

IS THE SUPREME COURT IRRATIONAL: *TRUMP V. HAWAII*

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I. INTRODUCTION

President Donald Trump told the American people during the 2016 election that he would discriminate against Muslims if elected. Although each new travel ban the President went on to implement presented a moving target, they all were rooted in the same discriminatory animus. The various challenges to these travel bans often focused on alleged violations of the First Amendment or the Immigration and Nationality Act.¹ This article, however, does not address those arguments, but instead tackles a different constitutional issue: rational basis review.

No doubt, the Supreme Court's case law addressing rational basis analysis typically favors the government. Nonetheless, there is a strong argument that the Trump travel bans violate the Constitution because they are irrational. Specifically, the Supreme Court's decision in *Trump v. Hawaii*² was wrongly decided because these travel bans are both underinclusive and overinclusive. Between 1975 and 2015, citizens from the nations designated in the travel bans had not committed any terrorist attacks resulting in any deaths within the United States.³ Indeed, "[o]ver the last four decades, 20 out of 3.25 million refugees welcomed to the United States have been convicted of attempting or committing terrorism on U.S. soil, and only three Americans have been killed in attacks committed by refugees—all by Cubans in the 1970s."⁴ Thus, the argument that the travel bans will prevent or reduce terrorist attacks in the United States is not rational. Instead, the record before the Supreme Court established that Trump dislikes Muslims and fully intended to discriminate against them based on this dislike.

In Part II, I address the first travel ban and its subsequent litigation. Similarly, Part III discusses the second travel ban and its litigation history. Next, Part IV addresses the September 24, 2017 proclamation, which constituted the third travel ban. In Part V, I analyze the Supreme Court's decision in *Trump v. Hawaii*, especially the Court's discussion on rational

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¹ See *Hawaii v. Trump*, 859 F.3d 741, 777 (9th Cir. 2017) (per curiam); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572, 581 (4th Cir. 2017) (en banc); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 551–52 (D. Md. 2017).

² *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

³ Uri Friedman, *Where America's Terrorists Actually Come From*, ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/international/archive/2017/01/trump-immigration-ban-terrorism/514361/>.

That is not to say that nationals from these countries have not tried to commit some terrorist attacks in the United States. One researcher found that there were only seventeen individuals from these countries convicted of attempting or perpetrating terrorist attacks in the United States. *Id.* No one from either Libya or Syria had been convicted of such offenses. *Id.*

⁴ *Id.*

basis review. Part VI unpacks the Supreme Court's jurisprudence regarding the role that both underinclusivity and overinclusivity play in rational basis analysis. Finally, Part VII analyzes the underinclusivity and overinclusivity of Trump's travel bans and his discriminatory animus against Muslims in light of travel bans.

II. TRAVEL BAN I

a. EXECUTIVE ORDER 13769

President Trump issued his first travel ban, Executive Order 13769 ("the First Travel Ban,") entitled "Protecting the Nation From Foreign Terrorist Entry into the United States" on January 27, 2017, which temporarily suspended entry into the United States from certain countries.⁵ Specifically, it noted that almost three thousand people died on September 11, 2001 due to the terroristic acts committed by nineteen foreign nationals who legally entered the United States.⁶ Thus, the First Travel Ban sought to stop other acts of terrorism by foreign nationals seeking admission into the United States.⁷

Consistent with this purpose, the Trump administration suspended entry into the United States for immigrants and nonimmigrants from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.⁸ Furthermore, the First Travel Ban emphasized that admission of Syrian refugees was detrimental to American interests and thus barred their entry until the administration determined that their readmission satisfied American interests.⁹

People protested the First Travel Ban all over the country, including at airports.¹⁰ Moreover, immigration lawyers provided legal assistance to people seeking entry into the United States at these airports.¹¹ Finally, this travel ban brought several legal challenges.

i. Washington v. Trump

The states of Minnesota and Washington filed a lawsuit challenging the First Travel Ban.¹² Specifically, they sought and obtained a temporary restraining order from the district court after establishing that the travel ban

⁵ See generally Protecting the Nation From Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017), *superseded by executive order*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

⁶ *Id.* at 8,977.

⁷ *Id.*

⁸ *Id.* at 8,978; see 8 U.S.C. § 1182(f) (2019); Jack Goodman, *US Travel Ban: Why These Seven Countries?*, BBC (Jan. 30, 2017), <http://www.bbc.com/news/world-us-canada-38798588>.

⁹ Protecting the Nation From Foreign Terrorist Entry into the United States, 82 Fed. Reg. at 8,979.

¹⁰ Emanuella Grinberg & Madison Park, *2nd Day of Protests Over Trump's Immigration Policies*, CNN (Jan. 30, 2017, 1:42 AM), <http://www.cnn.com/2017/01/29/politics/us-immigration-protests/index.html>.

¹¹ See *id.*

¹² See generally *Washington v. Trump*, No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (order granting temporary restraining order).

“adversely affect[ed] the States’ residents in areas of employment, education, business, family relations, and freedom to travel.”¹³ Furthermore, the court found that both states were injured due to “the damage that implementation of the Executive Order has inflicted upon the operations and missions of their public universities and other institutions of higher learning, as well as injury to the States’ operations, tax bases, and public funds.”¹⁴ Finally, the court concluded that these injuries were “significant and ongoing.”¹⁵

President Trump appealed the district court’s order and sought an order to stay pending appeal on February 4, 2017.¹⁶ Three days later, the United States Court of Appeals for the Ninth Circuit heard oral arguments.¹⁷

First, the Ninth Circuit found that both Minnesota and Washington had standing to assert rights on behalf of their residents as well as themselves.¹⁸ Second, it concluded that the federal courts may address the constitutionality of the travel ban notwithstanding any national security concerns.¹⁹ Third, President Trump did not establish that this travel ban had a likelihood of success on the question of whether it violated these foreign nationals’ due process rights.²⁰ Finally, the court determined that President Trump did not demonstrate that the United States would suffer irreparable harm if the stay was not granted.²¹

On March 8, 2017, President Trump moved to dismiss his appeal, which the Ninth Circuit granted.²² Because none of the parties sought to vacate the order denying the stay of the restraining order, the court, on its own accord, analyzed the question and determined that stay should continue to operate.²³

En banc, several Ninth Circuit judges filed dissents from the denial of the reconsideration to the amended order denying the vacatur of the order staying the restraining order.²⁴ Judge Kozinski asserted that reliance on President Trump’s statements during the 2016 election campaign and on his social media posts was inappropriate.²⁵ He also posited that most of the citizens impacted by this travel ban do not have due process rights.²⁶ Additionally, Judge Jay Bybee maintained that the federal courts have a limited role in reviewing a president’s immigration policy.²⁷ Finally, Judge Carlos Bea asserted that states may not sue the federal government for due process violations.²⁸

¹³ *Id.* at *2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Washington v. Trump*, 691 F. App’x 834, 835 (9th Cir. 2017) (order denying stay pending appeal).

¹⁷ *See generally* *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

¹⁸ *See id.* at 1159–61.

¹⁹ *See id.* at 1161–64.

²⁰ *See id.* at 1164–67.

²¹ *See id.* at 1168–69.

²² *Washington v. Trump*, 858 F.3d 1168, 1169 (9th Cir. 2017) (amended order).

²³ *See id.*

²⁴ *Id.* at 1173–88 (Kozinski, J., Bybee, J., and Bea, J. dissenting).

²⁵ *See id.* at 1173–74 (Kozinski, J. dissenting); *see also* Richard L. Hasen, *Does the First Amendment Protect Trump’s Travel Ban?*, SLATE (Mar. 20, 2017, 9:28 AM), <https://slate.com/news-and-politics/2017/03/the-9th-circuits-alex-kozinski-defends-trumps-travel-ban-on-first-amendment-grounds.html> (characterizing Judge Kozinski’s First Amendment defense of Trump’s campaign statements).

²⁶ 858 F.3d at 1171–72 (Kozinski, J. dissenting).

²⁷ *See id.* at 1174–85 (Bybee, J. dissenting).

²⁸ *See id.* at 1185–88 (Bea, J. dissenting).

ii. *Aziz v. Trump*

While the *Washington v. Trump* litigation brought by Minnesota and Washington proceeded, Ammar Aqel Mohammed Aziz and Tareq Aqel Mohammed Aziz filed another action, *Aziz v. Trump*, in the United States District Court for the Eastern District of Virginia challenging the First Travel Ban.²⁹ United States District Judge Leonie Brinkema issued an order requiring the Trump Administration to “permit lawyers access to all legal permanent residents being detained at Dulles International Airport” and ordering the government to refrain “from removing petitioners—lawful permanent residents at Dulles International Airport—for a period of 7 days from the issuance of this Order.”³⁰

Ammar Aqel Mohammed Aziz and Tareq Aqel Mohammed Aziz are two Yemeni nationals who received immigrant visas from the American Embassy in Djibouti.³¹ On January 28, 2017, they entered the United States at Dulles International Airport in Virginia on a flight from Ethiopia and were detained by United States Custom and Border Protection.³² These agents terminated their visas, which authorized them to enter the United States, forcing them to purchase and board returning flights to Ethiopia.³³

Osman Nasreldin is an American citizen engaged to Sahar Kamal Ahmed Fadul who is a Somali national.³⁴ Fadul obtained a visa to enter the United States and flew into Dulles International Airport from Ethiopia.³⁵ After she landed, customs agents revoked her visa and, like the Azizs, she had to purchase a return ticket to Ethiopia and board that flight.³⁶ Judge Brinkema granted the motion to intervene by Nasreldin and Fadul in this action.³⁷

Judge Brinkema also determined that the Commonwealth of Virginia should be allowed to intervene.³⁸ Specifically, she found that Virginia, in its sovereign capacity, had standing to raise a *parens patriae* action on behalf of the welfare of its residents.³⁹ Additionally, Virginia, like other states, had standing to raise its non-sovereign proprietary interests based on alleged injuries to its state universities.⁴⁰

Judge Brinkema considered injuries that Virginia and its residents suffered⁴¹ and the Trump administration’s rationale for the travel ban.⁴² Finally, she considered the many comments that President Trump and his representatives made during the 2016 presidential election campaign as well as in support of the First Travel Ban.⁴³ On February 13, 2017, Judge

²⁹ See generally *Aziz v. Trump*, 231 F. Supp. 3d 23 (E.D. Va. 2017).

³⁰ *Aziz v. Trump*, No. 1:17-CV-116, 2017 WL 386549, at *1 (E.D. Va. Jan. 28, 2017).

³¹ *Aziz*, 231 F. Supp. 3d at 27.

³² *Id.* at 23.

³³ *Id.*

³⁴ *Id.* at 28.

³⁵ *Id.* at 28, 28 n.6.

³⁶ See *id.* at 28.

³⁷ See *id.* at 29.

³⁸ See *id.*

³⁹ See *id.* at 32.

⁴⁰ See *id.*

⁴¹ *Aziz v. Trump*, 234 F. Supp. 3d 724, 728–29 (2017).

