

## PRESIDENTIAL SPEECH AND THE DISCRIMINATION PARADOX

The Supreme Court promises that government action is illegitimate if it “lack[s] any purpose other than a ‘bare . . . desire to harm a politically unpopular group.’”<sup>1</sup> But increasingly, that promise is at risk in the context of actions by the Executive. Recent Supreme Court cases signal a reticence to find unofficial presidential statements probative of governmental purpose for actions taken by the Executive. Because courts increasingly require discrimination litigants to prove up animus with evidence such as statements, that reticence to review unofficial presidential statements impedes access to justice. Cordoning presidential statements off from purpose review insulates executive action from claims of discrimination.

But this impending collision between discrimination doctrine and judicial treatment of presidential speech is not inevitable. This Note explains that although the Supreme Court has retreated from analyzing presidential speech, it has not squarely prohibited such analysis. Now, President Trump’s informal speech has forced courts to deal directly with the problem. The issue has percolated in lower courts,<sup>2</sup> especially district courts, which have trended toward relying on unofficial presidential speech for governmental purpose inquiries. The Supreme Court should mirror this district court approach because examining presidential speech can be “a manageable, sensible inquiry”<sup>3</sup> that preserves the feasibility of discrimination claims against executive action.

Previous scholarship by Professors Katherine Shaw and Shawn Fields has defended consideration of presidential speech in purpose inquiries.<sup>4</sup> This Note builds on the existing literature by identifying how the Roberts Court has shunned presidential speech evidence, despite its strong theoretical foundation.<sup>5</sup> The Note illustrates that a square holding averse to presidential speech would make discrimination cases against the Executive difficult to prove. To make this argument, the Note proceeds in four Parts. Part I explains the increasingly limited pathways to establishing discriminatory purpose, under which explicit statements have become critical tools to prove discriminatory intent.

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<sup>1</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (omission in original) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>2</sup> See generally Michael Coenen & Seth Davis, *Percolation’s Value*, 73 STAN. L. REV. 363, 365–66 (2021) (identifying Justices who have endorsed percolation).

<sup>3</sup> *Contra* *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc) (arguing that examining presidential speech cannot be “a manageable, sensible inquiry”).

<sup>4</sup> See Katherine Shaw, *Speech, Intent, and the President*, 104 CORN. L. REV. 1337, 1373 (2019); Shawn E. Fields, *Is It Bad Law to Believe a Politician? Campaign Speech and Discriminatory Intent*, 52 U. RICH. L. REV. 273, 276 (2018).

<sup>5</sup> See Shaw, *supra* note 4, at 1392.

Part II then analyzes the Supreme Court’s treatment of presidential speech, and Part III contrasts that treatment with current trends in the district courts. Part IV identifies how the Supreme Court can adopt the lower court approach.

The Trump era shows that devaluing presidential speech evidence allows the Executive to avoid accountability and meaningful judicial checks.<sup>6</sup> It is not unprecedented for a President to say “the quiet part out loud”<sup>7</sup> and admit discriminatory purpose.<sup>8</sup> In *Korematsu v. United States*,<sup>9</sup> the Supreme Court failed to inquire into the impermissible purpose of President Roosevelt or other executive officials despite briefing that alleged explicit statements of prejudice.<sup>10</sup> President Nixon expressed anti-Black animus to his staff when advocating for the War on Drugs.<sup>11</sup> But President Trump has raised the profile of discriminatory bully pulpits.<sup>12</sup> His “incendiary” rhetoric<sup>13</sup> frequently includes discriminatory sentiments, and his affinity for informal communication with the public means that extensive presidential speech is available for consideration.<sup>14</sup> The Trump Administration’s hostility to judicial review,<sup>15</sup> combined with its willingness to contradict its own statements in court,<sup>16</sup> has increased the urgency of asking how courts consider presidential speech when assessing governmental purpose.<sup>17</sup>

Few dispute the propriety of considering *official* presidential statements — including signing statements, executive orders, and other formal proclamations.<sup>18</sup> But this Note focuses on the open question: Can *unofficial* presidential statements be considered in purpose inquiries? Unofficial statements — meaning social media posts, speeches, and

<sup>6</sup> See *id.* at 1392–1400.

