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## Bias and Immigration: A New Factors Test to Examine Extrinsic Evidence of Animus in Immigration Cases

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# BIAS AND IMMIGRATION: A NEW FACTORS TEST TO EXAMINE EXTRINSIC EVIDENCE OF ANIMUS IN IMMIGRATION CASES<sup>†</sup>

## ABSTRACT

*Courts have historically struggled to consistently consider extrinsic evidence of animus and bias in immigration cases. In two key cases concerning challenges to restrictive immigration policies of the Trump Administration—Trump v. Hawaii and DHS v. Regents of the University of California—the Supreme Court shied away from considering numerous examples of former President Trump’s discriminatory rhetoric and public comments of religious and racial animus that would challenge the constitutionality of the policies. Instead, the Court invoked the historically prominent deference to the executive branch’s immigration power and to the interest in national security. However, the Court’s quick dismissal of extrinsic evidence of biased comments departs from compelling legal precedent. In multiple previous cases concerning immigration and other matters, courts have looked beyond the record at public statements made by high-ranking government officials involved in the promulgation of policies that became the subject of legal challenges. Thus, courts’ inability to consider extrinsic evidence of animus stemming from former President Trump exposes a weakness in the existing legal analytical framework and suggests the need for an alternative test. Deference to national security should not justify excluding entire categories of evidence that may reveal the unconstitutionality of an immigration law.*

*To address these shortcomings, this Comment proposes a new factors test to assist courts in considering how much weight to give to external statements of bias and animus in immigration cases. Courts should weigh five key factors: (1) the identity of the speaker, (2) the temporal proximity between the biased statement and the challenged government action, (3) the scope of the statement’s entry in the public sphere, (4) the frequency of the statements, and (5) whether a reasonable observer would view the government action as enacted because of animus toward a particular protected class. In a post-Trump era where unbridled political rhetoric has been normalized, use of this new test will allow courts to deal with overt statements of bias more consistently and avoid upholding discriminatory immigration policies under the guise of national security.*

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## INTRODUCTION

Courts have struggled to consistently deal with external evidence of bias and animus.<sup>1</sup> This inconsistency poses a unique risk in the context of immigration law. In ruling on immigration policies, courts must balance deference to the executive branch's immigration power and to national security, with protecting against unlawful discrimination and other constitutional violations.<sup>2</sup> This balancing act was proven problematic and inadequate when, against the backdrop of divisive, discriminatory rhetoric from the executive,<sup>3</sup> courts were faced with constitutional challenges to the Trump Administration's harsh immigration policies.<sup>4</sup>

In cases concerning the constitutionality of the Trump Administration's immigration policies, the Supreme Court departed from precedent in failing to

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<sup>1</sup> *Compare, e.g.*, *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) (considering the Secretary of Commerce's statements of racial bias to hold a gerrymandering effort violated the Fourteenth Amendment), *with Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (declining to consider the President's statements of bias against Muslims to uphold the travel ban).

<sup>2</sup> *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>3</sup> *See, e.g.*, Brief for Respondents at 5, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 16-1540), 2017 U.S. S. Ct. Briefs LEXIS 3420, at \*16 (citing President Trump's campaign promises for "a total and complete shutdown of Muslims entering the United States") (citation and internal quotation marks omitted); *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1917 (2020) (Sotomayor, J., dissenting) (citations omitted) (citing President Trump's declarations that Mexican nationals are "people that have lots of problems" and "criminals, drug dealers [and] rapists").

<sup>4</sup> For example, these policies included the "zero tolerance" policy for undocumented immigrants who crossed the border, a ban on the entry of foreign nationals from seven Muslim-majority nations, the end to Temporary Protected Status program for nationals from various countries, the rescission of the Deferred Action for Childhood Arrivals program and a new harsher public charge rule for green card applicants. Jeff Sessions, Att'y Gen., Dep't of Just., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>; Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); Press Release, Elaine Duke, Acting Sec'y, Dep't of Homeland Sec., Announcement on Temporary Protected Status for Haiti (Nov. 20, 2017), <https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti>; Press Release, Kirstjen M. Nielsen, Sec'y, Dep't of Homeland Sec., Announcement on Temporary Protected Status for El Salvador (Jan. 8, 2018), <https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>; Press Release, Kirstjen M. Nielsen, Sec'y, Dep't of Homeland Sec., Announcement on Temporary Protected Status for Honduras (May 4, 2018), <https://www.dhs.gov/news/2018/05/04/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>; Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA), Elaine Duke, Acting Sec'y, Dep't of Homeland Sec. Sec'y (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/rescission-deferred-action-childhood-arrivals-daca>; Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pt. 103). The Biden Administration has signaled its intent to reverse many of these policies. *See* Press Release, White House Briefing Room, Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>.

consider evidence of bias, animus, and prejudice from the executive and other high-ranking government actors involved in the promulgation of the laws at issue—evidence that undermines constitutionality. In *Trump v. Hawaii*,<sup>5</sup> the case concerning former President Trump’s Muslim travel ban, the Supreme Court ignored the former President’s public statements made on Twitter and on the campaign trail that demonstrated an anti-Muslim animus and quickly dismissed the statements as extrinsic evidence that need not be considered.<sup>6</sup> Similarly, in *DHS v. Regents of the University of California*,<sup>7</sup> the Court ignored former President Trump’s public statements when it dismissed an Equal Protection claim.<sup>8</sup> However, this treatment of extrinsic evidence is inconsistent with the Court’s practice both in other immigration-related cases<sup>9</sup> as well as in cases from other areas of the law.<sup>10</sup> Furthermore, many lower courts *have* grappled with such evidence of the executive’s publicly-made and publicly-available statements of bias and animus instead of shying away and ignoring them.<sup>11</sup> Although certain statements may seem clear to the general public as indicative of prejudice toward a certain class of people grouped by race, nationality, or gender, courts have struggled to deal with such explicit indications of bias in a consistent manner, particularly in the context of immigration. As divisive rhetoric becomes more pervasive and publicly normalized, a new test is needed to ensure that a national security justification only protects immigration policies that are constitutional.

To address this inconsistency, this Comment argues for the adoption of a new factors test to help courts determine whether to consider the public statements of high-ranking government officials in immigration cases concerning constitutional issues. This Comment builds upon the holistic factors specified by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,<sup>12</sup> which include (1) the decision’s historical background, (2) the “sequence of events leading up to the challenged decision,” (3) the departure from normal procedure, and (4) the “legislative or

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<sup>5</sup> 138 S. Ct. 2392.

<sup>6</sup> *Id.* at 2412, 2418, 2420.

<sup>7</sup> 140 S. Ct. 1891.

<sup>8</sup> *Id.* at 1915–16.

<sup>9</sup> See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

<sup>10</sup> See *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2017); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>11</sup> See, e.g., *Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018), *rev’d*, 140 S. Ct. 1891 (2020); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *rev’d*, 975 F.3d 872 (9th Cir. 2020).

<sup>12</sup> 429 U.S. 252.

administrative history.”<sup>13</sup> There is also a compelling reason to consider such statements when the public would reasonably understand the statements to be biased.<sup>14</sup> Thus, courts should carefully consider frequent, public statements made by high-ranking government actors closely involved in the matter at issue. Although courts afford great deference to the executive in matters of national security and immigration, this deference should not automatically disqualify the consideration of extrinsic evidence of animus in constitutional cases when a compelling reason to do so exists.

Before turning to the implementation of the new factors test, this Comment provides a background in immigration law, constitutional issues, and the existing methods of analysis courts have used in similar cases. First, Part I reviews relevant principles of immigration, constitutional, and administrative law. Part I.A examines the history of immigration law and the judiciary’s deference to both national security and the executive’s immigration power. Next, Part I.B turns to the existing standards for constitutional cases concerning the Equal Protection and the Establishment Clauses of the Constitution and administrative cases under the Administrative Procedure Act (APA).<sup>15</sup> Part II reviews the doctrine of animus, evidence law, and the administrative record. Part III reviews various cases from before and during the Trump Administration in which courts considered statements of bias or prejudice, and then juxtaposes these precedents with the Supreme Court’s minimal treatment of biased statements in *Trump v. Hawaii* and *DHS v. Regents of the University of California*. In Part IV, this Comment argues that although the Supreme Court has developed two lines of precedent, the Court’s recent treatment of evidence of bias as “extrinsic” is inconsistent with the more compelling precedent and that, instead, courts should employ a new factors test to more thoroughly evaluate explicit statements of bias when such statements are sufficiently relevant, clear, and public. Finally, Part V reviews the implications on law and policy that arise from employing this test.

## I. BACKGROUND ON IMMIGRATION, CONSTITUTIONAL, AND ADMINISTRATIVE LAW

Because this Comment analyzes cases that consider challenges to different rights in the broad realm of immigration law, the contextualization of

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<sup>13</sup> *Id.* at 267–68; *see infra* notes 214–217.

<sup>14</sup> *See Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

<sup>15</sup> Administrative Procedure Act of 1946, 5 U.S.C. §§ 550–596.

immigration and constitutional law is necessary to understand what tools and backdrops courts have when evaluating immigration cases.

*A. Immigration Law, Deference, and National Security*

A common refrain is that the United States is a nation of immigrants.<sup>16</sup> While it is true that this country was founded by settlers who left Great Britain and elsewhere, the United States is also a nation of immigration regulation. Since its founding, the country has been regulating immigration<sup>17</sup>—controlling who may permissibly enter and restricting who may naturalize to become citizens.

The U.S. Constitution gives Congress the express authority to “establish a[] uniform [r]ule of [n]aturalization.”<sup>18</sup> As a result, Congress has regulated immigration throughout history depending on the contemporaneous political, social, and demographic trends. In 1790, Congress enacted a law that made naturalization available only to “free white person[s]” who had resided in the United States for two years and who demonstrated “good character.”<sup>19</sup> Eight years later, the Alien and Sedition Acts afforded sweeping powers to the government to remove aliens who were deemed to pose a threat to the safety of the country.<sup>20</sup> Over the next century, as more immigrants from Asia came to the United States and were viewed as a threat, Congress responded by barring the entry of Chinese,<sup>21</sup> Japanese,<sup>22</sup> and other Asian<sup>23</sup> nationals. It was not until the Immigration and Nationality Act of 1952 that Congress repealed the Japanese exclusion policy.<sup>24</sup> Today, United States immigration law is governed by the 1965 Immigration and Nationality Act (INA),<sup>25</sup> which contains preference

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<sup>16</sup> See, e.g., *Foley v. Connelie*, 435 U.S. 291, 294 (1978) (“[W]e have often been described as a ‘nation of immigrants.’”); JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1964).

<sup>17</sup> D’Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RSCH. CTR. (Sept. 30, 2015), <https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/>.

<sup>18</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>19</sup> An Act to Establish a Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790).

<sup>20</sup> Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired June 25, 1800); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21–23 (1999)); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801).

<sup>21</sup> See Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882).

<sup>22</sup> See Immigration (Johnson-Reed) Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924) (also imposing annual quotas of two percent of the number of foreign-born individuals of a given nationality residing in the United States).

<sup>23</sup> Immigration (Literacy) Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (1917).

<sup>24</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

<sup>25</sup> Immigration and Nationality (Hart-Celler) Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified at 8 U.S.C. §§ 1101–1537 (2020)).

categories for family-based,<sup>26</sup> employment-based,<sup>27</sup> and diversity<sup>28</sup> immigration, as well as provisions for humanitarian immigrants such as refugees<sup>29</sup> and asylees.<sup>30</sup>

An overview of the history of immigration law sheds light on how the executive and legislative branches get broad deference in exercising the immigration power. This deference is exemplified in judicial decisions<sup>31</sup> as well as in broader legal discourse. For example, immigration law has been characterized as “exceptional” in the eyes of the courts and as having not yet gone through a process of “normalization” by which courts treat these issues the same as any other legal issue.<sup>32</sup> This concept of exceptionalism illustrates that there is something unique about immigration law, making it different even from other foreign relations questions.<sup>33</sup> Furthermore, courts have historically viewed the power to expel and to regulate the entry of non-citizens as central to the concept of sovereignty.<sup>34</sup> Because the power to regulate immigration is inherent to a sovereign nation, courts give substantial deference to the exercise of such power.

Another reason that the judiciary affords deference to immigration law is because of national security.<sup>35</sup> Use of national security rhetoric to regulate immigration is particularly common in moments of war when racialized assumptions prompt crisis responses.<sup>36</sup> The most notable example is *Korematsu v. United States*,<sup>37</sup> which reached the Supreme Court in 1944 and is considered part of the American anticanon of cases that are now considered wrongly

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<sup>26</sup> See 8 U.S.C. § 1153(a); 8 U.S.C. § 1151(b)(2)(A).

<sup>27</sup> See § 1153(b).

<sup>28</sup> See § 1153(c).

<sup>29</sup> See § 1101(a)(42) (defining “refugee”).

<sup>30</sup> See § 1158.

<sup>31</sup> See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (recognizing “the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control”).

<sup>32</sup> Mac LeBuhn, *The Normalization of Immigration Law*, 15 NW. J. HUM. RTS. 91, 92 (2017).

<sup>33</sup> *Id.*

<sup>34</sup> See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 585 (1889) (“The inherent right of a sovereign power to prohibit, even in time of peace, the entry into its territories of the subjects of a foreign state will not be denied.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions.”).

<sup>35</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citations omitted) (“National-security policy is the prerogative of the Congress and President. Judicial inquiry into the national-security realm raises ‘concerns for the separation of powers in trenching on matters committed to the other branches.’”).

<sup>36</sup> Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1834 (2007).

<sup>37</sup> 323 U.S. 214 (1944).

decided.<sup>38</sup> In *Korematsu*, the Court upheld a wartime Japanese exclusion order against a challenge by a citizen of Japanese descent who was convicted for violating the order.<sup>39</sup> The Court reasoned that *Korematsu* was excluded not because of “hostility to him or his race” but rather because “we are at war with the Japanese Empire.”<sup>40</sup> Although this decision is widely regarded as one of the Court’s “most egregious failures,”<sup>41</sup> it was not overturned until seventy-five years later.<sup>42</sup> The case remains as a chilling reminder of the extent to which national security will overshadow even the rights of citizens in times of war.<sup>43</sup>

More recently, after September 11, 2001, Congress’s and the President’s immigration power became wrapped up in the goal of combating terrorism in the interest of national security.<sup>44</sup> After 9/11, discourse around liberal immigration reform came to a halt and instead efforts focused on ensuring public safety and “seal[ing] the borders.”<sup>45</sup> The focus on national security even went so far as to limit the civil rights of non-citizens, citizens, and minorities.<sup>46</sup> For example, when the Department of Justice detained hundreds of men following 9/11, one of the men, Javid Iqbal (who was later deported), filed a federal lawsuit alleging mistreatment on the basis of race and national origin and also

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<sup>38</sup> Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381, 422–27 (2011) (arguing that anticononical status “depends on the attitude the constitutional interpretive community takes toward the ethical propositions that the decision has come to represent”).