⁴² See *id.* at 729.

⁴³ See *id.* at 729–31.

Brinkema granted a preliminary injunction against the United States' implementation of the First Travel Ban.⁴⁴

In granting the preliminary injunction, Judge Brinkema determined that Virginia had demonstrated a likelihood of success on the merits.⁴⁵ Moreover, she concluded that Virginia established it would suffer irreparable harm if the travel ban remained in effect.⁴⁶ Finally, Judge Brinkema weighed the various issues and found that the balance favored Virginia.⁴⁷ Consequently, she concluded that enjoining the travel ban served the public interest.⁴⁸

iii. *Hawaii v. Trump*

On February 3, 2017, the State of Hawaii, like Virginia, Washington, and Minnesota, also filed a lawsuit seeking injunctive relief against the First Travel Ban.⁴⁹ Relying on Trump's appeal to the Ninth Circuit in *Washington v. Trump*, United States District Judge Derrick Watson granted President Trump's motion for a stay in this action during the pendency of the appeal in *Washington v. Trump*.⁵⁰

III. TRAVEL BAN II

a. EXECUTIVE ORDER 13780

On March 6, 2017, President Trump revoked his first travel ban executive order.⁵¹ He replaced it, however, with Executive Order 13780 ("the Second Travel Ban"), entitled "Protecting the Nation From Foreign Terrorist Entry into the United States."⁵²

The Second Travel Ban reduced the number of banned nations to six: Iran, Libya, Somalia, Sudan, Syria, and Yemen.⁵³ The Trump administration excluded Iraq because it constituted a special case.⁵⁴ Unlike the First Travel Ban, the administration did not raise the September 11 attacks as a basis for justifying this travel ban. The Second Travel Ban explicitly asserted that the issuance of the First Travel Ban was not designed to foster any religious discrimination.⁵⁵

⁴⁴ *Id.* at 739.

⁴⁵ *See id.* at 737.

⁴⁶ *See id.*

⁴⁷ *See id.* at 738.

⁴⁸ *See id.*

⁴⁹ *Hawaii v. Trump*, 233 F. Supp. 3d 850, 851 (D. Haw. 2017).

⁵⁰ *See id.* at 856.

⁵¹ Protecting the Nation From Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,218 (Mar. 6, 2017).

⁵² *See generally id.*

⁵³ *See id.* at 13,211.

⁵⁴ *See id.* at 13,211–13,212.

⁵⁵ *See id.* at 13,210.

Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That

In the Second Travel Ban, the Trump administration noted that the First Travel Ban had been challenged in the federal courts.⁵⁶ Consequently, the second ban excluded from its applicability lawful permanent residents or to any individuals to whom the United States already granted refugee or asylum status.⁵⁷ In the Second Travel Ban, the Trump administration prohibited entry into the United States of any new refugees from the six targeted nations for 120 days as well as reduced the number of refugees to be admitted by about 50 percent.⁵⁸ Like the First Travel Ban, the Second Travel Ban drew various legal challenges.

i. *International Refugee Assistance Project v. Trump*

In *International Refugee Assistance Project v. Trump*, six people and three organizations challenged the Second Travel Ban in the United States District Court for the District of Maryland.⁵⁹ The individual plaintiffs all had Muslim relatives who were trying to come to the United States and were concerned that the Second Travel Ban would prevent them from entering the country.⁶⁰ Two organizations—International Refugee Assistance Project and Hebrew Immigrant Aid Society—who assist refugees seeking entry into the United States both indicated that they had lost revenue and faced a decline in people seeking their assistance because of the travel bans.⁶¹ A third organization—Middle East Studies Association—suffered harm because its members were barred from traveling for academic conferences, engaging in field work, and attending an annual conference.⁶²

In this action, United States District Judge Theodore Chuang considered the statements by President Trump and those speaking on his behalf as evidence that the travel bans were designed to target Muslims.⁶³ Judge Chuang concluded that the plaintiffs had standing based on the Immigration and Nationality claim⁶⁴ and the Establishment Clause.⁶⁵ Nonetheless, the court ruled that they were unlikely to succeed on the merits of their claim based on the statute because “an executive order barring entry to the United States based on nationality pursuant to the President’s authority under § 1182(f) does not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas.”⁶⁶ In other words, the President’s exclusion of aliens from these six nations with a history of promoting or fostering terrorism does not violate the statute’s anti-discriminatory provisions.

order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside.

Id.

⁵⁶ *See id.*

⁵⁷ *See id.* at 13,213–13,214.

⁵⁸ *See id.*

⁵⁹ *See generally* *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017).

⁶⁰ *See id.* at 548.

⁶¹ *See id.* at 548–49.

⁶² *See id.* at 549.

⁶³ *See id.* at 547–48.

⁶⁴ *See id.* at 549–51.

⁶⁵ *See id.* at 551–52.

⁶⁶ *Id.* at 554.

Judge Chuang also determined that the individual plaintiffs had standing to assert a First Amendment Establishment Clause.⁶⁷ With regard to this claim, the court found that the plaintiffs established the likelihood of success on the merits.⁶⁸ Additionally, this travel ban would cause these individuals irreparable harm if it went into effect.⁶⁹ Finally, on balance, the public interest supported the issuance of injunctive relief.⁷⁰ Thus, Judge Chuang issued an order barring the implementation of the Second Travel Ban across the country.⁷¹

On appeal of the order granting injunctive relief, the United States Court of Appeals for Fourth Circuit sitting *en banc* affirmed in part and vacated in part the district court's decision.⁷² The court focused on the Establishment Clause claim because "[t]he breadth of the preliminary injunction issued by the district court may be justified if and only if Plaintiffs can satisfy the requirements for a preliminary injunction based on their Establishment Clause claim."⁷³

In its decision, the Fourth Circuit relied, in part, on the numerous statements that President Trump and his surrogates made demonstrating a hostility towards Muslims.⁷⁴ Consequently, the Establishment Clause allegations were sufficient in part because of Trump's well documented animus toward Muslims and Islam during his campaign and on social media.⁷⁵ Specifically, "[b]ecause Plaintiffs have made a substantial and affirmative showing that the government's national security purpose was proffered in bad faith, we find it appropriate to apply our longstanding Establishment Clause doctrine."⁷⁶ President Trump's statements against Muslims played a significant role in the Fourth Circuit's determination that the plaintiffs established that they met the three factors necessary to establish and obtain injunctive relief.⁷⁷ Consequently, the Fourth Circuit affirmed Judge Chuang's decision to apply injunctive relief nationwide.⁷⁸

ii. *Sarsour v. Trump*

In *Sarsour v. Trump*, Judge Anthony Trenga of the United States District Court for the Eastern District of Virginia denied a motion for a temporary

⁶⁷ *See id.* at 551–52.

⁶⁸ *See id.* at 556–64.

⁶⁹ *See id.* at 564.

⁷⁰ *See id.* at 565.

⁷¹ *See id.* at 583–86.

⁷² *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017) (*en banc*).

⁷³ *Id.* at 581. The Fourth Circuit did not address the discrimination claim based on the Immigration and Nationality Act. *See id.*

⁷⁴ *See id.* at 575–77.

⁷⁵ *See id.*

⁷⁶ *Id.* at 592.

⁷⁷ *See id.* at 594–601.

⁷⁸ *See id.* at 604. On June 14, 2017, in response to this decision, President Trump issued the "Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence." Effective Date in Executive Order 13780, 82 Fed. Reg. 27,965 (June 14, 2017) (Memorandum). Addressing the preliminary injunctions, this executive order stayed the effective dates in Executive Order 13,780 until seventy-two hours after the injunctions are lifted. *Id.* at 27,966.

restraining order.⁷⁹ In *Sarsour*, the plaintiffs were Muslims who had legal status to be in the United States as citizens or legal permanent residents, or based on student visas.⁸⁰ The plaintiffs were concerned about being able to bring relatives from the banned countries into the United States, or in the case of the students, being able to return if they left the United States.⁸¹

Although Judge Trenga found that the plaintiffs had standing to challenge the Second Travel Ban, the court denied the motion for injunctive relief.⁸² Specifically, Judge Trenga concluded that the plaintiffs were unlikely to succeed on claims pursuant to the Immigration and Nationality Act, the Establishment Clause, or the Equal Protection Clause.⁸³

iii. *Hawaii v. Trump*

In *Hawaii v. Trump*, the State of Hawaii filed a motion for a temporary restraining order prohibiting the implementation of the Second Travel Ban on March 8, 2017.⁸⁴ It maintained “that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions.”⁸⁵ Specifically, Hawaii asserted that the travel ban would adversely impact its tourism industry and thus its economy.⁸⁶ Additionally, there was a second plaintiff—Dr. Ismail Elshikh—an American citizen of Egyptian descent who served as an imam and a leader in the Honolulu Muslim community.⁸⁷ His mother-in-law was a Syrian national whose trip to the United States was derailed when her visa was placed on hold after the First Travel Ban.⁸⁸ Thus, Dr. Elshikh and his wife were concerned that the Second Travel Ban would prevent her from entering the country.⁸⁹ On appeal, the Ninth Circuit affirmed Judge Watson’s decision in part and vacated it in part.⁹⁰ The Ninth Circuit found that both Hawaii and Dr. Elshikh had standing to assert their claims, including the state’s interests in operating its university and implementing various policies concerning refugees.⁹¹

Although the Trump administration argued that national security concerns were more important than any of the plaintiffs’ claims, the Ninth Circuit determined that the executive branch could not act unrestrained in the name of national security.⁹² The Ninth Circuit found the travel ban unavailing because there was no causal relationship between the six targeted countries and their roles in international terrorism to the nationality of the

⁷⁹ *Sarsour v. Trump*, 245 F. Supp. 3d 719, 724 (E.D. Va. 2017).

⁸⁰ *See id.* at 725–27.

⁸¹ *See id.* at 727.

⁸² *See id.* at 728, 742.

⁸³ *See id.* at 730–40.

⁸⁴ *See generally Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017).

⁸⁵ *Id.* at 1126.

⁸⁶ *Id.* at 1130–31.

⁸⁷ *Id.* at 1131.

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See generally Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam).

⁹¹ *See id.* at 763, 765.

⁹² *See id.* at 774 (“National security is not a ‘talismanic incantation’ that, once invoked, can support any and all exercise of executive power under § 1182(f).”) (quoting *United States v. Robel*, 389 U.S. 258, 263–64 (1967)); *see also id.* at 770–72.

individual applicants and their role in terrorism.⁹³ Moreover, the Trump administration could not demonstrate that—without the Second Travel Ban—American national interests and security would be harmed.⁹⁴

The Ninth Circuit explained that the Immigration and Nationality Act prohibited discrimination on the basis of national origin.⁹⁵ Although the Trump administration asserted that the Second Travel Ban did not discriminate on the basis of national origin as it “bars *entry* of nationals from six designated countries but does not deny the *issuance of immigrant visas* based on nationality,”⁹⁶ the Ninth Circuit concluded that the plaintiffs established a likelihood of success.⁹⁷ Moreover, both plaintiffs also would likely suffer irreparable harm if injunctive relief were not provided.⁹⁸ In balancing these injuries with the government’s interest, the court concluded that “[t]he public interest favors affirming the preliminary injunction.”⁹⁹

Finally, the Ninth Circuit largely upheld the district court’s nationwide injunctive relief.¹⁰⁰ Additionally, while it reversed the injunction against President Trump, that injunction affirmed it against executive branch officials and their agents.¹⁰¹

IV. TRAVEL BAN III

On September 24, 2017, President Trump issued his third travel ban within eight months (“the Third Travel Ban”): a proclamation entitled “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.”¹⁰² The Third Travel Ban slightly modified the impacted countries, but was in many ways very similar to the first two travel bans.

