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## THE EMERGING LESSONS OF *TRUMP V. HAWAII*

Shalini Bhargava Ray\*

In the years since the Supreme Court decided *Trump v. Hawaii*,<sup>1</sup> federal district courts have adjudicated dozens of rights-based challenges to executive action in immigration law.<sup>2</sup> Plaintiffs, including U.S. citizens, civil rights organizations, and immigrants themselves, have alleged violations of the First Amendment and the equal protection component of the Due Process Clause with some regularity based on President Trump's animus toward immigrants.<sup>3</sup> This Article assesses *Hawaii*'s impact on these challenges to immigration policy, and it offers two observations. First, *Hawaii* has amplified federal courts' practice of privileging administrative law claims over constitutional ones. For example, courts considering separate challenges to the travel ban waiver process and the mass-rescission of humanitarian parole concluded that plaintiffs had not stated constitutional claims under *Hawaii*'s "circumscribed inquiry," but these courts remained receptive to plaintiffs' claims that an agency violated its obligation to provide a reasoned justification, consider reliance interests, explain itself sufficiently, or follow its own procedures.<sup>4</sup> Second, *Hawaii* has prompted district courts to engage more deeply with the notion that different classes of immigrants are entitled to different levels of constitutional protection.<sup>5</sup> This more open discussion of the contours of immigrants' rights acknowledges immigrants as potential rights-holders but ultimately exposes the limits of a rights-based approach to protecting immigrants' well-being.

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\* Assistant Professor of Law, University of Alabama School of Law. I am grateful to the *William & Mary Bill of Rights Journal* for inviting me to participate in its symposium on "The Presidency and Individual Rights." Ashley Binnetti Armstrong, Eisha Jain, and Jennifer Lee Koh provided valuable feedback on earlier drafts; I benefitted from a conversation about this project with Sam Spital as well. Finally, I thank Jorge Solis (UA Law Class of 2019), Miranda Ronnow (UA Law Class of 2020), and Josephine Rykhus (UA Law Class of 2021) for excellent research assistance.

<sup>1</sup> 138 S. Ct. 2392 (2018).

<sup>2</sup> See, e.g., *Alharbi v. Miller*, 368 F. Supp. 3d 527, 540 (E.D.N.Y. 2019); *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1011 (N.D. Cal. 2019); *NAACP v. Trump*, 298 F. Supp. 3d 209, 215–16 (D.D.C. 2018), *aff'd sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Vidal v. Nielsen*, 279 F. Supp. 3d 401, 406–07 (E.D.N.Y. 2018), *vacated sub nom. Regents*, 140 S. Ct. 1891.

<sup>3</sup> See generally *Alharbi*, 368 F. Supp. 3d 527; *Emami*, 365 F. Supp. 3d 1009; *NAACP v. Trump*, 298 F. Supp. 3d 209; *Vidal*, 279 F. Supp. 3d 401.

<sup>4</sup> See, e.g., *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1093 (N.D. Cal. 2018).

<sup>5</sup> See, e.g., *Ramos v. Nielsen (Ramos I)*, 336 F. Supp. 3d 1075, 1105, 1107 (N.D. Cal. 2018), *vacated sub nom. Ramos v. Wolf (Ramos II)*, 975 F.3d 872 (9th Cir. 2020).

## INTRODUCTION

The Trump Administration has altered immigration law profoundly in just a few years. Through Executive Orders (EOs) and Proclamations, as well as agency action, the administration has intensified deportations, crippled the asylum system, and cut legal immigration.<sup>6</sup> Immigrants and their allies have challenged these policies in federal court, providing a window into how the federal courts adjudicate immigrants' rights in numerous cases. The Supreme Court's 2018 decision in *Trump v. Hawaii*, which allowed the third version of the administration's travel ban on nationals from seven majority-Muslim countries to go into effect,<sup>7</sup> offers an example of judicial review of executive action in immigration law. For this symposium on "The Presidency and Individual Rights," I consider the implications of *Trump v. Hawaii* for rights-based challenges to executive action in immigration law.

Immigrants have seldom succeeded on race-based equal protection claims challenging statutes or regulations, but these losses have often been attributed to the lack of evidence of discriminatory intent.<sup>8</sup> In the challenges considered in this Article, however, plaintiffs alleged or provided direct evidence of discriminatory intent based on Trump's anti-Muslim, anti-Mexican, and anti-Black rhetoric.<sup>9</sup> Despite these specific allegations and this direct evidence, courts have been, nonetheless, exceedingly reluctant to acknowledge immigrants' equal protection rights.<sup>10</sup> Instead, they have been much more willing to grant preliminary relief or deny motions to dismiss on ordinary administrative law claims.<sup>11</sup> The persistence of this trend, despite plaintiffs' extensive direct evidence of discriminatory intent, calls for analysis, one that this Article undertakes.

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<sup>6</sup> See, e.g., Proclamation No. 9984, 85 Fed. Reg. 6,709, 6,710 (Jan. 31, 2020); Proclamation No. 9983, 85 Fed. Reg. 6,699, 6,703–05 (Jan. 31, 2020); Proclamation No. 9945, 84 Fed. Reg. 53,991, 53,992 (Oct. 4, 2019); Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,161–62 (Sept. 24, 2017).

<sup>7</sup> 138 S. Ct. 2392, 2400, 2403 (2018).

<sup>8</sup> Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1735 (2010).

<sup>9</sup> Ibram X. Kendi, *Is This the Beginning of the End of American Racism?*, ATLANTIC (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/the-end-of-denial/614194/> [<https://perma.cc/4HUE-NWFV>] (chronicling Donald Trump's racism).

<sup>10</sup> See, e.g., *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915–16 (2020) (rejecting plaintiffs' equal protection challenge to the rescission of DACA). For a discussion of federal courts' practice of overlooking explicit bias in antidiscrimination cases and other areas, including immigration, see Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 510 (2018).

<sup>11</sup> See *Regents*, 140 S. Ct. at 1915 (determining that DHS's rescission of DACA was arbitrary and capricious). For a discussion of the relative success of ordinary administrative law claims over equal protection claims brought by noncitizens prior to *Hawaii*, see Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 398 (2013).

This Article proceeds in three parts. Part I explains the 2017 travel bans and the Supreme Court's decision in 2018 allowing a version of the travel ban to go into effect. It also lays out the standard of review under the Administrative Procedure Act (APA). Part II explores how the federal district courts have applied *Trump v. Hawaii* in a range of cases, from the ongoing travel ban litigation to challenges to the termination of Temporary Protected Status (TPS) and the rescission of humanitarian parole. Part III offers a few thoughts on the emerging lessons of *Hawaii* for immigrants' rights litigation generally.

### I. THE LEGAL FRAMEWORKS OF *TRUMP V. HAWAII* AND THE APA

Congress has plenary power to regulate the grounds for admission into and removal from the United States,<sup>12</sup> but the President's role in immigration law has garnered increasing attention in recent years.<sup>13</sup> Since its earliest days, the Trump Administration has worked to restrict all forms of immigration, legal and extralegal, whether through family, employment, or humanitarian channels.<sup>14</sup> Its use of executive orders and proclamations have struck commentators as "unorthodox."<sup>15</sup> Because the President is not an agency, his actions are not "final agency action" reviewable under the APA.<sup>16</sup> But the administration has frequently implemented its policies through agency action. Accordingly, this Part discusses the legal framework articulated in *Trump v. Hawaii* as well as the APA's framework for reviewing ordinary administrative law claims.

#### A. *Trump v. Hawaii*

Litigation over the 2017 travel bans culminated in the Supreme Court's decision in *Trump v. Hawaii*.<sup>17</sup> As discussed in this Article, the "travel ban" refers to the series of entry bans issued beginning just after the inauguration,<sup>18</sup> which barred entry of foreign nationals initially from several majority-Muslim countries and then later North Korea and Venezuela as well.<sup>19</sup> Trump's relentless campaign against Muslim

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<sup>12</sup> *Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 599–600 (1889).

<sup>13</sup> See generally Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

<sup>14</sup> See generally, e.g., *id.*; Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency*, MIGRATION POL'Y INST. 1 (July 2020), [https://www.migrationpolicy.org/sites/default/files/publications/MPI\\_US-Immigration-Trump-Presidency-Final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf) [<https://perma.cc/2N26-QPTW>].

<sup>15</sup> Michele Waslin, *The Use of Executive Orders and Proclamations to Create Immigration Policy: Trump in Historical Perspective*, 8 J. ON MIGRATION & HUM. SEC. 54, 54 (2020).

<sup>16</sup> *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). For a critique of *Franklin*, see Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 68 (2020).

<sup>17</sup> See generally 138 S. Ct. 2392 (2018).

<sup>18</sup> See *Franklin*, 505 U.S. at 796.

<sup>19</sup> The administration subsequently issued numerous other entry bans including bans

immigration led to the “Muslim ban” moniker.<sup>20</sup> The bans separated families<sup>21</sup> and prevented universities from welcoming students and researchers from banned countries.<sup>22</sup> Plaintiffs argued that the President had exceeded his statutory authority to ban entry of foreign nationals and violated the Establishment Clause by enacting a law designed to express disapproval of Muslims.<sup>23</sup> Although plaintiffs succeeded early on, a divided Supreme Court ultimately allowed a revised version of the ban to take effect.<sup>24</sup>

In *Hawaii*, the Supreme Court held that plaintiffs were unlikely to succeed on their statutory and constitutional challenges to the third iteration of the travel ban.<sup>25</sup> The third iteration of the ban, framed as a Presidential Proclamation, barred travel from seven majority-Muslim countries as well as North Korea and Venezuela.<sup>26</sup> It provided for a waiver procedure in individual cases.<sup>27</sup> It imposed the ban indefinitely.<sup>28</sup> The administration claimed that the ban was designed to enhance national security, but plaintiffs and the national security community questioned the sincerity of that purpose.<sup>29</sup>

In *Hawaii*, the Court analyzed only the third version of the travel ban. It first determined that INA section 212(f) authorized the President to broadly restrict entry.<sup>30</sup> INA section 212(f) states:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants,

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relating to health insurance and travel from China amid the COVID-19 pandemic. See Proclamation No. 9945, 84 Fed. Reg. 53,991, 53,991–92 (Oct. 4, 2019); Proclamation No. 9984, 85 Fed. Reg. 6,709, 6,710 (Jan. 31, 2020).

<sup>20</sup> David J. Bier, *A Dozen Times Trump Equated His Travel Ban with a Muslim Ban*, CATO INST. (Aug. 14, 2017, 12:06 PM), <https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban> [<https://perma.cc/4AFD-NSFD>].

<sup>21</sup> Aidan Gardiner, *Iranian Families Divided by the Trump Travel Ban Tell of Holidays Apart and Lives on Hold*, N.Y. TIMES (Dec. 20, 2019), [https://www.nytimes.com/2019/12/20/reader-center/trump\\_travel\\_ban.html](https://www.nytimes.com/2019/12/20/reader-center/trump_travel_ban.html) [<https://perma.cc/M6BA-D4RE>].

<sup>22</sup> Mary O’Hara, *The U.S. Travel Ban Would Be Bad News for American Universities*, GUARDIAN (Feb. 21, 2017, 2:15 PM), <https://www.theguardian.com/education/2017/feb/21/donald-trump-travel-ban-universities-international-students> [<https://perma.cc/N5AN-CHXC>].

<sup>23</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018) (describing plaintiffs’ claims).

<sup>24</sup> *Id.* at 2423.

<sup>25</sup> *Id.*

<sup>26</sup> Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,164 (Sept. 24, 2017).

<sup>27</sup> See, e.g., *id.* at 45,168.

<sup>28</sup> *Id.* at 45,171.

<sup>29</sup> *Hawaii*, 138 S. Ct. at 2417 (describing plaintiffs’ claims).

