

THEOCRATIC EXCLUSION: SCOTUS OPENS THE DOOR TO ESTABLISHMENT CLAUSE LIMITS ON IMMIGRATION POWER BUT ERRANTLY REFUSES TO WALK THROUGH IT

Abstract: In 2018, in *Trump v. Hawaii*, the Supreme Court held that former President Donald J. Trump’s “travel ban” did not violate the Establishment Clause because national security was a “facially legitimate and bona fide” justification. The Court grappled with how to balance its divided Establishment Clause precedent under the *McCreary County v. ACLU of Kentucky* reasonable observer test with the plenary sovereign-inherent immigration power precedent under *Kleindienst v. Mandel*. In relying on the facially legitimate and bona fide standard, the majority wholly placed immigration in the arena of national security review, distinguishing all Establishment Clause precedent as only applying to the domestic context. Nevertheless, for the first time, the Court applied some semblance of review of the immigration power, not considering political question deference. While acknowledging the significance of this review, this Note argues that the majority arbitrarily distinguished all Establishment Clause precedent, ignoring the ramifications that a First-Amendment-void immigration power can create. On the other hand, the dissent’s reliance on the reasonable observer standard remains too flexible and subjective, and thus unpredictable. Instead, Congress should codify into the Immigration and Nationality Act the compelling government interest standard found in the Religious Freedom and Restoration Act of 1993. Doing so would sufficiently protect citizens’ constitutional rights while continuing to acknowledge the importance of and compelling interest in the federal government’s unhindered ability to address national security concerns.

INTRODUCTION

Seeking financial opportunities to support his family during the Yemeni civil war, Mohammed Saleh journeyed to the United States as a lawful permanent resident in 1995, leaving his spouse and five children behind.¹ Just over twenty years later, his wife unexpectedly died, leaving his children alone in

¹ Rowaida Abdelaziz, *Trump’s Travel Ban Forever Changed the Lives of Muslims Around the World*, HUFFPOST (Jan. 25, 2022), https://www.huffpost.com/entry/trump-travel-ban-muslims-changed-lives_n_61e86498e4b01f707dabbdcd [https://perma.cc/W3CF-YWPF].

Yemen.² Being eligible for U.S. citizenship, Mohammed naturalized and filed petitions for permission to bring his children to the United States.³

Following a congenital heart disease diagnosis, Mohammed's son, Ayman, sought treatment in the United States given the limited medical treatment in a rebuilding Yemen.⁴ In a last-ditch effort to save his son's life, Muhammed peti-

² *Id.* The United States began diplomatic relations with Yemen in the nineteenth century, however the U.S. Department of State closed the U.S. consulate in Sana'a in 2015 due to internal destabilization following a civil war in the 1990s. *U.S. Embassy Sana'a, Yemen*, NAT'L MUSEUM AM. DIPL., <https://diplomacy.state.gov/encyclopedia/u-s-embassy-sanaa-yemen/> [https://perma.cc/Q2L9-CPER]. Consequently, the United States maintains a Yemen unit in its consulate in Saudi Arabia. *Id.* Yemen is a Muslim-majority nation located north of Djibouti and Somalia, south of Saudi Arabia. *Maps of Yemen*, WORLDATLAS, <https://www.worldatlas.com/maps/yemen> [https://perma.cc/4DMJ-G4ZC] (Dec. 7, 2022); Joyce Chepkemoi, *Religious Beliefs in Yemen*, WORLDATLAS (Apr. 25, 2017), <https://www.worldatlas.com/articles/religious-beliefs-in-yemen.html> [https://perma.cc/7XLD-Z5WV]. Sana'a is Yemen's largest city and capital, constituting approximately ten percent of the nation's nearly thirty million people. *Maps of Yemen, supra*.

³ Abdelaziz, *supra* note 1. To be eligible for U.S. naturalization, a foreign national must be older than eighteen years, have maintained lawful permanent resident status for either three or five years, maintain "physical presence" and "continued residence" within the United States, possess sufficient English language abilities, be of "good moral character," possess a baseline knowledge of American history and civics, and pledge allegiance and loyalty to the United States. *Become a U.S. Citizen Through Naturalization*, USA GOV, <https://www.uscis.gov/forms/explore-my-options> [https://perma.cc/9337-UZ66] (Dec. 12, 2023). Once eligible for naturalization, a non-U.S. citizen may file a naturalization application with supporting evidentiary documentation proving his or her eligibility with the applicable filing fee, which at times can reach one thousand U.S. dollars. *Id.* To initially receive permission to enter the United States, a foreign national must have a qualified family member or U.S. business petition on his or her behalf. *Family of U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/forms/explore-my-options/us-citizen-petition-for-an-immediate-relative-to-become-a-lawful-permanent-> [https://perma.cc/NSE3-NH9V] (Mar. 23, 2018). The agency's priority in processing a petition and considering the availability of potential visas depends on two factors: the petitioner's status, with U.S. citizens receiving preferential treatment, and his or her relation to the beneficiary with certain, closer-family relationships receiving priority. *Id.* The difference in priority can vary from immediate processing to a decades-long wait for processing. *See, e.g.*, Bureau of Consular Affs., U.S. Dep't of State, *Visa Bulletin for April 2023*, TRAVEL.STATE.GOV (Mar. 22, 2023), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-april-2023.html> [https://perma.cc/KE2W-7UCZ] (displaying the wait times for certain visas and countries of origin; for instance, Mexican nationals must wait approximately twenty years for U.S. Citizenship and Immigration Services to process their visa petition).

⁴ Abdelaziz, *supra* note 1. Due to Yemen's deteriorating economy, UNICEF estimates that 80% of children lack access to proper health care in Yemen. *Health*, UNICEF YEMEN, <https://www.unicef.org/yemen/health> [https://perma.cc/MWV2-ZMQG]. Following the nation's civil war in the early 2000s, many hospitals remain destroyed and inoperable while health care workers have not received pay in several years, relying on outside organizations like UNICEF or Doctors Without Borders to provide assistance. *Id.*; *Our Work in Yemen*, DOCTORS WITHOUT BORDERS, <https://www.doctorswithoutborders.org/what-we-do/where-we-work/yemen> [https://perma.cc/NL4J-Y3TT]. Yemen's civil conflict resulted in a complete collapse of its medical infrastructure. Bureau of Democracy, Hum. Rts., & Lab., 2021 Country Reports on Human Rights Practices: Yemen, U.S. DEP'T. OF STATE, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/yemen/> [https://perma.cc/9G7W-DH2J]. Significantly, a concerning majority of displaced persons in Yemen lack adequate access to not only health care, but also necessities such as food, shelter, and water. *Id.*

tioned for his son to enter the United States in 2018.⁵ U.S. Citizenship and Immigration Services initially approved Mohammed's petition, however the U.S. consulate to Yemen denied Ayman's application for a visa due to former President Donald J. Trump's 2017 travel ban.⁶ Mohammed never saw his son again; Ayman passed away in 2021 in a Yemeni hospital while the U.S. consulate was still processing his visa application.⁷

Similarly, Mahmood Salem fled Yemen during its civil war to seek the opportunity to financially support his family and eventually afford to petition for their permission to enter the United States.⁸ He was eventually able to afford to petition for his family to join him, but given their status as Yemeni nationals, the U.S. consulate denied them visas according to the travel ban.⁹

⁵ Abdelaziz, *supra* note 1. Even if the United States approves a qualifying relative's petition for a family member, the beneficiary must then separately apply abroad for a visa at his or her closest U.S. consulate. *Family of U.S. Citizens*, *supra* note 3; Bureau of Consular Affs., *supra* note 3. This requires waiting for the priority date to apply—the date assigned to beneficiaries based on their relationship to the qualified relative petitioner, country from which applying, and backlog in processing applications. Bureau of Consular Affs., *supra* note 3. Some individuals must wait years or even decades to be able to apply for a visa, even after receiving an approved petition. *Id.*

⁶ Abdelaziz, *supra* note 1; see *U.S. Embassy Sana'a, Yemen*, *supra* note 2 (clarifying that the U.S. Department of State hosts the U.S. consulate to Yemen in Saudi Arabia). See generally *infra* notes 55–78 and accompanying text (defining and discussing former President Trump's "travel ban").

⁷ Abdelaziz, *supra* note 1.

⁸ Mallory Moench, *U.S. Citizen's Family Was Denied Visas Under Trump's Travel Ban. Then He Died by Suicide*, NBC NEWS, <https://www.nbcnews.com/news/us-news/u-s-citizen-s-family-was-denied-visas-under-trump-n895381> [<https://perma.cc/W8KV-F72X>] (July 28, 2018). Yemen's civil war started in 2014 and continues today. Ctr. for Preventive Action, *War in Yemen*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/global-conflict-tracker/conflict/war-yemen> [<https://perma.cc/XE9X-5777>] (Mar. 5, 2024). The war began when Iranian-linked Shiite extremists overthrew the existing government, gaining control of the city of Sana'a. *Id.* Following the expulsion of Yemeni president Abd Rabbu Mansour Hadi, and the rise of the Shiite insurgents, a Saudi-led coalition initiated embargos, economic sanctions, and bombings across Yemen. *Id.* Since then, concerns have grown over the widening Sunni-Shiite Muslim divide across the Middle East, but the United States has been reluctant to fully intervene given Saudi and Iranian involvement in Yemen. See Kareem Fahim & Missy Ryan, *U.S. Is Resisting Calls to End Its Support for Saudi-led Coalition in Yemen's War*, WASH. POST (Mar. 20, 2018), https://www.washingtonpost.com/world/national-security/yemen-is-a-humanitarian-nightmare-but-the-us-is-resisting-calls-to-end-its-role-in-the-war/2018/03/19/5c8c3bd2-294b-11e8-bc72-077aa4dab9ef_story.html [<https://perma.cc/5AG7-YEW5>] (detailing how the United States has maintained an arm's-length involvement in the Yemeni conflict). The collapse of Yemen's internal infrastructure, in tandem with the insurgents' refusal of foreign aid, has threatened to become a humanitarian crisis and spark an impending nationwide famine. Bureau of Democracy, Hum. Rts., & Lab., *supra* note 4. Recent developments in the Israeli-Hamas War, however, have emboldened Iran-backed Houthi insurgents to stockpile weapons and attack shipments entering the region to aid Israel. Eleanor Watson, *U.S. and U.K. Conduct Fourth Round of Joint Airstrikes on Houthi Targets in Yemen*, CBS NEWS, <https://www.cbsnews.com/news/u-s-u-k-fourth-round-joint-airstrikes-houthi-targets-yemen/> [<https://perma.cc/LKT9-KDCY>] (Feb. 24, 2024). In attempts to protect the international movement of goods and humanitarian aid, the United States and allies have broken from their traditionally more neutral position by conducting airstrikes on Houthi weapon sites. *Id.*

⁹ Moench, *supra* note 8. The final iteration of Trump's travel ban, ordered in 2017, included a complete and indefinite immigration halt for Chad, Iran, Libya, Somalia, Syria, and Yemen. Amanda Devlin & Jon Lockett, *Travel Ban Row: What Was Donald Trump's Muslim Travel Ban?*, THE SUN,

Mahmood became distraught with the inability to bring his family to safety.¹⁰ Late one night, he called his family, informing them that he locked himself inside his convenience store, had a gun, and was going to shoot himself.¹¹ His brother later found his lifeless body.¹²

Though President Joseph Biden rescinded the travel ban just days into his presidency in 2021, the long-lasting impact of the Trump-era policy remains.¹³ In

<https://www.thesun.co.uk/news/2738203/donald-trump-travel-ban-supreme-court-muslim-countries-overrule/> [<https://perma.cc/B3KW-XVB7>] (Jan. 22, 2021). Accordingly, while qualified relatives could petition and receive approved petitions from the United States, their relatives from these countries could not apply for a visa, except for select visa waivers. *Id.*

¹⁰ Moench, *supra* note 8. Depressive suicidal patterns are common amongst immigrant populations given the pre-migration stress forcing them to flee and the stresses of assimilating in a different culture and society, which family separation and economic hardship then compound. Leo Sher, *A Model of Suicidal Behavior Among Depressed Immigrants*, 10 EXPERT REV. NEUROTHERAPEUTICS 5, 5 (2010).

¹¹ Moench, *supra* note 8. Concerningly, about 60% of all firearm-related deaths in the United States are suicides. *Firearm Suicide in the United States*, EVERYTOWN RSCH. & POL'Y, <https://everytownresearch.org/report/firearm-suicide-in-the-united-states/> [<https://perma.cc/847J-WGS9>] (Feb. 20, 2023). Not considering foreign nationals in the country, nearly 25,000 individuals annually commit suicide by firearm. *Id.* That is equivalent to nearly two-thirds of Fenway Park in Boston, Massachusetts. See Ian Browne, *Fenway Cleared for Full Capacity on May 29*, MAJOR LEAGUE BASEBALL (May 17, 2021), <https://www.mlb.com/news/fenway-park-to-host-fans-at-full-capacity-may-29> [<https://perma.cc/SKL3-REHC>] (detailing the stadium's capacity and re-opening after the COVID-19 pandemic).

¹² Moench, *supra* note 8.

¹³ *Proclamation on Ending Discriminatory Bans on Entry to the United States*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/> [<https://perma.cc/J5JP-AAM9>]; See Ed Mayberry, *Anti-Muslim Hate Crime Increase Traced to Trump's Travel Ban*, HOUS. PUB. MEDIA (July 24, 2017), <https://www.houstonpublicmedia.org/articles/news/2017/07/24/222610/anti-muslim-hate-crime-increase-traced-to-trumps-travel-ban/> [<https://perma.cc/HBQ4-5JDX>] (discussing rising levels of anti-Muslim hate in the United States); BUREAU OF CONSULAR AFFS., U.S. STATE DEP'T., IMPLEMENTATION OF PRESIDENTIAL PROCLAMATIONS (P.P.) 9645 AND 9983, at 1–2, https://travel.state.gov/content/dam/visas/presidentialproclamation/PP-9645_Montly-Public-Reporting-January%202021.pdf [<https://perma.cc/73KU-HPNC>] (outlining the ban's lasting delays and impacts on contributing to a delay or back up in processing petitions); Abdelaziz, *supra* note 1 (providing an example of the lasting delays and long-term impact on families); see also Jennifer Agiesta & Ariel Edwards-Levy, *CNN Poll: Trump Narrowly Leads Biden in General Election Rematch*, CNN (Feb. 1, 2024), <https://www.cnn.com/2024/02/01/politics/cnn-poll-trump-biden-election-2024/index.html> [<https://perma.cc/6VLV-D7LB>] (discussing the increasing likelihood of a Biden-Trump rematch in the 2024 presidential general election). One of President Biden's major policies as a presidential candidate included subverting and reverting many of his predecessor's immigration actions. Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121, 124 n.5 (2021); see *The Biden Plan for Securing Our Values as a Nation of Immigrants*, DEMOCRATIC NAT'L COMM., <https://web.archive.org/web/20230301193823/https://joebiden.com/immigration/#> ("Trump has waged an unrelenting assault on our values and our history as a nation of immigrants. It's wrong, and it stops when Joe Biden is elected president."). In this regard, President Biden campaigned on a platform to restore the United States as a "nation of immigrants," yet U.S. history complicates such a trope. See Daniel Kanstroom, *From the Reign of Terror to Reigning in the Terrorists: The Still-Undefined Rights of Non-Citizens in the "Nation of Immigrants,"* 9 NEW ENG. J. INT'L & COMPAR. L. 47, 63 (2003) ("[T]he targeting of enforcement initiatives against non-citizens contradicts the United

the wake of the ban's implementation, anti-Muslim hate crimes across the country increased by ninety-one percent, an unprecedented level even surpassing the post-9/11 era.¹⁴ For example, since Trump's travel ban, some studies reported a thirty-two percent jump in hate crimes against Muslim-perceived individuals and an exponential increase in anti-Muslim tweets and presence throughout social media.¹⁵ In total, the U.S. Department of State reported nearly one hundred thousand individuals as being subject to Trump's presidential proclamation, and countless people experienced horrific situations like Mohammed and Mahmood.¹⁶

States' self-definition as a nation of immigrants *as that self-definition is instantiated by constitutional protections for non-citizens' rights to an array of individual liberties, due process, and equal protection of law.*" (citing David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002))). The Statue of Liberty, for instance, declares on its base for the world to bring her "your tired, your poor, [y]our huddled masses yearning to breathe free. The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me." *Statue of Liberty: The New Colossus*, NAT'L PARK SERV., <https://www.nps.gov/stli/learn/historyculture/colossus.htm> [<https://perma.cc/6XCC-SA44>] (Aug. 14, 2019) (internal quotation marks omitted) (quoting an 1883 poem by Emma Lazarus included on the statue's pedestal). Nonetheless, Congress excludes such immigrants from the country, including those deemed to suffer from a communicable disease, those suffering from substance use disorders, prostitutes, and those considered to be a "public charge" depending on various factors including health and financial status. *See* 8 U.S.C. § 1182(a) (detailing all grounds of inadmissibility); 8 C.F.R. §§ 212.0, 212.20, 212.22 (2023) (same); *Admissibility*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-8> [<https://perma.cc/VX3A-VM77>] (Mar. 29, 2024) (same).

