

Examining *Trump v. Hawaii*: Moving Forward in Light of the Supreme Court’s Adverse Holding on the Muslim Ban

KARMA ORFALY*

TABLE OF CONTENTS

INTRODUCTION	42
I. BACKGROUND	42
A. <i>Trump’s Rhetoric Demonstrates Religious Animus</i>	42
B. <i>The Muslim Bans</i>	46
1. Muslim Ban 1.0: Blatant Discrimination Against Muslims	46
2. Muslim Ban 2.0: A Watered-Down Version of Muslim Ban 1.0	48
3. Muslim Ban 3.0: A Further Sanitized Version of Muslim Ban 1.0	49
II. AN ADVERSE HOLDING	50
A. <i>The Supreme Court’s Majority Decision on Muslim Ban 3.0 Incorrectly Held that the Ban Did Not Violate the First Amendment’s Establishment Clause</i>	50
B. <i>The Dissent Correctly Characterized Trump’s Executive Order as a Muslim Ban and Argued it Violated the First Amendment’s Establishment Clause</i>	52
III. RAMIFICATIONS	53
A. <i>The Separation of Families Runs Contrary to Both International Human Rights Norms and the Fourteenth Amendment Due Process Clause</i>	53
B. <i>The Muslim Ban’s Waiver Process is Merely Window Dressing that Creates an Illusion of Discretion and Nothing More</i>	55
C. <i>Fearmongering as a Scare Tactic on the Campaign Trail and Through the Muslim Ban Creates a Greater Risk that the Number of Hate Crimes in the United States will Further Increase</i>	57
IV. <i>EMAMI V. NEILSEN, AN EFFECTIVE FIRST STEP FOR PUSHING BACK AGAINST AN ADVERSE HOLDING</i>	57
A. <i>Muslim Advocate’s Pending Litigation, Emami v. Nielson, Serves as an Effective First Step for Pushing Back Against an Adverse Holding on the Muslim Ban</i>	58
CONCLUSION	60

* Administrative Editor, GEO. J. L. & MOD. CRIT. RACE PERSP. (Vol. 11); J.D., Georgetown University Law Center (2019); B.A., Southern Methodist University (2015). © 2020, Karma Orfaly.

INTRODUCTION

The following analysis dissects the Supreme Court's recent decision in *Trump v. Hawaii*, which held that the Muslim ban was not a violation of the First Amendment's Establishment Clause. The analysis begins in Part I with a discussion of President Donald Trump's Islamophobic rhetoric, shedding light on the events leading up to the ban and providing context for why I choose to refer to Trump's executive orders as the *Muslim* ban, rather than *travel* ban.

Part II addresses the original Muslim ban, the subsequent watered-down versions of the ban, and the rationale used by federal courts in blocking it from taking effect.

Part III discusses the Supreme Court's adverse holding in *Trump v. Hawaii*, highlighting both the majority and the dissent's reasoning.

Part IV addresses the ramifications of the Muslim bans—the direct impact on foreigners from the banned countries and their American family members. Part IV also addresses why the waiver process—a major reason why the Supreme Court majority upheld the ban—is merely a superficial attempt at backtracking from blatant discrimination, and one that in practice, presents no meaningful alteration from the original ban. Further, Part IV discusses the impact of the 2016 election cycle on the increase of hate crimes in 2017 and the effect that the Muslim ban could have on the number of hate crimes in the future.

Part V addresses current and potential pushback against the Supreme Court's adverse holding, including Muslim Advocate's¹ challenge to the waiver process in *Emami v. Nielsen*. These potential actions are simply necessary first steps in undoing the effects of the Muslim ban. They are in no way comprehensive.

I. BACKGROUND

A. *Trump's Rhetoric Demonstrates Religious Animus*

On August 12, 2008, the late-Senator John McCain spoke at a town hall meeting in the Toyota Arena in York, Pennsylvania.² There, a woman approached McCain and took his microphone: "I can't trust Obama. I have read about him, and he's not, he's not – he's an Arab."³ Immediately, McCain shook his head.⁴ He then took the microphone from the woman while shaking his head and said, "No ma'am. He's a decent family man, a citizen that I just happen to have disagreements with on fundamental issues, and that's what this campaign is all about."⁵ During the 2008 presidential campaign, there was widespread xenophobia and Islamophobia surrounding President Obama; baseless rumors circulated among some in the country that he was a socialist Muslim, that he was an Arab and that he did not have a U.S. birth

1. Muslim Advocates is a legal advocacy organization working against bigotry. See *Home Page*, MUSLIM ADVOCATES, <https://www.muslimadvocates.org/> [<https://perma.cc/WG4W-XUAA>].

2. Lisa Marie Segarra, *Watch John McCain Strongly Defend Barack Obama During the 2008 Campaign*, TIME (Aug. 25, 2018, 11:05 AM), <http://time.com/4866404/john-mccain-barack-obama-arab-cancer/> [<https://perma.cc/UTH4-4CK2>].

3. *Id.*

4. *Id.*

5. *Id.*

certificate.⁶ In fact, at this same town hall, when Senator McCain urged that Obama was “a decent person that [the crowd did] not have to be scared of as President,” some people in the crowd booed.⁷ Senator McCain did not use fear-mongering in this instance to win votes.⁸

Donald Trump behaved quite differently during an early campaign rally in New Hampshire. When a rally attendee stated unequivocally into a microphone: “We have a problem in this country. It’s called Muslims,”⁹ Trump nodded.¹⁰ The attendee continued, “We know our current President is one. You know he’s not even an American.”¹¹ Trump interrupted, *laughing*, and said, “We need this question. This is the first question.”¹² The man continued, “But anyway, we have training camps . . . where they [Muslims] want to kill us.”¹³ “Uh-huh,” Trump said.¹⁴ “That’s my question. *When can we can we get rid of them?*”¹⁵ Trump responded, “We’re going to be looking at a lot of different things. You know, a lot of people are saying that, and a lot of people are saying that bad things are happening out there. We’re going to look at that and plenty of other things.”¹⁶

That moment was an opportunity for then-candidate Trump to address the Islamophobia dripping from the individual’s question and to demonstrate leadership, as Senator McCain did.¹⁷ Instead, Trump used this moment as the first of many to capitalize on unwarranted fears of his voter base and to eventually win the 2016 presidential election.