<sup>30</sup> *Id.* at 2408.

or impose on the entry of aliens any restrictions he may deem to be appropriate.<sup>31</sup>

The Court further determined that, under a standard akin to rational basis review, and on the limited record before the Court, there was likely no Establishment Clause violation. Specifically, the Court rejected traditional Establishment Clause analysis that inquires whether the challenged enactment has the “principal or primary effect of promoting religion . . . [or] if a reasonable, objective observer would view its purpose as one of endorsing religion.”<sup>32</sup> Under that analysis, plaintiffs would need only show that a reasonable observer would regard the purpose of the travel ban as showing disapproval of Islam.<sup>33</sup>

Instead, the Supreme Court determined that a 1972 case, *Kleindienst v. Mandel*,<sup>34</sup> offered the appropriate analytic approach to the question of the travel ban’s probable constitutionality.<sup>35</sup> In *Mandel*, plaintiffs were U.S. universities which sought to bring a Belgian professor, Ernest Mandel, to the U.S. to address university audiences.<sup>36</sup> Unbeknownst to Mandel, on his previous U.S. visits, the State Department had found him “inadmissible,” but the Attorney General had waived his inadmissibility.<sup>37</sup> This time, however, the Attorney General declined to waive his inadmissibility, and Mandel was excluded, prompting the litigation.<sup>38</sup> The Court addressed for the first time the appropriate analytic approach to judicial review of executive exclusion decisions.<sup>39</sup> It determined that the executive branch’s determination to exclude a noncitizen was entitled to deference.<sup>40</sup> So long as the Attorney General offered a “facially legitimate and bona fide reason” for the exclusion, the Court’s inquiry was complete.<sup>41</sup> The Court would not pry into the executive’s motives to determine if the stated reason was mere pretext.<sup>42</sup>

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<sup>31</sup> 8 U.S.C. § 1182. For an analysis of the legislative history of this provision, see Dan Ordorica, Note, *Presidential Power and American Fear: A History of INA § 212(F)*, 99 B.U.L. REV. 1839, 1871–72 (2019) (arguing that Congress intended to authorize the broadest possible authority to exclude noncitizens but that the judiciary could develop more robust standards for its exercise).

<sup>32</sup> See Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 80 (2017).

<sup>33</sup> See *id.*

<sup>34</sup> 408 U.S. 753 (1972).

<sup>35</sup> *Hawaii*, 138 S. Ct. at 2419.

<sup>36</sup> *Mandel*, 408 U.S. at 756–57.

<sup>37</sup> *Id.* at 756.

<sup>38</sup> *Id.* at 757–59.

<sup>39</sup> See *id.* at 768–70.

<sup>40</sup> *Id.* at 770.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

The Court elaborated on this inquiry years later in *Kerry v. Din*.<sup>43</sup> In *Din*, an American citizen, Fauzia Din, sought a spousal visa for her husband, Berashk, who lived in Afghanistan.<sup>44</sup> Berashk was denied the visa, with the State Department stating only that he was inadmissible under INA section 212(a)(3)(B), a provision related to terrorism.<sup>45</sup> It provided no further explanation or supporting facts.<sup>46</sup> The trial court and Ninth Circuit determined that Din had a constitutional liberty interest in cohabiting with her husband in the United States and that the State Department's adjudication, lacking a full explanation of the decision, violated due process.<sup>47</sup> A plurality of Justices disagreed.<sup>48</sup> The Supreme Court held that, even if Din had a constitutionally protected liberty interest in living with her husband in the U.S., the procedure used by the State Department did not violate due process.<sup>49</sup> The State Department had offered a "facially legitimate and bona fide reason" for the denial—specifically, it had cited the INA provision, section 212(a)(3)(B), and it had described what that provision covered.<sup>50</sup> It was not required to further explain what conduct it believed Berashk had engaged in.<sup>51</sup> Thus, *Din* appears to require as little of the government as *Mandel*.

In his concurring opinion, however, Justice Kennedy presented the possibility of greater scrutiny under certain narrow circumstances.<sup>52</sup> He observed that "[a]bsent an affirmative showing of bad faith . . . plausibly alleged with sufficient particularity," the Court would not look further into the adjudicator's decisionmaking.<sup>53</sup> But what if bad faith abounds? At least one federal court of appeals construed *Din* as permitting more searching review where the executive evinces bad faith.<sup>54</sup> But the Supreme Court rejected this approach in *Trump v. Hawaii*.<sup>55</sup> Instead, the Court emphasized deference to the President and looked to the official statements of purpose behind the bans—ignoring the bevy of public statements evincing racial and religious animus.<sup>56</sup>

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<sup>43</sup> 576 U.S. 86 (2015).

<sup>44</sup> *Id.* at 88 (plurality opinion).

<sup>45</sup> *Id.* at 89–90.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 90.

<sup>48</sup> *See generally id.*

<sup>49</sup> *Id.* at 101.

<sup>50</sup> *See id.* at 103–04 (Kennedy, J., concurring).

<sup>51</sup> *See id.* at 101 (plurality opinion).

<sup>52</sup> *See id.* at 105 (Kennedy, J., concurring).

<sup>53</sup> *See id.*

<sup>54</sup> *See, e.g., Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 264 (4th Cir. 2018) (describing *Din* as accounting "for those very rare instances in which a challenger plausibly alleges that a government action runs so contrary to the basic premises of our Constitution as to warrant more probing review").

<sup>55</sup> 138 S. Ct. 2392, 2440 (2018) (Sotomayor, J., dissenting).

<sup>56</sup> *Id.* at 2421 (majority opinion).

In *Hawaii*, the Court applied *Mandel* to an exclusion policy rather than a single exclusion decision.<sup>57</sup> It deemed national security to constitute an “independent justification.”<sup>58</sup> Rather than inquiring whether this “facially legitimate reason” was in fact bona fide, considering the allegations of bad faith, the Court stopped at facial legitimacy and considered whether any facts on record supported the stated justification.<sup>59</sup> Finding that the administration had conducted a multiagency worldwide review of vetting protocols, the Court determined that the record contained such facts.<sup>60</sup> Ultimately, evidence of bad faith had no impact on the Court’s analytic framework. That the Court remained unmoved, despite smoking gun evidence of animus, has proven to be one of *Hawaii*’s legacies.

Four Justices dissented.<sup>61</sup> Justices Breyer and Kagan began with the premise that the Proclamation would be unlawful “[i]f its promulgation or content was significantly affected by religious animus against Muslims.”<sup>62</sup> In contrast, if its “sole” basis was national security, it would be lawful.<sup>63</sup> This, in effect, turned the majority’s test on its head. Although the majority found plaintiffs unlikely to succeed absent allegations that religious animus was the sole basis for the Proclamation, Justices Breyer and Kagan would find the Proclamation unlawful if *national security* were *not* the sole basis.<sup>64</sup>

Apart from offering a different framework, these Justices drew inferences from how the government applied the Proclamation in practice. Specifically, the Justices looked to the “elaborate system of exemptions and waivers” for information about the Proclamation’s similarity to or differences from prior presidential orders in immigration law.<sup>65</sup> The Proclamation’s system of exemptions and case-by-case waivers, if available in practice, would bolster its lawfulness.<sup>66</sup> The Justices expressed concern, however, that the waivers and exemptions were not available even to Muslims who met “the Proclamation’s own security terms.”<sup>67</sup> First, the State Department and the Department of Homeland Security (DHS) had not issued any guidance for consular officers to follow when adjudicating requests for waivers or exemptions.<sup>68</sup> Second,

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<sup>57</sup> See generally *id.* (considering a provision that gives the President authority to provide further limitations on entry beyond those in the INA).

<sup>58</sup> *Id.* at 2420–21.

<sup>59</sup> *Id.* (noting “persuasive evidence that the entry suspension has a legitimate grounding in national security concerns” but not addressing evidence of animus).

<sup>60</sup> *Id.* at 2421 (“The Proclamation . . . reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies.”).

<sup>61</sup> See generally *id.*

<sup>62</sup> *Id.* at 2429 (Breyer, J., dissenting).

<sup>63</sup> *Id.*

<sup>64</sup> See *id.*

<sup>65</sup> *Id.* at 2429–30.

<sup>66</sup> *Id.*

<sup>67</sup> See *id.* at 2430.

<sup>68</sup> *Id.* at 2431.

publicly available statistics suggested that the government had granted only a “minuscule percentage” of waivers to those who were likely eligible for them.<sup>69</sup> Finally, the Justices noted that a consular officer filed an affidavit in pending litigation in federal district court, indicating that he lacked discretion to grant waivers.<sup>70</sup> If true, the waiver process would rightly be understood as “mere[] ‘window dressing.’”<sup>71</sup> Thus, the Justices sounded a note of caution but called for further proceedings to develop the facts regarding the operation of the waiver process.

Justices Sotomayor and Ginsburg, dissenting separately, rejected the majority’s deferential approach to the Proclamation.<sup>72</sup> They concluded that plaintiffs were likely to succeed on their Establishment Clause claim because a “reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus.”<sup>73</sup> Reserving judgment on plaintiffs’ “complex statutory claims,” the Justices determined that the constitutional question was “far simpler.”<sup>74</sup> The Justices catalogued the President’s anti-Muslim statements on the campaign trail and after the inauguration and chided the majority for merely “set[ting] them aside” and deferring on national security grounds.<sup>75</sup> The Justices questioned *Mandel*’s applicability, but they determined that *even under Mandel*, plaintiffs were likely to succeed based on the Supreme Court’s animus jurisprudence.<sup>76</sup> In direct opposition to the majority’s conclusion, Justices Sotomayor and Kagan determined that the Proclamation was “divorced from any factual context from which we could discern a relationship to legitimate state interests.”<sup>77</sup> In addition, they did not regard the multiagency worldwide review as having any cleansing effect on earlier versions of the travel ban.<sup>78</sup> Finally, they cautioned that the majority had made the same mistake that the majority had made in *Korematsu*—rending the nation’s “constitutional fabric” with a “barren invocation of national security.”<sup>79</sup>

Because plaintiffs in *Hawaii* asserted an Establishment Clause claim, but not an equal protection claim, the Court lacked an opportunity to evaluate the travel ban under equal protection principles.<sup>80</sup> The Supreme Court generally reviews race-based equal

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 2432–33.

<sup>71</sup> *Id.* (quoting and citing Declaration of Christopher Richardson at 3–4, *Alharbi v. Miller*, 368 F. Supp. 3d 527 (E.D.N.Y. 2019) (No. 1:18-cv-2435)).

<sup>72</sup> *See id.* at 2433 (Sotomayor, J., dissenting).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2434.

<sup>75</sup> *Id.* at 2440.

<sup>76</sup> *Id.* at 2441–42 (discussing *Romer v. Evans*, 517 U.S. 620 (1996), and *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)).

<sup>77</sup> *Id.* 2440–42 (quoting *Romer*, 517 U.S. at 635).

<sup>78</sup> *Id.* at 2443.

<sup>79</sup> *Id.* at 2447–48.

<sup>80</sup> *Cf.* Shirin Sinnar & Jayashri Srikantiah, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. 197 (2019) (arguing that plaintiffs should bring equal protection claims to challenge white nationalist immigration policies).

protection challenges to facially neutral laws according to the framework developed in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>81</sup> There, the Court explained that an “official action will not be held unconstitutional solely because it results in a racially disproportionate impact.”<sup>82</sup> But when a plaintiff has proof of a discriminatory purpose, deference to the legislature “is no longer justified.”<sup>83</sup> Thus, when a law is facially neutral, the plaintiff must prove that invidious discrimination played a role, and many factors are probative, including disparate impact based on race, the historical background of a decision, procedural or substantive irregularities, and legislative or administrative history.<sup>84</sup> The Court further explained that invidious discrimination need not be the only motive or even the primary motive.<sup>85</sup> Ultimately, plaintiffs had to show that the same decision would not have been made absent invidious discrimination.<sup>86</sup> Thus, the Court endorsed a “but-for” motive standard.<sup>87</sup>

In immigration law, however, the Supreme Court has generally insulated executive judgments from rights-based challenges. In *Reno v. American-Arab Anti-Discrimination Committee*, the Court held that deportable noncitizens who claimed to have been targeted for deportation based on their political speech and national origin had no right against selective deportation under the First Amendment because the executive has prosecutorial discretion.<sup>88</sup> Even amidst allegations of discrimination, the Court ruled that the special role of the executive in law enforcement requires the judiciary to defer to the executive’s discretionary judgments.<sup>89</sup> Absent “‘outrageous’ . . . discrimination,” the judiciary lacks authority to review the executive’s choice to enforce the law against specific individual offenders.<sup>90</sup>

Similarly, every federal court of appeals to consider an equal protection challenge to a DHS program requiring certain deportable Middle Eastern men to register with the government rejected that claim.<sup>91</sup> In *Rajah v. Mukasey*, the Second Circuit

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<sup>81</sup> 429 U.S. 252, 265 (1977) (affirming the requirement of “[p]roof of racially discriminatory intent or purpose to show a violation of the Equal Protection Clause”); see Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1144 (2018).

