

2020

## American Animus: Where *Trump v. Hawaii* Leaves the Animus Doctrine Today

Megan L. Mallamas

Follow this and additional works at: <https://scholarship.law.campbell.edu/clr>

---

### Recommended Citation

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

This Comment is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized editor of Scholarly Repository @ Campbell University School of Law.

## American Animus: Where *Trump v. Hawaii* Leaves the Animus Doctrine Today

### ABSTRACT

*Early in his presidency, President Donald Trump took three presidential actions denying individuals from countries with large Muslim populations entry into the United States. On their faces, the actions do not appear to be discriminatory. However, when taking into consideration his personal comments and tweets exhibiting an antagonism towards Muslim individuals, these actions seemed to reveal a policy intending to disparage foreign nationals on the basis of their religion. In 2018, the Supreme Court held in Trump v. Hawaii that these actions are not displays of animus by the Executive Branch or are unconstitutionally discriminatory. This Comment addresses where the Supreme Court has found animus in the past, and how its decision in Trump v. Hawaii is inconsistent with its precedent in balancing the animus doctrine with executive power.*

ABSTRACT.....	139
INTRODUCTION.....	140
I. THE ANIMUS DOCTRINE AND DEFERENCE TO THE EXECUTIVE BRANCH.....	141
A. <i>What is Animus?</i> .....	141
1. Plyler v. Doe.....	143
2. City of Cleburne v. Cleburne Living Center.....	144
B. <i>Supreme Court Deference to the Executive Branch</i> .....	145
II. <i>TRUMP V. HAWAII</i> .....	147
A. <i>Background</i> .....	147
B. <i>The Majority Opinion</i> .....	151
C. <i>The Dissenting Opinions</i> .....	153
III. COMPARING ANIMUS.....	155
A. <i>President Trump and the Muslim Population</i> .....	155
B. <i>Comparison to Plyler and Cleburne</i> .....	157
CONCLUSION.....	159

## INTRODUCTION

“Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what the hell is going on.”<sup>1</sup> President Trump, known for his controversial, divisive, and candid remarks,<sup>2</sup> read this statement from a press release at a rally in South Carolina before winning the presidential election.<sup>3</sup> President Trump has continued this divisive rhetoric throughout his first two years in office.<sup>4</sup> Yet, as extreme as many of President Trump’s statements may seem, according to *Trump v. Hawaii*<sup>5</sup> they have not yet crossed over into the legal doctrine of animus.<sup>6</sup>

This Comment discusses how the United States Supreme Court distinguishes between (1) the executive branch’s constitutional power to limit immigration and (2) animus towards Muslims. This Comment also addresses the effectiveness of the animus doctrine after this 2018 case, which refused to find any animus in the signing of three presidential actions soon after President Trump took office. On their faces, these actions were not motivated by animus; however, a deep dive into statements made by President Trump and the executive branch reveals deep-seeded tension between the government and the world’s Muslim population. The majority in *Trump v. Hawaii* chose not to base its holding on this underlying tension,<sup>7</sup> creating

1. Gregory Krieg, *Trump’s History of Anti-Muslim Rhetoric Hits Dangerous New Low*, CNN (Nov. 30, 2017), <https://perma.cc/RT2M-22BM>; see Press Release, Donald J. Trump, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), (on file with Campbell Law Review). This press release, along with every press release from the White House prior to January 1, 2017, was deleted from President Trump’s website in May of 2017. Matt Novak, *President Trump Deletes Every Old Press Release, But the Internet Never Forgets*, GIZMODO (May 9, 2017), <https://perma.cc/3V2Y-VRFX>.

2. See, e.g., Paul Waldman, *How Trump’s Big Mouth Could be His Undoing*, WASH. POST: PLUM LINE (Jan. 25, 2018), <https://perma.cc/XD9X-9588>.

3. Krieg, *supra* note 1.

4. *Id.* President Trump frequently shares his thoughts and opinions through his infamous Twitter account, which, when searching the word “Muslim,” has several tweets that share anti-Muslim rhetoric from himself or others; see *Trump v. Hawaii*, 138 S. Ct. 2392, 2417–18 (2018); Brendan Brown, TRUMP TWITTER ARCHIVE, <https://perma.cc/4YLK-E4FY>. Muslims who follow the religion of Islam make up 1.8 billion of the world’s population, right behind Christianity. See Conrad Hackett & David McClendon, *Christians Remain World’s Largest Religious Group, but They are Declining in Europe*, PEW RES. CTR.: FACT TANK (Apr. 5, 2017), <https://perma.cc/B6ZW-J46C>.

5. *Trump*, 138 S. Ct. at 2392.

6. *Id.* at 2423. Animus is defined as “[i]ntent in general, or particular ill will.” *Animus*, BOUVIER’S LAW DICTIONARY (Vol. I, 2012).

7. *Trump*, 138 S. Ct. at 2423.

new questions: how far is the Supreme Court willing to go to look for animus, and how much deference is it willing to give to the executive branch?

Part I of this Comment addresses how the Supreme Court has developed the animus doctrine<sup>8</sup> and compares it to the Supreme Court's deferential treatment of the executive branch's actions involving immigration. Part II discusses the timeline of events which led to *Trump v. Hawaii*, including the two executive orders and final proclamation that led to the *Trump v. Hawaii* decision. Finally, Part III analyzes comments made by President Trump through the lens of the animus doctrine. After reviewing actions which the Supreme Court has historically considered to be animus, a look into the underlying motivation for the travel ban reveals strong animus towards the Muslim population underneath a pretextual national security justification.