Despite such Islamophobic rhetoric plaguing his campaign from the very beginning, Trump often denied that his Executive Order was a flat-out Muslim ban. However, in addition to the above instance, which kicked off the beginning of his Islamophobic campaign, plenty of egregious moments indicate otherwise. For example, on September 30, 2015, Trump pledged to remove all Syrian refugees (the majority of whom are Muslims) from the country, stating, “They could be ISIS, I don’t

6. Donald Trump was one of the highest profile birther conspiracy theorists back in 2011, maintaining the racist doubt that President Obama was not born in the United States until at least 2015. See Andrew Prokop, *Trump Fanned a Conspiracy About Obama’s Birthplace for Years. Now He Pretends Clinton Started It*, VOX (Sept. 16, 2016), <https://www.vox.com/2016/9/16/12938066/donald-trump-obama-birth-certificate-birther> [https://perma.cc/HYV3-BXW9].

7. See Segarra, *supra* note 2.

8. See *id.*

9. Jenna Johnson, *Trump Doesn’t Correct Rally Attendee Who Says Obama Is Muslim and “Not Even an American,”* WASH. POST (Sept. 17, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/09/17/trump-doesnt-correct-rally-attendee-who-says-obama-is-muslim-and-not-even-an-american/> [https://perma.cc/7PNX-DQYK].

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* (ellipses original).

14. *Id.*

15. *Id.* (emphasis added).

16. *Id.*

17. Some may note McCain’s response at the town hall insufficiently addressed the Islamophobia. This is a valid argument. Even so, McCain’s response was at least an attempt, albeit not a perfect one, to shut down the racist rhetoric.

know. This could be one of the great tactical ploys of all time. A 200,000-man army, maybe.”¹⁸

On November 16, 2015, after the horrific terrorist attacks in Paris, Trump stated during an interview with MSNBC’s “Morning Joe” that he would “strongly consider” shutting down some mosques.¹⁹ He proclaimed, “I would hate to do it, but it’s something that you’re going to have to strongly consider because some of the ideas and some of the hatred—the absolute hatred—is coming from these areas.”²⁰ A few days later, at an Alabama rally, Trump stated that on September 11, 2001, he “watched when the World Trade Center came tumbling down. And [he] watched in Jersey City, N.J., where thousands and thousands of people were cheering as that building was coming down.”²¹ The following day, he did not back down, stating, “It was well-covered at the time. There were people over in New Jersey that were watching it, a heavy Arab population, that were cheering as the buildings came down. Not good.”²² However, there is no evidence of such celebration on U.S. soil on that tragic day.²³ But facts did not matter for listeners who already had been convinced that Obama was secretly an Arab or a Muslim. Trump knew that. Such rhetoric set the stage for his call for a “complete shutdown of Muslims entering the United States” on December 7, 2015.²⁴

Later that day, Trump released a campaign statement, which included polls showing that a sizable segment of the global Muslim population had “great hatred towards Americans.”²⁵ At a rally in Mount Pleasant, South Carolina, Trump pointed to the statement and asked the crowd, “Should I read you the statement?”²⁶ The crowd cheered.²⁷ Trump stated, “Donald J. Trump is calling for a total and complete

18. Jenna Johnson & Abigail Hauslohner, “*I Think Islam Hates Us: A Timeline of Trump’s Comments About Islam and Muslims*,” WASH. POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/> [<https://perma.cc/EHW8-X4A4>].

19. Rebecca Shabad, *Trump: U.S. Should “Strongly Consider” Shutting down Mosques*, CBS NEWS (Nov. 16, 2015, 11:10 AM), <https://www.cbsnews.com/news/trump-u-s-should-strongly-consider-shutting-down-mosques/> [<https://perma.cc/9GD7-GJ57>].

20. Jenna Johnson, *Donald Trump Would “Strongly Consider” Closing Some Mosques in the United States*, WASH. POST (Nov. 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states> [<https://perma.cc/N57M-GXSA>].

21. *Id.*

22. *Id.*

23. Glenn Kessler, *Trump’s Outrageous Claim that “Thousands” of New Jersey Muslims Celebrated the 9/11 Attacks*, WASH. POST (Nov. 22, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks> [<https://perma.cc/5YD8-4SFH>].

24. Jenna Johnson, *Trump Calls for “Total and Complete Shutdown of Muslims Entering the United States,”* WASH. POST (Dec. 7, 2015), <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> [<https://perma.cc/C65S-3ZXX>].

25. *Id.*

26. *Id.*

27. *Id.*

shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on."²⁸ The crowd erupted with applause.²⁹

On December 13, 2015, Trump was asked on Fox News whether his ban would apply to a Canadian businessman who is a Muslim. He responded: "There's a sickness. They're sick people. There's a sickness going on. There's a group of people that is very sick."³⁰

On February 3, 2016, Trump further spewed Islamophobic rhetoric on Fox News when he criticized President Obama for visiting a mosque in Baltimore, Maryland, stating: "Maybe he feels comfortable there . . . There are a lot of places he can go, and he chose a mosque."³¹ On February 20, 2016, he noted Obama's absence at Supreme Court Justice Antonin Scalia's funeral, stating: "I wonder if President Obama would have attended the funeral of Justice Scalia if it were held in a Mosque."³² That same night at a rally in North Charleston, South Carolina, Trump reiterated his support for waterboarding and enhanced interrogation techniques by telling the military fable about U.S. General John J. Pershing, who served during the Philippine-American War.³³ As the story goes, General Pershing caught fifty terrorists. He then had fifty of his men load guns with bullets dipped in pigs' blood. They shot forty-nine of the terrorists, but saved the last one so he could tell his people what happened.³⁴ As a result, that region no longer had an issue with terrorism.³⁵ During this speech, he never said the word "Muslim," but he did not need to; the crowd knew exactly what he was getting at, and at one point, Trump even clarified, saying, "There's a whole thing with swine and animals and pigs, and – you know the story, you know *they* don't like that."³⁶ This statement alluded to prohibition in the Islamic faith from consuming pork.

On March 9, 2016, Trump stated on CNN, "I think Islam hates us."³⁷ And on March 22, 2016 after three suicide bombings in Brussels, Trump stated, "We're having problems with the Muslims, and we're having problems with Muslims coming into the country," targeting both Muslim-Americans and Muslims abroad.³⁸ On March 23, 2016, in an interview with Bloomberg TV, he stated, "[Muslims] do not respect us at all."³⁹ The unabashed racism in Trump's statements is particularly frightening. The context for these statements only make the statements worse.