<sup>82</sup> *Arlington Heights*, 429 U.S. at 264–65.

<sup>83</sup> *Id.* at 266.

<sup>84</sup> *See id.* at 267–68.

<sup>85</sup> *Id.* at 265.

<sup>86</sup> *Id.*

<sup>87</sup> Verstein, *supra* note 81, at 1144 (discussing *Arlington Heights*).

<sup>88</sup> 525 U.S. 471, 489–91 (1999).

<sup>89</sup> *Id.* at 490.

<sup>90</sup> But this doctrine has evolved, and recent judicial decisions have elaborated on the “‘outrageous’ . . . discrimination” exception. *See Ragbir v. Homan*, 923 F.3d 53, 69 (2d Cir. 2019) (quoting *AADC*, 525 U.S. at 488). In *Ragbir*, the Second Circuit concluded that the government’s targeting of an immigration activist for deportation based on his advocacy constituted “outrageous” discrimination, permitting judicial review of his claim of selective deportation. *Id.*

<sup>91</sup> *Rajah v. Mukasey*, 544 F.3d 427, 439 (2d Cir. 2008); see also *Kandamar v. Gonzales*,

applied only rational basis review to the program based on the government's national security justification and the noncitizens' deportability.<sup>92</sup> Notably, plaintiffs lacked direct evidence of presidential animus there.<sup>93</sup> With existing jurisprudence offering only limited guidance on the proper analytic framework for equal protection challenges to executive action in immigration law, *Hawaii* filled a void.

### *B. Arbitrary and Capricious Review Under the APA*

Apart from seeking constitutional review, plaintiffs challenging executive action in immigration law during the Trump Administration have sought review under the APA. Under section 706(2) of the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>94</sup> In its *State Farm* decision, the Supreme Court described the arbitrary and capricious standard as “narrow,” but that agency action would be arbitrary and capricious when:

[T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>95</sup>

Based on *SEC v. Chenery Corp.*, reviewing courts lack the authority to supply reasoning for a challenged action that the agency has not itself articulated.<sup>96</sup> Decades later, the Court clarified that an agency that changes a policy need not overcome any additional hurdle in justification beyond what it would need to for adopting a policy in the first instance.<sup>97</sup> In *FCC v. Fox Television Stations, Inc.*, the Court ruled that “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.”<sup>98</sup> According to the Court, an agency need

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464 F.3d 65, 73–74 (1st Cir. 2006); *Ali v. Gonzales*, 440 F.3d 678, 681 n.4 (5th Cir. 2006); *Zafar v. U.S. Att’y Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006).

<sup>92</sup> *Rajah*, 544 F.3d at 439.

<sup>93</sup> *Id.*

<sup>94</sup> Administrative Procedure Act, 5 U.S.C. § 706(2).

<sup>95</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

<sup>96</sup> *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); see Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 962 (2007) (noting evolution of the *Chenery* rule from applying to adversarial adjudication to applying to informal agency action as well).

<sup>97</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>98</sup> *Id.*

not do more than consider serious reliance interests created by an earlier policy or provide an explanation when the agency's factual findings contradict ones supporting the earlier policy.<sup>99</sup>

At its core, this standard requires that an agency supply "a reasoned explanation for its action."<sup>100</sup> In *Judulang v. Holder*, the Supreme Court invalidated, under the arbitrary and capricious standard, a Board of Immigration Appeals (BIA) policy regarding the availability of discretionary relief from removal.<sup>101</sup> The Court deemed arbitrary and capricious the BIA's failure to consider the noncitizen's "fitness to reside" in the U.S. in determining whether to make discretionary relief available.<sup>102</sup> In particular, the Court faulted the BIA for failing to consider factors including, "the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the family, the number of citizens in the family, and the character of any service in the Armed Forces."<sup>103</sup> The Court likened the BIA's policy to distributing relief based on a "coin flip."<sup>104</sup> As a result, it was arbitrary and capricious.<sup>105</sup>

Arbitrary and capricious review under the APA has been routinely characterized as more stringent than rational basis review,<sup>106</sup> which offers one possible reason why policies that survive minimal constitutional scrutiny could nonetheless violate the APA.<sup>107</sup>

## II. DISTRICT COURTS APPLY *TRUMP V. HAWAII* AND THE APA<sup>108</sup>

Plaintiffs challenging a range of executive action in immigration law have asserted both constitutional and administrative law claims. *Hawaii* has influenced the federal courts on questions of immigration law beyond the analysis of entry

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<sup>99</sup> *Id.*

<sup>100</sup> *Judulang v. Holder*, 565 U.S. 42, 45 (2011).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 53.

<sup>103</sup> *Id.* at 48 (quoting *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 296 n.5 (2001)).

<sup>104</sup> *Id.* at 56.

<sup>105</sup> *Id.* at 45.

<sup>106</sup> See Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010).

<sup>107</sup> In addition, the many jurisdiction-stripping provisions of the Immigration and Nationality Act (INA) removed some agency action from APA review. See JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 11–12 (2016). The Supreme Court has held that the APA creates a "presumption of judicial review," but an agency may defeat this presumption if another statute clearly precludes review. *Id.*

<sup>108</sup> For an overview of litigation challenging the Trump Administration's immigration policies, see generally Shoba Sivaprasad Wadhia, *Immigration Litigation in the Time of Trump*, 53 U.C. DAVIS L. REV. ONLINE 121 (2019).

bans. This Part begins with a survey of recent litigation in three broad areas: (1) the exclusion of immigrants not present on U.S. soil; (2) the rescission of status for immigrants who have been admitted into the U.S.; and (3) policies directed at immigrants who have not yet been admitted into the U.S. (whether present on U.S. soil or not). This range of cases helps showcase the factors that influence courts' analyses of immigrants' constitutional rights claims. This Part also explains how district courts have treated the ordinary administrative law claims raised by plaintiffs in these cases.

### A. Travel Ban & Waiver Litigation

The first set of cases involves ongoing challenges to the travel ban and its associated waiver procedure.<sup>109</sup> Under the third version of the 2017 travel ban, a noncitizen whose entry is barred under the ban may seek an individualized waiver.<sup>110</sup> The Proclamation provides for case-by-case waivers if the consular officer determines that the applicant satisfies three criteria: “(A) denying entry would cause the foreign national undue hardship; (B) entry would not pose a threat to the national security or public safety of the United States; and (C) entry would be in the national interest.”<sup>111</sup> The waiver plays an integral role in the overall ban. In *Trump v. Hawaii*, the majority referenced the waiver as evidence of the ban’s legitimacy.<sup>112</sup>

However, the State Department has granted few waivers. As noted above, in their dissenting opinion in *Hawaii*, the “minuscule” number of grants prompted Justices Breyer and Kagan to question the authenticity of the waiver process.<sup>113</sup> Instead, the Justices posited that the waiver process could be mere “window dressing” for an unconstitutional entry ban.<sup>114</sup> They contended that a sham waiver process would suggest that animus tainted the entry ban, thus rendering it unconstitutional.<sup>115</sup>

Federal district courts have considered separate legal challenges to the waiver process. In *Emami v. Nielsen*, plaintiffs brought a class action challenge to the State

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<sup>109</sup> See Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020). On January 31, 2020, the President added six countries to the list, restricting the issuance of immigrant visas but not nonimmigrant visas. Proclamation No. 9983, 85 Fed. Reg. 6701–02.

<sup>110</sup> Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,168 (Sept. 24, 2017).

<sup>111</sup> *Id.*; Letter from Mary K. Waters, Assistant Sec’y for Legis. Affs., U.S. Dep’t of State, to the Hon. Chris Van Hollen, U.S. Senator (Feb. 22, 2018), <https://paaia.org/wp-content/uploads/2018/03/Van-Hollen-Response-Letter.pdf> [<https://perma.cc/LD86-4MM6>].

<sup>112</sup> 138 S. Ct. 2392, 2423 (2018).

<sup>113</sup> *Id.* at 2431 (Breyer, J., dissenting). Between Dec. 8, 2017 and Oct. 31, 2018, just six percent of applicants were granted waivers, and of those, thirty percent had not yet received them by early 2019. See Yeganeh Torbati, *Exclusive: Only 6 Percent of Those Subject to Trump Travel Ban Granted U.S. Waivers*, REUTERS (Apr. 4, 2019), <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/CPQ3-R928>].

<sup>114</sup> *Hawaii*, 138 S. Ct. at 2433 (Breyer, J., dissenting).

<sup>115</sup> *Id.* at 2432–33.

Department's implementation of the travel ban waiver process.<sup>116</sup> There, the court determined that plaintiffs had failed to state claims under due process and equal protection.<sup>117</sup> The court ruled that plaintiffs' allegations underlying those claims were conclusory and likely subject to rational basis review.<sup>118</sup> As in *Hawaii*, the government proffered a national security justification, which the court took to satisfy the requirement of a rational basis.<sup>119</sup> Similarly, plaintiffs had not alleged deprivation of a fundamental right.<sup>120</sup>

Nonetheless, the plaintiffs succeeded in stating a claim under the APA and the *Accardi* doctrine.<sup>121</sup> The *Accardi* doctrine requires agencies to follow their own procedures.<sup>122</sup> The *Emami* court ruled that plaintiffs had sufficiently alleged that the State Department failed to follow the procedures they announced on their website for the adjudication of waivers, thus violating *Accardi*.<sup>123</sup> Specifically, plaintiffs had alleged instances where they were denied further interviews or an opportunity to submit documents demonstrating their eligibility for a waiver, contrary to the procedure outlined by the State Department.<sup>124</sup>

Other constitutional challenges to the waiver procedure have also faltered. In *Alharbi v. Miller*, plaintiffs sought class certification for a group of U.S. citizens, lawful permanent residents, and asylees who filed family visa petitions for Yemeni national relatives and the relatives on whose behalf the petitions were filed.<sup>125</sup> Plaintiffs contended that they were "issued" visas before the Proclamation, but the court found that they were simply given a printed piece of paper, rather than an official document.<sup>126</sup> As a result, they were not "issued" visas such that they could be grandfathered under the Proclamation's provision for those noncitizens who had been issued visas prior to the date of the Proclamation.<sup>127</sup> Furthermore, the court lacked subject matter jurisdiction to review the "consular officer's decision to revoke a previously issued visa."<sup>128</sup> Applying *Mandel* and *Hawaii*, the court also viewed the Proclamation as a "facially legitimate and bona fide reason" for failure of visas to issue.<sup>129</sup>

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<sup>116</sup> See generally 365 F. Supp. 3d 1009 (N.D. Cal. 2019).

<sup>117</sup> *Id.* at 1022.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1023.

<sup>120</sup> *Id.* at 1022.

<sup>121</sup> *Id.* at 1020.

<sup>122</sup> *Accardi v. Shaughnessy*, 347 U.S. 260, 262–63 (1954); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006).

<sup>123</sup> *Emami*, 365 F. Supp. 3d at 1021.

