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ARTICLE

ARE PRESIDENT TRUMP'S TRAVEL BANS RATIONAL?

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Introduction

Much has been already said and written about the executive orders issued by President Donald Trump, including whether they violate the First Amendment or the Immigration and Nationality Act. Indeed, with essentially a third executive order in the form of a presidential proclamation and the potential Supreme Court dismissal of the petition, these travel bans have become a moving target. Nonetheless, this article arguably applies to all three orders, given the relative similarities among the three. Toward that end, this article does not address the arguments that have been put forward by many legal advocates or scholars regarding equal protection, the First Amendment, or the statutory interpretation of the Immigration and Nationality Act. That is not to say that those arguments are invalid or unpersuasive, but that this article seeks a different (and I hope more straightforward) path.

Although the Supreme Court's jurisprudence regarding rational basis review typically favors the government, there is a good argument that the travel bans are unconstitutional for that reason.[1] Specifically, they are both under-inclusive and over-inclusive. Notably, between 1975 and 2015, people from the countries targeted in the travel bans have not killed any people in the United States based on a terrorist attack.[2] Moreover, "[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."[3] In other words, it appears dubious that the proposed travel bans will prevent or reduce terrorist attacks in the United States.

In this article, Sections I and II discuss the first and second travel bans, including the subsequent litigation concerning each one. Section III addresses the most recent proclamation. Section IV focuses on Supreme Court decisions regarding inclusivity and rational basis review. Next Section V discusses how the travel bans are under-inclusive based on evidence that they would have failed to

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1 I feel compelled to note that I do not favor the travel bans as I view them to be discriminatory based on animus toward Muslims.

2 Uri Friedman, *Where America's Terrorists Actually Come From*, THE 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 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. *See id.* No one from either Libya or Syria had been convicted of such offenses. *See id.*

3 *Id.*

prevent numerous people from other nations, as well as our own, who committed various atrocious attacks. Similarly, the travel bans are under-inclusive because they would have barred many people from the targeted nations who have immigrated to the United States and made numerous valuable contributions to the nation. Finally, Section VI addresses how the third travel ban has many of the same problems as the first two travel bans in regard to the failure to satisfy a rational basis review.

I. Travel Ban I

A. Executive Order 13769 Targeted Nationals from Seven Muslim Nations.

On January 27, 2017, President Trump issued Executive Order 13769 entitled "Protecting the Nation from Foreign Terrorist Entry into the United States."[4] In discussing the executive order's purpose, the Trump administration recalled the deaths of over 3,000 people on September 11, 2001, by nineteen foreign nationals who had all obtained visas to enter the United States.[5] Thus, the Trump administration indicated that the order's purpose was to eliminate acts of terrorism by foreign nationals who seek admission to the United States to commit terrorist attacks.[6]

Based on this purpose, the Trump administration suspended entry into the United States of immigrants and nonimmigrants from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[7] The executive order specifically declared that the continued admission of Syrian refugees "is detrimental to the interests of the United States" and thus barred their entry until a determination that their readmission is "consistent with the national interest."[8]

Needless to say, there was a backlash regarding this travel ban, including protests at airports across the nation where immigration lawyers served to assist

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4 Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Travel Ban I] (revoked by Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017)).

5 *Id.* § 1.

6 *Id.*

7 *Id.* § 3(c); *see also* 8 U.S.C. § 1182(f); Jack Goodman, *US Travel Ban: Why These Seven Countries?*, BBC NEWS, (Jan. 30, 2017), http://www.bbc.com/news/world-us-canada-38798588.

8 Travel Ban I, at § 5(c).

people entering the country.[9] Moreover, the issuance of the executive order spawned litigation.

B. Executive Order 13769 Spawned Litigation Across the Country.

1. Washington v. Trump

After the first travel ban, the states of Washington and Minnesota filed a lawsuit against President Trump challenging Executive Order 13769.[10] Specifically, the plaintiffs filed an amended motion for a temporary restraining order, which the district court granted after finding that the plaintiffs had met their burden of establishing that the travel ban "adversely affect[ed] the States' residents in areas of employment, education, business, family relations, and freedom to travel."[11] Moreover, the states were injured because of "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."[12] The court characterized these injuries as "significant and ongoing."[13]

President Trump appealed this order. On February 4, 2017, President Trump filed an emergency motion for a stay pending appeal of the district court's order.[14] On February 7, 2017, the parties presented oral arguments before a three-judge panel of the United States Court of Appeals for the Ninth Circuit.[15] That panel made several rulings.

First, the court held that Washington and Minnesota had standing to assert rights on behalf of their residents as well as themselves.[16] Second, the Ninth Circuit determined that the federal courts may assess the constitutionality of executive

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

10 *See* Washington v. Trump, No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (order temporarily preventing the Administration from implementing the travel ban).

11 *Id.* at *2.

12 *Id.*

13 *Id.*

14 *See* Washington v. Trump, No.17-35105, 2017 WL 469608 (9th Cir. Feb. 4, 2017).

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

16 *See id.* at 1159–61.

orders even if they concern national security matters.[17] Third, the court concluded that President Trump failed to demonstrate that he had a likelihood of success on the issue of whether the aliens' Due Process rights were violated.[18] Finally, the Ninth Circuit held that President Trump failed to establish that a stay was necessary to avoid irreparable harm to the government's interests.[19] Based on all these reasons, the court denied the motion.[20]

President Trump filed an unopposed motion to dismiss his appeal, which the Ninth Circuit granted on March 8, 2017.[21] The court noted that none of the parties moved to vacate the order denying the stay of the restraining order.[22] Consequently, the court sua sponte addressed the matter and determined that the stay order should not be vacated.[23]

Judge Alex Kozinski, joined by four other circuit judges, filed a dissent from the denial of the reconsideration en banc to the amended order denying the vacatur of the order staying the restraining order ("Denial").[24] Specifically, he argued that the February 9 order denying the stay hinged on Due Process even though most foreign nationals addressed by the executive order do not have Due Process rights.[25] Moreover, Judge Kozinski took the three-judge panel to task for considering President Trump's statements on the campaign trail and social media.[26]

Judge Jay Bybee, joined by four other circuit judges, also filed a dissent from the Denial.[27] Specifically, he asserted that although the federal courts have a role in reviewing the president's immigration policy, that role is limited.[28]

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17 *See id.* at 1161–64.

18 *See id.* at 1164–67.

19 *See id.* at 1168–69.

20 *See id.*

21 Washington v. Trump, 858 F.3d 1168, 1168 (9th Cir. 2017).

22 *See id.*

23 *See id.*

24 *See id.* at 1171–74 (Kozinski, dissenting).

25 *See id.* at 1171–72.

26 *See id.* at 1173–74; *see also* Richard L. Hasen, *Does the First Amendment Protect Trump's Travel Ban?*, SLATE, (Mar. 20, 2017, 9:28 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/the_9th_circuit_s_alex_kozinski_defends_trump_s_travel_ban_on_first_amendment.html.

27 *See* Washington v. Trump, 858 F.3d at 1174–85 (Bybee, dissenting).