## I. THE ANIMUS DOCTRINE AND DEFERENCE TO THE EXECUTIVE BRANCH

### A. *What is Animus?*

In constitutional law, the creation of a discriminatory law will often trigger "heightened scrutiny," implemented by a court in order to decide whether to uphold or strike down the law under the Equal Protection or Due Process Clauses of the Fourteenth Amendment.<sup>9</sup> The class discriminated against determines what level of scrutiny applies: typically, discriminating against a protected class triggers a heightened level of scrutiny (strict or intermediate).<sup>10</sup> However, governmental actions that trigger these higher levels of scrutiny will be upheld if the government can show that the action was "sufficiently narrowly tailored to achieve a sufficiently compelling interest."<sup>11</sup>

If heightened scrutiny is not applicable, a court applies rational basis scrutiny, a highly deferential standard of review for a discriminatory governmental action.<sup>12</sup> While rational basis review is so deferential that it is "almost empty" and "meaningless," there is an exception: the animus doctrine.<sup>13</sup> At a basic level, animus is best described as "a bare . . . desire to

---

8. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982).

9. See William D. Araiza, *Animus and its Discontents*, 71 FLA. L. REV. 155, 187 (2019).

10. *Id.*

11. *Id.* at 187–88.

12. See generally Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018).

13. *Id.* at 1319 (internal quotation marks omitted).

harm a politically unpopular group” that does not stand for “a *legitimate* governmental interest.”<sup>14</sup> A discussion of animus is a rare occurrence in Supreme Court opinions.<sup>15</sup> However, a finding of animus has serious consequences: such a finding behind any governmental or legislative action will cause it to fail, regardless of the level of scrutiny applied.<sup>16</sup> For instance, even if a law is subject to the most deferential of standards—rational basis review—animus is seen as one of the only reasons to strike down the law as unconstitutional.<sup>17</sup>

To find animus in a governmental action, courts will look for some “subjective ill will” by the governmental actor and require a plaintiff suing on Equal Protection grounds to “show some level of ‘discriminatory intent’ when challenging facially neutral laws.”<sup>18</sup> Courts will rely on several factors, both objective and subjective in nature, that have been extrapolated from previous case law, to determine whether a discriminatory purpose is lurking beneath the ostensibly neutral law.<sup>19</sup> These factors include: (1) “troubling legislative history,” (2) the appearance of a “decisional process that one observer described as an emotional and strongly negative constituent reaction that triggered an after-the-fact legislative search for legitimate justifications,” (3) whether the law impacts a “politically powerless” group, and (4) an action that “deviated from the normal substance of the decision-maker’s conduct in the course of imposing both wide and deep burdens on a precisely targeted group.”<sup>20</sup>

To understand how the *Trump v. Hawaii* treatment of this potential case for animus has now changed the course of the animus doctrine’s application, we must look back to how the Court applied the animus doctrine prior to *Trump v. Hawaii*.

14. United States Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973); see Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 888 (2012) (“The Court has held on numerous occasions that where a law is based on such animus, it will not survive even the most deferential level of scrutiny under the Equal Protection Clause.”).

15. Pollvogt, *supra* note 14, at 888.

16. *Id.* at 888–89.

17. *Id.* Pollvogt, writing about the history and the development of unconstitutional animus over time, cites to four Supreme Court cases as examples in which a law that received rational basis review failed for a finding of animus: *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *Palmore v. Sidoti*, 466 U.S. 429 (1984), and *Moreno*, 413 U.S. at 528. *Id.* at 888 n.2.

18. Araiza, *supra* note 9, at 182.

19. *Id.* at 184. An example of a court utilizing these factors in its analysis is found in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Id.*

20. *Id.*

### 1. Plyler v. Doe

*Plyler* is a case involving illegal immigrants already within the boundaries of the United States, but provides a useful example of what the Supreme Court has considered to be animus in the past.<sup>21</sup> In *Plyler*, the school board in Smith County, Texas implemented a policy that charged undocumented children a tuition fee for attending the public school to combat extra costs the school was absorbing.<sup>22</sup> In 1977, an action was filed in the District Court for the Eastern District of Texas on behalf of Mexican children who were undocumented and who were denied entry into public schools.<sup>23</sup>

The district court found that while admitting these immigrant children created some problems for the public schools, excluding them would only save the school money—not necessarily improving the quality of education.<sup>24</sup> It further held that these children were protected under the Equal Protection Clause of the Fourteenth Amendment because “the state’s exclusion of undocumented children from its public schools . . . may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed.”<sup>25</sup> The Court of Appeals for the Fifth Circuit affirmed.<sup>26</sup>

In the first step of its analysis, the Supreme Court established that these children were subject to the Fourteenth Amendment’s Equal Protection Clause because the word “person” applies to any person, regardless of whether their presence is lawful in the country.<sup>27</sup> Next, the Court refused to recognize the children as a suspect class, because illegal entry into this country is mutable—that is, illegal status is the product of voluntary action.<sup>28</sup> However, the Court showed some concern regarding the fact the children were illegally in the country as a result of their *parents’* actions, not their own, making their illegal status immutable.<sup>29</sup> The Court held that “[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration.”<sup>30</sup>

---

21. *Plyler v. Doe*, 457 U.S. 202 (1982).

22. *Id.* at 206 n.2, 207.

23. *Id.* at 206.

24. *Id.* at 207.

25. *Id.* at 208 (internal quotation marks omitted).

26. *Id.* at 208–09.

27. *Id.* at 210.

28. *Id.* at 219 n.19.

29. *Id.* at 220.

30. *Id.* at 228 (alteration in original) (quoting *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978), *aff’d*, 628 F.2d 448 (5th Cir. 1980), *aff’d*, 457 U.S. 202 (1982)).

The holding of *Plyler* illustrates the Court's treatment of the animus doctrine in the context of classes that are comprised of those with "immutable" traits, even if the class itself will not be considered suspect. Additionally, this holding is significant because it provides an analysis in the immigration context, demonstrating the Court's ability to find animus in governmental actions that affect non-American individuals.