<sup>124</sup> *Id.*

<sup>125</sup> 368 F. Supp. 3d 527 (E.D.N.Y. 2019).

<sup>126</sup> *Id.* at 541, 553.

<sup>127</sup> *Id.* at 555.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 562–63, 571.

Plaintiffs further claimed a violation of equal protection, relying exclusively on Trump's anti-Muslim rhetoric.<sup>130</sup> But the court determined that the bigoted statements alone did not constitute a "but-for" motive for the Proclamation, but rather, might have been "in spite of" it.<sup>131</sup> Finally, the court determined that *Hawaii* foreclosed the Establishment Clause claim.<sup>132</sup> Thus, the district court granted the government's motion to dismiss, finding plaintiffs' allegations "conclusory."<sup>133</sup>

Other district courts have interpreted the *Mandel* standard to permit a more rigorous review than that undertaken by the *Alharbi* court. In *Arab-American Civil Rights League v. Trump*, the district court denied the government's motion to dismiss plaintiffs' complaint challenging the Proclamation as a violation of the First Amendment's guarantee of speech, religion, and associational rights, and the equal protection component of the Fifth Amendment's Due Process Clause.<sup>134</sup> The court ruled that *Mandel* governed all constitutional claims, which required upholding any exclusion decision based upon a "facially legitimate and bona fide" reason.<sup>135</sup> Nonetheless, the court concluded that plaintiffs' complaint sufficiently alleged violations under this standard.<sup>136</sup> The court specifically rejected the government's contention that *Hawaii v. Trump* mandated dismissal of plaintiffs' claims; instead, the court emphasized that the Supreme Court had considered only the highly limited factual record that had developed in the dispute over issuance of a preliminary injunction.<sup>137</sup> At the motion to dismiss phase, the court concluded that plaintiffs had stated a claim for relief.<sup>138</sup>

Similarly, in *International Refugee Assistance Project v. Trump*, the district court applied rational basis review to plaintiffs' constitutional challenge to the travel ban Proclamation and denied the government's motion to dismiss based on *Hawaii*.<sup>139</sup> The court observed that rational basis review, although deferential, has previously led to the invalidation of government classifications.<sup>140</sup> Plaintiffs sufficiently alleged uneven application of the national security criteria, suggesting that the criteria were mere pretext.<sup>141</sup> In order to prevail, however, plaintiffs would have to *refute* the government's national security rationale.<sup>142</sup>

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<sup>130</sup> *Id.* at 563.

<sup>131</sup> *Id.* at 564; see Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 19 (2019) (arguing for a but-for motive standard in this litigation). For a recent discussion of "but-for" causation in civil rights law, see *Comcast Corp. v. Nat'l Ass'n Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).

<sup>132</sup> *Alharbi*, 368 F. Supp. 3d at 561.

<sup>133</sup> *Id.* at 564.

<sup>134</sup> 399 F. Supp. 3d 717, 719 (E.D. Mich. 2019).

<sup>135</sup> *Id.* at 726 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2419–20 (2018)).

<sup>136</sup> *Id.* at 728.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 729.

<sup>139</sup> 373 F. Supp. 3d 650, 660 (D. Md. 2019), *rev'd*, 961 F.3d 635 (4th Cir. 2020).

<sup>140</sup> *Id.* at 670 (discussing the animus cases).

<sup>141</sup> *Id.* at 674 (discussing pretext).

<sup>142</sup> *Id.* at 676.

The Fourth Circuit ultimately rejected this conclusion in *International Refugee Assistance Project*, noting that the Supreme Court had already definitively determined that the most recent Proclamation bore some relationship to the stated national security objectives.<sup>143</sup> It was no longer an open question whether the Proclamation had some rational basis. Even if the Proclamation only obliquely related to the stated objective, or even frustrated those objectives at some level, it was immune from invalidation under rational basis review.<sup>144</sup> All that was required was some showing of *plausible* reasons, even if pretextual.

The ongoing challenges to the 2017 travel ban and its waiver procedure reveal district courts applying *Mandel* to constitutional claims and alternately exhibiting great deference or, following the “animus” cases,<sup>145</sup> allowing claims to proceed on the notion that the disputed orders might fail even on rational basis review.<sup>146</sup> The Fourth Circuit, however, does not view rational basis review as permitting a court to weigh competing considerations: if the challenged law is based on *plausible* reasons, it stands.<sup>147</sup> Apart from echoing this deferential approach to immigrants’ constitutional claims, cases like *Emami* also demonstrate that where constitutional claims might fail, an *Accardi* claim might succeed. These cases collectively demonstrate the limits of constitutional rights in protecting immigrants’ well-being as well as the promise of relief based on challenges to agency process.

### B. Temporary Protected Status

Apart from banning the entry of noncitizens, the Trump Administration has also sought to end lawful status for hundreds of thousands of immigrants already here. In 2017, the administration ended TPS for immigrants from Haiti, Honduras, El Salvador, Sudan, and Nepal.<sup>148</sup> Congress created TPS in 1990 in response to the need to provide temporary lawful status to immigrants from countries that had experienced natural disasters or war.<sup>149</sup> Congress further established a procedure for

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<sup>143</sup> *Id.* at 652.

<sup>144</sup> *Id.* at 651.

<sup>145</sup> See William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 168–70 (2019); Ray, *supra* note 131, at 50.

<sup>146</sup> Ray, *supra* note 131, at 48.

<sup>147</sup> *Id.* at 62–63.

<sup>148</sup> Kathryn Johnson & Peniel Ibe, *Trump Has Ended Temporary Protected Status for Hundreds of Thousands of Immigrants. Here’s What You Need to Know*, AM. FRIENDS SERV. COMM. (June 30, 2020), <https://www.afsc.org/blogs/news-and-commentary/trump-has-ended-temporary-protected-status-hundreds-thousands-immigrants> [<https://perma.cc/A87D-XDQR>].

<sup>149</sup> JILL H. WILSON, CONG. RSCH. SERV., RS20844, TEMPORARY PROTECTED STATUS: OVERVIEW AND CURRENT ISSUES 2 (2020). TPS shields certain noncitizens from deportation, authorizing them to work during their stay. INA § 244(b) explains eligibility:

The Attorney General, after consultation with appropriate agencies of the

the designation and de-designation of affected areas. Specifically, the INA authorizes the DHS Secretary to make an initial designation, and then provides for periodic review after the initial designation, every sixty days.<sup>150</sup> If the DHS Secretary determines that the foreign state previously designated “no longer continues to meet the conditions for designation,” they must publish a notice in the Federal Register explaining the basis for the determination.<sup>151</sup> If the DHS Secretary wishes to extend the designation, they may do so for a period of twelve or eighteen months.<sup>152</sup> The Secretary’s determination is conclusive and not subject to judicial review.<sup>153</sup> Over decades, the INS and then DHS have followed a standard procedure for making designation decisions—namely, consulting with the State Department, the National Security Council, and sometimes the Department of Justice.<sup>154</sup>

A wide range of community and legal organizations challenged the TPS terminations. The NAACP Legal Defense Fund brought suit to challenge the termination of TPS for Haitians, alleging that the decision reflected racial animus rather than objective review of country conditions.<sup>155</sup> The Family Action Network Movement

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Government, may designate any foreign state . . . under this subsection only if—

- (A) The Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state . . . would pose a serious threat to their personal safety;
- (B) The Attorney General finds that—
  - (i) There has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption to living conditions in the area affected,
  - (ii) The foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
  - (iii) The foreign state officially has requested designation under this subparagraph; or
- (A) The Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States . . . .

Immigration and Nationality Act § 244(b), 8 U.S.C. § 1254a(b).

<sup>150</sup> 8 U.S.C. § 1254a(b)(3)(A).

<sup>151</sup> *Id.* § 1254a(b)(3)(B).

<sup>152</sup> *Id.* § 1254a(b)(3)(C).

<sup>153</sup> *Id.* § 1254a(b)(5)(B).

<sup>154</sup> *Temporary Protected Status: An Overview*, AM. IMMIGR. COUNCIL (Jan. 20, 2020), <https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview> [<https://perma.cc/QK3S-9PAW>].

<sup>155</sup> *See* NAACP v. Dep’t of Homeland Sec., 364 F. Supp. 3d 568, 572 (D. Md. 2019);

challenged the rescission of TPS for Haitians as well in the *Saget* case.<sup>156</sup> The nonprofit Centro Presente challenged the termination on behalf of TPS recipients from Honduras, El Salvador, and Haiti, alleging violations of equal protection and due process.<sup>157</sup> Casa de Maryland sued on behalf of Salvadoran nationals, bringing APA claims in addition to constitutional ones.<sup>158</sup> Finally, the ACLU brought suit on behalf of TPS recipients from El Salvador, Haiti, Nicaragua, and Sudan, and their U.S. citizen children.<sup>159</sup>

All plaintiffs faced arguments that the courts lacked subject matter jurisdiction over their claims.<sup>160</sup> INA section 244(b)(5)(A) states: “There is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.”<sup>161</sup> Courts have acknowledged that this precludes judicial review of the substantive designation decision or the “content,” but some have ruled that it does not preclude review of the *process* by which the agency makes the decision.<sup>162</sup> In addition, at least one court noted that the provision did not preclude review of constitutional claims specifically.<sup>163</sup>

Plaintiffs in these lawsuits alleged a general pattern of DHS jettisoning longstanding practices regarding TPS designations and manipulating the process to obtain a predetermined result to end TPS for tens of thousands of Black and brown immigrants. According to plaintiffs in *Saget*, for example, DHS leadership manipulated the longstanding re-designation process to force a recommendation for termination of TPS for Haitians.<sup>164</sup> DHS initially designated Haiti for TPS in 2010 following a devastating earthquake there.<sup>165</sup> In 2017, plaintiffs alleged, United States Citizenship and Immigration Services (USCIS) researchers initially determined that conditions in Haiti warranted an extension of TPS, citing the earthquake’s continuing effect on

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Raymond Audain, *Not Yet Forgiven for Being Black: Haiti’s TPS, LDF, and the Protean Struggle for Racial Justice*, 52 LOY. L.A. L. REV. 409, 412 (2019).

<sup>156</sup> *Saget v. Trump*, 375 F. Supp. 3d 280, 328–29, 339 (E.D.N.Y. 2019) (granting preliminary injunction).

<sup>157</sup> *Centro Presente v. Dep’t of Homeland Sec.*, 332 F. Supp. 3d 393, 396 (D. Mass. 2018).

<sup>158</sup> *Casa de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 312 (D. Md. 2018).

<sup>159</sup> *Ramos I*, 336 F. Supp. 3d 1075, 1092–93, 1116 (N.D. Cal. 2018) (denying the government’s motion to dismiss), *vacated sub nom. Ramos II*, 975 F.3d 872 (9th Cir. 2020).

<sup>160</sup> See *Saget*, 375 F. Supp. at 330; *NAACP v. Dep’t of Homeland Sec.*, 364 F. Supp. 3d at 574; *Casa de Md., Inc.*, 355 F. Supp. at 316; *Ramos I*, 336 F. Supp. 3d at 1088; *Centro Presente*, 332 F. Supp. 3d at 386. It appears that only the NAACP brought constitutional claims alone. See generally *NAACP v. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568. The other plaintiffs brought constitutional claims as well as APA claims. See generally *Saget*, 375 F. Supp. 3d 280; *Casa de Md., Inc.*, 355 F. Supp. 307; *Ramos I*, 336 F. Supp. 3d 1075; *Centro Presente*, 332 F. Supp. 3d 393.

<sup>161</sup> Immigration and Nationality Act § 244(b)(5)(A), 8 U.S.C. § 1254a(b)(5)(A).

<sup>162</sup> *Saget*, 375 F. Supp. 3d at 333.

<sup>163</sup> *NAACP v. Dep’t of Homeland Sec.*, 364 F. Supp. 3d at 575.

<sup>164</sup> *Saget*, 375 F. Supp. 3d at 347.

