

University of the District of Columbia Law Review

Volume 27 | Issue 1

8-12-2024

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Recommended Citation

Nicole Dillard & Esperanza Sanchez, *...But Words Can Also Hurt You: How Hate Speech Contributed to Harmful Immigration Policy*, 27 U.D.C. L. Rev. (2024).

Available at: <https://digitalcommons.law.udc.edu/udclr/vol27/iss1/6>

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University of the District of Columbia Law Review
David A. Clarke School of Law

Volume 27

Spring 2024

Article 3

**...BUT WORDS CAN ALSO HURT YOU: HOW HATE SPEECH CONTRIBUTED TO
HARMFUL IMMIGRATION POLICY**

Nicole Dillard* and Esperanza Sanchez†

Introduction

On June 16, 2015, Donald J. Trump descended a golden escalator into the atrium of Trump Tower in New York City to announce his candidacy for president.¹ After commenting on the crowd size in his opening remarks, Mr. Trump turned his attention to China, Japan, and Mexico, assailing them as economic competitors. “They beat us all the time,” he railed.² Then, in his signature rambling style,³ he veered into his thoughts on Mexican immigrants:

The U.S. has become a dumping ground for everybody else’s problems . . . When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us [sic]. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.⁴

* Nicole C. Dillard, Esq., is a practicing immigration attorney with over 20 years of experience as well as an Assistant Professor, Howard University, the Cathy Hughes School of Communications. This article has been a labor of love, and we owe a debt of gratitude to our research assistants from the University of the District of Columbia, David A. Clarke, School of Law, especially Donny Williams. As an immigration attorney and life-long advocate, writing this article was particularly challenging as it compelled us to confront and revisit the pervasive harmful rhetoric that permeated our daily lives. With deep respect and admiration, I dedicate this article to my co-author, Esperanza N. Sanchez, Esq., a Texas native whose family immigrated from Mexico and who embodies her ancestor’s wildest dreams. Additionally, I dedicate this article to all of my immigration clients. May your future generations be shielded and safeguarded from harm.

† Esperanza N. Sanchez, Esq. is a Registered Nurse and Attorney.

¹ Alexander Burns, *Donald Trump, Pushing Someone Rich, Offers Himself*, N.Y. TIMES (June 16, 2015), <https://www.nytimes.com/2015/06/17/us/politics/donald-trump-runs-for-president-this-time-for-real-he-says.html>.

² *Full Text: Donald Trump announces a presidential bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/>.

³ Yaqin Wang & Haitao Liu, *Is Trump Always Rambling Like a Fourth-Grade Student? An Analysis of Stylistic Features of Donald Trump’s Political Discourse During the 2016 Election*, 29 DISCOURSE & SOCIETY 299, 300 (2018).

⁴ WASH. POST, *supra* note 2.

These remarks, while disparaging and unsavory, constitute protected speech under the First Amendment to the U.S. Constitution, which guarantees the right to free speech in this country.⁵ The United States celebrates and encourages the right to speak freely even if the message “may be harmful to a person’s dignity, character, or livelihood.”⁶ However, freedom of speech is not an unfettered right.⁷

Permissible limits on speech are intended to balance the right to free speech with other rights or legitimate government interests. For example, police arrested musician Tyler the Creator after a performance in 2014 and charged him with inciting a riot for shouting, “Just run in right now . . . Do it! . . . Push! Push! Push!” to a crowd of concertgoers that were denied admission because the venue had reached capacity.⁸ Defending their decision to charge the performer, law enforcement officials stated, “Regardless of the size of a crowd, the encouragement of unruly and unlawful behavior is against the law and cannot be tolerated.”⁹

Similarly, hate speech, which has been defined as “any form of expression through which speakers intend to vilify, humiliate or incite hatred against a group or a class of persons on the basis of race, religion, skin color, sexual identity, gender identity, ethnicity, disability or national origin,” is protected speech.¹⁰ However, hate speech that “directly incites imminent criminal activity or consists of specific threats of violence targeted against a person or group” can be criminalized.¹¹ The federal government and most U.S. states and territories have hate crime statutes on the books.¹² Under these laws, hate speech can be the basis for enhanced penalties if such speech demonstrates “that the defendant targeted the victim because of the victim’s race, ethnicity, identity, or beliefs.”¹³ Hate crimes are of special interest to policymakers because they “have a broader effect than most other kinds of crime,” victimizing “not only the crime’s immediate target but also others like them.”¹⁴

Permissible limits on speech may also vary based on the category of speaker.¹⁵ The speech of government employees, for example, is less protected than that of a private

⁵ The First Amendment guarantees four fundamental freedoms: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.

⁶ Leonard C. Simpson II, *Should Hate Speech Be Constitutionally Protected?* (Apr. 9, 2015) (M.S. thesis, Southern Illinois University Carbondale) (on file with OpenSIUC, Southern Illinois University Carbondale).

⁷ See *What Does Free Speech Mean?*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does> (last visited Apr. 18, 2023).

⁸ Sean Michaels, *Tyler the Creator Arrested for Allegedly Inciting Riot*, THE GUARDIAN (Mar. 17, 2014), <https://www.theguardian.com/music/2014/mar/17/tyler-the-creator-arrested-claims-incited-riot-sxsw> (quoting Tyler the Creator in a video released by local Austin officials).

⁹ *Id.* (quoting a statement released by Austin Police).

¹⁰ American Library Association, *Hate Speech and Hate Crime*, ALA, <https://www.ala.org/advocacy/intfreedom/hate> (last visited Oct. 22, 2023).

¹¹ *Id.*

¹² For a comprehensive list of federal hate crime statutes and which state statutes encompass similar protections, see *Hate Crimes: Laws and Policies*, U.S. DEP’T. JUSTICE, <https://www.justice.gov/hatecrimes/laws-and-policies> (last visited Oct. 22, 2023).

¹³ American Library Association, *supra* note 10.

¹⁴ *Learn About Hate Crimes*, U.S. DEP’T. JUSTICE, <https://www.justice.gov/hatecrimes/learn-about-hate-crimes> (last visited Oct. 22, 2023).

¹⁵ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and non obscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.”).

individual.¹⁶ Similarly, the speech of corporations can be regulated in particular ways not applicable to private individuals.¹⁷ The government, under the government speech doctrine, enjoys “the right to ‘speak for itself’” and is not subject to First Amendment scrutiny altogether.¹⁸ However, “[t]his does not mean that there are no restraints on government speech.”¹⁹ Government speech must comport with other constitutional constraints like the Establishments Clause for example, “[a]nd of course, a government entity is ultimately ‘accountable to the electorate and the political process for its advocacy.’”²⁰

The First Amendment “gives its greatest protection to political beliefs, speech, and association.”²¹ Political speech, particularly the speech of campaigning for public office, “occupies the highest, most protected position.”²² But, what happens when policymakers and candidates engage in hateful or dangerous political speech? Tangible harm flows from such speech. For example, hateful political speech can lead to “political violence and terrorism.”²³ As the nation witnessed on January 6, 2021, dangerous political speech can also be corrosive to our democratic process.²⁴

This Article will first explore the free speech doctrine, noting the distinctions between protected speech and unprotected speech, followed by a look at hate speech in hate crimes. The Article will then assess hateful political speech by policymakers and candidates that targets specific groups, highlighting the impact of openly discriminatory policies aimed at two distinct marginalized communities. Finally, this Article argues that there are legitimate and important public interests in mitigating the impact of biased policies borne from hateful government speech, and therefore, Congress should establish an administrative remedy to balance the tangible harms to individuals resulting from biased policies with the government’s rights as speaker.

¹⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.”).

¹⁷ See e.g., *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563 (1980) (“The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.”); *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”).

¹⁸ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (quoting *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)).

¹⁹ *Id.* at 468.

²⁰ *Pleasant Grove City*, 555 U.S. at 468-69 (quoting *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000)) (“‘If the citizenry objects, newly elected officials later could espouse some different or contrary position.’”).

²¹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting).

²² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (“[The First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.”). But see Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353 (2022) (“The First Amendment’s hierarchy of protection for different types of speech is a myth.”).

²³ James Piazza, *When Politicians Use Hate Speech, Political Violence Increases*, THE CONVERSATION (Sept. 28, 2020), <https://theconversation.com/when-politicians-use-hate-speech-political-violence-increases-146640>.

²⁴ See Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>; USAO-DC, *Three Years Since the Jan. 6 Attack on the Capitol*, U.S. DEPT. JUST. (Jan. 5, 2024), <https://www.justice.gov/usao-dc/36-months-jan-6-attack-capitol-0> (“Saturday, January 6, 2024, marks three years – or 36 months – since the attack on the U.S. Capitol that disrupted a joint session of the U.S. Congress in the process of affirming the presidential election results.”).

I. The Free Speech Doctrine and Its Limitations

Although the Constitution explicitly prohibits the government from “abridging the freedom of speech,” it fails to define what that freedom entails.²⁵ The Supreme Court’s interpretation of this language has barred government regulation of certain core areas of “protected” speech,²⁶ which sometimes encompasses expressive conduct.²⁷ The Free Speech doctrine also recognizes the government’s ability to regulate “unprotected” speech, which is speech or expressive conduct that the Court has found to be outside First Amendment protections.²⁸ This section will first explore the contours of the Free Speech doctrine then examine what is considered unprotected speech, concluding with a look at hate speech within the context of hate crimes.

A. Protected Speech

Freedom of speech is one of the most fundamental constitutional protections afforded United States citizens.²⁹ In many cases, the government can regulate speech only in limited circumstances because American legal thought supports a free marketplace of ideas, which requires robust and sometimes unpopular discussion.³⁰ The applicable protections afforded to speech will depend on who or what is speaking. Thus, this section will explore the protected speech of private individuals and contrast it to the government speech doctrine.

1. The Speech of Private Individuals

The First Amendment protects both individual and collective speech “in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”³¹ Therefore, the First Amendment’s protections will generally apply to the speech of individuals. This means that there is a presumed violation of the First Amendment when the government imposes laws that

²⁵ U.S. CONST. amend. I.

²⁶ See *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“Not all speech is of equal First Amendment importance, however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”) (citations omitted).

²⁷ The Court interprets the word “speech” under the Free Speech Clause to include both “oral or written expression.” *Clark v. Cmty for Creative Non-violence*, 468 U.S. 288, 295 (1984). Under the symbolic speech doctrine, the Court extends First Amendment protections to “conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.” *Id.* at 294 (citing *Spence v. Washington*, 418 U.S. 405 (1974) and *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969)).

²⁸ See e.g., *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (speech “directed to incite[e] or produc[e] imminent lawless action”); *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (threats against the President); *Roth v. United States*, 354 U.S. 476, 484-85 (1957) (obscenity).

²⁹ See 147 CONG. REC. 13498 (2001) (statement of Rep. Gerald Kleczka) (“The freedom to publicly voice one’s dissent of their government is a quality that separates our great nation from others. The United States of America has a long and proud history of providing this right to its citizens, and I do not believe that the voice of freedom should be muzzled.”).

³⁰ *Meyer v. Grant*, 486 U.S. 414, 419 (1988) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.”) (citations omitted).

³¹ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

“appl[y] to particular speech because of the topic discussed or the idea or message expressed.”³² Courts will apply strict scrutiny to such content-based restrictions on speech.