<sup>39</sup> *Korematsu*, 323 U.S. at 215–16, 223.

<sup>40</sup> *Id.* at 223.

<sup>41</sup> John Ip, *The Travel Ban, Judicial Deference, and the Legacy of Korematsu*, 63 HOW. L.J. 153, 153 (2020); see also Greene, *supra* note 38, at 381, 399–400 (noting that most of the then-recent Supreme Court nominees stated that *Korematsu* was wrongly decided and that a district court later vacated *Korematsu*’s conviction).

<sup>42</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’”).

<sup>43</sup> See Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties when “Fears and Prejudices are Aroused,”* 2 SEATTLE J. SOC. JUST. 129, 129–31 (2003) (arguing for more rigorous judicial review to check executive restrictions that limit civil liberties in times of war such as in *Korematsu* and in post-9/11 United States).

<sup>44</sup> See, e.g., MICHELLE MITTELSTADT, BURKE SPEAKER, DORIS MEISSNER & MUZAFFAR CHISHTI, THROUGH THE PRISM OF NATIONAL SECURITY: MAJOR IMMIGRATION POLICY AND PROGRAM CHANGES IN THE DECADE SINCE 9/11 (2011), [https://www.migrationpolicy.org/sites/default/files/publications/FS23\\_Post-9-11policy.pdf](https://www.migrationpolicy.org/sites/default/files/publications/FS23_Post-9-11policy.pdf). After 9/11, the Immigration and Naturalization Service was dissolved and in its place the Department of Homeland Security was formed with a focus on combating terrorism and removing criminal foreign nationals. *Post 9/11*, USCIS.GOV, <https://www.uscis.gov/about-us/our-history/post-911> (last updated Dec. 4, 2019).

<sup>45</sup> Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1370–71, 1373 (2007) (arguing that post-9/11 national security concerns “distorted” the debate over immigration reform).

<sup>46</sup> *Id.* at 1369–70.

alleging various abuses from his time in detention.<sup>47</sup> The Supreme Court shied away from the issue, holding that the pleadings were insufficient.<sup>48</sup> This avoidance demonstrates that the concept of national security, particularly in times of war, conflict, and external threats, justifies the judicial deference afforded to the President's and Congress's exercise of the immigration power.<sup>49</sup>

Despite this broad deference afforded to immigration authority in the interest of national security, the Supreme Court has repeatedly affirmed that the political branches' efforts to make immigration law and policy are still subject to constitutional review.<sup>50</sup> Although Congress has plenary authority over immigration, which is "not open to question,"<sup>51</sup> courts can and do ensure that "the exercise of that authority does not offend some other constitutional restriction."<sup>52</sup> Indeed, the Court has never held that the judiciary "lack[s] the authority to review executive action[s]" concerning immigration or national security issues to ensure they comply with the Constitution.<sup>53</sup> Therefore, the deference afforded to the judicial branches in the realm of immigration law and policy ends, or at least is curtailed, when constitutional and administrative law issues arise. The delicate balance between judicial deference and Congress's decision-making authority is a longstanding theme that has pervaded the judicial system for centuries,<sup>54</sup> but that inherent tension is perhaps more salient in issues of the political branches' exercise of their immigration power.

The amount of deference that the political branches will receive in the exercise of their immigration authority depends on the type of immigration that

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<sup>47</sup> Shoba Sivaprasad Wadhia, *Iqbal and Race: Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1486–87 (2010); Complaint, Elmaghrary, No. 04-1809 (E.D.N.Y. May 3, 2004).

<sup>48</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (holding that a complaint must contain "sufficient factual matter" to have "facial plausibility" and conclusory allegations are insufficient).

<sup>49</sup> *See Cruz*, *supra* note 43, at 130 ("[D]uring times of national security fears, the judiciary often embraces the executive's arguments of minimal judicial review and fails to closely scrutinize government national security actions.").

<sup>50</sup> *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (stating that Congress's plenary power to create immigration law "is subject to important constitutional limitations"); *INS v. Chadha*, 462 U.S. 919, 941 (1983) (affirming that Congress must chose a "constitutionally permissible means of implementing [its plenary] power").

<sup>51</sup> *Chadha*, 462 U.S. at 940.

<sup>52</sup> *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), *as recognized in* *Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228, 2019 U.S. Dist. LEXIS 170793, at \*47–48 (D.N.J. Oct. 2, 2019).

<sup>53</sup> *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017).

<sup>54</sup> *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) ("[W]e must never forget that it is a *constitution* we are expounding.").

is being addressed or regulated. Some of the key distinctions in immigration law revolve around questions of geographic location and admissibility.<sup>55</sup> Courts afford more rights to plaintiffs who are physically located inside the United States than those who are outside of the country's borders.<sup>56</sup> Non-citizens who have not been admitted to the United States have "no constitutional right of entry to this country as a nonimmigrant or otherwise."<sup>57</sup> Furthermore, foreign nationals deemed inadmissible are ineligible to receive visas or enter the country lawfully.<sup>58</sup> Courts are hesitant to second-guess the decisions of officials who grant or deny a foreign national's application to enter or gain admission to the United States.<sup>59</sup>

Thus, the history of immigration law in the United States demonstrates the judiciary's strong deference to the political branches' exercise of their authority to regulate immigration. In the interests of national security and ensuring the safety and sovereignty of the country, courts have upheld laws and policies that discriminate against non-citizens and citizens alike.<sup>60</sup> Although courts still assert their judicial role in reviewing the constitutionality of such immigration policies, an overall policy of deference has allowed courts to uphold some of the most insidious and discriminatory laws in this nation's history. These themes of judicial deference, broad immigration authority to exclude and deport, and national security provide a backdrop to understanding how courts struggle to evaluate constitutional issues in immigration policies that are alleged to be discriminatory.

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<sup>55</sup> See 8 U.S.C. § 1182(a) (providing that foreign nationals who are inadmissible "are ineligible to receive visas and ineligible to be admitted to the United States"). Compare § 1255(a) (providing that foreign nationals who were "inspected and admitted or paroled" into the United States may apply for adjustment of status on the basis of a family petition if they are "admissible"), with § 1201(a) (stating that foreign nationals who were not admitted into the country or who are located abroad must apply for their visas abroad at the consulate through the Department of State).

<sup>56</sup> Compare *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) (recognizing that Chinese non-citizens residing and domiciled in the United States are entitled to constitutional safeguards), with *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (upholding the denial of a visa to a foreign journalist who was deemed inadmissible).

<sup>57</sup> *Mandel*, 408 U.S. at 762.

<sup>58</sup> 8 U.S.C. § 1182.

<sup>59</sup> See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'").

<sup>60</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

## B. *Standards in Constitutional and Administrative Cases*

Many of the cases concerning the Trump Administration's immigration policies revolved around constitutional issues (specifically, Equal Protection or Establishment Clause issues), administrative procedure issues, or both.<sup>61</sup> A review of these different areas of the law is critical to examine the existing standards employed by courts and to understand how courts could incorporate the analysis of statements of bias while still adhering to these precedents. Although constitutional and administrative issues may be quite distinct in many regards, the juxtaposition of the varying issues at play in the immigration context illustrates how both the constitutional and administrative legal precedents employ frameworks that consider only certain types of evidence. Consequently, in many types of cases, courts may have room to ignore other compelling evidence of bias because of convenience, deference, or hesitation.

### 1. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o [s]tate shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>62</sup> This proclamation of equal treatment applies not only to citizens in the United States—it applies universally “to all persons within territorial jurisdiction” of the country.<sup>63</sup> The Clause applies to citizens, residents, and foreign nationals, and it also applies regardless of whether they may have unlawful presence or not. Furthermore, as the Supreme Court has stated, “the equal protection of the laws is a pledge of the protection of equal laws.”<sup>64</sup> However, scholars debate over competing visions of the constitutional meaning of equality. While some view equality as rooted in an antisubordination principle, whereby the state should not enforce inferior status on historically marginalized groups, others view equality through the lens of anticlassification in that individuals, not groups, are protected.<sup>65</sup> Under either view, the Constitution guarantees that every person physically present in the United States be treated equally by the state either to protect the individual or the classified group.

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<sup>61</sup> See *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1897 (2020) (APA and Equal Protection); *Trump v. Hawaii*, 138 S. Ct. 2392, 2400 (2018) (INA and Establishment Clause).

<sup>62</sup> U.S. CONST. amend. XIV, § 1, cl. 4.

<sup>63</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

<sup>64</sup> *Id.*

<sup>65</sup> Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004).

When evaluating an Equal Protection claim, courts examine whether the law or state action at issue treated different classes of people differently.<sup>66</sup> When treating two classes of persons differently, the government's actions are subjected to varying standards of judicial scrutiny depending on the type of classification. The first type—classifications based on race,<sup>67</sup> nationality,<sup>68</sup> and alienage<sup>69</sup>—receives strict scrutiny, the highest form of judicial review, under which the law at issue must be “narrowly tailored” to further a “compelling” state interest.<sup>70</sup> These classifications get the most stringent form of judicial scrutiny and the outcomes are more favorable to the individual plaintiffs because race and nationality are suspect classes.<sup>71</sup> The presumption supporting heightened scrutiny here is that “discrete and insular minorities” will be less able to protect themselves and consequently should be designated a suspect class.<sup>72</sup> Strict scrutiny is also proper when the contested government action “impinge[s] upon the exercise of a ‘fundamental right.’”<sup>73</sup> Government actions that classify based on race may be facially discriminatory or facially neutral.<sup>74</sup> When a law is facially neutral, courts invoke strict scrutiny if there is both a discriminatory purpose and a discriminatory effect.<sup>75</sup> The party alleging the Equal Protection violation “has the burden of proving” the state action had a discriminatory purpose.<sup>76</sup> A showing of discriminatory effects is insufficient on its own to subject a facially neutral law to strict scrutiny.<sup>77</sup>

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<sup>66</sup> *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (stating that the doctrine of Equal Protection ensures that similarly situated people “are treated alike[,] are subject to the same restrictions, and are entitled to the same privileges under similar conditions”).

<sup>67</sup> *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (asserting that racial classifications are “immediately suspect” and subject to the “most rigid scrutiny”).

<sup>68</sup> *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) (footnotes omitted) (“[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”).

<sup>69</sup> *See id.* (citation omitted) (“Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”).

<sup>70</sup> *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

<sup>71</sup> *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Korematsu*, 323 U.S. at 216 (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”).

<sup>72</sup> *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

<sup>73</sup> *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982).

<sup>74</sup> *See Washington v. Davis*, 426 U.S. 229, 241 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)) (“A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.”).

<sup>75</sup> *See id.* at 240 (“[T]he basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”).

<sup>76</sup> *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (citing *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)).

<sup>77</sup> *Washington v. Davis*, 426 U.S. at 238–39.

Second, classifications based on sex,<sup>78</sup> gender,<sup>79</sup> and children of unmarried parents<sup>80</sup> receive intermediate scrutiny, whereby the means of classification must be “substantially related” to an “important” government interest to survive this review.<sup>81</sup> Finally, all other classifications—such as those based on age,<sup>82</sup> disability,<sup>83</sup> wealth,<sup>84</sup> and non-marital families<sup>85</sup>—are subject to rational basis review, whereby the law at issue must be “rationally related to [a] legitimate government” interest.<sup>86</sup> The amount of deference a court will afford to the government depends on which standard of judicial scrutiny is proper to the classification at issue. For example, rational basis review affords the most deference to the government actor, tolerating “imperfect fit[s] between means and ends”<sup>87</sup> and substantial over- and under-inclusiveness of the law at issue.<sup>88</sup>

## 2. *Establishment Clause*

The Establishment Clause of the First Amendment to the Constitution declares that “Congress shall make no law respecting an establishment of religion.”<sup>89</sup> Although the First Amendment does not include a “textual definition of ‘establishment,’ and the term is . . . not self-defining,”<sup>90</sup> the Supreme Court has understood the clause to prohibit the government from officially preferring one religion over another.<sup>91</sup> In *Lemon v. Kurtzman*, the Court established three

<sup>78</sup> See *United States v. Virginia*, 518 U.S. 515, 519 (1996).

<sup>79</sup> See *Craig v. Boren*, 429 U.S. 190, 192 (1976).

<sup>80</sup> See *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (per curiam) (applying intermediate scrutiny to a statute of limitations for paternity actions).

<sup>81</sup> *Boren*, 429 U.S. at 197.

<sup>82</sup> See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (holding that a Massachusetts statute requiring mandatory retirement of state police at age fifty was “rationally related to furthering a legitimate state interest”).

<sup>83</sup> See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (“To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.”), *superseded by statute*, Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

<sup>84</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (concluding that a school finance system based on local property tax collection did not disadvantage a suspect class).

<sup>85</sup> See *USDA v. Moreno*, 413 U.S. 528, 538 (1973) (holding the “unrelated person” provision of the Food Stamp Act of 1964 failed rational basis review).

<sup>86</sup> *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

<sup>87</sup> *Heller v. Doe*, 509 U.S. 312, 321 (1993).

<sup>88</sup> See *Vance v. Bradley*, 440 U.S. 93, 108 (1979). The Constitution also provides for equal protection in the Fifth Amendment, whereby discriminatory legislation by Congress may amount to a denial of due process. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law[.]”); *Detroit Bank v. United States*, 317 U.S. 329, 337–38 (1943).

<sup>89</sup> U.S. CONST. amend. I, cl. 1.

<sup>90</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 874–75 (2005).

<sup>91</sup> *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is

“tests” or “cumulative criteria” that a statute must satisfy to avoid a violation of this Clause.<sup>92</sup> The Court enumerated, “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>93</sup> In this test, “purpose matters”: “[m]anifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the ‘understanding . . . that liberty and social stability demand a religious tolerance that respects the religious views of all citizens[.]’”<sup>94</sup>

Consequently, the overarching theme of the analysis of the Establishment Clause—and of the First Amendment as a whole—is the principle of government neutrality.<sup>95</sup> A government act that has the “ostensible and predominant purpose of advancing religion” thus violates the Establishment Clause and its principle of neutrality.<sup>96</sup> The government must adhere to the neutrality principle and cannot pass a law with the purpose of preferring one religion over another. The *Lemon* test provides courts with guidance for evaluating an Establishment Clause challenge.

### 3. *Administrative Procedure Act*

In addition to the constitutional issues revolving around the Equal Protection Clause and the Establishment Clause, immigration cases often involve issues of administrative law. Administrative law is common in these cases because much of immigration rulemaking and guidance comes from the Department of Homeland Security (DHS) and its promulgation of regulatory actions.<sup>97</sup> DHS also houses numerous other agencies in charge of other aspects of immigration in the United States, including enforcement and admission.<sup>98</sup>

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that one religious denomination cannot be officially preferred over another.”).