## 2. City of Cleburne v. Cleburne Living Center

*Cleburne* is another example of how the Supreme Court has confidently found animus on a smaller scale by a local government. In July of 1980, Jan Hannah purchased a home in Cleburne, Texas for the purpose of leasing it to Cleburne Living Center (CLC), a "group home for the mentally retarded."<sup>31</sup> The city of Cleburne told CLC that a special zoning permit would be "required for the construction of [h]ospitals for the insane or feeble-minded, or alcoholic [*sic*] or drug addicts, or penal or correctional institutions."<sup>32</sup> The city council voted three to one to deny the special permit, sparking CLC to file suit in federal district court.<sup>33</sup>

The district court determined that the home would have been permitted under the zoning ordinance had the house not been used for a group home specifically for the mentally disabled.<sup>34</sup> The court inferred the government's primary motivation came from "the fact that the residents of the home would be persons who are mentally [disabled]," but still found the city's justification to be constitutional.<sup>35</sup> The district court applied rational basis scrutiny and found that the purpose of the special zoning permit was reasonably related to Cleburne's legitimate interests in "the safety and fears of residents in the adjoining neighborhood."<sup>36</sup> The Court of Appeals for the Fifth Circuit reversed after recognizing the mentally disabled as a semi-suspect class demanding intermediate scrutiny.<sup>37</sup>

The Supreme Court examined CLC's position under the Equal Protection Clause of the Fourteenth Amendment and stated the general rule of rational basis: "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."<sup>38</sup> However, the Court provided a caveat to this rule: any

---

31. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

32. *Id.* at 436 (alterations in original) (internal quotation marks omitted).

33. *Id.* at 437.

34. *Id.*

35. *Id.*

36. *Id.* (internal quotation marks omitted).

37. *Id.* at 437–38.

38. *Id.* at 440.

discrimination based on race, national origin, or alienage must be justified under a strict scrutiny standard.<sup>39</sup> Ultimately, the Court struck down the Fifth Circuit's opinion, holding that mentally disabled individuals are *not* a suspect class and provided several reasons why they should not receive a heightened level of scrutiny.<sup>40</sup>

However, the Court emphasized that refusing to recognize the mentally disabled as a suspect class “does not leave them entirely unprotected from invidious discrimination.”<sup>41</sup> Finding no rational basis for the City of Cleburne to believe that CLC posed a threat to the city, the Supreme Court struck down the zoning ordinance as invalid as applied to CLC.<sup>42</sup> The Court reasoned that the fears of the city were “vague” and “undifferentiated,” and its alleged concern of “avoiding concentration of population” did not adequately explain its action against the CLC when the city already had “apartment houses, fraternity and sorority houses, hospitals and the like.”<sup>43</sup> Without explicitly using the term “animus,” the Supreme Court used an animus analysis and held the zoning ordinance unconstitutional, even though the governmental action was only subject to rational basis review.<sup>44</sup>

*Cleburne* stands as an example of the Court's ability to strike down a law for being discriminatory against a non-suspect class. This opinion demarcates the reach and breadth of the animus doctrine, revealing that at the bottom of its bounds are the striking down of a discriminatory law that affects a class that may not be suspect, but is instead vulnerable and politically powerless.

### *B. Supreme Court Deference to the Executive Branch*

To better explain how the animus doctrine might be applied to presidential action, this Section discusses the basis of the executive branch's power and the deference that the legislative and judicial branches have traditionally shown to it. The Constitution itself does not explicitly give immigration powers to the executive branch, but rather gives Congress the

---

39. *Id.*

40. *Id.* at 442–46. One reason is that the legislative branch has already acted to protect them as a group, and if the Court recognized them as a semi-suspect class, “it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others.” *Id.* at 445.

41. *Id.* at 446.

42. *Id.* at 448.

43. *Id.* at 449–50.

44. *Id.* While animus is not mentioned in its opinion, the Court in *Cleburne* conducted an animus analysis that has been the subject of much scholarship in the late 20th century. See generally Arazia, *supra* note 9.

ability “[t]o establish an uniform Rule of Naturalization.”<sup>45</sup> The most notable way Congress has executed this power is by passing the Immigration and Nationality Act (INA).

The INA, enacted in 1952, is the governing statute regarding any government actions concerning immigration.<sup>46</sup> This statute contains the majority of the president’s power, which enables him or her to “suspend the entry of all aliens or any class of aliens” if those individuals “would be detrimental to the interests of the United States.”<sup>47</sup> The president may impose “any restrictions he may deem to be appropriate.”<sup>48</sup> This broad grant of power to the president has been used to justify several presidential actions involving restrictions surrounding entry into the United States.<sup>49</sup> In addition to legislative deference to the president, the Supreme Court has shown reverence to the president’s treatment of foreign nations through their decisions. For example, in *Fiallo v. Bell*, several unwed, alien fathers challenged a provision in the INA that barred entry into the United States with their illegitimate children because they were unable to satisfy the definition of “parent” under the statute.<sup>50</sup> The Court held that this provision was constitutional, citing to the fact that questions involving immigration and naturalization are best left to Congress and the executive branch, and judicial involvement is not appropriate.<sup>51</sup>

While the pattern of judicial hesitancy predates the INA by many decades, decisions striking down executive conduct surrounding immigration found footing one year after passing the INA in *Shaughnessy v. United States*.<sup>52</sup> In *Shaughnessy*, the Supreme Court stated that “[c]ourts 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>53</sup> One recent example of this deference is in

45. U.S. CONST. art. I, § 8.

46. Immigration and Nationality Act, 8 U.S.C. §§ 1100–1178 (2012).

47. 8 U.S.C. § 1182(f).

48. *Id.*

49. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff’d*, 484 U.S. 1 (1987).