The Supreme Court’s “First Amendment decisions have created a rough hierarchy in the constitutional protection of speech” with “[c]ore political speech occup[ying] the highest, most protected position.”³³ By contrast, commercial speech, which is speech like advertising and marketing made with the purpose of proposing a business transaction that will involve the financial interests of the speaker and her audience, “has historically received less First Amendment protection than political speech.”³⁴ It is also important to note that the Supreme Court recognizes limited categories of speech as “unprotected” by the First Amendment, allowing the government to regulate such speech because of its content.³⁵ The narrow categories of unprotected speech will be discussed further in Section II.B.

2. The Government Speech Doctrine

The First Amendment’s “Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”³⁶ In other words, the government speech doctrine applies, and thus the First Amendment does not, “when the government is properly understood to be speaking as a participant in the marketplace of ideas.”³⁷ However, First Amendment free speech principles apply “when [the government] is acting as a regulator of private speech.”³⁸ Under the government speech doctrine, a government entity is entitled to its own rights as speaker, free “to select the views that it wants to express.”³⁹ The Supreme Court has reasoned that such an entitlement is necessary because “[i]f every citizen were to have a right to insist that no one paid by public funds expresses a view with which he disagreed, debate over

³² *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

³³ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); *Rickert v. Pub. Disclosure Comm’n*, 168 P.3d 826, 826-27 (Wash. 2007) (“The United States and Washington Constitutions both protect the right of free speech, and political speech is the core of that right.”).

³⁴ Victoria L. Killion *of Speech*, Congressional Research Service (Jan. 16, 2019), <https://sgp.fas.org/crs/misc/IF11072.pdf>. Since the mid-1970s, however, the Court has developed a commercial speech doctrine that affords some First Amendment protections to commercial speech but not the full coverage of protections afforded to non-commercial speech. See *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563 (1980) (“The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.”); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978) (“We instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values”); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (“[A] different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.”); *But see* CLAY CALVERT, DAN V. KOZLOWSKI, & DERIGAN SILVER, *MASS MEDIA LAW* 564 (20th ed. 2017) (“In some cases it is not easy to distinguish political speech from commercial speech as courts recently have observed. But the difference is critical” (citing *Bellsouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008))).

³⁵ *Roth v. United States*, 354 U.S. 476, 484-85 (1957).

³⁶ *Pleasant Grove City*, 555 U.S. at 467 (citing *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005)).

³⁷ Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1144 (2010).

³⁸ *Id.*

³⁹ *Pleasant Grove City*, 555 U.S. at 467-68.

issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.”⁴⁰

B. *Unprotected Speech*

In general, “the First Amendment means that [the] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁴¹ However, there are certain circumstances where “the government may regulate [speech] *because of* [its] content, as long as it does so evenhandedly.”⁴² This means that “serious constitutional concerns arise when legislatures single out subcategories of unprotected speech defined by viewpoint, subject matter, or communicative impact.”⁴³ As the Court explained in *R.A.V. v. City of St. Paul*, unprotected categories of speech are not “entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”⁴⁴ Thus, the Court’s First Amendment precedent features a “strategic protection” built into “the most prominent categories of historically unprotected speech.”⁴⁵

The Court has identified eight categories of unprotected speech. The first category of unprotected speech is speech integral to criminal conduct.⁴⁶ In *Giboney v. Empire Storage and Ice Co.*, the Court “reject[ed] the contention” outright “that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”⁴⁷ This is “one reason the government may prohibit, for example, conspiracy or solicitation to commit a crime, offers or requests to obtain illegal material, or impersonating a government officer.”⁴⁸ Child pornography is the second unprotected category. The First Amendment carveout for child pornography was borne out of similar reasoning.⁴⁹ In *New York v. Ferber*, the Court “made clear that [the facts at issue] presented a special case: The market for child pornography was ‘intrinsically related’ to the underlying

⁴⁰ *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990). Note that there is a distinction to be made between the speech of government employees for which the First Amendment applies, *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.”), and the speech of a government entity for which the government speech doctrine applies, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way”).

⁴¹ *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted) (emphasis in original).

⁴² Victoria L. Killion, *supra* note 34 (emphasis in original) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382-86 (1992)), <https://sgp.fas.org/crs/misc/IF11072.pdf>.

⁴³ Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 846 (2005).

⁴⁴ 505 U.S. 377, 383-84 (1992).

⁴⁵ *Counterman v. Colorado*, 143 S. Ct. 2106, 2115 (2023) (citation omitted).

⁴⁶ See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

⁴⁷ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. at 498.

⁴⁸ Victoria L. Killion, *supra* note 34 (citing *United States v. Williams*, 553 U.S. 285, 297-98 (2008) and *United States v. Alvarez*, 567 U.S. 709, 721 (2012)).

⁴⁹ See *New York v. Ferber*, 458 U.S. 747, 761-62 (1982) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. at 498)).

abuse, and was therefore ‘an integral part of the production of such materials, an activity illegal throughout the Nation.’”⁵⁰

The third category of unprotected speech is fraud, whereby fraudulent speech may be regulated to protect the public or consumers from deception.⁵¹ The fraud exception does not automatically extend to mere false statements because “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”⁵² The next category is defamation, and like fraud, it requires more than false statements alone.⁵³ For example, in cases where the statement concerns a public official or a public figure, the First Amendment requires a showing that the speaker acted with a specific intent.⁵⁴

The Court’s fifth carveout for unprotected speech is for true threats of violence, which are punishable as crimes.⁵⁵ In true-threats cases, the government must prove “that the defendant had some understanding of his statements’ threatening character,” and “a recklessness standard is enough.”⁵⁶ Although this mens rea requirement may “shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought,” it is designed to “reduce[] the prospect of chilling fully protected expression.”⁵⁷

Obscene speech is the sixth category of speech the Court has deemed outside First Amendment protections. Obscene speech is speech that is valueless and when “taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”⁵⁸ Although “obscene speech and writings are not protected,”⁵⁹ punishment for distributing obscene material will depend on the “‘vital element of scienter’—often described as the defendant’s awareness of ‘the character and nature’ of the materials he distributed.”⁶⁰ The element of scienter is required to prevent the “‘collateral effect of inhibiting’ protected expression.”⁶¹

⁵⁰ *United States v. Stevens*, 559 U.S. 460, 471 (2010) (quoting *New York v. Ferber*, 458 U.S. 747, 761-62 (1982)).

⁵¹ See *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003).

⁵² *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

⁵³ Defamation can be defined as “a false statement, made with some degree of fault, reflecting injuriously on a person’s reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace or affecting a person adversely in his trade, business or profession.” *Argentine v. USW*, 23 F. Supp. 2d 808, 820 (S.D. Ohio Oct. 16, 1998).

⁵⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 280-81 (1964) (holding that public officials may not “recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice.”) (quotations and citation omitted).

⁵⁵ *Counterman v. Colorado*, 143 S. Ct. at 2111 (“Today we consider a criminal conviction for communications falling within that historically unprotected category.”); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (holding that threats against the president are unprotected speech).

⁵⁶ *Counterman v. Colorado*, 143 S. Ct. at 2113.

⁵⁷ *Id.* at 2115 (“[B]y reducing an honest speaker’s fear that he may accidentally [or erroneously] incur liability,’ a mens rea requirement ‘provide[s] “breathing room” for more valuable speech.’”) (quoting *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring in judgment)).

⁵⁸ *Miller v. California*, 413 U.S. 15, 24 (1973).

⁵⁹ *Smith v. California*, 361 U.S. 147, 152 (1959).

⁶⁰ *Counterman v. Colorado*, 143 S. Ct. at 2116 (quoting *Hamling v. United States*, 418 U.S. 87, 122-23 (1974)).

⁶¹ *Id.* at 2115 (quoting *Smith v. California*, 361 U.S. 147, 151 (1959)).

The seventh category of unprotected speech is incitement.⁶² Because the Court “recognize[s] that incitement to disorder is commonly a hair’s-breadth away from political ‘advocacy’—and particularly from strong protests against the government and prevailing social order,” it has determined that the First Amendment requires a showing of specific intent.⁶³ Consistent with its “strategic protection” of unprotected speech, the Court has stated that “[a] strong intent requirement” is “a way to ensure that efforts to prosecute incitement [do] not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment’s core.”⁶⁴

Finally, the Court established fighting words, which are words “likely to provoke the average person to retaliation, and thereby cause a breach of the peace,” as an unprotected category of speech in 1942.⁶⁵ Although later describing fighting words as “what men of common intelligence would understand would be words likely to cause an average addressee to fight,”⁶⁶ the Court finally clarified in *Snyder v. Phelps* that “speech cannot be restricted simply because it is upsetting or arouses contempt.”⁶⁷ Despite its continued reference to fighting words as an unprotected category of speech, the “Court has not upheld a conviction under the fighting-words doctrine in 80 years.”⁶⁸

C. *Hate Crimes and Hate Speech*

Hate speech is “any form of expression through which speakers intend to vilify, humiliate or incite hatred against a group or a class of persons on the basis of race, religion, skin color, sexual identity, gender identity, ethnicity, disability or national origin.”⁶⁹ It “includes both totemic words and symbols, even if used casually, and discourse that, although it does not employ a hot-button epithet or symbol, nevertheless conveys a persecutory message of inferiority.”⁷⁰ Hate speech on its own does not fall within one of the eight categories of

⁶² In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court interpreted the First Amendment to protect the hate speech of a Ku Klux Klan leader where he advocated for violence if Congress and the President’s policies continued to, in the hate organization’s views, “suppress the white, Caucasian race.” *Id.* at 446. The Court established the standard that speech cannot be proscribed by government action unless it is: 1) directed at inciting imminent lawlessness or violence; and 2) likely to produce that action. *Id.* at 447.

⁶³ *Counterman v. Colorado*, 143 S. Ct. at 2118 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

⁶⁴ *Id.* at 2118. See e.g., Brian Bennett, *After President Trump Incited a Riotous Mob, Will He Face Any Consequences?*, TIME (Jan. 7, 2021, 7:41 AM),

<https://time.com/5927361/donald-trump-incited-capitol-consequences/>; Eli Stokols & Janet Hook, *Long warned against inciting violence, Trump does so with supporters’ Capitol siege*, L.A. TIMES (Jan. 6, 2021, 6:49 PM), <https://www.latimes.com/politics/story/2021-01-06/news-analysis-trumps-violent-rhetoric-incites-supporters-capitol-takeover>.

⁶⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

⁶⁶ *Goodling v. Wilson*, 405 U.S. 518, 523 (1972).

⁶⁷ *Snyder v. Phelps*, 562 U.S. at 458.

⁶⁸ *Counterman v. Colorado*, 143 S. Ct. at 2116 n.4 (2023). Note that the distinction between fighting words and incitement, while subtle, focuses on the intent of the speaker. See Jerry Snider, *Opinion, Incitement, Fighting Words, and First Amendment Rights*, THISISRENO (Aug. 16, 2017), <https://thisisreno.com/2017/08/incitement-fighting-words-first-amendment-rights-opinion/>.

⁶⁹ Kenneth D. Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. MIAMI L. REV. 733 (1998).