28. *Id.*

29. *Id.*

30. See Johnson & Hauslohner, *supra* note 18.

31. *Id.* (ellipses original).

32. *Id.*

33. Jenna Johnson & Jose A. DelReal, *Trump Tells Story About Killing Terrorists with Bullets Dipped in Pigs' Blood, Though There's No Proof of It*, WASH. POST (Feb. 20, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/20/trumps-story-about-killing-terrorists-with-bullets-dipped-in-pigs-blood-is-likely-not-true> [https://perma.cc/MX9F-JUBF].

34. *Id.*

35. *Id.*

36. *Id.* (emphasis added)

37. See Johnson & Hauslohner, *supra* note 18.

38. *Id.*

39. *Id.*

Trump continued to equivocate Islam and terrorism after the mass shooting at a gay nightclub in Orlando, Florida, by a man whose parents are Muslim-American immigrants from Afghanistan. After the shooting, Trump stated at a rally in North Carolina on June 14, 2016, “The children of Muslim-American parents, they’re responsible for a growing number . . . of terrorist attacks.”⁴⁰ Discussed below, these statements, in conjunction with the rhetoric highlighted by Justice Sotomayor’s dissent in *Trump v. Hawaii*, leave no doubt that religious animus motivated Trump’s Muslim bans.⁴¹

B. *The Muslim Bans*

1. Muslim Ban 1.0: Blatant Discrimination Against Muslims

On January 27, 2017—a mere week after his inauguration—Trump signed Executive Order 13769, titled *Protecting the Nation from Foreign Terrorist Entry into the United States*. The Order suspended the entry of nationals from eight Muslim-majority countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, Sudan, and Yemen, for ninety days.⁴² The Executive Order’s Purpose section stated, “the visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001.”⁴³ Trump has repeatedly used the tragedy of 9/11 for his own benefit.⁴⁴

The Purpose section also states, “In addition, the United States should not admit those who engage in acts of bigotry or hatred (including ‘honor’ killings, other forms of violence against women, or the persecution of those who practice religions different from their own).”⁴⁵ The reference to honor killings is another stereotype commonly lodged at Muslims. Muslims have repeatedly decried such practices, and most scholars from all Islamic sects state that there is absolutely no basis for such acts in the religion itself.⁴⁶

Trump also halted the entry of Syrian nationals as refugees because their entry was “detrimental to the interests of the United States.”⁴⁷ However, he left open exceptions for refugees on a case-by-case basis, “including when the person is a religious

40. *Id.*

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

42. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977-79 (Jan. 27, 2017) (citing the Immigration and Nationality Act (INA) § 217(a)(12), codified at 8 U.S.C. § 1187(a)(12)).

43. *Id.*; see also *Full text of Trump’s Executive Order on 7-Nation Ban, Refugee Suspension*, CNN (Jan. 28, 2017, 9:08 AM), <https://www.cnn.com/2017/01/28/politics/text-of-trump-executive-order-nation-ban-refugees/index.html> [https://perma.cc/Y6CX-33KA].

44. Paul Waldman, *Trump’s Long History of Lying About 9/11 and Exploiting It for Personal Gain*, WASH. POST (Sept. 11, 2018), <https://www.washingtonpost.com/blogs/plum-line/wp/2018/09/11/trumps-long-history-of-lying-about-9-11-and-exploiting-it-for-personal-gain> [https://perma.cc/9Z8B-H4YL].

45. See Exec. Order No. 13,769, 82 Fed. Reg. at 8977 (Jan. 27, 2017).

46. *Honor Killings*, N.Y. TIMES (Nov. 12, 2000), <https://www.nytimes.com/2000/11/12/opinion/honor-killings.html> [https://perma.cc/E369-8Z4T].

47. Exec. Order No. 13,769, 82 Fed. Reg. at 8979.

minority in his country of nationality facing religious persecution.”⁴⁸ In an interview with the Christian Broadcasting Network, Trump stated that Christians in Syria have been “horribly treated” and should be given priority as a result.⁴⁹ He stated:

If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair—everybody was persecuted, in all fairness—but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So, we are going to help them.⁵⁰

Such statements demonstrate a blatant religious preference. The Ninth Circuit characterized the chaos that ensued after Trump’s first Muslim ban as “immediate and widespread. It was reported that thousands of visas were immediately canceled. Hundreds of travelers with such visas were prevented from boarding airplanes bound for the United States or denied entry upon arrival. Some travelers were detained.”⁵¹

In response to Trump’s Muslim ban, on January 30, 2017, the states of Washington and Minnesota filed suit in the United States District Court for the Western District of Washington, challenging the Order’s constitutionality and legality.⁵² Specifically, the states’ concerns included the 90-day suspension of nationals from the eight enumerated countries, the 120-day suspension of the United States Refugee Admissions Program, and the indefinite entry of all Syrian refugees.⁵³ The states also challenged the prioritization of refugee claims based on religious persecution of minorities.⁵⁴ The district court entered a temporary restraining order, blocking the entry restrictions.⁵⁵ The federal Government then filed an emergency motion for a stay pending appeal.⁵⁶

In response, the Ninth Circuit held that the Government had not demonstrated that it was likely to succeed on appeal on its arguments about the states’ due process claims.⁵⁷ The court also noted “the serious nature of the allegations the States had

48. *Id.*

49. Daniel Burke, *Trump Says US Will Prioritize Christian Refugees*, CNN (Jan. 30, 2017, 11:28 AM), <https://www.cnn.com/2017/01/27/politics/trump-christian-refugees/index.html> [<https://perma.cc/FZB2-P4CE>].

50. *Id.*

51. Matt Zapposky, *7 Key Take-aways from the Court’s Ruling on Trump’s Immigration Order*, WASH. POST (Feb. 9, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/02/09/7-key-takeaways-from-the-courts-ruling-on-trumps-immigration-order> [<https://perma.cc/X55K-JDA2>].

52. *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017).