50. *Fiallo v. Bell*, 430 U.S. 787, 789–90 (1977). “The definition does not extend to an illegitimate child seeking preference by virtue of his relationship with his natural father.” *Id.* at 789.

51. *Id.* at 796.

52. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

53. *Id.* at 210.

*Zivotofsky v. Kerry*,<sup>54</sup> in which the Supreme Court held that it is the president's power alone to recognize or decline the sovereignty of another foreign nation.<sup>55</sup> In this case, the Court also refused to implement judicial review in the context of the United States relations with other countries.<sup>56</sup>

With a cursory glance at this judicial pattern, some may not be surprised if the Supreme Court refuses to insert itself into President Trump's immigration power, especially using an animus theory. However, when looking deeper into the underlying motivation for President Trump's executive orders, it appears that these actions fall outside the pattern of acceptable executive conduct in *Shaughnessy* and *Zivotofsky*. In *Trump v. Hawaii*, the Court asked itself how much deference should be given to the executive branch in the face of underlying animosity towards a religious group.<sup>57</sup> Without offering much analysis, the Court answered this question by giving an enormous amount of deference.

## II. *TRUMP V. HAWAII*

### A. Background

Executive Order No. 13769 (EO-1) was signed on February 1, 2017.<sup>58</sup> President Trump ordered the Secretary of Homeland Security to investigate foreign countries and “determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA,” allowing the agency to decide whether the individual seeking entrance into the United States is a safety threat.<sup>59</sup> As the rationale behind this policy, President Trump stated that allowing aliens from the countries listed in the INA into the United States “would be detrimental to the interests of the United States.”<sup>60</sup>

---

54. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). *Zivotofsky*, born to American parents in Jerusalem, was not allowed to put “Israel” as his place of birth on his passport “pursuant to State Department policy.” *Id.* at 2083.

55. *Id.* at 2096.

56. *Id.* at 2087. The Court reasoned that the president has this unilateral responsibility because the powers established in Article II are for the president alone to receive foreign officials and ministers and to create treaties. *Id.*

57. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

58. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (revoked by Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017)).

59. *Id.*

60. *Id.* at 8978.

Once the Department of Homeland Security conducted its review, it identified seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—considered security risks, and banned entry by any individual from the listed countries into the United States for ninety days.<sup>61</sup> Eight days later, the District Court for the Western District of Washington enjoined enforcement of this order, and the Court of Appeals for the Ninth Circuit later denied the Government’s motion to stay the injunction.<sup>62</sup> In its reasoning, the Ninth Circuit balanced the public’s interest in national security against the public’s “interest in free flow of travel, in avoiding separation of families, and in freedom from discrimination,” noting that the Fifth Amendment’s Due Process Clause applies to “all ‘persons’ within the United States,” regardless of their status under immigration laws.<sup>63</sup>

In response to the Ninth Circuit’s denial, President Trump signed Executive Order 13780 (EO-2) one month later on March 9, 2017.<sup>64</sup> Similar to EO-1, EO-2 restricted entry from Iran, Libya, Somalia, Sudan, Syria, and Yemen.<sup>65</sup> However, unlike EO-1, these countries were enumerated in the order itself, each with an explanation as to why access would be restricted.<sup>66</sup> The order states that EO-1 was “not motivated by animus towards any religion,” but instead was created to allow religious minorities to utilize the United States Refugee Admissions Program (USRAP)—the government program through which refugees must apply before the Department of Homeland Security decides whether to approve their entry into the country.<sup>67</sup>

Soon after EO-2 was signed into law, both “District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary

61. *Trump*, 138 S. Ct. at 2403.

62. *Id.* (citing *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017), *reh’g denied*, 858 F.3d 1168 (9th Cir. 2017), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017)).

63. *Washington*, 847 F.3d at 1169, 1165 (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

64. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (March 9, 2017).

65. *Id.* at 13,211. Iraq was presented as a special circumstance, and several reasons for its omission in the EO-2 were named: “the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq’s commitment to combat ISIS justify different treatment for Iraq.” *Id.* at 13,212.

66. *Id.* at 13,211. The explanations following each country generally described the previous terrorist encounters the United States has experienced, with many mentions of the terrorist groups ISIS and al-Qa’ida. *See id.*

67. *Id.* at 13,210; see Bureau of Population, Refugees, & Migration, *U.S. Refugee Admissions Program: Overseas Application and Case Processing*, U.S. DEP’T ST. (Mar. 27, 2019), <https://perma.cc/5LLE-CZ96>.

injunctions[.]”<sup>68</sup> which were each upheld in the Fourth and Ninth Circuits.<sup>69</sup> Comparatively, the Ninth Circuit refused to reach the Establishment Clause issue, but stated that President Trump exceeded his power granted to him by Congress, and that there was “no sufficient finding in [EO-2] that the entry of the excluded classes would be detrimental to the interests of the United States.”<sup>70</sup>

On September 24, 2017, President Trump issued Proclamation 9645 (Proclamation), entitled “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.”<sup>71</sup> Much like the first two executive orders, the Proclamation set out vetting requirements for foreign nationals with the purpose of finding and stopping high-risk security threats who attempt to enter the country.<sup>72</sup> To measure the adequacy of a country’s vetting standards, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence designed a baseline consisting of three different criteria: identity-management information, national security and public-safety information, and national security and public-safety risk assessment.<sup>73</sup>

The Department of State identified sixteen countries with “inadequate” vetting standards and thirty-one with “at risk” standards, and therefore implemented a fifty-day period during which these countries were to improve their guidelines in compliance with the three named criteria.<sup>74</sup> After the period ended, the Secretary of Homeland Security identified eight countries that failed to meet the Proclamation’s standards—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen.<sup>75</sup> The Proclamation lists each

68. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018). Justice Thomas in his concurring opinion notes his disturbance at the ability of district courts to issue such widespread and far-reaching injunctions, believing them to be pushing the limits of the Article III powers granted in the Constitution. *Id.* at 2424–25 (Thomas, J., concurring).

