege that the primary purpose of the Proclamation is the president's religion animus towards Muslims and that Trump's stated concerns about vetting protocols were pretexts for discriminating against Muslims.[118]

The United States is built on a foundation of religious tolerance. Countless presidents have spoken in support of religious freedom and tolerance, principles on which the nation was founded. Trump is not even the first president to address Muslims or Islam in particular, but he is the first to disregard the principles on which the nation was built.[119] The plaintiffs contend that Trump's words

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[110] *Id.* at 2416
[111] *Trump*, 138 S. Ct. at 2416.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 2417.
[115] *Id.*
[116] *Id.*
[117] *Trump*, 138 S. Ct. at 2417.
[118] *Id.*
[119] *See* THE PAPERS OF GEORGE WASHINGTON 285 (Dorthy Twohig, Mark A. Mastromarino, & Jack Warren eds., Charlottesville: Univ. Press of Virginia 1996).

strike at the fundamental standards of respect and tolerance, which violations our constitutional tradition.[120] However, the issue here is not whether Trump's statements are acceptable (or should be denounced) but rather, the significance of those statements in reviewing the Proclamation that is neutral on its face.[121] In short, should the Court take Trump's prior anti-Muslim statements into consideration when determining whether or not the Proclamation is constitutional? Because the Proclamation is facially neutral toward religion, the plaintiffs asked the Court to probe the sincerity of that stated justifications for the policy by referencing extrinsic statements, many of which were made before the president took the oath of office.[122]

As was shown previously, the Court has recognized that the admission and exclusion of foreign nationals is "a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control."[123] Because decisions regarding immigration matters implicate "relations with foreign powers," these decisions are typically limited to the legislature or executive.[124] Yet, even though foreign nationals seeking admission into the United States have no constitutional right to entry, the Court has conducted judicial inquiries when the denial of entry allegedly burdens the constitutionals rights of a U.S. citizen.[125]

As far back as our nation's founding, America has been a nation of inclusion and religious freedom. For example, in 1790, President George Washington reassured a Hebrew congregation that "happily the government of the United States . . . gives bigotry no sanction, to persecution no assistance and requires only that they who live under its protection should demean themselves as good citizens." *See also* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 1957 509 (Gen. Servs. Admin. 1999). President Eisenhower spoke at the opening of the Islamic Center of Washington, telling the audience, "America would fight with her whole strength for your right to have here your church," declaring that "this concept in indeed a part of America." *See also* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE W. BUSH 2002 1121 (Nat'l Archives & Recs. Admin. 2003). Similarly, just days after September 11th, President Bush spoke at the same Islamic Center to remind Americans that "the face of terror is not the true face of Islam."

[120] *Trump*, 138 S. Ct. at 2418.

[121] *Id.*

[122] *Id.*

[123] I*d.* at 2418-19.

[124] *Id.* at 2419.

[125] *Id.*

V. STANDARD OF REVIEW USED BY THE MAJORITY TO COME TO CONCLUSION THAT THE PROCLAMATION WAS NOT UNCONSTITUTIONAL

In *Mandel*, the Court acknowledged that U.S citizen's "right to receive information" was implicated, but still limited their review to whether the president gave a "facially legitimate and bona fide" reason for its action.[126] Because of the authority given to the executive branch over these matters, "when the executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balance its justification" against the asserted constitutional interests of the U.S. citizens.[127] The narrow standard of review set forth in *Mandel* has particular force in immigration matters that also deal with national security.[128]

The Court concedes that following the narrow standards set forth by *Mandel*, whether the policy is facially legitimate and bona fide, would put an end to the review.[129] However, the government suggested that it may be appropriate for the inquiry to extend beyond the facial neutrality of the Proclamation.[130] Thus, the Court assumed they may look behind the face of the Proclamation to apply a rational basis review – whether the entry policy is plausibly related to the government's stated objective to protect the country and improve the vetting process.[131] Because of this, the Court could consider extrinsic evidence but will uphold the order if it can be "reasonably understood to result from a justification independent of unconstitutional grounds."[132]

Under this standard of review, the Court rarely strikes down a president's policy as illegitimate under the rational basis test.[133] On the rare occasions where the court has struck down a policy using rational basis scrutiny, the laws at issue lacked any purpose