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.* at 1164. The Ninth Circuit applied the four-prong legal standard from *Nken v. Holder*, 556 U.S. 418, 434 (2009). *Id.* The Court explained that its decision would be guided by four questions: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* The Ninth Circuit focused its analysis on “[t]he first two factors . . . [which] are the most critical.” *Id.* The Ninth Circuit concluded the government had “failed to clear each of the first two critical steps” and that “the final two factors do not militate in favor of a stay.” *Id.*

57. *Id.*

raised with respect to their religious discrimination claims.”⁵⁸ The court found that the federal “[g]overnment ha[d] not shown what due process requires, such as notice and a hearing prior to restricting an individual’s ability to travel.”⁵⁹ The Government argued in response that “most or all of the individuals affected by the Executive Order have no rights under the Due Process Clause.”⁶⁰ The court rejected this argument, holding that “the procedural protections provided by the Fifth Amendment’s Due Process Clause are not limited to citizens. Rather they appl[y] to all persons within the United States, including aliens, regardless of whether their presence here is lawful, unlawful, temporary, or permanent.”⁶¹ With regards to the religious discrimination claim, the Court reserved consideration of the claims until the parties could fully brief the merits. However, it did note that “it is well established that evidence of purpose beyond the face of the challenged law [i.e., invidious discrimination] may be considered in evaluating Establishment and Equal Protection Clause claims.”⁶² Discrimination, as opposed to invidious discrimination, would later become a major argument before the Supreme Court.

2. Muslim Ban 2.0: A Watered-Down Version of Muslim Ban 1.0

On March 6, 2017, Trump signed Executive Order 13780,⁶³ referred to here as the Muslim ban 2.0. The revised Order contained notable differences from the first ban. Now, the Order included explanations for *six* of the designated countries in Muslim ban 1.0 as to “why their nationals continue to present heightened risks to the security of the United States.”⁶⁴ Nationals of Iraq were removed as a target of the Muslim ban as a “special case” due to “the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq’s commitment to combat ISIS.”⁶⁵ The new ban had other revisions as well. It exempted residents and current visa holders,⁶⁶ removed reference to the exception given to religious minorities,⁶⁷ and reversed an indefinite ban on Syrian refugees.⁶⁸ Muslim ban 2.0 replaced the indefinite ban with a 120-day freeze that requires review and renewal.⁶⁹

58. *Id.*

59. *Id.*

60. *Id.* at 1164-65.

61. *Id.* at 1165 (relying on *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)) (internal quotations omitted).

62. *Id.* at 1167 (relying on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)).

63. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

64. *Id.* at 13,210.

65. *Id.* at 13,211-12.

66. *Id.* at 13,213-14.

67. *See generally id.*

68. *Id.* at 13,212 (stating the ban on Syrian refugees is now “temporary”).

69. Glenn Thrush, *Trump’s New Travel Ban Blocks Migrants from Six Nations, Sparing Iraq*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html> [https://perma.cc/X9L7-MMZU].

Many considered this version of the Muslim ban to be a “watered-down ban” that was “meanspirited and un-American.”⁷⁰ Omar Jadwat, Director of the Immigrants’ Rights Project at the American Civil Liberties Union, stated: “This is [a] retreat, but let’s be clear—it’s just another run at a Muslim ban. . . . [T]hey can’t unring the bell.”⁷¹ The extent to which Muslim ban 2.0 sanitized some of the more controversial provisions of the first Muslim ban became the crux of the argument of whether the revised ban would pass constitutional muster.

3. Muslim Ban 3.0: A Further Sanitized Version of Muslim Ban 1.0

Donald Trump issued Proclamation No. 9645 on September 24, 2017, titled, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*.⁷² The Proclamation added Chad, North Korea and Venezuela to the list of banned countries and again left out Iraq, leaving six majority-Muslim nations on the list.⁷³ The Proclamation also included more individualized restrictions on travel based on the country of origin.⁷⁴ A district court in Maryland partially blocked this sanitized version of the Muslim ban.⁷⁵ In his ruling, Judge Chuang stated that he looked to Trump’s tweets in order to determine that the latest Proclamation was an “inextricable re-animation of the twice-enjoined Muslim ban” that Trump called for while on the campaign trail.⁷⁶ The district court’s reasoning—that Trump’s rhetoric is clear proof of religious animus—reappears in Justice Sotomayor’s dissenting opinion in *Trump v. Hawaii*.⁷⁷

Judge Chuang’s ruling came shortly after Judge Derrick K. Watson’s, a federal judge in Hawaii, who also partially blocked the Muslim ban 3.0.⁷⁸ Judge Watson (who blocked Muslim ban 2.0) wrote that the third version, like the two before it, “lacks sufficient findings that the entry of more than 150 million nationals from six specified countries would be ‘detrimental to the interests of the United States.’”⁷⁹ Analyzed below, the Supreme Court would disagree and subsequently uphold the ban.

70. *Id.*

71. *Id.*

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

73. *See id.* at 45,163; *see also* Joel Rose & Bill Chappell, *Federal Judge in Maryland Blocks Trump’s Latest Travel Ban Attempt*, NPR, (Oct. 18, 2017, 8:22 AM), <https://www.npr.org/sections/thetwo-way/2017/10/18/558501163/federal-judge-in-maryland-blocks-trumps-latest-travel-ban-attempt> [<https://perma.cc/CCX9-H5U4>].

74. 82 Fed. Reg. at 45,164-65.

75. *See* Rose & Chappell, *supra* note 73.

76. *Id.*

77. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2433-48 (2018) (Sotomayor, J., dissenting).

78. *See* Camila Domonoske & Richard Gonzales, *Federal Judge in Hawaii Blocks Trump’s Third Attempt at Travel Ban*, NPR (Oct. 17, 2017, 3:23 PM), <https://www.npr.org/sections/thetwo-way/2017/10/17/558354914/federal-judge-in-hawaii-blocks-trumps-third-attempt-at-travel-ban> [<https://perma.cc/S5VR-UUJD>].

79. *Id.*

II. AN ADVERSE HOLDING

A. The Supreme Court's Majority Decision on Muslim Ban 3.0 Incorrectly Held that the Ban Did Not Violate the First Amendment's Establishment Clause

The question before the Court was “whether the President had authority under the [Immigration and Nationality] Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.”⁸⁰ The analysis below focuses only on the Establishment Clause question. In short, the Court held that Trump’s most recent version of the Muslim ban does not violate the Establishment Clause.