The Third Travel Ban noted that the federal government conducted a review of the vetting process for nationals from almost two hundred countries and determined that only a few failed to provide adequate information to assist in the government’s analysis.¹⁰³ It expounded that “[t]he criteria assessed in this category include whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports.”¹⁰⁴ The Trump administration designated seven nations for entry restrictions

⁹³ See *id.* at 770–74.

⁹⁴ See *id.* at 774.

⁹⁵ See *id.* at 777; see also 8 U.S.C. § 1152(a)(1)(A) (2019) (“no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”).

⁹⁶ 859 F.3d at 776.

⁹⁷ *Id.* at 779.

⁹⁸ See *id.* at 783.

⁹⁹ *Id.* at 785 (citing *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008)).

¹⁰⁰ See *id.* at 785–88.

¹⁰¹ See *id.* at 788.

¹⁰² See generally *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

¹⁰³ Brian L. Owsley, *Are President Trump’s Travel Bans Rational?*, UNT DALL. L. REV. ON CUSP, Spring 2018, at 1, 18.

¹⁰⁴ 82 Fed. Reg. at 45,162.

based on their failure to provide adequate information about each of these processes: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.¹⁰⁵ Except for Venezuelan nationals, all immigrants from each of these seven countries were denied entry into the United States.¹⁰⁶ Additionally, citizens from the six other countries who sought non-immigrant entry into the United States also faced other restrictions.¹⁰⁷

V. THE SUPREME COURT'S DECISION REJECTS RATIONAL BASIS REVIEW

On June 26, 2017, the Supreme Court granted President Trump's petition for a writ of certiorari challenging both the Fourth Circuit's decision in *International Refugee Assistance Project v. Trump* and the Ninth Circuit's decision in *Hawaii v. Trump*.¹⁰⁸ Furthermore, the Court determined that the stay should be lifted as it related to anyone who had no bona fide relationship with the United States.

With the Supreme Court's partial lifting of the stay, the Trump administration construed the Court's decision to justify excluding fiancés as well as grandparents and cousins,¹⁰⁹ though the Court soon reversed its position regarding fiancés.¹¹⁰ Initially, Judge Watson denied the plaintiffs' request for clarification about whether "bona fide" applied to grandparents from the district court was denied by Judge Watson.¹¹¹ Specifically, he reasoned that such clarification should be sought from and provided by the Supreme Court.¹¹² Eventually, Judge Watson reversed course, issuing a second decision on July 13, 2017, finding that grandparents, cousins, aunts, uncles, nieces, nephews, brothers-in-law, and sisters-in-law fit within the relationships contemplated by the Supreme Court's use of the term "bona fide" and are still protected by the injunctive relief.¹¹³ The Supreme Court then denied the government's motion for clarification and stayed the district court's modification order pending appeal to the Ninth Circuit.¹¹⁴

On September 25, 2017, the Supreme Court ordered the parties to brief whether the Third Travel Ban rendered moot the petitions before it.¹¹⁵ The Trump administration asserted that the petitions were moot based on the

¹⁰⁵ See *id.* at 45,163.

¹⁰⁶ See *id.* at 45,165–45,167. The restrictions apply only to certain Venezuelan governmental officials and their family members. *Id.* at 45,166. Somalia was not listed as providing inadequate identity-management protocols, but its citizens were among those who were restricted entry as immigrants and had limitations on any entrance as non-immigrants. See *id.* at 45,167.

¹⁰⁷ See *id.* at 45,165–45,167.

¹⁰⁸ *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2083 (2017).

¹⁰⁹ Associated Press, *Grandparents and Cousins Aren't Considered 'Close' Family Under Trump's New Visa Criteria*, L.A. TIMES (June 29, 2017, 3:55 AM), <http://www.latimes.com/world/la-fg-new-visa-criteria-20170628-story.html>.

¹¹⁰ Yeganeh Torbati & Mica Rosenberg, *Trump Administration Reverses Policy on Fiancés as Travel Ban Takes Effect*, REUTERS (June 29, 2017), <http://www.reuters.com/article/us-usa-immigration-travelban-idUSKBN19K25Z>.

¹¹¹ See *Hawaii v. Trump*, 258 F. Supp. 3d 1188, 1191 (D. Haw. 2017) (denying plaintiffs' request for clarification of "bona fide").

¹¹² See *id.*

¹¹³ *Hawaii v. Trump*, 263 F. Supp. 3d 1049, 1057–58 (D. Haw. 2017).

¹¹⁴ *Trump v. Hawaii*, 138 S. Ct. 34 (2017) (mem.).

¹¹⁵ *Id.*; *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 50 (2017) (mem.).

Third Travel Ban.¹¹⁶ Hawaii, however, maintained that the petition was not moot and should be addressed on the merits.¹¹⁷ Alternatively, it posited that instead of dismissing the case as moot, the Court should dismiss the writ of certiorari as improvidently granted.¹¹⁸

When the Supreme Court finally heard the case on the merits in *Trump v. Hawaii*, Chief Justice John Roberts, writing for the majority, first assumed the justiciability of the aliens' Immigration and Nationality Act claims.¹¹⁹ In addressing the claims pursuant to the Immigration and Nationality Act raised in many of the various lower court challenges to the briefs, the Court, however, ultimately rejected them.¹²⁰

The Court determined that there was standing to assert the constitutional claims.¹²¹ As an initial matter, the Court acknowledged that the Respondents call attention to a number of statements by President Trump and his proxies.¹²² Specifically, Chief Justice Roberts noted that as a presidential candidate, Trump had "called for a 'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.'"¹²³ Moreover, the Court discussed that, as a candidate, Trump expressed the belief that "Islam hates us."¹²⁴ After being elected, but before being sworn into office, Trump reiterated that he planned to ban Muslims from entering the United States.¹²⁵

In framing the issue before the Court, Chief Justice Roberts posited that it "is not whether to denounce the statements."¹²⁶ Instead, he explained that the Court was analyzing a neutral presidential directive regarding a matter within a president's responsibility as executive.¹²⁷

The Court explained that courts address "whether the entry policy is plausibly related to the government's stated objective to protect the country and improve vetting processes."¹²⁸ Consequently, although it happens, courts rarely strike down governmental policies based on rational basis review.¹²⁹ Thus, notwithstanding how Chief Justice Roberts framed the issue before the Court, President Trump's vitriolic statements against Muslims must be addressed.

The Court laid out its prior applications of rational basis.¹³⁰ The majority discussed *United States Department of Agriculture v. Moreno* and noted that the laws at issue in *Moreno* "lack any purpose other than a 'bare . . . desire

¹¹⁶ See generally Reply Brief for Petitioner, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (Nos. 16-1436, 16-1540), 2017 WL 4457184.

¹¹⁷ Letter from Neal Kumar Katyal, Partner, Hogan Lovells LLP, to Hon. Scott S. Harris, Office of the Clerk, U.S. Supreme Court (Oct. 5, 2017), at 2-4, <https://www.scotusblog.com/wp-content/uploads/2017/10/16-1540-bssb-Hawaii.pdf>.

¹¹⁸ See *id.* at 4-6.

¹¹⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018).

¹²⁰ See *id.* at 2407-15.

¹²¹ See *id.* at 2416-17.

¹²² *Id.* at 2417.

¹²³ *Id.* (citation omitted).

¹²⁴ *Id.* (citation omitted).

¹²⁵ *Id.* (citation omitted).

¹²⁶ *Id.* at 2418.

¹²⁷ See *id.*

¹²⁸ *Id.* at 2420 (citing *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980)).

¹²⁹ See *id.*

¹³⁰ *Id.* at 2420-23.

to harm a politically unpopular group.”¹³¹ Moreover, it noted that the Court had struck down an ordinance because “the city’s stated concerns about (among other things) ‘legal responsibility’ and ‘crowded conditions’ rested on ‘an irrational prejudice’ against the intellectually disabled.”¹³² Finally, the Court referenced *Romer*, a case in which the Court invalidated a state constitutional amendment because it was “divorced from any factual context from which we could discern a relationship to legitimate state interests.”¹³³ Ultimately, Chief Justice Roberts explained that the only explanation for the amendment was animus.¹³⁴

Even with this precedent, the majority determined that these cases did not apply to the facts at hand, and instead, the Court determined that there was a legitimate governmental interest in the travel bans in “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.”¹³⁵ The Court explained that, “[t]he text says nothing about religion.”¹³⁶ Moreover, the Trump administration conducted a worldwide review process regarding the criteria implemented in the Third Travel Ban. Finally, the Court found that the Third Travel Ban had additional support because it removed some Muslim countries, permitted entry of nationals from banned countries based on some exceptions, and had a waiver program for banned nationals.¹³⁷

VI. RATIONAL BASIS ANALYSIS REQUIRES THAT THE GOVERNMENT’S ACTIONS BE RATIONALLY RELATED TO A GOVERNMENTAL INTEREST

Generally, there are three standard of review levels that courts may apply in analyzing allegations of governmental discrimination: strict scrutiny, intermediate scrutiny, and rational basis review.¹³⁸ Strict scrutiny applies to claims alleging discrimination on the basis of race,¹³⁹ national origin,¹⁴⁰ or religion.¹⁴¹ Intermediate scrutiny most commonly applies to claims alleging discrimination on the basis of gender.¹⁴²

Rational basis analysis is the most lenient standard of review and the easiest for the government to overcome. In order to assert an equal protection claim, plaintiffs must demonstrate that they were treated differently from others *similarly* situated to them.¹⁴³ Classifications involving neither fundamental rights nor suspect classes cannot violate equal protection if there is a rational relationship between the disparity of treatment and some

¹³¹ *Id.* at 2420 (citing *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

¹³² *Id.* (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448–50 (1985)).

¹³³ *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

¹³⁴ *See id.* (quoting *Romer*, 517 U.S. at 635).

¹³⁵ *Id.* at 2421.

¹³⁶ *Id.*

¹³⁷ *See id.* at 2422.

¹³⁸ Mariam Morshedi, *Levels of Scrutiny*, *SUBSCRIPT L.* (Mar. 6, 2018), <https://www.subscriptlaw.com/blog/levels-of-scrutiny>.

¹³⁹ *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹⁴⁰ *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

¹⁴¹ *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 687 n.13 (1984).

¹⁴² *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197–98 (1976).