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[126] *Trump*, 138 S. Ct. at 2419.
[127] *Id.*
[128] *Id.* "Judicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the president's authority in the area of foreign affairs.
[129] *Id.*
[130] *Id.* at 2420.
[131] *Id.*
[132] *Trump*, 138 S. Ct. at 2420.
[133] *Id.*

other than a "bare…desire to harm a politically unpopular group."[134] The Court decided that there is persuasive evidence that the Travel Ban has a legitimate grounding in national security concerns unrelated to any religious hostility Trump has towards Muslims, so the Court must accept the independent justification for creating the entry restrictions.[135]

The legitimate and facially neutral grounds for the proclamation are preventing the entry of nationals who cannot be adequately vetted and induce other nations to improve their vetting practices.[136] Religion is not mentioned at all in the Proclamation, even though five of the seven countries that are mentioned have Muslim-majority populations.[137] The Court does not believe that the fact that the majority of the people affected by these entry exclusions are Muslim does not support an inference of religious hostility, because it only affects 8% of the world's Muslim population and each country was chosen based on a worldwide review process.[138] The Court held that the government has set forth a sufficient national security justification to survive rational basis review.[139] The Court declined to express a view on the soundness of the imposed entry restrictions but simply held that the plaintiffs did not demonstrate a likelihood of success on the merits of their constitutional claim.[140] Because the plaintiffs could not show they were likely to succeed, the Court reversed the preliminary injunction as an abuse of discretion.[141]

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[134] *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disable, but not for other facilities, like fraternity houses or hospitals. The city's stated concerns rested on an irrational prejudice against the intellectually disabled); *see also* Romer v. Evans, 517 U.S. 620 (1996) (overturned a state constitution amendment that denied gays and lesbians access to protection of antidiscrimination laws. The amendment was "divorced from any factual context from which we could discern a relationship to legitimate state interests" and could not be explained by anything but animus).

[135] *Trump*, 138 S. Ct. at 2420.

[136] *Id.* at 2421.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 2423.

[140] *Id.*

[141] *Trump*, 138 S. Ct. at 2423.

VI. "WATERED-DOWN" LEGAL STANDARD USED BY THE COURT INSTEAD OF USING STRICT SCRUTINY REVIEW WHICH IS CUSTOMARY FOR CLAIMS OF RELIGIOUS DISCRIMATION

Because of the Court's deference to immigration and national security related issues, the Court incorrectly applied a "watered-down" legal standard.[142] The Court agreed "that is may be appropriate here for the inquiry to extend beyond the facial neutrality of the order," and thus declined to apply Mandel's "narrow standard" of review. [143] However, the Court without explanation or precedential support, limited its review to rational-basis scrutiny. Even though, as every law student learns their first year in their Constitutional Law class, cases involving religious animus or discrimination warrant a stricter standard [144] of review.[145] If the Court had applied the stricter level of scrutiny, the Proclamation would undoubtedly be unconstitutional.

Even under the less scrutinizing rational-basis test, the Proclamation should also have been declared unconstitutional. The Proclamation is inexplicable by anything but animus against Muslims. *Cleburne v. Cleburne Living Ctr., Inc.*, stated that laws based on discriminatory animus cannot be legitimate because the government has no legitimate interest in exploiting "mere negative attitude, or fear" toward a disfavored group. [146] Based on the president's countless previous statements, that the Court declined to consider, that show nothing but animus towards Muslims, it cannot be said that the Proclamation actually has a legitimate basis. The government may not act on the basis on animus towards any disfavored religion and it is clear to anyone who heard Trump on the campaign trail or follows him on twitter, that his true intent with the Proclamation is to ban Muslims from entering the United States.

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[142] *Id.* at 2440.
[143] *Id*. at 2441.
[144] *See* Colorado Christian Univ. v. Weaver, 535 F. 3d 1245 (10th Cir. 2008) (Supreme Court precedent requires that laws involving discrimination of the basis of religion are subject to heightened scrutiny whether they are under the Free Exercise Clause, the Establishment Clause or the Equal Protection Clause).
[145] *Id.*
[146] *Cleburne*, 473 U.S. at 448.

VII. RELIANCE OF THE MAJORITY OF THE EXTREME DEFERENCE GIVEN TO THE PRESIDENT FOR IMMIGRATION RELATED MATTERS

In the past, the treatment of the Travel Ban by the lower courts would have been considered unexpected because of the known extreme deference given to the president for all matters regarding immigration.[147] The Supreme Court has never held that a substantive limitation on the entrance of noncitizens into the United States violated the Constitution.[148] The Court had never even held that noncitizens outside of the U.S. could claim the protections of the Bill of Rights.[149] The Court was not about to rule against the precedent that gives the president almost absolute power of immigration related matters. This deference to the president started in 1975 with *Chae Chang Ping* and has continued ever since and is unlikely to change in the future.