69. *Id.* at 2404 (majority opinion).

70. *Hawaii v. Trump*, 859 F.3d 741, 770 (9th Cir.), *aff’d*, 871 F.3d 646, *vacated*, 138 S. Ct. 377 (2017).

71. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

72. *See id.*

73. *Id.* at 45,162–63. Identity-management information seeks information regarding whether the foreign government keeps track of an individual’s documents and who they claim to be; public-safety information includes information about an individual’s known criminal and/or terrorist background; and public-safety risk assessment weighs the country’s connection with terrorist safe havens. *Id.*

74. *Id.* at 45,163.

75. *Id.* Although Iraq did not meet the baseline requirements, the Secretary of Homeland Security suggested that it be excluded from the list because of the strong relationship between Iraq and the United States, as well as “its commitment to combating the Islamic State of Iraq and Syria.” *Id.*

country's specifically-tailored plan for restricting nationals, with each plan ending in a declaration that suspended travel to the United States.<sup>76</sup> Additionally, the Proclamation excepts lawful permanent residents, those with dual citizenship, and any foreign nationals who were granted asylum or traveling for diplomatic reasons.<sup>77</sup> The Proclamation also allows the government to grant waivers to any individual from these countries on a case-by-case basis.<sup>78</sup> Finally, the Proclamation concludes by detailing the time period for each country's immigration suspension.<sup>79</sup>

After President Trump signed the Proclamation, nationwide panic ensued and airports became a place of chaos.<sup>80</sup> Around 200 people found themselves detained by federal agents on planes headed to the United States of America at the exact time President Trump signed the Proclamation into law, and more than 700 were held for "lengthy screening."<sup>81</sup> Lawyers and activists flocked to their closest international airports to provide legal assistance and comfort to both the affected individuals and their distraught families who feared they may never see their relatives again.<sup>82</sup>

Three individuals brought suit in the District of Hawaii, who were either United States citizens or lawful permanent residents but who had relatives from Iran, Syria, and Yemen that were affected by the Proclamation.<sup>83</sup> These plaintiffs argued that the Proclamation was not in conformity with the INA, and that it was invalid under the First Amendment's Establishment Clause because it was a product of unconstitutional animus toward Muslims.<sup>84</sup> The District Court of Hawaii ruled that the president was overstepping constitutional boundaries of limited power and the Proclamation

76. *Id.* at 45,165–67.

77. *Id.* at 45,167.

78. *See Id.* at 45,168. The waiver process is not clearly defined in the proclamation itself; lawsuits have been filed as recently as 2017 to compel the Trump administration to be transparent in its process of deciding which individuals are allowed to receive waivers. Liz Hayes, *Americans United Asks Court To Block Trump's Muslim Ban 3.0*, AM. UNITED: WALL SEPARATION BLOG (Oct. 6, 2017), <https://perma.cc/W45N-7TLV>.

79. Proclamation No. 9645, 82 Fed. Reg. at 45,171. September 24, 2017 marked the beginning of the suspension period for any country who would have been subject to EO-2, while October 18, 2017 marked the beginning of the period for Chad, North Korea, and Venezuela, as well as those from Iran, Libya, Syria, Yemen, and Somalia who have "a credible claim of a bona fide relationship with a person or entity in the United States." *Id.*

80. *See* Betsy Woodruff & Katie Zavadski, *Trump's Travel Ban Is Back, but Airport Chaos Isn't*, DAILY BEAST (June 30, 2017), <https://perma.cc/GHS8-JSXD>.

81. *Id.*

82. *See id.*

83. *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018). Another plaintiff included the Muslim Association of Hawaii, a nonprofit organization in Hawaii. *Id.*

84. *Id.*

“improperly uses nationality as a proxy for risk,” and therefore granted an injunction.<sup>85</sup> The Ninth Circuit eventually affirmed, finding that this was “an executive override of broad swaths of immigration laws that Congress has used its considered judgment to enact.”<sup>86</sup> The Supreme Court then granted certiorari.<sup>87</sup>

### *B. The Majority Opinion*

Chief Justice Roberts’ majority opinion, supported by Justices Kennedy, Thomas, Alito, and Gorsuch, was a lost opportunity for the Supreme Court to draw a definitive line in the animus doctrine, solidifying how the executive branch can go too far in its powers.<sup>88</sup> The Court first addressed the petitioner’s argument that “the Proclamation is not a valid exercise of the President’s authority under the INA.”<sup>89</sup> Here, the Court found no issue with the broad, sweeping power granted to the president in the text of the INA.<sup>90</sup> The Court instead noted that President Trump satisfied the only prerequisite assigned to a president seeking to utilize this power: that entry of these foreign nationals “would be detrimental to the interests of the United States.”<sup>91</sup> This was supported by evidence of foreign governments engaging in inadequate immigration practices that allow terrorists or dangerous foreign nationals to enter the United States without providing notice to United States officials.<sup>92</sup>

After deciding the text of the INA supported President Trump’s Proclamation, as well as the legislative history and historical practice of the INA, the Court next considered the petitioner’s argument that these suspensions violate Section 1152(a) of the INA, which states that “no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person’s race . . . nationality, place of birth, or place of residence.”<sup>93</sup> The petitioner argued that nationality-based discrimination is prohibited in the INA regarding immigration travel.<sup>94</sup> The Court discredited this argument

---

85. *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1155 (D. Haw.), *aff’d in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017).

86. *Hawaii v. Trump*, 878 F.3d 662, 690 (9th Cir. 2017), *rev’d*, 138 S. Ct. 2392 (2018). The court did not address the Establishment Clause argument. *Id.* at 702.

87. *Trump*, 138 S. Ct. at 2407.

88. *Id.* at 2402.