<sup>92</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>93</sup> *Id.* at 612–13 (citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

<sup>94</sup> *McCreary County*, 545 U.S. at 860, 866 n.14 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting)).

<sup>95</sup> *Id.* (citation omitted) (“When the government acts with the ostensible and predominant purpose of advancing 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.”).

<sup>96</sup> *Id.*

<sup>97</sup> See *DHS Rulemaking*, DEP’T OF HOMELAND SEC. (Mar. 4, 2019), <https://www.dhs.gov/dhs-rulemaking>.

<sup>98</sup> Agencies housed in DHS include U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and the Transportation Security Administration (TSA). *Id.* The agencies in charge of administering deportation and other immigration court proceedings are housed in the Department of Justice and include the Executive Office for Immigration Review (EOIR) and the Board of Immigration Appeals (BIA). *About the Office*, U.S. DEP’T OF JUST., <https://www>.

The Administrative Procedure Act (APA) provides the procedural framework for agency decision-making.<sup>99</sup> The APA allows for formal and informal notice and comment rulemaking<sup>100</sup> and formal adjudication.<sup>101</sup> Under notice and comment rulemaking, DHS must provide advanced notice in the Federal Register of the proposed rule’s legal authority and either the terms or substance of the rule or a description of the issues involved.<sup>102</sup> The agency must also allow interested parties an opportunity to comment and must engage in “meaningful review”<sup>103</sup> to respond to and address material comments.<sup>104</sup> Finally, the agency incorporates in the final rule “a concise general statement of [the rule’s] basis and purpose.”<sup>105</sup> While rulemaking is proper for future-oriented rules that could affect many people, adjudication is the proper process for past-oriented rulemaking that affects a specific entity or incident.<sup>106</sup> The rules that DHS promulgates in accordance with the APA are binding and have the force of law.<sup>107</sup>

When courts review an agency’s final action that was expressly delegated by Congress, the standard of review is arbitrary or capricious.<sup>108</sup> The APA instructs courts to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>109</sup> Under this standard, the agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>110</sup> Even if the government actor acted within the scope of his authority,

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justice.gov/eoir/about-office (last updated Feb. 3, 2021); *Board of Immigration Appeals*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Aug. 31, 2021).

<sup>99</sup> Administrative Procedure Act of 1946, 5 U.S.C. §§ 550–596.

<sup>100</sup> § 553.

<sup>101</sup> §§ 556–557.

<sup>102</sup> § 553(b).

<sup>103</sup> *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977).

<sup>104</sup> § 553(c).

<sup>105</sup> *Id.*

<sup>106</sup> § 551(5), (7).

<sup>107</sup> *See Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (declaring that agency regulations, when filling a gap left open by Congress implicitly or explicitly for the agency to fill, “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute”); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”).

<sup>108</sup> § 706(2)(A).

<sup>109</sup> *Id.*

<sup>110</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

the reviewing court must still determine whether there has been a “clear error of judgment.”<sup>111</sup> The Supreme Court has elaborated on the review process, explaining the following:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>112</sup>

However, in examining these factors, a court should not overstep its role as a reviewing court and substitute its judgment for the agency.<sup>113</sup> For example, a reviewing court should not offer a reasoned basis for the agency’s action if the agency itself did not give such a reason.<sup>114</sup> Therefore, a reviewing court still affords some deference to the agency in making its determination under the arbitrary or capricious standard.<sup>115</sup>

The APA’s procedures for agency rulemaking and guidance for reviewing courts in examining agency action apply in the immigration context to DHS actions of notice and comment rulemaking and review of its actions.<sup>116</sup> In addition to the constitutional issues covered in the preceding section, plaintiffs, when challenging a new rule or published policy, can allege that a DHS rulemaking action was arbitrary or capricious in violation of the APA.<sup>117</sup> Although different standards apply for a reviewing court that examines an agency’s action under either the Constitution or the APA, both occur frequently in the immigration context.<sup>118</sup>

## II. HOW COURTS EXAMINE EVIDENCE OF ANIMUS AND BIAS

The animus doctrine<sup>119</sup> in Equal Protection cases is well established through case law concerning classifications of race and nationality, which receive strict

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<sup>111</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>112</sup> *State Farm*, 463 U.S. at 43.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (“[The Court] will, however, ‘uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.’”).

<sup>116</sup> *See DHS Rulemaking*, *supra* note 97.

<sup>117</sup> *See Administrative Procedure Act of 1946*, 5 U.S.C. § 706(2)(A).

<sup>118</sup> *See, e.g., DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>119</sup> *See generally* WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* (2017)

scrutiny.<sup>120</sup> Recently, however, instances of explicit bias by high-ranking government officials, such as former President Trump, present courts with challenges in how much weight and determinative effect to give such evidence.<sup>121</sup> A review of the animus doctrine, evidence law, and historical cases where the adjudicating courts considered extrinsic evidence of bias or other motives suggests that new guidelines are necessary to maintain consistency across courts and throughout history.

### A. *Bias and Animus*

Under rational basis review for potential Equal Protection violations, the animus doctrine provides for an additional inquiry. The animus doctrine comes into play in the first step of rational basis review when courts ask whether the law at issue is addressing a legitimate government interest.<sup>122</sup> When the predominant motivation of government action is animus towards a certain group, courts hold that such a purpose is not a legitimate government interest.<sup>123</sup> Indeed, the Supreme Court has noted that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>124</sup> Consequently, in this context “animus” means just that—“a bare desire . . . to harm a politically unpopular group.”<sup>125</sup> Once animus is shown, unless the government can provide another, independent purpose not based in animus, it is very difficult for the government to prevail.<sup>126</sup> Although courts generally afford a large amount of deference to the government actors in rational basis review, cases falling under the animus doctrine are not given such deference if the only purpose for the government action was animus or bias towards the affected group. Because courts evaluate government actions differently when they are motivated by animus, scholars have given this type of

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(explaining that when the government acts on the basis of animus or bias, its act is categorically unconstitutional and impermissible).

<sup>120</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

<sup>121</sup> See, e.g., *DHS v. Regents*, 140 S. Ct. 1891; *Trump v. Hawaii*, 138 S. Ct. 2392.

<sup>122</sup> See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985).

<sup>123</sup> See *id.* at 450 (holding that a Texas zoning ordinance violated the Equal Protection Clause because it “rest[ed] on an irrational prejudice against the mentally retarded”); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (holding that a Colorado law prohibiting homosexuals from obtaining protection lacked a legitimate government interest); *USDA v. Moreno*, 413 U.S. 528, 534–35 (1973) (holding that a federal food stamp program’s purpose to discriminate against hippies and hippie communes was not a legitimate government interest).

<sup>124</sup> *Moreno*, 413 U.S. at 534.

<sup>125</sup> *Id.*

<sup>126</sup> See *Romer*, 517 U.S. at 632 (striking down a law that was “inexplicable by anything but animus toward the class it affect[ed]”); *Moreno*, 413 U.S. at 535.

review numerous other names, including “rational basis with bite,”<sup>127</sup> “rational basis with teeth,”<sup>128</sup> and “rational basis plus.”<sup>129</sup>

One issue that remains largely unresolved in cases involving the animus doctrine is how courts should treat implicit biases compared to explicit biases.<sup>130</sup> The Supreme Court has stated that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”<sup>131</sup> Although private, hidden, or implicit biases may be difficult to detect, courts will consider such biases in conducting rational basis with bite review.<sup>132</sup> However, some scholars argue that the animus doctrine has failed to properly detect or deal with all types of bias. Jessica Clarke, a professor at Vanderbilt Law School, has examined how courts have modified discrimination doctrines to ignore incidents of explicit bias.<sup>133</sup> In her article *Explicit Bias*, Clarke argues that “[d]octrines that would shield evidence of explicit bias from consideration in discrimination cases should be rejected.”<sup>134</sup> She defines the term “explicit bias” to have a broader meaning than animus and to mean “what a reasonable listener could consider to be views about the attributes of a particular group.”<sup>135</sup>

In her article, Clarke cites examples of when courts disregard evidence of discriminatory purposes. These include when the contested laws are facially neutral,<sup>136</sup> when government officials intended the enacted law to achieve other nondiscriminatory ends, such as national security, controlling crime, or winning elections;<sup>137</sup> when judges express concern for the parties accused of discrimination;<sup>138</sup> and in the stray remarks doctrine in employment law.<sup>139</sup>

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<sup>127</sup> E.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 536 (1997); Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759 (2011).

<sup>128</sup> E.g., Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 540 (2014); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 488 n.5 (1998).

<sup>129</sup> E.g., Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 135 n.5 (2011).

<sup>130</sup> See Jessica A. Clarke, *Explicit Bias*, 113 NW. U.L. REV. 505, 509 (2018).

<sup>131</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

<sup>132</sup> See, e.g., *id.* (striking down a zoning ordinance as applied to a disabled home because property owners’ animus toward the disabled is not a permissible basis for different treatment).

<sup>133</sup> Clarke, *supra* note 130, at 510.

<sup>134</sup> *Id.* at 507.

<sup>135</sup> *Id.* at 513–14.

<sup>136</sup> *Id.* at 523.

<sup>137</sup> See *id.*

<sup>138</sup> *Id.* at 539.

<sup>139</sup> *Id.* at 542–47 (“[T]he stray remarks doctrine enables courts to altogether exclude explicit bias from consideration in employment discrimination cases.”).

Clarke argues that in these instances, courts often ignore examples of explicit bias unless such bias manifests so clearly as “naked animus”<sup>140</sup> that it cannot be ignored. She juxtaposes two Equal Protection cases that reached the Supreme Court—*Palmer v. Thompson*<sup>141</sup> and *Trump v. Hawaii*<sup>142</sup>—to exemplify how courts’ failure to consider evidence of explicit bias arising from facially neutral laws “eviscerate[s] the potential for [sic] equal protection doctrine to protect minorities.”<sup>143</sup>

Clarke maintains that legal scholarship’s and courts’ failure to consider evidence of explicit bias has dangerous consequences.<sup>144</sup> She asserts that “[t]he legitimization of explicitly biased attitudes may therefore increase the prevalence of discrimination and further entrench inequality.”<sup>145</sup> Through this legitimization process, doctrines that shield consideration of such explicit biases, in the context of Equal Protection and in other contexts, cause discriminatory beliefs to become “self-fulfilling prophecies.”<sup>146</sup> Finally, Clarke also rebuts four counterarguments against considering such evidence, arguing instead that (1) “[u]nofficial remarks may be . . . reliable evidence,” (2) courts should recognize bias rather than turning a “blind eye” out of fear of judicial overreach, (3) “the threat to free expression” posed by her approach must be balanced against the “interest[] in enforcing equality law,” and (4) “[t]he risk of backlash should also be assessed against the harms of condoning explicit bias.”<sup>147</sup>

Clarke’s article illustrates the shortcomings of courts’ hesitance to consider evidence of explicit bias and warns against the broader policy and social implications of continued judicial ignorance of such evidence.<sup>148</sup> While Clarke examined cases concerning Equal Protection, employment law, and other issues, legal scholars have examined the animus doctrine in other specific contexts. For example, in a recent article, Megan Mallamas reviewed the tension between the animus doctrine and the judicial deference afforded to the executive branch’s actions in *Trump v. Hawaii*.<sup>149</sup> Mallamas suggested that the Supreme Court in

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<sup>140</sup> *Id.* at 539.

<sup>141</sup> 403 U.S. 217 (1971).

<sup>142</sup> 138 S. Ct. 2392 (2018).

<sup>143</sup> Clarke, *supra* note 130, at 530.

<sup>144</sup> *Id.* at 516 (“When discrimination is explicit, it has material and expressive harms that are intertwined.”).

<sup>145</sup> *Id.* at 522–23.

<sup>146</sup> *Id.* at 523.

<sup>147</sup> *Id.* at 511–12.

<sup>148</sup> *Id.* at 510 (“These cases deserve attention not only because they deny justice to individual victims of discrimination but also because the failure to confront explicit forms of discrimination may normalize prejudice.”).

<sup>149</sup> Megan L. Mallamas, *American Animus: Where Trump v. Hawaii Leaves the Animus Doctrine Today*, 42 CAMPBELL L. REV. 139 (2020).

*Trump v. Hawaii* inconsistently followed the precedent of *City of Cleburne v. Cleburne Living Center* because “[i]f a law that discriminated against a small group as a result of unsubstantiated fear for the community’s safety is found to be animus, a law that discriminates against religion based on unsubstantiated fear [in *Trump v. Hawaii*] should also be struck down for animus.”<sup>150</sup> Other researchers have similarly exposed incongruencies in how courts employ the animus doctrine and to what degree they consider animus in making their decisions.<sup>151</sup>

Although the animus doctrine has been established in Equal Protection cases concerning racial classifications, the doctrine is being inconsistently applied as courts struggle to balance the principles of equality law with issues such as national security, deference to the executive, and the identity of the person making the biased statements.<sup>152</sup> Public officials’ explicit statements of bias and hate were perhaps rare historically,<sup>153</sup> but they are becoming more common.<sup>154</sup> As will be shown below, a new approach for dealing with these issues is necessary—particularly in the immigration law context where issues of national security are frequently invoked to curtail consideration of external evidence of bias.<sup>155</sup>

### *B. Evidence Law, Extrinsic Evidence, and the Administrative Record*

The issue of which evidence of animus or bias to consider is intimately related to the rules of evidence law concerning whether evidence is permitted for consideration by the trier of fact or dismissed as “extrinsic.” An examination of these rules suggests that current practices do not always secure a consistent or logical result.

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<sup>150</sup> *Id.* at 158–59.

<sup>151</sup> See Daniel Mach, *The Supreme Court Cares About Religious Animus—Except When It Doesn’t*, ACLU (June 26, 2018, 4:30 PM), <https://www.aclu.org/blog/immigrants-rights/supreme-court-cares-about-religious-animus-except-when-it-doesnt>.

<sup>152</sup> Compare *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723–24 (2017) (considering state commissioners’ statements of animus in a First Amendment challenge to a civil rights commission’s order holding a violation of state law), with *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (ignoring the President’s statements of animus in a First Amendment challenge to an immigration executive order).

<sup>153</sup> See *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) (“Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority.”).

<sup>154</sup> See, e.g., Sanam Malik, *When Public Figures Normalize Hate*, CTR. FOR AM. PROGRESS (Mar. 25, 2016, 9:01 AM), <https://www.americanprogress.org/issues/race/news/2016/03/25/134070/when-public-figures-normalize-hate/>; Kevin Quealy, *The Complete List of Trump’s Twitter Insults (2015–2021)*, N.Y. TIMES (Jan. 19, 2021), <https://www.nytimes.com/interactive/2021/01/19/upshot/trump-complete-insult-list.html>.

<sup>155</sup> See *infra* Part III.