28 *See id.*

Judge Carlos Bea, joined by three other circuit judges, filed a dissent from the Denial as well.[29] Specifically, he argued that states may not sue the federal government for Due Process rights on their behalf or on behalf of third parties.[30]

2. Aziz v. Trump

Simultaneous to the West Coast action in *Washington v. Trump*, an action was filed challenging Executive Order 13769 in the United States District Court for the Eastern District of Virginia.[31] Initially, United States District Judge Leonie Brinkema issued a temporary restraining order that mandated the federal government "shall permit lawyers access to all legal permanent residents being detained at Dulles International Airport."[32] Moreover, she ordered that the federal government refrain "from removing petitioners —lawful permanent residents at Dulles International Airport—for a period of 7 days from the issuance of this Order."[33]

Originally, Tareq Aqel Mohammed Aziz and Ammar Aqel Mohammed Aziz filed this action.[34] They are two Yemeni nationals who had immigrant visas issued by the American Embassy in Djibouti.[35] They landed at Dulles in Virginia on January 28, 2017, and were detained by agents with United States Custom and Border Protection.[36] These agents ultimately cancelled both of their visas before forcing them to buy tickets to Ethiopia.[37]

On February 3, 2017, the court granted motions to intervene by Osman Nasreldin and Sahar Kamal Ahmed Fadul, along with the Commonwealth of Virginia.[38] Nasreldin is a United States citizen who is engaged to marry Fadul, a

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29 *See* Washington v. Trump, 858 F.3d at 1185–87 (Bea, dissenting).

30 *See id.*

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

32 *See* Aziz v. Trump, _ F. Supp.3d _, No. 1:17-cv-116, 2017 WL 386549, at *1 (E.D. Va. Jan. 28, 2017).

33 *See id.* at *1.

34 *See Aziz v. Trump*, 231 F. Supp. 3d at 27.

35 *See id.*

36 *See id.*

37 *See id.*

38 *See id.* at 26.

Somali citizen.[39] She flew to Dulles from Ethiopia with a visa authorizing her entry into the United States based on her engagement to Nasreldin.[40] However, Customs and Border agents rescinded her visa and forced her to buy tickets to Ethiopia.[41]

In Virginia's motion to intervene, it raised three bases for intervening.[42] "First, it assert[ed] a general *parens patriae* interest in the well-being of its citizens and residents, and a more particular interest in ensuring that such persons are not discriminatorily denied the benefits of federal law."[43] Second, it argued that the federal government has not been complying with a January 28, 2017, temporary restraining order regarding access to attorneys at Dulles by legal permanent residents.[44] Finally, it maintained "that its 'public universities and their administration, faculty, students, and families are being harmed by the Executive Order' because several such persons are being prevented from returning to the United States or traveling from it."[45]

Regarding the intervenors, United States District Judge Leonie Brinkema made several rulings.[46] First, the court determined that Fadul and Nasreldin could intervene.[47] Concerning Virginia, Judge Brinkema held that Virginia had a right to intervene.[48] Next, she determined that Virginia, in its sovereign capacity, could proceed based on standing to raise a *parens patriae* action to protect the welfare of its residents based on its allegations.[49] Finally, the court held that Virginia also had standing to raise its non-sovereign proprietary interests based on alleged injuries to its state universities.[50]

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39 *See id.* at 28.

40 *See id.* at 28, n.6.

41 *See id.* at 28.

42 *See id.*

43 *See id.*

44 *See id.*

45 *See id.*

46 *See* id at 23–33.

47 *See id.* at 29.

48 *See id.*

49 *See id.* at 32.

50 *See id.*

On February 13, 2017, Judge Brinkema issued a decision granting Virginia's motion for a preliminary injunction of the first travel ban.[51] In considering the motion, the court heard more evidence regarding injuries that Virginia and its residents suffered.[52] Moreover, it reviewed the government rationale for the executive order.[53] Finally, it reviewed comments that President Trump and his representatives made during the electoral campaign and in support of the executive order.[54]

As an initial matter, she determined that the court had jurisdiction over Virginia's motion.[55] In analyzing a preliminary injunction, the court concluded that Virginia had established a likelihood of success on the merits.[56] Moreover, it determined that Virginia had established it would suffer irreparable harm if the executive order remained in effect.[57] Finally, Judge Brinkema weighed the various issues and found that the balance favored Virginia.[58] Consequently, the court concluded that enjoining the travel ban served the public interest.[59]

3. Hawaii v. Trump

The State of Hawaii, like Virginia, Washington, and Minnesota, filed an action seeking injunctive relief along with a motion for a temporary restraining order on February 3, 2017.[60] Based on the Ninth Circuit's appeal in *Washington v. Trump*, United States District Judge Derrick Watson granted President Trump's motion for a stay during the pendency of this appeal.[61]

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51 *See* Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017).

52 *See id.* at 728–29.

53 *See id.* at 729.

54 *See id.* at 729–31.

55 *See id.* at 731–33.

56 *See id.* at 737.

57 *See id.*

58 *See id.* at 738.

59 *See id.*

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

61 *See id.* at 856.

II. Travel Ban II

A. Executive Order 13780 Revoked Executive Order 13769 and Targeted Nationals from Six Muslim Nations.

On March 6, 2017, President Trump issued Executive Order 13780, again entitled "Protecting the Nation from Foreign Terrorist Entry into the United States."[62] This new executive order revoked Executive Order 13769.[63]

In this second executive order, President Trump included only six nations: Iran, Libya, Somalia, Sudan, Syria, and Yemen.[64] In this order, he did not include Iraq because he explained that it presented a special case.[65] In discussing the executive order's purpose, President Trump ignored the discussion of the attack on September 11 that was included in the first travel ban. However, he explicitly indicated that the travel bans were not about religious discrimination.[66]

President Trump's second travel ban acknowledged the litigation that ensnared the first one.[67] In response to this litigation, the second executive order limited the scope so that it was not applicable to lawful permanent residents or to those persons who were already granted refugee status or asylum in the United States.[68] However, it suspended the entry of any new refugees from these six countries for 120 days as well as reduced the number of refugees to be admitted by about fifty percent.[69] Notwithstanding the revisions in the second travel ban, it also resulted in a new round of litigation.

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62 Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

63 *See id.* § 13.

64 *See id.* § 1(f).

65 *See id.* § 1(g).

66 *See id.* § 1(b)(iv) ("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 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").

67 *See id.* § 1(c).

68 *See id.* § 3(b).

69 *See id.* § 6(a).

B. Executive Order 13780 Spawned Additional Litigation Across the Country.

1. International Refugee Assistance Project v. Trump

In an action in Maryland federal court, three organizations and six individuals filed an action challenging the second executive order.[70] Each of the individual plaintiffs had Muslim relatives who were seeking entry into the United States and feared that the executive order would delay or bar these relatives' entry.[71] Plaintiffs International Refugee Assistance Project and Hebrew Immigrant Aid Society are organizations that work with refugees and had already suffered a decline in caseload and a loss of revenue.[72] The third organizational plaintiff was Middle East Studies Association, which suffered harm because its members were restricted from traveling for academic conferences, field work, and the annual conference.[73]

United States District Judge Theodore Chuang began the opinion by revisiting the first executive order and its subsequent legal challenges.[74] Next, he discussed the second executive order.[75] Significantly, he also addressed in some detail various public statements that President Trump and his surrogates made about the travel bans being a Muslim ban.[76]

Judge Chuang determined that the Muslim plaintiffs had standing to bring a claim pursuant to the Immigration and Nationality Act.[77] However, the court concluded that these plaintiffs were unlikely to succeed on the merits of their claim based on this 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."[78] In other words, the President's excluding aliens

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

71 *See id.* at 548.

72 *See id.* at 548–49.

73 *See id.* at 549.

74 *See id.* at 544–45.

75 *See id.* at 546–47.

76 *See id.* at 547–48.

77 *See id.* at 551.

78 *Id.* at 554.

from these six nations with a history of promoting or fostering terrorism is not violative of the statute's anti-discriminatory provisions.