89. *Id.* at 2408.

90. *Id.*

91. *Id.* (quoting Immigration and Nationality Act, 8 U.S.C. § 1182(f) (2012)).

92. *Id.* at 2408–09.

93. 8 U.S.C. § 1152(a)(1)(A).

94. *Trump*, 138 S. Ct. at 2413–14 (2018).

because the text of both applicable sections of the INA, along with the historical presidential use of the power, supported a complete ban on an entire nationality.<sup>95</sup>

The Court finally addressed the petitioner’s animus argument, which was that “the Proclamation was issued for the unconstitutional purpose of excluding Muslims.”<sup>96</sup> Specifically, they argued that further investigation into previous executive orders and the Proclamation showed that the justifications of “vetting protocols and national security” were mere “pretexts” to disguise their true purpose—discriminating against the Muslim population.<sup>97</sup> From this, it was clear that the plaintiffs were describing the many statements President Trump made preceding and during the signing of his orders.<sup>98</sup>

The Court surprisingly addressed President Trump’s infamous “anti-Muslim” statements head-on.<sup>99</sup> Each of President Trump’s statements to the media described in the opinion mentioned his intent to ban Muslims from entering the United States for their connection with radical Islam.<sup>100</sup> However, the court side-stepped this underlying evidence of discrimination, stating that “the 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.”<sup>101</sup>

The Court, relying on *Kleindienst v. Mandel*, a case involving entry denial to a proclaimed Marxist, applied rational basis review to the Proclamation.<sup>102</sup> With rational basis being the lowest hurdle for a government to jump, it is unsurprising that the Court found President Trump’s ban to be reasonably connected to legitimate interests in national security concerns.<sup>103</sup> The Court relied on the fact that the text of the Proclamation does not specifically address religion, and only affects eight percent of the Muslim

95. *Id.* at 2414–15.

96. *Id.* at 2415.

97. *Id.* at 2417.

98. *See id.*

99. *Id.*

100. *Id.*

101. *Id.* at 2418.

102. *Id.* at 2419 (referencing *Kleindienst v. Mandel*, 408 U.S. 753, 755–58 (1972)). Under *Mandel*, the Court “will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.* at 2420.

103. *Id.*

population.<sup>104</sup> The Court held that the petitioners were not able to present a showing of unconstitutional animus.<sup>105</sup>

### C. *The Dissenting Opinions*

The majority opinion was met with two dissents: a short piece written by Justice Breyer, joined by Justice Kagan; and the principal dissent, written by Justice Sotomayor and joined by Justice Ginsburg.<sup>106</sup> Justice Breyer's dissent disapproved of the waiver system and the case-by-case exemptions.<sup>107</sup> His main point of contention with the majority was that the Government was not applying the Proclamation's waiver system consistently with its text or consistently amongst the individuals applying for an exemption.<sup>108</sup>

Justice Sotomayor took issue with the way the majority ignored blatant evidence of animus toward the Muslim population.<sup>109</sup> Her opinion began by stating the basis upon which the United States was founded: "religious liberty."<sup>110</sup> She continued to argue that "a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus," and would have found that the Proclamation was used to cover the discriminatory animus against the Islamic faith.<sup>111</sup> Like the majority, Justice Sotomayor spent several paragraphs recounting the many statements made by President Trump, and even agreed that "the issue before us is not whether to denounce" what has been said.<sup>112</sup> However, she presented an even narrower question than the majority, and believed the real issue to be "whether a reasonable observer, presented with all 'openly available data,' the text and 'historical context' of the Proclamation, and the 'specific sequence of events' leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country."<sup>113</sup>

Additionally, Justice Sotomayor distinguished this situation from the case the majority relied on in its opinion, *Mandel*, which held that "when the Executive Branch provides 'a facially legitimate and bona fide reason'

---

104. *Id.* at 2421.

105. *Id.* at 2423.

106. *Id.* at 2429 (Breyer, J., dissenting), 2433 (Sotomayor, J., dissenting).

107. *Id.* at 2430–33 (Breyer, J., dissenting).

108. *Id.* at 2431.

109. *Id.* at 2433 (Sotomayor, J., dissenting).

110. *Id.*

111. *Id.* at 2433, 2440.

112. *Id.* at 2435–38, 2438 (internal quotation marks omitted).

113. *Id.* at 2438 (quoting *McCreary County v. ACLU*, 545 U.S. 844, 862–63 (2005)).

for denying a visa, ‘courts will neither look behind the exercise of that discretion, nor test it by balancing its justification.’”<sup>114</sup> In arguing that *Mandel* does not apply to the situation at hand, Justice Sotomayor first stated that *Mandel* involved a single foreign national’s denial of entry into the United States, while President Trump’s actions deny entry to “millions of individuals on a categorical basis.”<sup>115</sup> Second, she argues that in this potential Establishment Clause violation, the *Mandel* precedent should not apply because the Court has previously stated that “[f]acial neutrality is not determinative” in finding an unconstitutional purpose in a governmental action.<sup>116</sup> Finally, Justice Sotomayor argues that even if *Mandel* applied, it would not stop the Court from “looking behind the face of the Proclamation” if there is “an affirmative showing of bad faith” by President Trump, which is evidenced by his query into finding a “‘lega[l]’ way’ to enact a Muslim ban.”<sup>117</sup>

In her opinion, a reasonable person would view the extrinsic evidence of President Trump’s remarks as intent to discriminate against Muslims. She criticized the majority for applying a “watered-down legal standard in an effort to short circuit plaintiffs’ Establishment Clause claim.”<sup>118</sup> She went even further to say that the Proclamation would still fail under the majority’s rational basis review because of the overwhelming evidence indicating President Trump’s hostility towards Muslims, creating no legitimate basis for his Proclamation.<sup>119</sup> In curt fashion, Justice Sotomayor ended with the words “I dissent.”<sup>120</sup>

---

114. *Id.* at 2440 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

115. *Id.* at 2440 n.5.