<sup>7</sup> *The Quiet Part Loud*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/the-quiet-part-loud> [<https://perma.cc/TSN8-EF4Q>].

<sup>8</sup> See Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 74–75 (2017) (cataloging examples).

<sup>9</sup> 323 U.S. 214 (1944), *overruled by*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>10</sup> Shaw, *supra* note 4, at 1390–91.

<sup>11</sup> Noam Biale, Elizabeth Hinton & Elizabeth Ross, *The Discriminatory Purpose of the 1994 Crime Bill*, 16 HARV. L. & POL’Y REV. 115, 137 (2021); andré douglas pond cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs & the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 461–62 (2022).

<sup>12</sup> See Fields, *supra* note 4, at 274.

<sup>13</sup> *Id.*

<sup>14</sup> See Solcyré Burga, *Trump Posted More Than 160 Times on Truth Social in Late-Night Blitz. That’s Not Even His Record*, TIME (Dec. 2, 2025, at 12:35 ET), <https://time.com/7338077/trump-truth-social-posts-addiction> [<https://perma.cc/2C3L-PREN>].

<sup>15</sup> See Jack Goldsmith, *The Supreme Court, 2024 Term — Essay: Interim Orders, The Presidency, and Judicial Supremacy*, 139 HARV. L. REV. 86, 86–87 (2025).

<sup>16</sup> See Jessica Piper, Myah Ward & Kyle Cheney, *The Trump Administration’s Conflicting Messages to the Public and the Courts*, POLITICO (Apr. 14, 2025, at 10:53 ET), <https://www.politico.com/interactives/2025/trump-administration-messaging-public-courts-discrepancies-tracker> [<https://perma.cc/6DDR-NG9C>] (“You’re saying one thing in public. You’re saying a different thing in court.” (quoting Judge Reyes of the U.S. District Court for the District of Columbia)).

<sup>17</sup> See *id.* (“The court is not going to be gaslit.” (quoting Judge Reyes)).

<sup>18</sup> Cf. Shaw, *supra* note 8, at 77 (using a similar definition).

press interviews<sup>19</sup> — are referred to here as “presidential speech” or the “bully pulpit.” Although considering presidential speech may be especially important in equal protection cases for the reasons outlined in Part I, the judiciary’s approach to considering presidential speech impacts any challenge to executive action where purpose is relevant, including claims involving the First Amendment and pretext. The bully pulpit is a powerful presidential tool,<sup>20</sup> and this Note does not suggest that it is the judiciary’s responsibility “to denounce the statements” of the President.<sup>21</sup> However, it is the judiciary’s responsibility to uphold the Constitution’s promise of equal protection.<sup>22</sup> If a President’s speech illuminates that government actions are motivated by discriminatory purpose, or any other illegal purpose, the judiciary should not turn a blind eye.<sup>23</sup>

### I. THE EROSION OF *ARLINGTON HEIGHTS* AND DISCRIMINATORY PURPOSE

Consideration of presidential speech in purpose inquiries is critical for discrimination claims, because, although rare,<sup>24</sup> an explicit statement by a decisionmaker is one of the few clear paths left to establishing unconstitutional discrimination.<sup>25</sup> When considering a facially neutral law, “[p]roof of . . . discriminatory intent or purpose<sup>26</sup> is required to show” an equal protection violation.<sup>27</sup> *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>28</sup> identified four<sup>29</sup> kinds of evidence that could establish discriminatory purpose: (1) disparate impact;

<sup>19</sup> Cf. *id.* at 77–78 & n.17 (using a similar definition).

<sup>20</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2417–18 (2018) (“The President of the United States possesses an extraordinary power to speak . . .”); Shaw, *supra* note 8, at 73.