The court also held that these same Muslim plaintiffs had standing to bring a claim asserting a violation of the First Amendment's Establishment Clause.[79] Unlike the Immigration and Nationality Act claims, Judge Chuang found that the plaintiffs would likely succeed on the merits of their claims.[80] Moreover, he determined that the plaintiffs had established that they would suffer irreparable harm if the second travel ban went into effect.[81] Finally, he determined that a balancing of the public interest and equities at issue weighed in favor of issuing a preliminary injunction.[82] Consequently, in granting a preliminary injunction, the court ordered a nationwide ban of implementation of this second travel ban by the federal government.[83]

In a decision by the entire United States Court of Appeals for the Fourth Circuit, the court affirmed in part and vacated in part the decisions by Judge Chuang.[84] The Fourth Circuit focused on the plaintiff's 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."[85] Furthermore, the court declined to address the discrimination claim based on the Immigration and Nationality Act.[86]

In support of its analysis, the Fourth Circuit noted many of the statements made by President Trump and his surrogates.[87] Reviewing one of the plaintiff's claims, the court found that there was standing based on a cognizable injury caused by the delay in his wife's pending visa application and the prolonged separation that he will experience.[88] Additionally, the court rejected the federal government's

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79 *See id.* at 551–52.

80 *See id.* at 556–64.

81 *See id.* at 564.

82 *See id.* 564–65.

83 *See id.* at 565–66.

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

85 *Id* at 581.

86 *See id.*

87 *See id.* at 575–77.

88 *See id.* at 583–86.

arguments that the plaintiffs' claims were unripe.[89] Finally, the court dismissed the government's argument that consular non-reviewability barred review of the plaintiffs' claim.[90]

The Fourth Circuit explained that the plaintiffs' allegations of an Establishment Clause violation are sufficient, in part, based on the ample evidence of President Trump's animus toward Islam during his campaign and on social media.[91] Most significantly, the court determined that "[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."[92]

Based in large part to all of President Trump's statements, the Fourth Circuit held that the plaintiffs had demonstrated a likelihood of success on the merits of their Establishment Clause claim.[93] Moreover, they established that they would likely suffer irreparable harm unless the court granted injunctive relief.[94] Additionally, both the equities and the public interest weighed in favor of the plaintiffs and their need for injunctive relief.[95]

Finally, the Fourth Circuit affirmed the nationwide scope of the injunctive relief.[96] However, the court held that the district judge abused his discretion in issuing the injunction against President Trump individually.[97]

In response to the Fourth Circuit's decision in *International Refugee Assistance Project*, on June 14, 2017, President Trump issued "Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence."[98] Addressing the preliminary

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89 *See id.* at 586–87.

90 *See id.* at 587–88.

91 *See id.* at 591–92.

92 *Id.* at 592.

93 *See id.* at 594–601.

94 *See id.* at 601–02.

95 *See id.* at 602–04.

96 *See id.* at 604–05.

97 *See id.* at 605.

98 Exec. Order No. 13,780, 82 Fed. Reg. 27965 (June 14, 2017) (Memorandum).

injunctions, he stayed the effective dates in Executive Order 13780 until 72 hours after the injunctions are lifted.[99]

2. Sarsour v. Trump

There was a second federal action filed in the Fourth Circuit's jurisdiction, but in the Eastern District of Virginia. In that case, the court denied the plaintiffs' motion for a temporary restraining order.[100] The plaintiffs were all Muslims. The named plaintiffs were American citizens who had relatives from the banned countries who were no longer able to visit the United States.[101] One Doe plaintiff is an American citizen who filed a pending application to bring his Sudanese wife into the United States.[102] Two of the other Doe plaintiffs were legal permanent residents from Syria and Sudan who had filed pending applications to bring their wives to the United States.[103] Two Doe defendants were Somali and Yemeni nationals who were in the United States on student visas and feared leaving the country as they might not be able to reenter.[104]

United States District Judge Anthony Trenga held that the plaintiffs had standing to challenge President Trump's second executive order.[105] However, he first determined that the plaintiffs were not likely to succeed on the merits in their claim that the executive order constitutes discrimination that violates the Immigration and Nationality Act.[106] Additionally, the court concluded that they had not established a likelihood of success on the merits of their claim that the executive order violates the Establishment Clause based on its disfavoring of Islam.[107] Judge Trenga also ruled that the plaintiffs were not likely to succeed on the merits of their claim that the executive order violates the Equal Protection Clause based on subjecting Muslims to different treatment.[108] In denying the plaintiffs' motion, the court concluded that they had not established irreparable harm, that the balance of

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99 *Id.* at 27966.

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

101 *See id.* at 726–27.

102 *See id.* at 727.

103 *See id.*

104 *See id.*

105 *See id.* at 728–29.

106 *See Id.* at 730–33.

107 *See id.* at 733–38.

108 *See Id.* at 738–40.

equities favored them, or that the public interest would be served by their request for injunctive relief.[109]

3. Hawaii v. Trump

On March 8, 2017, the State of Hawaii and Ismail Elshikh filed a motion for a temporary restraining order barring the federal government from implementing the second executive order.[110] Hawaii maintained "that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions."[111] Specifically, it alleged that tourism, which is critical to the state's economic well-being was adversely impacted by the travel ban.[112] Moreover, Dr. Elshikh is an American citizen of Egyptian descent who has lived in Hawaii for over ten years and is an imam and a leader of the Muslim community.[113] His wife is an American citizen of Syrian descent whose mother is a Syrian national who had a pending visa application that was placed on hold based on the first executive order.[114] Although that application was progressing after this first travel ban was enjoined, the plaintiffs feared that the second travel ban would adversely impact it.[115] Dr. Elshikh asserted injuries by himself, his family, and other members of his mosque based on the executive order's discrimination that violated both the Immigration and Nationality Act and the Constitution.[116]

Judge Watson addressed the first executive order and its legal challenge in the Ninth Circuit.[117] Next, he discussed the second executive order.[118] Furthermore, he noted in some detail various public statements by President Trump and his surrogates about the travel bans being a Muslim ban.[119]

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109 *See id.* at 740–42.

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

111 *Id.* at 1126.

112 *See id.* at 1130–31.

113 *See id.* at 1131–33.

114 *See id.*

115 *See* id at 1131.

116 *See id.* at 1126.

117 *See id.* at 1123–24.

118 *See id.* at 1124–26.

119 *See id.* at 1126–27.

In granting the motion for a temporary restraining order, the court held that both Hawaii and Dr. Elshikh had standing.[120] Additionally, Judge Watson determined that Dr. Elshikh's claims were ripe.[121] Addressing the Establishment Clause claim, the court held that both plaintiffs established a likelihood of success on the merits.[122] Finally, both the irreparable harm and the balancing of the public interest weighed in favor of granting the motion.[123] Consequently, the court granted a nationwide temporary restraining order.[124]

President Trump appealed this grant of a nationwide temporary restraining order to the Ninth Circuit.[125] In a three-judge panel, that court affirmed the district court's decision in part and vacated it in part.[126]

As an initial matter, the Ninth Circuit determined that Dr. Elshikh established that he had standing to raise the Immigration and Nationality Act claim.[127] Moreover, Hawaii had standing based on its proprietary interests in running a state university as well as implementing refugee policies.[128] The court rejected the federal government's arguments that the claims were neither ripe nor justiciable.[129]

In addressing the merits of the granting of the preliminary injunction, the federal government asserted that national security interests defeated the plaintiffs' claims.[130] Specifically, the federal government maintained that national security interests authorized President Trump to restrict entry into the country based on nationality.[131] However, the court concluded that national security is not a magic wand that allows the president to do just anything. Here, the executive order failed

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120 *See id.* at 1128–31.

121 *See id.* at 1133.

122 *See id.* at 1133–34.

123 *See id.* at 1139–40.

124 *See id*. at 1140.

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

126 *See id.*

127 *See id.* at 762–63.

128 *See id.* at 763–65.

129 *See id.* at 767–68.

130 *See id.* at 773–74 ("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)).