According to the Supreme Court, past and present, the Constitution simply was not designed to protect those who are not inside the jurisdiction of the government of the United States.[150] While this makes sense, it does mean that the president is almost free to do whatever he wants in matters pertaining to immigration and this decision basically proves that. If the president is allowed to basically exclude who enters the county based on their religion, it seems unlikely that there is anything else he can do that the Supreme Court will declare unconstitutional.

Chief Justice Roberts stated that, "the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control"[151] and that the fact that Trump had previously made anti-Muslim statements did not alter this basic principle.[152] If not even the obvious animus towards Muslims which was the motivation for this Proclamation is enough for the Court to depart from their precedented deference given to the president, what is? Moreover, the Chief Justice further insisted that the argument for judicial deference "has particular force" in admission

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147 Earl Maltz, *Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391 (2018).
148 *Id*. at 410.
149 *Id*.
150 *Id*.
151 *Fiallo*, 430 U.S. at 792.
152 *Id*. at 412.

and immigration cases that also deal with matters of national security.[153] The kinds of restrictions imposed by the Proclamation are linked to decisions related to foreign policy, for which the Court has also given the president extreme deference.[154] Because of this, the Proclamation easily passes the test set forth in *Mandel* – whether the policy is facially legitimate and justified.[155]

VIII. STATEMENTS MADE BY TRUMP OR HIS ADVISORS SHOWING ANIMUS TOWARDS MUSLIMS

Statements made by Trump and his advisors led the plaintiffs, and many members of the American public, to the believe that the true objective of the Proclamation was not what the president says it is but is in fact fueled by Trump's animus towards Muslims. For example, in a statement released by his campaign and made during a campaign stop in South Carolina on December 7, 2015, Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on."[156] For over a year, Trump campaigned on this promise that he would ban Muslims from entering the United States. Trump also called for greater scrutiny of Muslims, including Muslim Americans who are legal residents of the country – going so far as the recommend creating a database to track all Muslims in the country.[157] Trump has even considered closing down mosques in the United States, claiming "if you have people coming out of mosques with hated and death in their eyes and on their minds, we're going to have to do something.[158] When Trump was asked why he would bar entry to all Muslims rather than focusing on countries linked to terrorism, Trump responded,

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[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States,'* WASH. POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?noredirect=on&utm_term=.e3267cde5211.
[157] *Id.*
[158] Jenna Johnson, *Donald Trump Would 'Strongly Consider' Closing Some Mosques in the United States,'* WASH. POST (Nov. 16, 2015), https://www.washingtonpost.com/news/ post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/?utm_term=.b2ccae52c1a0.

"there's a sickness. They're sick people. There's sickness going on. There's a group of people that is very sick."[159]

Trump has also been known to spread lies about the Muslim community that encourage his followers to engage in animus towards Muslims as well.[160] On CNN, Trump said that, "Islam hates us…there's tremendous hatred there. We have to get to the bottom of it. There's an unbelievable hatred of us."[161] Trump has even gone so far as to claim that a group of Muslims in Jersey City cheered when the World Trade Center fell on September 11th, a claim that has never been verified. [162] When asked whether Islam is an inherently peaceful religion that's been perverted by a small percentage of followers or it is an inherently violent religion, Trump's response was "All I can say…there's something going on…I don't know that that question can be answered." [163] Trump repeatedly called out Muslims on national television and during campaign rallies, claiming "We're having problems with the Muslims, and we're having problems with the Muslims coming into the country."[164]

The anti-Muslim comments did not end once Trump was elected president. In December 2016 after an attack in Berlin, Trump was asked if he would reconsider his proposed Muslim ban, he responded "You know my plans. All along, I've been right. One hundred percent correct."[165] Within a week of becoming president,

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[159] Dan Friedman, *Trump Cites 'Sickness' in Defense of Muslim Immigration Ban Proposal,* WASH. EXAMINER (Dec. 13, 2015), https://www.washingtonexaminer.com/trump-cites-sickness-in-defense-of-muslim-immigration-ban-proposal.

[160] *Id.*

[161] Theodore Schleifer, *Donald Trump: 'I Think Islam Hates us,'* CNN (Mar. 10, 2016), https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/.

[162] Glenn Kessler, *Trump's Outrageous Claim That 'Thousands' of New Jersey Muslims Celebrated the 9/11 Attacks,'* WASH. POST (Nov. 22, 2015), www.washingtonpost.com /news/ fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/?utm_term=.61e112151b45.