⁷⁰ Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1141 (2010).

unprotected speech established by the Court.⁷¹ However, hate speech that “directly incites imminent criminal activity or consists of specific threats of violence targeted against a person or group” can form the basis of enhanced criminal penalties under federal and state hate crime statutes.⁷²

Hate crimes are distinct from non-biased crime in that they “are not committed because of animosity towards the victim as an individual, but rather because of hostility toward the group to which the victim belongs.”⁷³ Hate crime statutes punish criminal conduct but will enhance the penalty for that conduct if it is motivated by “the victim’s race, ethnicity, identity, or beliefs.”⁷⁴ Because nothing in the First Amendment “prohibit[s] the evidentiary use of speech to establish the elements of a crime or to prove motive or intent,”⁷⁵ hate speech can be used as evidence of biased motivation in hate crimes cases.⁷⁶ Legislatures favor enhancement for bias-motivated crimes because hate crimes are “thought to inflict greater individual and societal harm” by, for example “provok[ing] retaliatory crimes, inflict[ing] distinct emotional harms on their victims, and incit[ing] community unrest.”⁷⁷

II. The Impact of Hate Speech by Policy Makers

A government agency is entitled to its own rights as speaker, free “to select the views that it wants to express.”⁷⁸ Government speech “includes any government action that communicates or subsidizes the communication of a particular message.”⁷⁹ For example, an administration’s immigration policy constitutes government speech because it expresses the administration’s views on *who* should be allowed into this country.⁸⁰

⁷¹ See *What We Investigate: Hate Crimes*, FBI, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (“Hate itself is not a crime—and the FBI is mindful of protecting freedom of speech and other civil liberties.”) (last visited Mar. 6, 2024). *But see* Richard Stengel, *Why America needs a hate speech law*, Wash. Post (Oct. 29, 2019, 8:20AM), <https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/> (“[W]here truth cannot drive out lies, we must add new guardrails. Speech that is arguably offensive undermines the very values of a fair marketplace of ideas that the First Amendment is designed to protect.”).

⁷² American Library Association, *supra* note 10; *Hate Crimes: Laws and Policies*, U.S. Dept. Justice, <https://www.justice.gov/hatecrimes/laws-and-policies> (last visited Oct. 22, 2023).

⁷³ Jeannine Bell, *Deciding When Hate Is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime*, 4 RUTGERS RACE & L. REV. 33, 36 (2002).

⁷⁴ American Library Association, *supra* note 10; *See e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993).

⁷⁵ *Wisconsin v. Mitchell*, 508 U.S. at 489.

⁷⁶ *See Dawson v. Delaware*, 503 U.S. 159, 165 (1992) (“[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.”) (italics in original).

⁷⁷ *Wisconsin v. Mitchell*, 508 U.S. at 487-88.

⁷⁸ *Pleasant Grove City*, 555 U.S. at 467-68.

⁷⁹ Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1143 (2010) (“It encompasses activities from appropriating taxpayer money to campaign for or against specific legislative measures to deciding who gets access to public fora such as theatres and broadcasting frequencies to offering a program of subsidies for expression—for example, funding for the arts—that makes content-based decisions among qualified applicants.”).

⁸⁰ For example, during an Oval Office talk with several U.S. senators about a new immigration package designed to protect immigrants from Haiti, El Salvador, and African countries, President Donald Trump reportedly said, “Why are we having all these people from shithole [sic] countries come here?” *See* Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/> (“Trump had reportedly

The rapid demographic changes in the United States over the past generation has yielded a more diverse—“browner”—population, leading both Republicans and Democrats to adapt their respective political strategies. Both parties are actively trying “to be more present in black and brown communities.”⁸¹ Although Republicans have historically taken a hardline, seemingly unwelcoming approach to immigration policy,⁸² the Republican Party found itself strategizing on how to capture the Latino vote “[a]fter losing a record margin of Latinos in the 2012 presidential election.”⁸³ However, despite the Republican National Committee’s calls “for Republicans to endorse immigration reform,” “the 2013 immigration reform bill died in Congress — with Republicans standing in the way, despite it passing the Senate with 68 votes.”⁸⁴ By the 2016 presidential campaign, the Republican Party found itself elevating a candidate who abandoned the party’s desire to embrace immigrants altogether, and instead pointed to immigrants as an acute threat to the Party’s base voters.⁸⁵

This section discusses the impact two of distinct immigration policies (a) the restrictions on entry from the southern border, and (b) the ban on citizens from certain Muslim countries. These purportedly unbiased policies designed to promote national security, safety, and welfare resulted in the tangible harm to marginalized communities. Each case discussed involves immigration policies that target specific racial or ethnic groups by severely restricting their lawful entry into the United States. Despite the purported non-biased basis for those policies, each policy decision aligns with the policymakers’ openly discriminatory statements and attitudes that predated their policy decisions. While these openly discriminatory statements may

complained that Nigerian immigrants would never ‘go back to their huts’ and Haitians ‘all have aids.’ He doubled down at the Oval Office meeting. ‘Why do we need more Haitians?’ Trump said. ‘Take them out.’”

⁸¹ Domenico Montanaro, *How The Browning Of America Is Upending Both Political Parties*, NPR (Oct. 12, 2016, 11:16 AM), <https://www.npr.org/2016/10/12/497529936/how-the-browning-of-america-is-upending-both-political-parties> (“The country is changing — it’s getting browner, as population growth slows among whites. Non-whites now make up a majority of kindergartners; by the next presidential election, the Census Bureau predicts they will be a majority of all children; and by 2044, no one racial group will be a majority of the country.”).

⁸² Note, however, that policies such as amnesty for specific categories of immigrants were a key feature of the Reagan administration’s approach. *A Reagan Legacy: Amnesty For Illegal Immigrants*, NPR (July 4, 2010, 2:12 PM), <https://www.npr.org/templates/story/story.php?storyId=128303672>.

⁸³ Domenico Montanaro, *supra* note 81; Seung Min Kim, *Immigration reform bill 2013: Senate passes legislation 68-32*, POLITICO (June 27, 2013, 4:25 PM), <https://www.politico.com/story/2013/06/immigration-bill-2013-senate-passes-093530> (“Republicans, shellacked by Mitt Romney’s 44-point loss among Latinos in the 2012 presidential election, almost immediately coalesced behind immigration reform as a top priority.”). Note that both Presidents George W. Bush and Obama unsuccessfully attempted to get comprehensive immigration reform passed by Congress during their respective tenures. Connor Perrett, *George W. Bush said failing to pass immigration reform was one of the ‘biggest disappointments’ of his presidency*, BUSINESS INSIDER (Apr. 18, 2021), [https://www.businessinsider.com/george-w-bush-disappointed-immigration-reform-2021-4#:~:text=In%20a%20rare%20interview%2C%20former,similar%20comments%20about%20immigration%20Sunday;Robert%20Pear%20&%20Carl%20Hulse,Immigration%20Bill%20Fails%20to%20Survive%20Senate%20Vote,NY%20TIMES%20\(June%2028,%202007\),https://www.nytimes.com/2007/06/28/washington/28cnd-immig.html](https://www.businessinsider.com/george-w-bush-disappointed-immigration-reform-2021-4#:~:text=In%20a%20rare%20interview%2C%20former,similar%20comments%20about%20immigration%20Sunday;Robert%20Pear%20&%20Carl%20Hulse,Immigration%20Bill%20Fails%20to%20Survive%20Senate%20Vote,NY%20TIMES%20(June%2028,%202007),https://www.nytimes.com/2007/06/28/washington/28cnd-immig.html).

⁸⁴ Domenico Montanaro, *supra* note 81. Consequently, it left only the limited tool of Executive Orders to address the nation’s extensive and expansive for immigration challenges. See UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, 2014 EXECUTIVE ACTIONS ON IMMIGRATION (2014), [https://www.uscis.gov/archive/2014-executive-actions-on-immigration#:~:text=On%20November%2020%2C%202014%2C%20the,the%20U.S.%20without%20fear%20of;Lazaro%20Zamora,Obama's%20Immigration%20Executive%20Action's%20Two%20Years%20Later,BIPARTISAN%20POLICY%20CENTER%20\(Dec.%209,%202016\),https://bipartisanpolicy.org/blog/obamas-immigration-executive-actions-two-years-later/](https://www.uscis.gov/archive/2014-executive-actions-on-immigration#:~:text=On%20November%2020%2C%202014%2C%20the,the%20U.S.%20without%20fear%20of;Lazaro%20Zamora,Obama's%20Immigration%20Executive%20Action's%20Two%20Years%20Later,BIPARTISAN%20POLICY%20CENTER%20(Dec.%209,%202016),https://bipartisanpolicy.org/blog/obamas-immigration-executive-actions-two-years-later/).

⁸⁵ Ed Lowther, *US election 2020: Trump’s impact on immigration - in seven charts*, BBC (Oct. 21, 2020), <https://www.bbc.com/news/election-us-2020-54638643>.

constitute permissible government speech, these statements demonstrate the biased motivation driving the implementation of these policies.

A. *The Southern Border: Cruelty Is the Point*

The Trump Administration's immigration policies were central to the Trump campaign's political platform and were veiled under the pretext of national security.⁸⁶ From the moment he declared his candidacy for President, then-candidate Trump made openly discriminatory statements about Latinos being “rapists,” “people that have lots of problems,” and “bad hombres,” and promised to restrict their entry into the United States if he were elected President.⁸⁷ His promise to build a wall along the southern border to keep “undesirable people” from entering the United States, which he claimed Mexico would pay for,⁸⁸ became a rallying cry for his base.⁸⁹ Trump openly and unabashedly “homogenized Latinos as criminal invaders regardless of age, gender, or motive for migration.”⁹⁰ He “relied on racist tropes and populist language, honed over the course of his campaign . . . to position himself as the protector of America's declining [w]hite majority who [we]re under attack by immigration.”⁹¹

⁸⁶ Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) (“Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety.”); *The Trump White House: Immigration*, WHITE HOUSE, <https://trumpwhitehouse.archives.gov/issues/immigration/> (“President Trump kept his promise to build a wall on our southern border between the United States and Mexico. . . . By enforcing America's immigration laws, President Trump made major gains toward ending the humanitarian crisis at our border; keeping criminals, terrorists, and drugs out of our country; and protecting American workers and taxpayers against job loss and misuse of the welfare system.”) (last visited Apr. 1, 2024).

⁸⁷ See Amber Phillips, ‘They’re rapists.’ President Trump’s campaign launch speech two years later, *annotated*, WASH. POST (Nov. 25, 2021), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/>; Adam Kealoha Causey, *To some, Trump’s ‘bad hombres’ is much more than a botched Spanish word*, PBS (Oct. 20, 2016), <https://www.pbs.org/newshour/politics/trumps-bad-hombres-draws-jeers-spanish-lessons>; Janell Ross, *From Mexican rapists to bad hombres, the Trump campaign in two moments*, WASH. POST (Oct. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/>.

⁸⁸ Michael D. Shear & Emmarie Huetteman, *Trump Insists Mexico Will Pay for Wall After U.S. Begins the Work*, NY TIMES (Jan. 6, 2017), <https://www.nytimes.com/2017/01/06/us/politics/trump-wall-mexico.html>.