The Court began by highlighting numerous examples of “statements by the President and his advisers casting doubt on the official objective of the Proclamation.”⁸¹ The majority mentioned Trump’s rhetoric while on the campaign trail, including a published “Statement on Preventing Muslim Immigration” on Trump’s campaign website, which 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.”⁸² The Court noted that this statement remained on the campaign website until May of 2017.⁸³ The Court further noted that Trump has stated “Islam hates us” and that the United States “[had] problems with Muslims coming into the country.”⁸⁴ Additionally, the Court noted that in a television interview, former New York City Mayor Rudy Giuliani, explained that when the President “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”⁸⁵ Giuliani stated that Members of Congress and lawyers were brought together and “focused on, instead of religion, danger . . . on places where there [is] substantial evidence that people are sending terrorists into our country.”⁸⁶

The Court continued, noting that the President “[m]ore recently, on November 29, 2017 . . . retweeted links to three anti-Muslim propaganda videos.”⁸⁷ The Court further cited examples of Presidents espousing principles of religious freedom and tolerance in this country. The court cited George Washington speaking to the Hebrew Congregation of Newport, Rhode Island, in 1790 that “happily the government of the United States . . . gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens.”⁸⁸ The Court also harkened back to George W. Bush’s remarks at the Islamic Center of Washington days after September 11, 2001, that “[t]he face of terror is not the true faith of Islam,” and that America is “a great

80. *Trump v. Hawaii*, 138 S. Ct. at 2403.

81. *Id.* at 2417.

82. *Id.* (internal citations omitted).

83. *See id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 2418 (internal citations omitted).

country because we share the same values of respect and dignity and human worth.”⁸⁹ The Court seems to hint that Trump is one of those Presidents in our nation’s history who has “performed unevenly in living up to those inspiring words.”⁹⁰

Despite establishing a record of Trump’s Islamophobic statements, the majority decided that “the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”⁹¹ Applying rational basis review, the Court majority upheld the ban and held that the ban was “expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.”⁹² The Court added, “[t]he text says nothing about religion.”⁹³ In short, the Supreme Court acknowledged a laundry list of the racist rhetoric used on the campaign trail and, despite this laundry list, sidestepped the obvious conclusion: the watered-down ban’s facially neutral wording cannot obscure the clear, discriminatory intent behind it.

The Court discussed the “legitimate” national security interests, noting “three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of countries” since the President introduced entry restrictions in January 2017.⁹⁴ Moreover, the Proclamation “include[d] significant exceptions for various categories of foreign nationals”; the Court determined the “carveouts for nonimmigrant visas [were] substantial.”⁹⁵ Furthermore, the Court emphasized that the “Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants.”⁹⁶ Discussed later, this waiver program is pending litigation by the legal advocacy organization Muslim Advocates.

Finally, in a truly tone-deaf manner, the Court closed by discussing the inapplicability of the infamous decision in *Korematsu v. United States*, 323 U.S. 214 (1944), holding that the “forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unconstitutional.”⁹⁷ The Court ineffectively “make[s] express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”⁹⁸ The discussion of *Korematsu* is so ineffective and insulting because a day after calling “for a total and complete shutdown of Muslims entering the United States,” President Trump justified the proposal during a television interview by noting that President Franklin D. Roosevelt “did the same

89. *Id.* (internal citations omitted).

90. *Id.*

91. *Id.*

92. *Id.* at 2421.

93. *Id.*

94. *Id.* at 2422.

95. *Id.*

96. *Id.*

97. *Id.* at 2423

98. *Id.* (citing *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

thing” with respect to Japanese-Americans during World War II.⁹⁹ Thus, in “overruling” *Korematsu*, the Court effectively supplants the infamous holding with *Korematsu II*—the Muslim ban.

B. The Dissent Correctly Characterized Trump’s Executive Order as a Muslim Ban and Argued it Violated the First Amendment’s Establishment Clause

The Court issued two dissenting opinions—one written by Justice Breyer, joined by Justice Kagan, and the other by Justice Sotomayor, joined by Justice Ginsburg. Justice Breyer questioned the exemptions and waivers, characterizing them as “window dressing.”¹⁰⁰ He cited an amicus brief bringing attention to a Yemeni child with cerebral palsy.¹⁰¹ The Yemeni civil war had prevented her from receiving medication, rendering her unable to move or speak.¹⁰² The doctors said that she would not survive in Yemen.¹⁰³ The child’s visa application was denied when her family received a form with a check mark in a box next to the statement: “a waiver will not be granted in your case.”¹⁰⁴ After the child’s situation was highlighted in an amicus brief, the family received an update with a new form that stated “the consular officer is reviewing your eligibility for a waiver under the Proclamation.”¹⁰⁵ The officer who initially denied the waiver said that she felt the child met the waiver criteria, but could not say that to the family because it was still pending review from the supervisor.¹⁰⁶ Because of the pending mandatory review from the officer’s supervisor, the supervisor could not decide whether to declare the child eligible for the waiver.¹⁰⁷ Justice Breyer’s opinion posited that the Yemeni child’s status changed only after the child received international attention resulting from the amicus and that generally, the waiver process does little to reduce the blanket ban on Muslims, as officers do not have discretion at all.¹⁰⁸

Justice Sotomayor noted that the majority “ignor[ed] facts, misconstrue[ed] our legal precedent, and turn[ed] a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals.”¹⁰⁹ Justice Sotomayor set out the test from *McCreary County v. American Civil Liberties Union of Kentucky*: “When the government acts with the ostensible and predominant purpose” of disfavoring a particular religion, “it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”¹¹⁰ The test for determining whether a violation of the Establishment

99. *Id.* at 2434 (Sotomayor, J., dissenting).

100. *Id.* at 2433.

101. *See id.* at 2432.

102. *See id.*

103. *See id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. This lack of discretion from the officer will be highlighted below in the discussion of the litigation brought by Muslim Advocates.

108. *Trump v. Hawaii*, 138 S. Ct. at 2432 (Sotomayor, J., dissenting).

109. *Id.* at 2433.

110. *Id.* at 2434 (quoting *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)).

Clause occurred asks “whether the reasonable observer would view the government action as enacted for the purpose of disfavoring a religion.”¹¹¹ The Court takes into account the text of the policy, its operation and *any available evidence* regarding the historical background of the decision, the series of events leading up to the enactment, legislative and administrative history, and also statements by the decision maker.¹¹² Justice Sotomayor’s dissent unequivocally stated that “[b]ased on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim.”¹¹³ Justice Sotomayor cited numerous examples of President Trump’s Islamophobic rhetoric to come to this conclusion.