¹⁴ Mayberry, *supra* note 13; *Decades After 9/11, Muslims Battle Islamophobia in US*, AL JAZEERA (Sept. 11, 2022), <https://www.aljazeera.com/news/2022/9/11/decades-after-9-11-muslims-battle-islamophobia-in> [<https://perma.cc/6HKW-SBPD>].

¹⁵ Karsten Müller & Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Antiminority Sentiment*, 15 AM. ECON. J.: APPLIED ECON. 270, 272 (2023). Islamophobia is an ideology that deems Islam as inseparable from extremist terrorism and that individuals practicing the religion cannot integrate into Western society. Khaled A. Beydoun, *On Islamophobia, Immigration, and the "Muslim Bans,"* 43 OHIO N.U. L. REV. 443, 445–46 (2019). Following Trump's travel ban, islamophobia remains prevalent throughout the United States; anti-Muslim sentiment was heightened post-9/11 but has existed in the country since its founding. *See id.* at 444–45 (critiquing media coverage attaching the existence of U.S. islamophobia to Trump). Some pundits even consider the U.S. intervention and war across the Middle East post-9/11 as fueled by such Islamophobic ideals. *See* Bridge Initiative, *2021 Islamophobia in Review: United States*, GEORGETOWN UNIV. (Jan. 5, 2022), <https://bridge.georgetown.edu/research/2021-islamophobia-in-review-united-states/> [<https://perma.cc/8RLY-86N9>] ("Through it all, America said other people, the ones staring down the barrel of the War on Terror, were the barbarians." (quoting SPENCER ACKERMAN, *REIGN OF TERROR: HOW THE 9/11 ERA DESTABILIZED AMERICA AND PRODUCED TRUMP* 329 (2021))).

¹⁶ BUREAU OF CONSULAR AFFS., *supra* note 13, at 2. For instance, another Yemeni man, Anwar, won the diversity visa lottery before the travel ban went into effect. Leila Rafei & Ashoka Mukpo, *The Enduring Harms of Trump's Muslim Ban*, ACLU (Jan. 19, 2021), <https://www.aclu.org/news/immigrants-rights/the-enduring-harms-of-trumps-muslim-ban> [<https://perma.cc/D4Q6-G6EM>]. The Diversity Immigrant Visa Program, created in the twentieth century to rectify the nation's historically racial and ethnic bars and quotas, awards fifty thousand U.S. visas to obtain lawful permanent residency. *See* *Green Card Through the Diversity Immigrant Visa Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-eligibility/green-card-through-the-diversity-immigrant-visa-program> [<https://perma.cc/F7AP-RJAB>] (Jan. 11, 2018) (awarding visas to historically underrepresented nations in U.S. immigration). The Department of State runs the lottery, and even if a foreign national wins the lottery, he or she must still have a visa available and be admissible per statutory qualifications and eligibility criteria. *Id.*; *see* 8 U.S.C. § 1182 (outlining inadmissibility criteria,

Part I of this Note discusses the Supreme Court's jurisprudence and treatment concerning review of immigration matters and Establishment Clause claims.¹⁷ Part II addresses the majority and dissent's reasoning in *Trump v. Hawaii*, objectively analyzing Chief Justice John Robert's majority opinion and Justice Sonia Sotomayor's dissenting opinion, while also considering the compelling governmental interest standard.¹⁸ Finally, Part III argues that judicial review of the immigration power should allow constitutional review by incorporating the compelling governmental interest standard, thus protecting both aims while providing increased predictability moving forward.¹⁹

I. TRUMP'S TRAVEL BAN: AN UNPRECEDENTED CONVERGENCE OF THE ESTABLISHMENT CLAUSE AND THE IMMIGRATION POWER

In 2018, in *Trump v. Hawaii*, the U.S. Supreme Court concluded that former President Donald J. Trump's purported "Muslim ban" of certain foreign nationals from entering the country did not violate the Establishment Clause because the proclamation was facially neutral and the Court defers to executive authority pertaining to foreign relations.²⁰ In so doing, the Court unprecedentedly applied rational basis review of the executive branch's historical plenary immi-

exceptions, and waivers). There is no U.S. consulate in Yemen, so Anwar sold all of his belongings, consolidating just over one thousand U.S. dollars, to undergo a sixteen-hour journey through hostile territory in order to get to the closest U.S. consulate in Djibouti. Rafei & Mukpo, *supra*. After arriving, Anwar spent months living off this savings, eventually running out and having to beg others for money. *Id.* Shortly thereafter, the consulate denied his visa because the travel ban excluded him as a Yemeni national. *Id.* Thus, despite winning the visa lottery, as of 2021, Anwar returned to Yemen and was still living there with his two children. *Id.*

¹⁷ See *infra* notes 20–78 and accompanying text.

¹⁸ See *infra* notes 79–118 and accompanying text.

¹⁹ See *infra* notes 118–134 and accompanying text.

²⁰ *Trump v. Hawaii (Hawaii VI)*, 585 U.S. 667, 702–10 (2018) (first quoting *Fiallo v. Bell*, 430 U.S. 787, 795, 799 (1977); then quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); and then quoting *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)). While Congress still utilizes "alien" in the INA to refer to non-U.S. citizens, some courts consider this term to be offensively antiquated, thus this Note seeks to use nominal alternatives such as "non-citizen" or "foreign national." See *id.* at 746 n.7 (Sotomayor, J., dissenting) (quoting *Flores v. U.S. Citizenship & Immig. Servs.*, 718 F.3d 548, 551–52 n.1 (6th Cir. 2013), *overruled in part by Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021)) (discussing the problematic usage of the term "alien" yet continuing to abide by statutory terminology). This Note also interchangeably uses the terms "travel ban" or "Muslim ban" for convenience and neutrality instead of incorporating the proclamation's formal title, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." See Abby Livingston, *At Homeland Security Hearing, McCaul Calls Trump's Travel Ban Rollout "Problematic,"* TEX. TRIB. (Feb. 7, 2017), <https://www.texastribune.org/2017/02/07/michael-mccaul-calls-trumps-travel-ban-rollout-problematic/> [<https://perma.cc/7RZ3-LW6L>] (emphasizing how critiques referred to Trump's proclamation as a "Muslim ban").

gration power.²¹ Yet, the Court did not go as far as to apply heightened scrutiny review as it had done with Establishment Clause claims.²²

²¹ *Hawaii VI*, 585 U.S. at 702–06; see *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 602–03 (1889) (detailing the plenary immigration power). In the Court’s 1889 decision, *Chae Chan Ping v. United States*, for example, a Chinese national living in California visited his family in Hong Kong with proper customs documentation legally authorizing re-entry into the United States. 130 U.S. at 582. Prior to the plaintiff’s voyage, the United States had signed treaties with China that initially encouraged Chinese immigration to satisfy the labor demand of the California gold rush, thus the plaintiff had appropriate documentation to re-enter the United States. *Id.* at 589–95. However, during his voyage, as the population swelled, Congress determined it should ban the “invading” Chinese race. *Id.* at 595–96; see also Stephanie Hinneshitz, *The Chinese Exclusion Act*, BILL RTS. INST., <https://billofrightsinstitute.org/essays/the-chinese-exclusion-act> [<https://perma.cc/RYE3-R7VW>] (providing a history of the Chinese Exclusion Act). As a result, immigration and customs agents refused the Chinese national entry, detaining Chae Chan Ping in San Francisco Bay aboard the ship upon which he made the voyage for several weeks before removing him to China. *Chae Chan Ping*, 130 U.S. at 581–82. The Court denied his appeal, deciding that there was no right to entry, and that Congress had validly passed its exclusionary laws given that immigration is a power inherent to an independent nation’s sovereignty. *Id.* at 602–06. Moreover, the Court expressly refused to determine the moral appropriateness of other federal departments’ actions. *Id.* at 602–03. This remains binding precedent, upon which the Court has relied through the twentieth century and into the modern era. See *Fiallo*, 430 U.S. at 792 (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attributed exercised by the Government’s political departments largely immune from judicial control.’” (citing *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953))); *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Scalia, J., dissenting) (interpreting *Chae Chan Ping* to require constitutional limits “more or less” on federal immigration power (quoting *Chae Chan Ping*, 130 U.S. at 604)).

²² See *Hawaii VI*, 585 U.S. at 702–06 (declining to apply the reasonable observer standard, opting instead for a form of rational basis review); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (applying heightened scrutiny to Establishment Clause claims). In *McCreary County v. ACLU of Kentucky* in 2005, the Court determined that a county government’s courthouse display of the Ten Commandments violated the Establishment Clause because a “reasonable observer” would find that the county’s purpose was purely religious. 545 U.S. at 850–51, 881. The Ten Commandments include several divine laws revealed to the Jewish prophet Moses during the Jewish flight from slavery in Egypt, which include prohibitions on murder and adultery, as well as a mandate to honor one’s father and mother. See *Exodus* 20:2–17 (New International) (including, at length, the full list of Commandments). The county attempted three subsequent displays that included the Ten Commandments; the first consisted of framed text that included an abridged version of the laws, placed prominently in the courthouse. *McCreary*, 545 U.S. at 851–55. Following the ACLU’s lawsuit seeking an injunction for a violation of the First Amendment, the county changed the display to include a statement that the Christian tradition and law is the historical foundation of the law in Kentucky, surrounding it with other government texts such as the Declaration of Independence that referenced rights “endowed by their Creator.” *Id.* at 853–56 (quoting THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776)). After a lower court determined the two displays violated the First Amendment, the county constructed yet a third display, titled “The Foundations of American Law and Government,” which included several equally sized, framed documents such as the Ten Commandments and lyrics to the Star-Spangled Banner. *Id.* at 853–55. The county argued that its purpose was secular, to educate others on the history of American law, yet the Court ruled that an “objective observer” considering the several iterations of the display would conclude that it clearly did not have a secular purpose and violated neutrality between church and state. *Id.* at 857–63 (citing *Stone v. Graham*, 449 U.S. 39, 77 (1980) (per curiam)). In so doing, the Court expressly rejected applying only rational basis review and determined it was appropriate to consider the government’s purpose because otherwise, there would be no judicial power. See *id.* at 862 (“There is, then, nothing hinting at an unpredictable or disingenuous exercise when a

This Part of the Note discusses how the Court faced the cavernous divide between the deferential standard of review in national security and immigration matters, and the heightened scrutiny historically applied in Establishment Clause claims.²³ Section A of this Part discusses the Court's precedential treatment of claims within the foreign arena, national security, and the immigration power.²⁴ Section B then discusses the Court's historic handling of claims arising under the First Amendment's Establishment Clause.²⁵ Lastly, Section C expands on the factual and procedural history of the 2018 Supreme Court case, *Trump v. Hawaii (Hawaii VI)*, in front of the legislative backdrop of the Immigration and Nationality Act (INA).²⁶

A. Judicial Review of the Federal Immigration Power

From the earliest instances of judicial review, the Supreme Court has determined that the immigration power is plenary and nearly non-reviewable.²⁷ For example, in 1889, in the *Chinese Exclusion Case*, the Court allowed Congress's complete exclusion of Chinese nationals from immigration to the United States, reasoning that the judiciary must not consider the ethics or morals of federal immigration law.²⁸ Four years later, in 1893, in *Fong Yue Ting v. United States*,

court enquires into purpose after a claim is raised under the Establishment clause." (first citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); and then citing *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring))). Moreover, the Court distinguished its 1961 case *McGowan v. Maryland*, which allowed laws that enforced business closure on Sunday because it had a practical, modern, secular purpose (providing a day to rest) and was centuries-removed from its religious foundations. *Id.* at 860–61.

²³ See *infra* notes 27–78 and accompanying text.

²⁴ See *infra* notes 27–41 and accompanying text.

²⁵ See *infra* notes 42–48 and accompanying text.

²⁶ See *infra* notes 49–78 and accompanying text.

²⁷ *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 602–06 (1889); see also *supra* note 21 (elaborating on the facts underlying the case). *Black's Law Dictionary* defines "plenary" as "full; complete; entire." *Plenary*, BLACK'S LAW DICTIONARY (11th ed. 2019). Other scholars define "plenary power" as the ultimate authority, knowing no bounds, and preempting all state and inferior law. Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1071 n.2 (2004) (citing David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 362–66 (1976)); see also Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 1 (1998) (considering the intersections and motivations of race in immigration's plenary precedent).

²⁸ *Chae Chan Ping*, 130 U.S. at 602–03; see also Emily S. Bremer, *The Dynamic Last-in-Time Rule*, 22 IND. INT'L & COMPAR. L. REV. 27, 55–56 (2012) (explaining that the Court felt the best avenue for judging the morality and ethics of the Executive or Legislative branches was in the democratic citizenry and the political process). *Chae Chan Ping* remains binding case law, last affirmed in 1977 in *Fiallo v. Bell* and last mentioned in passing without challenge in 2001, in *Zadvydas v. Davis* by Justice Antonin Scalia in his dissent. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Scalia, J., dissenting). Nonetheless, legal scholars considering the racist history of the nation's immigration laws consistently critique and bemoan this precedent. See Corin James, Comment, *Fairness and Efficiency in Removal Proceedings: The Hidden Costs of Not Appointing Counsel to Noncitizens*, 71 ADMIN. L. REV. 391, 396 (2019) (discussing the "(in)famous

the Court further elaborated that, among the powers vested in Congress, the power to regulate the entry of foreign nationals is an inherent right of the nation as a sovereign power.²⁹ As recently as 1977, the Court has held the immigration power is purely a political question dealing with foreign affairs, and thus the judiciary has no role in reviewing Congress's or the President's discretionary determinations.³⁰

1889 Chinese exclusion case" and detailing the historically penal administration of deportation); Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3, 12–13 (2019) (detailing the case as "notorious" and upholding racially prejudicial Congressional action); Lori A. Nessel, *Deporting America's Children: The Demise of Discretion and Family Values in Immigration Law*, 61 ARIZ. L. REV. 605, 631–32 (2019) (labeling the case as "infamous" and creating precedent that allows unconstitutional acts survive the judiciary when they are within the realm of immigration); see also Garrett Epps, *The Ghost of Chae Chan Ping*, THE ATLANTIC (Jan. 20, 2018), <https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015/> [<https://perma.cc/5YBW-Q2TM>] (equating *Chae Chan Ping* to the resoundingly condemned cases of *Plessy v. Ferguson* and *Korematsu v. United States*).