<sup>21</sup> See *Hawaii*, 138 S. Ct. at 2418.

<sup>22</sup> See U.S. CONST. amend. XIV, § 1.

<sup>23</sup> See Shaw, *supra* note 4, at 1343 (“[I]t is appropriate and often necessary for courts to consider presidential intent in cases involving constitutional challenges to presidential action.”).

<sup>24</sup> See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135–36 (1997).

<sup>25</sup> See *infra* section I.D, pp. 1657–58.

<sup>26</sup> Discriminatory purpose is defined as “akin to malice.” Siegel, *supra* note 24, at 1135. The malice requirement excludes most plaintiffs from relief. *Id.* at 1136; see Reva B. Siegel, Opening Address, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp — And Some Pathways for Change*, 112 NW. U. L. REV. 1269, 1286–87 (2018); Angela Onwuachi-Willig, *From Loving v. Virginia to Washington v. Davis: The Erosion of the Supreme Court’s Equal Protection Intent Analysis*, 25 VA. J. SOC. POL’Y & L. 303, 307 (2018). The Court has remarked that “[p]roving the motivation behind official action is often a problematic undertaking.” *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

<sup>27</sup> *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (footnote added).

<sup>28</sup> 429 U.S. 252 (1977).

<sup>29</sup> Some analyses count differently. Compare Sofia D. Martos, Note, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099, 2114 (2010) (identifying six factors), with Andrea Galvez, Comment, *Bias and Immigration: A New Factors Test to Examine Extrinsic Evidence of Animus in Immigration Cases*, 71 EMORY L.J. 57, 60–61 (2021) (identifying four factors).

(2) historical evidence of discrimination; (3) unusual procedures and substantive standards; and (4) “legislative or administrative history[,] . . . especially . . . contemporary statements by” decisionmakers.<sup>30</sup> But federal courts have narrowed these evidentiary pathways one by one. This Part proceeds by identifying how each prong of *Arlington Heights* has been eroded in order to illustrate how discriminatory statements are critical evidence.

### A. Disparate Impact

*Arlington Heights* and its predecessor, *Washington v. Davis*,<sup>31</sup> both acknowledged that disparate impact could be relevant to identifying animus.<sup>32</sup> An especially severe pattern of disparity could even be determinative.<sup>33</sup> But the impact prong of *Arlington Heights* has been diminished, as later cases have given statistical disparities little weight.<sup>34</sup> *Personnel Administrator v. Feeney*<sup>35</sup> undercut the value of statistical evidence when it found that a hiring policy favoring veterans, when veterans were ninety-eight percent male, was insufficient to find discrimination.<sup>36</sup> The plaintiffs in *McCleskey v. Kemp*<sup>37</sup> offered sophisticated statistical analysis paired with additional animus evidence,<sup>38</sup> and again the Supreme Court declined to find discriminatory purpose.<sup>39</sup> “[T]he *McCleskey* opinion offers [a] powerful obstacle to discriminatory purpose claims — allowing, if not encouraging, judges to refuse inferences of discriminatory purpose from statistical disparities . . . .”<sup>40</sup> The Roberts Court reaffirmed this anti-impact view in *Brnovich v. Democratic National Committee*<sup>41</sup> when it rejected discrimination challenges to voting restrictions.<sup>42</sup> The majority declined to consider extensive statistical evidence of disparate impact (which appeared at length in Justice Kagan’s dissent<sup>43</sup>) showing that minority groups were twice as likely to

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<sup>30</sup> *Arlington Heights*, 429 U.S. at 268; *see id.* at 266–68.

<sup>31</sup> 426 U.S. 229 (1976).

<sup>32</sup> *Id.* at 242 (explaining that severe disparate impact could be relevant in determining purpose, especially if the impact would be “difficult to explain” absent discrimination); *Arlington Heights*, 429 U.S. at 266; *see also* Siegel, *supra* note 26, at 1278 (reviewing treatment of disparate impact evidence in *Davis* and *Arlington Heights*).