The purpose of evidence law, as stated in the Federal Rules of Evidence, is “to administer every proceeding fairly” with the goal of “ascertaining the truth and securing a just determination.”<sup>156</sup> Out of concerns about practicality, efficiency, and integrity, only certain types of evidence are considered by courts.<sup>157</sup> For example, the rules of hearsay do not permit the admission of out-of-court statements if they are offered “to prove the truth of the matter asserted,” unless an exception applies.<sup>158</sup> Furthermore, the best evidence doctrine generally requires an original writing or recording to prove its contents instead of proof by testimonial description.<sup>159</sup> Evidence law is also concerned with avoiding certain biases of jurors used during trial.<sup>160</sup> These rules focus on admitting the most credible and reliable evidence to preserve the accuracy and integrity of judicial decisions.

The term “extrinsic evidence” refers to “all evidence relating to some fact or question that arises indirectly” and that “sheds light on a matter from a source other than the matter itself.”<sup>161</sup> Examples of extrinsic evidence include legislative history as evidence for legislation and parole evidence in contracts cases.<sup>162</sup> To understand written documents, extrinsic evidence may be used to prove a meaning if such a meaning is “reasonably susceptible.”<sup>163</sup> In other matters, extrinsic evidence is generally not considered for the same reasons of reliability and credibility.<sup>164</sup>

The rules of extrinsic evidence also apply in administrative law cases. When courts review agency conduct that takes the form of an adjudication, courts sometimes consider “outside statements” to disqualify such agency action.<sup>165</sup> However, when reviewing legislative history, courts generally do not consider extrinsic or “extra-textual evidence” if the text is clear.<sup>166</sup>

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<sup>156</sup> FED. R. EVID. 102.

<sup>157</sup> See FED. R. EVID. 801, 802, 1002.

<sup>158</sup> FED. R. EVID. 801, 802.

<sup>159</sup> FED. R. EVID. 1002 (“An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.”).

<sup>160</sup> See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (“[W]here a juror makes a clear statement [indicating reliance] on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way . . . to permit the trial court to consider the evidence of the juror’s statement.”).

<sup>161</sup> *Extrinsic Evidence*, WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

<sup>162</sup> *Id.*

<sup>163</sup> Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968).

<sup>164</sup> See FED. R. EVID. 608(b) (“[E]xtrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness.”).

<sup>165</sup> Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1365 (2019).

<sup>166</sup> Trump v. Hawaii, 138 S. Ct. 2392, 2412 (2018).

When referring to public statements of animus that undermine an immigration policy's constitutionality, different terminology should be used. The term "extrinsic evidence"—which categorizes the evidence as remote,<sup>167</sup> indirect,<sup>168</sup> and beyond consideration—does not capture the contemporaneous,<sup>169</sup> overt,<sup>170</sup> or public<sup>171</sup> nature of such statements. Furthermore, legal scholars have argued that when the President makes public statements, courts may appropriately rely on and consider those statements in certain situations.<sup>172</sup> As will be discussed below, courts *have* considered public statements by the President and by other high-ranking government officials.<sup>173</sup> Therefore, although this Comment uses the term "extrinsic evidence" out of convenience, the term does not adequately characterize the compelling, explicit statements of bias that courts often consider in determining impermissible animus in immigration cases.

### III. WHEN COURTS LOOKED BEYOND TO EXTRINSIC EVIDENCE

When courts apply the rules and doctrines related to extrinsic evidence and animus to cases at hand, the results vary considerably. Existing case law paints a conflicting picture of when courts consider or ignore extrinsic evidence in various constitutional and administrative contexts related to immigration. Not only is there variation in results among foundational cases from the twentieth century but, as will be shown below, the juxtaposition of foundational and Trump Administration cases suggests that courts struggle to consistently deal with evaluating extrinsic evidence in immigration cases. Consequently, courts would benefit from a new test to apply uniformly to determine whether to consider explicit statements of bias in immigration cases.

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<sup>167</sup> See *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (explaining extrinsic evidence of former President Trump's statements as "remote in time and made in unrelated contexts").

<sup>168</sup> Sheppard, *supra* note 161.

<sup>169</sup> See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

<sup>170</sup> See *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 278 (E.D.N.Y. 2018), *rev'd*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (describing such evidence as "overt expressions of prejudice").

<sup>171</sup> See Clarke, *supra* note 130, at 553.

<sup>172</sup> See generally Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017) (arguing that judicial reliance on presidential speech is appropriate when such speech clearly manifests an intent to enter the legal sphere and in cases concerning national security); Shawn E. Fields, *Is It Bad Law to Believe a Politician? Campaign Speech and Discriminatory Intent*, 52 U. RICH. L. REV. 273 (2018) (proposing a flexible and fact-specific approach to determining when courts should consider campaign statements in discerning discriminatory intent); Michael Coenen, *Campaign Communications and the Problem of Government Motive*, 21 U. PA. J. CONST. L. 333, 337–38 (2018) (suggesting an "inclusionary approach" that would consider campaign communications in judicial determinations of illicit motivations).

<sup>173</sup> See *infra* Part III.

### A. Foundational Cases

In three foundational immigration cases—*Kleindienst v. Mandel*,<sup>174</sup> *Fiallo v. Bell*,<sup>175</sup> and *Kerry v. Din*<sup>176</sup>—the Supreme Court discussed the importance of judicial deference toward the executive and legislative branches’ exercise of their immigration power in decisions to admit foreign nationals into the United States. The Court in these three immigration admission cases elaborated on the “facially legitimate and bona fide” requirement, whereby further judicial inquiry into constitutional issues and extrinsic evidence was not necessary if the statute or decision at issue was legitimate on its face.<sup>177</sup>

In *Kleindienst v. Mandel*, a Marxist professional journalist from Belgium applied for a nonimmigrant visa to enter the United States to participate in an academic conference, but the Department of State denied his application and found him inadmissible under 8 U.S.C. § 212(a)(28).<sup>178</sup> Six U.S. citizens filed suit arguing the denial deprived them of their First and Fifth Amendment rights to hear and meet with the journalist at the conference.<sup>179</sup> They argued that the application of the statute was “arbitrary and capricious” and that denying “leftist” scholars but admitting “rightist” scholars denied them equal protection.<sup>180</sup> The Court rejected their claims and instead held the following:

[W]hen the Executive [Branch] exercises this power [to exclude an alien] 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 First Amendment interests of those who seek personal communication with the applicant.<sup>181</sup>

In reaching its decision, the Court repeatedly cited judicial deference to the political branches in matters of admission of foreign nationals and national security.<sup>182</sup> The Court noted that “the power to exclude aliens is inherent in sovereignty, necessary for . . . defending the country against foreign encroachment and dangers.”<sup>183</sup> Furthermore, the Court concluded that the “plenary congressional power” to exclude foreign nationals was “firmly

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<sup>174</sup> 408 U.S. 753 (1972).

<sup>175</sup> 430 U.S. 787 (1977).

<sup>176</sup> 576 U.S. 86 (2015).

<sup>177</sup> *Mandel*, 408 U.S. at 770; see *Fiallo*, 430 U.S. at 794–95; *Din*, 576 U.S. at 103–04 (Kennedy, J., concurring).

<sup>178</sup> *Mandel*, 408 U.S. at 756–59.

<sup>179</sup> *Id.* at 759–60.

<sup>180</sup> *Id.* at 760.

<sup>181</sup> *Id.* at 770.

<sup>182</sup> *Id.* at 764–70.

<sup>183</sup> *Id.* at 765 (citations and internal quotation marks omitted).

established” as a power of the executive.<sup>184</sup> As a result of the interest in sovereignty and judicial deference to the political branches, the Court reversed the decision and ruled against the U.S. citizens’ constitutional claims.<sup>185</sup> However, in his dissent, Justice Thurgood Marshall criticized the Court’s “facially legitimate” standard as “unusual” and lacking any precedent or justification.<sup>186</sup>

A few years later, the Supreme Court heard another case concerning the admission of foreign nationals into the United States: *Fiallo v. Bell*.<sup>187</sup> Three sets of unwed natural fathers and their children born out of wedlock filed suit, arguing that the statutory definitions of “child” and “parent” in the INA of 1952 were unconstitutional violations of the First, Fifth, and Ninth Amendments.<sup>188</sup> The INA of 1952 granted special preference immigration status to the children and parents of U.S. citizens or lawful permanent residents, but the statute only included preference to the children born out of wedlock seeking admission through their natural mothers, not through their natural fathers.<sup>189</sup> Thus, the fathers and children argued that the statute denied them equal protection because it discriminated against them “on the basis of the father’s marital status, the illegitimacy of the child and the sex of the parent.”<sup>190</sup> The Court again followed a “limited scope of judicial inquiry into immigration legislation”<sup>191</sup> and left the “policy question” of the statute’s distinctions for the political branches.<sup>192</sup> The Court ruled in favor of the government, holding that “the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”<sup>193</sup> Following its holding from *Mandel*, the Court did not consider the “double-barreled discrimination” in this case because the sovereign power to admit or exclude foreign nationals was a “legitimate and bona fide reason” requiring no further investigation.<sup>194</sup>

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<sup>184</sup> *Id.* at 769–70.

<sup>185</sup> *Id.* at 770.

<sup>186</sup> *Id.* at 777–78 (Marshall, J., dissenting) (“Merely ‘legitimate’ governmental interests cannot override constitutional rights. Moreover, the majority demands only ‘facial’ legitimacy and good faith, by which it means that this Court will never ‘look behind’ any reason the Attorney General gives. No citation is given for this kind of unprecedented deference to the Executive.”).

<sup>187</sup> *Fiallo v. Bell*, 430 U.S. 787 (1977).

<sup>188</sup> *Id.* at 790–91; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1101(b)(1)(D), (2) (2020)).

<sup>189</sup> *Fiallo*, 430 U.S. at 788–89.

<sup>190</sup> *Id.* at 791.

<sup>191</sup> *Id.* at 792.

<sup>192</sup> *Id.* at 798.

<sup>193</sup> *Id.* at 792 (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

<sup>194</sup> *Id.* at 794–95 (internal quotation marks omitted).

In the more recent case of *Kerry v. Din*, the Supreme Court revisited the “facially legitimate and bona fide reason” requirement.<sup>195</sup> A naturalized citizen and resident of the United States alleged that the government had violated due process by denying her husband’s visa application without providing an adequate explanation.<sup>196</sup> The Court followed *Fiallo v. Bell* and did not interfere with immigration “policy questions” best left for Congress.<sup>197</sup> In his concurrence, Justice Kennedy concluded that, particularly in the area of national security, courts should defer to the executive branch’s “substantial discretion” to exclude foreign nationals.<sup>198</sup> The only way a court would “look behind” the challenged action would be if the plaintiff made an “affirmative showing of bad faith” that was “plausibly alleged with sufficient particularity.”<sup>199</sup>

These three cases constitute one precedent whereby the Supreme Court does not look beyond a facially legitimate reason for admitting or excluding foreign nationals and instead defers to national security. However, as discussed below, the Court has established another competing line of precedent.

### *B. Cases in Which the Supreme Court Looked Beyond*

Although the Supreme Court in these three foundational cases adhered to the “facially legitimate and bona fide” requirement when presented with a challenged decision to exclude a foreign national, in other cases the Court *has* looked beyond the challenged decision to consider constitutional challenges and extrinsic evidence. These other decisions represent compelling precedent and guidance for courts to consider additional evidence of bias or other motives in certain immigration cases concerning admission, exclusion, and national security.

One early example where the Court went beyond the face of the decision and considered extrinsic evidence of biased statements was the case *United States ex rel. Accardi v. Shaughnessy*.<sup>200</sup> In *Shaughnessy*, a foreign national applied for habeas corpus after the Board of Immigration Appeals (BIA) denied his

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<sup>195</sup> *Kerry v. Din*, 576 U.S. 86 (2015).

<sup>196</sup> *Id.* at 88.

<sup>197</sup> *Id.* at 97 (quoting *Fiallo*, 430 U.S. at 798).

<sup>198</sup> *Id.* at 104 (Kennedy, J., concurring). The plurality also concluded that the United States citizen did not have a protected liberty interest in her marriage that entitled her to seek judicial review of a consular officer’s denial of her husband’s visa application. *Id.* at 93–97 (plurality opinion).

<sup>199</sup> *Id.* at 105 (Kennedy, J., concurring).

<sup>200</sup> 347 U.S. 260 (1954), *superseded by statute*, Immigration and Nationality Act, § 106, 8 U.S.C. § 1105(a) (1961), *as recognized in* *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998) (the statute changed the method of judicial review of deportation orders from habeas corpus to declaratory judgment actions).

application for suspension of his deportation order.<sup>201</sup> The foreign national claimed that prior to the BIA's decision, the Attorney General had announced at a press conference that he intended to deport certain "unsavory characters" included on a confidential list of 100 individuals' names, including the foreign national's name.<sup>202</sup> The foreign national argued that the circulation of the list at the BIA and the Department of Justice made the BIA's "fair consideration" of his case impossible.<sup>203</sup> The Court held that the BIA failed to exercise its discretion because the Attorney General was "dictating the [BIA's] decision" in violation of the existing regulations requiring due process.<sup>204</sup> Therefore, the foreign national was entitled to a hearing to try to prove his allegations,<sup>205</sup> against the dissent's proposal for judicial deference to the Attorney General.<sup>206</sup> Although the Court in *Shaughnessy* looked beyond at the Attorney General's public statements at the press conference, the Court did not elaborate on how courts should determine whether to consider certain extrinsic evidence in administrative cases.<sup>207</sup> Other courts have similarly considered the Attorney General's statements as extrinsic evidence.<sup>208</sup>

Two decades later, the Supreme Court filled in the gap by articulating non-exhaustive factors that courts should consider when going beyond and assessing discriminatory purpose in Fourteenth Amendment cases.<sup>209</sup> In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, a nonprofit development corporation challenged a village's denial of its request for rezoning from a single- to multiple-family classification, arguing that the denial was racially discriminatory and violated the Fourteenth Amendment.<sup>210</sup> To have an equal protection violation, proof of racially discriminatory intent or purpose is required because discriminatory impact alone is not determinative.<sup>211</sup> The discriminatory purpose does not need to be the "dominant" or "primary"

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<sup>201</sup> *Id.* at 261–62.

<sup>202</sup> *Id.* at 264.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 267–68.

<sup>205</sup> *Id.* at 268.

<sup>206</sup> *Id.* at 269, 271 (Jackson, J., dissenting) ("Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. . . . We would affirm and leave the responsibility for suspension or execution of this deportation squarely on the Attorney General, where Congress has put it.").

<sup>207</sup> *Id.* at 268.

<sup>208</sup> See *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (2017) (considering statements by the President and the Attorney General to grant a motion for a nationwide injunction of an executive order's threat to remove federal funding from sanctuary cities).

<sup>209</sup> *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

<sup>210</sup> *Id.* at 254.