⁸⁹ See *Trump Leads ‘Build That Wall’ Chant in California*, NBC NEWS (May 25, 2016), <https://www.nbcnews.com/video/trump-leads-build-that-wall-chant-in-california-692809283877> (“Presumptive Republican presidential nominee Donald Trump campaigns in Anaheim, California, on Wednesday.”). Trump linked illegal immigration to crime to appeal to the day-to-day concerns of his base voters. Michelle Ye Hee Lee, *Donald Trump’s false comments connecting Mexican immigrants and crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>.

⁹⁰ Stephanie L Canizales & Jody Agius Vallejo, *Latinos & Racism in the Trump Era*, 150(2) DAEDALUS 150, 151 (2021). See also *Celebrities call on Latinos to fight Donald Trump’s ‘fear-mongering’*, FOX NEWS (Feb. 11, 2016, 4:47 PM), <https://www.foxnews.com/politics/celebrities-call-on-latinos-to-fight-donald-trumps-fear-mongering>; Carolina Moreno, *Latinos Call Out Donald Trump For His Fear-Mongering Speech*, HUFFPOST VOICES (July 22, 2016, 10:08 AM), https://www.huffpost.com/entry/latinos-call-out-donald-trump-for-his-fear-mongering-speech_n_579212b3e4b0bddc4d40881.

⁹¹ Canizales, *supra* note 90 at 152. ; see Eugene Scott, *Trump’s most insulting — and violent — language is often reserved for immigrants*, WASH. POST (Oct. 2, 2019, 3:21 PM),

<https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/>.

Candidate Trump’s animus was not limited to Mexican immigrants who had crossed the southern border illegally. Take, for example, his disparaging comments about Federal Judge Gonzalo Curiel, a U.S. District Court judge who was presiding over a civil matter involving Trump.⁹² During an interview with the Wall Street Journal, Trump suggested that the judge had a conflict due to his Mexican heritage, despite the fact that Curiel was born in Indiana.⁹³ Trump contended that because he promised to build a wall to keep Mexicans out of the United States, Curiel could not possibly be impartial.⁹⁴ In subsequent interviews, Trump further reiterated his belief that a judge of Mexican descent could not fairly preside over the case.⁹⁵

As President, he continued to express openly his biased views of Latinos—particularly those of Mexican descent—through the use of racist and xenophobic stereotypes.⁹⁶ He placed key policy advisors in his Administration who were linked to organizations known for their anti-immigrant and white nationalist ideologies.⁹⁷ His chief immigration policy advisor, for example, had connections to notable anti-immigrant groups like the Federation for American Immigration Reform and the Center for Immigration Studies.⁹⁸ As a result, the Trump Administration took a cruelty-is-the-point approach to migrants on the southern border.⁹⁹

Although immigration reform was central to his agenda,¹⁰⁰ the Trump Administration’s “zero-tolerance policy” was its most shocking and harmful immigration policy initiative because

⁹² See Nina Totenberg, *Who Is Judge Gonzalo Curiel, The Man Trump Attacked For His Mexican Ancestry?*, NPR (June 7, 2016, 7:20 PM), <https://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry>.

⁹³ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict’*, WALL STREET J. (June 3, 2016, 10:03 AM), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

⁹⁴ *Id.*

⁹⁵ See Reena Flores, *Trump: “It’s possible” a Muslim judge would be unfair*, CBS NEWS (June 5, 2016, 8:10 AM), <https://www.cbsnews.com/news/donald-trump-its-possible-muslim-judge-would-treat-me-unfairly/>.

⁹⁶ See e.g., David Scott FitzGerald, Gustavo López & Angela Y. Mclean, *Mexican Immigrants Face Threats to Civil Rights and Increased Social Hostility* 64 (2019), https://ccis.ucsd.edu/_files/conference_papers_present/CNDH-final-3.4.19.pdf

⁹⁷ Katie Rogers, *Before Joining White House, Stephen Miller Pushed White Nationalist Theories*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/11/13/us/politics/stephen-miller-white-nationalism.html>.

⁹⁸ *Extremist Files: Stephen Miller*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/individual/stephen-miller> (last visited June 16, 2024).

⁹⁹ See Adam Serwer, *The Cruelty Is the Point*, THE ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/> (“Somewhere on the wide spectrum between adolescent teasing and the smiling white men in the lynching photographs are the Trump supporters whose community is built by rejoicing in the anguish of those they see as unlike them, who have found in their shared cruelty an answer to the loneliness and atomization of modern life.”).

¹⁰⁰ Two other key immigration initiatives central to the Trump Administration’s immigration agenda include the termination of Temporary Protected Status (TPS) for six countries, El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, and the Migrant Protection Protocols (MPP), which was also known as the “remain in Mexico” policy. TPS, a program for eligible nationals of certain countries who are already in the United States may remain due to unsafe conditions in their home country, “was in place for about 330,000 from 10 countries who would otherwise be subjected to disease, violence, starvation, the aftermath of natural disasters, and other life-threatening conditions.” Bill Ong Hing, *Mistreating Cent. Am. Refugees: Repeating History in Response to Humanitarian Challenges*, 17 HASTINGS RACE & POVERTY L.J. 359, 371 (2020). Lawsuits were filed to challenge the TPS terminations, and “TPS holders from [those six countries] won preliminary injunctions, requiring the Trump administration to extend their immigration protections and work authorizations while the cases [we]re ongoing.” *Id.* These terminations were part of a broader policy shift that affected several TPS-designated countries. *Id.* MPP required that certain asylum-seekers be returned to Mexico, regardless of country of origin, to wait through the

it resulted in parents being deported while children remained in the United States.¹⁰¹ In a particularly controversial move, “[j]ust seven weeks after Trump took office, then-DHS Secretary John Kelly told CNN that his agency was planning to separate children from their unauthorized immigrant parents at the border to ‘deter more movement.’”¹⁰² This decision came on the heels of a report issued by a DHS Advisory Committee warning against the use of detention to deter future family migration or to punish families seeking asylum in the United States, calling such a policy “unlawful and ineffective.”¹⁰³ The report outlined the ways in which separating and detaining families “exacerbates existing mental trauma and is likely to have additional deleterious physical and mental health effects on immigrants—particularly traumatized persons like asylum seekers.”¹⁰⁴

Within its first few months, the Trump Administration announced a zero-tolerance policy for migrants caught crossing the border outside authorized entry points, meaning it aimed to prosecute 100 percent of adults caught violating immigration law.¹⁰⁵ The zero-tolerance policy included separating children from their families at the border “to deter mothers from migrating to the United States with their children.”¹⁰⁶ This policy was a rebuke of the Obama-era policy that allowed adults without criminal histories who crossed the border with children to not be referred for prosecution, but rather be booked into immigrant family detention centers or referred for civil deportation proceedings and released.¹⁰⁷

The policy of separating children from their parents meant placing them under the supervision of the U.S. Department of Health and Human Services, “which shipped them miles away from their parents and scattered them among 100 Office of Refugee Resettlement (ORR)

duration of their cases pending in the U.S. immigration court system. Memorandum from Kirstjen M. Nielsen, Secretary of Homeland Security, U.S. Dep’t of Homeland Security, Policy Guidance for Implementation of Migrant Protection Protocols (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf. By returning asylum seekers to Mexico, the MPP exposed individuals to the dangers of extortion and violence that they sought to flee in the first place. *Mexico: Abuses Against Asylum Seekers at US Border*, HUMAN RIGHTS WATCH (Mar. 5, 2021, 1:00 AM), <https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border>. MPP was criticized for denying refugees their legal right to seek asylum in the United States as recognized by international agreements and U.S. law. Emily J. Johanson, *The Migrant Protection Protocols*, 11 U.C. IRVINE L. REV. 873 (2021).

¹⁰¹ Exec. Order No. 13,767, § 6, 82 Fed. Reg. 8,793, 8,795 (Jan. 25, 2017); Attorney General Jeff Sessions, Address Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.

¹⁰² David Scott FitzGerald et al., *supra* note 96, (citing Daniella Diaz, *Kelly: DHS Is considering separating undocumented children from their parents at the border*, CNN (Mar. 7, 2017, 7:33 AM), <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>).

¹⁰³ Report of the DHS Advisory Committee on Family Residential Centers 7 (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

¹⁰⁴ *Id.* at 8.

¹⁰⁵ Exec. Order No. 13,767, § 6, 82 Fed. Reg. 8,793, 8,795 (Jan. 25, 2017).

¹⁰⁶ Julia Edwards Ainsley, *Exclusive - Trump administration considering separating women, children at Mexico border*, REUTERS (Mar. 3, 2017, 8:32 PM), <https://www.reuters.com/article/us-usa-immigration-children-idUSKBN16A2ES/>.

¹⁰⁷ Graham Kates, *Migrant children at the border – the facts*, CBS NEWS (June 20, 2018, 10:32 AM), <https://www.cbsnews.com/news/migrant-children-at-the-border-by-the-numbers/> (reporting that then-DHS Secretary referred to the Obama-era practice as “the historic ‘get out of jail free’ practice of the previous administration.”).

shelters and other care arrangements across the country.”¹⁰⁸ In total, “[h]undreds of these children, including infants and toddlers, were under the age of [five].”¹⁰⁹ The parents of these children were sent to federal detention centers and eventually deported.¹¹⁰ Consequently, the child separations were met with significant public outcry and scrutiny, forcing President Trump to issue an executive order to stop the separation of families at the border with an exception for cases where there is concern that the parent represented a risk to the child.¹¹¹

Although the executive order declared it a policy of the Trump Administration “to maintain family unity,”¹¹² President Trump continued to make public statements in support of family separations as a deterrent months after signing the executive order to suspend child separations.¹¹³ Most importantly, child separations continued for years after the Administration’s purported end to the policy.¹¹⁴ The Trump Administration continued separating families despite a nation-wide injunction, issued six days after the executive order, prohibiting further family separations with limited exceptions and requiring the return of nearly all children younger than five to their parents within fourteen days and within thirty days for older children.¹¹⁵

One case of such unlawful separation is that of Helen, a five-year-old asylum seeker from Honduras who was separated from her grandmother just one month after the injunction.¹¹⁶ Although she asserted her legal right to have her custody reviewed when she was apprehended, administration officials provided her with a legal document weeks later whereby—with the assistance of officials—Helen checked a box rescinding her right to legal review of her custody and “signed her name in wobbly letters.”¹¹⁷ Following an intense public campaign, Helen was reunited with her family nearly two months after being apprehended. The family reported that even months after their reunification they struggled to cope with the trauma of the experience.¹¹⁸

¹⁰⁸ *Family Separation – A Timeline*, SOUTHERN POVERTY LAW CENTER (Mar. 23, 2022), <https://www.splcenter.org/news/2022/03/23/family-separation-timeline>.

¹⁰⁹ *Id.* It was reported that in the short period between May 5 and June 9, 2018, 2,342 children were separated at the border from more than 2,200 adults. Graham Kates, *supra* note 107.

¹¹⁰ Camila Domonoske & Richard Gonzales, *What We Know: Family Separation And ‘Zero Tolerance’ at the Border*, NPR (June 19, 2018, 2:17 PM), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border>. See also Philip Rucker, Josh Dawsey & Seung Min Kim, *Trump defiant as crisis grows over family separation at the border*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/politics/trump-defiant-as-crisis-grows-over-family-separation-at-the-border/2018/06/18/210c78ca-730f-11e8-805c-4b67019fcfe4_story.html.