III. RAMIFICATIONS

The effects of the Muslim ban are numerous and adverse. First, individuals have been separated from parents, spouses, children, and other relatives. This separation violates international human rights norms and the Due Process Clause of the Fourteenth Amendment. Second, the Muslim ban’s waiver process is a sham, creating an illusion of discretion. The reality is that consular officers are stripped of their discretion, leaving almost no chance of individuals being reunited with loved ones. Finally, hate crimes have risen over the past four years, and as of 2017, are at an all-time high.¹¹⁴ Trump’s fearmongering was channeled into a written Islamophobic policy, which has stoked fear that may be contributing to the spike in hate crimes.

A. The Separation of Families Runs Contrary to Both International Human Rights Norms and the Fourteenth Amendment Due Process Clause

The negative impact of the Muslim ban is evidenced by its role in separating loved ones from each other. Even the closest bonds—the spousal relationship and the parent-child relationship—have not saved individuals from the banned countries. To make matters worse, many individuals married to American citizens have seen the process of obtaining their visa halted. Some applications were initially approved, but then rejected and given the typical waiver form, with only the check box marked next to a statement denying their entry. As a result, some Americans are facing a difficult choice: remain separated from their spouses and children or move to foreign or even war-torn countries to be reunited.

Ismail Alghazali, a twenty-five-year-old U.S. citizen living in New York, is one such American.¹¹⁵ In 2013, Ismail fell in love and got married in Yemen to his now

111. *Id.*

112. *Id.* (citing *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 540 (1993)) (emphasis added).

113. *Id.* at 2433.

114. *See infra*, note 144 and accompanying text.

115. Rowaida Abdelaziz, *Trump’s Muslim Ban Is Forcing Some Americans to Move to War-Torn Countries to Reunite with Their Families*, HUFFPOST (Oct. 23, 2018), https://www.huffingtonpost.com/entry/muslim-ban-separating-americans-from-family_us [<https://perma.cc/JP8U-QUPG>].

wife, Hend Alghazali.¹¹⁶ He returned to the United States to file paperwork to sponsor his wife to join him in the U.S.¹¹⁷ While this is usually a lengthy process, Hend received initial visa approval before the Muslim ban went into effect.¹¹⁸ After the Muslim ban, however, she received a rejection letter from immigration officials, using the standard waiver form with a check in the box next to the curt statement: “Taking into account the provisions of the Proclamation, a waiver will not be granted in your case.”¹¹⁹ Ismail is one of thirty-six plaintiffs in a class action, *Emami v. Nielsen*, discussed at length below. The plaintiffs claim that visa applications are being wrongfully denied. Currently, Ismail has chosen to stay with his wife and newborn son, who is a U.S. citizen, in the country of Djibouti.¹²⁰ This choice comes at the expense of leaving behind his entire life in the United States, where most of his family members live and work.¹²¹

Sondos al-Silwi, a New York City charter school teacher and U.S. citizen, provides another example of the hardship brought on by the ban.¹²² She fell in love with and married a Yemeni citizen.¹²³ She petitioned for him to join her in the United States when they married, but the Muslim ban thwarted their efforts.¹²⁴ Sondos now plans to move—with her newborn child—to Sanaa, Yemen, which has been the epicenter of a civil war since 2015. She is forced to make this decision so that she does not rob her newborn daughter from seeing her father, who has yet to meet his child.¹²⁵

Such examples of family separation not only go against who we are as a nation of immigrants, but offend the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights. The word “family” is mentioned six times in the otherwise succinct UDHR.¹²⁶ The collective representatives of nations throughout the world—in which the United States led the efforts at the time—decided that the very first clause would be “[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human *family* is the foundation of freedom, justice and peace in the world.”¹²⁷ Article 12 states, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.”¹²⁸ Article 16 declares, “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family,” and “[t]he family is the natural and fundamental group unit of society and is

116. *See id.*

117. *See id.*

118. *Id.*

119. *Id.*

120. *See id.*

121. *See Abdelaziz, supra* note 115.

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.*

126. *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

127. *Id.* at pmb1. (emphasis added).

128. *Id.* at art. 12.

entitled to protection by society and the State.”¹²⁹ Separating Sondos and Ismail from their families violates international human rights norms.

Separating families also implicates the U.S. Constitution. It is an established principle that “freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”¹³⁰ The Supreme Court stated in *Loving v. Virginia* that the guarantee of personal privacy and autonomy from government interference also “has some extension to activities relating to marriage.”¹³¹ *Loving* dictates that the freedom to marry is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.”¹³² This tradition of respecting the rights of families was further upheld, emphasized, and expanded in *Obergefell v. Hodges*, where the Supreme Court stated that the right to marry applies to same-sex couples.¹³³

B. The Muslim Ban’s Waiver Process is Merely Window Dressing that Creates an Illusion of Discretion and Nothing More

The Supreme Court’s majority analysis gave much credit to the waiver process when it upheld Muslim ban 3.0. The Court reasoned that the section on waivers provided a broad and discretionary exception for foreign nationals that are banned under the Proclamation’s framework.¹³⁴ This section provides that “a consular officer, or the Commissioner, United States Customs and Border Protection (CBP), or the Commissioner’s designee, as appropriate, may, *in their discretion*, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended.”¹³⁵ The Proclamation further states that “the Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants.”¹³⁶ However, as of this writing, the agencies have issued no such guidance. The Proclamation provides only limited guidance as follows:

[A] waiver may be granted only if a foreign national demonstrates to the consular officer’s or CBP official’s satisfaction that: (A) denying entry would cause the foreign national undue hardship; (B) entry would not pose a threat to national security or public safety of the United States; and (C) entry would be in the national interest.¹³⁷

129. *Id.* at art. 16.

130. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

131. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

132. *Loving*, 388 U.S. at 12.

133. See *Obergefell v. Hodges*, 125 S. Ct. 2584, 2604-05 (2015).

134. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2422-23 (2018).

135. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,168 (Sept. 24, 2017) (emphasis added).