¹⁴³ *See generally* Giovanna Shay, *Similarly Situated*, 18 *GEO. MASON L. REV.* 581 (2011).

legitimate government purpose.¹⁴⁴ Courts will not independently examine neither the legislative goals nor the classification's reasonableness.¹⁴⁵ Because a legislature need not articulate the reasons for a classification, those attacking the rationality of the classification have the burden to negate every conceivable basis that might support the classification.¹⁴⁶

a. UNDERINCLUSIVE STATUTES TYPICALLY MEET RATIONAL BASIS REVIEW.

In *Railway Express Agency, Inc. v. New York*, the Supreme Court addressed issues related to underinclusivity and rational basis review.¹⁴⁷ Specifically, it elaborated that when a statute “target[s] fewer people than would be necessary to satisfy the legitimate purpose” that legislative classification is underinclusive.¹⁴⁸

Railway Express concerned a New York City ordinance prohibiting the display of commercial advertising on vehicles using public streets that exempted advertisements displayed on company vehicles that promoted the business of those companies.¹⁴⁹ Railway Express Agency was a national company that sold advertising space on the sides of its trucks for other companies.¹⁵⁰ At the time, Railway Express had over 1900 trucks advertising on New York City streets.¹⁵¹ Thus, per the ordinance, Railway Express Agency could operate trucks advertising for Railway Express Agency, but not for any other firm—even though it was in the advertising business. Several of Railway Express Agency's drivers were fined and convicted of driving trucks with advertising of companies like Camel Cigarettes, the Ringling Brothers, and Barnum and Bailey Circus.¹⁵²

In its Supreme Court argument, Railway Express Agency maintained that the regulation violated the Equal Protection Clause because the distinction between a company's own advertisements, as opposed to other companies' advertisements, was not relevant to the ordinance's purpose.¹⁵³ Furthermore, it characterized the problem as “one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial

¹⁴⁴ *E.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”); ERWIN CHEMERINKSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 699 (5th ed. 2015).

¹⁴⁵ *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

¹⁴⁶ *See Owsley, supra* note 103, at 19.

¹⁴⁷ *See generally Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

¹⁴⁸ Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2064 (2014); *see* Kenneth W. Simons, *Overinclusion And Underinclusion: A New Model*, 36 U.C.L.A. L. REV. 447, 465 (1989) (A “law is underinclusive, because some persons . . . pose the harm yet are not burdened in the relevant sense.”).

¹⁴⁹ *Ry. Express*, 336 U.S. at 107–08.

¹⁵⁰ *See id.* at 108.

¹⁵¹ *See id.*

¹⁵² *See id.* at 108, 108 n.2.

¹⁵³ *See id.* at 109.

house carried the same advertisement on its own truck.”¹⁵⁴ Ultimately, “the regulation allows the latter to do what the former is forbidden from doing.”¹⁵⁵

This governmental regulation provided an excellent example of an underinclusive law because it prohibited Railway Express Agency from displaying advertising signs unless they related to its business. Thus, it was underinclusive because all trucks pose the problem of being a distraction. The regulation, however, allowed trucks to advertise their own business and thus did not remove all distractions from the roads.

Nonetheless, the Supreme Court determined that the regulation was valid because it limited distractions for motorists, which met the legislative purpose.¹⁵⁶ The Court ruled that “it is no requirement of equal protection that all evils of the same genus be eradicated or none at all.”¹⁵⁷ Therefore, New York City could ban some advertisements that distracted pedestrians or other drivers without having to eliminate every distraction to pedestrians or drivers.

The more underinclusive a law is, the more irrational it appears, seemingly making it more likely to be invalidated by a court.¹⁵⁸ In reality, however, courts rarely find a law irrational simply because it is underinclusive.¹⁵⁹ Instead, courts generally find, as the Supreme Court did in *Railway Express*, that the government can proceed incrementally in solving a specific problem.¹⁶⁰

b. OVERINCLUSIVE STATUTES TYPICALLY MEET RATIONAL BASIS REVIEW.

Conversely, the Supreme Court addressed the opposite phenomenon of over inclusivity in *New York City Transit Authority v. Beazer*.¹⁶¹ A

¹⁵⁴ *Id.* at 109–10.

¹⁵⁵ *Id.* at 110.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* It is this type of rationale that undercuts the concern for a solution to homegrown terrorists like Timothy McVeigh, Ted Kaczynski, and Dylann Roof.

¹⁵⁸ See *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985); see also Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 431 (2012) (“Serious over- or under-inclusivity dooms a regulation by creating a presumption that impermissible animus motivated the legislation.”).

¹⁵⁹ A notable exception is the *City of Cleburne* decision. In 1980, Cleburne Living Center submitted a special use permit application to operate a home for mentally disabled persons. *City of Cleburne*, 473 U.S. at 435–37. Cleburne’s city council voted to deny the special use permit, acting pursuant to a municipal zoning ordinance. *Id.* The Court unanimously held that the denial of the special use permit to Cleburne Living Centers was premised on an irrational prejudice against persons with mental disabilities, and hence unconstitutional pursuant to the Equal Protection Clause. *Id.* at 447–50. While the Court declined to grant the mentally disabled the status of a “quasi-suspect class,” it nevertheless found that the “rational relation” test for legislative action provided sufficient protection against invidious discrimination. *Id.* at 443–50. Writing for the majority, Justice Byron White determined that the ordinance was underinclusive because other homes for the elderly or the mentally insane received permits to operate in the same area. *Id.* at 447–50.

¹⁶⁰ See *Ry. Express*, 336 U.S. at 110 (“It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.”); see also *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (“The legislature may select one phase of one field and apply a remedy there, neglecting the others.”); McGowan, *supra* note 158, at 393 (“rational basis analysis often tolerates under-inclusive regulations”).

¹⁶¹ See generally *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

classification is overinclusive when it “target[s] more people than necessary to fulfill the legitimate purpose” in the statute.¹⁶²

In *Beazer*, Jose Reyes and Carl Beazer worked for the New York Transit Authority while undergoing methadone treatment for heroin addiction.¹⁶³ According to Transit Authority policy, the agency did not hire or employ anyone using narcotics.¹⁶⁴ Because the Transit Authority deemed methadone to be a narcotic, it terminated Reyes and Beazer for their use of methadone.¹⁶⁵ They filed a class action lawsuit against the Transit Authority, alleging that its policy discriminated against blacks and Hispanics.¹⁶⁶ Statistics established that 81 percent of suspected violations of this policy were by black or Hispanic employees.¹⁶⁷ The trial court ruled in favor of the class,¹⁶⁸ and the Second Circuit affirmed its decision.¹⁶⁹

Before the Supreme Court, Beazer and Reyes asserted that the Transit Authority’s policy against hiring anyone who used methadone violated their constitutional right to equal protection.¹⁷⁰ They argued that this employment policy was overinclusive because it excluded methadone addicts from working for the Transit Authority even though the statistics demonstrated that 75 percent would be safe employees.¹⁷¹

The Supreme Court held that the Transit Authority’s employment policy was not unconstitutional or illegal pursuant to the Civil Rights Act, and Justice Stevens, writing for the majority, applied rational basis review in addressing the claim.¹⁷² Specifically, Justice Stevens described Beazer’s statistical argument as “weak,” because the 81 percent statistic did not relate to methadone users specifically.¹⁷³ Moreover, the Court recognized the public safety interest in keeping narcotics users from working for the Transit Authority.¹⁷⁴ The narcotics rule was a permissible policy choice, and any specific exemption for methadone users from the narcotics rule would have been “costly” and “less precise.”¹⁷⁵ The concern about overinclusive laws is that they are unfair as they regulate where there is no need for regulation, and the more overinclusive a law is the less likely it is to be regarded as rational. In *Beazer*, the Court upheld such laws “because ‘[a] classification having some reasonable basis does not offend [the Equal Protection Clause] merely because it is not made with mathematical nicety or because in practice it results in some inequity.’”¹⁷⁶

¹⁶² Ross, *supra* note 148, at 2065; *see* Simons, *supra* note 148, at 465 (A law is “overinclusive, because many who are burdened . . . do not pose the harm.”).

¹⁶³ *See N.Y.C. Transit Auth.*, 440 U.S. at 576 n.11.

¹⁶⁴ *See id.* at 576–77.

¹⁶⁵ *See id.* at 573–74, 577 n.11.

¹⁶⁶ *See id.* at 578–79.

¹⁶⁷ *See id.* at 579.

¹⁶⁸ *See generally* *N.Y.C. Transit Auth. v. Beazer*, 414 F. Supp. 277 (S.D.N.Y. 1976).

¹⁶⁹ *See generally* *N.Y.C. Transit Auth. v. Beazer*, 558 F.2d 97 (2d Cir. 1977).

¹⁷⁰ *See N.Y.C. Transit Auth.*, 440 U.S. at 588–92.

¹⁷¹ *See id.* at 576 n.10.

¹⁷² *Id.* at 592–94.

¹⁷³ *See id.* at 579.

¹⁷⁴ *See id.* at 592.

¹⁷⁵ *See id.* at 590.

¹⁷⁶ Ross, *supra* note 148, at 2065 (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)); *see also* Robert D. Dodson, *Homosexual Discrimination And Gender: Was Romer v. Evans Really a Victory For Gay Rights?*, 35 CAL. W. L. REV. 271, 288 (1999).

c. WHEN STATUTES ARE BOTH OVERINCLUSIVE AND UNDERINCLUSIVE, THE SUPREME COURT IS MOST LIKELY TO HOLD THEM UNCONSTITUTIONAL PURSUANT TO RATIONAL BASIS REVIEW

Some Supreme Court decisions consider government action that is both overinclusive and underinclusive. Such actions provide a reliable basis for finding against the government pursuant to rational basis review. For example, in *Moreno*, the Supreme Court addressed a federal statute that was both overinclusive and underinclusive.¹⁷⁷ In *Moreno*, Jacinta Moreno lived with Ermina Sanchez along with Sanchez's three children even though they were unrelated.¹⁷⁸ Sanchez provided care to Moreno, who contributed to household living expenses.¹⁷⁹ Moreno satisfied the income requirements for the federal food stamp program, but was denied pursuant to a provision that prohibited households with unrelated members from receiving food stamp benefits.¹⁸⁰ Sanchez's food stamp benefits were also to be terminated.¹⁸¹

In *Moreno*, other families also filed suit. Sheilah Hejny was married with three children and received food stamps.¹⁸² The family allowed a young woman with emotional problems to live with them, but feared if they continued to allow the young woman to live with them, they would lose their family's food stamps.¹⁸³ Similarly, Victoria Keppler and her daughter received food stamps.¹⁸⁴ The daughter was hearing impaired and needed to attend a special school, so Keppler and her daughter lived with another woman because the apartment was too expensive to rent—thus jeopardizing their food stamps.¹⁸⁵

Moreno and other households who were denied benefits pursuant to Section 3 challenged the statute in federal district court, which held that the provision violated the Due Process Clause of the Fifth Amendment.¹⁸⁶ *Moreno* and Sanchez argued to the Supreme Court that Section 3 of the Food Stamp Act of 1964 violated the equal protection component of the Due Process Clause of the Fifth Amendment.¹⁸⁷

In *Moreno*, the Court found Section 3 was underinclusive because other people commit food stamp fraud who do not reside in the same household, while, at the same time, the statute was overinclusive because many households with unrelated people would not commit such fraud.¹⁸⁸ For example, there was no evidence that any of the original plaintiffs committed food stamp fraud even though they lived together.