[163] *Trump: 'We Are no Loved by Many Muslims,'* MSNBC (Nov. 30 2015), http://www.msnbc.com/morning-joe/watch/trump--we-are-not-loved-by-many-muslims-576202819729.

[164] Marie Solis, *Six Anti-Muslim Comments that Count Haunt Trump in Travel Ban Supreme Court Case*, NEWSWEEK (Apr. 24, 2018), https://www.newsweek.com/tk-trumps-anti-muslim-comments-could-come-back-haunt-him-travel-ban-supreme-898086.

[165] Melissa Fares, *Trump After Berlin, Turkey Attacks: 'I've Been Proven to be Right*,' REUTERS (Dec. 21, 2016), https://www.reuters.com/article/us-usa-trump-

Trump signed the first executive order blocking Syrian refugees and citizens of seven Muslim-majority countries from entering the country. Upon signing the order, Trump said, "We all know what this means."[166] In addition, Trump's advisor, Rudy Giuliani, stated "When [Trump] first announced it, he said, 'Muslim ban.'. . . He said, 'Put a commission together. Show me the right way to do it legally." [167] The plaintiff argues that Trump's statement upon signing the order, along with his other anti-Muslim remarks prove that the travel ban is a logical extension of his promise of a "total and complete shutdown" on Muslims entering the United States.[168]

Trump did not limit is anti-Muslim comments and statements about the Travel Ban to television and campaign appearances, he often took to twitter to express his feelings about Muslims and the Travel Ban, as well. After Trump was forced to issue the second executive order to replace the first, he tweeted to express his regret that the first order had now been "watered down" and called for a "much tougher version of his Travel Ban," tweeting "the Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to [the Supreme Court]."[169] Before the release of the proclamation, Trump tweeted "The travel ban into the United States should be far larger, tougher and more specific – but stupidly, that would not be politically correct!"[170] The day he signed the first Proclamation, Trump explained to the media that Christians would be given priority for entry as refugees into the United States.[171] Clearly evidencing the favoring of one religion over another that is prohibited by the First Amendment.[172]

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attacks/trump-after-berlin-turkey-attacks-ive-been-proven-to-be-right-idUSKBN14A243.

[166] *Trump*, 138 S. Ct. at 2419.

[167] Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says – And Ordered a Commission to do it 'Legally,'* WASH. POST (January 29, 2017), https://www.washingtonpost.com/ news/ the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.8ca5e5e4d68c.

[168] *Trump*, 138 S. Ct. at 2419.

[169] Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 6:29 AM), https://twitter.com/realDonaldTrump/status/871675245043888128.

[170] Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 15, 2017, 6:54 AM), https://twitter.com/realDonaldTrump/status/908645126146265090.

[171] *Trump*, 138 S. Ct. at 2436.

[172] *See* Engel v. Vitale, 370 U.S. 421 (1962) (The Court has long acknowledged that governmental actions that favor one religion inevitably foster the hatred, disrespect and even contempt of those who hold contrary beliefs); *See* Santa Fe

IX. THE SUPREME COURT'S DECISION NOT TO LOOK INTO TRUMP'S TWEETS AND PRIOR STATEMENTS AS EVIDENCE TO THE TRUE INTENT OF THE PROCLAMATION

The question that the Supreme Court was tasked with answering was whether Proclamation No. 9645 was lawful, and this question turned on whether its content was significantly affected by religious animus against Muslims.[173] If the motivation behind the enactment of the Proclamation was religious animus than it violates the Constitution. The Court found its *sole ratio decidendi* was one of national security, and thus, did not violate the Constitution.[174] However, in making this decision, the Court did not look at the history of Trump's prior statements regarding Muslims or the "Muslim Ban." This is a mistake. How is it possible to determine the intent of the Proclamation enacted by Trump without using his own words regarding the very subject? Words that he campaigned on and uttered repeatedly and proudly. The true intent behind the statute would have been clear if the Court had looked at even just one of Trump's tweets. Trump's prior statements were readily available to the Court, as they are to the whole nation, and they refused to look at them. Any reasonable person looking at Trump's prior statements would conclude that the Proclamation was motivated by anti-Muslim animus.

As Justice Sotomayor pointed out in the dissent, the United States in a nation built upon the promise of religious liberty – honored by the Founders by embedding the principle of religious freedom in the First Amendment of the United States Constitution.[175] The Court's decision in *Trump v. Hawaii* does not protect this fundamental principle. As Sotomayor said, "it leaves undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown of Muslims entering the United States' because the policy does not masquerade behind a façade of national-security concerns."[176] The Court failed to look beyond the face of the

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Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (Government action that favors one religion sends messages to members of minority faiths that they are outsiders, not full members of the political community).