²⁹ 149 U.S. 698, 706–11 (1893). In determining that Congress may prevent entry or remove foreign nationals from the United States in its discretion, the Court explained that such powers are inherent to an independent nation because they are crucially necessary to establish boundaries and protect itself from other foreign nations, governments, and nationals. *Id.* at 706, 711 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)). Importantly, of the powers vested in Congress, the Constitution does not vest an immigration power in the Executive nor Congress except to the extent they apply to Congress's ability to regulate foreign commerce and the President's ability to accept ambassadors. See U.S. CONST. art. I, § 8 (failing to explicitly mention an immigration power); *id.* art. II, § 2 (same). Thus, the Court has implied that the immigration power is inherent to these other departments of the federal government. *Fong Yue Ting*, 149 U.S. at 698. This same sentiment remains today in issues of foreign affairs such as the Chinese surveillance balloon shot down over the United States on February 5, 2023, which the House of Representatives condemned as a direct attack on American sovereignty. See Clare Foran & Ali Zaslav, *House Passes Resolution Condemning China's Use of Spy Balloon*, CNN, <https://www.cnn.com/2023/02/09/politics/chinese-spy-balloon-house-vote/index.html> [<https://perma.cc/WLF2-59GJ>] (Feb. 9, 2023) (exemplifying the outrage over an apparent Chinese invasion of U.S. sovereignty, though reports of espionage are now debunked).

³⁰ *Fiallo*, 430 U.S. at 787, 792–96. In refraining from conducting higher scrutiny of policy distinctions that did not grant preferential treatment to "illegitimate" children of unwed parents, the Court considered the immigration power to be purely political, inherently intertwined with foreign relations, and, thus, the judiciary has a very limited, if any, role in reviewing these determinations. *Id.* at 798. *Fiallo*, with several plaintiffs bringing Equal Protections and Due Process claims, challenged the Immigration and Nationality Act's (INA's) distinctions that granted preferential treatment to parents and their children, but not if the children were born out of wedlock. *Id.* at 788–91 (citing Immigration and Nationality Act, Pub. L. No. 82-414, § 101(b)(1)(D), (b)(2), 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101(b)(1)(D), (b)(2))). Irrespective of whether the immigration policy directly involved issues of national security, the Court reasoned that immigration is inherently intertwined with foreign relations, therefore, so long as Congress has a "facially legitimate and bona fide reason" for its legislation, it may pass and always has passed laws that, if applied to citizens, would be invalid. See *id.* at 792, 794–96, 806 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)) (explaining that distinctions between U.S. citizens must follow equal protection and due process, whereas the same is not guaranteed to non-citizens). Accordingly, the Court did not and determined it shall not consider the motivations and underlying policies concerning distinctions in admitting foreign nationals. *Id.* at 787, 798–800 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89, 596–97 (1952) (Frankfurter, J., concurring)).

Cracks in this impenetrable power, however, began to show in the Court's earliest reviews and have become more prevalent in the modern era.³¹ In *Fong Yue Ting*, for example, Justice David J. Brewer lamented that the immigration power is not outside of constitutional limits such that Congress may banish a non-citizen, depriving him or her of "life, liberty, and property" without protections guaranteed under due process.³² Moreover, in 2001, in *Nguyen v. Immigration and Naturalization Services*, the Court utilized domestic gender discrimination precedent to apply intermediate scrutiny to gender-based immigration distinctions.³³ That same year, in *Zadvydas v. Davis*, Justice Scalia argued that, even with the validity of *Chae Chan Ping*, there must be constitutional restraints to the immigration power.³⁴

The Court has particularly struggled balancing the immigration power with a U.S. citizen's constitutional rights.³⁵ In 1972, in *Kleindienst v. Mandel*, for instance, the Court grappled with a U.S. citizen's constitutional right to have face-to-face discourse with a Marxist ideologue under the First Amendment with INA Section 212(a)(28), which deems foreign nationals who espouse communist ideologies inadmissible.³⁶ In *Mandel*, the majority determined that a right to hear

³¹ See *Fiallo*, 430 U.S. at 800 (Marshall, J., dissenting) (lamenting that the immigration power cannot usurp other protections). In his dissent, Justice Thurgood Marshall argued that Congress cannot invoke the immigration power to operate freely (without judicial review), and, thus, the gender-based distinctions at issue necessitated a compelling government interest to survive Equal Protection and Due Process review. *Id.* at 807. Moreover, in 1972, in *Kleindienst v. Mandel*, the Court permitted a First Amendment analysis of the immigration power, though ultimately ruled that a U.S. citizen's right to free speech did not outweigh the immigration power. 408 U.S. at 769–70. The dissents in *Mandel*, however, strongly criticized ideological exclusions, arguing that there is not a government interest compelling enough to overcome a citizen's right to freely give or receive speech. *Id.* at 770–72 (Douglas, J., dissenting). Justice Marshall further argued that Congress must not be given a free pass to act against the Constitution or act arbitrarily solely under the guise of immigration. *Fiallo*, 430 U.S. at 776–77 (Marshall, J., dissenting).

³² 149 U.S. at 743–44 (Brewer, J., dissenting). Chief Justice Melville W. Fuller also criticized the majority, arguing that Congress cannot hide behind the immigration power to act arbitrarily because it runs counter to the foundational constitutional principles. *Id.* at 763 (Fuller, C.J., dissenting).

³³ 533 U.S. 53, 60–61 (2001).

³⁴ *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Scalia, J., dissenting).

³⁵ See *Kerry v. Din*, 576 U.S. 86, 101–06 (2015) (Kennedy, J., concurring in judgment) (grappling with balancing a U.S. citizen's right to be physically present in the country with her spouse and the Attorney General's decision prevent her spouse from entering).

³⁶ 408 U.S. at 760. Several U.S.-citizen professors and students who were to hear Mandel speak at debates and conferences across the United States brought this suit to challenge the U.S. Attorney General's failure to grant Mandel a visa waiver after the Immigration and Naturalization Services deemed him inadmissible as a leftist Marxist under INA § 212(a)(28). *Id.* at 759–60. Mandel was a world-renowned journalist and political philosopher known for his writing on Marxism and coverage in *La Gauche*, a Leftist and Marxist weekly publication in Belgium. Barry Weisleder, *The Life and Struggles of Ernest Mandel*, MARXISTS.ORG (Sept. 1995), <https://www.marxists.org/archive/mandel/biog/mandel.htm#f1> [<https://perma.cc/228N-KDGE>]. Mandel regularly published literature on Trotskyite-Marxist critiques and praises of European society from challenging Stalin's regime in the Soviet Union to critiquing opportunistic democracy in Europe as a sham of a government powered by the people. *Id.* See generally ERNEST MANDEL, INTRODUCTION TO MARXISM (Louisa Sadler trans., Pluto

speech did not outweigh the immigration power when the attorney general has a “facially legitimate and bona fide reason.”³⁷ In its reasoning, the Court feared that allowing such a balancing test would either unravel the entire immigration power or force ill-equipped courts to balance constitutional rights with Congress’s ultimate right to exclude foreign nationals.³⁸ In his dissent, Justice Marshall argued the visa violations reason was only a front to deny a communist entry to the United States, and the majority’s standard was unprecedented because there not a compelling enough interest in stifling communist ideology to outweigh the protections under the First Amendment.³⁹ In his determination, utiliz-

Press 1982) (1977) (providing an example of Mandel’s political philosophy); KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO: A MODERN EDITION* (Samuel Moore trans. Verso 2012) (1848) (providing the seminal literature that inspired today’s Marxist/communist ideology). Mandel came to the United States twice before this saga, with the first trip made in 1962 on a discretionary waiver as a journalist. *Mandel*, 408 U.S. at 756. On the second trip in 1968, he also came on a discretionary waiver for a specific speaking tour, though he ultimately exceeded the bounds of this itinerary. *Id.* at 756, 758.

³⁷ *Mandel*, 408 U.S. at 770. Because of the Attorney General’s explanation of previous visa waiver violations, the Court reasoned, he had a “facially legitimate and bona fide reason” to deny Mandel admission, and thus the Court refused to look at the motivations underlying that reason. *Id.* The parties agreed that there is no constitutional right of entry to non-U.S. citizens, but rather focused on the appellee-plaintiffs’ right to receive ideas and experience discourse face-to-face under the First Amendment. *Id.* at 762. It is settled precedent that non-U.S. citizens have no right to enter the country, nor do constitutional protections prevent the foreign nationals’ expulsion. *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). Furthermore, Congress has the near-absolute right to exclude any foreign nationals whom it deems inadmissible. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *Mahler v. Eby*, 264 U.S. 32, 40 (1924); *Keller v. United States*, 213 U.S. 138, 143–44 (1909); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 294–95 (1904); *Fok Yung Yo v. United States*, 185 U.S. 296, 302 (1902); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). Moreover, the Constitution under the First Amendment protects U.S. citizens’ right to not only give speech but also receive and participate in discourse. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *United States v. Robel*, 389 U.S. 258, 263 (1967); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

³⁸ *Mandel*, 408 U.S. at 766–67.

³⁹ *Id.* at 776–78, 780 (Marshall, J., dissenting) (first citing *Noto v. United States*, 367 U.S. 290, 297–98 (1961); and then citing *Bradenburg v. Ohio*, 395 U.S. 444, 447–49 (1969)). Justice Marshall further explained that the First Amendment does not allow the other branches to discretionarily select which ideologies it permits into the country or otherwise. *Id.* at 780. Furthermore, he distinguished the precedents of the *Chinese Exclusion Case* and the 1893 case *Fong Yue Ting v. United States*, which allowed a near-non-reviewable plenary immigration power, arguing that they did not include an immigration policy that infringed on U.S. citizens’ rights. *Id.* at 781–83. Thus, when there is an immigration policy that infringes on U.S. citizens’ constitutional rights, it cannot be absolute and unreviewable. *Id.* at 782–83 (quoting *Robel*, 389 U.S. at 264). In fact, the Court has balanced a U.S. citizen’s constitutional rights within national security or foreign affairs on multiple occasions. *See Robel*, 389 U.S. at 263, 267–68 (striking a provision prohibiting employees of a federal army base to be Communist Party members, despite the action falling within the scope of the war powers); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (determining that, within the realm of national security, the Executive cannot inherently go judicially unsupervised); *Aptheker v. Sec’y of State*, 378 U.S. 500, 514 (1964) (not allowing the government to deny passports to Americans who espoused communism despite invoking

ing the compelling governmental interest standard would be more appropriate in balancing the immigration power with constitutional claims.⁴⁰ Despite these dissents, the Court has nevertheless remained steadfast in protecting the judicial blockade surrounding the immigration power.⁴¹

B. Judicial Review of Claims Arising Under the Establishment Clause

Under the Establishment Clause, the First Amendment seeks to prevent three main entanglements between church and state: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”⁴² Considering this, in 1971, in *Lemon v. Kurtzman*, the Supreme Court established the

national security reasoning); *Schneider v. Rusk*, 377 U.S. 163, 166, 169 (1964) (utilizing Equal Protections to prohibit statutory discrimination between citizens who were naturalized or native-born).

⁴⁰ *Mandel*, 408 U.S. at 776–78 (Marshall, J., dissenting). Codified in the Religious Freedom and Restoration Act of 1993, the compelling interest standard dictates that the government may infringe on someone’s First Amendment right to freely exercise their religion *if* the state actor can show: (1) it has a “compelling governmental interest,” (2) the action furthers that interest, and (3) there is no less restrictive way to satisfy that interest. 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress and the Supreme Court regularly use the compelling government interest standard to ascertain whether a state actor’s conduct is permissible despite impinging on people’s constitutional rights. *See Holt v. Hobbs*, 574 U.S. 352, 356–57 (2015) (determining that preventing inmates from growing their facial hair in accord with their religious beliefs was not in furtherance of the compelling government interest to prevent smuggling contraband into prisons); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 686, 723 (2014) (preventing a health care mandate to require companies to provide abortifacients when it would violate their “sincerely held religious belief[s]” because the mandate was not the least restrictive means to accomplish the compelling government interest of providing affordable health care).

⁴¹ *See Kerry v. Din*, 576 U.S. 86, 101–06 (2015) (Kennedy, J., concurring) (stating that although the plaintiff U.S. citizen was denied the guarantee of living in the United with her husband, such impingement was valid because the government had a facially legitimate purpose to deny him admission due to his connection to terrorist activities). In *Kerry v. Din* in 2015, the Court expressly applied and affirmed *Mandel*’s facially legitimate and bona fide reason standard, determining that it shall not consider the underlying motivations in such scenarios. *Id.* at 104 (quoting *Mandel*, 408 U.S. at 770). Justice Kennedy did acknowledge, however, that should there be concrete proof of bad faith, the Court may be able to consider the government’s motivation. *Id.* at 105 (citing *Mandel*, 408 U.S. at 770). Moreover, in 1950, in *United States ex rel. Knauff v. Shaughnessy*, the Court stated that foreign nationals have no legal guarantee of entry into the United States, and when Congress delegates its immigration power to the president, his power is at its most absolute, thus the judiciary has a limited role in reviewing his discretionary decisions. 338 U.S. at 542–43.

⁴² *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)) (outlining the still-followed, though questioned, three-prong test for ascertaining whether a state actor’s conduct violates the Establishment Clause), *abrogation recognized* in *Groff v. DeJoy*, 600 U.S. 447 (2023). Courts across the country have implemented this test to prohibit certain religious government entanglement. *See, e.g., Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 259–60, 290 (3d Cir. 2011) (determining that a school board beginning its meetings with a prayer violated the Establishment Clause because it overtly sponsored or endorsed religion and thus coerced school-aged children attending); *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 787–88 (10th Cir. 2009) (ruling that a reasonable observer would conclude that the purpose of erecting a Ten Commandments display outside the county courthouse was to promote religion, thus violating the Establishment Clause).

primary tripartite test that courts across the country continue to implement.⁴³ This test dictates that state action offends the Establishment Clause when: (1) there is a “[non-]secular legislative purpose;” (2) its “primary effect [is] one that neither advances nor inhibits religion,” and (3) it produces “an excessive government entanglement with religion.”⁴⁴

While the Court may have implicitly overruled *Lemon* in *Kennedy*, it had already strayed from it and utilized other methods of considering if state action does not subvert the Establishment Clause.⁴⁵ More recently, several circuits and the Supreme Court have implemented the 2014 *Town of Greece v. Galloway* test, which considers whether a reasonable observer who knows the background and surrounding information of a particular government action would assume or per-

⁴³ 403 U.S. at 612–13 (first citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); and then quoting *Walz*, 397 U.S. at 674).