<sup>165</sup> *Id.* at 301.

infrastructure, health, sanitation services, and emergency response capacity.<sup>166</sup> Plaintiffs alleged, however, that new USCIS appointees rejected this recommendation and sought to build a record in support of termination.<sup>167</sup> They “directed staffers” to revise the draft “to include an option for terminating TPS for Haiti.”<sup>168</sup> Ultimately, USCIS circulated a draft memorandum recommending termination, concluding that Haiti had “made significant progress in recovering from the 2010 earthquake” and no longer warranted the TPS designation.<sup>169</sup> Thus, according to plaintiffs, the DHS leadership pressed USCIS officials to launder their recommendation until it supported their preferred outcome.<sup>170</sup>

The procedural irregularities that characterized this process led the *Saget* court to conclude that plaintiffs had alleged violations of the APA. Specifically, DHS’s failure to consider the *current* state of Haiti, not merely conditions attributable to the 2010 earthquake, departed from prior practice, and DHS had failed to supply a “reasoned explanation” for the change in policy.<sup>171</sup> In addition, whatever review process occurred was designed to build a case for a predetermined outcome.<sup>172</sup> Rather than focusing on statutory factors such as earthquakes and dangerous conditions, DHS focused on “crime rates and public benefit usage by TPS holders.”<sup>173</sup>

Similarly, plaintiffs in *Casa de Maryland, Inc.* alleged that the DHS Secretary’s decision-making process ignored the extensive factual record that had supported re-designation of TPS for El Salvador *eleven times* from 2002 to 2016.<sup>174</sup> The agency’s departure from its traditional approach to determining whether to re-designate a country served as circumstantial evidence of racial animus.<sup>175</sup> The court in *Centro Presente* determined that, based on documented procedural irregularities, plaintiffs had plausibly alleged that the TPS designation decision was both “arbitrary and capricious” and made “without ‘observance of procedure required by law.’”<sup>176</sup> Finally, in *Ramos*, the court observed that the record supported the view that the White House influenced

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 315.

<sup>168</sup> *Id.* at 305.

<sup>169</sup> *Id.* at 306.

<sup>170</sup> *See id.* at 305–06, 372–74.

<sup>171</sup> *Id.* at 354; *see also Ramos I*, 336 F. Supp. 3d 1075, 1105–08 (N.D. Cal. 2018) (on motion for preliminary injunction, finding plaintiffs likely to succeed on APA claim due to agency’s failure to provide a “reasoned explanation” for its departure from a prior policy or practice of considering “intervening conditions not directly related to the originating condition”), *vacated sub nom. Ramos II*, 975 F.3d 872 (9th Cir. 2020).

<sup>172</sup> *Saget*, 375 F. Supp. 3d at 299.

<sup>173</sup> *Id.*

<sup>174</sup> *Casa de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 312 (D. Md. 2018).

<sup>175</sup> Nonetheless, the district court clarified that it lacked the authority to assess the merits of the Secretary’s termination decision—it could only determine that plaintiffs had stated an APA claim based on racial animus. *Id.* at 321.

<sup>176</sup> *Centro Presente v. Dep’t of Homeland Sec.*, 332 F. Supp. 3d 393, 416 (D. Mass. 2018).

TPS decisions, with Acting Secretary Elaine Duke at one point attributing the terminations to an “America first view.”<sup>177</sup> Moreover, declarations by career DHS employees revealed that the agency could arrive at a recommendation to terminate TPS only if it limited its consideration to those country conditions attributable to the original event triggering the designation; thus, intervening conditions that would justify a TPS designation according to the “standard metrics” would not be considered.<sup>178</sup> Agency officials further resisted staff recommendations for extending designations, noting, “I do not think [this] is the conclusion we are looking for.”<sup>179</sup> Allegations regarding a fundamental change in the nature of the TPS designation process led district courts in these cases to find plausible claims of APA violations.

These courts also determined that plaintiffs had stated constitutional claims based on Trump’s “racial animus towards immigrants of color.”<sup>180</sup> The *Saget* plaintiffs argued that the evidence of racial animus triggered strict scrutiny of DHS’s termination decision, *Trump v. Hawaii* notwithstanding.<sup>181</sup> The district court agreed, noting that the national security rationale so prominent in *Hawaii* was absent in this case, and critically, that the noncitizens in question here were already present in the United States.<sup>182</sup> As a result, the reasons for *Hawaii*’s deferential standard of review did not apply, and the court determined that a traditional equal protection analysis under *Arlington Heights* was proper.<sup>183</sup> Implicitly, the court regarded the plenary power doctrine as irrelevant outside of the regulation of entry or the national security context.

Other courts have similarly concluded that *Trump v. Hawaii* does not apply to plaintiffs’ constitutional claims. In *Ramos*, the court observed not only that the government lacked a national security or foreign policy rationale for its TPS decision but that TPS beneficiaries have extensive ties to the U.S. that entitle them to greater constitutional protection.<sup>184</sup> Many have lived in the U.S. for years. In addition to lengthy terms of residence, TPS beneficiaries often have U.S. citizen children, have obtained higher education in the U.S., and have had substantial careers in the U.S.<sup>185</sup> Thus, they enjoy more robust constitutional protection than a non-citizen seeking admission.<sup>186</sup> Finally, in *NAACP v. Department of Homeland Security*, the district court declined to apply “deferential rational basis review.”<sup>187</sup> As in *Saget*,

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<sup>177</sup> *Ramos I*, 336 F. Supp. 3d 1075, 1100 (N.D. Cal. 2018), *vacated sub. nom. Ramos II*, 975 F.3d 872 (9th Cir. 2020).

<sup>178</sup> *Id.* at 1093, 1096, 1104.

<sup>179</sup> *Id.* at 1104.

<sup>180</sup> *Saget v. Trump*, 375 F. Supp. 3d 280, 300 (E.D.N.Y. 2019).

<sup>181</sup> *Id.* at 334–35; *see also NAACP v. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568, 578 (D. Md. 2019).

<sup>182</sup> *Saget*, 375 F. Supp. 3d at 301–02.

<sup>183</sup> *Id.* at 366.

<sup>184</sup> *Ramos I*, 336 F. Supp. 3d at 1107; *see also Centro Presente v. Dep’t of Homeland Sec.*, 332 F. Supp. 3d 393, 411 (D. Mass. 2018).

<sup>185</sup> *Ramos I*, 336 F. Supp. 3d at 1107.

<sup>186</sup> *See, e.g., id.* at 1107–08; *Centro Presente*, 332 F. Supp. 3d at 411.

<sup>187</sup> 364 F. Supp. 3d 568, 576 (D. Md. 2019).

the district court in *NAACP v. Department of Homeland Security* determined that *Arlington Heights* applied.<sup>188</sup>

Ultimately, every district court considering challenges to TPS terminations permitted plaintiffs' constitutional claims to survive a motion to dismiss and, in at least one case, also granted a preliminary injunction based on plaintiffs' likelihood of success in establishing an equal protection violation.<sup>189</sup> In *NAACP v. Department of Homeland Security*, the court ruled that the INA's jurisdiction-stripping provision did not apply to constitutional challenges to the DHS Secretary's determination,<sup>190</sup> and plaintiffs had plausibly alleged that the Acting DHS Secretary refused to acknowledge evidence of Haiti's troubled country conditions and failed to consider all the statutory factors.<sup>191</sup> Combined with the President's racial animus, the court found that several factors supported a finding of discriminatory intent.<sup>192</sup> In *Ramos*, the district court determined that the Equal Protection Clause applied to executive action in immigration law, and that the narrow review described in *AADC* applied only to individual selective prosecution rather than programmatic challenges.<sup>193</sup> Similarly, *Ramos* found *Rajah v. Mukasey* distinguishable, despite the noncitizens' presence in U.S. territory in that case, because the government had advanced a national security rationale there, and the noncitizens at issue were otherwise deportable.<sup>194</sup>

Although TPS determinations are committed to the DHS Secretary's discretion,<sup>195</sup> federal district courts ruling on the legality of the termination of TPS for several countries have held that plaintiffs' specific claims were reviewable.<sup>196</sup> Courts have noted that DHS's deviation from established procedure, combined with the President's rhetoric, supported an inference of unconstitutional animus as well as a claim for violation of the APA.<sup>197</sup> These courts have concluded that an "amalgam of factors" determine the constitutional status of particular noncitizens.<sup>198</sup> The presence or absence of a national security or foreign policy rationale matters, but so do the noncitizens' lawful presence in and ties to the United States.

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<sup>188</sup> *Id.* On appeal, the Ninth Circuit affirmed the applicability of *Arlington Heights* but determined that plaintiffs had "fail[ed] to present even 'serious questions' on the merits" by failing to tie "the President's alleged discriminatory intent to the specific TPS terminations . . . ." *Ramos II*, 975 F.3d 872, 897 (9th Cir. 2020).

<sup>189</sup> *See generally, e.g., Ramos I*, 336 F. Supp. 3d 1075; *Centro Presente*, 332 F. Supp. 3d 393; *Casa de Md., Inc. v. Trump*, 355 F. Supp. 3d 307 (D. Md. 2018); *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. 2019).

<sup>190</sup> 364 F. Supp. 3d at 575.

<sup>191</sup> *Id.* at 572–73, 578.

<sup>192</sup> *See id.* at 576–78.

<sup>193</sup> *Ramos I*, 336 F. Supp. 3d at 1105–08.

<sup>194</sup> *Id.* at 1107–08.

<sup>195</sup> *See* 5 U.S.C. § 701(a)(2); *Ramos I*, 336 F. Supp. 3d at 1082; *Heckler v. Chaney*, 470 U.S. 821, 835 (1985).

<sup>196</sup> *Ramos I*, 336 F. Supp. 3d at 1090, 1104–05.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1107.

These early plaintiff victories, however, have proven fragile. In *Ramos*, for example, the Ninth Circuit reversed the district court's grant of a preliminary injunction, finding that none of plaintiffs' claims were likely to succeed.<sup>199</sup> The court determined that the APA claim was unreviewable and the equal protection claim failed because plaintiffs had failed to demonstrate that Trump had directly influenced the TPS rescission decision.<sup>200</sup>

### C. Humanitarian Parole

The final set of cases I consider involves challenges to the administration's decision to rescind humanitarian parole in individual cases as well as on a mass scale. Humanitarian parole refers to "processes to allow entry or permission to remain in the United States to those [who] do not otherwise qualify for admission."<sup>201</sup> Under INA section 212(d)(5)(A), the Attorney General has the discretion to "parole" any noncitizen into the United States on a case-by-case basis "for urgent humanitarian reasons or significant public benefit."<sup>202</sup> The applicable regulation permits parole of noncitizens with serious medical conditions, pregnant women, juveniles, witnesses in U.S. proceedings, or those whose detention "is not in the public interest" as determined by the DHS Secretary or their designees.<sup>203</sup>

The Obama Administration created the Central American Minors program (CAM) to permit minors from El Salvador, Guatemala, and Honduras to be considered for refugee resettlement in the U.S. while still in their home country.<sup>204</sup> If deemed ineligible for resettlement, the minors were considered for humanitarian parole, but the Trump Administration terminated this program in 2017.<sup>205</sup> In *S.A. v. Trump*, parents lawfully residing in the U.S. sued DHS and USCIS alleging that termination of their beneficiary children's conditionally approved parole under the CAM program violated the APA and the Equal Protection Clause.<sup>206</sup> The district court viewed DHS's termination of the CAM Parole Program as two actions: 1) terminating the Program going forward for new applicants, and 2) rescinding conditional approvals of parole made prior to termination.<sup>207</sup>

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<sup>199</sup> *Ramos II*, 975 F.3d 872, 878 (9th Cir. 2020).

<sup>200</sup> *Id.* at 899.

<sup>201</sup> ALISON KAMHI, LENA GRABER, ERIN J. QUINN, ALLISON DAVENPORT & JOSE MAGAÑA-SALGADO, *PAROLE IN IMMIGRATION LAW* § 1.1 (1st ed. 2016).