<sup>211</sup> *Id.* at 266 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

purpose of the action, but the discriminatory intent must be at least a “motivating factor” for courts to leave behind their judicial deference.<sup>212</sup> To evaluate whether a defendant acted with discriminatory purpose, the Court proposed four non-exhaustive factors that courts should consider.<sup>213</sup> These factors included (1) the decision’s historical background, “particularly if it reveals a series of official actions taken for invidious purposes”;<sup>214</sup> (2) “[t]he specific sequence of events leading up to the challenged decision”;<sup>215</sup> (3) the defendant’s “[d]epartures from the normal procedural sequence”;<sup>216</sup> and (4) the “legislative or administrative history,” with particular focus on “contemporary statements by members of the decisionmaking body” such as meeting minutes or reports.<sup>217</sup> When applying these factors, the Court concluded that although the decision had a discriminatory impact, a discriminatory purpose was not proven because the official meeting minutes focused “almost exclusively” on the zoning aspects of the request, not racial concerns.<sup>218</sup> Although the Court in *Arlington Heights* proposed the factors for a Fourteenth Amendment case concerning rezoning, the Court has later used the same factors in other First Amendment cases<sup>219</sup> and in immigration-related cases concerning the Fifth Amendment.<sup>220</sup>

In *Lemon v. Kurtzman*,<sup>221</sup> the Supreme Court proposed a separate test for when to look beyond at additional external evidence in First Amendment cases. In this case, taxpayers challenged two state statutes that provided state financial support to nonpublic, church-related elementary and secondary schools and their teachers, arguing that the statutes violated the Establishment Clause.<sup>222</sup> To reach its conclusion, the Court summarized the “cumulative criteria” of existing case law precedent and articulated a three-step test for when the court may look beyond the face of the challenged law or action.<sup>223</sup> First, the government must show that the challenged action has a “secular legislative purpose”<sup>224</sup> that is

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<sup>212</sup> *Id.* at 265–66.

<sup>213</sup> *Id.* at 266–68.

<sup>214</sup> *Id.* at 267.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 268.

<sup>218</sup> *Id.* at 269–71.

<sup>219</sup> *See, e.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993) (applying the *Arlington Heights* factors to a free exercise of religion case).

<sup>220</sup> *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (mentioning the *Arlington Heights* factors before dismissing an equal protection challenge to the rescission of the DACA program).

<sup>221</sup> 403 U.S. 602 (1971).

<sup>222</sup> *Id.* at 606–07.

<sup>223</sup> *Id.* at 612.

<sup>224</sup> *Id.*

“genuine, not a sham, and not merely secondary to a religious objective.”<sup>225</sup> Second, the challenged action’s “principal or primary effect must be one that neither advances nor inhibits religion.”<sup>226</sup> Third, the challenged action must not foster “an excessive government entanglement with religion.”<sup>227</sup> Employing these factors, the Court held the statutes were unconstitutional violations of the First Amendment.<sup>228</sup> The Court reasoned that although the statutes clearly stated their intent “to enhance the quality of . . . secular education,”<sup>229</sup> the cumulative impact of the statutes involved excessive entanglement between government and religion.<sup>230</sup> The test’s analysis of intent and impact parallels the doctrine of discriminatory purpose and effect from Fourteenth Amendment jurisprudence.<sup>231</sup> Lower courts have employed this test in more recent cases concerning the Establishment Clause in the realm of immigration law.<sup>232</sup>

In addition to these earlier cases elaborating various tests of how and when courts should look beyond the face of a challenged law or action to consider further evidence or external statements, the Supreme Court has, on numerous more recent occasions, considered external statements to determine constitutional violations.<sup>233</sup> One of the most relevant examples of this was in the 2017 case *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.<sup>234</sup> In this case, the Court was presented with a First Amendment challenge on the basis of freedom of speech and free exercise of religion.<sup>235</sup> After a bakery owner refused to create a wedding cake for a same-sex couple due to his religious beliefs, the Colorado Civil Rights Commission found probable cause in the couple’s anti-discrimination claim and referred the case for a formal hearing by an administrative law judge who “ruled in the couple’s favor.”<sup>236</sup> The Commission and the Colorado Court of Appeals affirmed the administrative law judge’s decision.<sup>237</sup> On petition, the Court held that the Commission violated the

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<sup>225</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 864 (2005).

<sup>226</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

<sup>227</sup> *Id.* at 613 (quoting *Walz v. Tax. Comm’n of N.Y.*, 397 U.S. 664, 674 (1970)).

<sup>228</sup> *Id.* at 661 (White, J., concurring).

<sup>229</sup> *Id.* at 613 (majority).

<sup>230</sup> *Id.* at 614.

<sup>231</sup> *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

<sup>232</sup> *See, e.g., Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *vacated*, *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017).

<sup>233</sup> *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019).

<sup>234</sup> 138 S. Ct. 1719.

<sup>235</sup> *Id.* at 1723.

<sup>236</sup> *Id.* at 1724–26.

<sup>237</sup> *Id.* at 1726–27.

bakery owner's First Amendment right to freedom of expression of religion because the Commission displayed a "clear and impermissible hostility"<sup>238</sup> to his religious beliefs, thus violating the state's duty to not base laws on such hostility towards religion.<sup>239</sup>

In evaluating religious neutrality to reach its decision in *Masterpiece Cakeshop*, the Supreme Court considered public, recorded statements made by commissioners during the formal, public hearings.<sup>240</sup> The Court discussed how some commissioners made "inappropriate and dismissive comments" that the bakery owner's religious beliefs were not fully welcome in the business community.<sup>241</sup> The Court quoted some of the commissioners' comments in full in the body of the opinion<sup>242</sup> and emphasized that none of the other commissioners made any objection to those comments and none of the subsequently filed briefs "disavowed" the comments.<sup>243</sup> Consequently, the Court reasoned that the statements "cast doubt on the fairness and impartiality of the Commission's adjudication of [the] case"<sup>244</sup> and thus indicated that the Commission violated its duty to remain not hostile to religion.<sup>245</sup> However, in her dissent, Justice Ruth Bader Ginsburg disagreed with the weight the Court gave to the commissioners' statements.<sup>246</sup> She asserted that the majority's analysis did not evidence hostility to a degree warranting a free exercise violation, "nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below."<sup>247</sup>

Another recent case where the Supreme Court considered public statements is *Cooper v. Harris*.<sup>248</sup> Voters argued that North Carolina's redrawing of two congressional districts after conducting the 2010 census constituted

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<sup>238</sup> *Id.* at 1729.

<sup>239</sup> *Id.* at 1731.

<sup>240</sup> *Id.* at 1729–30. Although the Court mentioned that some courts disagree whether to consider statements made by lawmakers, the Court reasoned that these comments were made in adjudicatory hearings and thus could be considered. *Id.* at 1730.

<sup>241</sup> *Id.* at 1729 ("One commissioner suggested that [the bakery owner] can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'").

<sup>242</sup> *Id.* ("Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust[.] . . . we can list hundreds of situations where freedom of religion has been used to justify discrimination.") (internal quotation marks omitted).

<sup>243</sup> *Id.* at 1729–30.

<sup>244</sup> *Id.* at 1730.

<sup>245</sup> *Id.* at 1731.

<sup>246</sup> *Id.* at 1749, 1751 (Ginsburg, J., dissenting).

<sup>247</sup> *Id.* at 1749.

<sup>248</sup> 137 S. Ct. 1455 (2017).

“impermissible racial gerrymander[ing]” and an Equal Protection violation.<sup>249</sup> In holding that “racial considerations predominated” the redistricting effort,<sup>250</sup> the Court considered “[u]ncontested evidence in the record” of the comments of the legislators in charge of the redistricting.<sup>251</sup> The Court noted that the Senator and Representative who led the redistricting effort “were not coy in expressing” this impermissible goal.<sup>252</sup> They made public statements at a Senate debate, to redistricting committees, and to their consultant that the new district needed to have a majority black voting age population.<sup>253</sup> In light of “this body of evidence,”<sup>254</sup> the Court concluded that the redistricting effort violated the Fourteenth Amendment.<sup>255</sup> However, like the dissent in *Masterpiece Cakeshop*,<sup>256</sup> the dissent in *Cooper v. Harris* criticized the majority for “focus[ing] almost all its attention on a few references” of bias and for “read[ing] far too much into these references.”<sup>257</sup>

In a third recent case, *Department of Commerce v. New York*,<sup>258</sup> the Supreme Court again considered extrinsic evidence of statements of bias. In this case, the Court considered potential violations of the Enumeration Clause, APA requirements, and the Equal Protection Clause in the decision to reinstate a citizenship question in the 2020 census.<sup>259</sup> The Secretary of Commerce announced the decision in a memo at the request of the Department of Justice.<sup>260</sup> Although the memo invoked the need to enforce the Voting Rights Act as the reason for adding the citizenship question,<sup>261</sup> the Court used “extra-record discovery” to determine that the Secretary intended to reinstate the question since he entered office and only assumed the Voting Rights rationale “late in the process.”<sup>262</sup> Such an “extra-record discovery” may be warranted on “a strong showing of bad faith or improper behavior.”<sup>263</sup>

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<sup>249</sup> *Id.* at 1465–66.

<sup>250</sup> *Id.* at 1482.

<sup>251</sup> *Id.* at 1468.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 1468–69.

<sup>254</sup> *Id.* at 1460.

<sup>255</sup> *Id.* at 1482.

<sup>256</sup> *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1748–52 (2018) (Ginsburg, J., dissenting).

<sup>257</sup> *Cooper*, 137 S. Ct. at 1497 (Alito, J., dissenting).

<sup>258</sup> 139 S. Ct. 2551 (2019).

<sup>259</sup> *Id.* at 2562.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 2574.

<sup>263</sup> *Id.* at 2573–74 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

Although the Supreme Court noted that the additional evidence in the case should have been part of the administrative record, the Court clarified that such “extra-record discovery” should be ordered only after the government produces the administrative record.<sup>264</sup> Consequently, the Court concluded that “[o]ur review is deferential, but we are ‘not required to exhibit a naiveté from which ordinary citizens are free.’”<sup>265</sup> However, Justice Clarence Thomas disagreed, arguing instead that the majority “engage[d] in an unauthorized inquiry into evidence not properly before us”<sup>266</sup> and consequently “reflect[ed] an unprecedented departure from our deferential review of discretionary agency decisions.”<sup>267</sup>

When taken together, all these cases—older cases concerning admission of foreign nationals and more recent cases on immigration and other issues—exemplify how the Supreme Court’s consideration of extrinsic evidence of bias is not unprecedented. Instead, judicial consideration of statements of bias is well-established and has occurred frequently over the past fifty years. The existing case law suggests that it is feasible for courts to consider extrinsic evidence of bias or alternative motives when evaluating constitutional issues such as Equal Protection and First Amendment claims. Furthermore, such examinations may even be warranted in certain situations when evaluating administrative law questions.<sup>268</sup> The Court has articulated applicable tests to use in such situations, including the *Arlington Heights* factors test<sup>269</sup> and the *Lemon v. Kurtzman* analysis.<sup>270</sup> Consequently, it is not unprecedented for courts to consider external statements of high-ranking officials or other government actors, particularly when there is an alleged Equal Protection violation of a suspect class. However, the longstanding Supreme Court precedent on considering extrinsic evidence conflicts with the Court’s refusal to consider such statements in challenges to former President Trump’s immigration policies. This juxtaposition highlights the inconsistencies in Supreme Court jurisprudence and instead suggests the need for a new approach.

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<sup>264</sup> *Id.* at 2574.

<sup>265</sup> *Id.* at 2575 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

<sup>266</sup> *Id.* at 2578 (Thomas, J., dissenting).

<sup>267</sup> *Id.* at 2576.

<sup>268</sup> *See id.* at 2573–74 (citing *Overton Park*, 401 U.S. at 420).

<sup>269</sup> *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

<sup>270</sup> *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

### C. *Trump Administration Immigration Cases*

A background in the immigration policies of former President Trump is necessary to contextualize the Supreme Court's handling of the constitutional challenges to those policies. The Trump Administration focused on limiting immigration to the United States and arguably reshaped immigration more than any other President.<sup>271</sup> It cut legal immigration almost in half, making it more difficult for skilled foreign workers, refugees, and asylum seekers to gain admission to the United States.<sup>272</sup> Wait times for applications for immigration benefits such as green cards and naturalization increased dramatically.<sup>273</sup> The Trump Administration also sought to combat undocumented migration by focusing primarily on the southern border.<sup>274</sup> For example, the “zero tolerance” policy<sup>275</sup> was intended to deter future immigration<sup>276</sup> but resulted in the humanitarian crisis of family separation<sup>277</sup> where hundreds of young children

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<sup>271</sup> Elliot Spagat & Sophia Tareen, *Under Trump, Citizenship and Visa Agency Focuses on Fraud*, PALM BEACH DAILY BUS. REV., Nov. 4, 2020, at A7.

<sup>272</sup> Stuart Anderson, *A Review of Trump Immigration Policy*, FORBES (Aug. 26, 2020, 2:01 AM), <https://www.forbes.com/sites/stuartanderson/2020/08/26/fact-check-and-review-of-trump-immigration-policy/?sh=3e5e5b3156c0>. Even those seeking political asylum are now being turned away at the border. See Kevin Sieff, *This American Life: The Walls Close In: The People Up the Stairs*, CHI. PUB. RADIO (Oct. 23, 2020) (streamed using Stitcher) (reporting on two Nicaraguan political activists who travelled to the U.S. border to seek asylum but were deported back to Nicaragua before they could begin their asylum case).

<sup>273</sup> See BOUNDLESS, 2020 STATE OF NEW AMERICAN CITIZENSHIP REPORT (2020), <https://www.boundless.com/research/state-of-new-american-citizenship-report/> (noting that the current processing time for citizenship applications, ten months, has doubled what it was between 2012 and 2016, even before the COVID-19 pandemic shut down in-person interviews and oath ceremonies).

<sup>274</sup> The undocumented population in the United States is also comprised of those who enter the country lawfully as nonimmigrants, such as with tourist or student visas, and overstay their visas. According to the Department of Homeland Security, there were 676,422 “overstay events” in 2019, comprising 1.21% of nonimmigrant admissions. DEP’T OF HOMELAND SEC., FISCAL YEAR 2019 ENTRY/EXIT OVERSTAY REPORT, at iv (2020), [https://www.dhs.gov/sites/default/files/publications/20\\_0513\\_fy19-entry-and-exit-overstay-report.pdf](https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf).

<sup>275</sup> Sessions, *supra* note 4 (“I have put in place a ‘zero tolerance’ policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It’s that simple.”).

<sup>276</sup> See *Situation Room: Full Interview with DHS Secretary John Kelly* (CNN television broadcast Mar. 6, 2017), <https://www.cnn.com/videos/politics/2017/03/06/john-kelly-dhs-trump-travel-ban-wiretap-tsr-intv-full.cnn>; IMMIGRATION NATION (Netflix Series 2020), <https://www.netflix.com/title/80994107>.