The Supreme Court held that Section 3 violated the Due Process Clause of the Fifth Amendment in creating two types of households—one in which

¹⁷⁷ See generally *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

¹⁷⁸ *Id.* at 530–32.

¹⁷⁹ See *id.* at 531.

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.* at 532.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ *Id.* at 529.

¹⁸⁷ See *id.* at 534. Here, the Fifth Amendment applied, as opposed to the Fourteenth Amendment, because the governmental action was federal as opposed to state.

¹⁸⁸ See *id.* at 534–38.

all members were related and one in which at least one member was unrelated.¹⁸⁹ The Court acknowledged the congressional interest in preventing abuse of the food stamp program.¹⁹⁰ However, the statute did not fulfill the stated congressional purpose of preventing “hippies” and “hippie communes” from enrolling in the food stamp program.¹⁹¹ Importantly, there existed other measures within the Food Stamp Act that were specifically aimed at preventing abuse of the program.¹⁹² Because the statute “simply does not operate so as rationally to further the prevention of fraud,” the distinction between households with related members and households with unrelated members did not further the governmental interest and therefore violated the equal protection component of the Due Process Clause of the Fifth Amendment.¹⁹³

The law’s extreme overinclusiveness and underinclusiveness rendered the law so irrational that the Supreme Court concluded it violated the Constitution.¹⁹⁴ *Moreno* instructs that the more one can show that governmental action is overinclusive and underinclusive, the more likely one is to demonstrate that it is arbitrary and irrational.

In *Romer v. Evans*, the Supreme Court addressed another case in which the regulation was both overinclusive and underinclusive.¹⁹⁵ After several Colorado cities passed ordinances, barring discrimination on the basis of sexual orientation in employment, housing, etc., Colorado voters adopted Amendment 2 to their State Constitution precluding any judicial, legislative, or executive action designed to protect persons from discrimination based on their “homosexual, lesbian, or bisexual orientation, conduct, practices or relationships.”¹⁹⁶ Following a lawsuit, the state trial court entered a permanent injunction enjoining Amendment 2’s enforcement, which the Colorado Supreme Court affirmed.¹⁹⁷

The Supreme Court held that Amendment 2 of the Colorado State Constitution violated the equal protection clause. Amendment 2 singled out homosexual and bisexual persons, imposing on them a broad disability by denying them the right to seek and receive specific legal protection from discrimination. A law will often be sustained pursuant to the equal protection clause even if it seems to disadvantage a specific group, so long as it can be shown to “advance a legitimate government interest.”¹⁹⁸ The Supreme Court held Amendment 2, by depriving persons of equal protection under the law due to their sexual orientation, failed to advance any such legitimate interest. “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”¹⁹⁹

¹⁸⁹ *See id.*

¹⁹⁰ *See id.* at 537.

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.* at 533–38.

¹⁹⁵ *See generally* *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁹⁶ *See id.* at 624.

¹⁹⁷ *See id.* at 626.

¹⁹⁸ *Id.* at 632 (citing *New Orleans v. Duke*, 427 U.S. 297 (1976)).

¹⁹⁹ *See id.* at 634–35 (citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (italics in original).

Discussing the concern of inclusivity, the Supreme Court explained that Amendment 2 “is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.”²⁰⁰ As one commentator noted, “[w]hat troubled the Court was not simply the fact that Amendment 2 was over and under inclusive. Rather, it was the degree of over and under inclusiveness which most concerned the Justices.”²⁰¹

VII. RATIONAL BASIS REVIEW AND THE TRUMP TRAVEL BANS

Moreno and *Romer* both establish that when a governmental statute or regulation is “both over-inclusive and under-inclusive, . . . one might conclude that the legislature has performed an irrational act.”²⁰² In other words, “[t]he constitutionality of an under- or over-inclusive statute is necessarily a matter of degree. As the mismatch becomes increasingly pronounced, the legal instrument becomes increasingly unfair and futile—and by what indicator are we to judge instrumental rationality if not by the effectiveness of the means chosen?”²⁰³

Despite this significant burden, courts must actually review the evidence. In *Trump v. Hawaii*, Chief Justice Roberts acknowledged some of the discriminatory statements made by candidate Trump during the election. The majority also discussed the applicable precedents and standards in assessing whether a governmental regulation meets rational basis.

a. THE MAJORITY IMPROPERLY ACCOUNTS FOR TRUMP’S REPEATED DISCRIMINATORY STATEMENTS AGAINST MUSLIMS.

As a candidate, Trump was vocal and candid about his intention to institute a ban against Muslims entering the United States. For example, in December 2015, he called for “total and complete shutdown” for Muslims at American borders following a terrorist attack in San Bernardino, California.²⁰⁴ Chief Justice Robert noted this incident in *Trump v. Hawaii*.²⁰⁵

The problems of Trump’s bias against Muslims, however, began before Trump’s December 2015 comments referenced by Chief Justice Roberts. For example, in March 2011, Trump told Bill O’Reilly that the United States has a “Muslim problem.”²⁰⁶ One month later, he reiterated that the United States

²⁰⁰ *Id.* at 633.

²⁰¹ Dodson, *supra* note 176, at 288–89 (discussing *Romer*’s overinclusivity and underinclusivity).

²⁰² Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 409 (1993) (discussing *Kotch v. Bd. of River Port Pilots Comm’rs*, 330 U.S. 552 (1946)).

²⁰³ Eric Blumenson & Eva Nilson, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 111 (2002).

²⁰⁴ Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States’*, WASH. POST (Dec. 7, 2015, 5:12 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/>; Ed Pilkington, *Donald Trump: Ban All Muslims Entering US*, GUARDIAN (Dec. 7, 2015), <https://www.theguardian.com/us-news/2015/dec/07/donald-trump-ban-all-muslims-entering-us-san-bernardino-shooting>; see also Brian L. Owsley, *Can Apple Build a Privacy Minded iPhone Security System so Secure that Apple Cannot Access It?*, 7 HEALTH & TECH. 369 (2017) (discussing the San Bernardino attack).

²⁰⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

²⁰⁶ 86 *Times Donald Trump Displayed or Promoted Islamophobia*, MEDIUM (Apr. 19, 2018), <https://medium.com/nile/86-times-donald-trump-displayed-or-promoted-islamophobia-49e67584ac10>;

has a Muslim problem due to the hatred taught in the Koran.²⁰⁷ On the campaign trail, Trump was confronted with an audience member who asserted that President Obama is a Muslim.²⁰⁸ Unlike Senator John McCain who challenged a woman who made a similar comment when he was running for president,²⁰⁹ Trump did not correct the person, but rather told the man that his administration would look into getting rid of Muslims.²¹⁰

In addition to banning Muslims from entering the United States, then-candidate Trump indicated that mosques should be closed. For example, he suggested in an October 2015 interview on Fox Business that he would close mosques and thought such an approach was a great idea.²¹¹ In November 2015, he indicated that he would “strongly consider” shutting mosques based on terrorist attacks by Muslims in Paris.²¹² During an interview on “Hannity” on Fox News, he explained that “some bad things are happening” in mosques so that “[t]here’s absolutely no choice.”²¹³ In that same interview, he discussed the refugee situation, noting that “we take everybody” and that as president “they’re going out.”²¹⁴ When discussing Muslim immigrants, he decried “[t]hey come into our country, they want to take it over.”²¹⁵

Along with closing mosques, candidate Trump suggested that law enforcement should also surveil Muslims. In November 2015, he indicated that he also wanted surveillance of mosques after the Paris terrorist attacks.²¹⁶ In June 2016, after a terrorist attack in an Orlando mosque by a Muslim born in the United States, he reiterated his calls for such surveillance and said “we have to be very strong in terms of looking at the mosques.”²¹⁷ While asserting

Donald Trump Sits Down with Bill O’Reilly, FOX NEWS (Jan. 27, 2017), <https://www.foxnews.com/transcript/donald-trump-sits-down-with-bill-oreilly>.

²⁰⁷ 86 *Times Donald Trump Displayed or Promoted Islamophobia*, *supra* note 206; Anonymous Deference League – STOP George Soros, *Donald Trump Warns of the Muslim Problem*, YOUTUBE (Dec. 12, 2011), <https://www.youtube.com/watch?v=fWzDAvemJG8&t=>.

²⁰⁸ Theodore Schleifer, *Trump Doesn’t Challenge Anti-Muslim Questioner at Event*, CNN (Sept. 18, 2015, 10:07 AM), <https://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/index.html>.

²⁰⁹ *John McCain Remembered: Defending Obama From Racist Questions-Video*, GUARDIAN (Aug. 27, 2018), <https://www.theguardian.com/us-news/video/2018/aug/27/john-mccain-remembered-defending-obama-from-racist-questions-video>.

²¹⁰ Schleifer, *supra* note 208.

²¹¹ Sarah Pulliam Bailey, *Donald Trump Says He Would Consider Closing Down Some Mosques in the U.S.*, WASH. POST (Oct. 21, 2015, 1:29 PM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/>; Everything About News, *Full Interview Donald Trump on Fox Business 102015 HD Part 1* (Oct. 21, 2015), <https://www.youtube.com/watch?v=75jzYVWuAKQ&feature=youtu.be&t=7m12s>; Alan Rappeport, *Donald Trump Says He Would Be Open to Closing U.S. Mosques to Fight ISIS*, N.Y. TIMES (Oct. 22, 2015, 7:00 AM), <https://www.nytimes.com/politics/first-draft/2015/10/22/donald-trump-says-he-would-be-open-to-closing-u-s-mosques-to-fight-isis/>.

²¹² Nick Gass, *Trump: ‘Absolutely No Choice’ But to Close Mosques*, POLITICO (Nov. 18, 2015, 6:45 AM), <https://www.politico.com/story/2015/11/trump-close-mosques-216008>; Gregory Krieg, *Donald Trump: ‘Strongly Consider’ Shutting Mosques*, CNN (Nov. 16, 2015, 12:11 PM), <https://www.cnn.com/2015/11/16/politics/donald-trump-paris-attacks-close-mosques/>.

²¹³ Gass, *supra* note 212.

²¹⁴ *Id.*

²¹⁵ Jeremy Diamond, *Trump Doubles Down on Calls for Mosque Surveillance*, CNN (Nov. 21, 2016), <https://www.cnn.com/2016/06/15/politics/donald-trump-muslims-mosque-surveillance/index.html>.

²¹⁶ David Mark & Jeremy Diamond, *Trump: ‘I Want Surveillance of Certain Mosques’*, CNN (Nov. 21, 2016, 7:27 PM), <https://www.cnn.com/2015/11/21/politics/trump-muslims-surveillance/index.html>.