131 *See id.* at 770–74.

because there was no linkage to what are six problematic nations and their roles in international terrorism to the nationality of the individual applicants and their role in terrorism.[132] Regarding the suspension of the United States Refugee Admissions Program and the cap of no more than 50,000 refugees in 2017, the court further concluded that President Trump failed to establish that if these actions were not taken there would actually be detrimental consequences for the interests of the United States.[133]

The Ninth Circuit noted that the Immigration and Nationality Act barred discrimination on the basis of nationality.[134] The federal government argued that the executive order did not discriminate on the basis of nationality because it "bars *entry* of nationals from six designated countries but does not deny the *issuance of immigrant visas* based on nationality."[135] The court concluded that Hawaii and Dr. Elshikh had demonstrated a likelihood of success on the merits that the executive order violates the non-discriminatory principle set out in the Act.[136]

The court determined that Dr. Elshikh and Hawaii would likely suffer irreparable harm if they were unable to obtain a preliminary injunction.[137] The court next balanced the injuries likely for the plaintiffs with the federal government's interest and found that the equities favored the plaintiffs.[138] Moreover, "[t]he public interest favors affirming the preliminary injunction."[139]

The Ninth Circuit allowed that the nationwide injunction was appropriate except that it was overly broad as it related to the federal government's internal review procedures.[140] Moreover, the court held that injunctive relief enjoining the president was inappropriate but that other executive branch officials and their agents could be enjoined.[141]

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132 *See id.*

133 *See id.* at 774–76.

134 *See id.* at 776–77; *see also* 8 U.S.C. § 1152(a)(1)(A) ("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.").

135 *See id.*

136 *See id.* at 778–79.

137 *See id.* at 782–83.

138 *See id.* 783–84.

139 *Id.* at 785 (citing Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 24 (2008)).

140 *See id.* at 785–88.

141 *See id.* at 788.

4. Supreme Court Grants the Government's Petition for Writ of Certiorari.

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*.[142] Moreover, the Court concluded that the stay should be lifted in part for people who had no bona fide relationship with the United States.[143]

The Trump Administration interpreted this language to authorize exclusion of fiancés as well as relationships involving grandparents and cousins.[144] However, it soon reversed itself regarding fiancés.[145] Originally, Judge Watson, who was presiding over the *Hawaii v. Trump* action, declined without prejudice the plaintiffs' request for clarification about whether "bona fide" applied to grandparents, indicating that it should be filed with the Supreme Court.[146] However, he subsequently issued a decision 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.[147] 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.[148]

III. Travel Ban III

On September 24, 2017, President Trump issued a proclamation entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats."[149] This

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142 *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2086 (2017) (per curiam)

143 *See* id. at 2088.

144 *See Grandparents and Cousins Aren't Considered 'Close' Family under Trump's New Visa Criteria*, L.A. TIMES, (June 29, 2017), http://www.latimes.com/world/la-fg-new-visa-criteria-20170628-story.html.

145 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.

146 *See generally* Hawaii v. Trump, 258 F. Supp. 3d 1188 (D. Haw. 2017).

147 *See* Hawaii v. Trump, _ F. Supp. 3d _, No. 17-00050, 2017 WL 2989048 (D. Haw. July 13, 2017).

148 *See* Trump v. Hawaii, 138 S. Ct. 34 (2017).

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

proclamation slightly altered the impacted countries but suffers similar deficiencies as the two earlier executive orders.

The proclamation explained that the federal government has reviewed the vetting process for nationals from almost 200 countries and that only a handful have failed insofar as providing adequate information to assist in this analysis.[150] The proclamation explained 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."[151] Based on their shortcomings regarding these identity-management protocols, President Trump designated seven nations for entry restrictions: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.[152] Consequently, with the exception of Venezuelan nationals, all immigrants from these seven nations are restricted from entering the United States.[153] The restrictions apply only to certain Venezuelan governmental officials and their family members.[154] Moreover, the nationals of these other six nations who are seeking non-immigrant entry into the United States are restricted as well in different ways.[155] Moreover, Somalia was not listed as providing inadequate identity-management protocols, but its nationals were among those who were restricted entry as immigrants and had limitations on entrance as non-immigrants.[156]

In response to this proclamation, the United States Supreme Court ordered the parties to file letter briefs addressing whether it rendered the cases before it moot.[157] In President Trump's letter brief, he argued that the cases were moot in light of his September 24 Proclamation.[158] On the other hand, Hawaii submitted a letter brief asserting that the case is not moot and should be addressed on the

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150 *Id*.

151 *Id.* § 1(c)(i).

152 *See id.* § 1(g).

153 *See generally id.* § 2.

154 *See id.* § 2(f)(ii).

155 *See generally id.* § 2.

156 *See id.* § 2(h)(ii).

157 *See* Trump v. Int'l Refugee Assistance Project, No. 16-1436, 2017 WL 2405595 (U.S. Sept. 25, 2017).

158 *See* Supplemental Brief of Petitioners at 4–6, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (No. 16-1436), http://www.scotusblog.com/wp-content/uploads/2017/10/16-1436-16-1540-tssb.pdf.

merits.[159] In the alternative, Hawaii suggested that instead of dismissing the case as moot, the Court should dismiss the writ of certiorari as improvidently granted.[160]

IV. Rational Basis Requires that the Government's Actions be Rationally Related to a Governmental Interest.

In teaching Constitutional Law, the norm is to focus on the three levels of review: strict scrutiny, intermediate scrutiny, and rational basis review. Strict scrutiny applies to claims alleging discrimination on the basis of race,[161] national origin,[162] or religion.[163] Intermediate scrutiny most commonly applies to claims alleging discrimination on the basis of gender.[164]

Rational basis review provides the least rigorous standard.[165] To state an equal protection claim, parties must establish they were treated differently from others *similarly* situated to them. 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 legitimate government purpose.[166] In other words, a court will uphold a classification as long as there is any conceivable set of facts that might provide a basis for concluding that the classification is rationally related to a legitimate government interest.[167] The judiciary will not independently examine either the ends of the legislation or the reasonableness of the classification.[168] 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.[169]

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159 *See* Supplemental Brief of Respondents at 3–7, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (No. 16-1436), http://www.scotusblog.com/wp-content/uploads/2017/10/16-1436-bssb-IRAP.pdf.

160 *Id.* at 8–9.

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

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

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

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

165 *See generally*, City of Cleburne,, 473 U.S. at 439-441.

166 *See generally*, Armour v. City of Indianapolis, Ind., 566 U.S. 673, 680-81 (2012).

167 *See generally*, City of Cleburne,, 473 U.S. at 439-441; Armour, 566 U.S. at 680-81.

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

169 *See* Armour, 566 U.S. at 681.

A. Under-Inclusive Statutes Generally Satisfy Rational Basis Review.

In an often-taught case regarding rational basis review, *Railway Express Agency, Inc. v. New York*,[170] the Supreme Court addressed issues related to under-inclusivity. A classification is under-inclusive when it "target[s] fewer people than would be necessary to satisfy the legitimate purpose" in the statute.[171]

New York City enacted a traffic regulation barring the display of commercial advertising on vehicles using public streets that exempted advertisements displayed on company vehicles that promoted the business of those companies.[172] Railway Express Agency was a national company in the business of selling advertising space on the sides of its trucks for other companies.[173] Indeed, Railway Express operated 1,900 trucks with advertising in New York City alone.[174] In other words, Railway Express Agency could have advertising on its trucks promoting Railway Express Agency, but it could not have advertisements for any other companies even though that was its business. Several of Railway Express Agency's drivers were fined and convicted of driving trucks with advertising of companies like Camel Cigarettes and the Ringling Brothers and Barnum & Bailey Circus.[175]

Before the Supreme Court, Express Railway Agency argued 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.[176] Moreover, Railway Express Agency 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 house carried the same advertisement on its

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170 336 U.S. 106 (1949).

171 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 also* 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.").

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

173 *See id.* at 108.

174 *See id.*

175 *See id.* at 108, n.2.