¹¹¹ Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018).

¹¹² *Id.*

¹¹³ Toluse Olorunnipa, Tamara Thueringer & Jennifer Epstein, *President Trump Says Family Separations May Deter Illegal Immigration*, TIME (Oct. 14, 2018, 9:49 AM), <https://time.com/5424225/trump-family-separation-illegal-immigration/> (quoting President Trump saying, “If they feel there will be separation, they won’t come.”).

¹¹⁴ Sarah Abdel-Motaleb, Roberto Lopez & Andy Udelsman, *Family Separations continue in South Texas, years after they allegedly ended*, TEXAS CIVIL RIGHTS PROJECT (Oct. 21, 2020), <https://www.txcivilrights.org/post/family-separations-continue-in-south-texas-years-after-they-allegedly-ended-3>.

¹¹⁵ Josh Gerstein and Ted Hesson, *Federal judge orders Trump administration to reunite migrant families*, POLITICO (June 26, 2018, 11:29 PM), <https://www.politico.com/story/2018/06/26/judge-orders-trump-reunite-migrant-families-678809>.

¹¹⁶ Sarah Stillman, *The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights*, THE NEW YORKER (Oct. 11, 2018), <https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights>.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (“Lately, at bedtime, Helen hides in the closet and refuses to go to sleep, afraid that her family might leave her in the night. Sometimes [her grandmother] wants to hide, too; she buried her round face in her hands, weeping, when she recounted one of Helen’s declarations upon her return: ‘You left me behind.’”).

The Trump Administration's execution of the child separation policy was detrimental at every level. Children were subjugated to conditions and duration of detention that openly violated the specific body of law governing the care and custody of migrant children, which is "comprised of federal statutes, [the *Flores* Settlement Agreement], and regulations partially implementing that agreement."¹¹⁹ The *Flores* Settlement Agreement, where litigants of a class action lawsuit against the government entered into a consent decree in 1997, establishes the "nationwide policy for the detention, release, and treatment of minors."¹²⁰ It favors the release of detained migrant children but requires that detained migrant children be placed in "safe and sanitary" facilities that are "the least restrictive setting appropriate to the minor's age and special needs."¹²¹ It also limits the period of detention to within three to five days, affording the government some flexibility to extend that period during emergencies or times of influx of minors but not for more than 20 days.¹²²

Detained children were subjected to conditions likened to cages and considered inhumane.¹²³ In 2019, lawyers visited a detention facility in Clint, Texas, as part of the *Flores* Settlement Agreement and found "[a] traumatic and dangerous situation . . . unfolding for some 250 infants, children and teens locked up for up to 27 days without adequate food, water and sanitation."¹²⁴ Interviews of detained children revealed "that they were fed uncooked frozen food or rice and had gone weeks without bathing or a clean change of clothes."¹²⁵ Additionally, while the zero-tolerance policy was in place, the federal government saw an increase in complaints about the sexual abuse of children under the care of the Office of Refugee Resettlement. Complaints alleged "that adult staff members had harassed and assaulted children, including fondling and kissing minors, watching them as they showered, and raping them."¹²⁶

Even the reunification process was riddled with failures. For example, in July 2018, 37 migrant children between the ages of 5 and 12 years old boarded a van for a 30-minute ride from Harlingen, Texas to Los Fresnos, Texas, with the promise of reunification upon arrival. Instead,

¹¹⁹ Kelsey Y. Santamaria, *Child Migrants at the Border: The Flores Settlement Agreement and Other Legal Developments*, CONG. RES. SERV. (Apr. 1, 2021), <https://crsreports.congress.gov/product/pdf/IF/IF11799>; see also *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. Jan. 17, 1997) [hereinafter *The Flores Settlement Agreement*]; Jaclyn Kelley-Widmer, *A federal judge blocked a Trump administration rule that would allow children to be detained indefinitely. Here's what you need to know*, WASH. POST (Sept. 28, 2019, 1:51 AM), <https://www.washingtonpost.com/politics/2019/08/24/new-trump-administration-rule-allows-children-be-detained-indefinitely-heres-what-you-need-know/>.

¹²⁰ *The Flores Settlement Agreement* at *3, para. 9.

¹²¹ *Id.* at para. 11-12.

¹²² See Order re Plaintiffs' Motion to Enforce and Appoint a Special Monitor 29-30, *Flores v. Sessions*, No. 85-CV-4544 (C.D. Cal. 2017) (explaining that the issue surrounds minor plaintiffs' detention exceeding 20 days).

¹²³ Michael Garcia Bochenek, *In the Freezer*, HUMAN RIGHTS WATCH (Feb. 28, 2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>; Nomaan Merchant, *Hundreds of children wait in Border Patrol facility in Texas*, AP NEWS (June 18, 2018, 1:34 AM), <https://apnews.com/article/9794de32d39d4c6f89fbefaea3780769> ("Inside an old warehouse in South Texas, hundreds of children wait in a series of cages created by metal fencing. One cage had 20 children inside. Scattered about are bottles of water, bags of chips and large foil sheets intended to serve as blankets.").

¹²⁴ Cedar Attanasio, Garance Burke & Martha Mendoza, *Lawyers: 250 children held in bad conditions at Texas border*, AP NEWS (June 20, 2019, 6:39 PM), <https://apnews.com/article/a074f375e643408cb9b8d1a5fc5acf6a>.

¹²⁵ *Id.*

¹²⁶ Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, NY TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>; Ediberto Roman & Ernesto Sagas, *A Domestic Reign of Terror: Donald Trump's Family Separation Policy*, 24 HARV. LATINO L. REV. 65, 82 (2021) (detailing the abuse of a three-year-old girl who was separated from her father because his paternity was questioned until a DNA test verified the relationship).

the children were forced to stay in the van under the blistering South Texas sun for more than 24 hours while they waited to be processed by Immigration and Customs Enforcement (ICE).¹²⁷ It was reported that “[d]espite two notifications from [the U.S. Department of Health and Human Services] that the children would be arriving, ICE officers kept to their regular schedule, clocking out for the day while the parking lot filled with children eager to see their parents again.”¹²⁸

The Trump Administration’s child separation policy to deter unwanted migration has been described as “a social experiment that was both cruel and chaotic.”¹²⁹ Between July 1, 2017, and January 20, 2021, the Trump Administration separated and detained more than 3,900 children.¹³⁰ One of President Biden’s first official acts was to sign an Executive Order to establish an interagency task force to reunite those families separated at the Mexico-U.S. border.¹³¹ In its initial progress report, Biden’s reunification task force identified 2,127 children who remained separated from their families.¹³²

B. Muslim Ban: Which God Do You Pray To?

Candidate Trump moved seamlessly from his toxic characterizations of Latinos at the southern border to fear-mongering about Muslims seeking to enter the United States.¹³³ Evidence of Candidate Trump’s Islamophobia was noted in a 2011 interview on the Christian Broadcasting Network’s *The Brody File*, where, after admitting to having a limited understanding of the

¹²⁷ Jacob Soboroff & Julia Ainsley, *Botched family reunifications left migrant children waiting in vans overnight*, NBC NEWS (June 3, 2019, 8:00 PM), <https://www.nbcnews.com/politics/immigration/botched-family-reunifications-left-migrant-children-waiting-vans-overnight-n1013336> (“Not until 39 hours later — after two nights in a van — did the last child step out of a van to be reunited. Most spent at least 23 hours in the vehicles.”).

¹²⁸ *Id.*

¹²⁹ Susan Ferriss, *The Trump administration knew migrant children would suffer from family separations. The government ramped up the practice anyway.*, TEXAS TRIBUNE (Dec. 16, 2019, 12:00 AM), <https://www.texastribune.org/2019/12/16/trump-administration-knew-family-separations-harm-migrant-children/>.

¹³⁰ U.S. Dep’t of Homeland Sec’y., Initial Progress Report: Interagency Task Force on the Reunification of Families 7-8 (July 2, 2021), https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf; Kristina Davis, *U.S. officials say they are highly confident to have reached tally on separated children: 4,368*, LA TIMES (Jan. 18, 2020, 5:38 AM), <https://www.latimes.com/world-nation/story/2020-01-18/u-s-officials-say-they-are-highly-confident-to-have-reached-tally-on-separated-children-4-368>.

¹³¹ Exec. Order No. 14012, 86 Fed. Reg. (Feb. 2 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/> (Biden’s policy addressed the lingering issue of reuniting those children who had already been separated from their families before President Trump put an end to the practice of separating children from their families.) *Id.*; see also Michael Balsamo & Colleen Long, *AP Report: DOJ rescinds ‘zero tolerance’ immigration rule*, PBS NEWS HOUR (Jan. 26, 2021), <https://www.pbs.org/newshour/politics/ap-reports-doj-rescinds-zero-tolerance-immigration-rule>.

¹³² U.S. Dep’t of Homeland Sec’y., *supra* note 130.

¹³³ Tyler Anbinder, *Trump has spread more hatred of immigrants than any American in history*, WASH. POST (Nov. 7, 2019, 10:03 AM), https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html

(“Trump portrays immigrants as a threat or a menace, and he calls the largest segment of America’s newcomers—Latinos—“animals” and invaders.”); Patrick Healy & Thomas Kaplan, *Donald Trump Responds to Orlando Attack by Exploiting Fear, Not Easing It*, NY TIMES (June 14, 2016),

<https://www.nytimes.com/2016/06/15/us/politics/donald-trump-shooting-response.html>.

Quran, Trump said flatly, “There’s something there that teaches some very negative vibe.”¹³⁴ On the campaign trail, Trump’s call for establishing a database to track Muslims in the United States received sharp criticism with prominent figures comparing such a policy to Nazi Germany.¹³⁵

Trump then doubled down on his Islamophobic rhetoric following a December 2015 mass shooting in San Bernardino, California. The then-Republican presidential frontrunner suggested that the shooters’ Middle Eastern ethnicity was proof that “radical Islamic terrorism” caused the shooting, stating, “Take a look. I mean, you look at the names, you look at what’s happened. You tell me.”¹³⁶ The Trump Campaign issued an official statement days later calling for “a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what the hell is going on.”¹³⁷ Trump followed the announcement with a tweet from his personal account informing his supporters that he had “just put out a very important policy statement on the extraordinary influx of hatred and danger coming into our country.”¹³⁸

Despite Republican opposition,¹³⁹ Candidate Trump remained committed to his promise to impose restrictions on individuals from Muslim-majority countries, as well as those practicing Islam generally.¹⁴⁰ He reaffirmed this position in a 2016 CBS interview with Lesley Stahl, where

¹³⁴ See C. Welton Gaddy, Interfaith Alliance, Letter to Donald Trump Regarding His Recent Comments About Islam and the Koran (Apr. 14, 2011), <https://interfaithalliance.org/letter-to-donald-trump-regarding-his-recent-comments-about-islam-and-the-koran/> (responding to those comments) (“You have made it no secret that you are considering running for U.S. President. I believe in and will continue to defend the right of candidates to talk about the role faith plays in their lives, but a line is crossed when a candidate or potential candidate uses the political forum as a conduit for vilifying another religion or those who follow it.”).