⁴⁴ *Id.* (first citing *Bd. of Educ. v. Allen*, 392 U.S. at 243; and then quoting *Walz*, 397 U.S. at 674). To analyze excessive entanglement, courts will consider the nature or purpose of the private institutions that the government action benefits, the nature and type of aid that the government offers, and the resulting church and state relationship. *Id.* at 612–15. In breaking from the United Kingdom and the Church of England, the founding generation saw the mixture of state and religion breed abuse, corruption, and oppression. See Letter from James Madison to Edward Livingston (July 10, 1822), <https://founders.archives.gov/documents/Madison/04-02-02-0471> [<https://perma.cc/2SRJ-7DLC>] (“[R]eligion & Govt. will both exist in greater purity, the less they are mixed together.”); Letter from James Madison to Jasper Adams (Sept. 1833), <https://founders.archives.gov/documents/Madison/99-02-02-2830> [<https://perma.cc/DJ7X-SLQP>] (demonstrating a weariness of mixing church and state in that the “tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by entire abstinence of the Government from interference”). In 2022, in *Kennedy v. Bremerton School District*, Justice Neil Gorsuch noted that the Court has effectively abandoned the 1971 *Lemon v. Kurtzman* test because of its defects stemming from an “ambitio[u]s, abstract, and ahistorical approach” to analyzing claims under the Establishment Clause, yet only Justice Sonia Sotomayor’s dissent indicated that the majority was explicitly overruling *Lemon*. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534–36 (2022) (internal quotation marks omitted) (quoting *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 49, 60 (2019) (plurality opinion)); *id.* at 546–57 (Sotomayor, J., dissenting). Several circuits that have decided Establishment Clause claims since *Kennedy* have acknowledged the end of *Lemon*, yet trial courts from coast to coast continue to implement it. Compare *Firewalker-Fields v. Lee*, 58 F.4th 104, 111 (4th Cir. 2023) (remanding for further consideration of plaintiff’s Establishment Clause argument, following *Kennedy*’s overruling of *Lemon*); and *Freedom from Religion Found., Inc. v. Mack*, 49 F.4th 941, 954 n.20 (5th Cir. 2022) (“[The *Lemon* Test]’s long Night of the Living Dead . . . is now over.”) (internal citation omitted); and *Rojas v. City of Ocala*, 40 F.4th 1347, 1351–52 (11th Cir. 2022) (acknowledging the end of the *Lemon* Test), *cert. denied*, 143 S. Ct. 764 (mem.) (2023); with *Carroll v. Tobesman*, No. 20-2110, 2023 U.S. Dist. LEXIS 29253, at *7 (D. Md. Feb. 21, 2023) (following *Lemon*); and *Buchanan v. Jumpstart S.C.*, No. 21-cv-00385, 2022 U.S. Dist. LEXIS 157191, at *34–37 (D. SC. Aug. 30, 2022) (same).

⁴⁵ See *Lemon*, 403 U.S. at 612–13 (detailing the three-part Establishment Clause test (first citing *Allen*, 392 U.S. at 243; and then quoting *Walz*, 397 U.S. at 674)); *Van Orden v. Perry*, 545 U.S. 677, 685–86 (2005) (expressly refusing to apply the *Lemon* Test); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862–63 (2005) (applying heightened scrutiny to Establishment Clause claims); *Town of Greece v. Galloway*, 572 U.S. 565, 587 (2014) (applying the reasonable observer standard). Despite the Supreme Court’s reservations to utilize the *Lemon* test and other legal scholars’ criticisms, district courts across the country continue to predominantly implement the test. Karthik Ravishankar, *The Establishment Clause’s Hydra: The Lemon Test in the Circuit Courts*, 41 DAYTON L. REV. 261, 262–63 (2016).

ceive such action to be an endorsement or denigration of a particular religion.⁴⁶ In 2005, in *McCreary County v. ACLU of Kentucky*, the Court similarly implemented the reasonable observer standard in determining that such a person would conclude that a county's Ten Commandments display in its courthouse unconstitutionally promoted a certain religion.⁴⁷ In reaching this conclusion, *McCreary* permits a reviewing court to consider a government's action in conjunction with its surrounding history, context, and delineated action to determine what such an observer would conclude.⁴⁸

⁴⁶ See 572 U.S. at 587 (highlighting that a reasonable observer considers the tradition of governmental action); *Borden v. Sch. Dist. of East Brunswick*, 532 F.3d 153, 166 (3d Cir. 2008) (including that a reasonable observer may consider the "history and context" of governmental action). To do this, courts take into account the text of the state's policy, how it operates, and any other information concerning "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993); see, e.g., *McCreary*, 545 U.S. at 862 (incorporating past iterations of a Ten Commandments display to determine that a courthouse's placement of the religious doctrines in its lobby was unconstitutional).

⁴⁷ *McCreary*, 545 U.S. at 862. While both the *Lemon* test and reasonable observer test are available to a reviewing court, there is still a general exception for religious activities with established history in the foundation and tradition of the United States. *Van Orden*, 545 U.S. at 686–88 (ruling that a Ten Commandments monument on the Texas State Capitol did not subvert the Establishment Clause because it was one of many commemorating the history of Texas); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (allowing legislatures to open sessions with chaplain-led prayer because the founding generation also practiced such a tradition); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."). The Court does not necessarily apply a formal test in considering whether a practice fits this exception apart from considering whether the founding generation practiced such religious traditions in government, showing that it was not within their original intent in separating church and state. *Van Orden*, 545 U.S. at 688. In considering this approach, many leaders in the founding generation intertwined religion and government, with presidents making formal announcements of days of prayer or fasting, and Thomas Jefferson, a strong advocate of separation of church and state, participating in religious meetings within government buildings. Mallie Jane Kim, Opinion, *The Founding Fathers, Religion, and God*, U.S. NEWS (Dec. 30, 2010), <https://www.usnews.com/opinion/articles/2010/12/30/the-founding-fathers-religion-and-god> [<https://perma.cc/9BYB-9LMF>] (quoting Thomas S. Kidd, Baylor University history Professor). During the Civil War, President Abraham Lincoln regularly and publicly invoked the Christian faith and shared values of the Bible in attempting to bridge divides between the North and South. *Lincoln's Second Inaugural Address*, NAT'L PARK SERV., <https://www.nps.gov/linc/learn/historyculture/lincoln-second-inaugural.htm> [<https://perma.cc/CP4K-5MRH>] (Apr. 18, 2020) ("Both read the same Bible and pray to the same God and each invokes His aid against the other.").

⁴⁸ *McCreary*, 545 U.S. at 862; see also *supra* note 22 and accompanying text (discussing the history of and Court's analysis in *McCreary*).

C. A Saga of Executive Orders and Ensuing Litigation

1. Inadmissibility and Delegated Presidential Authority

The INA sets forth the procedures and requirements for admitting non-U.S. citizens into the country.⁴⁹ In regard to former President Trump's executive action, subsection 1182(f) allows the president, whenever he determines it to be "detrimental to the interests of the United States," to discretionarily bar any for-

⁴⁹ See generally Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537) (including all relevant statutory provisions regarding immigration policy). Section 1182 of the Act as codified, for example, includes certain criteria for ineligibility regarding admission to the country, such as: controlled substance violations, involvement in prostitution or other commercialized vices, engaging in human or weapons trafficking, laundering money, committing acts against or to overthrow the U.S. government, engaging in terrorist activities, being a communist, and being a former member of the Nazi Germany government. 8 U.S.C. § 1182. The statute has undergone several iterations, and some commentators consider the bill fraught with unintended consequences, such as discriminatory preferences and an impractical swelling of green card holders. Muzaffar Chishti, Faye Hipsman & Isabel Ball, *Fifty Years on, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POL'Y INST. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [<https://perma.cc/48RH-DY6A>]. A green card grants a foreign national long-term, indefinite status within the United States, which they can attain through meeting different requirements such as having qualified familial relations or employment opportunities, which then allows a foreign national to eventually qualify to apply for citizenship. See *Green Card Processes and Procedures*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures> [<https://perma.cc/S7KQ-RQUX>] (detailing the requirements and procedures for obtaining a green card). Upon its enactment, the INA became the seminal legislation in the country's immigration policy, replacing previous approaches such as the Chinese Exclusion Act, racial quotas, and the Bracero Program. 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/> [<https://perma.cc/26AX-RRD2>]; see 159 CONG. REC. 13943 (2013) (statement of Rep. Jerry McNerney) (noting a congressional statement honoring the agricultural workers that immigrated to the United States during the Bracero Program). See generally ROGER DANIELS, *NOT LIKE US: IMMIGRANTS AND MINORITIES IN AMERICA, 1890–1924* (Ivan R. Dee ed., 1998) (discussing the initial numerical limits and racial quota system imposed on American immigration). Since its original passage in 1952, the INA has undergone several variations from discretionary enforcement to employment penalties and regulations. See Suzanne Gamboa, *What Is DACA? What You Need to Know.*, NBC NEWS, <https://www.nbcnews.com/storyline/smart-facts/what-daca-n854906> [<https://perma.cc/5LVA-X3DA>] (Mar. 8, 2018) (detailing former President Barack Obama's executive program, Deferred Action for Childhood Arrivals, which delayed enforcement of the INA against certain minor-aged children who entered the United States without proper documentation); Suzanne Gamboa, *What to Know About Title 42: How Its End Could Affect Immigration*, NBC NEWS, <https://www.nbcnews.com/news/latino/title-42-end-covid-ban-migrants-border-immigration-rena61803> [<https://perma.cc/M6B8-5UPB>] (May 10, 2023) (detailing how Trump utilized health and safety laws to stagnate asylum entrants and place indefinite halts on immigration due to the COVID-19 pandemic in 2020). See generally Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 101 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (granting amnesty to certain foreign nationals present in the United States without status, creating penalties for employers hiring foreign nationals without proper documentation, and introducing the visa waiver program); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 Div. C, 110 Stat. 3009–546 (codified as amended in scattered sections of 8 U.S.C.) (amending the INA to increase penalties for immigration violations and streamline the removal process).

eign national or class of non-U.S. citizens from entry for as long as he finds necessary.⁵⁰ Presidents throughout the provision's existence have utilized it for purposes of foreign relations in times when Congress has not acted swiftly or in accordance with the president's intentions.⁵¹

2. Trump's Campaign of Anti-Muslim Rhetoric

Before ascending to the presidency and promulgating these executive orders, Trump, per his critics, has espoused explicit hatred toward Muslims and Islam.⁵² He continued this negative sentiment into his presidential campaign, tweeting several times about the so-called "Muslim problem," and declining to distinguish between mainline Islam and radical Islamic terrorists in interviews and at public rallies.⁵³ During his campaign and even after his election, his offi-

⁵⁰ 8 U.S.C. § 1182(f).

⁵¹ See generally Exec. Order No. 14065, 3 C.F.R. 340 (2023) (temporarily suspending the entry of individuals related to Russia's invasion of Ukraine in 2022); Exec. Order No. 14059, 3 C.F.R. 715 (2022) (expanding the anti-controlled substance provisions of INA § 212); Proclamation No. 10309, 3 C.F.R. 306 (2022) (suspending entry for any government-related officials from Nicaragua). In this regard, executive officials, including the president, are limited only by statutory delegation and treaties, thus Congress has the primary power to expand or narrow the president's discretionary authority for immigration affairs. See Anne Y. Lee, Note, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?*, 39 COLUM. J.L. & SOC. PROBS. 223, 234–35 (2005) (outlining the president's immigration authority as explained in *Nishimura Ekiu v. United States*, 142 U.S. 651, 659–60 (1892)); see also *Gegiov v. Uhl*, 239 U.S. 3, 9 (1915) (explaining that a foreign national may seek his or her release from detention via habeas corpus where the executive has exceeded its statutory authority to detain him or her). Insofar as Congress has designated immigration authority to the executive, it is clear that the president often utilizes this authority for purposes of foreign relations and managing international conflicts and wars. See Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345, 1405 n.313 (2007) (highlighting the comingling of the immigration authority other powers related to war and foreign relations (quoting Brief for the Respondents at 17, *Zadvydas v. Davis*, 533 U.S. 678 (2001) (No. 99-7791))).

⁵² See David Brody, *Brody File Exclusive: Donald Trump Says Something in Koran Teaches a 'Very Negative Vibe'*, CBN NEWS: THE BRODY FILE (Apr. 12, 2011), <http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donald-trump-says-something-in-koran-teaches> [<https://perma.cc/4NNH-3PHL>] (showing how Trump considered Islam a hateful ideology). In 2011, for example, when a pundit inquired whether Islam was a national concern, he answered that there of course was an issue because the Quran teaches hatred. *Id.*

⁵³ Donald J. Trump (@realDonaldTrump), X (Dec. 10, 2015), <https://twitter.com/realDonaldTrump/status/674934005725331456> [<https://perma.cc/3UXE-GZD4>]; Theodore Schleifer, *Trump Doesn't Challenge Anti-Muslim Questioner at Event*, CNN, <http://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/> [<https://perma.cc/CNL3-ZV2W>] (Sept. 18, 2015). See generally *The Situation Room with Wolf Blitzer: Interview with Donald Trump* (CNN television broadcast Jan. 25, 2016), <https://www.youtube.com/watch?v=IPkHW0mA8O4> [<https://perma.cc/8Y5D-EDKU>] (discussing his agenda regarding Muslims in the United States, including a Muslim registry). During this time, President Trump used the terms "Muslim" and "terrorist" interchangeably. See Donald J. Trump (@realDonaldTrump), X (Nov. 25, 2015), <https://twitter.com/realdonaldtrump/status/669682774673137665> [<https://perma.cc/B6U4-5ZLR>] ("Credible Source on 9-11 Muslim Celebrations: FBI."); *Trump Defends 9/11 Celebrations with Article*, AP NEWSROOM (Nov. 23, 2015), <https://newsroom.ap.org/editorial-photos-videos/detail?itemid=cadcfee1334d2a1fea065ba383ef68e&>

cial website included the proposed policy statement that he, as president, sought to prevent Islamic individuals from entering the country.⁵⁴

3. The First Executive Order and Its Failure in Court

In releasing his first proclamation, Executive Order No. 13769, “Protecting the Nation from Foreign Terrorist Entry into the United States” (EO-1), Trump invoked his delegated authority under the INA to bring to fruition his campaign promise to prevent Muslim immigration into the United States.⁵⁵ Immediately after signing EO-1, several parties brought lawsuits across the country, and, ul-

mediatype=video [https://perma.cc/U8FC-ZZHZ] (explaining how Trump believed Muslims celebrated in New York City after the World Trade Center attack); *Donald Trump Campaign Rally in Charleston, South Carolina* (C-Span broadcast Feb. 19, 2016) (including an interaction with supporters where Trump claimed sources corroborated the 9/11 celebration story).

⁵⁴ Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015), https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html [https://perma.cc/BR8H-H5TH]. Furthermore, then-candidate Trump also considered whether to surveil or close mosques and whether to create a Muslim registry until the country could better understand the situation. Jenna Johnson, *Donald Trump Would ‘Strongly Consider’ Closing Some Mosques in the United States*, WASH. POST (Nov. 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/ [https://perma.cc/A5XL-ES8T]; Nick Gass, *Trump: ‘Absolutely No Choice’ But to Close Mosques*, POLITICO (Nov. 18, 2015), https://www.politico.com/story/2015/11/trump-close-mosques-216008 [https://perma.cc/N5EA-TQ2Q]; Hunter Walker, *Donald Trump Has Big Plans for ‘Radical Islamic’ Terrorists, 2016 and ‘That Communist’ Bernie Sanders*, YAHOO!NEWS (Nov. 19, 2015), https://www.yahoo.com/news/donald-trump-has-big-plans-1303117537878070.html [https://perma.cc/E3H8-5L5J]; Lauren Carroll, *In Context: Donald Trump’s Comments on a Database of American Muslims*, POLITIFACT (Nov. 24, 2015), https://www.politifact.com/article/2015/nov/24/donald-trumps-comments-database-american-muslims/ [https://perma.cc/T3EU-44KF]. Moreover, he continued to retweet debunked anti-Muslim conspiracist videos of purported Muslim men destroying a statute of the Virgin Mary, pushing a child off a building, and assaulting a handicapped bystander. Peter Baker & Eileen Sullivan, *Trump Shares Inflammatory Anti-Muslim Videos, and Britain’s Leader Condemns Them*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html [https://perma.cc/64ZA-ZCPE].