[173] *Trump*, 138 S. Ct. at 2436.

[174] *Id.* at 2429.

[175] *Id.* at 2433.

[176] *Id.* at 2433.

statute to determine its true intent. If the Court had looked at Trump's previous statements regarding the "Muslim Ban" it would be clear that the plaintiffs could succeed on the merits of their Establishment Clause claim.

Under the Establishment Clause[177], the government is not allowed to favor or disfavor one religion over another. [178] To safeguard this principle, the Framers mandated a strict "principle of denominational neutrality."[179] While this Proclamation is facially neutral on religion, it can hardly be said that the Proclamation is 'denominationally neutral,' as it disproportionately affects Muslims. The Proclamation mainly targets Muslim-majority countries and thus, mainly restricts Muslims from entering the country – hence why it was marketed by Trump as a "Muslim Ban." Even before he was elected president, Trump promised that he was going to ban Muslims from entering the country – this definitely does not reflect the Framer's principle of 'denominational neutrality.'[180]

The test to determine whether plaintiffs have proven an Establishment Clause violation, is whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion.[181] To answer this question, the Court has generally considered "the text of the government policy, its operation, and any available evidence regarding the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legitimate or administrative history, including

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[177] *See* Larson v. Valente, 456 U.S. 244 (1982) (The clearest command of the Establishment Clause is that the government cannot favor or disfavor on religion over another); *see also* Church of Lukumi Babalu Aye Inc. v. Hialeah, 508 U.S. 520 (1993) (The First Amendment forbids an official purpose to disapprove of a particular religion); *see also* Lynch v. Donnelly, 465 U.S. 688 (1984) (The Establishment Clause forbids hostility toward any religion because such hostility would bring us to war with our national tradition included in the First Amendment); Epperson v. Arkansas, 393 U.S. 97 (1968) (The Establishment Clause forbids the adoption of any programs or practices which aid or oppose any religion and that prohibition is absolute).

[178] *Id*. at 2434.

[179] *Id.*

[180] *See* McCreary Cnty. v. Am. C.L. Union of Kentucky, 545 U.S. 844 (2005) (When the government acts with the ostensible and predominant purpose of disfavoring a particular religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides).

[181] *Trump*, 138 S. Ct. at 2434-35.

contemporaneous statements made by the decisionmaker."[182] But Courts should not engage in "any judicial psychoanalysis of a drafter's heart of hearts.[183]

The issue before the Court was not "whether to denounce" Trump's offensive statement but whether the reasonable observer presented with all of the factors listed above – available data, text and historical context of the Proclamation, and the specific sequence of events leading up to it – would conclude that the primary purpose of the Proclamation was to disfavor Islam and prohibit Muslims from entering the country.[184] Any of Trump's prior statements listed above would lead a reasonable observer to view the government action as disfavoring Islam. There is no way to interpret any of Trump's prior statements regarding this matter in any other way. It is obvious, and it is blatant that Trump was and is still motivated by anti-Muslim animus. It should be clear to any rational and reasonable observer that the Proclamation was driven by Trump's anti-Muslim animus, rather than the national-security justifications that the government argued.

Trump has been given many opportunities to denounce his prior anti-Muslim statements and his statements regarding the "Muslim Ban" but he has refused.[185] Unsurprisingly, he has instead continued to make statements that any reasonable observer would view as an attack on Islam and its followers.[186] Trump's unwavering animus against Muslims should have been evidence enough for the Court to see that this Proclamation is, without a doubt, an attack on Muslims. This Proclamation began as a promise to Trump's voters for a "total and complete shutdown of Muslims entering the United States" that has been masked as a government act to protect matters of national security.[187] It should be clear to everyone what has happened here – Trump knew a Muslim Ban would not pass constitutional muster, so he needed to disguise it as something else. The Court should not have let itself be fooled by the "window dressing," the words of president create a strong perception that the

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[182] *Id.* at 2435.
[183] *Id.*
[184] *Id*. at 2438.
[185] Korte, Gregory, *Trump Won't Apologize for Muslim Comments: 'It Wouldn't Make 10 Cents Worth of Difference,'* USA TODAY (Apr. 30, 2018), https://www.usatoday.com/story/news/politics/2018/04/30/trump-wont-apologize-immigration-comments-wouldnt-make-10-cents-worth-difference/565712002/.
[186] *Id.*
[187] Johnson, *supra* note 156.