<sup>202</sup> Immigration and Nationality Act § 212(d)(5)(A), 8 U.S.C. § 1182(a)(5)(A).

<sup>203</sup> 8 C.F.R. § 212.5(b)(5) (2020).

<sup>204</sup> *Central American Minors (CAM): Information for Parole Applicants*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/humanitarian-parole/central-american-minors-cam-information-for-parole-applicants> [<https://perma.cc/3MTE-BXER>] (June 18, 2019).

<sup>205</sup> *Id.*

<sup>206</sup> 363 F. Supp. 3d 1048 (N.D. Cal. 2018).

<sup>207</sup> *Id.* at 1077.

The district court determined that plaintiffs had stated a claim challenging the second action, but not the first.<sup>208</sup> It ruled that termination of the program going forward satisfied the APA's requirement of an adequate explanation because termination was consistent with Trump's desire to secure the border.<sup>209</sup> Unlike with the termination of Deferred Action for Childhood Arrivals (DACA), the court noted, DHS terminated the program for policy reasons and took political responsibility for it.<sup>210</sup> In addition, DHS's legal interpretation of the parole statute lacked the flaws tainting Secretary Nielsen's view of DACA's purported illegality.<sup>211</sup> The court noted that a parole termination was distinct from TPS termination as well, because the TPS termination process involved a marked departure from past practice; here, the termination of CAM parole did not involve a marked departure from past parole terminations.<sup>212</sup> Thus, the termination had a satisfactory explanation.<sup>213</sup>

The court similarly rejected the notion that DHS had failed to consider "serious reliance interests."<sup>214</sup> USCIS told applicants that it would consider requests for parole case-by-case, but it did not guarantee parole.<sup>215</sup> Similarly, the court found that neither a liberal awarding of parole in prior cases nor the payment of application fees creates a "serious reliance interest" in approval.<sup>216</sup> Nor did DHS's decision fail to consider "important aspects of the problem," such as the conditions in Central America, because the parole statute does not require DHS to consider such factors.<sup>217</sup>

Plaintiffs succeeded, however, in stating a claim that DHS's rescission of conditional approvals en masse was arbitrary and capricious.<sup>218</sup> Plaintiffs alleged that the government failed to consider serious reliance interests for those who *were already approved*.<sup>219</sup> Although DHS has authority to rescind conditionally approved parole applications, the only remaining steps for plaintiffs were entirely "nondiscretionary ones: completion of a medical exam, final security checks, and making travel arrangements."<sup>220</sup> Thus, participants approved for parole had serious reliance interests, and DHS failed to explain why mass rescission was justified despite these interests.<sup>221</sup>

In contrast to the court's treatment of plaintiffs' APA claim regarding mass rescission, the court ruled that plaintiffs had not stated due process or equal protection

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<sup>208</sup> *Id.* at 1096.

<sup>209</sup> *Id.* at 1080.

<sup>210</sup> *Id.* at 1065–66.

<sup>211</sup> *Id.* at 1082.

<sup>212</sup> *Id.* at 1084.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1087.

<sup>215</sup> *Id.* at 1086.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1088.

<sup>218</sup> *Id.* at 1090.

<sup>219</sup> *Id.* at 1085.

<sup>220</sup> *Id.* at 1089.

<sup>221</sup> *Id.* at 1090, 1094.

claims.<sup>222</sup> First, plaintiffs lacked a protected liberty interest.<sup>223</sup> Unlike an immigrant visa, parole created no statutorily created liberty interest.<sup>224</sup> With respect to plaintiffs' claim that mass rescission reflected racial animus toward Latino and Latina immigrants, the court emphasized that plaintiffs' children had not yet entered the U.S., thus entitling them to a less rigorous standard of judicial review.<sup>225</sup> Citing *Trump v. Hawaii*, the court noted that foreign nationals seeking entry lack a constitutional right of entry, and U.S. citizens do have rights of association, but this triggers only a "circumscribed judicial inquiry."<sup>226</sup> According to the court, the *Mandel* standard asks whether the policy is "inexplicable by anything but animus."<sup>227</sup> In other words, the court ruled that a policy will survive review under *Mandel* so long as animus is not the sole motive.<sup>228</sup>

The court regarded the termination of the CAM Parole Program as analogous to the entry ban under review in *Hawaii*.<sup>229</sup> It credited the government's view that an over-generous use of parole had contributed to the "border crisis" and that parole should be used "sparingly and only in individual cases."<sup>230</sup> The court explicitly attributed this conclusion to the deferential standard of review used in *Hawaii*, noting that an argument about animus might have more weight in a challenge to the termination of DACA or TPS, which "involve only individuals located in the United States."<sup>231</sup> The court weighed heavily the noncitizens' absence from U.S. territory, and the *Mandel* standard doomed plaintiffs' equal protection claim.<sup>232</sup> Under the "facially legitimate and bona fide" standard, the court was powerless to "test [government's] reasons [for terminating the CAM Parole Program] by balancing them against the plaintiffs' constitutional interests."<sup>233</sup> *S.A.* offers an example of a court applying *Mandel* even when the challenged policy lacks a national security rationale; instead, the court applied *Mandel* because the noncitizens were not present on U.S. soil.<sup>234</sup>

Courts considering other parole-related claims have similarly applied a deferential standard of review. In *Gutierrez-Soto v. Sessions*, petitioners sought a writ of habeas corpus based on the Attorney General's revocation of their humanitarian parole, allegedly in violation of their constitutional rights under substantive due

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<sup>222</sup> *Id.* at 1093.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1088.

<sup>226</sup> *Id.* at 1093.

<sup>227</sup> *Id.*

<sup>228</sup> See Verstein, *supra* note 81, at 1139 (describing the "sole motive" standard).

<sup>229</sup> *S.A.*, 363 F. Supp. 3d at 1093.

<sup>230</sup> *Id.* at 1064.

<sup>231</sup> *Id.* at 1095.

<sup>232</sup> *Id.* at 1096.

<sup>233</sup> *Id.*

<sup>234</sup> See Cristina M. Rodríguez, *Trump v. Hawaii and the Future of Presidential Power over Immigration*, 2 AM. CONST. SOC'Y SUP. CT. REV. 161 (2018).

process, equal protection, procedural due process, and the APA.<sup>235</sup> The district court determined that it retained jurisdiction over petitioners' substantive due process claim under *Zadvydas v. Davis*.<sup>236</sup> However, it ruled that plaintiffs had not articulated a violation of their rights.<sup>237</sup> Specifically, the court ruled that Immigration and Customs Enforcement (ICE) had not violated petitioners' rights by initially granting them parole, letting them work, live, and build a network for ten years, followed by abruptly apprehending and detaining them.<sup>238</sup> Similarly, the court determined that petitioners had not suffered an equal protection violation based on Trump's anti-Mexican rhetoric.<sup>239</sup> The court applied *Trump v. Hawaii* and determined that petitioners' revocation of parole could "be reasonably understood to result from a justification independent of unconstitutional grounds."<sup>240</sup> Harsher immigration enforcement per se (revealed in DHS policy changes) was not evidence of national origin discrimination.<sup>241</sup> Finally, ICE emails showed that they targeted petitioners because their asylum claims failed, not because of their national origin.<sup>242</sup>

By downgrading the due process and equal protection rights of plaintiff-parolees, the district court revived a trend or theme in immigrants' rights jurisprudence that weighs a formal admission heavily in evaluating the constitutional protection due to a noncitizen.<sup>243</sup> Where the government does not advance a national security rationale, noncitizens' presence in the U.S. typically enhances their constitutional status.<sup>244</sup> Although the noncitizens denied parole in *S.A.* were located outside the United States, the petitioners in *Gutierrez-Soto* were already here.<sup>245</sup> Moreover, the plaintiffs in *Gutierrez-Soto* alleged just the sort of "substantial ties" with the U.S. that TPS beneficiaries described in their initially successful complaints.<sup>246</sup> And although parolees have not been "admitted," they are present with the permission of the United States. The district court appears to have weighed heavily the lack of formal admission, overlooking the significance of a noncitizen's presence in the United States.<sup>247</sup>

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<sup>235</sup> See generally 317 F. Supp. 3d 917 (W.D. Tex. 2018).

<sup>236</sup> *Id.* at 925 (citing *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001)).

<sup>237</sup> *Id.* at 928–29.

<sup>238</sup> *Id.* at 929.

<sup>239</sup> *Id.* at 930–31.

<sup>240</sup> *Id.* at 931 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018)).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 71 (arguing that immigrants' rights jurisprudence weighs both a noncitizen's community ties and formal admission in calibrating constitutional protection, thus putting parolees in an unfavorable position).

<sup>244</sup> *Id.* at 84.

<sup>245</sup> Compare *Gutierrez-Soto*, 317 F. Supp. 3d at 921–23, with *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1067 (N.D. Cal. 2018).

<sup>246</sup> *S.A.*, 363 F. Supp. 3d at 1067.

<sup>247</sup> See *id.* at 1089–91.

Surprisingly, given the court's dim view of petitioners' constitutional status and *AADC*'s general prohibition on selective deportation claims, the court ruled that petitioners had stated a First Amendment claim.<sup>248</sup> As a journalist who criticized ICE, petitioner was apprehended months after an event at the National Press Club, thus establishing proximity between his expressive conduct and adverse action.<sup>249</sup> The court concluded that "[d]rawing all reasonable inferences in favor of Petitioners, the evidence could establish that Respondents retaliated against immigrant activists who criticized the government's policies."<sup>250</sup> Thus, the court denied summary judgment on these claims.<sup>251</sup>

These humanitarian parole cases show the peril of *Mandel* for plaintiffs and the uncertain constitutional status of parolees, despite their presence within U.S. territory and the lack of any national security rationale in terminating their status.

### III. EMERGING LESSONS

Challenges to executive action in immigration law demonstrate the continuing vitality of traditional administrative law claims amid mixed success for constitutional claims, and this, I argue, is partly the legacy of *Trump v. Hawaii*. Scholars have characterized arbitrary and capricious review under the APA as more stringent<sup>252</sup> and more flexible than rational basis review of constitutional claims.<sup>253</sup> That offers one reason, pre-*Hawaii*, for the relative success of administrative law claims. But the impact of *Hawaii* remains important and discernible. District courts have read *Hawaii* to stand for the propositions that noncitizens who have not yet entered U.S. territory lack constitutional rights and that the associational rights of U.S. citizens in this setting are subject only to the mildest form of review.<sup>254</sup> In addition, courts have applied this mild review to noncitizens who have not been admitted, but who are physically present.<sup>255</sup> Instead, courts with this tepid view of immigrants' rights

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<sup>248</sup> *Gutierrez-Soto*, 317 F. Supp. 3d at 932–35; cf. Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1268 (2016).

<sup>249</sup> *Gutierrez-Soto*, 317 F. Supp. 3d at 933.

<sup>250</sup> *Id.* at 934.

<sup>251</sup> *Id.*

<sup>252</sup> See Metzger, *supra* note 106, at 484.

<sup>253</sup> See Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 383 (2018) (describing “fluidity” of arbitrary and capricious review).

<sup>254</sup> See, e.g., *Int’l Refugee Assistance Project v. Trump*, 404 F. Supp. 3d 946, 951 (D. Md. 2019) (“Notably, courts that have been asked to consider the applicable standard since *Hawaii* have read that opinion as calling for rational basis review of constitutional claims challenging the Proclamation, such that there is likely not ‘substantial ground for difference of opinion.’” (citations omitted)).

<sup>255</sup> See *Gutierrez-Soto*, 317 F. Supp. 3d at 931.

might understandably invoke reasoning more generally available when reviewing an agency's final action. This Part elaborates on these observations and suggests a direction for future exploration in litigation to protect immigrants' well-being—one not premised on immigrants' rights.