⁵⁵ Exec. Order No. 13769, 3 C.F.R. 272, 272–73 (2018); see Blair Guild, *Muslim Ban Language Wiped from Trump Campaign Website*, CBS NEWS (May 9, 2017), https://www.cbsnews.com/news/muslim-ban-language-wiped-from-trump-campaign-website/ [https://perma.cc/BTH5-2V7K] (showing Trump’s campaign website platform advocating for the exclusion of all Muslim-identifying individuals from entering the United States). After the 2020 election, Rudy Giuliani, one of President Trump’s legal advisors, explained that the president had asked him to figure out how to enact the “Muslim ban” in a way that would not violate any discrimination laws or otherwise that the president would have the authority to do so. Rebecca Savransky, *Giuliani: Trump Asked Me How to Do a Muslim Ban ‘Legally’*, THE HILL (Jan. 29, 2017), https://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally/ [https://perma.cc/F52T-ZV5D]. Thus, the ban became focused on terrorism and safety rather than solely the religion of Islam. *Id.* Executive Order No. 13769, “Protecting the Nation from Foreign Terrorist Entry into the United States” (EO-1), ordered the Department of Homeland Security to conduct a study and analysis of what information foreign governments provided to the United States regarding their respective citizens and nationals in connection to threats of terrorism. 3 C.F.R. 273. During this review, the order suspended all foreign entry for approximately three months from seven Muslim-majority countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. *Id.*

timately, the United States Court of Appeals for the Ninth Circuit upheld the lower court's temporary restraining order (TRO).⁵⁶

4. The Second Executive Order and Conducting a Widespread Review

Instead of challenging the Circuit's decision by petitioning for review at the Supreme Court, the Trump rescinded EO-1 and implemented his second executive order, No. 13780, of the same title (EO-2).⁵⁷ EO-2 called for the same sweeping review of vetting procedures for several Muslim-majority countries, but only temporarily banned the approval of visas to six of the previously listed countries, removing Iraq by reasoning that the remaining countries were strongly linked to fostering terrorists.⁵⁸ Like EO-1, litigants quickly challenged the order's enforcement, successfully obtaining a TRO in the U.S. Court of Appeals for the Fourth Circuit.⁵⁹ This time, the Trump administration did petition the Supreme Court for review, but before the Court could decide, the ninety day review period expired, so the Court vacated the case as moot.⁶⁰

⁵⁶ *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam). Temporary restraining orders (TROs) are preliminary injunctions given by a presiding court that, in this context, inhibits the enforcement of certain presidential action or legislation pending the resolution of the court's final opinion. *Temporary Restraining Order*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/temporary_restraining_order [<https://perma.cc/XLF9-JT7Z>]. In making its determination, the court must consider whether enforcement of the action will cause harm that cannot later be rectified without the court's preliminary injunction. *Id.* Federal Rule of Civil Procedure 65(b) dictates the standards and process regarding TROs, including that the court need not notify the effected party, nor does it have to conduct a formal hearing beforehand. FED. R. CIV. P. 65(b).

⁵⁷ Exec. Order No. 13780, 3 C.F.R. 301, 301–02 (2018); Steve Almasy & Darran Simon, *A Timeline of President Trump's Travel Bans*, CNN, <https://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/index.html> [<https://perma.cc/R8EF-PARS>] (Mar. 30, 2017).

⁵⁸ 3 C.F.R. 303–04. After the issuance of EO-1, Iraq applied great pressure in seeking to be removed from the travel ban's list, which included an in-person meeting between Haider al-Abadi, the Iraqi Prime Minister, and Former Vice President Mike Pence, a phone call between al-Abadi and Trump, and another in-person meeting between former U.S. Secretary of State Rex Tillerson and several members of Iraq's government. Kevin Liptak, *Why Iraq Was Removed from the Revised Travel Ban*, CNN, <https://www.cnn.com/2017/03/06/politics/iraq-travel-ban/index.html> [<https://perma.cc/AZ4U-TABM>] (Mar. 6, 2017). As result of these meetings, Iraq assured the United States that it would respect the required vetting measures to ensure that terrorists were not immigrating to the United States. *Id.*; Megan R. Wilson, *Iraq's Lobbyists Mobilized After Travel Ban, Documents Reveal*, THE HILL (Mar. 6, 2017), <https://thehill.com/business-a-lobbying/business-a-lobbying/322622-iraqs-lobbyists-mobilized-after-travel-ban-documents/> [<https://perma.cc/7YLW-T2VU>].

⁵⁹ *Int'l Refugee Assistance Project v. Trump (IRAP I)*, 857 F.3d 554, 572 (4th Cir.), *vacated*, 583 U.S. 912 (2017) (mem.). After the lower courts blocked his first two executive orders, President Trump took to Twitter, critiquing the decisions and lamenting that he should have implemented his initial plan to ban the entrance of all Muslims into the country rather than the diluted, legal version. Donald J. Trump (@realDonaldTrump), X (June 5, 2017, 6:29 AM), <https://twitter.com/realDonaldTrump/status/871675245043888128> [<https://perma.cc/9HPS-9SU8>]; Donald J. Trump (@realDonaldTrump), X (June 5, 2017, 6:25 AM), <https://twitter.com/realDonaldTrump/status/871674214356484096> [<https://perma.cc/52G8-4A7S>].

⁶⁰ *Trump v. Int'l Refugee Assistance Project (IRAP II)*, 583 U.S. 912, 912 (2017) (mem.); *Hawaii VI*, 585 U.S. 667, 677 (2018). The mootness doctrine derives from the U.S. Constitution's Article III

5. The Final Executive Order and the Ultimate Litigation

Following EO-2's expiration, Trump signed Proclamation No. 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats" (EO-3) based on EO-2's ninety day review and report on other countries' vetting procedures and information sharing practices.⁶¹ EO-3 completely and indefinitely banned immi-

power in which the judiciary resolves cases and controversies, thus, where there is no dispute, "live" issue, or there lacks a "cognizable interest," courts do not have jurisdiction to decide a case. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180, 189–92 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority . . . underpins . . . our mootness jurisprudence."); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). By requiring lack of mootness and adhering to this interpretation of Article III of the U.S. Constitution, the judiciary protects itself from exceeding its constitutionally imposed boundaries. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) ("[The mootness doctrine] ensures that the federal judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved."). The Court regularly uses the mootness doctrine to dismiss cases covering various areas of law, including immigration. *See, e.g., N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam) (dismissing a Second Amendment claim seeking an injunction from enforcing a law that had been voided since commencing litigation); *United States v. Sanchez-Gomez*, 584 U.S. 381, 394 (2018) (dismissing criminal defendants' claims regarding the constitutionality of full restraints during criminal court proceedings because their criminal proceedings and appeals had since ended); *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72–73 (1983) (dismissing an all-male fraternity's sought injunction against the Secretary of State from enforcing Title IX because the third-party, non-litigant university president determined that irrespective of the lawsuit, the fraternity could no longer continue at the university, thus no relief could be granted); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (dismissing prisoner's constitutional claims regarding his parole hearing because he had been released from prison).

⁶¹ *See generally* Exec. Procl. No. 9645, 3 C.F.R. 135 (2018). Ordinarily, the National Vetting Center (NVC) reviews all non-U.S. citizens seeking entrance into the United States. *National Vetting Center*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/ports-entry/national-vetting-center> [<https://perma.cc/367F-XWGL>] (Jan. 4, 2024) ("The NVC is a collaborative, interagency effort to provide a clearer picture of threats to national security, border security, homeland security, or public safety posed by individuals seeking to transit our borders or exploit our immigration system."). The NVC is a subdivision of U.S. Customs and Border Protection established under the National Security Presidential Memorandum. *Id.* Even before engaging with the NVC, most foreign nationals seeking admission to the United States must first seek approval for a visa at their nearest U.S. consulate and National Visa Center, which requires verifying supporting evidence, and often then attending an interview with a consular officer. *Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing> [<https://perma.cc/ES3Y-5LXJ>] (July 20, 2023). Before obtaining a visa, a foreign national must have a qualified relative or U.S. business submit a petition on his or her behalf, pay the petition fees, submit supporting documentation like affidavits and financial documentation, wait for NVC processing, submit an application, submit further supporting documentation, prepare for an interview, attend an interview, and lastly wait for a final decision about whether he or she will receive a visa, among other procedural requirements. *See* Bureau of Consular Affs., U.S. Dep't of State, *Immigrant Visa Process*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-8-scan-collected-documents/step-9-upload-and-submit-scanned-documents.html> [<https://perma.cc/A6K6-3CG9>] (outlining the steps to obtain an immigrant visa for permission to enter into the United States).

gration from several countries: Yemen, Venezuela, Syria, North Korea, Libya, Iraq, Iran, and Chad.⁶² The Trump administration explained that it chose these countries because of the Department of Homeland Security's investigative report, which had created an information-sharing baseline to allow the United States to deem a country's nationals as security threats or otherwise.⁶³

EO-3 sparked outrage amongst many states and non-federal governments, including the State of Hawaii, which became the main litigant in the Supreme Court case *Hawaii VI*.⁶⁴ Following its previous litigation against the first two executive orders, Hawaii again brought suit in the District Court of Hawaii, seeking a TRO against the implementation of EO-3.⁶⁵ Primarily, the state claimed that the travel ban would severely inhibit the state's revenue as it relies almost solely on tourism and migration for raising state funds.⁶⁶ Moreover, Hawaii argued that the ban would severely prevent or inhibit the operations of its

⁶² 3 C.F.R. 136–45.

⁶³ *Id.* at 137–38. This baseline included criteria such as whether a country had physical or electronic passports, whether it collected biometric data, and whether it collected and shared information regarding individuals' criminal record or terrorist-related dealings. *Trump Signs New Travel Ban with Enhanced Vetting*, CBS NEWS, <https://www.cbsnews.com/news/donald-trump-new-travel-ban-enhanced-vetting/> [<https://perma.cc/N7JY-YQCP>] (Sept. 24, 2017); *see also* Donald J. Trump (@realDonaldTrump), X (Sept. 24, 2017), <https://twitter.com/realDonaldTrump/status/912101775221706752> [<https://perma.cc/GWH6-UQXA>] (“Making America Safe is my number one priority. We will not admit those into our country we cannot safely vet.”).

⁶⁴ 585 U.S. at 677–82. Hawaii has a deep and rich history of Muslim presence on its islands, dating back to the nineteenth century when the first Muslim migrants arrived within its territory. *See* Jennifer Sinco Kelleher, *Travel Ban Challenge Puts Hawaii's Few Muslims in Spotlight*, AP NEWS (Mar. 10, 2017), <https://apnews.com/article/hawaii-donald-trump-us-news-ap-top-news-honolulu-d296daac0ed546b89e18dde2a6f87d12> [<https://perma.cc/5HCF-53JG>] (detailing the history of Islam and Middle Eastern immigration to Hawaii). In the modern era, Hawaii is now host to around five thousand Muslims with ties to forty-six other countries and of which eighty families originate from the several countries that were listed on the travel ban. *Id.*

⁶⁵ *Hawaii VI*, 585 U.S. at 677–82; *see also* *Hawaii v. Trump (Hawaii II)*, 263 F. Supp. 3d 1049, 1049 (D. Haw. 2017) (discussing Hawaii's previous lawsuit seeking an injunction against Trump's second executive order (EO-2)). In litigation, former Hawaii Attorney General Doug Chin equated the travel ban to the U.S. internment of individuals with Japanese heritage during World War II, but differentiated that, this time, he and Hawaii would advocate for those targeted. Kelleher, *supra* note 64.

⁶⁶ *Hawaii v. Trump (Hawaii I)*, 241 F. Supp. 3d 1119, 1130–31 (D. Haw. 2017); Kelleher, *supra* note 64. Tourists in Hawaii spend nearly eighteen billion dollars per year. *Hawai'i Visitor Statistics Released for 2019*, HAWAII TOURISM AUTH. (Jan. 29, 2020), <https://www.hawaii-tourism-authority.org/news/news-releases/2020/hawai-i-visitor-statistics-released-for-2019/> [<https://perma.cc/5MVN-7PAP>]. Hawaii not only feared the immediate effect of the travel ban, but the long-term deterrence of tourism not just from countries effected but from across the globe as the United States communicated an exclusionary policy to the world. Cathy Bussewitz, *Hawaii Fears Donald Trump's 'Muslim Travel Ban' Could Hit Tourism*, THE INDEPENDENT (Mar. 15, 2017), <https://www.independent.co.uk/news/world/americas/hawaii-donald-trump-muslim-travel-ban-hit-tourism-federal-lawsuit-attorney-general-doug-chin-a7631501.html> [<https://perma.cc/2HZE-VA9A>].

state-sponsored university, impacting non-citizen professors and students from the affected countries.⁶⁷

Several other plaintiffs joined the case with Hawaii, including Dr. Ismail Elshikh and the Muslim Association of Hawaii (MAH).⁶⁸ Dr. Elshikh was a U.S. citizen with Egyptian heritage and a prominent Muslim leader throughout Hawaii.⁶⁹ According to the initial TRO won in state court, Dr. Elshikh's primary injury arose from the inability of his wife's four Syrian brothers and mother to visit his family in Hawaii to celebrate his children's birthdays.⁷⁰

More similar to Hawaii, the MAH, located in Manoa on the island of Oahu, claimed that EO-3 affected its nearly four thousand members, including foreign nationals from Syria, Somalia, Iran, Yemen, and Libya.⁷¹ The MAH complained

⁶⁷ Brief for Respondents at 19–20, *Hawaii VI*, 585 U.S. 667 (No. 17-965); see also HAW. CONST. art. X §§ 5–6 (outlining how the University is sufficiently legally connected to the state to allow it to act as an arm of the state); HAW. REV. STAT. § 304(A)-103 (2024) (designating the University as a state-funded corporation with explicitly delegated powers). The University alleged that approximately twenty students enrolled when Trump released the travel ban would be impacted by it, and it would hurt the university's recruiting efforts for potential scholars and students. *Hawaii I*, 241 F. Supp. 3d at 1129–30. Moreover, Hawaii contended that EO-3 would deter or inhibit professors and other faculty from the affected countries from continuing or beginning their work at the university. *Hawaii v. Trump (Hawaii III)*, 265 F. Supp. 3d 1140, 1149 (D. Haw. 2017), *aff'd in part, rev'd in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 585 U.S. 667 (2018).

⁶⁸ *Hawaii III*, 265 F. Supp. 3d at 1150–52.