176 *See id.* at 109.

own truck."[177] Ultimately, "the regulation allows the latter to do what the former is forbidden from doing."[178]

This ordinance was a classic example of an under-inclusive statute because it barred Railway Express Agency from having signs unless the signs related to the truck owner's business. Thus, it is under-inclusive because all trucks pose some problem. In other words, trucks advertising their services would be permissible but also seemingly distractive.

Nonetheless, the Supreme Court found that the ordinance was valid because it limited distractions for motorists, which was its intended purpose.[179] The Court ruled that "it is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[180] Therefore, New York City could ban some advertisements that distracted pedestrians or other drivers without having to eliminate every distraction.

In theory, the more under-inclusive a law is, the more irrational the law seems and the more likely a court will strike it down.[181] However, the reality is that the Court will rarely find a law irrational simply because it is under-inclusive.[182] The Court typically concludes, such as in *Railway Express Agency*, that the government can proceed incrementally in solving a specific problem.[183]

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177 *Id.* at 109–10.

178 *Id.* at 110.

179 *Id.* at 109–10.

180 *Id.* at 110. It is this type of rationale that undercuts the concern for a solution to homegrown terrorists like Timothy McVeigh, Ted Kaczynski, and Dylann Roof.

181 *See City of Cleburne*, 473 U.S. at 449; 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.").

182 A notable exception is the decision in *City of Cleburne*. In 1980, Cleburne Living Center submitted a special use permit application to operate a home for mentally disabled persons. Cleburne's city council voted to deny the special use permit, acting pursuant to a municipal zoning ordinance. 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. 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. Writing for the majority, Justice Byron White determined that the ordinance was under inclusive because other homes for the elderly or the mentally insane received permits to operate in the same area.

183 See *Ry. Express Agency*, 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.

B. Over-Inclusive Statutes Generally Satisfy Rational Basis Review.

Conversely, the Supreme Court addressed the opposite phenomenon of over-inclusivity in *New York City Transit Authority v. Beazer*.[184] A classification is over-inclusive when it "target[s] more people than necessary to fulfill the legitimate purpose" in the statute.[185]

Carl Beazer and Jose Reyes were among employees of the New York Transit Authority who were heroin addicts undergoing methadone treatment.[186] The Transit Authority had a policy against hiring anyone using narcotics.[187] Methadone was considered a narcotic, and both Beazer and Reyes were terminated after the Authority learned of their methadone use.[188] Beazer and Reyes filed a class action against the Transit Authority, alleging that the Authority's policy discriminated against blacks and Hispanics.[189] They cited a statistic showing that 81% of suspected violations of the Authority's policy were black or Hispanic.[190] The federal district court ruled for the plaintiffs,[191] and the Second Circuit affirmed this decision.[192]

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.[193] They argued that the Transit Authority's employment policy was over-inclusive because it excluded methadone addicts from

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483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."); F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 316 (1993) (quoting *Williamson*); McGowan, *supra* note 181, at 393 ("rational basis analysis often tolerates under-inclusive regulations").

184 440 U.S. 568 (1979).

185 Ross, *supra* note 171, at 2065; *see also* Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 U.C.L.A. L. REV. 447, 465 (1989) (A law is "overinclusive, because many who are burdened . . . do not pose the harm.").

186 *See New York City Transit Auth.*, 440 U.S. at 576 n.11.

187 *See id.* at 576–77.

188 *See id.* at 573–74, 577 n.11.

189 *See id.* at 578–79.

190 *See id.* at 579.

191 *See generally* New York City Transit Auth. v. Beazer, 414 F. Supp. 277 (S.D.N.Y. 1976).

192 *See generally* New York City Transit Auth. v. Beazer, 558 F.2d 97 (2d Cir. 1977).

193 *See New York City Transit Auth.*, 440 U.S. at 588-92.

working for the Transit Authority even though the statistics demonstrated that 75% would be safe employees.[194]

The Supreme Court held that the Transit Authority's employment policy was not unconstitutional or illegal pursuant to the Civil Rights Act.[195] Writing for the majority, Justice Stevens applied rational basis review in addressing the claim. Specifically, he described Beazer's statistical argument as "weak," as the 81% statistic did not relate to methadone users specifically.[196] Moreover, the Court recognized the public safety interest in keeping narcotics users from working for the Authority.[197] 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."[198] The concern about over-inclusive laws is that they are unfair as they regulate where there is no need, and the more over-inclusive a law is the less likely it is to be regarded as rational. Here, 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.'"[199]

C. Statutes That Are Both Under-Inclusive and Over-Inclusive Are More Likely to Be Found Unconstitutional Pursuant to Rational Basis Review.

In some cases, the governmental action is both over- and under-inclusive. For example, in *United States Department of Agriculture v. Moreno*,[200] the Supreme Court addressed a federal statute that was both over- and under-inclusive.

In *Moreno*, Jacinta Moreno lived with Ermina Sanchez along with Sanchez's three children even though they were unrelated. Sanchez provided care to Moreno, who contributed to household living expenses.[201] Moreno satisfied the income requirements for the federal food stamp program but was denied pursuant

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194 *See id.* at 576, n.10.

195 *See id.* at 589–93.

196 *See id.* at 584–87.

197 *See id.* at 592.

198 *See id.* at 590.

199 Ross, *supra* note 171, at 2065 (citing Lindsley v. Nat. 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) (discussing *Beazer*).

200 413 U.S. 528 (1973).

201 *See id.* at 531.

to a provision that prohibited households with unrelated members from receiving food stamp benefits.[202] Sanchez's food stamp benefits were also to be terminated.[203]

There were other families who filed suit as well. Sheilah Hejny was married with three kids and received food stamps.[204] They allowed a young woman with emotional problems to live with them but feared that if they continued to allow the young woman to live with them, they would lose their food stamps.[205] Similarly, Victoria Keppler and her daughter received food stamps.[206] The daughter was hearing impaired and needed to attend a special school, where they lived with another woman because the apartment was too expensive — thus jeopardizing all of their food stamps.[207]

Moreno and other households who were denied benefits pursuant to this provision challenged the statute in federal district court, which held that the provision violated the Due Process Clause of the Fifth Amendment. The Supreme Court addressed the argument by Moreno and Sanchez that Section 3 of the Food Stamp Act of 1964 violated the equal protection component of the Due Process Clause of the Fifth Amendment.[208]

In *Moreno*, Section 3 was under-inclusive because other people will commit food stamp fraud who do not reside in the same household. At the same time, the statute was over-inclusive because many households with unrelated people would not commit such fraud. 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 as amended violated the Fifth Amendment in creating two types of households—one in which all members were related and one in which at least one member was unrelated.[209] The Court acknowledged the congressional interest in preventing abuse of the Food Stamp

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202 *See id.*

203 *See id.*

204 *See id.* at 532.

205 *See id.*

206 *See id.*

207 *See id.*

208 *See id.* at 533–38.

209 *See id.* at 537–38.

program.[210] However, the statute did not fulfill the stated congressional purpose of preventing "hippies" and "hippie communes" from enrolling in the food stamp program.[211] Additionally, there existed other measures within the Food Stamp Act that were specifically aimed at preventing abuse of the program.[212] 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.[213]

The law was both so over-inclusive and under-inclusive that it was irrational to such a degree that the Supreme Court concluded that it violated the Constitution. Consequently, the more one can show that governmental action is over-inclusive and under-inclusive, the more one is likely to demonstrate that it is arbitrary and irrational.

In *Romer v. Evans*,[214] the Supreme Court addressed another case in which the regulation was both over- and under-inclusive. 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."[215] Following a lawsuit, the state trial court entered a permanent injunction enjoining Amendment 2's enforcement. The Colorado Supreme Court affirmed on appeal.[216]

The Supreme Court held that Amendment 2 of the Colorado State Constitution violated the equal protection clause.[217] 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.[218]

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210 *See id.* at 536–37.