*A. The First Lesson: The Primacy of Ordinary Administrative Law Claims*

The first lesson of *Hawaii* is the relative success of administrative law claims over constitutional claims in challenges to executive action in immigration law. Some of this follows from the relative strength of arbitrary and capricious review compared to rational basis review. Arbitrary and capricious review requires courts to evaluate the process by which an agency makes a factual finding or discretionary decision. Specifically, it calls for setting aside action unless there is a “rational connection between the facts found and the choice made.”<sup>256</sup> Although the relationship between the facts found and ultimate choice need not be particularly strong, an agency cannot rely on post hoc rationalizations to explain its decision.<sup>257</sup> This prohibition on post hoc rationalizations immediately distinguishes arbitrary and capricious review from rational basis review, the mildest form of constitutional scrutiny, and one that thrives on hypothetical governmental purposes.<sup>258</sup>

1. Reasons for the Judicial Preference for Ordinary Administrative Law Claims

Robust arbitrary and capricious review can serve as a meaningful check on agency power when an agency uses an irregular process or fails to offer a sufficient explanation for its action, but it does not on its own condemn substantively racist policies. In *Judulang*, as noted in Section I.B, the Court determined that the BIA had not adequately explained its reasons for relying on a meaningless distinction for limiting a form of discretionary relief for noncitizens with certain criminal convictions.<sup>259</sup> A similarly robust version of arbitrary and capricious review applied in *Department of Homeland Security v. Regents of the University of California*, discussed in Part III below.<sup>260</sup> There, the Court ruled that DHS had failed to consider “important aspects of the problem” when rescinding DACA.<sup>261</sup> It had assumed without explanation that both the work authorization and forbearance from deportation elements of DACA should be rescinded to cure the purported illegality of only the former.<sup>262</sup> Procedural

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<sup>256</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

<sup>257</sup> *Id.* at 50.

<sup>258</sup> See Steve Sanders, *Making It Up: Lessons for Equal Protection Doctrine from the Use and Abuse of Hypothesized Purposes in Marriage Equality Litigation*, 68 HASTINGS L.J. 657, 659 (2017).

<sup>259</sup> See *supra* notes 101–05 and accompanying text.

<sup>260</sup> 140 S. Ct. 1891, 1901 (2020).

<sup>261</sup> *Id.* at 1912.

<sup>262</sup> *Id.*

irregularities also dominated the analysis in the TPS litigation at the district court level.<sup>263</sup> Except for the NAACP, plaintiffs in the TPS litigation raised both constitutional and APA claims, with both sets of claims emanating from what plaintiffs described as the racist decision-making that plagued the TPS re-designation process.<sup>264</sup>

Judges might prefer to issue a ruling favorable to immigrants on administrative law grounds rather than constitutional law grounds for several reasons. Professor Geoffrey Heeren has noted that this approach allows judges to avoid intervening in an unsettled area of the law, namely, immigrants' rights.<sup>265</sup> In addition, basing a decision on ordinary administrative law errors permits judges to preserve a narrow institutional role, to judge only the process rather than the substantive ends an agency chooses. To brand an agency's decision or policy a violation of equal protection on a vast record of explicit animus, a judge would essentially have to condemn the policy itself. This would involve straying from a purely procedural critique, even though engaging in substantive analysis is the court's job when confronted with a constitutional claim.<sup>266</sup>

Relatedly, judges might imagine a more straightforward remedy to an APA violation compared to a constitutional one. On remand, the agency must go back and weigh all the relevant considerations, and no irrelevant considerations, before devising a policy.<sup>267</sup> In contrast, the remedy for an equal protection violation is more fraught. What would the cure to a racist decision-making process look like? How long after the President's utterance of hateful rhetoric, if ever, would the agency be permitted to end TPS for maligned immigrants of color? These types of questions plagued plaintiffs in *Hawaii* as well.<sup>268</sup> In the end, the Court dodged those issues by ignoring the record of animus altogether.<sup>269</sup> For these reasons, courts may prefer to resolve disputes on ordinary administrative law grounds.

The litigation over the rescission of DACA illustrates the first lesson of *Hawaii*, even though none of the Justices cited *Hawaii* in their opinions resolving the case. DACA was an Obama-era program that shielded certain noncitizens from deportation temporarily and provided them with work authorization.<sup>270</sup> The Trump Administration rescinded DACA in 2017 based on the then-Attorney General's view that DACA was illegal from its inception.<sup>271</sup> Plaintiffs challenged the rescission in multiple

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<sup>263</sup> *Id.* at 1926–27.

<sup>264</sup> *See id.* at 1919–35.

<sup>265</sup> Heeren, *supra* note 11, at 398.

<sup>266</sup> *See generally* George Bach, *Answering the “Serious Constitutional Question”: Ensuring Meaningful Review of All Constitutional Claims*, 117 W. VA. L. REV. 177 (2014).

<sup>267</sup> *See* *Vidal v. Nielsen*, 279 F. Supp. 3d 401, 420–21, 431–33 (E.D.N.Y. 2018), *vacated sub nom. Regents*, 140 S. Ct. 1891 (2020).

<sup>268</sup> *See* Transcript of Oral Argument at 48–52, 54, 56–58, 60, 62–73, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

<sup>269</sup> *See Hawaii*, 138 S. Ct. at 2392–93, 2417–18.

<sup>270</sup> *Regents*, 140 S. Ct. at 1901–02, 1918.

<sup>271</sup> Press Release, Elaine Duke, Acting Sec'y, Dep't of Homeland Sec., Rescission of Deferred Action for Childhood Arrival (DACA) (Sept. 5, 2017).

lawsuits filed across the country, asserting claims under the APA and the Equal Protection Clause.<sup>272</sup> District courts permitted lawsuits to move forward on both sets of claims.<sup>273</sup> The Supreme Court ruled in the October 2019 term that the rescission “was arbitrary and capricious” under the APA<sup>274</sup> but that plaintiffs had not adequately pled an equal protection claim based on Trump’s anti-Mexican animus.<sup>275</sup>

With respect to the APA claims, the Court reasoned that Acting DHS Secretary Elaine Duke’s 2017 rescission memorandum cited one, and only one, reason for rescission—the Attorney General’s view that DACA was illegal.<sup>276</sup> A subsequent memorandum issued by Duke’s successor, Acting Secretary Kirsten Nielsen, could not be considered because it constituted a post hoc rationalization for Duke’s decision.<sup>277</sup> Accordingly, the Court considered only Duke’s memorandum and found the justification for her policy choice lacking.<sup>278</sup> Under the APA, an agency has discretion to make policy choices, but it must explain its reasoning adequately.<sup>279</sup>

Citing *State Farm*, the Court further reasoned that an agency’s decision is arbitrary and capricious if it “failed to consider . . . important aspect[s] of the problem.”<sup>280</sup> Here, Duke was bound to accept the Attorney General’s view that DACA was illegal but that did not compel rescission.<sup>281</sup> Rather, the source of the illegality, on the Attorney General’s view, was the granting of work authorization and similar benefits, not forbearance from deportation.<sup>282</sup> As a result, the Court reasoned, Duke should have at least *considered* decoupling benefits from forbearance; having not even considered it, let alone explained why it was insufficient to meet the agency’s goals, Duke’s decision was arbitrary and capricious.<sup>283</sup>

Apart from her failure to consider an “important aspect of the problem” with respect to DACA’s purported illegality, Duke further failed to consider DACA recipients’ reliance interests.<sup>284</sup> The Court conceded that those interests might not be particularly strong, given that DACA recipients were informed that the program could be

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<sup>272</sup> See *Regents*, 140 S. Ct. at 1903; *NAACP v. Trump*, 298 F. Supp. 3d 209, 215, 246 (D.D.C. 2018); *Vidal*, 279 F. Supp. 3d at 407.

<sup>273</sup> *Regents*, 140 S. Ct. at 1901–02, 1906–07, 1915–16; *NAACP v. Trump*, 298 F. Supp. 3d at 215–16, 246; *Vidal*, 279 F. Supp. 3d at 407, 409, 438.

<sup>274</sup> *Regents*, 140 S. Ct. at 1912, 1915.

<sup>275</sup> *Id.* at 1906, 1915–16. The Court first held, as a threshold matter, that it had jurisdiction to review the challenge to the rescission.

<sup>276</sup> *Id.* at 1903–04.

<sup>277</sup> *Id.* at 1908–09.

<sup>278</sup> *Id.* at 1908–10.

<sup>279</sup> *Id.* at 1905, 1907–11, 1913, 1915.

<sup>280</sup> *Id.* at 1910–12, 1915 (alteration in original) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

<sup>281</sup> *Id.* at 1910–13, 1915.

<sup>282</sup> *Id.* at 1910–12.

<sup>283</sup> *Id.* at 1910–13, 1915.

<sup>284</sup> *Id.* at 1913–14 (quoting *State Farm*, 463 U.S. at 43).

canceled at any time.<sup>285</sup> But regardless, many DACA recipients enrolled in higher education, married their partners, and bought homes in reliance on DACA, and the complete failure to consider those interests further undermined Duke's reasoning.<sup>286</sup>

In contrast to its receptivity to plaintiffs' APA claim, the Court dismissed plaintiffs' equal protection claim.<sup>287</sup> A plurality of Justices concluded that plaintiffs had not adequately pled an equal protection claim, despite the President's campaign rhetoric maligning Mexican immigrants, which is disproportionately the country of origin for DACA recipients.<sup>288</sup> The Justices declined to decide the proper analytic framework for this claim, but they ruled that even if *Arlington Heights* supplied the correct framework, plaintiffs had not adequately pled a violation of equal protection.<sup>289</sup> First, most unauthorized immigrants are Latino; thus, "one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program."<sup>290</sup> In addition, the Court did not recognize any irregularity in the rescission process.<sup>291</sup> Finally, the Court deemed Trump's animus "unilluminating" because Acting Secretary Duke and the Attorney General, rather than Trump, were the "relevant actors."<sup>292</sup> Contesting each of these conclusions, only Justice Sotomayor was convinced that plaintiffs had adequately pled that Trump's campaign rhetoric constituted circumstantial evidence to show that racial animus motivated the rescission of DACA.<sup>293</sup> The Court's DACA decision illustrates the relative success of administrative law claims over constitutional ones, even for immigrants present on U.S. soil.<sup>294</sup> Although no Justice cited *Hawaii*, attorneys involved in the case attributed the failure of the equal protection claim in part to a skepticism of immigrants' rights evinced in *Hawaii*.<sup>295</sup>

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<sup>285</sup> *Id.*

<sup>286</sup> *See id.* at 1914–15.

<sup>287</sup> *Id.* at 1915–16.

<sup>288</sup> *See id.* at 1915–17.

<sup>289</sup> *Id.* at 1915–16.

<sup>290</sup> *Id.* at 1915.

<sup>291</sup> *Id.* at 1916.

<sup>292</sup> *Id.* Federal courts of appeal have taken note of the DACA majority's skepticism of immigrants' equal protection claims. In *Ramos II*, described above in the discussion of TPS litigation, the Ninth Circuit dismissed plaintiffs' equal protection claim, citing *Regents*. 975 F.3d 872, 898 (9th Cir. 2020).

<sup>293</sup> *Regents*, 140 S. Ct. at 1916–18.

<sup>294</sup> *See Frequently Asked Questions: DHS DACA FAQs*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions> [<https://perma.cc/9SPA-3K6D>] (Feb. 4, 2021) (noting that DACA recipients do not accrue unlawful presence while their removal has been deferred, but DACA does not confer lawful status).

<sup>295</sup> Amicus, *Blockbusters: DACA and Title VII*, SLATE, at 23:10–26:47 (June 20, 2020, 6:00 AM), <https://slate.com/podcasts/amicus/2020/06/trump-bad-week-supreme-court> [<https://perma.cc/5C59-L2WE>].