136. *Id.*

137. Proclamation No. 9645, 82 Fed. Reg. at 45,161.

The Proclamation further provides discretion: “Unless otherwise specified by the Secretary of Homeland Security, *any waiver issued by a consular office . . . will be effective* both for the issuance of a visa and for any subsequent entry on that visa, but will leave unchanged all other requirements for admission or entry.”¹³⁸

Firstly, granting consular officers discretion is problematic. Discretion compromises the consistency, and thus fairness, of the process. But this concern is currently irrelevant because, as at the time of this writing, the discretion reserved for consular officers is an illusion. In fact, officers “were not allowed to exercise that discretion.”¹³⁹ Christopher Richardson, a consular officer for the State Department explained in an opinion piece to *Slate* why the waiver process is a sham:¹⁴⁰

[T]he decision to tolerate the latest iteration of the travel ban . . . was a better choice than quitting. Many of us thought it would be better to stay inside the system and do what we could to narrowly tailor the animus coming from the White House, hopeful that we could somehow mitigate the damage both to qualified visa applicants and to the United States as a whole.¹⁴¹

The “travel ban’s waiver process supposedly offered consular officers an opportunity to shape how the ban was implemented.”¹⁴² However, as applied, the discretion was “limited.”¹⁴³ Consular officers were not permitted to issue waivers without going through “nondiscretionary hurdles, including supervisory review and concurrence by the State Department’s Visa Office in Washington.”¹⁴⁴ This policy, according to Richardson, discouraged consular officers from even trying to seek waivers.¹⁴⁵

Thus, the waiver process has in fact turned out to be window dressing for the original blanket ban, as Justice Breyer predicted. The State Department’s statistics support this claim. Between December 8, 2017 and October 31, 2018, people from the banned countries filed 38,000 applications for non-immigrant and immigrant visas.¹⁴⁶ Of those, State Department officers determined that only six percent of applicants, 2,216 people, met the criteria for a waiver, 670 of which had not received their visas but were expected to.¹⁴⁷

138. *Id.* at 45,168 (emphasis added).

139. *Trump v. Hawaii*, 138 S. Ct. at 2433 (Breyer, J., dissenting) (relying on Decl. of Christopher Richardson, *Alharbi v. Miller*, No. 1:18-cv-2435 (BMC), 2019 WL 1367758 (E.D.N.Y. Mar. 26, 2019)).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.*

146. *See* Yaganeh Torbati, *Exclusive: Only 6 Percent of Those Subject to Trump Travel Ban Granted U.S. Waivers*, REUTERS (Apr. 4, 2019, 10:05 PM), <https://www.reuters.com/article/us-usa-immigration-visas-exclusive/exclusive-only-6-percent-of-those-subject-to-trump-travel-ban-granted-u-s-waivers-idUSKCN1RG30X> [<https://perma.cc/8EMZ-CTAK>] (relying on letter from Assistant Secretary of State May Waters to Democratic Senator Chris Van Hollen).

147. *Id.*

C. Fearmongering as a Scare Tactic on the Campaign Trail and Through the Muslim Ban Creates a Greater Risk that the Number of Hate Crimes in the United States will Further Increase

Trump's Muslim ban affects not only Muslim foreign nationals or Muslim-Americans, but the entire country, particularly minorities. This ban is a manifestation of the fearmongering that was emblematic of Donald Trump's campaign. Unfortunately, fearmongering has also manifested itself in the form of hate crimes.

In November 2018, the FBI reported that hate crimes in the ten largest cities in the United States rose by seventeen percent in 2017, marking the fourth year in a row that rate has increased.¹⁴⁸ According to the FBI, a hate crime is a violent or property crime such as murder, arson, assault or vandalism that is "motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity."¹⁴⁹ The number of hate crimes under this definition is the highest it has ever been despite the fact that the overall crime rate has declined since the 1990s.¹⁵⁰

The issue with this election is that many individuals, including some Muslim voters, thought that Trump's rhetoric regarding Muslim ban was merely tough talk.¹⁵¹ It is as though the United States is so accustomed to fear-mongering that when a politician promises something as outrageous as banning Muslims, we do not believe him or her in the moment.¹⁵² The degree of comfort with fear-mongering used on Trump's campaign trail seems to manifest in the Supreme Court majority's decision, where despite the numerous references to Trump's Islamophobic remarks, the Court upholds the ban as constitutional under the Establishment Clause of the First Amendment.

IV. *EMAMI V. NEILSEN*, AN EFFECTIVE FIRST STEP FOR PUSHING BACK AGAINST AN ADVERSE HOLDING

In the face of an adverse Supreme Court holding, many wonder about how to move forward. Muslim Advocates, an organization which serves as "a legal resource to promote the full and meaningful participation of Muslims in American public life,"¹⁵³ filed a class action lawsuit to challenge Trump's waiver program about a

148. See *2017 Hate Crime Statistics Released: Report Shows More Departments Reporting Hate Crime Statistics*, FBI (Nov. 13, 2018), <https://www.fbi.gov/news/stories/2017-hate-crime-statistics-released-111318> [<https://perma.cc/AV38-63JD>].

149. *What We Investigate: Civil Rights*, FBI, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> [<https://perma.cc/G4KY-CF3A>].

150. See Abigail Hauslohner, *Hate Crimes Jump for Fourth Straight Year in Largest U.S. Cities, Study Shows*, WASH. POST (May 11, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/05/11/hate-crime-rates-are-still-on-the-rise> [<https://perma.cc/MB63-X3MJ>].

151. See Morning Edition, *Muslim Trump Voters Reflect on Travel Ban Ahead of Elections*, NPR (Nov. 1, 2018), <https://www.npr.org/2018/11/01/662070235/video-muslim-trump-voters-reflect-on-travel-ban-ahead-of-elections> [<https://perma.cc/Z8E9-BYEL>].

152. *Id.*

153. *About: Mission*, MUSLIM ADVOCATES, <https://www.muslimadvocates.org/about/mission/> [<https://perma.cc/2TEJ-TNUF>].

month after the Supreme Court's decision. The complaint and Muslim Advocates' efforts are discussed below as a clear route to push back against the Trump administration's policies in a creative manner.