²¹⁷ Diamond, *supra* note 215.

a need for surveillance, he also argued for an indefinite ban on Muslims entering the United States.²¹⁸

In March 2016, candidate Trump declared that “Islam hates us.”²¹⁹ Previously, he had indicated that he would be open to a Muslim database.²²⁰ Calls for such a database were reiterated by Trump and his transition team after the election.²²¹ In addition, he further expressed an openness to requiring Muslims carrying special identification cards denoting their religion.²²²

During the 2016 election campaign, candidate Trump repeatedly told a story that Muslims in New Jersey cheered after the World Trade Center collapsed on September 11, 2001.²²³ Although he has repeatedly made this comment about such celebrations, this claim has repeatedly been debunked.²²⁴ His dubious claims are essentially a manner in which he race-baits for his base and to promote his anti-Muslim agenda.

This clear animus by President Trump towards Muslims throughout the 2016 campaign and post-election demonstrate his irrational bias establishing that all three iterations of the travel ban are irrational. The significance of this hatred is important when viewing the travel bans as both underinclusive and overinclusive, which warrants a finding that they are unconstitutional based on rational basis review.

b. THE TRAVEL BANS ARE UNDERINCLUSIVE.

President Trump’s travel bans targeting *every* national from Iran, Libya, Somalia, Sudan, Syria, and Yemen are underinclusive because they ignore all other potential sources of threats to the national security. The First Travel Ban explicitly referenced the terrorist attack on September 11, 2001, which often serves a justification for Trump’s prejudice against Muslims, as a reason to enhance security in the visa application steps to improve American national security.²²⁵ This justification ignores the fact that both the Bush and Obama administrations had taken measures in response to that attack.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Mark & Diamond, *supra* note 216.

²²¹ Matt Broomfield, *Donald Trump’s Proposed Muslim Database Resisted as Politicians, Celebrities and Activists Vow to Register*, INDEPENDENT (Jan. 26, 2017), <https://www.independent.co.uk/news/world/americas/doald-trump-muslim-register-database-protest-madeleine-albright-mayim-bialik-white-house-refugee-ban-a7546896.html>; Dara Lind, *Donald Trump’s Proposed ‘Muslim Registry,’ Explained*, VOX (Nov. 16, 2016, 11:40 AM), <https://www.vox.com/policy-and-politics/2016/11/16/13649764/trump-muslim-register-database>.

²²² Alan Yuhas, *Trump Won’t Rule out Special ID for Muslim Americans Noting Their Religion*, GUARDIAN (Nov. 20, 2015), <https://www.theguardian.com/us-news/2015/nov/19/donald-trump-muslim-americans-special-identification-tracking-mosques>.

²²³ Don Gonyea, *Trump Reasserts Claim That ‘Thousands’ of N.J. Muslims Cheered After Sept. 11*, NPR (Nov. 24, 2015, 5:10 AM), <https://www.npr.org/2015/11/24/457203786/trump-tells-ohio-crowd-he-will-be-tough-on-isis>; Glenn Kessler, *Trump’s Fuzzy Vision on the Sept. 11 Attacks*, WASH. POST (Sept. 12, 2019, 12:00 AM), <https://www.washingtonpost.com/politics/2019/09/12/trumps-fuzzy-vision-sept-attacks/>.

²²⁴ Igor Derysh, *Trump’s False or Dubious 9/11 Claims: 18 Years of Shameless BS*, SALON (Sept. 13, 2019, 8:30 PM), <https://www.salon.com/2019/09/13/trump-keeps-claiming-he-helped-at-ground-zero-on-9-11-theres-no-evidence-that-happened/>.

²²⁵ Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8,977, 8,977 (Jan. 27, 2017), *superceded by executive order*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

Significantly, no refugees from Iran, Libya, Somalia, Sudan, Syria, or Yemen have killed anyone during a domestic terrorist attack.²²⁶

More importantly, the travel bans ignore potential terrorists coming into the United States with valid visas from other countries. For example, the travel bans do not bar citizens from Saudi Arabia, Egypt, Lebanon, or United Arab Emirates. Significantly, those four nations' citizens comprised the nineteen September 11 attackers, which then-candidate Trump noted as significant.²²⁷ Fifteen Saudi citizens participated in the four September 11 hijackings.²²⁸ Mohammed Atta was an Egyptian citizen who served as the hijackers' leader and flew the plane hijacked from American Airlines Flight 11 that collided into the World Trade Center.²²⁹ Two United Arab Emirates citizens were involved and participated in hijacking United Airlines Flight 175 that also struck the World Trade Center.²³⁰ Ziad Jarrah was a Lebanese citizen who flew the hijacked United Airlines Flight 93 that crashed in Shanksville, Pennsylvania.²³¹

Osama bin Laden, a Saudi national, founded and led al-Qaeda, whose members committed the September 11 attacks. Furthermore, Mullah Muhammed Omar was the Taliban leader who controlled Afghanistan and provided bin Laden shelter and support in his country.²³² Finally, Khalid Sheikh Mohammed is a Pakistani national who was the mastermind of the September 11 attacks and is currently held on terrorism charges at the Guantanamo Bay detention center.²³³ Nonetheless, none of Trump's travel bans prohibited any nationals from Saudi Arabia, Afghanistan, or Pakistan in the interest of national security notwithstanding the significance of the September 11 attacks.

²²⁶ See Eric Levenson, *How Many Fatal Terror Attacks Have Refugees Carried out in the US? None*, CNN (Jan. 29, 2017, 6:54 PM), <http://www.cnn.com/2017/01/29/us/refugee-terrorism-trnd/index.html>; Christopher Mathias, *There Have Been No Fatal Terror Attacks in the U.S. by Immigrants from the 7 Banned Muslim Countries*, HUFFINGTON POST (Jan. 28, 2017), http://www.huffingtonpost.com/entry/no-terror-attacks-muslim-ban-7-countries-trump_us_588b5a1fe4b0230ce61b4b93. To be clear, there have been terrorist attacks by Muslim refugees from these six nations, but these attacks did not lead to any deaths. For example, on November 28, 2016, Abdul Razak Ali Artan, a refugee from Somalia, drove a Honda Civic through a crowd on the campus of Ohio State University in Columbus, Ohio. Mitch Smith, Rukmini Callimachi & Richard Perez-Pena, *ISIS Calls Ohio State University Attacker a 'Soldier'*, N.Y. TIMES (Nov. 29, 2016), <https://www.nytimes.com/2016/11/29/us/ohio-state-university-abdul-artan-islamic-state.html>. He then got out of his car wielding a butcher knife. *Id.* Although thirteen people were injured, the only fatality was Artan himself who was shot by a campus police officer. *Id.*

²²⁷ Mark Berman, *Trump and His Aides Keeping Justifying the Entry Ban by Citing Attacks It Couldn't Have Prevented*, WASH. POST (Jan. 30, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/01/30/the-trump-white-house-keeps-justifying-the-entry-ban-by-citing-attacks-it-couldnt-have-prevented/>.

²²⁸ *September 11 Hijackers Fast Facts*, CNN (Sept. 8, 2019, 9:21 PM), <http://www.cnn.com/2013/07/27/us/september-11th-hijackers-fast-facts/index.html>.

²²⁹ John Hooper, *The Shy, Caring, Deadly Fanatic*, GUARDIAN, (Sept. 23, 2001), <https://www.theguardian.com/world/2001/sep/23/september11.education>.

²³⁰ See *September 11 Hijackers Fast Facts*, *supra* note 228 (listing Fayed Banihammad and Marwan al Shehhi as United Arab Emirates nationals contributing to the hijacking of Flight 175).

²³¹ Fouad Ajami, *The Making of a Hijacker: The Banal Life and Barbarous Deed of a 9/11 Terrorist*, NEW REPUBLIC, (Aug. 23, 2011), <https://newrepublic.com/article/94155/september-11-the-making-of-a-hijacker>.

²³² See Carlotta Gall, *Mullah Muhammad Omar, Enigmatic Leader of Afghan Taliban, Is Dead*, N.Y. TIMES (July 30, 2015), <https://www.nytimes.com/2015/07/31/world/asia/mullah-muhammad-omar-taliban-leader-afghanistan-dies.html>.

²³³ *Khalid Sheikh Mohammed Fast Facts*, CNN (Dec. 26, 2019, 4:11 PM), <http://www.cnn.com/2013/02/03/world/meast/khalid-sheikh-mohammed-fast-facts/index.html>.

On April 15, 2013, Tamerlan Tsarnaev and his brother Dzhokhar Tsarnaev planted bombs along the Boston Marathon's route, killing three and injuring 280 people.²³⁴ Four days after the bombing, police officers killed Tamerlan in a shootout.²³⁵ Dzhokhar escaped the shootout, but law enforcement officers subsequently apprehended him, charging with several federal offenses for which he was tried and received the death penalty.²³⁶ He is ethnically Chechen and was born in Kyrgyzstan, but entered the United States in 2002 with his family who sought asylum.²³⁷ In 2012, Dzhokhar became a United States citizen.²³⁸ None of the travel bans prevent anyone from the former Soviet Union from entering the United States based on nationality.

Similarly, Tashfeen Malik, a Pakistani citizen, entered the United States on a K1 visa to marry Syed Rizwan Farook who was of Pakistani descent, but born in Illinois.²³⁹ Together, they killed fourteen people at his county jobsite in San Bernardino, California.²⁴⁰ In December 2015, before entering the United States, Malik had discussions with Farook about jihad "on an online messaging platform, as well as emails and communications on a dating site."²⁴¹ Prior to attacking Farook's jobsite, Malik announced her allegiance to ISIS.²⁴² Nonetheless, the travel bans do not ban Pakistanis and would not have impacted Malik. Thus, they would not have prevented the San Bernardino attack even though that attack heightened candidate Trump's vitriolic rhetoric.

Moreover, on July 16, 2016, Muhammad Youssef Abdulazeez attacked at a Marine recruiting center and a naval reserve center in Chattanooga, Tennessee, killing five.²⁴³ Responding law enforcement officers arriving on the scene shot and killed him at the naval reserve center building. Abdulazeez is of Palestinian descent and was born in Kuwait, but entered the United States between ages five and six²⁴⁴ and became an American citizen

²³⁴ Milton J. Valencia, *In Gripping Testimony, Carnage in Marathon Attacks is Recalled*, BOS. GLOBE (Mar. 5, 2015), <https://www.bostonglobe.com/metro/2015/03/05/more-bombing-survivors-expected-testify-tsarnaev-trial/t06u2dvauhQDHymwuPpCAN/story.html>.

²³⁵ See *id.*

²³⁶ See *id.*; Katherine Q. Seelye & Jess Bidgood, *Breaking Silence, Dzhokhar Tsarnaev Apologizes for Boston Marathon Bombing*, N.Y. TIMES (June 24, 2015), <https://www.nytimes.com/2015/06/25/us/boston-marathon-bombing-dzhokhar-tsarnaev.html>.