¹³⁵ Vaughn Hillyard, *NBC News: Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, (Nov. 20, 2015, 9:27 AM), <https://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716>.

¹³⁶ *ABC News: Trump Says San Bernardino Shooting Appears Tied to Terrorism: 'Look at the Names'*, (Dec. 3, 2015, 3:59 PM), <https://abcnews.go.com/Politics/donald-trump-san-bernardino-shooting-appears-tied-terrorism/story?id=35561319>.

¹³⁷ Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States'*, WASH. POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/>.

¹³⁸ *Id.* Trump consistently upheld this stance during media interviews, even after winning the election. See e.g., an interview with CNN’s Anderson Cooper <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html> (“I think Islam hates us. . . . we can’t allow people coming into this country who have this hatred of the United States and of people who are not Muslim.”); *Morning Joe: Donald Trump on Muslim Travel Ban, Obama and 2016* (MSNBC television broadcast Dec. 18, 2015), https://www.youtube.com/watch?v=5I3E3-U-1jc&t=845s&ab_channel=MSNBC; Patrick Healy & Michael Barbaro, *Donald Trump Calls for Barring Muslims From Entering U.S.*, N.Y. TIMES (Dec. 7, 2015), <https://archive.nytimes.com/www.nytimes.com/politics/first-draft/2015/12/07/donald-trump-calls-for-banning-muslims-from-entering-u-s/>.

¹³⁹ Alan Rappoport, *Donald Trump's Republican Rivals Condemn His Call to Bar Muslims from Entering U.S.*, N.Y. TIMES (Dec. 7, 2015, 5:59 PM) <https://archive.nytimes.com/www.nytimes.com/politics/first-draft/2015/12/07/donald-trumps-republican-rivals-condemn-his-call-to-ban-muslims-from-entering-u-s/> (“Repudiation of Mr. Trump’s remarks was swift and severe among religious groups and politicians from both parties. Mr. Trump is “unhinged,” said one Republican rival, former Gov. Jeb Bush of Florida, while another, Senator Marco Rubio of Florida, called the ban “offensive and outlandish.”); see also Patrick Healy & Michael Barbaro, *Donald Trump Calls for Barring Muslims From Entering U.S.*, N.Y. TIMES (Dec. 7, 2015, 4:36 PM), <https://archive.nytimes.com/www.nytimes.com/politics/first-draft/2015/12/07/donald-trump-calls-for-banning-muslims-from-entering-u-s/>.

¹⁴⁰ See Vanita Saleema Snow, *Reframing Radical Religion*, 11 GEO. J. L. & MOD. CRIT. RACE PERSP. 1, 11-13 (2019) (“Donald Trump has called for a possible Muslim database registry and questioned Muslims’ loyalties as

he was joined by his running mate, then-Indiana Governor Mike Pence.¹⁴¹ Candidate Trump remained committed to implementing the ban even after the interviewer confronted them with a tweet Pence posted six months prior that read, “Calls to ban Muslims from entering the U.S. are offensive and unconstitutional.”¹⁴² Before Pence could answer, Trump retorted, “So you call it territories. Okay? We’re going to do territories. We’re going to not let people come in from Syria that nobody knows who they are.”¹⁴³

Nonetheless, “scapegoating Islam and vilifying Muslims” proved to be a “winning strategy” for the Trump Campaign.¹⁴⁴ President Trump surrounded himself with key advisors “who echo[ed] [his] most bellicose anti-Muslim rhetoric.”¹⁴⁵ His National Security Advisor, for example, publicly declared “Islamism” to be a “vicious cancer inside the body of 1.7 billion people” that needed to be “excised.”¹⁴⁶ That same advisor later derided Islam as a “political ideology,” stating that it “hides behind this notion of it being a religion.”¹⁴⁷ Similarly, President Trump’s chief strategist called Islam “the most radical religion in the world”¹⁴⁸ that posed a direct threat to the “Christian West.”¹⁴⁹

President Trump kept his campaign promise when he signed an executive order on “Protecting the Nation from Foreign Terrorist Entry into the United States” just seven days after his inauguration.¹⁵⁰ The order effectively imposed a ban on nationals from the predominantly Muslim countries of Iran, Iraq, Libya, Somalia, Sudan, and Yemen, preventing the citizens of

Americans. Steve Bannon, Trump’s former advisor professed the West is ‘at war with Islam.’ Michael Flynn, Trump’s former National Security Advisor, referenced Islam as a ‘vicious cancer inside the body of 1.7 billion people needing to be excised.’”); Engy Abdelkader, *Muslim Americans: Do U.S. Democratic Institutions Protect Their Religious Liberty?*, 26 *ASIAN AM. L.J.* 52 (2019).

¹⁴¹ *The Republican Ticket, Bastille Day Tragedy, Mountain Lions of L.A.* S48 E44 CBS 60 MINUTES (July 17, 2016), <https://www.cbs.com/shows/video/iOwEqxanXCzqusgfSfy92AUPuvu62hvk/>; See also, Chris Cillizza, *Donald Trump’s interview with ‘60 Minutes’ was eye-opening. Also, Mike Pence was there.*, WASH. POST (July 18, 2016, 8:51 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/07/18/donald-trump-is-way-more-humble-than-you-could-possibly-understand/>.

¹⁴² Governor Mike Pence (@GovPenceIN), TWITTER (Dec. 8, 2015, 10:30 AM), <https://twitter.com/GovPenceIN/status/674249808610066433> [<https://perma.cc/MZ9W-CRXM>].

¹⁴³ See Rappeport, *supra* note 139. Understandably, these controversial policy proposals raised legitimate concerns about potential violations of constitutional and international laws and generated significant discourse and controversy within the Muslim community and among politicians and political experts. Snow, *supra* note 140; Engy Abdelkader, *Muslim Americans: Do U.S. Democratic Institutions Protect Their Religious Liberty?*, 26 *ASIAN AM. L.J.* 52 (2019).

¹⁴⁴ Khaled A Beydoun, *Donald Trump: The Islamophobia president*, ALJAZEERA (Nov. 9, 2016), <https://www.aljazeera.com/opinions/2016/11/9/donald-trump-the-islamophobia-president/>.

¹⁴⁵ Anthony Zurcher, *What Trump team has said about Islam*, BBC NEWS (Feb. 7, 2017), <https://www.bbc.com/news/world-us-canada-38886496>; Snow, *supra* note 140.

¹⁴⁶ Andrew Kaczynski, *Michael Flynn in August: Islamism a ‘vicious cancer’ in body of all Muslims that ‘has to be excised’*, CNN (Nov. 22, 2016, 8:36 PM), <https://www.cnn.com/2016/11/22/politics/kfile-michael-flynn-august-speech/index.html>.

¹⁴⁷ Anthony Zurcher, *What Trump Team Has Said About Islam*, BBC NEWS (Feb. 7, 2017), <https://www.bbc.com/news/world-us-canada-38886496>.

¹⁴⁸ *Id.*

¹⁴⁹ Greg Jaffe, *For a Trump Adviser, an Odyssey from the Fringes of Washington to the Center of Power*, WASH. POST (Feb. 20, 2017), https://www.washingtonpost.com/world/national-security/for-a-trump-adviser-an-odyssey-from-the-fringes-of-washington-to-the-center-of-power/2017/02/20/0a326260-f2cb-11e6-b9c9-e83fce42fb61_story.html.

¹⁵⁰ Exec. Order No. 13,769, 82 FR 8977 (2017) (suspended the issuance of visas, and “other immigration benefits” from the citizens of those countries seeking to gain entrance into the United States. The order removed the waiver for in-person interviews to visa applicants.).

those countries from visiting the United States for a 90-day period.¹⁵¹ It also suspended all Syrian refugees from entering the United States indefinitely and placed a 120-day suspension on all other refugees from entering the United States.¹⁵² Despite evidence to the contrary, the unfounded fear that foreign-born Muslims carried terroristic intent guided the Trump Administration's immigration agenda.¹⁵³ Because the goal of the order, by President Trump's admission, was to prevent the entry of foreign-born Muslims, exceptions would be made for Christian minorities from those countries.¹⁵⁴

The order immediately sparked widespread confusion over its application leading to the immediate detention or refusal of entry to existing visa and green card holders.¹⁵⁵ The public response was swift.¹⁵⁶ Protesters flooded airports in droves to support those individuals who were being detained or turned away across the country.¹⁵⁷ Lawyers and immigrants' rights organizations nationwide expeditiously filed lawsuits across the country.¹⁵⁸ Several "[c]ourts quickly blocked the order's impact on existing visa holders and eventually put the key part of the travel ban on hold worldwide."¹⁵⁹ After a failed appeal to the Ninth Circuit Court of Appeals, the Trump Administration "issued new iterations of the ban to circumvent the law and conceal its real purpose, which in his own words was to block Muslims from entering the United States."¹⁶⁰

¹⁵¹ Louise Cainkar, *The Muslim Ban and Trump's War on Immigration*, MIDDLE EAST RESEARCH & INFORMATION PROJECT (Spring, 2020), <https://merip.org/2020/06/the-muslim-ban-and-trumps-war-on-immigration-2/> ("The original Muslim Ban excluded refugee entry and all travel from Iran, Iraq, Libya, Somalia, Sudan and Yemen for 90 days.").

¹⁵² *Protecting the Nation From Foreign Terrorist Entry Into the United States*, Executive Order 13769 of January 27, 2017, Executive Office of the President, Feb 1, 2017,

<https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>.

¹⁵³ Faiza Patel, *Deference to Discrimination: Immigration and National Security in the Trump Era*, 45 HUMAN RIGHTS 2 (2020) ("[T]he analysis Extreme Vetting of Immigrants: Estimating Terrorism Vetting Failures concludes that from 2002 to 2016, one deadly terrorist made it through for every 379 million decisions authorizing a foreigner to enter the United States."); see also Alex Nowrasteh, *Immigration and Terrorism, Risk Analysis: 1975-2022*, CATO INSTITUTE (Aug. 22, 2023), <https://www.cato.org/policy-analysis/terrorism-immigration> ("There were 219 foreign-born terrorists who planned, attempted, or carried out attacks on U.S. soil from 1975 through 2022 ... The chance of a person perishing in a terrorist attack committed by a foreigner on U.S. soil over the 48-year period studied here is 1 in 4.3 million per year. ... the annual chance of an American being murdered in a terrorist attack by a refugee is about 1 in 3.3 billion").

¹⁵⁴ Carol Marelló, *Trump Signs Order Temporarily Halting Admission of Refugees, Promises Priority for Christians*, WASH. POST (Jan. 27, 2017, 9:28 PM), https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c_story.html. This distinction clearly indicates that the Trump administration has discovered that framing immigrants as threats to national security has allowed it to leverage a potent legal mechanism for shaping social change—aligning U.S. policy with the perspective that "America is a white, Christian nation." Patel, *supra* note 153 at 3.

¹⁵⁵ Josh Gerstein & Ted Hesson, *Supreme Court Appears Split on Trump's Travel Ban*, POLITICO (Apr. 25, 2018, 1:42 PM), <https://www.politico.com/story/2018/04/25/trump-travel-ban-supreme-court-549224>.

¹⁵⁶ See Alan Taylor, *A Weekend of Protest Against Trump's Immigration Ban*, THE ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/photo/2017/01/a-weekend-of-protest-against-trumps-immigration-ban/514953/>.