<sup>277</sup> Among the children separated from their parents, press and watchdog reports have found signs of post-traumatic stress, feelings of abandonment, separation anxiety, and other mental health issues. See Colleen Long, Martha Mendoza & Garance Burke, *‘I Can’t Feel My Heart’: Children Separated from their Parents at US-Mexico Border Showed Increased Signs of Post-Traumatic Stress, According to Watchdog Report*, FRONTLINE (Sept. 4, 2019), <https://www.pbs.org/wgbh/frontline/article/children-separated-from-their-parents-at-us-mexico-border-showed-increased-signs-of-post-traumatic-stress-us-report-says/>.

are still not reunited with their parents<sup>278</sup> and hundreds of others were sent to Mexico without their parents despite not being Mexican nationals.<sup>279</sup>

Many of the Trump Administration's policies on immigration and other matters originated from Presidential executive orders.<sup>280</sup> As one notable example, one week after he was inaugurated, former President Trump issued an executive order titled "Protecting the Nation from Foreign Terrorist Entry Into the United States," which imposed a ninety-day ban on the entry of foreign nationals from seven Muslim-majority nations.<sup>281</sup> The action was colloquially referred to as the "Muslim ban" or the "travel ban."<sup>282</sup> This executive order was later revised twice<sup>283</sup> and the final version restricted the entry of foreign nationals from five Muslim-majority nations and two other countries.<sup>284</sup> During the COVID-19 pandemic, he also issued executive orders under the guise of national security that suspended the issuance of green cards to foreign nationals abroad<sup>285</sup> and the entry of foreign nationals with temporary employment-based visas.<sup>286</sup> Other major changes to immigration came from DHS, including the decisions to end the Temporary Protected Status (TPS) program for various

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<sup>278</sup> Maya Yang, *Parents of 337 Children Separated at Border Under Trump Still Not Found*, THE GUARDIAN (Aug. 12, 2021, 12:06 PM), <https://www.theguardian.com/us-news/2021/aug/12/migrant-children-separated-parents-border-trump>; Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. TIMES, <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html> (last updated Mar. 15, 2021). Early in his term President Biden created a task force to try to reunify these families. Exec. Order No. 14,011, 86 Fed. Reg. 8,273 (Feb. 2, 2021).

<sup>279</sup> Caitlin Dickerson, *U.S. Expels Migrant Children from Other Countries to Mexico*, N.Y. TIMES, <https://www.nytimes.com/2020/10/30/us/migrant-children-expulsions-mexico.html> (last updated Mar. 15, 2021).

<sup>280</sup> See Avalon Zoppo, Amanda Proença Santos & Jackson Hudgins, *Here's the Full List of Donald Trump's Executive Orders*, NBC NEWS, <https://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796> (last updated Oct. 17, 2017, 11:58 AM).

<sup>281</sup> Exec. Order No. 13,769, *supra* note 4 (imposing a ban on the entry of foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen for ninety days and instating a 120-day ban on the entry of refugees).

<sup>282</sup> See, e.g., Editorial Board, *President Trump's Muslim Ban Lite*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/opinion/president-trumps-muslim-ban-lite.html>; Christopher Richardson, *Op-Ed: Two Years in, Trump's Travel Ban is Still Ruining Lives*, L.A. TIMES (Jan. 22, 2019, 3:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-richardson-travel-ban-20190122-story.html>.

<sup>283</sup> See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (banning the entry of foreign nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

<sup>284</sup> Proclamation No. 9,645, *supra* note 283 (imposing entry restrictions on foreign nationals from Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen). The ban was not revoked until President Biden took office. Proclamation No. 10,141 86 Fed. Reg. 7,005 (Jan. 20, 2021).

<sup>285</sup> Proclamation No. 10,014, 85 Fed. Reg. 23,441 (Apr. 22, 2020).

<sup>286</sup> Proclamation No. 10,052, 85 Fed. Reg. 38,263 (June 22, 2020).

countries,<sup>287</sup> rescind the Deferred Action for Childhood Arrivals (DACA) program,<sup>288</sup> and impose a new public charge rule for green card applicants.<sup>289</sup>

In two recent decisions concerning the immigration policies of the Trump Administration, the Supreme Court declined to consider extrinsic evidence of bias despite the existence of multiple public statements suggesting bias and animus.<sup>290</sup> In both cases, the Court afforded great deference to the executive's power in the realm of immigration and shied away from a more involved analysis of the former President's public statements suggesting animus.<sup>291</sup>

In *Trump v. Hawaii*, the Supreme Court took up the constitutionality of former President Trump's executive order that banned the entry of foreign nationals from majority-Muslim countries.<sup>292</sup> The appellees—"the state of Hawaii, three individuals . . . and the Muslim Association of Hawaii"—argued that the executive order violated provisions of the INA and the Establishment Clause.<sup>293</sup> In arguing the decision was motivated by religious animus, they relied on various public comments former President Trump made as a then-candidate on the campaign trail, as President-Elect, and as President.<sup>294</sup> For example, in December 2015 while speaking publicly on the presidential campaign, he called for "a total and complete shutdown of Muslims entering the United States."<sup>295</sup> His campaign website also included a similar statement and was not removed until well into his presidency.<sup>296</sup> The appellees' brief highlighted that Trump

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<sup>287</sup> *E.g.*, Duke, Announcement on Temporary Protected Status for Haiti, *supra* note 4; Nielsen, El Salvador TPS, *supra* note 4; Nielsen, Honduras TPS, *supra* note 4.

<sup>288</sup> Duke, Memorandum on Rescission of Deferred Action for Childhood Arrivals, *supra* note 4. The DACA program continues to be the subject of much litigation. In December 2020, the District Court for the Eastern District of New York ordered DHS to reinstate the DACA program and accept new applications again. *Vidal v. Wolf*, No. 16-CV-4756, 2020 U.S. Dist. LEXIS 228328 (E.D.N.Y. Dec. 4, 2020). However, in July 2021, a Texas federal judge granted a permanent injunction and vacatur ordering DHS to stop approving new DACA applications and ruled that the executive branch overstepped its authority by creating the program. *Texas v. United States*, No. 1:18-cv-00068, 2021 U.S. Dist. LEXIS 133117, at \*13 (S.D. Tex. July 16, 2021).

<sup>289</sup> Inadmissibility on Public Charge Grounds, *supra* note 4. President Biden has since sought to review this rule. Exec. Order No. 14,012, 86 Fed. Reg. 8,277, 8,278 (Feb. 2, 2021).

<sup>290</sup> *See Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018); *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020).

<sup>291</sup> *See Trump v. Hawaii*, 138 S. Ct. at 2409; *DHS v. Regents*, 140 S. Ct. 1891.

<sup>292</sup> *Trump v. Hawaii*, 138 S. Ct. at 2415; *see* Exec. Order No. 13,780, *supra* note 283.

<sup>293</sup> *Trump v. Hawaii*, 138 S. Ct. at 2406.

<sup>294</sup> Brief for Respondents at 5–10, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 16-1540), 2017 U.S. S. Ct. Briefs LEXIS 3420, at \*16–22.

<sup>295</sup> *Id.* at 5; *see Outcry as Donald Trump Calls for US Muslim Ban* (BBC News video broadcast Dec. 8, 2015), <https://www.bbc.com/news/av/world-us-canada-35036567>.

<sup>296</sup> Brief for Respondents, *supra* note 294, at 7–8; Christine Wang, *Trump Website Takes Down Muslim Ban Statement After Reporter Grills Spicer in Briefing*, CNBC, <https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html> (last updated May 8,

“complained as early as July 2015 that ‘Islamic’ refugees from Syria were being admitted to the United States, but ‘Christian’ refugees were not.”<sup>297</sup> Furthermore, on a televised interview after the executive order was issued, one of his advisors explained that “when [Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”<sup>298</sup> In light of this evidence, the appellees argued that the executive order “carr[ied] out the Muslim ban [Trump] promised” in violation of statute and the First Amendment.<sup>299</sup>

However, the Court held the executive order survived rational basis scrutiny<sup>300</sup> because it was not “inexplicable by anything but animus.”<sup>301</sup> Following the *Mandel* test, the Court reasoned that the executive order had a “facially legitimate and bona fide reason”<sup>302</sup> based on national security.<sup>303</sup> Consequently, the Court concluded that, “[g]iven the clarity of the text, [it] need not consider such extra-textual evidence” and thus did not analyze former President Trump’s statements.<sup>304</sup> The Court further noted that it “may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”<sup>305</sup> In dismissing Trump’s public statements, the majority concluded the following:

[T]he issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.<sup>306</sup>

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2017, 3:16 PM).

<sup>297</sup> Brief for Respondents, *supra* note 294, at 5.

<sup>298</sup> *Id.* at 7.

<sup>299</sup> *Id.* at 11–14.

<sup>300</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

<sup>301</sup> *Id.* at 2420–21.

<sup>302</sup> *Id.* at 2419 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972)).

<sup>303</sup> *Id.* at 2422 (reasoning that the executive order had a legitimate national security interest because three Muslim-majority nations had been removed from the list of countries since the executive order was first issued, the executive order “includ[ed] significant exceptions for various categories of foreign nationals,” and the executive order included a waiver program).

<sup>304</sup> *Id.* at 2412; *see also* Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 *YALE L.J. F.* 641, 652 (2019) (“The *Hawaii* majority tried to grapple with the extrinsic evidence, but did not engage with everything Trump said—it merely recited a select few examples.”).

<sup>305</sup> *Trump v. Hawaii*, 138 S. Ct. at 2420.

<sup>306</sup> *Id.* at 2418.

However, in her dissent, Justice Sonia Sotomayor argued against this deference, maintaining that the executive order “masquerades behind a façade of national-security concerns”<sup>307</sup> and has a “discriminatory taint.”<sup>308</sup> Instead of the *Mandel* test, Justice Sotomayor said the proper test should be whether a reasonable observer would, in light of the full record, view the government action as enacted for the purpose of disfavoring a religion.<sup>309</sup> And in light of various campaign statements, tweets, TV interview statements, and other public statements made by former President Trump and his advisors, “a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications.”<sup>310</sup> Indeed, legal scholars have widely criticized the Court’s decision in *Trump v. Hawaii* for recreating the *Korematsu* doctrine through “perpetuat[ing] [a] very-near-blind deference to the executive branch”<sup>311</sup> and for perpetuating “the epistemology of ignorance” in the law.<sup>312</sup>

The Supreme Court also heard another case, *DHS v. Regents of the University of California*,<sup>313</sup> concerning a major immigration policy change from the Trump Administration. In 2012, DHS announced the Deferred Action for Childhood Arrivals (DACA) program, which provided young undocumented individuals in the United States who came to the country as children with relief from removal and eligibility for work authorization.<sup>314</sup> DACA’s protections have since been extended to almost 700,000 recipients.<sup>315</sup> In 2017, the program was rescinded through a memorandum<sup>316</sup> after “the Attorney General advised DHS to rescind [it].”<sup>317</sup> The rescission was challenged as “arbitrary and capricious” in violation of the APA and as a violation of the equal protection

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<sup>307</sup> *Id.* at 2433 (Sotomayor, J., dissenting).

<sup>308</sup> *Id.* at 2438.

<sup>309</sup> *Id.* at 2433.

<sup>310</sup> *Id.* at 2438.

<sup>311</sup> Katyal, *supra* note 304, at 642.

<sup>312</sup> George Martinez, *Law, Race, and Epistemology of Ignorance*, 17 HASTINGS RACE & POVERTY L.J. 507, 533 (2020) (“[T]he Court [in *Trump v. Hawaii*], in essence, ignored the strong evidence that the Proclamation was primarily the result of prejudice against Muslims. The use of the rational basis scrutiny allows the Court to, in essence, set aside the discriminatory statements against Muslims.”).

<sup>313</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

<sup>314</sup> Press Release, Janet Napolitano, Sec’y, Dep’t of Homeland Sec., Announcement of Deferred Action Process for Young People Who are Low Enforcement Priorities (June 15, 2012), <https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

<sup>315</sup> *DHS v. Regents*, 140 S. Ct. at 1901.

<sup>316</sup> Duke, Memorandum on Rescission of Deferred Action for Childhood Arrivals, *supra* note 4.

<sup>317</sup> *DHS v. Regents*, 140 S. Ct. at 1901.

guarantee of the Fifth Amendment’s Due Process Clause.<sup>318</sup> The plurality decided that DHS’s rescission of the program was “arbitrary and capricious” because the Acting DHS Secretary offered no reasons for terminating the policy, failed to consider alternatives, and “failed to address whether there was ‘legitimate reliance’ on the [2012] DACA Memorandum.”<sup>319</sup>

While most of the plurality opinion focused on the APA claim, six paragraphs at the end were devoted to the Equal Protection claim.<sup>320</sup> As if as an afterthought, the plurality rejected the Equal Protection challenge, stating that the appellants “fail[ed] to raise a plausible inference that the rescission was motivated by animus.”<sup>321</sup> Using the *Arlington Heights* factors test, the Court found no disparate impact and no unusual history in the DACA rescission.<sup>322</sup> The Court reasoned that because Latinxs make up a large part of the undocumented immigrant population, if the Court were to accept the Equal Protection claim, then any “generally applicable immigration policy” could be so challenged.<sup>323</sup> The plurality also quickly dismissed former President Trump’s statements as “unilluminating,”<sup>324</sup> “remote in time and made in unrelated contexts,”<sup>325</sup> and not probative contemporary statements.<sup>326</sup>

However, like in *Trump v. Hawaii*, the plurality opinion failed to thoroughly discuss or analyze Trump’s statements that were presented as evidence of bias and improper animus.<sup>327</sup> In her dissent, Justice Sotomayor explained that it was “unwarranted on the existing record and premature at this stage of the litigation” for the plurality to “foreclose[]” any equal protection challenge.<sup>328</sup> She criticized the plurality for not considering Trump’s statements that were cataloged in the appellants’ briefs and in the lower courts’ decisions.<sup>329</sup> These statements included remarks made before and after former President Trump assumed office, such as his comment that Mexican immigrants are “people that have lots of problems,” “the bad ones,” and “criminals, drug dealers, [and] rapists,” as well

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<sup>318</sup> *Id.* at 1903.

<sup>319</sup> *Id.* at 1912–13 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)).

<sup>320</sup> *Id.* at 1915–16.

<sup>321</sup> *Id.* at 1916.

<sup>322</sup> *Id.* at 1915–16; *see also* *Ramos v. Wolf*, 975 F.3d 872, 896–97 (9th Cir. 2020) (using the *Arlington Heights* factors test to reject the claim that racial animus was behind the decision to end TPS).

<sup>323</sup> *DHS v. Regents*, 140 S. Ct. at 1915–16.

<sup>324</sup> *Id.* at 1916.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 1915–16.