211 *See id.* at 537–38.

212 *See id.* at 535–36.

213 *See id.* at 537.

214 517 U.S. 620 (1996).

215 *See id.* at 624–25.

216 *See id.* at 626.

217 *See id.* at 635-36.

218 *See id.* at 624.

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."[219] The Supreme Court held Amendment 2, by depriving persons of equal protection under the law due to their sexual orientation, failed to advance such a legitimate interest.[220] "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."[221]

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."[222] 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."[223]

V. Rational Basis Review and the Trump Travel Bans

As the decisions in both *Moreno* and *Romer* establish, when a governmental statute or regulation are "both over-inclusive and under-inclusive, . . . one might conclude that the legislature has performed an irrational act."[224] 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?"[225]

A. The Travel Bans are Under-Inclusive.

President Trump's second travel ban is under-inclusive because it targets every national from Iran, Libya, Somalia, Sudan, Syria, and Yemen but ignores all

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219 *See id.* at 632.

220 *See id.* at 635.

221 *Id.* at 634.

222 *Id.* at 633.

223 Dodson, *supra* note 199, at 288–89 (discussing *Romer*).

224 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'r, 330 U.S. 552 (1946)).

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

other potential sources of threats to the national security. The first travel ban explicitly listed the terrorist attack on September 11, 2001, as a reason to enhance security in the visa application process. This justification ignores the fact that both the Bush and Obama administrations had taken measures to enhance such security. Furthermore, there are no incidents of refugees from any country killing anyone in the United States in a terrorist attack.[226]

More important for our discussion of under-inclusivity is that President Trump's second travel ban ignores potential terrorists entering the United States via the visa application process from some other significant countries. For example, the travel ban does not exclude nationals from Saudi Arabia, Egypt, Lebanon, or United Arab Emirates. Those four countries are significant because the September 11 attackers were nationals from these four countries. Specifically, there were fifteen different Saudi nationals on the four airplanes hijacked that day.[227] Mohammed Atta, the leader of the terrorist hijackers, was an Egyptian national who served as a pilot on American Airlines Flight 11 that hit the World Trade Center.[228] Two of these terrorists were from the United Arab Emirates and participated in the hijacking of United Airlines Flight 175 that also hit the World Trade Center.[229] Ziad Jarrah, a Lebanese national, piloted the hijacked United Airlines Flight 93 that crashed in Shanksville, Pennsylvania.[230]

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[226] *See* Eric Levenson, *How Many Fatal Terror Attacks Have Refugees Carried Out in the US? None*, CNN, (Jan. 29, 2017), 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, a few months later, on November 28, 2016, Abdul Razak Ali Artan was a refugee from Somalia who drove a Honda Civic through a crowd on the campus of Ohio State University in Columbus. *See* Mitch Smith, Rukmini Callimachi, & Richard Perez-Pena, *ISIS Calls Ohio State University Attack a 'Soldier'*, N.Y. TIMES, (Nov. 29, 2016), https://www.nytimes.com/2016/11/29/us/ohio-state-university-abdul-artan-islamic-state.html. *See id.* He then got out of his car wielding a butcher knife. Although thirteen people were injured, the only fatality was Artan himself who was shot by a campus police officer. *See id.*

[227] *September 11th Hijackers Fast Facts*, CNN, (Sept. 5, 2016), http://www.cnn.com/2013/07/27/us/september-11th-hijackers-fast-facts/index.html.

[228] John Hooper, *The Shy, Caring, Deadly Fanatic*, THE GUARDIAN, (Sept. 23, 2001), https://www.theguardian.com/world/2001/sep/23/september11.education.

[229] Rich Phillips, *American Who Trained al Qaeda Pilots Still Wonders, 'Why Me?'*, CNN, (May 4, 2011), http://www.cnn.com/2011/US/05/03/al.qaeda.flight.school/index.html.

[230] 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.

The September 11 attack was committed by members of al-Qaeda, which was founded and led by Osama bin Laden, a Saudi national. Moreover, bin Laden received shelter in Afghanistan when Mullah Muhammed Omar was the leader of the Taliban that controlled the country.[231] Finally, the mastermind of the 9/11 attacks was reported to be Khalid Sheikh Mohammed, who is a Pakistani national, held on terrorism charges at the Guantanamo Bay detention center.[232] Yet neither of Trump's travel bans address nationals from Saudi Arabia, Afghanistan, or Pakistan.

On April 15, 2013, Tamerlan Tsarnaev and his brother Dzhokhar Tsarnaev planted bombs on the route of the Boston Marathon that killed three people and injured 280.[233] Four days after the bombing, Tamerlan was killed in a shootout with police.[234] Dzhokhar escaped but was subsequently apprehended and charged with several federal offenses for which he received the death penalty after a trial.[235] He was born in Kyrgyzstan and was ethnically Chechen, but came to the United States in 2002 where his family had claimed asylum.[236] He became a United States citizens in 2012.[237] The travel ban does not apply to anyone from the former Soviet Union.

Similarly, Tashfeen Malik was a Pakistani national who immigrated to the United States to marry Syed Rizwan Farook.[238] Together, they killed fourteen

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231 *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.

232 *Khalid Sheikh Mohammed Fast Facts*, CNN (Dec. 22, 2016), http://www.cnn.com/2013/02/03/world/meast/khalid-sheikh-mohammed-fast-facts/index.html.

233 Milton J. Valencia, *In Gripping Testimony, Carnage in Marathon Attacks is Recalled, Boston Globe*, (Mar. 5, 2015), https://www.bostonglobe.com/metro/2015/03/05/more-bombing-survivors-expected-testify-tsarnaev-trial/t06u2dvauhQDHyMwuPpCAN/story.html.

234 *See id.*

235 *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.

236 Peter Finn, Carol D. Leonnig, & Will Englund, *Tsarnaev Brothers' Homeland Was War-Torn Chechnya*, WASHINGTON 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.

237 *See id.*

238 Brian Bennett, *San Bernardino Shooter Tashfeen Malik Said She Was Pregnant When She Sought U.S. Green Card*, LOS ANGELES TIMES, (Dec. 28, 2015), http://www.latimes.com/nation/nationnow/la-na-san-bernardino-shooting-malik-pregnant-20151228-story.html.

people at his workplace in San Bernardino, California, in December 2015.[239] Prior to immigrating to the United States, she had conversations with Farook about jihad "on an online messaging platform, as well as emails and communications on a dating site."[240] Before launching the attack on the workplace, Malik declared her allegiance to ISIS.[241] Nonetheless, the travel bans would not have impacted Malik as a Pakistani.

Furthermore, President Trump's second travel ban does not apply to Kuwaitis. On July 16, 2016, Muhammed Youssef Abdulazeez killed five Marines in attacks in Chattanooga, Tennessee, at a recruiting center and a naval reserve center.[242] Police officers shot and killed him at the naval reserve center building. Abdulazeez was born in Kuwait to parents of Palestinian descent, but immigrated to the United States when he was six years old and became an American citizen when he was thirteen.[243] FBI director James Comey characterized the attack as "motivated by foreign terrorist organization propaganda."[244] The travel ban does not apply to people born in Kuwait.

On September 23, 2016, Arcan Cetin, who emigrated from Turkey as a child with his family, shot and killed five people at a mall in Burlington, Washington.[245] In online activity, Cetin had praised the leader of ISIS.[246] While in jail pending a

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239 *See* Brian Owsley, *Lavabitten*, 119 W. VA. L. REV. 941, 948-49 (2017).

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

241 *See* Owsley, *supra* note 239, at 949.

242 *See* Amanda Holpuch & Alan Yuhas, *Mohammad Youssuf Abdualzeez: Everything We Know About the Chattanooga Gunman*, THE GUARDIAN, (July 17, 2015).