A. Muslim Advocate's Pending Litigation, Emami v. Nielson, Serves as an Effective First Step for Pushing Back Against an Adverse Holding on the Muslim Ban

The Trump administration's inclusion of the case-by-case waiver formed the Supreme Court's main justification for upholding Muslim ban 3.0. When President Trump issued the latest version of the Muslim ban, he directed federal agencies to promulgate guidance establishing when the issuance of a case-by-case waiver would be appropriate.¹⁵⁴ However, according to Muslim Advocates, no such guidance has been issued and the process of granting waivers remains ineffective.¹⁵⁵ Muslim Advocates' challenge to the waiver process, which Justice Breyer deemed a sham in his dissenting opinion, is the first legal challenge to the Muslim ban's implementation in the wake of *Trump v. Hawaii*.¹⁵⁶

The plaintiffs all seek entry to the United States to be reunited with their families or because of significant business or professional relationships in the country.¹⁵⁷ The complaint alleged that the defendants "adopted a policy or practice of not instituting an orderly waiver process through which individuals may 'demonstrate,' as stated in the Proclamation, their eligibility for a case-by-case waiver."¹⁵⁸ The complaint also alleged that the defendants adopted a "policy or practice of not providing information about the waiver process and have thereby hindered plaintiffs' and their family members' ability to make a showing that they meet the relevant criteria."¹⁵⁹ Furthermore, the complaint alleged that the defendants "have . . . adopted a policy or practice of denying or stalling virtually all visa issuance and waiver grants under the Proclamation, and have not given consular officials the discretion to grant any waivers."¹⁶⁰ The complaint stated that these actions, or inactions, by the defendants are "in violation of the Administrative Procedure Act ("APA"), the Immigration and Nationality Act ("INA"), and plaintiffs' right to due process under the Fifth Amendment to the U.S. Constitution."¹⁶¹

The complaint requested that the United States District Court for the Northern District of California San Francisco Division do the following:

154. Scott Simpson, *36 People File Class Action Suit Against Administration for Wrongfully Denied Muslim Ban Waivers*, MUSLIM ADVOCATES (July 29, 2018), <https://www.muslimadvocates.org/36-people-file-class-action-suit-against-administration-for-wrongfully-denied-muslim-ban-waivers/> [https://perma.cc/M6TL-PQGF].

155. *See id.*

156. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Breyer, J. dissenting).

157. Complaint at ¶ 4, *Emami v. Nielsen*, 365 F. Supp. 3d 1009 (N.D. Cal. 2019) (No. 18-cv-01587-JD).

158. *Id.* at ¶ 5.

159. *Id.* at ¶ 6.

160. *Id.* at ¶ 7.

161. *Id.* at ¶ 8.

order Defendants to immediately cease their unlawful policies and/or practices of refusing to receive or consider requests for waivers under the Proclamation for visa applicants; retract visa denials issued before an orderly process is put in place; provide clear guidance that defines key words and sets well-defined standards for consular officers and applicants to use; provide an orderly process by which applicants may demonstrate their eligibility for a waiver and give full consideration for case-by-case waivers to all visa applicants as set forth in the Proclamation.¹⁶²

On February 4, 2019, United States District Court Judge, James Donato, issued an opinion addressing the Government's motion to dismiss the class action lawsuit for failure to state a claim.¹⁶³ Judge Donato granted in part and denied in part the government's motion to dismiss, holding that the plaintiffs stated an APA claim but failed to state a Due Process and Equal Protection Claim under the Fifth Amendment.¹⁶⁴ However, Judge Donato dismissed the Fifth Amendment claims without prejudice with leave to file an amended complaint.¹⁶⁵ Thus, this claim may still be addressed in a later proceeding.¹⁶⁶

Judge Donato held that the plaintiffs' APA claim "has solid legal support in the 'well-established' proposition that 'agencies may be required to abide by certain internal policies.'"¹⁶⁷

At the crux of the current litigation's argument was that the "State Department has acted arbitrarily and unlawfully by disregarding its own procedures and rules in administering the waiver program."¹⁶⁸ The class action lawsuit provided numerous examples of wanton disregard for the rules and procedures, such as instances where applicants were denied visas and waivers in summary fashion, without the opportunity to submit further documentation.¹⁶⁹ The complaint also provided declarations of former consular officers who have stated that they were not allowed to exercise discretion and that in application, there is actually no waiver process.¹⁷⁰ Furthermore, the complaint pointed to a sample waiver letter provided to applicants which does not contain an option for a grant of a waiver.¹⁷¹

"These facts," Judge Donato reasoned, "adequately allege that the State Department has not followed its own guidance with respect to its requirement that visa applicants must disclose at their visa interviews any information that might demonstrate that the applicant is eligible for a waiver."¹⁷² Thus, Judge Donato held, the

162. *Id.* at ¶ 9.

163. See *Emami v. Nielsen*, No. 18-CV-01587-JD, 2019 WL 428780 (N.D. Cal. Feb. 4, 2019).

164. *Id.*

165. *Id.* at *10.

166. At the time of writing this Note, there has been no updates on this case.

167. *Emami*, 2019 WL 428780, at *7 (citing *Alcaraz v. Immigration and Naturalization Serv.*, 384 F.3d 1150, 1162 (9th Cir. 2004)).

168. *Id.* at *8.

169. *Id.*

170. *Id.* at *9.

171. *Id.*

172. *Id.* at *8.

plaintiffs have adequately stated an APA claim and the Defendants' motion to dismiss the APA claim is denied.¹⁷³

This case will be worth following, as it appears so far that Judge Donato is potentially amenable to the plaintiffs' claims, especially their APA claim. Based on the short opinion by Judge Donato, it appears that case law supports the plaintiffs' APA claim that the State Department is not following its own guidance with regard to the waiver process. Judge Donato apparently agrees with Justice Breyer's dissenting opinion in *Hawaii v. Trump* that the waiver process is nothing more than window dressing.

CONCLUSION

The holding in *Trump v. Hawaii* is one that will go down in infamy alongside cases like *Korematsu* and *Dred Scott*. Since the Court's holding, President Trump has not ceased his Islamophobic rhetoric. Recently, President Trump retweeted a video that merged footage of House Representative Ilhan Omar with footage of the attacks on 9/11.¹⁷⁴ The video edits a speech by Omar to make it appear as though she does not find the attacks on 9/11 to be serious. President Trump's words accompanying the retweet were, "WE WILL NEVER FORGET!"¹⁷⁵ Such divisive rhetoric is President Trump's trademark and unfortunately, the Supreme Court missed its opportunity to strike down the manifestation of such rhetoric in the Muslim ban. Instead, the Court's holding has only emboldened the President to continue advancing his message of Islamophobia, now under its own imprimatur.

173. *Id.* at *10.

174. Eli Rosenberg & Kayla Epstein, *President Trump Targets Rep. Ilhan Omar with a Video of Twin Towers Burning*, WASH. POST (Apr. 13, 2019), <https://www.washingtonpost.com/politics/2019/04/13/president-trump-targets-rep-ilhan-omar-with-video-twin-towers-burning/> [<https://perma.cc/T5BU-M4D7>].

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