⁶⁹ *Id.* at 1150. Dr. Elshikh has been prominent to the Muslim community in Hawaii since 2003, when he became the Imam of the Muslim Association of Hawaii. *About Our Imam*, MUSLIM ASS'N HAW., <https://www.hawaiimasjid.com/about-imam> [<https://perma.cc/H6PX-VMJF>]. He is a renowned scholar in the field of Islamic studies, having participated in several speaking events across the United States, obtaining a bachelor's degree in Islamic Da'wah from Al-Azhar University in Cairo, Egypt, and achieving a Ph.D. in Islamic Studies and Quranic Authentication from Sheikh Abulhakim Abdullateef of Al-Azhar Quoranic Hlaqah, a position considered to be one of the most elite authorities regarding Sunni Islamic law. *Id.*

⁷⁰ *Hawaii III*, 265 F. Supp. 3d at 1150. Dr. Elshikh's children are U.S. citizens, however, his wife, her mother, and her four brothers were Syrian nationals at the time of the travel ban. *Id.* In a signed declaration to the district court, Dr. Elshikh lamented that EO-3 separated and denigrated his family solely due to their nationality and religion. *Id.*

⁷¹ *Hawaii III*, 265 F. Supp. 3d at 1151–52; see also Moshe Terdiman, *The Muslim Association of Hawai'i—the History of the Muslim Association of Hawai'i*, ISLAM & MUSLIMS PAC. (Jan. 16, 2012), <https://islaminpacific.wordpress.com/2012/01/16/the-muslim-association-of-hawaii-the-history-of-the-muslim-association-of-hawaii/> [<https://perma.cc/V7HG-8JVJ>] (outlining the beginning of the organization and its societal impact, influence, and presence in Hawaii); Mary Adamski, *Manoa Mosque Welcomes Visitors of All Faiths*, HONOLULU STAR-BULLETIN: ONLINE EDITION (Mar. 24, 2001), <http://archives.starbulletin.com/2001/03/24/news/adamski.html> [<https://perma.cc/R7GG-DMEG>] (discussing a Muslim Association of Hawaii (MAH) event held in its mosque); *About MAH*, MUSLIM ASS'N HAW., <https://www.hawaiimasjid.com/about-mah> [<https://perma.cc/N2X3-84VM>] (providing a simple overview of the MAH). The MAH originated in 1979 as the Muslim Students' Association of Hawaii, the state's first and only organization representing Muslims in Hawaii. Terdiman, *supra*. The organization is involved in various aspects of Muslim-Hawaiians' lives, including providing schooling for children, hosting various prayer services, providing funeral and marriage services, and hosting other social events. *About MAH, supra*; *Muslim Association of Hawaii: Serving the Muslim Community of Hawaii for Over 50 Years*, MUSLIM ASS'N HAW., <https://www.hawaiimasjid.com/> [<https://perma.cc/9MF8-3FJN>].

that EO-3 significantly caused financial injuries, given that it relied on foreign nationals to come to Hawaii to fill its membership and raise its annually-required revenue for regular operations, by preventing immigration and deterring its resident members from staying in Hawaii when their friends and family could not visit them.⁷² The MAH also argued that the travel ban led to increased Islamophobia and fear from its members about being Muslim in the United States.⁷³

After Trump released EO-3, Hawaii, Dr. Elshikh, the MAH, and several other plaintiffs promptly sought an injunction against the Muslim ban.⁷⁴ They argued that EO-3 exceeded the president's authority pursuant to 8 U.S.C. § 1182(f) and violated the Establishment Clause because Trump had an insidious, anti-Muslim motivation in promulgating the order to effectively ban Muslim immigration.⁷⁵ The district court agreed with the plaintiffs as to the statutory arguments under the INA, but did not consider their Establishment Clause contentions.⁷⁶ The Ninth Circuit affirmed this decision, elaborating on the statutory

⁷² Kelleher, *supra* note 64. For example, MAH's mosque in Honolulu saw a dramatic decrease in tourists joining the local residents in weekly prayers after the reinstatement of the travel ban. *Id.* Hakim Ouansafi, a Moroccan Muslim who was the executive director of the Hawaii Public Housing Authority and attendee at MAH, further explained that the mosque relies on foreign princes and royalty to visit and raise funds. *Id.* Ouansafi has held his role as the executive director of the Hawaii Public Housing Authority for over twelve years and has been a board member at the Interfaith Alliance, a chairman for the MAH, a board member at the Federal Law Enforcement Foundation, and a commissioner for the city and county of Honolulu, Hawaii. Hakim Ouansafi, LINKEDIN, <https://www.linkedin.com/in/hakim-ouansafi-050b04b9> [https://perma.cc/AZB3-8X9K].

⁷³ *Hawaii III*, 265 F. Supp. 3d at 1151–52. One member explained how their children no longer wanted to be Muslim and instead westernized by adopting American names and abandoning their Muslim attire. *Id.* at 1152.

⁷⁴ *Hawaii VI*, 585 U.S. 677, 681 (2018). An injunction is a form of equitable relief that does not necessarily grant a plaintiff monetary damages, but rather prevents a defendant from pursuing a course of conduct that could cause irreparable harm. 1 FEDERAL LITIGATION GUIDE § 7.01 (Mar. 2024) (first citing *Nken v. Holder* 556 U.S. 418, 428 (2009); and then citing *Bell v. Keating*, 697 F.3d 445, 451 (7th Cir. 2012)). There are three main types of injunctive relief, including: permanent injunctions, preliminary injunctions, and TROs. *Id.* (citing FED. R. CIV. P. 65). A court may enter a preliminary injunction against an adverse party upon notice to that party and prior to the merits stage of proceedings, whereas a temporary restraining order may be entered against such a party without notice when the moving party can allege specific facts that establish “immediate and irreparable injury.” FED. R. CIV. P. 65(a)–(b). Alternatively, a permanent injunction is entered at the conclusion of a trial. *Permanent Injunction*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/permanent_injunction [https://perma.cc/8CZB-S9BX] (Dec. 2020).

⁷⁵ *Hawaii VI*, 585 U.S. at 681. The plaintiffs argued that according to statutory interpretation, INA § 212, as codified at 8 U.S.C. § 1182(f), inherently included non-discriminatory protections and limits. *Id.* Despite this assertion, Trump considered this subsection to be his “magical authority” which would allow him to effectively create an immigration bar. Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>.

⁷⁶ *Hawaii III*, 265 F. Supp. 3d at 1145, 1154–55, 1158–60 (granting a temporary restraining order). In relying on the plaintiffs' statutory arguments, the Court reasoned that the executive order's findings were not necessarily consistent with its actual restrictions, and more importantly, that it used nationality to determine risk, which, in the Circuit's view, offended the non-discrimination requirements found elsewhere in INA § 212. *Id.* at 1154–55 (“Under the law of this Circuit, these provisions [in the INA] do

arguments but also not touching the Establishment Clause issues.⁷⁷ The Supreme Court subsequently granted certiorari upon the Trump administration's appeal, staying the TRO pending the appeal's outcome.⁷⁸

II. THE BONA FIDES OF NATIONAL SECURITY VERSUS WHAT A REASONABLE OBSERVER WOULD CONCLUDE

When deciding the 2018 case *Trump v. Hawaii* (*Hawaii VI*), the Court unprecedentedly applied a level of scrutiny to the historically plenary immigration power.⁷⁹ Nonetheless, the majority applied the facially legitimate and bona fide reason rational basis standard, which led to reversing the lower court's injunction and allowing Trump's travel ban by deferring to the other departments due to national security concerns.⁸⁰ In her dissent, Justice Sonia Sotomayor argued for a more flexible reasonable observer standard, relying on Establishment Clause precedent, in opining that the majority errantly reversed the circuit court's injunction.⁸¹ Outside of the immigration context, but still in the arena of national

not afford the President unbridled discretion to do as he pleases.”). Scholars seemingly agree but emphasize that the U.S. immigration system continues to operate discriminatorily, structurally preferring white Europeans, over Black and brown foreign nationals from regions such as Latin America or Africa. See Charles Kamaski, *US Immigration Policy: A Classic, Unappreciated Example of Structural Racism*, BROOKINGS (Mar. 26, 2021), <https://www.brookings.edu/articles/us-immigration-policy-a-classic-unappreciated-example-of-structural-racism/> [<https://perma.cc/5NA3-239Z>] (outlining the racial history of U.S. immigration law such as quotas based specifically on race or ethnicity); Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455, 1456–57 (2022) (“[T]he Supreme Court’s blanket rejection of constitutional challenges to . . . discriminatory [immigration] laws—in fact immunizing them from constitutional review—laid the groundwork for the systemic racial injustice that thrives in today’s immigration laws and their enforcement.”); E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445, 449–50 (2022) (“Notably, these borders structurally exclude and discriminate on a racial basis as a matter of course through facially race-neutral law and policy.”). Certain data support this notion, yet also show a diversifying trend through United States immigration history as European immigration vastly dominated the population with nearly 75% of immigration in 1960 but dropped to only approximately 10% in 2019. Kamaski, *supra*. In comparison, over 50% of modern immigration comes from Latin America and another 30% from Asia. *Id.* Only approximately one in twenty migrants coming to the United States are from Africa, which may be concerning given that approximately one in five people on Earth are from Africa. *Id.*; Victor Kiprop, *Continents by Population Density*, WORLDATLAS (Apr. 17, 2019), <https://www.worldatlas.com/articles/continents-by-population-density.html> [<https://perma.cc/37LQ-PLAU>].

⁷⁷ *Hawaii v. Trump* (*Hawaii IV*), 878 F.3d 662, 702 (9th Cir. 2017), *rev’d*, 585 U.S. 667 (2018); see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7 (1993) (detailing that when utilizing statutory grounds to wholly settle a case, it is unnecessary for a court to consider constitutional issues).

⁷⁸ *Trump v. Hawaii* (*Hawaii V*), 583 U.S. 1099, 1099 (2018) (mem.).

⁷⁹ See 585 U.S. at 702–06 (applying a semi-intermediate level of scrutiny such that the Court “look[ed] behind the face of the Proclamation to the extent of applying rational basis review.”)

⁸⁰ *Id.* at 706–10

⁸¹ *Id.* at 728–31 (Sotomayor, J., dissenting).

security and foreign relations, the Supreme Court has applied the compelling governmental interest standard to determine religious freedom claims.⁸²

This Part of the Note discusses the contrasting opinions in the Supreme Court's ultimate decision in the travel ban saga.⁸³ Section A of this Part introduces and elaborates on Chief Justice John Roberts's majority opinion.⁸⁴ Section B then accomplishes the same for Justice Sotomayor's dissenting opinion.⁸⁵ Lastly, Section C discusses instances where courts have been required to balance the compelling governmental interest of national security with a person's religious liberties.⁸⁶

A. Chief Justice Roberts' Majority Opinion

The Supreme Court ultimately upheld Trump's executive order, garnering a majority of five votes, consisting of: Chief Justice Roberts and Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch with Justice Kennedy concurring in the judgment.⁸⁷ The Court relied on the INA's plain statutory meaning, which granted great discretion to the president in deciding to admit or exclude foreign nationals from the United States, and, thus, Trump acted within his statutory au-

⁸² See e.g., *Brown v. Glines*, 444 U.S. 348, 354, 361 (1980) (reasoning that an Air Force regulation that required a base commander's consent to circulate petitions was permissible despite the First Amendment because the Executive has a compelling interest of military discipline within the national security, foreign relations, and military context). The Supreme Court has long acknowledged a person's First Amendment right to religion is a freedom deserving of such heightened scrutiny of the compelling governmental interest standard. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (considering religion on equal footing to the review required in race-based discrimination review (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (classifying a distinctions made based on one's religion or race as suspect); *City of New Orleans v. Dukes*, 427 U.S. 297, 303–04 (1976) (same); *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) (considering one's religion or race to be unacceptable bases for classifications (quoting *Oyler*, 368 U.S. at 456)); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that distinctions made based on religion, among other factors, should receive heightened judicial scrutiny).

⁸³ See *infra* notes 84–118 and accompanying text.

⁸⁴ See *infra* notes 87–101 and accompanying text.

⁸⁵ See *infra* notes 102–111 and accompanying text.

⁸⁶ See *infra* notes 112–118 and accompanying text.

⁸⁷ *Hawaii VI*, 585 U.S. 667, 676–77 (2018). The Court reasoned that Congress delegated its authority in discretionarily admitting foreign nationals to the president, thus his power is at its most absolute. *Id.* at 684 (citing 8 U.S.C. § 1182(f)). Thus, in circumstances involving delegated authority for purposes of national security, the Court must allow for substantial deference when the President is acting swiftly and absolutely to national security concerns. See *id.* at 684 (citing *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986)) (including circumstances such as a naval blockade in which the president could suspend immigration under the INA). The Court moreover relied on the fact that the EO-2 directed a multi-agency review of information sharing systems across the globe, led by the Department of Homeland Security, in determining that it would not disrupt Trump's determination that foreign nationals from the listed countries "would be detrimental to the interests of the United States." *Id.* at 684–85 (quoting 8 U.S.C. § 1182(f)).

thority.⁸⁸ The majority also reasoned that, because Congress granted this power to the president, the judiciary must allow for substantial deference when the president is acting swiftly and absolutely to address national security concerns.⁸⁹

Turning to the appellee-plaintiffs' Establishment Clause claims, Chief Justice Roberts first decided that family separation for a U.S. citizen is a cognizable injury under Article III and the Establishment Clause.⁹⁰ After making this determination, however, the Court then distinguished all Establishment Clause precedent, reasoning that it dealt wholly with domestic issues, and, thus, it did not apply to the context of foreign affairs and immigration.⁹¹ Therefore, instead of

⁸⁸ *Id.* at 684–85 (citing § 1182(f)). To determine the meaning of a congressional statute, the Supreme Court utilizes approximately twelve rules of statutory interpretation, including: when the text is clear, its plain meaning prevails; interpretation should validate a statute; words should be understood in their ordinary meaning; and every statutory provision has individual meaning such that Congress would not write surplusage, among other canons. See Antonin Scalia & Bryan Garner, *A Dozen Canons of Statutory and Constitutional Text Construction*, JUDICATURE, Autumn 2015, at 80, 80, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1001&context=judicature> [<https://perma.cc/D8UA-2JMC>] (outlining the rest of the canons of statutory interpretation).

⁸⁹ *Hawaii VI*, 585 U.S. at 684 (citing *Abourezk*, 785 F.2d at 1049 n.2). The Constitution only confers onto the president several enumerated powers, including: command of the armed forces, pardon power, the ability to make treaties, and the ability to commission officers of the United States, among others. U.S. CONST. art. II. The Supreme Court has generally considered the presidential power to be flexible, consisting of that which the Constitution enumerates and that which Congress delegates to him. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596–97 (1952) (Frankfurter, J., concurring). Thus, when Congress delegates power to the president, he is at his most powerful and the judiciary must grant great deference when the two democratically appointed branches are acting in accord. See *id.* (“The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But in doing so we should be wary and humble.”).

⁹⁰ *Hawaii VI*, 585 U.S. at 698–99 (“We agree that a person’s interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact.”). In concurring, Justice Anthony Kennedy agreed that the appellee-plaintiffs had a cognizable injury to a constitutional right, emphasizing that even in a world wrought with grief, strife, and conflict, U.S. citizens must know that their constitutional rights are still protected. *Id.* at 712 (Kennedy, J., concurring).