243 *See* Craig Whitlock & Carol D. Leonnig, *Chattanooga Gunman Came from a Middle-Class Muslim Family*, WASHINGTON POST, (July 16, 2015), https://www.washingtonpost.com/world/national-security/chattanooga-shooter-came-from-middle-class-muslim-family/2015/07/16/815c39c2-2c04-11e5-bd33-395c05608059_story.html?utm_term=.fd1c6fee04e6.

244 Kristina Sgueglia, *Chattanooga Shootings 'Inspired' by Terrorists, FBI Chief Says*, CNN, (Dec. 16, 2015), http://www.cnn.com/2015/12/16/us/chattanooga-shooting-terrorist-inspiration/index.html.

245 *See* Jody Allard, M.L. Lyke, & Amy Wang, *Washington Mall Shooting Suspect Confesses to Killings*, WASHINGTON POST, (Sept. 26, 2016), 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=.fddbb77e84e0.

246 Charles Kurzman, *Muslim-American Involvement with Violent Extremism, 2016*, TRIANGLE CTR. ON TERRORISM & HOMELAND SEC., at 6, (Jan. 26, 2016), https://sites.duke.edu/tcths/

determination of his competency to stand trial, he committed suicide.[247] As with other terrorist attackers, the travel ban does not apply to people born in Turkey.

There were also notable terrorist attacks before those on September 11, 2001. For example, terrorists previously attacked the World Trade Center.[248] On February 26, 1993, Ramzi Yousef was involved in an attack on the World Trade Center in which terrorists rented a van and loaded it with explosives.[249] The van was parked in the basement garage and then detonated. This attack killed six people and injured over 1,000.[250] Yousef was born in Kuwait to a father of Pakistani descent and a mother of Palestinian descent.[251] He was convicted of murder and conspiracy to murder, receiving a sentence of life with no possibility of parole plus 240 years.[252] He is currently in prison at the Supermax federal facility in Florence, Colorado.

Omar Abdel-Rahman was a blind Muslim cleric who was born in Egypt.[253] He entered the United States on a tourist visa even though he was on a terrorist watch list.[254] He settled into New York where he preached to a group of Muslims who became radicalized.[255] He was convicted of conspiracy in the 1993 World Trade Center bombing and was sentenced to life plus fifteen years for that and other offenses.[256] He died in February 2017 in the federal medical center in Butner, North Carolina.[257]

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files/2017/01/FINAL_Kurzman_Muslim-American_Involvement_in_Violent_Extremism_2016.pdf.

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

248 *See e.g.* United States v. Yousef, 327 F.3d 56 (2d Cir. 2003).

249 *See id*. at 78–79.

250 *See id.* at 79.

251 *See* Mitchell D. Silber, The Al Qaeda Factor: Plots Against the West 174 (2011); Dennis Piszkiewicz, Terrorism's War with Amercia: A History 95 (2003).

252 *See id.* at 80.

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

254 *See id.*

255 *See id.*

256 *See generally* United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) (per curiam).

257 *See* Trott, *supra* note 253.

Not only are there examples of terrorist attacks resulting in loss of life, but there are examples of failed attempts as well. For example, on December 22, 2001, just months after the September 11 attack, Richard Reid attempted to blow up American Airlines Flight 63, bound from Paris to Miami, with a bomb in his shoes.[258] Passengers prevented his efforts, subduing him until the plane landed in Boston where he was arrested.[259] Reid, who became known as the shoe bomber, was a British citizen who converted to Islam at his father's suggestion. He pled guilty in federal court and received several life sentences and is currently incarcerated at the Supermax federal facility in Florence, Colorado.[260] As a citizen of the United Kingdom, the travel ban would not have applied to him.

On December 25, 2009, Umar Farouk Abdulmutallab, a Nigerian national, attempted to blow up Northwest Flight 253, bound from Amsterdam to Detroit, by detonating plastic explosives that he had hidden in his underwear.[261] He attempted to detonate this explosive as the airplane approached Detroit, causing noises and a burning odor.[262] Passengers noticed that his pants and the airplane near him were on fire.[263] They subdued him and put out the fire until the airplane landed.[264] Abdulmutallab pled guilty to attempted murder of 289 people as well as attempted use of a weapon of mass destruction.[265] He received four life sentences plus fifty years and is currently incarcerated at the Supermax federal facility in Florence, Colorado.[266] The travel ban does not apply to people born in Nigeria.

On May 1, 2010, Faisal Shahzad attempted to detonate a car bomb in New York City's Times Square.[267] He pled guilty to a ten-count indictment and received

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258 *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).

259 Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism"*, 1 J. NAT'L SECURITY L. & POL'Y 285, 324–25 (2006).

260 *See United States v. 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).

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

262 *See id.* at 895.

263 *See* Gregory S. McNeal, *Security Scanners in Comparative Perspective*, 22 HEALTH MATRIX 461, 463-64 (2013).

264 *See id.* at 464.

265 *See United States v. Abdulmutallab*, 739 F.3d at 898.

266 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.

267 *See* Kendall Coffey, *The Lone Wolf – Solo Terrorism and the Challenge of Preventative Prosecution*, 7 FIU L. REV. 1, 9-10 (2011).

a sentence of life in prison without parole and is currently in prison at the Supermax federal facility in Florence, Colorado.[268] Shahzad was born in Pakistan, but eventually entered the United States to study. He became an American citizen after marrying an American woman of Pakistani descent.[269]

On September 17, 2016, a pressure cooker bomb filled with shrapnel exploded in New York City, injuring 31 people.[270] That same day, a pipe bomb exploded in Seaside Park, New Jersey, but did not injure anyone.[271] Ultimately, police in New Jersey apprehended Ahmad Khan Rahimi, charging him with federal and state charges for both bombings pending trial.[272] Rahimi is a naturalized American citizen who was born in Afghanistan and immigrated to the United States when he was twelve years old.[273]

On September 17, 2016, Dahir Adan attacked people at a St. Cloud, Minnesota shopping mall with two steak knives.[274] Although ten people were injured, the only fatality was Adan himself who was shot by an off-duty police officer.[275] Although Adan was of Somali descent, he was actually born in Kenya before moving to the United States on a refugee visa and ultimately becoming an American citizen.[276] Again, the travel bans would not have excluded Adan.

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268 *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.

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

270 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.

271 *See id.*

272 *See id.*

273 *See id.*

274 Abigail Hauslohner & Drew Harwell, *An Unassuming Life Before a Suspect's Rampage in a Minnesota Mall*, WASHINGTON POST, (Sept. 19, 2016), https://www.washingtonpost.com/business/economy/an-unassuming-life-before-a-suspects-rampage-in-a-minnesota-mall/2016/09/19/f2a608f0-7e7a-11e6-9070-5c4905bf40dc_story.html?utm_term=.bc3c1f34229e.

275 *See id.*

276 *See id.*

B. The Travel Bans are Over-Inclusive

Similarly, the second travel ban is over-inclusive because it targets every national from Iran, Libya, Somalia, Sudan, Syria, and Yemen regardless of their personal circumstances. In other words, young children and babies would be viewed the same as young men from those countries. Similarly, the elderly would also be viewed the same as young men from those countries. Moreover, most of the young men from those countries seeking to enter the United States would not have any terroristic intentions. Specifically, the travel ban would exclude people who do not need to be excluded in the interest of national security.