Proclamation is contaminated by impermissible discriminatory animus against Islam and was not formulated to address valid national-security concerns as the president claims.[188]

A. THE USE OF PRESIDENTIAL SPEECH IN COURT – PRESIDENTIAL SPEECH ALLOWED WHEN IT EVIDENCES INTENT OF GOVERNMENT ACTION AT ISSUE

The president's words should have played a bigger role in the judicial assessment of the meaning, lawfulness and constitutionality of this executive action. Trump made statements regarding the function and purpose of the Proclamation; wouldn't it make sense for the Supreme Court to look at these statements to determine the primary purpose of the Proclamation. It would have been clear to the Court, just what the true purpose of this Proclamation was, if they had decided to include Trump's and his advisor's statements in their legal analysis.

The weight the Court should accord the president's prior speech was perhaps the central legal question in this case – as the decision would turn on whether the Court decided to include the prior statements in their legal analysis.[189] Each of the lower courts gave significant weight to Trump's statement, which led each of them to strike down the Proclamation. [190] The Fourth Circuit Court decline the government's request to set aside Trump's statements, writing "we cannot shut our eyes to such evidence where it stares us in the face, for there's none so blind as they that won't see."[191]

Judicial reliance on presidential speech should be applicable where such speech supplies relevant evidence of intent or purpose, especially where an established legal test provides for the invalidity of government action when it is motivated by a constitutionally impermissible purpose. [192] Because the Court has held that discriminatory intent is a required component of a successful equal protection claim, many courts have relied on statements made by government officials as potential evidence of such intent. The

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[188] *Trump*, 138 S. Ct. at 2440.
[189] Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 109 (2017).
[190] *Id*. at 109.
[191] *Id.* at 110.
[192] *Id.* 137.

Supreme Court should be no different. In fact, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[193] the Court advised that in looking for evidence of discriminatory intent that would constitute a denial of equal protection, "the legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body." [194] Nothing seems to restrict the consideration of statements by legislators and where, like here, the government action in question is an executive action, statements made by executive branch officials supply the most relevant evidence of intent.[195] In *Trump v. Hawaii*, Donald Trump is the decision-making body and it would follow, that the Supreme Court could have and should have used his prior statements as evidence of the intent of the Proclamation.

Additionally, in cases regarding religion, the Supreme Court has often emphasized "the intuitive importance of official purpose to the realization of Establishment Clause values." [196] Courts adjudicating Free Exercise and Establishment Clause claims have long been using statements made by government officials in determining the existence of an impermissible purpose to discriminate on the basis of religion.[197]

Some scholars have expressed doubt about using previous statements as evidence of the intent of a statute, especially when attempting to ascertain the intent of a multimember body, like the legislatures.[198] However, this issue should not apply here and has not stopped courts from using such a method in the past.[199] The difficulty of ascertaining intent from a multimember does not exist here, as the only relevant member of the executive branch is the president.[200] When determining the true intent of an executive order, the only intent that matters is the intent of the President.[201] And here, the intent of President Trump is abundantly clear. When it comes to the president's purpose, the statements of other

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[193] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).
[194] Shaw, *supra* note 189, at 138.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at 139.
[199] *Id.*
[200] Shaw, *supra* note 189, at 139.
[201] *Id.*

executive officials could not possibly overcome the president's own words – presidential statements clearly control.[202]

Judicial reliance of presidential speech occurs quite often[203], so why did it not happen here[204]? Judicial consideration of presidential statements is appropriate where those statements supply evidence of the purpose of the government action at issue. The issue the Court was tasked with deciding here is whether the Proclamation was motivated by anti-Muslim animus i.e. the intent of the statute.[205] As stated above, presidential speech can be used when they supply evidence of purpose. It would seem that the best was to determine the purpose of this Proclamation would be to look at the statements made by the man who enacted it. Especially when those statements could not be clearer about the purpose of the Proclamation and were made repeatedly over the span of several years.

By using presidential speech in courts, it binds presidents to their claims and representations made to the American public.[206] The president should be accountable for the things he says, and what better way to hold him accountable than by using his speech in court. Trump told Americans what he intended to do if he became president of the United States – a "complete and total" ban against Muslims who seek to enter the country. He campaigned on this promise, people voted for him based on this promise, this promise remained up on his website until May 2017.[207] It seems ridiculous not to use these statements as evidence of the intent of the Proclamation that he promised to the American people – to call it what it is, what Trump called it: a Muslim ban.