⁹¹ *Id.* at 699–702 (majority opinion). Chief Justice Roberts emphasized that plaintiffs relied on Establishment Clause precedent that had only ever been applied to the domestic context but seemingly chides the plaintiffs for expanding this precedent to the foreign arena of national security and international relations. See *id.* at 698–99 (emphasizing that the plaintiffs seemed to stretch the Establishment Clause precedent). As discussed below, it seems incomprehensible to distinguish religion from immigration policy given their intertwined and entrenched history such as sanctuary cities or churches, missionary trips abroad, and congregations across the country that have and continue to house and aid immigrants. See Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1709–10 (2018) (considering religious-based immigrants’ rights movements from the 1980s through the 2000s); see also *Full Text of Pope Francis’ In-Flight Interview from Mexico to Rome*, CATH. NEWS AGENCY (Feb. 18, 2016), <https://www.catholicnewsagency.com/news/33452/full-text-of-pope-francis-in-flight-interview-from-mexico-to-rome> [<https://perma.cc/5ZYR-ZXVG>] (including Pope Francis’s reaction to Trump’s desire to construct a wall on the U.S.-Mexico border, in which the Pope stated that “[a] person who thinks only about building walls, wherever they may be, and not building bridges, is not Christian”); *infra* notes 125–129 and accompanying text (elaborating on this connected history).

applying either the *Lemon v. Kurtzman* test or *McCreary County v. ACLU of Kentucky* reasonable observer test, the Court applied *Kleindienst v. Mandel*'s facially legitimate and bona fide reason standard.⁹²

By doing so, the Court seemingly abandoned all Establishment Clause precedent and moved the issues solely into the foreign affairs and political question arena, within which the Court has historically been highly deferential to the other departments' action.⁹³ Accordingly, the Court concluded that the national security justification was facially legitimate and bona fide so it would not consider the underlying motivations in creating the travel ban.⁹⁴

Moreover, by conducting a multi-agency review, and incorporating the recommendations of various cabinet officials, the president acted within his delegated authority to halt entry into the United States by concluding that such entry would harm American interests.⁹⁵ This review resulted in restricting countries already designated by Congress or other administrative agencies as security threats before Trump's travel ban.⁹⁶ The majority also emphasized that not all of the countries listed in the travel ban were Muslim-majority and, in total, the travel ban only affected about eight percent of the global Islamic population.⁹⁷

Nonetheless, the majority did still conduct, for the first time, a rational basis analysis through the Establishment Clause, creating the potential opportunity to limit Congress's historically plenary foreign affairs and immigration powers.⁹⁸ Like most rational basis analyses, though, it determined that it must defer to the president's discretion within the context of national security.⁹⁹ Within his analy-

⁹² *Hawaii VI*, 585 U.S. at 703–05; see *supra* notes 35–48 and accompany text (discussing the three earlier cases).

⁹³ See *id.* at 703–5 (unequivocally sidelining all Establishment Clause precedent to only the domestic context and chiding the respondents for wanting to expand Establishment Clause jurisprudence to the international context (first quoting *Fiallo v. Bell*, 430 U.S. 787, 795, 799 (1977); then quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); and then quoting *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)).

⁹⁴ *Id.* (citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)). After the Court's decision, political commentators were quick to opine that it would encourage Trump to expand his travel ban and target further populations. *Travel Ban Ruling Could Embolden Trump in Remaking U.S. Immigration System*, CHI. TRIB., <https://www.chicagotribune.com/nation-world/ct-travel-ban-ruling-immigration-20180626-story.html> [<https://perma.cc/AH43-B9N9>] (Aug. 22, 2019).

⁹⁵ *Hawaii VI*, 585 U.S. at 684 (quoting 8 U.S.C. § 1182(f)).

⁹⁶ *Id.* at 706–07 (citing 8 U.S.C. § 1187(a)(12)(A)) (including Syria and Iran as state-sponsors of terrorism and a national security threat); *DHS Announces Further Travel Restrictions for the Visa Waiver Program*, DEP'T HOMELAND SEC., (Feb. 18, 2016), <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program> [<https://perma.cc/88BA-WZ3N>] (identifying Libya, Somalia, and Yemen as national security threats); *Rajah v. Mukasey*, 544 F.3d 427, 433 n.3 (2d Cir. 2008) (discussing how the National Security Entry-Exit Registration System included restrictions on Iran, Libya, Somalia, Syria, and Yemen).

⁹⁷ *Hawaii VI*, 585 U.S. at 706–07.

⁹⁸ See *id.* at 703–05 (utilizing a rational basis review to consider the reasons behind the president's Proclamation).

⁹⁹ *Id.* at 706–08.

sis, Chief Justice Roberts did consider whether Trump's travel ban was "plausibly related" to national security.¹⁰⁰ In deciding that it was, the Chief Justice emphasized that constitutional law must not inhibit the president's ability to swiftly and appropriately react to the ever-changing politics and dangers of the global arena.¹⁰¹

B. Justice Sotomayor's Dissenting Opinion

Responding to the majority's opinion, Justice Sotomayor wrote a scathing dissent, relying on *McCreary's* reasonable observer test to determine that anti-Muslim animus motivated the implementation of the travel ban, and thus violated the Establishment Clause.¹⁰² She elaborated that the Establishment Clause prevents a state actor from denigrating a religion because doing so shares the sentiment that it is subpar and its followers are a lesser class in society.¹⁰³

The travel ban therefore did not even pass rational basis scrutiny, let alone heightened scrutiny given Trump's clearly demonstrated animus toward Muslims, vowing to ban them from the country and then implementing a travel ban.¹⁰⁴ Given this, the dissent argued that the majority arbitrarily neglected or ignored the Establishment Clause, intentionally not considering the clear under-

¹⁰⁰ *Id.* at 703–06.

¹⁰¹ *Id.* at 703–06, 710. Riding this judicially legitimated power, the former president expanded the ban in 2020 to include several more nations in Africa and Asia, including: Eritrea, Kyrgyzstan, Myanmar (Burma), and Nigeria, reasoning that these nations fell short of the required information-sharing benchmark, though they were not initially included on the list. Proclamation No. 9983, 3 C.F.R. 24, 27 (2021); Camilo Montoya-Galvez, *Trump Administration Expands Travel Ban to Include Nigeria and 5 Other Countries*, CBS NEWS (Jan. 31, 2020), <https://www.cbsnews.com/news/trump-travel-ban-expands-nigeria-5-other-countries/> [<https://perma.cc/MQZ6-3GS4>]. Then-presidential candidate Joe Biden took to Twitter, criticizing this new, so-called "African Ban," calling it an American disgrace in the forum of global opinion. Joe Biden (@JoeBiden), X (Feb. 1, 2020), <https://twitter.com/JoeBiden/status/1223807268703043588> [<https://perma.cc/G9MU-M5V2>] ("Trump further diminished the U.S. in the eyes of the world by expanding his travel ban.").

¹⁰² *Hawaii VI*, 585 U.S. at 728–41 (Sotomayor, J., dissenting).

¹⁰³ *Id.* at 728–29 (first citing *Larson v. Valente*, 456 U.S. 228, 244 (1982); then citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993); then citing *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); then citing *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); then citing *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); then citing *Engel v. Vitale*, 370 U.S. 421, 431 (1962); and then citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000)).

¹⁰⁴ *Id.* at 741–48. In fact, at the time the original travel ban took effect, over two thirds of Muslim-identifying individuals in the United States were worried about Trump. *The Muslim American Experience in the Trump Era*, PEW RSCH. CTR. (July 26, 2017), <https://www.pewresearch.org/religion/2017/07/26/the-muslim-american-experience-in-the-trump-era/> [<https://perma.cc/HT87-N9WT>]. Consequently, those surveyed actually did have a reason to be worried as anti-Muslim assaults reached record highs during the travel ban era, reaching well beyond the rates seen after the 2001 attack on the World Trade Center. Katayoun Kishi, *Assaults Against Muslims in U.S. Surpass 2001 Level*, PEW RSCH. CTR. (Nov. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/> [<https://perma.cc/X78D-WJXN>].

lying policy to absolutely prevent all Muslim immigration into the United States.¹⁰⁵

To reach this conclusion, the dissent did not employ the three-part *Lemon* test, but did analogize to the Ten Commandments display at issue in *McCreary*.¹⁰⁶ It reasoned, that like the three iterations of the display, each increasingly secularized from its original display, Trump's final executive order reasoning national security can be traced to his anti-Muslim sentiment on the campaign trail.¹⁰⁷ Following *McCreary*, Justice Sotomayor reasoned that the Establishment Clause necessitates government neutrality toward religion, thus when the government seemingly takes one side over another, it no longer is neutral and violates the Establishment Clause.¹⁰⁸ Therefore, in the travel ban's case, despite the continued efforts to legalize or secularize his Muslim ban, Trump's motivation from his candidacy to his presidency was to denigrate Islam and ban Muslim immigration.¹⁰⁹

In applying this heightened-level scrutiny of the reasonable observer, the dissent lamented that there is no precedent to distinguish domestic Establishment Clause cases from the international immigration context, as the majority concluded.¹¹⁰ By doing so, the majority strategically implemented a rational basis review simply because the former president invoked the interest of national security, which in Justice Sotomayor's opinion did not comport with settled Establishment Clause principles that require a heightened level of scrutiny where facial neutrality is not the end of an analysis.¹¹¹

C. Balancing the Compelling Governmental Interest of National Security with a Person's First Amendment Liberties

Outside of the immigration context, but within the foreign arena or national security, the Supreme Court has regularly balanced a compelling governmental interest with the need to meet demands of national security.¹¹² In 1972, in

¹⁰⁵ *Hawaii VI*, 585 U.S. at 740–42 n.6 (Sotomayor, J., dissenting).

¹⁰⁶ *Id.* at 728–29 (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)).

¹⁰⁷ *Id.* at 728–39; see *supra* note 22 and accompanying text (detailing the Ten Commandments saga in the 2005 case *McCreary County v. ACLU of Kentucky*).

¹⁰⁸ *Id.* at 728–39, 747–48.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 740–43, 742 n.6.

¹¹¹ *Id.* at 740 n.5 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993)); *id.* at 740–43, 742 n.6 (first citing *McCreary*, 545 U.S. at 860–63; then citing *Larson v. Valente*, 456 U.S. 228, 244 (1982); then citing *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449–52 (1969); and then citing *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008)).

¹¹² See, e.g., *Brown v. Glines*, 444 U.S. 348, 354, 361 (1980) (reasoning that an Air Force regulation that required a base commander's consent to circulate petitions was permissible despite the First Amendment because the government has a compelling interest of military discipline within the national security, foreign relations, and military context). The Supreme Court has long acknowledged

Kleindienst v. Mandel, this is precisely what Justice William Douglas advocated for in his dissent, arguing that, in the arena of the plenary immigration power, the compelling government interest standard sufficiently satisfies the need to protect First Amendment constitutional rights while acknowledging the need for protecting national security and providing the president with ultimate flexibility in handling foreign affairs.¹¹³

In 1965, in *Lamont v. Postmaster General of the United States*, for instance, the Court did not allow the U.S. postmaster to prevent mailing communist-related propaganda because the state's interest in hindering the free-flow of communist ideas was not compelling enough to outweigh U.S. citizens' right to free speech.¹¹⁴ Similarly, circuit courts across the country have engaged in such a balancing test so detested by the majority in *Mandel* and Chief Justice Roberts in *Hawaii VI*.¹¹⁵

In 2022, in *Singh v. Berger*, the U.S. Court of Appeals for the D.C. Circuit ordered a preliminary injunction against the U.S. Marine Corps to allow Sikh Marines to wear a turban and grow a beard in accord with their religious beliefs and in violation of the Marine Corps' grooming policies in boot camp.¹¹⁶ In acknowledging the judiciary's ill-equipped stature toward reviewing the Marine Corps' internal policies, the Court also emphasized that members of the military are not exempt from important constitutional protections.¹¹⁷ Thus, the D.C. Circuit, other circuits, and congressional legislation in the Religious Restoration and

that infringements on the right to freedom of religion requires a heightened level of scrutiny like the compelling governmental interest standard. See *supra* note 82 and accompanying text (providing multiple cases to this end).

¹¹³ *Kleindeinst v. Mandel*, 408 U.S. 753, 777–84 (1972) (Douglas, J., dissenting) (citing *Lamont v. Postmaster Gen. of the U.S.*, 381 U.S. 301, 308 (1965)).

¹¹⁴ 381 U.S. at 308–09 (Brennan, J., concurring).

¹¹⁵ See *Hassan v. City of New York*, 804 F.3d 277, 301 (3d Cir. 2015) (considering surveillance without criminal suspicion of Muslims as deserving heightened scrutiny); *Abdulahaseeb v. Calbone*, 600 F.3d 1301, 1322 n. 10 (10th Cir. 2010) (reviewing a challenge to a prison denying a Muslim inmate halal food); *United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003) (determining that an attorney could not peremptorily strike a potential juror based on his religion); *Christian Sci. Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1012 (9th Cir. 1986) (labeling religious distinctions in governmental action as suspect).

¹¹⁶ 56 F.4th 88, 96–98 (D.C. Cir. 2022).

¹¹⁷ *Id.* at 92–93. When considering military policies, the Supreme Court has determined that the judiciary is especially ill-equipped to judge what is best practice given the overwhelming interest of national security. *Id.* at 91 (first citing *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); then citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); and then citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). Specifically, in 1986, in *Goldman v. Weinberger*, the Supreme Court determined that a Jewish servicemember's right to adorn his yarmulke did not outweigh the military's desire to regulate a uniform way to dress. 475 U.S. 503, 504, 510 (1986), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180 § 508, 101 Stat. 1019, 1086–87 (1987) (codified at 10 U.S.C. § 774). Congress, however, legislatively overruled *Weinberger* in 1987, passing a statute that protected servicemembers' religious right to adorn such expressively faith-based apparel. 10 U.S.C. § 774.

Freedom Act of 1993 demonstrate that courts already and regularly implement and conduct balancing tests between a person's religious liberties and various potentially-compelling government interests, including national security, the military, and foreign affairs.¹¹⁸

III. A REASONABLE OBSERVER CAN BALANCE THE FIRST AMENDMENT AND NATIONAL SECURITY-RELATED IMMIGRATION WHEN DISCERNING A COMPELLING GOVERNMENT INTEREST

The majority's 2018 opinion in *Trump v. Hawaii* (*Hawaii VI*) falls short of protecting the long-standing American notion of separating church and state through the Establishment Clause.¹¹⁹ In applying only rational basis review and not a heightened level of scrutiny, the Court essentially permits a future president to ban all immigrants of a particular religion, which would clearly endorse and/or denigrate certain religions within the domestic arena.¹²⁰ Moreover, by distinguishing all Establishment Clause precedent to apply only to the domestic context, the Court fails to consider the ramifications of immigration on American culture, especially religion, shown through the nation's cyclical history of immigration and cultural change.¹²¹

¹¹⁸ See 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (providing the basis for review of Free Exercise claims); *supra* notes 115–117 and accompanying text (discussing cases in which courts have applied a heightened standard of review to seemingly religious government actions).

¹¹⁹ See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof”); Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, Comm. Members of the Danbury Baptist Ass’n (Jan. 1, 1802), <https://www.loc.gov/loc/lcib/9806/danpre.html> [<https://perma.cc/RR92-ND82>] (“[R]eligion is a matter which lies solely between Man & his God”). As society modernizes, it has become more difficult to maintain religion and government in two isolated fields. See JIMMY CARTER, *LIVING FAITH* 9 (1996) (“It seems increasingly difficult to separate church and state issues.”). In one instance, former Democratic President Jimmy Carter, a devout evangelical Christian, recalled when a religious leader in his community strongly questioned his first strides into politics in 1962, which to the preacher seemed antithetical to Christianity, yet Carter saw it as an opportunity to evangelize within politics. *Id.* (“He asked me, ‘How can you, as a Christian, a deacon, and a Sunday school teacher, become involved in politics?’ . . . [I answered,] ‘I will have 75,000 people in my senate district. How would you like to have a congregation that big?’”).