For example, Ilhan Omar was born in Somalia before fleeing the country when she was eight years old.[277] After spending several years in a Kenyan refugee camp, she immigrated to the United States.[278] Currently, she serves in the Minnesota House of Representatives and was elected on the Democratic-Farmer-Labor Party.[279]

In 2014, Maryam Mirzakhani, a professor of mathematics at Stanford University, became the first woman to win the most prestigious Fields Medal.[280] She was born and raised in Iran, where she attended university before earning her Ph.D. from Harvard University.[281]

Poet and translator Khaled Mattawa was named a MacArthur Fellow, known as the genius fellowship, for his work.[282] Mattawa, who also teaches at the University of Michigan, previously earned a Guggenheim Foundation

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277 *See* Doualy Xaykaothao, *Somali Refugee Makes History in U.S. Election*, NPR, (Nov. 10, 2016), http://www.npr.org/sections/goatsandsoda/2016/11/10/501468031/somali-refugee-makes-history-in-u-s-election; *see also Meet Ilhan*, https://www.ilhanomar.com/bio/ (last visited Nov. 19, 2017).

278 *Supra* note 277.

279 *Supra* note 277.

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

281 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.

282 Carolyn Kellogg, *MacArthur Fellows include Alison Bechdel, Terrance Hayes*, L.A. TIMES, (Sept. 17, 2014), http://www.latimes.com/books/jacketcopy/la-et-jc-macarthur-fellows-alison-bechdel-terrance-hayes-20140916-story.html; *Khaled Mattawa*, MACARTHUR FOUND., https://www.macfound.org/fellows/922/ (last visited Nov. 21, 2017).

fellowship.[283] He was originally born in Benghazi, Libya, and moved to the United States as a teenager.[284]

Professor Abdullahi Ahmed An-Na'im is "an internationally recognized scholar of Islam and human rights and human rights in cross-cultural perspectives" who is currently the Charles Howard Candler Professor of Law at Emory University.[285] He was born and educated at the University of Khartoum.

These are just some examples of people who have come from the countries targeted in the travel ban. More important, there are countless people living in the United States who were born in one of these countries who today are making contributions big and small in their communities. These people would have been excluded from entry based on the travel bans.

VI. The Third Time Has Not Proven to be the Charm for Travel Bans.

With the third travel ban still currently pending before the courts, there is much discussion about statutory interpretation of the Immigration and Nationality Act, the First Amendment and religious discrimination, and various procedural matters. Indeed, many of these issues have already been extensively addressed in various judicial decisions. Recently, the Supreme Court has allowed the travel ban to go into effect while the cases are litigated. Of course, this is a third iteration that has been reduced in its scope and stridency in the two previous versions. Nonetheless, rational basis review offers a viable approach to solving these cases.

In the Ninth Circuit's *Hawaii v. Trump* decision, the court alluded to the irrational manner in which the travel bans are both over-inclusive and under-inclusive. In discussing the second executive order, it noted:

> 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

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283 *See Khaled Mattawa*, POETRY FOUND., https://www.poetryfoundation.org/poets/khaled-mattawa (last visited Nov. 21, 2017); MACARTHUR FOUND., *supra* note 282.

284 *See* POETRY FOUND., *supra* note 283.

285 *See Abdullahi Ahmed An-Na'im*, EMORY UNIV. SCH. LAW, http://law.emory.edu/faculty-and-scholarship/faculty-profiles/annaim-profile.html (last visited Nov. 21, 2017).

> of nationals from the six designated countries under current protocols would be detrimental to the interests of the United States.[286]

Although the court does not specifically discuss rational basis review or the case law regarding that test, there is an echo of the Supreme Court's reasoning in that analysis.

As has been demonstrated, the travel bans are over-inclusive and under-inclusive. Various commentators have indicated that if the goal is making the United States safer from terrorist attacks, then it makes no sense to ignore the significant threats posed by countries like Afghanistan, Egypt, Pakistan, and Saudi Arabia.[287] Applicants should be assessed on their individual merits as opposed to their nationality, and that goes for people from Pakistan and Saudi Arabia as much as it goes for people from Syria and Iran. The Ninth Circuit made a similar argument based on under-inclusivity: "[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."[288] 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.[289] Specifically, "'country of citizenship is unlikely to be a reliable indicator of potential terrorist activity.'"[290]

The second travel ban failed to address a number of countries from which terrorists have come to the United States and engaged in terroristic acts. Moreover, it would potentially exclude countless well-meaning people 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

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

287 *See* Shamil Shams, *Trump's Travel Ban 'Makes No Sense' Without Pakistan and S. Arabia*, DEUCTHES WELLE, (Mar. 1, 2017), http://www.dw.com/en/trumps-travel-ban-makes-no-sense-without-pakistan-and-s-arabia/a-37326532; Aryeh Neier, *Saudi Arabia and Egypt Are Excluded from Trump's Ban. Why?*, THE GUARDIAN, (Jan. 30, 2017), https://www.theguardian.com/commentisgree/2017/jan/30/saudi-arabia-egypt-excluded-from-trumps-ban.

288 *Hawaii v. Trump*, 859 F.3d at 772.

289 *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.

290 *Id.*

countries, it appears that the travel ban is both widely over- and under-inclusive. Consequently, an application of *Moreno* and *Romer* would lead to the conclusion that the travel ban is unconstitutional as it cannot satisfy the rational basis test.

The legal analysis is not appreciably altered by the most recent travel ban.[291] Indeed, the third travel ban is in some ways tailored to account for the significant deficiencies in the first two travel bans. Moreover, the third travel ban has not fared well in court either.[292] It still excludes people in seemingly irrational ways. It still targets countries with predominantly Muslim populations as five of the seven countries, including Chad,[293] fall into that category.[294] Moreover, it still also targets Somalia,[295] even though that country is not among the original seven, and its nationals are subject to the ban on its nationals as immigrants and as non-immigrants.

Although the limits on Venezuelan nationals are very narrowly tailored to certain governmental officials and their family members,[296] it is unclear how that will prevent terrorism in the United States in light of the dearth of attacks here by Venezuelan nationals. Indeed, there do not appear to be any.

Similarly, the travel ban on North Korean nationals[297] seems to be a solution in search of a problem as almost no North Koreans come to the United States either as immigrants or as non-immigrants.[298] Indeed, in the ten-year period after the enactment of the North Korean Human Rights Act of 2004, only about 186 North

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[291] Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

[292] *See generally* Int'l Refugee Assistance Project v. Trump, _ F.3d _, 2018 WL 894413 (4th Cir. Feb. 23, 2018) (holding that both the organization and individual plaintiffs could challenge the travel ban based on the First Amendment's Establishment Clause and that a nationwide preliminary injunction for individuals who had a bona fide relationship was justified).

[293] The United States Department of State reports that Muslims comprise about 58% of Chad's population. *See* U.S. STATE DEP'T, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2016: CHAD, https://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper.

[294] *See supra* note 291, at 45165.

[295] *See id.* at 45167.

[296] *See id.* at 45166.

[297] *See id.*

[298] *See* Emily Rauhala, *Almost No North Koreans Travel to the U.S., So Why Ban Them?*, WASHINGTON 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?utm_term=.b82a20e88f8b.

Koreans emigrated to the United States as refugees.[299] Including North Koreans in the travel ban is not necessarily rational, unless as with Venezuela, the goal is to give the appearance that non-Muslim countries are also being targeted.

Conclusion

When courts review policies or statutes that are both over- and under-inclusive, it appears that there is some impermissible ulterior motive based on animus. In other words, when a policy or statute is both over- and under-inclusive, there is a clear indication that the governmental action is arbitrary and capricious, leading to a determination that the action is irrational and thus constitutionally invalid. However, there is more, in that the governmental action is motivated by impermissible animus and fear. In *Moreno*, the federal law's animus was based against 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 that if a statute is arbitrary and capricious, courts should find it unconstitutional. Here, the travel bans are irrational because they are over- and under-inclusive.

[299] Keegan Hamilton, *How a 19-Year-Old North Korean Escaped and Became a Sushi Chef in America*, VICE NEWS, (Oct. 8, 2015), https://news.vice.com/article/how-a-19-year-old-north-korean-escaped-and-became-a-sushi-chef-in-america.