²³⁷ Peter Finn, Carol D. Leonnig & Will Englund, *Tsarnaev Brothers' Homeland Was War-Torn Chechnya*, WASH. POST (Apr. 19, 2013), https://www.washingtonpost.com/politics/details-emerge-on-suspected-boston-bombers/2013/04/19/ef2c2566-a8e4-11e2-a8e2-5b98cb59187f_story.html?utm_term=.b5e1e3e3f5dd.

²³⁸ Jon Schuppe, *Brothers' Classic Immigrant Tale Emerges as Relatives Speak Out*, NBC 10 PHILA. (July 1, 2013, 1:48 PM), <https://www.nbcphiladelphia.com/news/national-international/boston-bombing-suspects-are-russian-brothers-officials-say/1954375/>.

²³⁹ Brian Bennett, *San Bernardino Shooter Tashfeen Malik Said She Was Pregnant When She Sought U.S. Green Card*, L.A. TIMES (Dec. 28, 2015), <http://www.latimes.com/nation/nationnow/la-na-san-berardino-shooting-malik-pregnant-20151228-story.html>; Berman, *supra* note 227.

²⁴⁰ See Brian Owsley, *Lavabitten*, 119 W. VA. L. REV. 941, 948-49 (2017); Berman, *supra* note 227.

²⁴¹ Matt Apuzzo, Michael S. Schmidt & Julia Preston, *U.S. Visa Process Missed San Bernardino Wife's Online Zealotry*, N.Y. TIMES (Dec. 12, 2015), <https://www.nytimes.com/2015/12/13/us/san-berardino-attacks-us-visa-process-tashfeen-maliks-remarks-on-social-media-about-jihad-were-missed.html>.

²⁴² See Owsley, *supra* note 240, at 949.

²⁴³ Richard Fausset, Richard Pérez-Peña & Matt Apuzzo, *Slain Troops in Chattanooga Saved Lives Before Giving Their Own*, N.Y. TIMES (July 22, 2015), <https://www.nytimes.com/2015/07/23/us/chattanooga-tennessee-shooting-investigation-mohammad-abdulazeez.html>.

²⁴⁴ *4 Marines Killed in Attacks on Chattanooga Military Facilities*, CBS NEWS (July 16, 2015, 11:34 PM), <https://www.cbsnews.com/news/report-police-officer-shot-near-tennessee-army-recruiting-center/>

when he was about thirteen years old.²⁴⁵ Former FBI director James Comey described the attack as “motivated by foreign terrorist organization propaganda.”²⁴⁶ The travel bans do not apply to people born of Palestinian descent or from Kuwait from entering the United States.

On September 23, 2016, Arcan Cetin, a Turkish citizen who entered the United States as a child with his family, shot and killed five people in Burlington, Washington mall.²⁴⁷ A review of his online activity established that Cetin praised the ISIS leader.²⁴⁸ He committed suicide while in custody following his arrest and pending a competency determination.²⁴⁹ Just like other terrorist attackers in the United States, the travel bans do not apply to Turkish nationals.

Other significant terrorist attacks happened before those on September 11. For example, terrorists previously attacked the World Trade Center. On February 26, 1993, Ramzi Yousef led a coordinated attack on the World Trade Center exploding a rented van loaded with explosives that was parked in the basement garage.²⁵⁰ This first attack on the World Trade Center killed six people and injured over one thousand.²⁵¹ Yousef is of Pakistani descent, but was born in Kuwait. A jury convicted him of murder and conspiracy to murder for which he received a sentence of life with no possibility of parole plus 240 years.²⁵² He is currently incarcerated at the Supermax federal prison facility in Florence, Colorado.

Egyptian Omar Abdel-Rahman was a blind Muslim cleric who entered the United States on a tourist visa despite being on a terrorist watch list.²⁵³ Settling in New York City, Abdel-Rahman preached to a group of Muslims a radical strand of Islam.²⁵⁴ A jury convicted him of conspiracy in the 1993 World Trade Center bombing like Yousef and sentenced him to life plus

(Abdulazeez was born in 1990, and “came to the United States in 1996,” making him between five and six years old at the time he arrived in the United States).

²⁴⁵ See *Chattanooga Gunman Talked of Frequenting Gun Range*, CBS NEWS (July 18, 2015, 7:18 PM), <https://www.cbsnews.com/news/chattanooga-shooting-gunman-muhammad-youssef-abdulazeez-gun-range/> (Abdulazeez was born in 1990, and “[i]nvestigators believe Abdulazeez became a U.S. citizen in 2003,” making him about thirteen years old at the time of his naturalization).

²⁴⁶ Kristina Sgueglia, *Chattanooga Shootings ‘Inspired’ by Terrorists, FBI Chief Says*, CNN (Dec. 16, 2015, 4:23 PM), <http://www.cnn.com/2015/12/16/us/chattanooga-shooting-terrorist-inspiration/index.html>.

²⁴⁷ See Jody Allard, M.L. Lyke & Amy Wang, *Washington Mall Shooting Suspect Confesses to Killings*, WASH. POST (Sept. 26, 2016, 2:30 PM), https://www.washingtonpost.com/news/post-nation/wp/2016/09/25/after-day-long-manhunt-police-arrest-20-year-old-in-washington-state-mall-killings/?utm_term=.fddb77e84e0.

²⁴⁸ See CHARLES KURZMAN, *MUSLIM-AMERICAN INVOLVEMENT WITH VIOLENT EXTREMISM*, 2016 6 (2017), https://sites.duke.edu/tcths/files/2017/01/FINAL_Kurzman_Muslim-American_Involvement_in_Violent_Extremism_2016.pdf (“In 2015, a blog featuring his photograph called Abu Bakr al-Baghdadi, the leader of the ‘Islamic State,’ ‘my main dude.’”).

²⁴⁹ Sara Jean Green, *Arcan Cetin, Man Accused of Killing 5 in Cascade Mall Shooting, Dies in Jail*, SEATTLE TIMES (Apr. 17, 2017, 9:53 AM), <http://www.seattletimes.com/seattle-news/crime/accused-cascade-mall-shooter-dies-in-snohomish-county-jail/>.

²⁵⁰ *United States v. Yousef*, 327 F.3d 56, 135 (2d Cir. 2003).

²⁵¹ See *id.* at 79.

²⁵² See *id.* at 80.

²⁵³ See *id.*

²⁵⁴ See *id.*

fifteen years.²⁵⁵ In February 2017, he died while incarcerated at the federal medical center in Butner, North Carolina.²⁵⁶

In addition to these and other terrorist attacks resulting in loss of life, there are examples of failed attempts as well from people who would have been unaffected by the travel bans. For example, just months after the September 11 attack, on December 22, 2001, Richard Reid tried to bring down American Airlines Flight 63 bound from Paris to Miami with a bomb in his shoes.²⁵⁷ Passengers subdued him while the plane made an emergency landing in Boston where he was arrested.²⁵⁸ Reid, a British national, became known as the shoe bomber. He converted to Islam while serving a sentence in an English jail. After pleading guilty in federal court, Reid received several life sentences, which he is currently serving at the Supermax federal facility.²⁵⁹ As a British citizen, the travel bans would not have applied to him.

On December 25, 2009, Umar Farouk Abdulmutallab, a Nigerian citizen, tried to explode plastic explosives hidden in his underwear during Northwest Flight 253 from Amsterdam to Detroit.²⁶⁰ This attempt to detonate the bomb as the airplane was landing in Detroit caused noise and a burning odor.²⁶¹ When passengers noticed that his pants as well as his seating area were on fire, they put out the fire and subdued him until the airplane landed.²⁶² Abdulmutallab pled guilty to 289 counts of attempted murder and attempted use of a weapon of mass destruction, and received four life sentences plus fifty years, which he is currently serving at the Supermax federal facility.²⁶³ The travel bans do not apply to Nigerian nationals.

On May 1, 2010, Faisal Shahzad attempted to explode a car bomb in Times Square in New York City.²⁶⁴ After pleading guilty to a ten-count indictment, he received a life sentence without the possibility of parole and is currently imprisoned at the Supermax federal facility.²⁶⁵ Shahzad was born in Pakistan, but entered the United States to study.²⁶⁶ He eventually became an American citizen after marrying an American woman.²⁶⁷

²⁵⁵ See generally *United States v. Rahman*, 861 F. Supp. 247 (S.D.N.Y. 1994).

²⁵⁶ See Bill Trott, 'Blind Sheikh' Convicted in 1993 World Trade Bombing Dies in U.S. Prison, *REUTERS* (Feb. 18, 2017, 8:19 AM), <http://www.reuters.com/article/us-usa-tradecenter-rahman-idUSKBN15X0KU>.

²⁵⁷ See *United States v. Reid*, 369 F.3d 619, 619–20 (1st Cir. 2004); *United States v. Reid*, 214 F. Supp. 2d 84, 87 (D. Mass. 2002).

²⁵⁸ *Richard Reid Fast Facts*, *CNN* (Dec. 25, 2019, 11:46 AM), <https://www.cnn.com/2013/03/25/us/richard-reid-fast-facts/index.html> ("During the flight, Reid tries to use a match to light explosives hidden in his shoes. Passengers and crew restrain him. The flight diverts to Boston. Reid is arrested.").

²⁵⁹ See *Reid*, 369 F.3d at 619–20; Janet Cooper Alexander, *Military Commissions: A Place Outside the Law's Reach*, 56 *ST. LOUIS U. L.J.* 1115, 1120 (2012).

²⁶⁰ See *United States v. Abdulmutallab*, 739 F.3d 891, 894–95 (6th Cir. 2014).

²⁶¹ See *id.* at 895.

²⁶² See Gregory S. McNeal, *Security Scanners in Comparative Perspective*, 22 *HEALTH MATRIX: J. L.-MED.* 461, 463–64 (2013).

²⁶³ Jonathan Stempel, *Underwear Bomber's Life Sentence Upheld by U.S. Court*, *REUTERS* (Jan. 13, 2014), <http://www.reuters.com/article/us-underwear-bomber-idUSBREA0C17920140113>.

²⁶⁴ See Kendall Coffey, *The Lone Wolf – Solo Terrorism and the Challenge of Preventative Prosecution*, 7 *FLA. INT'L L. REV.* 1, 9–10 (2011).

²⁶⁵ See Michael Wilson, *Shahzad Gets Life Term for Times Square Bombing Attempt*, *N.Y. TIMES* (Oct. 5, 2010), <http://www.nytimes.com/2010/10/06/nyregion/06shahzad.html>.

²⁶⁶ Nina Bernstein, *Bombing Suspect's Route to Citizenship Reveals Limitations*, *N.Y. TIMES* (May 7, 2010), <https://www.nytimes.com/2010/05/08/nyregion/08immig.html>.

²⁶⁷ See Jerry Markon & Spencer S. Hsu, *Probe in Failed Times Square Attack Focusing on Pakistani Taliban*, *WASH. POST* (May 5, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050400192.html>.