¹⁵⁷ Brady Dennis & Jerry Markon, *Amid Protests and Confusion, Trump Defends Executive Order: 'This is not a Muslim ban'*, WASH. POST (Jan. 29, 2017, 8:23 PM), https://www.washingtonpost.com/national/health-science/trump-gives-no-sign-of-backing-down-from-travel-ban/2017/01/29/4ffe900a-e620-11e6-b82f-687d6e6a3e7c_story.html.

¹⁵⁸ Leila Rafei & Ashoka Mukpo, *The Enduring Harms of Trump's Muslim Ban*, ACLU (Jan. 19, 2021), <https://www.aclu.org/news/immigrants-rights/the-enduring-harms-of-trumps-muslim-ban>.

¹⁵⁹ Gerstein and Hesson, *supra* note 155.

¹⁶⁰ *Id.*

After two rewrites, the third version was upheld by the U.S. Supreme Court and was in effect from March 2017 until January 2021.¹⁶¹

While there is no evidence that international terrorism was reduced during the period of the Muslim ban, the impact of the Muslim ban negatively affected students, academics, medical patients, professionals, and families.¹⁶² Specifically, families with valid visas remained separated, educational and job opportunities were abandoned, medical needs left unattended, and refugees were left in dire straits.¹⁶³ In many cases, separation meant never seeing a loved one again because they died while the ban was in place.¹⁶⁴

The story of Mohammed Saleh is one such story. Mohammed, the son of a naturalized U.S. citizen, lived in New York as a green card holder from Yemen since 1995.¹⁶⁵ He split his time between New York, where he co-owned a deli in Queens, and Yemen, where his wife and five children remained. His wife Amina died in 2017, leaving his five children alone in war-torn Yemen. One of those children Ayman struggled with a congenital heart condition.¹⁶⁶ Because years of civil war decimated the healthcare infrastructure in Yemen, Mohammed petitioned for a visa for Ayman to seek medical treatment in the United States. As any father would, Mohammed “wanted to hold Ayman, take him to his doctor appointments, and give him a chance at life.”¹⁶⁷ However, the Muslim ban triggered an indefinite delay of Ayman’s visa application. Ayman died in Yemen during the holy month of Ramadan without the chance to say goodbye to his father.¹⁶⁸

Mahmood Salem’s family faced similar devastation as a direct result of the Trump Administration’s Muslim ban.¹⁶⁹ Mahmood, a Yemeni-American, had been living in Crowley, Louisiana, while his wife and children awaited the processing of their visas from Djibouti when the Muslim ban took effect.¹⁷⁰ Although their visas were approved a month before, the hasty roll-out of Muslim ban triggered an automatic pause of the processing of their visas.¹⁷¹ By January 2018, the United States officially denied their visas, leaving Mahmood desperate and alone. Mahmood fatally shot himself six months later. Reflecting on the tragedy, Mahmood’s brother believes the Muslim ban was directly related to Mahmood’s death. “I’ll say it’s the first

¹⁶¹ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (narrowly concluding that the Trump Administration’s third version of the ban passed constitutional scrutiny); see also, Timeline of the Muslim Ban, ACLU OF WASHINGTON (<https://www.aclu-wa.org/pages/timeline-muslim-ban>) [<https://perma.cc/7AYU-P96Y>] (explaining that despite the holding, opponents of the ban still believed that the policy “is still religious discrimination in the pretextual guise of national security and is still unconstitutional.”). The Trump administration then further expanded the ban, explicitly targeting Africans. This travel ban was effective from March 6, 2017, until January 20, 2021, when President Biden revoked the Executive Order and all subsequent Proclamations. *Id.*

¹⁶² Patel, *supra* note 153 at 2; see also Morello, *supra* note 154.

¹⁶³ Rowaida Abdelaziz, *Trump’s Travel Ban Forever Changed the Lives of Muslims Around the World*, HUFFINGTON POST (Jan. 22, 2022), https://www.huffpost.com/entry/trump-travel-ban-muslims-changed-lives_n_61e86498e4b01f707dabbdcd.

¹⁶⁴ Abdelaziz, *supra* note 163.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Abdelaziz, *supra* note 163.

¹⁶⁹ Mallory Moench, *U.S. citizen’s family was denied visas under Trump’s travel ban. Then he died by suicide.*, NBC NEWS (July 28, 2018, 9:12 AM), <https://www.nbcnews.com/news/us-news/u-s-citizen-s-family-was-denied-visas-under-trump-n895381>.

¹⁷⁰ *Id.* (“[Mahmood’s] three youngest kids are U.S. citizens, but his wife and two oldest are not—and they were denied visas under President Donald Trump’s travel ban.”).

¹⁷¹ Moench, *supra* note 169. It is important to note that Mahmood had applied for his family’s visas in 2013.

and main reason. Maybe there is other stuff, but I could give it 90 percent,” his brother said.¹⁷² In the wake of Mahmood’s suicide, the government exempted his family from the Muslim ban, permitting them lawful entry into the United States but not in time to attend Mahmood’s funeral.¹⁷³

In another instance, Leyla Abbasnezhad, a highly educated Iranian doctoral candidate, achieved a remarkable feat by winning the Diversity Immigrant Visa Program lottery.¹⁷⁴ The Diversity Immigrant Visa Program lottery was established in 1990 to provide a pathway for individuals from countries with historically low rates of immigration to the United States, but the Muslim ban effectively excluded all individuals from those Muslim-majority countries from participating in the Program.¹⁷⁵ In May 2017, Leyla learned that she was selected to participate in the Program the following year. She quit her PhD program, spent thousands of dollars on travel and fees, and enrolled in English classes to prepare for her interview at the U.S. consulate in Turkey.¹⁷⁶ However, when she arrived for her interview in December 2017, embassy staff informed her that the Trump Muslim ban prohibited her from receiving her visa.¹⁷⁷

Having planned her entire life around the U.S. government’s invitation to contribute to America’s rich diversity, the Muslim ban left Leyla spiraling into depression.¹⁷⁸ The ban derailed Leyla’s career and destabilized her life. Re-enrolling into her Ph.D. program in Iran would mean taking the entrance exam again. Leyla suffered hair loss, skin eruptions, anxiety, and insomnia, which were the physical and psychological manifestations of the stress of America’s broken promise.¹⁷⁹

Despite the Trump Administration’s purported goal of identifying and preventing individuals with connections to terrorism from entering the country, there is no evidence that the Muslim ban achieved this objective. In fact, people who have carried out terrorist attacks in the United States are from countries not listed in the Muslim ban.¹⁸⁰ What it did succeed in, however, was creating an unwelcoming atmosphere to Muslims both in the United States and internationally.¹⁸¹ Although President Biden rescinded the Muslim ban policy shortly after taking

¹⁷² Moench, *supra* note 169.

¹⁷³ *Id.*

¹⁷⁴ Abdelaziz, *supra* note 163.

¹⁷⁵ The American Diversity Immigrant Visa Program “randomly selects up to 50,000 people from countries with low levels of representation in the U.S. for a visa.” Abdelaziz, *supra* note 163; Cainkar *supra* 151 (The ban prevented individuals from Iran, Libya, Somalia, Syria, and Yemen, as well as North Korea and Venezuela, from applying for and receiving Diversity Visas).

¹⁷⁶ Abdelaziz, *supra* note 163.

¹⁷⁷ Although the embassy asked for additional paperwork the week after she interviewed, she received a formal rejection email in January 2018 citing the Muslim ban as a reason for denial. Abdelaziz, *supra* note 163.

¹⁷⁸ Abdelaziz, *supra* note 163.

¹⁷⁹ *Id.*

¹⁸⁰ Hannah Giorgis, *The Faulty Logic in Trump’s Travel Ban*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trumps-travel-ban-logic-flaw/579631/> (“But even by the President’s own logic, the ban was curious in its scope: He ignored the country that produced the vast majority of the 9/11 hijackers.”).

¹⁸¹ While there is little data suggesting that the policy impact of the ban was achieved, the impact on the health of people born from the banned countries seems to have been a significant unintended consequence. Compare Elizabeth A. Samuels, Lilla Orr, Elizabeth B. White, Altaf Saadi, Aasim I. Padela, Michael Westerhaus, Aarti D. Bhatt, Pooja Agrawal, Dennis Wang & Gregg Consalves, *Health Care Utilization Before and After the “Muslim Ban” Executive Order Among People Born in Muslim-Majority Countries and Living in the US*, JAMA NETWORK OPEN, July 30, 2021, at 1,

office,¹⁸² the U.S. government inflicted “permanent emotional harm” on targeted individuals simply because their stories began in Muslim-majority countries.¹⁸³ Additionally, because the Biden Administration’s reversal on the Muslim ban did not include protections for visa applicants from the Diversity Immigrant Visa Program,¹⁸⁴ the more than 40,000 diversity visa applicants who were denied entry during the life of the Muslim ban would have to reapply and face the nearly impossible odds of being chosen again.¹⁸⁵

III. Biased-Motivated Policies: Inflicting Greater Individual and Societal Harm

Although the U.S. Constitution guarantees the right to free speech, statutory exemptions permit hate speech to form the basis of enhanced criminal penalties under federal and state law. These enhanced criminal penalties exist because hate crimes “inflict greater individual and societal harm.”¹⁸⁶ However, although the government enjoys its own rights as speaker, there is no similar mechanism for biased-motivated policies designed to inflict harm on targeted communities.¹⁸⁷ Government policies that perpetuate discrimination and marginalization against certain groups demand attention because the impact of those bias-motivated government policies, especially at the federal level, inflicts greater individual and societal harm.¹⁸⁸

https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2782563?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=073021 (after examining 252,594 patients, a 2021 study found an increase in visits to the emergency room by people born in majority-Muslim countries, as well as an increase in diagnoses of stress-related conditions) with Goleen Samari, Ralph Catalano, Héctor E. Alcalá & Alison Gemmill, *The Muslim Ban and preterm birth: Analysis of U.S. vital statistics data from 2009 to 2018*, 265, SOCIAL SCIENCE & MEDICINE, Nov. 22, 2020, <https://doi.org/10.1016/j.socscimed.2020.113544> (another study suggesting that stress related to the travel ban actually increased the chances for preterm births among women born in the targeted countries currently living in the United States by 6.8 percent).

¹⁸² Proclamation No. 10141, 86 Fed. Reg. 7005, Ending Discriminatory Bans on Entry to The United States, (Jan. 20, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01749.pdf>. But see the rescission of these presidential proclamations at Rescission of Presidential Proclamations 9645 and 9983. *Rescission of Presidential Proclamations 9645 and 9983*, TRAVEL.STATE.GOV, (Mar. 10, 2021) <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visas-news-archive/rescission-of-presidential-proclamations-9645-and-9983.html#:~:text=On%20January%202020%2C%202021%2C%20President,certain%20nationals%2C%20based%20on%20visa>.

¹⁸³ Abdelaziz, *supra* note 163 (“Even though the policies are now gone, you do see the effects continuing to ripple out in people’s lives for years.” (quoting Cody Wofsy, staff attorney at the ACLU Immigrants Rights Project)).