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[202] *Id.*

[203] *See* Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (the court repeatedly invoked presidential statements when deciding a case that challenged the Obama Administration's executive action on immigration); *See* 10 U.S.C. § 654 (presidential statements play a role in a constitutional challenge to the military's "Don't Ask Don't Tell" policy – the District Court relied on a single presidential speech for its holding); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (court relied on contents of a presidential speech to establish changed prison conditions that rendered prisoners detention unlawful); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014) (used presidential speech as evidence of continuing threat posed by the target of the strike to reject a constitutional challenge to a targeted killing).

[204] Shaw, *supra* note 189, at 140.

[205] *Trump*, 859 F.3d at 755.

[206] Shaw, *supra* note 189, at 129.

[207] *Id.*

X. THE "WINDOW DRESSING" – HOW TRUMP USED A FALSE NATIONAL-SECURITY REASONING TO GET HIS MUSLIM BAN

The majority insisted that the Proclamation is constitutional because it furthers two national-security interests: "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." [208] The Courts offers insufficient support for its reasoning that "the entry suspension has legitimate grounding in national security concerns, quite apart from any religious hostility." [209] Even just a cursory glance at the government's national-security rationale shows that the Proclamation is nothing more than a "religious gerrymander."[210] The government is quick to point out that it can't be a Muslim Ban because both Venezuela and North Korea are included – but the restrictions on these countries are minor compared to the restrictions imposed on Muslim-majority nations.[211] Additionally, the effect the entry ban has on these nations is insubstantial.[212] The president's inclusion of North Korea and Venezuela should do little to diminish the anti-Muslim animus that pervades the Proclamation. [213] North Korea and Venezuela were clearly only included to mask Trump's true intent of the proclamation, so that Trump could hide behind the defense that not all the countries included are not Muslim-majority counties, even though the Proclamation has little to no effect on the countries that are not Muslim-majority.[214]

Congress has already addressed the national-security issues that president sought to address with his Proclamation. The INA already sets forth the rules regarding who can enter the United States and subjects them to extensive vetting, making the provisions of this Proclamation unnecessary.[215] There is no other

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[208] *Trump*, 138 S. Ct. at 2442.
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *See* Exec. Order No. 13810, 82 Fed. Reg. 184 (Sept. 20, 2017). A prior sanction already exists that restricts the entry of North Korean nationals. The Proclamation only targets a handful of Venezuelan government officials and their immediate family members.
[213] *Id.*
[214] *Id.* at 2443.
[215] *Id.* at 2444.

national-security interest not already addressed by Congress that renders the Proclamation necessary.[216] None of the features outlined by the majority supports the government's claim that the Proclamation is genuinely rooted in a legitimate national-security interest. It is clearly a "window dressing" to circumvent the inevitable declaration of unconstitutionality based on the real primary purpose and function of the Proclamation to disfavor Islam by banning Muslims from entering the United States.[217]

XI. EFFECTS OF THE TRAVEL BAN

After the Supreme Court upheld Trump's travel ban in June, the presidential order took effect in December[218]. The Travel Ban indefinitely suspends the issuance of nonimmigrant visas to applicants from the seven nations specified.[219] The number of people effected by the ban exceeds 123 million, according to immigrant advocacy groups.[220] The majority of people effected are in the five Muslin-majority countries. Iran, with a population of more than 80 million, is the country the most effected.[221] There is an estimated one-million Iranian-Americans, now many have relatives in Iran who may now be unable to emigrate or visit their relatives in the United States.[222] Looking at the numbers, the effects of the Travel Ban are obvious and instantaneous. All nationals from countries on the list saw nonimmigrant visa issuances decline 86 percent, with Iranians having the biggest decline of 91 percent.[223] Immigrant visa issuances declined 93 percent for all nationalities, with Yemenis seeing the biggest decline at 98 percent.[224]

The government claims there is a comprehensive system for issuing waivers to citizens of the affected countries who need