<sup>328</sup> *Id.* at 1917 (Sotomayor, J., dissenting).

<sup>329</sup> *Id.*

as his statement comparing undocumented immigrants to “animals.”<sup>330</sup> Justice Sotomayor also argued the DACA rescission was similar to the executive order in *Trump v. Hawaii* because the action “was an outgrowth of the [former] President’s campaign statements about Muslims.”<sup>331</sup> Because the appellants’ Equal Protection claim survived the pleading threshold, Justice Sotomayor’s dissent proposed permitting the appellants to develop it on remand.<sup>332</sup>

In these two immigration cases, the Supreme Court demonstrated its hesitation to analyze former President Trump’s public statements of bias. This blind deference to national security in the face of explicit statements of bias contrasts greatly with the approach taken by lower courts.

#### *D. Lower Courts’ Approaches*

Although the Supreme Court shied away from considering former President Trump’s statements in *Trump v. Hawaii* and *DHS v. Regents of the University of California*, lower courts have grappled with his public comments that demonstrated animus and bias, instead of dismissing them behind the guise of national security.<sup>333</sup> Although many of the cases have since been reversed or vacated by the Supreme Court, they offer alternative examples of how courts can more properly engage with high-ranking government officials’ public statements of bias in constitutional challenges to immigration policies.<sup>334</sup>

First, in a lower court’s evaluation of an Equal Protection challenge to DHS’s decision to rescind the DACA program, the District Court for the Eastern District of New York considered former President Trump’s statements to determine that the allegations of racial animus were sufficiently pleaded to survive a motion to dismiss.<sup>335</sup> The court articulated that the plaintiffs had to show a discriminatory effect<sup>336</sup> and that an “invidious discriminatory purpose was a motivating factor” in the decision.<sup>337</sup> To prove discriminatory intent, the

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<sup>330</sup> *Id.* (citing *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 276–77 (E.D.N.Y. 2018), *rev’d*, *DHS v. Regents*, 140 S. Ct. 1891); *Regents of the Univ. of Cal. v. DHS*, 298 F. Supp. 3d 1304, 1314 (N.D. Cal. 2018).

<sup>331</sup> *DHS v. Regents*, 140 S. Ct. at 1917 (Sotomayor, J., dissenting).

<sup>332</sup> *Id.*

<sup>333</sup> See *Vidal v. Nielsen*, 291 F. Supp. 3d at 274, *rev’d*, *DHS v. Regents*, 140 S. Ct. 1891; *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1100 (N.D. Cal. 2018), *rev’d*, *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 601 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (2017).

<sup>334</sup> See *Vidal v. Nielsen*, 291 F. Supp. 3d 260, *rev’d*, *DHS v. Regents*, 140 S. Ct. 1891; *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, *rev’d*, *Ramos v. Wolf*, 975 F.3d 872; *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, *vacated as moot*, 138 S. Ct. 353.

<sup>335</sup> *Vidal v. Nielsen*, 291 F. Supp. 3d at 274.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 276 (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

court noted that that “litigants may make ‘a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’”<sup>338</sup> The court reviewed former President Trump’s “disheartening number of statements”<sup>339</sup> made along the campaign trail, including his comments that Mexican immigrants are “criminals, drug dealers, [and] rapists” and that Latinx immigrants are “animals” and “bad hombres.”<sup>340</sup> Because this case was decided at the pleading stage, the court concluded that the allegations were “sufficiently racially charged, recurring, and troubling” enough to raise a plausible inference of discriminatory animus.<sup>341</sup> Consequently, the court concluded that “[p]laintiffs have alleged sufficient facts to raise a plausible inference that the DACA rescission was substantially motivated by unlawful discriminatory purpose.”<sup>342</sup> Notably, the court declared that it should not “bury its head in the sand when faced with overt expressions of prejudice.”<sup>343</sup>

Another example where a lower court grappled with the former President’s public statements of bias was in *Ramos v. Nielsen*.<sup>344</sup> In a challenge to DHS’s termination of the TPS designation for four countries—El Salvador, Haiti, Nicaragua, and Sudan—the District Court of the Northern District of California granted a preliminary injunction because the plaintiffs showed a “substantial record supporting their claim” that the decision violated the APA and Equal Protection.<sup>345</sup> The court considered former President Trump’s statements and even listed seven examples in the opinion.<sup>346</sup> Beyond direct evidence of animus, the court also noted the existence of circumstantial evidence of race being a motivating factor in the decision.<sup>347</sup> In light of the statements, the court concluded that Trump “expressed animus against non-white, non-European immigrants” and such animus may have influenced the DHS Secretary’s decision to rescind the TPS designation.<sup>348</sup>

Finally, the Court of Appeals for the Fourth Circuit similarly reviewed statements by the former President in an early challenge to the executive order

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<sup>338</sup> *Id.* at 276 (citation omitted).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 276–77; *see supra* note 330 and accompanying text.

<sup>341</sup> *Id.* at 277.

<sup>342</sup> *Id.* at 274.

<sup>343</sup> *Id.* at 278.

<sup>344</sup> 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *rev’d*, *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020).

<sup>345</sup> *Id.* at 1080–81.

<sup>346</sup> *Id.* at 1100–01.

<sup>347</sup> *Id.* at 1101 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977)).

<sup>348</sup> *Id.* at 1098.

that banned travel from various majority-Muslim countries.<sup>349</sup> In *International Refugee Assistance Project v. Trump*, lawful permanent residents sought to enjoin the enforcement of the executive order arguing they suffered an injury because they had family members seeking entry into the country and arguing a violation of the Establishment Clause of the First Amendment.<sup>350</sup> Following the precedents from *Kerry v. Din* and *Lemon v. Kurtzman*, the court articulated that if the plaintiff “makes an affirmative showing of bad faith that is plausibly alleged with sufficient particularity,” then the court may “look behind the challenged action to assess its facially legitimate justification.”<sup>351</sup> Regarding Trump’s campaign and other public statements demonstrating bias,<sup>352</sup> the court rigorously examined the statements and called them “direct, specific evidence” of motivation<sup>353</sup> and “readily discoverable fact[s].”<sup>354</sup> Because these comments were “explicit statements of purpose,” the court noted that “[w]e need not probe anyone’s heart of hearts to discover the purpose of [the executive order].”<sup>355</sup> After such review, the court decided to “look behind” the executive order because the comments plausibly alleged animus.<sup>356</sup> However, the court held that the first prong of the *Lemon v. Kurtzman* test failed because the primary purpose of the executive order was religious animus.<sup>357</sup> In so holding, the court declared that “the political branches’ power over immigration is not tantamount to a constitutional blank check, and . . . vigorous judicial review is required when an immigration action’s constitutionality is in question.”<sup>358</sup>

Each of these three lower court decisions provides a lens into how courts can grapple with problematic public statements of animus coming from the President and other high-ranking public officials.<sup>359</sup> The stark contrast between how lower courts and the Supreme Court have treated these statements in evaluating constitutional challenges to immigration policies suggests that the existing tests need revision. Instead, courts could benefit from more explicit guidance in how to balance the constitutional issues with the historical trend of the judiciary’s

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<sup>349</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (2017).

<sup>350</sup> *Id.* at 577–78.

<sup>351</sup> *Id.* at 590–91 (internal quotation marks omitted) (quoting *Kerry v. Din*, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring)).

<sup>352</sup> *See supra* note 330 and accompanying text.

<sup>353</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d at 595.

<sup>354</sup> *Id.* at 593 (citation omitted).

<sup>355</sup> *Id.* at 595.

<sup>356</sup> *Id.* at 592 (quoting *Din*, 576 U.S. at 105 (Kennedy, J., concurring)).

<sup>357</sup> *Id.* at 594.

<sup>358</sup> *Id.* at 590.

<sup>359</sup> Although all these decisions were later reversed or vacated by the Supreme Court, the Court did not directly address the issue of extrinsic evidence or explicit statements of bias in reaching its decisions.

deference to the executive branch in matters of immigration and national security.

#### IV. A NEW TEST FOR EXTRINSIC EVIDENCE OF BIAS IN IMMIGRATION CASES

##### A. *Shying Away from Extrinsic Evidence*

A review of the Supreme Court's decisions on constitutional challenges to immigration policies demonstrates that although there are two competing precedents, the precedent to consider such extrinsic evidence is more compelling. The first precedent—the facially legitimate or bona fide reason requirement—led the Court not to consider extrinsic evidence in cases concerning admission of foreign nationals.<sup>360</sup> Under the second precedent, however, the Court considered the biased statements of the decisionmakers behind the challenged actions—including the Attorney General,<sup>361</sup> state legislators,<sup>362</sup> and the Secretary of Commerce.<sup>363</sup> In the context of immigration policies whose constitutionality is challenged because of the promulgator's discriminatory rhetoric and animus, the second line of precedent is more compelling because it recognizes the speaker's key role in the promulgation of the challenged policies. Consideration of this link between speaker and policy is important in the immigration context because the executive's immigration power receives broad deference and is inextricably connected to the fundamental concept of sovereignty.<sup>364</sup> Furthermore, the first precedent is distinguishable from this context because that line of cases concerned the admission of foreign nationals located geographically outside the country and did not include allegations of discriminatory bias or animus.<sup>365</sup>

This Comment argues that the Supreme Court sheepishly shied away from considering the then-President's public discriminatory statements in contrast to compelling precedent. In both *Trump v. Hawaii* and *DHS v. Regents of the University of California*, the Supreme Court failed to consider former President Trump's public statements of animus and even failed to discuss at length any

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<sup>360</sup> See *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Din*, 576 U.S. 86.

<sup>361</sup> *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 261–62, 264 (1954).

<sup>362</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1468–69 (2017).

<sup>363</sup> *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019).

<sup>364</sup> See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893).

<sup>365</sup> See *Mandel*, 408 U.S. at 756–59; *Fiallo*, 430 U.S. at 790 n.3; *Din*, 576 U.S. at 88.

specific example of his biased statements.<sup>366</sup> In *Trump v. Hawaii*, a blind deference to the interest of national security and to the power of the Presidency resulted in the Court's failure to recognize the former President's explicit public statements of bias that would undermine the constitutionality of the travel ban.<sup>367</sup> In *DHS v. Regents of the University of California*, the Court's concern for setting a precedent on the disparate impact ground, while ignoring compelling evidence to preliminarily dismiss a claim,<sup>368</sup> suggests the existing tests for looking beyond at extrinsic evidence of bias are imperfect.

However, the absence of substantive analysis of extrinsic evidence of bias in *Trump v. Hawaii* and *DHS v. Regents of the University of California* contrasts greatly with the Supreme Court's approach in other pivotal cases decided since 2017<sup>369</sup> as well as with lower courts' approaches.<sup>370</sup> Notably, the Court varies considerably in how much of its opinion it devotes to discussion of the extrinsic evidence of biased comments, ranging from discussing the statements at length to not even referencing the statements in a footnote.<sup>371</sup> Furthermore, the Court inconsistently treats such statements when considering how public the statements are. For example, in *Masterpiece Cakeshop*, the Court considered the statements made by a couple of commissioners at public hearings in the state of Colorado.<sup>372</sup> If the Court will analyze a few statements that were made publicly on a local level, then it should follow that the Court would likewise consider statements made publicly on a national level—on presidential campaigns, Twitter, and nationally broadcasted television. Similarly, the identity of the speaker—including their job title and scope of public recognition—should affect the extent of the Court's concern with their statements. Although in other cases the Court analyzed biased statements made by state legislators in charge of

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<sup>366</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2412–17 (2018); *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020); see also Katyal, *supra* note 304, at 652 (explaining that the Court in *Trump v. Hawaii* “did not engage with” and “did not even cite” former President Trump’s problematic statements).

<sup>367</sup> See *Trump v. Hawaii*, 138 S. Ct. at 2422, 2418.

<sup>368</sup> See *DHS v. Regents*, 140 S. Ct. at 1915–16.

<sup>369</sup> See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019).

<sup>370</sup> See *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 274 (E.D.N.Y. 2018), *rev’d*, *DHS v. Regents*, 140 S. Ct. 1891; *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *rev’d*, *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *vacating as moot* 138 S. Ct. 353 (2017).

<sup>371</sup> Compare *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30 (devoting five paragraphs to reviewing the commissioners’ comments made at public formal hearings), and *Dep’t of Com.*, 139 S. Ct. at 2574–76 (devoting eleven paragraphs to discussing the Secretary’s statements of bias), with *Trump v. Hawaii*, 138 S. Ct. at 2417 (briefly summarizing a few of the President’s comments in two paragraphs), and *DHS v. Regents*, 140 S. Ct. at 1915–16 (devoting only six paragraphs to discuss and dismiss the entire Equal Protection claim).

<sup>372</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30.

redistricting<sup>373</sup> and made by the Secretary of Commerce,<sup>374</sup> the Court in *Trump v. Hawaii* failed to consider statements made by the nation’s chief executive who has much broader public recognition.<sup>375</sup>

Another point that illustrates the Supreme Court’s disparate treatment of statements of bias and animus is the great variation in terminology the Court used to refer to these statements. When the Court considered such statements in its analysis, it described them with neutral terms—“comments,”<sup>376</sup> “[u]ncontested evidence,”<sup>377</sup> “body of evidence,”<sup>378</sup> and “the evidence”<sup>379</sup>—suggesting a normalization of the judicial examination of biased statements. Lower courts sometimes went even further and used explicit terms such as “overt expressions of prejudice,”<sup>380</sup> “circumstantial and direct evidence,”<sup>381</sup> “direct, specific evidence,”<sup>382</sup> “readily discoverable fact[s],”<sup>383</sup> and “substantial extrinsic evidence.”<sup>384</sup> However, when the Court chose to ignore the proffered statements, the Court used terminology that distanced the statements as irrelevant, including terms such as “extrinsic evidence,”<sup>385</sup> “extra-textual evidence,”<sup>386</sup> “remote in time and made in unrelated contexts,”<sup>387</sup> “cited statements,”<sup>388</sup> and “additional factual details.”<sup>389</sup> Even on a lexical level, courts are split over how to consider overt statements of bias in constitutional challenges.

Although the Supreme Court has established analytical frameworks to apply in certain constitutional challenges—including the *Arlington Heights* holistic factors test<sup>390</sup> for Fourteenth Amendment challenges and the *Lemon v. Kurtzman*

<sup>373</sup> *Cooper*, 137 S. Ct. at 1468–69.

<sup>374</sup> *Dep’t of Com.*, 139 S. Ct. at 2574.

<sup>375</sup> *Trump v. Hawaii*, 138 S. Ct. at 2417.

<sup>376</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1721.

<sup>377</sup> *Cooper*, 137 S. Ct. at 1468.

<sup>378</sup> *Id.* at 1469.

<sup>379</sup> *Dep’t of Com.*, 139 S. Ct. at 2575.