## 2. Implications of the Preference for Ordinary Administrative Law Claims

Courts' preference for administrative law claims bears some relationship to the phenomenon identified by Professor Hiroshi Motomura of "phantom constitutional norms" driving statutory interpretation in immigration law.<sup>296</sup> Thirty years ago, Professor Motomura discerned the influence of "phantom norms"<sup>297</sup> on federal court decisions in challenges to federal immigration statutes. In these cases, courts typically faced a choice between openly deciding the constitutional question, which meant following the plenary power doctrine and applying only the mildest scrutiny—if any—to an immigration statute with harmful consequences for immigrants and interpreting the statute in an immigrant-friendly way.<sup>298</sup> Professor Motomura noted that the resort to phantom norms stunted the development of immigrants' rights jurisprudence but perhaps constituted a second-best solution in the shadows of the plenary power doctrine.<sup>299</sup>

The use of phantom norms, however, differs from the constitutional avoidance canon. That canon describes "a presumption that Congress does not intend to enact unconstitutional legislation."<sup>300</sup> When faced with one interpretation that would render a statutory provision unconstitutional and an equally plausible one that would not, the court has the authority to choose the interpretation that does *not* present the constitutional question.<sup>301</sup> This avoids invalidating a congressional enactment by assuming that Congress would not have intended to violate the Constitution.<sup>302</sup> The constitutional avoidance canon leads courts to protect potential constitutional interests without expressly deciding their contours.<sup>303</sup> In contrast, under phantom norms, the court reaches a decision *contrary* to what it would have reached had it followed the plenary power doctrine.<sup>304</sup> As a result, under the phantom norms framework, the court avoids a result that would harm immigrants' interests under constitutional law by instead opting to interpret a statute in a manner that protects immigrants' interests.

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<sup>296</sup> See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

<sup>297</sup> *Id.* at 564–65.

<sup>298</sup> See *id.* at 547–48.

<sup>299</sup> See *id.* at 564–67.

<sup>300</sup> WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 512 (2014).

<sup>301</sup> *Id.*

<sup>302</sup> See *id.*

<sup>303</sup> The alternative would be to protect constitutional interests through an expressly constitutional ruling that invalidates the statute in question.

<sup>304</sup> Motomura, *supra* note 296, at 564–65. Motomura argues that the use of phantom norms has stunted the development of jurisprudence on important questions, such as the extent to which analytic frameworks from mainstream public law apply to immigration cases.

This era of phantom norms driving sub-constitutional decisions to the benefit of immigrants appears to have ended with decisions such as *Jennings v. Rodriguez*<sup>305</sup> and *Hawaii*.<sup>306</sup> In *Jennings*, the Supreme Court declined to invoke the canon of constitutional avoidance to require bond hearings for certain detained noncitizens.<sup>307</sup> Similarly, in *Hawaii*, the Court rejected statutory arguments and decided the Establishment Clause question to plaintiffs' detriment.<sup>308</sup> As evidenced by these decisions, greater openness in the adjudication of immigrants' rights has not been favorable to immigrants.

Recent cases' deviation from the classic "phantom norm" cases serves as further evidence that the "phantom norms" era has ended. Rather than "avoiding" deciding constitutional questions, courts in the cases surveyed above take pains to articulate a restrictive conception of immigrants' rights, one frequently upheld by the Supreme Court.<sup>309</sup> Ultimately, the preference for administrative law claims has contributed to a crabbed vision of immigrants' rights by enabling courts to criticize agency process while remaining silent on racial and religious discrimination.

#### *B. The Second Lesson: Graduated Constitutional Protection for Noncitizens*

*Hawaii* and its progeny also reveal that immigrants enjoy "graduated constitutional protections," a phrase used by Professor David A. Martin to denote the varying constitutional protection noncitizens enjoy based on their ties to the U.S., duration of residence, and legal status.<sup>310</sup> The district court decisions applying *Hawaii* reveal a hierarchy among noncitizens, with those lawfully admitted into the U.S. and with substantial ties to the U.S. at the top, and those outside of U.S. territory at the bottom.<sup>311</sup> In between, courts draw lines based on formal admission.<sup>312</sup> Recent cases have also evinced this "positivis[t]" turn, emphasizing legal status.<sup>313</sup>

The *only* class of cases discussed above in which immigrants routinely succeeded in advancing constitutional claims at the district court level involved challenges to the rescission of TPS. Immigrants with TPS have been formally admitted and are lawfully present on U.S. soil. In contrast, courts applied only the mildest scrutiny to claims brought by noncitizens who were not present on U.S. soil, as in challenges to the travel ban and its waiver procedure and the *S.A.* humanitarian parole case.<sup>314</sup>

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<sup>305</sup> See 138 S. Ct. 830, 836 (2018).

<sup>306</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2392–93 (2018).

<sup>307</sup> *Jennings*, 138 S. Ct. at 836.

<sup>308</sup> *Hawaii*, 138 S. Ct. at 2392–93, 2407–08, 2422–23.

<sup>309</sup> See generally *id.*; *Jennings*, 138 S. Ct. 830.

<sup>310</sup> See Martin, *supra* note 243, at 48–49, 84–85, 89, 137.

<sup>311</sup> See, e.g., *Saget v. Trump*, 375 F. Supp. 3d 280, 367–68 (E.D.N.Y. 2019).

<sup>312</sup> See, e.g., *Yafai v. Pompeo*, 924 F.3d 969, 973–74 (7th Cir. 2019) (per curiam) (explaining that denial of a visa does not require reasoning).

<sup>313</sup> See Martin, *supra* note 243, at 97–99; see also, e.g., *Saget*, 375 F. Supp. 3d at 367–68.

<sup>314</sup> See, e.g., *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1091–92 (N.D. Cal. 2018).

This mild scrutiny applied also to claims brought by those who were present, but who had not yet been admitted, as in *Gutierrez-Soto*.<sup>315</sup> With the Court's recent decision in *Thuraissigiam* as well, where the Court deemed an asylum seeker who had crossed into the U.S. without having been admitted lacking a right to due process,<sup>316</sup> the role of formal admission in determining constitutional status has only grown.<sup>317</sup>

Uncertainty surrounding immigrants' constitutional rights partly drove the phenomenon of "phantom norms" discussed above.<sup>318</sup> But with greater openness in adjudication producing more anti-immigrant rulings, the uncertainty has yielded to a new doctrinal landscape, one in which most noncitizens are weak rights-holders, at least with respect to the First Amendment and the equal protection guarantee implicit in the Fifth Amendment.<sup>319</sup> For any noncitizen who is not or who never has been a legal permanent resident, or formally admitted into some other status, the Bill of Rights now offers very little.

Other avenues for vindicating immigrants' interests and promoting their well-being merit consideration. Traditional administrative law claims offer some hope, as evidenced in the DACA, humanitarian parole, and waiver litigation.<sup>320</sup> But an APA victory does not condemn bigotry the way an equal protection victory would, if at all.<sup>321</sup> In addition, as Professor Heeren has argued, ordinary administrative law victories offer mild and mercurial protection.<sup>322</sup> They make immigrants' interests more a matter of executive whim, for an immigrant-protective policy and an anti-immigrant policy can each be arbitrary and capricious.<sup>323</sup> As a result, APA claims may prove insufficiently protective of immigrants' interests.

As immigrants' constitutional claims receive mild or uneven scrutiny, advocates might consider a renewed focus on citizens' interests. Currently, citizens' right to

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<sup>315</sup> See, e.g., *Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 927–30, 932–33 (W.D. Tex. 2018).

<sup>316</sup> *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020) (holding that a noncitizen had "no entitlement to procedural rights other than those afforded by statute" when he "attempted to enter the country illegally and was apprehended just 25 yards from the border").

<sup>317</sup> With respect to DACA recipients, many of whom had been admitted at some point in their childhood, the Court appeared to view *Arlington Heights* as the proper framework, thus suggesting that traditional equal protection review would apply, even if plaintiffs' equal protection claim failed in that particular case. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914–16 (2020).

<sup>318</sup> See Motomura, *supra* note 296, at 549.

<sup>319</sup> This raises a more general problem, one recently explicated by Hiroshi Motomura, with reliance on a civil rights lens to confront the big questions of migration today. Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 458–60, 464–66, 471 (2020).

<sup>320</sup> See *supra* Part II.

<sup>321</sup> Sinnar & Srikantiah, *supra* note 80, at 206–07.

<sup>322</sup> See Heeren, *supra* note 11, at 418.

<sup>323</sup> See *id.* at 426.

associate with noncitizens located outside U.S. territory is protected weakly.<sup>324</sup> But the freedom of association is underappreciated and underdeveloped in many domains, including immigration law. Scholars and advocates might consider developing arguments rooted in the freedom of association as well as citizens' substantive due process rights of U.S. citizens to cohabit with noncitizen family members. At least a few Justices and federal judges endorsed this sort of argument in *Kerry v. Din*.<sup>325</sup> Such an approach also coheres with trends in international law and human rights law.<sup>326</sup>

Straying from a civil rights framework, immigrants' rights advocates might also explore structural constitutional claims, such as a claim arising under the Take Care Clause of Article II.<sup>327</sup> Complete development of this idea is beyond the scope of this Article, and the justiciability of such a claim is unclear, but a few key points merit discussion. At the most basic level, the Take Care Clause imposes on the President a duty to "take Care that the laws be faithfully executed."<sup>328</sup> On one view of this duty, the duty to faithfully execute the laws implies a duty of good faith, which the President violates when he acts out of racial animus.<sup>329</sup> Under this approach, even if a person subjected to a presidential order lacks equal protection rights, the Constitution imposes a structural constraint on the President nonetheless.

#### CONCLUSION

This Article assesses the emerging lessons of *Trump v. Hawaii* and concludes that the decision has dampened plaintiffs' success in litigating constitutional claims in a range of challenges to executive action in immigration law—even for immigrants

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<sup>324</sup> See Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 391–92 (2004).

<sup>325</sup> See 135 S. Ct. 2128, 2141–42 (2015) (Breyer, J., dissenting) (discussing freedom of association as a liberty interest with procedural due process protections); *Din v. Kerry*, 718 F.3d 856, 868 (9th Cir. 2013), *vacated*, 135 S. Ct. 2128.

<sup>326</sup> See Annalisa Ciampi (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Rights to Freedom of Peaceful Assembly and of Association*, 5–6, 8, 12, 14, 18, U.N. Doc. A/72/150 (July 14, 2017) (arguing for freedom of association to be considered a fundamental human right); Edison Lanza (Special Rapporteur for Freedom of Expression on the Inter-American Commission of Human Rights), *Protest and Human Rights: Standards on the Rights Involved in Social Protest and the Obligation to Guide the Response of the State*, 11–13, 16, 48, 70, 79, OEA/Ser.L/V/II (September 2019) (discussing the importance of freedom of association when applied to protests).

<sup>327</sup> See Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 1, 4–5 (2019).

<sup>328</sup> U.S. CONST. art. II, § 3.

<sup>329</sup> See Bernick, *supra* note 327, at 53 ("Not every deviation from perfect enforcement of the laws is constitutionally problematic. But both individualized nonenforcement decisions and general non-enforcement policies must be based on contextually legitimate reasons, rather than favoritism, animus, or policy disagreement with a statute that the President does not deem constitutionally objectionable.").

present within U.S. territory and in cases not implicating national security interests. For reasons that predate *Hawaii*, courts tend to privilege administrative law claims over constitutional ones in immigration law. But *Hawaii* has intensified that trend by calling into question immigrants' constitutional status and courts' capacity to remedy equal protection violations in an area where the government typically enjoys wide latitude.<sup>330</sup> In addition, district courts interpreting *Hawaii* appear to be implementing the idea of graduated constitutional protection for noncitizens, but hewing too closely to formal distinctions. This dim view of immigrants' rights ignores the substantial harm that citizens suffer, even when noncitizens lack robust rights. It also overlooks potential structural constitutional violations. Both avenues deserve greater attention in the years ahead.

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<sup>330</sup> See *Demore v. Kim*, 538 U.S. 510, 522–24 (2003).