¹⁸⁴ Kailani Koenig & Yasmin Vossoughian, *Biden Rescinded the ‘Muslim Ban.’ But Many Families Remain Stuck in the Backlog*, NBC NEWS (Mar. 20, 2021, 9:51 AM), <https://www.nbcnews.com/news/us-news/biden-rescinded-muslim-ban-many-families-remain-stuck-backlog-n1261631>.

¹⁸⁵ Jihan Abdalla, *‘Empty promises’: The US’s ‘Muslim ban’ still reverberates*, ALJAZEERA (Feb. 4, 2022), <https://www.aljazeera.com/news/2022/2/4/empty-promises-the-us-muslim-ban-still-reverberates>; *US says visa applicants denied by Trump ‘Muslim ban’ can reapply*, MIDDLE EAST EYE (Mar. 9, 2021, 9:20 PM), <https://www.middleeasteye.net/news/us-says-visa-applicants-denied-trump-muslim-ban-can-reapply>.

¹⁸⁶ *Wisconsin v. Mitchell*, 508 U.S. at 487-88.

¹⁸⁷ Compare Eun Hee Han, *Constitutional Law Chapter: B. Hate Crimes and Hate Speech*, 7 GEO. J. GENDER & L. 679, 698 (2006); and, David B. Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1 (2016).

¹⁸⁸ Nicole Novak & Natalie Lira, *Forced sterilization programs in California once harmed thousands – particularly Latinas*, THE CONVERSATION (Mar. 22, 2018, 4:00 PM), <https://theconversation.com/forced-sterilization-programs-in-california-once-harmed-thousands-particularly-latinas-92324>; Nathaniel Vincent Mohatt

Throughout history, U.S. policies influenced by racial and ethnic bias have disproportionately affected vulnerable populations, who bear the brunt of decisions made by those in power.¹⁸⁹ However, as the nation witnessed in the Trump Administration, policies can take on a cruelty-is-the-point approach. These policies exacerbate the effects of hate speech by legitimizing discriminatory attitudes and institutionalizing systemic injustices. Thus, victims of such policies driven by racial bias should have avenues for redress because, as we see in the stories of Helen, Mohammed, and Leyla, the harmful effects persist even after an administration changes.¹⁹⁰

The nexus between hateful government speech and harmful government policies underscores the urgent need for remedies to address the suffering inflicted upon victims.¹⁹¹ For example, the physical and psychological harm inflicted on families separated at the border has been immeasurable, leaving the Biden Administration to grapple with ways to redress the deleterious effects of such a bias-motivated policy.¹⁹² The Trump Administration's decision to use child separations as a deterrent "provides an important case study of why accountability is necessary and how it may be achieved."¹⁹³ However, until a remedy has been agreed upon, there is no administrative or judicial process that automatically allows for victims like Helen to seek redress.¹⁹⁴

To address these lingering harmful effects of policies derived from racist and nationalist ideologies, the United States needs an administrative tribunal dedicated to hearing grievances brought by victims and their families.¹⁹⁵ Indeed, some victims have turned to the Federal Tort

et. al, *Historical trauma as public narrative: A conceptual review of how history impacts present-day health*, 106 SOCIAL SCIENCE & MEDICINE 128, 128-36 (2014), <https://doi.org/10.1016/j.socscimed.2014.01.043>.

¹⁸⁹ David B. Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1 (2016).

¹⁹⁰ There have been numerous legal challenges to the Trump Administration's biased immigration policies. For example, in 2018, a federal judge in California ruled that the government's decision to terminate the Deferred Action for Childhood Arrivals (DACA) was based on racial animus and violated the Due Process of the Fifth Amendment. See e.g., *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); Ming Hsu Chen, *Race Masked in Colorblind Administrative Procedures*, THE REGULATORY REVIEW (Nov. 2, 2020), <https://www.theregreview.org/2020/11/02/chen-race-masked-colorblind-administrative-procedures/>.

¹⁹¹ U.S. Dep't of Just., Hate Crimes Case Examples (Oct. 31, 2023) <https://www.justice.gov/hatecrimes/hate-crimes-case-examples> [https://perma.cc/V7U7-EK3B].

¹⁹² Executive Order on the Establishment of Interagency Task Force on the Reunification of Families, WHITE HOUSE (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>; Anna Nawaz & Dorothy Hastings, *Settlement would stop U.S. government from separating families at border*, PBS NEWS HOUR (Oct. 17, 2023), <https://www.pbs.org/newshour/show/settlement-would-stop-u-s-government-from-separating-families-at-border>.

¹⁹³ Maggie Jo Buchanan, Phillip E. Wolgin & Claude Flores, *The Trump Administration's Family Separation Policy is Over: What Comes Next?*, CENTER FOR AMERICAN PROGRESS (Apr. 12, 2021), <https://www.americanprogress.org/article/trump-administrations-family-separation-policy/>.

¹⁹⁴ For a further discussion on ways that victims of the family separation policy can be addressed, see Maggie Jo Buchanan et al., *supra* note 193.

¹⁹⁵ A tribunal is also necessary because there will have to be an adjudicative body to determine whether harmful policies were based on race or ethnicity. Similar to that of analyzing the subjectivity of any other Title VII claim, so will the same challenges apply.

Claims Act (“FTCA”) to seek redress for harmful policy actions by the U.S. government.¹⁹⁶ The FTCA provides “a legal means for compensating individuals who have suffered personal injury, death, or property loss or damage caused by the negligent or wrongful act or omission of an employee of the federal government.”¹⁹⁷ Aggrieved individuals can “recover monetary damages from the United States under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the negligent or wrongful act or omission occurred.”¹⁹⁸

However, the FTCA does not readily encompass the remedies needed to address the issues raised by policies like the child separation policy or the Muslim ban. The FTCA typically only allows for individual actions against the government or its agents in cases of negligence or intentional misconduct by government actors.¹⁹⁹ Moreover, the FTCA also grants immunity for specific types of claims, particularly those arising from discretionary functions performed by federal employees. For instance, the FTCA does not permit claims for injuries or damages resulting from policy decisions made by federal employees.²⁰⁰ Consequently, even though the actual policy actions arguably cause the most harm, there is little to no recourse for victims. Given the current wording of the FTCA, it is challenging to provide a remedy to prospective claimants.

In cases where the repercussions of detrimental policies are under scrutiny, it is highly unlikely that a claimant will succeed in a direct claim against the President of the United States. In fact, while the Biden Administration condemned the family separation policy, established a task force to reunite separated families, and promised to make amends to victims, they simultaneously defended the legality of the Trump Administration’s policy actions in court. However, a claim against an entity like the U.S. Department of Homeland Security could potentially prevail if the FTCA’s authority is expanded to address policy actions rooted in racist or discriminatory ideologies. In today’s deeply divided nation, federal government policies have

¹⁹⁶ See e.g., *Alvarado v. United States*, CV 16-5028, 2017 WL 2303758 2 (D.N.J. May 25, 2017) (citing history and documentation on minor-plaintiff’s claims of mistreatment while imprisoned at border detention facilities and eventually settled for \$125,000); *Alvarado v. United States*, Asylum Seeker Advocacy Project (last visited May 16, 2024), <https://www.asylumadvocacy.org/ftca-litigation/>. For pending cases filed pursuant to the FTCA, see *International Human Rights Law Clinic: Pursuing Federal Tort Claims for Separated Families* (“Seeking justice for these families, and is representing two Central American families in Federal Tort Claims Act (FTCA) filings, seeking compensation for the pain and damages the U.S. government caused by separating them”); *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz., filed Sept. 19, 2019); *Separated Family Members Seek Monetary Damages from United States*, AMERICAN IMMIGRATION COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/separated-family-members-seek-monetary-damages-united-states> “Five asylum-seeking mothers and their children sued to seek monetary compensation for the trauma they suffered when torn apart under the Trump Administration’s family separation policy. Each family was fleeing persecution in their country of origin.”

¹⁹⁷ U.S. Environmental Protection Agency, *Programs and Projects of the Office of General Counsel*, <https://www.epa.gov/ogc/federal-tort-claims-act-ftca> (citing Federal Tort Claims Act, Pub. L. No. 89-506, § 2, 80 Stat. 306 (as codified in 28 U.S.C. § 2675)).

¹⁹⁸ *Id.*

¹⁹⁹ See 28 U.S.C. § 1346(b), 2671. See also IMMIGRATION AND CUSTOMS ENFORCEMENT, CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT (Jan. 26, 2021), <https://www.ice.gov/about-ice/opla/ftca>; *Practice Advisory, Claims Under the Federal Tort Claims Act*, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD (Feb. 17, 2021) (“A claim under the FTCA enables recovery of damages from the United States. In the immigration context, the FTCA authorizes money damages to non-citizen and citizen victims of misconduct by employees of federal agencies, including the Department of Homeland Security (DHS).”), <https://immigrationlitigation.org/wp-content/uploads/2021/02/2021.2.17-FTCA-PA-FINAL.pdf>.

²⁰⁰ 28 U.S.C. § 2680(a).

increasingly significant impacts on individuals from diverse racial and ethnic backgrounds. Consequently, xenophobia is masked by otherwise harmful policy decisions, concealed by their ostensibly legitimate motivations.²⁰¹

The mechanisms that exist to restrict private speech when it causes harm to individuals are notably absent when racially or ethnically motivated government speech leads to harmful policies. It is undeniably concerning that Americans do not have any way to protect individuals who experience significant harm due to xenophobic government policies. Therefore, justice requires the establishment of an administrative process to serve as an accessible mechanism for redress, thus, holding the U.S. government accountable in instances where official government policies violate human rights.

Conclusion

As a society, Americans need a remedy for the victims of intentional government harm, specifically harm that comes from policies driven by racial and ethnic animus. If American society agrees on the fundamental importance of freedom of speech, it should also agree that there should be tangible limitations without exceptions for certain speakers, particularly when the speaker's harm is of greater scale. Just as private speakers are held accountable for unprotected speech because of the harm it causes, individuals and groups must be able to hold the government accountable for any harm resulting from policies rooted in racial and ethnic animus.²⁰² Americans must acknowledge that freedom of speech is not an absolute right and that sensible limitations are needed to protect individuals from harm. Limiting rights of individuals just because the speaker is the U.S. government is an egregious denial, and the ultimate lack of accountability. Only by taking a stand against government harm and advocating for accountability can Americans create a more just and equitable society for all.

²⁰¹ See Michelle Goodwin & Erwin Chemerinsky, *The Trump Administration: Immigration, Racism and Covid-19*, 169 U. PA. L. REV. 313, 316 (“racism, classism, and xenophobia alarmingly marked (and mark) the times and dangerously dictated perceptions about so-called polluted bodies and unfit persons, bounded in domestic and foreign policy.”).

²⁰² This article is written based on one of the author's areas of expertise of immigration law and is not written to diminish other critical areas of research that are related to the issue of remedies for harmful policies. For conversation specific to reparations for hateful policies and their effects on African Americans. see Michael F. Blevins, Thesis: *Restorative Justice, Slavery and the American Soul, A Policy-Oriented Intercultural Human Rights Approach to the Questions of Reparations*, 31 T. MARSHALL L. REV. 253 (2005); Hal Clay, Comment: *Forty Acres and a Mule: America's Bill for Reparations is Long Past Overdue*, 24 SCHOLAR 505 (2022).