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[216] *Id.*
[217] *Id.*
[218] Rick Gladstone & Satoshi Sugiyama, *Trump's Travel Ban: How It Works and Who Is Affected*, N.Y. TIMES (July 1, 2018), https://www.nytimes.com/2018/07/01/world/americas/ travel-ban-trump-how-it-works.html
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] David Bier, *Travel Ban Cuts Immigration 93%, Travel 86% From Targeted Countries*, CATO INST. (June 27, 2018), https://www.cato.org/blog/travel-ban-cuts-immigration-93-travel-86-targeted-countries.
[224] *Id.*

visas.[225] Instead of categorical waivers for immediate relatives (parents, spouses and children) used to grant visas for family of U.S. citizens, U.S. citizen's family members from the countries subject to the Travel Ban must get waivers granted on a case-by-case basis.[226] The criteria for waivers is described in broad terms, based on whether denying entry to an applicant would cause undue hardship, whether the applicant represents a security threat and whether the entry would be in the national interest.[227] Thus, those that deserved to be allowed to enter the country will be allowed to enter via waiver.[228] However, there are indications[229] that only a small fraction of those applying for the waivers are getting them.[230] A State Department report revealed that out of 33,176 waiver applications received through April 30, 2018, only 579 had been granted – about 2 percent.[231] Immigrant rights lawyers are attempting to pressure the government to explain how it decides who gets the waivers.[232] Two advocacy groups filed a lawsuit demanding that government agencies responsible for the waivers provide detailed information on how they are granted.[233] The lawsuit contends many people had been denied waivers without knowing what information they needed to apply, suggesting the process is "cursory, nonexistent, not left to consular discretion, or so limiting that it can be considered nonexistent."[234]

The Proclamation also grants exceptions for student visas, but these students must go through more extensive background checks and vetting, which could delay their applications for

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[225] Johnson, *supra* note 156.
[226] Holly Yan*, If You're Trying to Come to the US, This is How the Travel Ban Could Affect You,* CNN (June 26, 2018), https://www.cnn.com/2018/06/26/politics/travel-ban-effects-on-people-trnd/index.html.
[227] Johnson, *supra* note 156.
[228] *Id.*
[229] Rick Gladstone, *Trump Travel Ban: How It Affects the Countries*, N.Y. TIMES (JUNE 26, 2018), https://www.nytimes.com/2018/06/26/world/americas/trump-travel-ban-effects.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer. For example, hundreds of Yemeni families with American families who have fled to Djibouti to file waiver applications for visas because the United States embassy in Yemen is closed have been summarily denied waivers and remain stranded there.
[230] Johnson, *supra* note 156.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*

months.[235] Even after a student obtains a visa, they can still be stopped and questioned at the border if Customs and Border Protections officers have doubts about whether the purpose of their travel is really to study.[236] Though, students who already have visas and are re-entering the country to return to school should not encounter problems due to the Travel Ban.[237] There are indications that many students who have accepted offers in the United States are looking to go to school elsewhere.[238] The president of the National Iranian American Council, Trita Parsi, said, "The problem is that with students knowing that they will never be allowed to work in the U.S., most of them will essentially choose not to come here in the first place."[239] Basically rendering the loophole for students useless.[240]

Those with permanent U.S residency, like a green card, are not subject to this ban.[241] Similarly, anyone on a diplomatic visa will be allowed to enter the United States.[242] Those who already have visa will not have them revoked, but once those visas expire, immigrants from the outlines countries will not be able to renew them.[243] Meaning this order could have significant long-term effects on the United States and its economy, especially if foreign nationals are not allowed to renew their work visas.[244] This is clear example of what has been a widely debunked yet prominent part of Trump's doctrine, that immigration hurts the American economy.[245] But to the contrary, it is restricting immigration that will definitely have a negative effect on the nation's economy.[246]

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[235] *Id.*
[236] Johnson, *supra* note 156.
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] Tara Golshan, *The Trump Administration Just Made its Travel Ban Permanent*, VOX (Sept. 28, 2017), https://www.vox.com/policy-and-politics/2017/9/25/16360496/trump-travel-ban-permanent.
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id.*

XII. CONCLUSION

The Supreme Court has a long history of giving extreme deference to the president in matters relating to immigration. This deference dates back over a hundred years, starting in cases like *Chae Chan Ping*. Chief Justice Roberts, writing for the majority, used this extreme deference given to the president to decide the outcome of this case. However, the Supreme Court should have used President Trump's own prior statements as evidence of his intent when enacting the Proclamation. The majority used the history of extreme deference given to the president for matters relating to immigration to declare the Proclamation constitutional. Instead, they should have looked at Trump's campaign promises and numerous tweets, which would have showed them that this Proclamation was motivated by anti-Muslim animus and a desire to disfavor Islam and its followers. When presidential speech is evidence of the intent of the government action at issue, it should always be included in the legal analysis. The issue for the Court to decide was whether the Proclamation was motivated by anti-Muslim animus, what better way to determine the intent of the Proclamation than by the statements made by the person who created it? The Supreme Court erred when refusing to consider statements made by President Trump about the Proclamation ("Travel Ban") in their legal analysis to determine the true intent of the Proclamation.