116. *Id.* (alteration in original). Justice Sotomayor also argues that another case relied on by the majority, *Fiallo v. Bell*, 430 U.S. 787 (1977) (discussed *supra* note 50), has no footing in this analysis because that case involved a legislative action, not an executive action. *Id.*

117. *Id.* (alteration in original) (citing *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015)).

118. *Id.* at 2440.

119. *Id.* at 2442.

120. *Id.* at 2448; see Dylan Matthews, *Read: Sonia Sotomayor Condemns Trump’s “Unrelenting Attack on the Muslim Religion and its Followers,”* VOX (June 26, 2018), <https://perma.cc/GBS3-A35S>. Typically, Supreme Court justices end a dissent with “I respectfully dissent,” which distinguishes Justice Sotomayor’s conclusion from other opinions. *Id.*

## III. COMPARING ANIMUS

*A. President Trump and the Muslim Population*

A clear picture of President Trump's view towards the Muslim population requires a review of his many statements made about the Muslim population. Then, it should be determined whether the executive orders and Proclamation were made as a result of bias, rather than solely for national security measures.

President Trump began announcing his plans for the "Muslim Ban" while still on the campaign trail in 2015.<sup>121</sup> For example, President Trump announced at a rally that he planned on initiating a complete and total ban of Muslims when president, *not* a ban on countries who had inadequate national security standards.<sup>122</sup> During this time period, he turned to his Twitter account to write anti-Muslim tweets, such as criticizing Obama about aiding Muslim countries<sup>123</sup>; to endorse a statement titled "Statement on Preventing Muslim Immigration"<sup>124</sup>; and to retweet several anti-Muslim tweets from other accounts.<sup>125</sup>

Once he became President, he made even more statements of disdain toward Muslim individuals. President Trump appears to often connect people who practice Islam to those who are involved with the terrorist group ISIS.<sup>126</sup> Additionally, during the signing of EO-1, he read the title of the executive order<sup>127</sup> to the media present, and followed it by saying, "[w]e all know what that means."<sup>128</sup> After its signing, Rudolph Giuliani, an advisor, said, "[w]hen [Donald Trump] first announced it, he said, 'Muslim ban.'

121. See Brief for Respondents at 6–7, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

122. Press Release, Donald J. Trump, *supra* note 1.

123. Donald J. Trump (@realDonaldTrump), Twitter (Dec. 6, 2015, 9:50 PM), <https://perma.cc/5LRP-B7W4>; Donald J. Trump (@realDonaldTrump), Twitter (Sep. 13, 2012, 7:27 AM), <https://perma.cc/VQ2D-C3C3>.

124. Donald J. Trump (@realDonaldTrump), Twitter (Dec. 7, 2015, 2:32 PM), <https://perma.cc/YEZ6-5LHS>. This has since been deleted.

125. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 2, 2015, 2:36 PM), <https://perma.cc/H2BQ-VDL8>.

126. Krieg, *supra* note 1.

127. The title of EO-1 is Protecting the Nation from Foreign Terrorist Entry Into the United States. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (revoked by Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017)).

128. Brief for Respondents, *supra* note 121, at 7.

He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”<sup>129</sup>

Trump has also spoken about the Islamic faith in an “us v. them” fashion, having made several statements that distinguish anyone who considers themselves a Muslim from citizens of the United States. These include statements such as, “[I]slam hates us . . . [W]e can’t allow people coming into this country who have this hatred of the United States,” and “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.”<sup>130</sup> These statements are evidence that the President does not differentiate between those who peacefully practice Islam and those who use the Islamic faith as validation for violent terrorist attacks on the rest of the world; instead, both subsets of the religion are grouped together and are viewed as an enemy-group to the United States.

When taking a closer look at EO-1, EO-2, and the Proclamation’s guise of banning countries who have inadequate security measures, it appears that there are irregular outcomes that suggest the purpose of the ban was *not* to protect the United States from dangerous attacks, or at least not completely. The Ninth Circuit Court of Appeals discovered that while EO-2 discriminates on nationality for the purpose of national security, countries that have “meaningful ties” to the banned countries are not included in Section 2(c) of EO-2 and are therefore allowed to access the United States.<sup>131</sup> If President Trump and his administration had the true intent of providing protection to United States citizens, it would be logical to include those countries who provide assistance to the countries that have been deemed dangerous.<sup>132</sup>

Through a closer examination of these statements, it appears that President Trump’s purpose for the three executive orders was to suspend entry of individuals who practice the Islamic faith simply because of their faith, and to ban them for at least a short period of time. However, the majority refused to call this animus, and only looked at President Trump’s statements in the limited view of providing justification for creating the national security standards.<sup>133</sup>

129. *Id.* at 8 (alteration in original).

130. *Id.* at 6–7 (second alteration in original).

131. *Hawaii v. Trump*, 859 F.3d 741, 773 (9th Cir.), *aff’d*, 871 F.3d 646, *vacated*, 138 S. Ct. 377 (2017).

132. Six of the eight countries’ populations listed in the travel ban are majority Muslim. See Samuel Osborne, *Donald Trump Travel Ban on Six Muslim-Majority Countries is Unlawful, US Appeals Court Rules*, INDEP. (Feb. 15, 2018), <https://perma.cc/J2PT-3CFX>.

133. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“Under these circumstances, the Government has set forth a sufficient national security justification . . .”).