On September 17, 2016, a pressure cooker bomb filled with shrapnel detonated in New York City, injuring thirty-one people.²⁶⁸ That same day, a pipe bomb exploded in Seaside Park, New Jersey, but fortunately no one was harmed.²⁶⁹ Ultimately, New Jersey law enforcement officers arrested Ahmad Khan Rahimi, charging him with federal and state charges for both bombings.²⁷⁰ Rahimi was born in Afghanistan, but became an American citizen after immigrating to the United States when he was twelve years old.²⁷¹

These people all serve as examples of individuals who committed terrorist attacks within the United States. Trump's travel bans do not apply to any of them and thus would not have prevented their violent acts. Consequently, they are an example of how the travel bans are irrational because they are underinclusive.

c. THE TRAVEL BANS ARE OVERINCLUSIVE.

Similarly, the travel bans are overinclusive because they target every citizen from the various countries regardless of their personal circumstances. In other words, babies, young children, and the elderly would be viewed the same as young men from those countries. Moreover, most of the young men from the targeted nations seeking to enter the United States do not have any terroristic intentions. Specifically, the travel bans would exclude individuals who pose no threat to national security.

For example, Ilhan Omar was born in Somalia before fleeing her country for neighboring Kenya when she was eight years old.²⁷² After several years in a Kenyan refugee camp, she entered to the United States as a refugee.²⁷³ Previously, she served in the Minnesota House of Representatives as a member the Democratic-Farmer-Labor Party.²⁷⁴ Since January 2019, she has served as the Congresswoman from Minnesota's Fifth Congressional District.

In 2014, Maryam Mirzakhani became the first woman to earn the Fields Medal, which is one of the most prestigious awards in mathematics.²⁷⁵ She was born and raised in Iran, where she attended university before coming to

²⁶⁸ Karen Workman, Eli Rosenberg & Christopher Mele, *Chelsea Bombing: What We Know and Don't Know*, N.Y. TIMES (Sept. 18, 2016), <https://www.nytimes.com/2016/09/19/nyregion/chelsea-explosion-what-we-know-and-dont-know.html>.

²⁶⁹ *See id.*

²⁷⁰ *See id.*

²⁷¹ *See id.*

²⁷² Doualy Xaykaothao, *Somali Refugee Makes History in U.S. Election*, NPR (Nov. 10, 2016, 12:14 PM), <https://www.npr.org/sections/goatsandsoda/2016/11/10/501468031/somali-refugee-makes-history-in-u-s-election>.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Ian Sample, *Fields Medal Mathematics Prize Won by Woman for First Time in its History*, GUARDIAN (Aug. 12, 2014), <https://www.theguardian.com/science/2014/aug/13/fields-medal-mathematics-prize-woman-maryam-mirzakhani>.

the United States to earn a Ph.D. from Harvard University.²⁷⁶ Prior to her untimely death, she taught mathematics at Stanford University.²⁷⁷

The MacArthur Foundation awarded poet Khaled Mattawa one of its MacArthur Fellowships for his work.²⁷⁸ This award is known as the genius fellowship. He also previously earned a Guggenheim Foundation fellowship.²⁷⁹ Mattawa was born in Benghazi, Libya, but moved to the United States as a teenager.²⁸⁰

Professor Abdullahi Ahmed An-Na'im is "an internationally recognized scholar of Islam and human rights and human rights in cross-cultural perspectives" who currently is the Charles Howard Candler Professor of Law at Emory University.²⁸¹ He was born in the Sudan and educated at the University of Khartoum.

These people are just a few examples of individuals who have come from the nations targeted in the travel bans. Far from being national security threats, they have contributed to the greatness that is American society. More importantly, there are numerous individuals living in the United States who were born in one of these targeted countries who today are making contributions big and small in their communities. They include doctors, educators, entrepreneurs, attorneys, and religious leaders who all add to the fabric of American culture and society. These people would have been excluded based on the travel bans.

VIII. CONCLUSION

Rational basis review offered the Supreme Court a viable approach toward solving the issues raised in *Trump v. Hawaii*. Indeed, in *Hawaii v. Trump*, the Ninth Circuit explicitly referenced the irrational nature in which the travel bans are both overinclusive and underinclusive. For example, in addressing the Second Travel Ban, the Ninth Circuit questioned its rationality:

The Order does not tie these nationals in any way to terrorist organizations within the six designated countries. It does not identify these nationals as contributors to active conflict or as those responsible for insecure country conditions. It does not provide any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness. In short, the Order does not provide a rationale explaining why permitting entry of

²⁷⁶ Kenneth Chang, *Maryam Mirzakhani, Only Woman to Win a Fields Medal, Dies at 40*, N.Y. TIMES (July 16, 2017), <https://www.nytimes.com/2017/07/16/us/maryam-mirzakhani-dead.html>.

²⁷⁷ See *id.*

²⁷⁸ Carolyn Kellogg, *MacArthur Fellows Include Alison Bechdel, Terrance Hayes*, L.A. TIMES (Sept. 17, 2014, 4:00 AM), <https://www.latimes.com/books/jacketcopy/la-et-jc-macarthur-fellows-alison-bechdel-terrance-hayes-20140916-story.html>.

²⁷⁹ See *Khaled Mattawa*, POETRY FOUND., <https://www.poetryfoundation.org/poets/khaled-mattawa> (last visited Apr. 27, 2020) [hereinafter POETRY FOUND.]; see also *Khaled Mattawa*, MACARTHUR FOUND. (Sept. 17, 2014), <https://www.macfound.org/fellows/922/>.

²⁸⁰ See POETRY FOUND., supra note 279.

²⁸¹ *Abdullahi Ahmed An-Na'im*, EMORY L., <http://law.emory.edu/faculty/faculty-profiles/annaim-profile.html> (last visited Jan. 27, 2020).

nationals from the six designated countries under current protocols would be detrimental to the interests of the United States.²⁸²

Although the Ninth Circuit did not specifically address rational basis review or the pertinent case law, its language recalled the Supreme Court's reasoning in that analysis.

Trump's three travel bans are both overinclusive and underinclusive. If Trump's objective was to make the United States safer from terrorist attacks, he would not ignore the significant harms caused by citizens from nations such as Afghanistan, Egypt, Pakistan, and Saudi Arabia.²⁸³ No one is advocating that individuals suspected of terroristic motives be granted entry into the United States. Visa applicants, however, should be assessed on their individual merits as opposed to their nationality. This argument holds just as true for Syrian and Iranian nationals as it does for Pakistani and Saudi nationals. In *Hawaii v. Trump*, when the district court assessed underinclusivity, it fashioned a similar position: "[the travel ban's] use of nationality as the sole basis for suspending entry means that nationals without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone, should be suspended from entry."²⁸⁴ Indeed, the United States Department of Homeland Security issued a report by intelligence analysts finding that individuals from the designated travel ban nations do not pose any greater threat.²⁸⁵ Specifically, "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity."²⁸⁶

The travel bans all fail to address the nationals from non-targeted nations who legally entered the United States and committed terroristic attacks. Furthermore, these bans potentially exclude countless well-meaning individuals from the targeted nations who seek to immigrate to the United States. Given the large numbers of individuals that are excluded when they are not a threat as well as the significant history of people coming from other countries, it appears that the travel bans are both widely overinclusive and underinclusive. Consequently, a faithful application of *Moreno* and *Romer* leads to the conclusion that the travel bans are unconstitutional because they cannot meet rational basis review.

This legal analysis was not altered by the Third Travel Ban. It still excluded people in seemingly irrational ways. Five of the seven countries targeted by this ban, including Chad, have predominantly Muslim

²⁸² *Hawaii v. Trump*, 859 F.3d 741, 772–73 (9th Cir. 2017).

²⁸³ See Aryeh Neier, *Saudi Arabia and Egypt are Excluded from Trump's Ban. Why?*, GUARDIAN (Jan. 30, 2017), <https://www.theguardian.com/commentisfree/2017/jan/30/saudi-arabia-egypt-excluded-from-trumps-ban>; Shamil Shams, *Trump's Travel Ban 'Makes No Sense' Without Pakistan and S. Arabia*, DEUTSCHE WELLE (Jan. 30, 2017), <https://www.dw.com/en/trumps-travel-ban-makes-no-sense-without-pakistan-and-s-arabia/a-37326532>.

²⁸⁴ 859 F.3d at 773.

²⁸⁵ See Ron Nixon, *People from 7 Travel-Ban Nations Pose No Increased Terror Risk, Report Says*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/us/politics/travel-ban-nations-terror-risk.html>.

²⁸⁶ *Id.*

populations.²⁸⁷ It also still targeted Somalia, both immigrants and non-immigrants, even though it is not among the original seven.²⁸⁸

Although the limits on Venezuelan nationals are very narrowly tailored to certain governmental officials and their family members, it was unclear how that will prevent terrorism in the United States as there is no evidence of any terroristic attacks by Venezuelan nationals. Moreover, the travel ban on North Korean nationals was a solution in search of a problem as essentially no North Koreans come to the United States either as immigrants or non-immigrants.²⁸⁹ Indeed, in the ten-year period after the enactment of the North Korean Human Rights Act of 2004, only about 186 North Koreans emigrated to the United States as refugees.²⁹⁰ Including North Koreans in the travel ban was not rational, unless as with Venezuela, the objective was to create the illusion that non-Muslim countries were also being targeted.

When courts review policies or statutes that are both overinclusive and underinclusive, those policies and statutes typically have improper discrimination at the heart of the governmental intent. In other words, when both overinclusivity and underinclusivity exists, that is a strong indication that the governmental action is arbitrary and capricious leading to a determination that the action is irrational and thus constitutionally invalid. In *Moreno*, the federal law's animus was based on a disdain for hippies. In *Romer*, the animus targeted Colorado's LGBT community. In the *City of Cleburne*, the city's ordinance was based on animus against mentally disabled individuals. These examples demonstrate how when a statute is arbitrary and capricious, courts should find that it is unconstitutional. Here, the travel bans are irrational based on their overinclusive and underinclusive nature.

²⁸⁷ The United States Department of State reports that Muslims comprise about 58 percent of Chad's population. See Bureau of Democracy, Human Rights and Labor, *International Religious Freedom Report for 2015*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/j/drl/rls/irf/religiousfreedom//index.htm#wrapper> (last visited Apr. 27, 2020).

²⁸⁸ Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,164–45,165 (Sept. 24, 2017).

²⁸⁹ See Emily Rauhala, *Almost No North Koreans Travel to the U.S., So Why Ban Them?*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/world/almost-no-north-koreans-travel-to-the-us-so-why-ban-them/2017/09/25/822ac340-a19c-11e7-8c37-e1d99ad6aa22_story.html.

²⁹⁰ Keegan Hamilton, *How a 19-Year-Old North Korean Escaped and Became a Sushi Chef in America*, VICE (Oct. 8, 2015, 8:40 AM), https://www.vice.com/en_us/article/9kj3ba/how-a-19-year-old-north-korean-escaped-and-became-a-sushi-chef-in-america.