<sup>380</sup> *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 278 (E.D.N.Y. 2018), *rev’d*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

<sup>381</sup> *Id.* at 276 (citation omitted).

<sup>382</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 595 (4th Cir. 2017), *vacated*, 138 S. Ct. 353 (2017).

<sup>383</sup> *Id.* (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005)).

<sup>384</sup> *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018), *rev’d*, *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020).

<sup>385</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

<sup>386</sup> *Id.* at 2412.

<sup>387</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020).

<sup>388</sup> *Id.*

<sup>389</sup> *Kerry v. Din*, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring).

<sup>390</sup> *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

test<sup>391</sup> for Establishment Clause challenges—the Court’s conflicting approaches illustrate that the tests are inadequate to scrutinize high-ranking government officials’ openly discriminatory speech. In this way, former President Trump’s openly discriminatory rhetoric exposed a weakness in the ability of existing tests to effectively and consistently consider evidence of animus in challenges to immigration policies.

Given the strong disparities between the Supreme Court’s inconsistent approaches to considering explicit statements of bias and animus in these cases, courts would benefit from a new factors test that is specifically tailored to the area of immigration law. Because the Court should not extrapolate too much from “a few references” of animus,<sup>392</sup> any new test must consider the weight of the statements in comparison to the rest of the evidence available on the record. In a post-Trump world where unbridled political rhetoric has become normalized,<sup>393</sup> a new, clearer test is critical to assist courts in dealing with a high-ranking public official’s statements of bias in constitutional challenges to immigration policies and decisions.

### *B. A New Balancing Test*

To provide courts with additional guidance<sup>394</sup> in determining how much weight to give to extrinsic evidence of biased statements in constitutional and administrative cases concerning immigration law, this Comment proposes a new test comprised of five factors: (1) the identity of the speaker, (2) the temporal proximity between the biased statement and the challenged government action, (3) the scope of the statement’s entry in the public sphere, (4) the frequency of the statements, and (5) whether a reasonable observer would view the government action as enacted because of animus toward a particular protected class. These factors are designed to help courts maintain a certain degree of deference to the issue of national security without categorically excluding compelling evidence of bias that undermines the constitutionality of the immigration law at issue.

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<sup>391</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>392</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1497 (2017) (Alito, J., dissenting); see also *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1749–51 (2018) (Ginsburg, J., dissenting) (disagreeing with the weight given by the majority to “the comments by one or two members of one of the four decisionmaking entities” involved in the case).

<sup>393</sup> See Malik, *supra* note 154; Tal Orian Harel, Jessica Katz Jameson & Ifat Maoz, *The Normalization of Hatred: Identity, Affective Polarization, and Dehumanization on Facebook in the Context of Intractable Political Conflict*, SOC. MEDIA + SOC’Y, Apr.–June 2020, at 1.

<sup>394</sup> These factors are intended to supplement the factors delineated in *Arlington Heights*, 429 U.S. 252.

First, the identity of the speaker who made the biased statements is relevant both in terms of rank in the government and proximity to the government agency or office that enacted the contested action. High-ranking public officials such as the Attorney General,<sup>395</sup> state legislators,<sup>396</sup> the Secretary of Commerce,<sup>397</sup> and certainly the President<sup>398</sup> are prominent public figures with expertise whose statements should be taken seriously. Furthermore, courts should more readily consider statements made by government officials that had either the authority to take the action or direct involvement with its enactment because of the apparent nexus between the statements and the challenged action.<sup>399</sup>

Second, a close temporal proximity between the biased statements and the challenged action suggests that courts should consider the statements. The decisionmakers' contemporaneous statements,<sup>400</sup> not those distant in time from the action at issue,<sup>401</sup> should be more readily analyzed. However, remoteness alone should not disqualify the statement from judicial consideration when the other factors outweigh the lack of contemporaneousness.<sup>402</sup>

Third, courts should hesitate to ignore statements that have a large scope of public existence. Statements made in a public forum<sup>403</sup> by high-ranking government decisionmakers should be more readily considered because of the broad public awareness and recognition. Although public recognition on a

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<sup>395</sup> See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 261–62 (1954); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 520 (N.D. Cal. 2017).

<sup>396</sup> See *Cooper*, 137 S. Ct. at 1468–69.

<sup>397</sup> See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019).

<sup>398</sup> See *Shaw*, *supra* note 172, at 133 (“The President’s utterances often represent the purest embodiment of politics.”).

<sup>399</sup> See *Cooper*, 137 S. Ct. at 1468–69 (considering statements made by the “State’s mapmakers” to determine the legislators engaged in race-based redistricting).

<sup>400</sup> See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (“The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of meetings, or reports.”).

<sup>401</sup> See *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (finding the President’s statements about the Latinx community “unilluminating” because they were “remote in time and made in unrelated contexts”); *Ramos v. Wolf*, 975 F.3d 872, 898 (9th Cir. 2020) (“[W]e find it instructive that these statements occurred primarily in contexts removed from and unrelated to TPS policy or decisions.”).

<sup>402</sup> For example, legal scholars have argued that courts should not be categorically barred from considering campaign speech in determining discriminatory intent in later government actions and instead the analysis should be fact-specific and follow other principles of evidence. See *Fields*, *supra* note 172, at 276; *Coenen*, *supra* note 172, at 338–39.

<sup>403</sup> Televised appearances, interviews, campaign statements, and public briefings are examples of statements made in public forums. Public forums include online social media platforms such as Twitter because of the degree of interactivity between users. See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d, 541, 549 (S.D.N.Y. 2018).

national scale should carry more weight than on a local scale,<sup>404</sup> private comments should not be excluded solely because they were not made in public.

Fourth, higher frequency of biased statements may indicate a stronger invidious purpose.<sup>405</sup> For example, given the President's multitude of disparaging and biased statements about Muslims made throughout his campaign and presidency,<sup>406</sup> courts should not hastily deem them irrelevant of analysis. Nevertheless, courts should avoid over-extrapolating from a few examples of animus.<sup>407</sup>

Fifth, following Justice Sotomayor's dissent in *Trump v. Hawaii*, if a reasonable observer, in light of the full record, would view the government action as enacted for the purpose of disfavoring a certain protected class, the statements suggest a strong discriminatory purpose.<sup>408</sup> Instead of shying away from inconvenient, discriminatory rhetoric, the court cannot be naïve<sup>409</sup> or "bury its head in the sand"<sup>410</sup> and instead must grapple with the compelling evidence of bias.

Overall, high-ranking government decisionmakers' frequent, public statements that a reasonable observer would consider to be discriminatory must be properly considered by courts in immigration cases. In cases concerning constitutional issues, such as Equal Protection and the First Amendment, the threshold for courts to consider external statements of bias should be lower because of the heightened scrutiny and concern for invidious discrimination from the highest levels of government. Because no one factor is determinative, courts must complete a thorough analysis of each factor to determine how much weight and credibility to give to the evidence. If all factors weigh strongly in favor of considering the evidence, courts should not invoke a blind deference to national security but instead must critically examine the law's constitutionality in light of such evidence.

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<sup>404</sup> If the Court considered statements made by state commissioners in a local public hearing in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729–30 (2018), then the Court should certainly consider statements made by national figures, such as the President, on national public platforms like the national news and Twitter.

<sup>405</sup> See *Arlington Heights*, 429 U.S. at 267 ("The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes.")

<sup>406</sup> See Brief for Respondents, *supra* note 294, at 5–10.

<sup>407</sup> See *Cooper v. Harris*, 137 S. Ct. 1455, 1497 (2017) (Alito, J., dissenting).

<sup>408</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

<sup>409</sup> *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019).

<sup>410</sup> *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 278 (E.D.N.Y. 2018), *rev'd*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

## V. IMPLICATIONS

### A. *Implications on the Law*

The new factors test assists courts with effectively handling widespread public statements of bias stemming from the executive branch in challenges to immigration laws. The Supreme Court and lower courts have struggled with the issue of how much extrinsic evidence of bias to permit and tolerate in constitutional and administrative challenges.<sup>411</sup> Indeed, courts have shied away from addressing the issue.<sup>412</sup> Although legal scholars have called for an end to legal doctrines that shield certain types of evidence of bias and animus from judicial consideration,<sup>413</sup> a concrete alternative test is still lacking. Therefore, the factors test provides much needed additional guidance to maintain consistency across judicial rulings. Additionally, going beyond and examining extrinsic evidence of biased statements is not without precedent. Existing case law demonstrates that examining such statements is not overly cumbersome or infeasible because courts have been engaged in such analysis for decades.<sup>414</sup> As a result of the implementation of the factors test, immigration agencies and the executive branch must provide adequate explanations for their proposed immigration policies that are more compelling than post hoc justifications<sup>415</sup> that shroud discriminatory purposes.

### B. *Implications on Policy*

The new factors test not only provides clear guidance for courts to handle public statements of bias in immigration cases, but it also helps prevent courts from upholding discriminatory policies under the guise of national security. Historically, courts have afforded great deference to the executive's immigration

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<sup>411</sup> *Compare* *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (considering a few comments made by state commissioners at local hearings), *with* *Trump v. Hawaii*, 138 S. Ct. 2392 (ignoring statements made by the President on Twitter and on televised campaign events).

<sup>412</sup> *See* *Ramos v. Wolf*, 975 F.3d 872, 907 (9th Cir. 2020) (Christen, J., dissenting) (citing the constitutional avoidance canon to avoid reaching the Equal Protection claim against the termination of the TPS program); *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (vacating and remanding to dismiss as moot the challenge to the travel ban without addressing the issue of how much extrinsic evidence to consider).

<sup>413</sup> *See* *Clarke*, *supra* note 130, at 511; *Fields*, *supra* note 172, at 276.

<sup>414</sup> *See* *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Masterpiece Cakeshop*, 138 S. Ct. 1719; *Dep't of Com.*, 139 S. Ct. 2551; *see also* *Fields*, *supra* note 172, at 325 (“Those who claim broadly that no judge should ‘peek behind the curtain’ to determine intent ignore forty years of precedent.”).

<sup>415</sup> *See* *DHS v. Regents*, 140 S. Ct. at 1909 (concluding that “impermissible post hoc rationalizations” are not properly before the court for consideration).

power<sup>416</sup> but national security has often been used to justify harsh, discriminatory immigration policies.<sup>417</sup> The factors test avoids such a result because the weight of the factors indicates how much deference is appropriate. For example, if the statements' frequency, public scope, and contemporaneity are high, they suggest a strong discriminatory purpose beyond a few isolated comments such that broad deference would not be proper. Courts can still honor the deference to the executive's immigration power but only if, after considering the applicable statements, the action does not violate the Constitution or the APA. Additionally, the factors test addresses substantial risks. Courts' failure to consider pervasive prejudicial rhetoric may raise a separate issue of national security whereby bad actors become empowered<sup>418</sup> and dangerous rhetoric becomes normalized.<sup>419</sup> Although immigration law in the United States has a history of exclusion and discrimination,<sup>420</sup> such explicit expressions of animus should not be permitted as the basis for enacting law and policy. Deference to national security is one factor of many and should not be blindly invoked in the presence of overt evidence of discriminatory intent.

## CONCLUSION

The Supreme Court's inability to adequately consider compelling extrinsic evidence of bias in two challenges to the immigration policies of the Trump Administration exposed a weakness in current analytical frameworks. Existing

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<sup>416</sup> See *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Kerry v. Din*, 576 U.S. 86 (2015).

<sup>417</sup> See Chacon, *supra* note 36, at 1832 ("The rhetoric of national security has long been used by the courts to mask the most virulent aspects of U.S. immigration policy.").

<sup>418</sup> See Benjamin Newman, Jennifer L. Merolla, Sono Shah, Danielle Casarez Lemi, Loren Collingwood & S. Karthick Ramakrishnan, *The Trump Effect: An Experimental Investigation of the Emboldening Effect of Racially Inflammatory Elite Communication*, BRIT. J. POL. SCI., Feb. 2020, at 1, 2 (arguing that the presence of prejudicial elite speech emboldens listeners to express their own prejudice); BRIAN LEVIN & LISA NAKASHIMA, CTR. FOR THE STUDY OF HATE AND EXTREMISM & CAL. STATE UNIV., SAN BERNARDINO, REPORT TO THE NATION: FACTBOOK ON HATE AND EXTREMISM IN THE U.S. AND INTERNATIONALLY 14, 34 (2019), [https://www.csusb.edu/sites/default/files/CSHE%202019%20Report%20to%20the%20Nation%20FINAL%207.29.19%2011%20PM\\_0.pdf](https://www.csusb.edu/sites/default/files/CSHE%202019%20Report%20to%20the%20Nation%20FINAL%207.29.19%2011%20PM_0.pdf) (revealing a correlation in FBI data between political leaders' divisive statements and hate crimes). The dangerous power of former President Trump's rhetoric—and its threat to national security—was exemplified when a violent mob stormed the U.S. Capitol shortly after Trump gave an inflammatory speech nearby declaring, "[y]ou'll never take back our country with weakness. . . . [y]ou have to be strong." Aaron Rupar, *How Trump's Speech Led to the Capital Riot*, VOX (Jan. 8, 2021), <https://www.vox.com/22220746/trump-speech-incite-capitol-riot>; see Trial Memorandum of the U.S. House of Representatives in the Impeachment Trial of President Donald J. Trump (Feb. 2, 2021), [https://judiciary.house.gov/uploadedfiles/house\\_trial\\_brief\\_final.pdf](https://judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf) (arguing that former President Trump undermined national security by inciting an insurrection).

<sup>419</sup> See Clarke, *supra* note 130, at 510.

<sup>420</sup> See *supra* notes 19–23 and accompanying text.

factors tests are ill equipped to properly deal with overt statements of animus from high-ranking government officials. In a post-Trump world where openly prejudicial rhetoric is increasingly normalized, courts cannot continue to “bury [their] head[s] in the sand”<sup>421</sup> when confronted with explicit, public statements of animus surrounding an immigration policy or executive action. Although national security is a fundamental part of immigration and sovereignty, deference to national security concerns cannot be invoked too readily in the face of clear public statements of bias that undermine the constitutionality of the immigration policy at issue. Otherwise, discriminatory and potentially unconstitutional immigration policies will continue to remain the law of the land under the façade of national security and may further legitimize discrimination.

The proposed factors test allows courts to better analyze overt statements of bias in the context of immigration. Using this new test, courts can recognize which statements by policy decisionmakers are pertinent to identifying impermissible discriminatory intent. The test also helps courts weigh the statements accordingly in constitutional and administrative challenges to immigration laws. An objective, consistent consideration of biased statements is critical to ensure immigration and other policies are not disguised mechanisms to exclude on racial, religious, or ethnic lines, but rather are legitimate, constitutional means to protect the nation’s sovereignty.

ANDREA GALVEZ\*

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<sup>421</sup> *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 278 (E.D.N.Y. 2018), *rev’d*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

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