B. *Comparison to Plyler and Cleburne*

Looking through the lens of *Plyler*, there should have been a finding of animus behind the Proclamation at issue in *Trump v. Hawaii*. In *Plyler*, the Court found that *undocumented, illegal immigrant* children are protected under the doctrine—that is, a group of people who did not enter the United States legally are still subject to the animus analysis.<sup>134</sup> In *Trump v. Hawaii*, people who are trying to enter the United States through *lawful* avenues, rather than entering the country illegally, appear to be punished because of their connection to Islam when one looks at the actions leading up to the Proclamation and Executive Orders; the majority opinion, however, refused to look past the neutral language of the Proclamation and Executive Orders.<sup>135</sup>

The main reason the *Plyler* Court used an animus analysis in this case involving undocumented children was because of their immutable status as an illegal immigrant; these kids did not have a choice in their illegal status, so punishment was seen as nonsensical and unfair.<sup>136</sup> Arguably, this same line of reasoning can be applied to those affected by the Proclamation because religion, and specifically Islam, can be seen as a “soft” immutable class.<sup>137</sup> Immutable classes are those which share a fixed characteristic that is so fundamental with an individual’s personal identity to the point that asking someone to change would be undesirable.<sup>138</sup> Asking an individual who is Muslim and lives in a predominantly Muslim country to change their beliefs would be irrational, making religion an immutable class that should be given more deference in determining whether the discrimination they face is fueled by an animus towards them. Therefore, like the

---

134. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (“It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime . . . . If the State is to deny a discrete group of innocent children the free public education that it offers to other children residents within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”).

135. *Trump*, 138 S. Ct. at 2423. “The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion.” *Id.* at 2421.

136. *Plyler*, 457 U.S. at 220.

137. Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 24 (2015) (quoting Joseph Landau, “Soft Immutability” and “Imputed Gay Identity”: *Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 263 (2005)). This so-called “new immutability is inflected with ideas about privacy and liberty,” and protection should be given to those characteristics that are ways human beings define and identify themselves. *Id.* at 26.

138. *See id.* at 5.

undocumented children from Mexico, the Muslims affected by the Proclamation are facing an animus by the United States government, under the publicly stated reason of national security, for Islam's connection to their country, which is something almost impossible to change.<sup>139</sup>

Similarly, like the Court in *Cleburne*, the Court in *Trump v. Hawaii* should have struck down the Proclamation as unconstitutional for animus. There are several characteristics that are shared between these two seemingly dissimilar cases that support a finding of animus in both. For instance, the special zoning permit and ordinance in *Cleburne* was created out of the unsubstantiated fear that the mentally disabled persons are dangers to their community.<sup>140</sup> Similarly, as evidenced by President Trump's verbal treatment of the world's Muslim population, the Proclamation was also created out of the unsupported fear that Muslims, as a whole, are dangerous to the United States.<sup>141</sup>

Statistically, ninety-four percent of the terrorist attacks the United States has experienced were caused by non-Muslims.<sup>142</sup> While the countries with suspended entry in the executive orders only make up eight percent of the world's Muslim population, the majority of almost each country's population is Muslim.<sup>143</sup> With a brief examination of President Trump's statements about Muslims preceding the ban, it appears likely that the three executive orders were created out of fear for the Islamic faith. The supposed national security interests implicated in the executive orders are pretextual and a distraction from the underlying motivation behind banning entry from those foreign nationals.

Furthermore, the discriminated group in *Cleburne* did not receive semi-suspect classification and were only subjected to rational basis review.<sup>144</sup> The Proclamation, on the other hand, discriminated against alienage, religion, and national origin, which receives strict scrutiny in the

139. It is important to note that the government power used in *Trump v. Hawaii* is different from *Plyler* in that President Trump was acting with extended Executive powers with respect to national security, compared to a school board's policy surrounding immigration in *Plyler*. This difference strangely shows that the Court is less tolerable towards animus in a localized area when compared to the majority in *Trump v. Hawaii*, which found no animus in an executive action that affected the globe.

140. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985).

141. See Jenna Johnson & Abigail Hauslohner, 'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims, WASH. POST (May 20, 2017), <https://perma.cc/Z2AK-BEJY>.

142. Omar Alnatour, *Muslims Are Not Terrorists: A Factual Look at Terrorism and Islam*, HUFFPOST (Dec. 9, 2015), <https://perma.cc/QNA6-CZLX>.

143. Brief for Respondents, *supra* note 121, at 10–11.

144. *City of Cleburne*, 473 U.S. at 446.

Supreme Court case law—a much higher standard that requires narrow tailoring of the means to the end.<sup>145</sup> If 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 should also be struck down for animus.

#### CONCLUSION

*Trump v. Hawaii* caused a world-wide stir and blurred the lines in the legal doctrine of animus. By looking at President Trump’s countless statements isolating Muslims from the United States, and by a review of what the Supreme Court has previously found to be animus, this case was an opportunity for the Court to strengthen or support the animus doctrine. For future courts searching for guidance in what should be considered animus toward a class of people, this case now places fog on their windshield. Furthermore, this case creates future concerns for what a President can do in terms of his or her immigration power. From the precedent set in *Trump v. Hawaii*, it appears that a president can show antagonism toward a group of people, as long as it is done “legally.”<sup>146</sup> While it is not clear where this case has placed the animus doctrine in terms of potential paths for the oppressed to find solace, it is evident that it strayed from the path that has been followed since its inception, and has made it more difficult for plaintiffs to defeat government action.

*Megan L. Mallamas\**

---

145. Pollvogt, *supra* note 14, at 895.

146. *See* Brief for Respondents, *supra* note 121, at 8 (internal quotation marks omitted). After EO-1 failed, Trump stated he wanted to create a ban that would be legal. *Id.*

\*J.D. Candidate 2020, Campbell University School of Law. The Author would like to thank her partner Matthew for his continued love and encouragement throughout the years, as law school could not have been possible without his unwavering support. The Author would also like to thank Jen Davis, Kempton Healey, Jessica Inscore, and the entire *Campbell Law Review* staff for their feedback, comments, and time devoted to editing this Comment for publication.