¹²⁰ See *Hawaii VI*, 585 U.S. 667, 738–39 (2018) (Sotomayor, J., dissenting) (reasoning that banning a certain religion from the United States surely relegates its followers, denigrates its faith, and thus violates the Establishment Clause). Even if not expressly religion, migrants as they move bring with them their diverse cultures, traditions, and other customs, which often intertwine socially and culturally with religion. See Melanie Kolbe & Peter S. Henne, *The Effect of Religious Restrictions on Forced Migration*, 7 POL. & RELIGION 665, 667 (2014) (“[R]eligious identity-based variables can overlap with economic, political, cultural, social, and racial factors.”).

¹²¹ See *infra* note 129 and accompanying text (discussing the religious history of the United States and the migratory waves into the country). Boston, Massachusetts provides a clear example of immigration's effects on domestic religions considering the prevalence of Catholicism there today when such practices were illegal for much of the nation's history. See *History of the Archdiocese of Boston*, ARCHDIOCESE BOS., <https://bostoncatholic.org/history-of-the-archdiocese-of-boston> [<https://perma.cc/>

In reaction to the majority's opinion in *Hawaii VI*, the judiciary moving forward should employ neither the dissent's reasonable observer standard nor the majority's facially legitimate and bona fide reason standard, but rather the compelling governmental interest standard.¹²² Much like how the legislature reacted to various judicial decisions in enacting the Religious Freedom and Restoration Act of 1993, Congress should extend codification of the compelling interest standard to the INA, qualifying Congress's original delegation of discretionary authority to the president.¹²³ Doing so protects the fundamental American priority of separation of church and state through the First Amendment's Establishment Clause, while acknowledging that there exist various compelling governmental interests within the immigration power from foreign relations to national security.¹²⁴

By invoking national security concerns, countries throughout history have banned certain religious groups from migrating across their borders, such as Nazi Germany in the 1930s, which excluded, expelled, and relocated those it deemed racially inferior, including groups such as Poles, Romani, and Jews in

5GZF-YDNU] (detailing the history of Catholicism in Boston). As a result of Irish and Italian migration to Boston in the twentieth century, the city became known as an epicenter for Catholicism in the United States, with approximately fifty percent of the city identifying as Catholic in the early 2000s. David Mizner, *The "Most Catholic City,"* KNIGHT CASE STUD. INITIATIVE COLUM. UNIV., https://cenmtl.columbia.edu/projects/caseconsortium/casestudies/14/casestudy/www/layout/case_id_14.html [<https://perma.cc/6YY9-HB42>].

¹²² See Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 ("Government may substantially burden a person's exercise of religion only if it . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kleindienst v. Mandel*, 408 U.S. 753, 777–83 (1972) (Marshall, J., dissenting) (arguing that the Court should implement that compelling government interest standard to balance excluding a non-citizen from the country with a U.S. citizen's right to freely hear speech). The judiciary and legislature regularly use the compelling government interest standard to ascertain if a state actor's is permissible despite impinging on someone's constitutional rights. See *supra* note 82 and accompanying text (providing cases in which the Court has implemented the compelling government interest standard).

¹²³ See *Singh v. Berger*, 56 F.4th 88, 96–98 (D.C. Cir. 2022) (determining that the Marines could not prevent a Sikh cadet from wearing his turban according to his religious beliefs); 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (detailing how government action can significantly burden a citizen's right to free exercise of religion based on the compelling governmental standard); cf. 8 U.S.C. § 1182(f) (providing near absolute authority to the president to exclude foreign nationals from the country when he decides it is in the U.S. interest). Though INA § 212(f) allows the president to take this action in the interest of the United States, it is arguable to a degree that maintaining separation of church and state is one of the pinnacle American interests, forged in and preserved from the founding generation. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) ("In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and State.'" (quoting *Reynolds v. United States*, 98 U.S. 145, 169 (1878))).

¹²⁴ See *Mandel*, 408 U.S. at 777–83 (Marshall, J., dissenting) (prioritizing a U.S. citizen's right to free speech over the immigration power); *supra* note 122 and accompanying text (detailing how foreign immigration policies affect the domestic contours of culture as different people bring with them different religions and philosophies).

promoting a scientifically secular, Aryan race.¹²⁵ Such policies inevitably affected the domestic contours of the religious landscape in Germany, where the majority of people now identify as Christian, whereas the Jewish population is now marginal compared to its historic prevalence.¹²⁶

Similarly, Japan's policy of isolationism and cultural homogeneity led to the expulsion of all foreigners in the seventeenth century and a subsequent two-century ban on all Christian immigration into the nation.¹²⁷ Accordingly, recent estimates place Japan's Christian citizenry at only two percent of its population,

¹²⁵ Tina Nguyen, *A Few Other Times Countries Banned Religious or Ethnic Groups*, VANITY FAIR (Dec. 8, 2015), <https://www.vanityfair.com/news/2015/12/trump-muslim-plan-history> [https://perma.cc/6TDJ-7H39]. This Note does not include this reference to equate in even the slightest Trump's travel ban and Nazi Germany's ethnic and religious policy, but rather to highlight the problematic notions of religious and ethnic exclusion. Cf. Press Release, Edna Freidberg, Historian, U.S. Holocaust Mem'l Museum's William Levine Fam. Inst. for Holocaust Educ., *Why Holocaust Analogies Are Dangerous* (Dec. 12, 2018), <https://www.ushmm.org/information/press/press-releases/why-holocaust-analogies-are-dangerous> [https://perma.cc/HR5H-LL6R] (critiquing ways in which people manipulate or oversimplify the history of the Holocaust to fit their arguments and agendas). Nations also have instituted exclusionary policies to preserve their identity and customs, such as modern issues facing Israel with the return of non-cultural but racial Jews who typically find it difficult to assimilate. Gideon Sapir & Mark Goldfeder, *Law, Religion, and Immigration: Building Bridges with Express Lanes*, 32 EMORY INT'L L. REV. 201, 207–08, 207 n.28 (2018) (explaining the complications of international Aliyah in which Jews from across the world return to Israel (citing *Defining Aliyah: The Meaning and History of Jewish Return to Zion*, INT'L CHRISTIAN EMBASSY JERUSALEM, <https://int.icej.org/aid/defining-aliyah> [https://perma.cc/2NPR-VQ24])).

¹²⁶ *Religious Affiliations 2020*, RSCH. GRP. WORLDVIEWS GER. (Sept. 23, 2021) (source translated by Google Translator), <https://fowid.de/meldung/religionszugehoerigkeiten-2020> [https://perma.cc/WQ7P-B7LM]. In total, estimates indicate that forty-one separate countries have some type of ban on certain religious groups with the vast majority located in Africa and Asia. Samirah Majumdar, *41 Countries Ban Religion-Related Groups; Jehovah's Witnesses, Baha'is Among the Most Commonly Targeted*, PEW RSCH. CTR. (Nov. 15, 2021), <https://www.pewresearch.org/fact-tank/2021/11/15/41-countries-ban-religion-related-groups-jehovahs-witnesses-bahais-among-the-most-commonly-targeted/> [https://perma.cc/RB63-2SY4]. In modern Germany, while it has demonstrated one of the most liberal and open immigration systems in the European Union, tensions between majority customs and government policies continue to conflict with Jewish tradition. See Stephen R. Munzer, *Secularization, Anti-Minority Sentiment, and Cultural Norms in German Circumcision Controversy*, 37 U. PA. J. INT'L L. 503, 506 (2015) (discussing the differing viewpoints regarding a German court's decision to criminalize circumcision of minor-aged males without medical indication); see also *The Circumcision Ceremony: The Brit Milah (Bris) Step by Step*, https://www.chabad.org/library/article_cdo/aid/1472861/jewish/The-Circumcision-Ceremony.htm [https://perma.cc/373B-JV69] (elaborating on the steps of Jewish circumcision and showing how it might be conflict with a modern medical system).

¹²⁷ Nguyen, *supra* note 125; Anthony Kuhn, *Driven Underground Years Ago, Japan's 'Hidden Christians' Maintain Faith*, NPR (Oct. 11, 2015), <https://www.npr.org/sections/parallels/2015/10/11/446865818/driven-underground-years-ago-japans-hidden-christians-maintain-faith> [https://perma.cc/V4G8-L69D]. During that time, Japan also instituted the death penalty for practicing Christians. Kuhn, *supra*. China offers an interesting contrast to Japan with a more-relaxed immigration system in the past, allowing for the Christian church to be the largest private organization in the country, and yet the controlling Chinese Communist Party has increasingly targeted the religion to either eradicate it or strongly regulate it in accordance with President Xi Jinping's "China Dream." See Eloise D. Rotenberg, Note, *Xi Jinping's Sinocentrism and Its Impact on Religion: Modern Chinese Christianity Under Attack*, 50 N.Y.U. J. INT'L L. & POL. 1057, 1058–59 (2018) (detailing the history of Christianity in China and its modern tension with the Xi Jinping administration).

a margin less than Iraq, for example; in contrast to over a quarter of the population in South Korea, which practiced a more liberal immigration policy with Christian missionaries.¹²⁸ Given the significant domestic impact of immigration, courts cannot distinguish Establishment Clause protections from immigration as a foreign affairs power.¹²⁹

Both the majority and the dissent in *Hawaii VI* employ determinations that are too flexible and subjective and thus create unpredictable decisions moving forward, especially when considering the increasing polarization of the Court.¹³⁰ Both tests are not rigid enough nor placed on a solid enough precedential foundation to enable future courts to make determinative conclusions that do not depend solely upon ideological makeup.¹³¹

Instead, in the realm of immigration and First Amendment religious liberties, Congress should codify the compelling government interest standard from the Religious Freedom and Restoration Act of 1993 in the INA, caveating its

¹²⁸ *The World Factbook: Field Listing—Religions*, CIA, <https://www.cia.gov/the-world-factbook/field/religions/> [<https://perma.cc/LK9C-T784>]; Press Release, Korean Catholic Bishops' Church, Publication of Catholic Church Statistics (2017) (Apr. 12, 2018), <https://cbck.or.kr/Notice/13013298?gb=K1300> [<https://perma.cc/FD4F-WHXA>].

¹²⁹ See Matthew Lindauer, *Immigration Policy and Identification Across Borders*, 12 J. ETHICS & SOC. PHIL. 280, 280 (2017) ("The external relationships of [a nation's] members, relationships they stand in with nonmembers, make it the case that the treatment of nonmembers can affect or express attitudes about members themselves.") (internal quotation marks omitted); Lawrence E. Sullivan & Christopher Jocks, *Native American Religions*, BRITANNICA, <https://www.britannica.com/topic/Native-American-religion/additional-info#history> [<https://perma.cc/6AAF-C2UA>] (detailing religions amongst Native American tribes prior to British colonization); Mark David Hall, *Did America Have a Christian Founding?*, HERITAGE FOUND. (June 7, 2011), <https://www.heritage.org/political-process/report/did-america-have-christian-founding> [<https://perma.cc/R7WT-R6HG>] (discussing the influence and prevalence of Protestant Christianity on the founding fathers); Julie Byrne, *Roman Catholics and Immigration in Nineteenth-Century America*, NAT'L HUMANITIES CTR. (Nov. 2000), <https://nationalhumanitiescenter.org/serve/nineteen/nkeyinfo/nromcath.htm> [<https://perma.cc/JPV7-NURT>]; *Religious Landscape Study*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study> [<https://perma.cc/3P28-2U6B>] (providing statistics of the increasingly diversifying faiths in the United States and particularly the increasing secularization). In even the simplest examination of U.S. history, it is evident how strongly related the religious development of the nation progressed in accord with immigration patterns from indigenous religions to Anglo-Protestantism to Italian-Irish Catholicism to today's religious plurality. See Lindauer, *supra*; Sullivan & Jocks, *supra*; Hall, *supra*; *Religious Landscape Study*, *supra*.

¹³⁰ See *Hawaii VI*, 585 U.S. 667, 703–05 (2018) (implementing a facially legitimate and bona fide reason standard of review to allow the travel ban under foreign policy jurisprudence); *id.* at 728–41 (Sotomayor, J., dissenting) (using a reasonable observer standard of review to argue for blocking the travel ban under the Establishment Clause jurisprudence); see, e.g., Thomas B. Leary, *The Need for Objective and Predictable Standards in the Law of Predation*, FED. TRADE COMM'N (May 10, 2001), <https://www.ftc.gov/news-events/news/speeches/need-objective-predictable-standards-law-predation> [<https://perma.cc/4Q3S-Y2L6>] (detailing the certain advantages to having predictable and objective standards rather than unpredictable, flexible standards in the realm of adjudicating predation claims).

¹³¹ See, e.g., Trevor Burrus, *How Political Polarization Affects the Supreme Court*, CATO INST. (July 30, 2018), <https://www.cato.org/commentary/how-political-polarization-affects-supreme-court> [<https://perma.cc/AMF7-6L98>] (explaining the increasingly polarized and political Supreme Court from publicized and cultural confirmation hearings to highly legislative judicial opinions).

delegation of discretionary authority to the president.¹³² As compared to the relatively novel tests employed in *Hawaii VI*, the compelling governmental interest standard has a long foundation of precedent to assist in informing future courts' decisions.¹³³ Moreover, it achieves both ends sought by the majority and dissent, in that it acknowledges the importance and compelling interest of national security and it is limited in infringing on civil liberties, particularly religion, where such action does not further the compelling interest.¹³⁴

CONCLUSION

The standards the majority and dissent employed in *Trump v. Hawaii*, while novelly address Establishment Clause implications on the immigration power, fail to appropriately marry the concerns of a citizens' right against the infusion of church and state with the government's interest in dictating immigration policy within the global arena and national security. The majority's facially legitimate and bona fide reason standard, rooted in precedent of a near non-reviewable and plenary immigration power, provides a concerning deference to the president's discretionary authority despite its potential violations of the First Amendment. Moreover, the majority's unprecedented distinguishing of all Establishment Clause precedent to only apply to the domestic context ignores the cultural and societal ramifications that immigration policy has on the religious identity of the U.S. population. On the other hand, the dissent's reasonable observer test, based in Establishment Clause precedent proves too flexible a standard within the context of immigration and national security.

Instead and in reaction to the Court's novel struggle with the Establishment Clause and the immigration power, Congress should amend the Immigration and Nationality Act to codify the compelling governmental interest standard in its delegation of discretionary authority to the president. Doing so provides judicial predictability, and acknowledges the compelling importance of national security, yet still protecting the citizenry's right to separation of church and state.

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¹³² See 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (exemplifying how Congress believed the courts could balance compelling governmental interests with constitutional rights); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 690–92 (2014) (showing how the Court balanced a strong governmental interest of providing health care with a private interest to free exercise of religion).

¹³³ See *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (building from traditional precedent that dictated judicial restraint in prison regulation, yet circumventing that tradition through the compelling governmental standard); *Hobby Lobby Stores*, 573 U.S. at 690–92 (dictating that despite the interest to provide health care, a private entity's interest in freedom of religion outweighs that interest).

¹³⁴ See *Kleindienst v. Mandel*, 408 U.S. 753, 776–78, 780 (1972) (Marshall, J., dissenting) (first citing *Noto v. United States*, 367 U.S. 290, 297–98 (1961); and then citing *Bradenburg v. Ohio*, 395 U.S. 444, 447–49 (1969)) (lamenting that the immigration power cannot be a cure-all for tyrannical overreach, yet reserving that fact that conflicting rights or interests must be balanced).