<sup>33</sup> *Arlington Heights*, 429 U.S. at 266.

<sup>34</sup> *See* Siegel, *supra* note 26, at 1278–80.

<sup>35</sup> 442 U.S. 256 (1979).

<sup>36</sup> *Id.* at 270, 275.

<sup>37</sup> 481 U.S. 279 (1987).

<sup>38</sup> *See id.* at 286–87; Siegel, *supra* note 26, at 1273.

<sup>39</sup> *McCleskey*, 481 U.S. at 297–99.

<sup>40</sup> Siegel, *supra* note 26, at 1287.

<sup>41</sup> 141 S. Ct. 2321 (2021).

<sup>42</sup> *Id.* at 2330.

<sup>43</sup> *Id.* at 2366–71 (Kagan, J., dissenting).

be impacted by the restrictions.<sup>44</sup> Taking the case law together, it seems like impact has been cleaved from purpose.<sup>45</sup>

### B. Historical Evidence of Discrimination

Like impact, the *Arlington Heights* promise of historical review has been whittled away from discriminatory purpose inquiries. History once was a strong pathway to demonstrating discriminatory purpose.<sup>46</sup> In *Hunter v. Underwood*,<sup>47</sup> the Court relied extensively on historical evidence in determining that a voting restriction was motivated by animus.<sup>48</sup> But other case law has constrained this inquiry.<sup>49</sup>

First, case law has declined to consider history that is too far removed from the challenged action.<sup>50</sup> As Professor Elise Boddie explains, “[t]he Court has relied on the passage of time to absolve state actors of responsibility for their predecessors’ prior discrimination. . . . [D]iscrimination must . . . be current.”<sup>51</sup> The Court in *McCleskey* dismissed historical evidence, explaining that “unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value.”<sup>52</sup> In *Abbott v. Perez*,<sup>53</sup> the Court rejected allegations of discriminatory redistricting, writing that “Texas’s ‘long ‘history of voting-related discrimination,’ . . . in no way . . . has any logical bearing on” the current discrimination claims.<sup>54</sup> An undefined window has been applied to history, devaluing the noncontemporary.<sup>55</sup>

Second, the reauthorization doctrine has undermined historical inquiry.<sup>56</sup> Even when an action originally had a discriminatory purpose, courts have indicated that government actors reauthorizing the action without the same overt discriminatory purpose may cure the action of its “discriminatory taint.”<sup>57</sup> The Supreme Court has not squarely endorsed reauthorization, but it has signaled the potential viability of such

<sup>44</sup> *Id.* at 2345 (majority opinion); see also Jeremiah Chin, *Modern Authorities from Brandeis to Brnovich: For Jurists Who Have Considered Social Science / When Doctrine Was Not Enough*, 13 ALA. C.R. & C.L. L. REV. 265, 315 (2022) (discussing rejection of statistical evidence in *Brnovich*).

<sup>45</sup> See Siegel, *supra* note 26, at 1279–80.

<sup>46</sup> See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977); see also Gary J. Simson, *Racially Neutral in Form, Racially Discriminatory in Fact: The Implications for Voting Rights of Giving Disproportionate Racial Impact the Constitutional Importance It Deserves*, 71 MERCER L. REV. 811, 832–33 (2020) (discussing cases in which the Court found history persuasive).

<sup>47</sup> 471 U.S. 222 (1985).

<sup>48</sup> See *id.* at 228–29.

<sup>49</sup> See Elise C. Boddie, Essay, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV. 1825, 1826–27 (2017).

<sup>50</sup> See *id.*

<sup>51</sup> *Id.* at 1828.

<sup>52</sup> *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987).

<sup>53</sup> 138 S. Ct. 2305 (2018).

<sup>54</sup> *Id.* at 2333 (quoting *id.* at 2358 (Sotomayor, J., dissenting)).

<sup>55</sup> Boddie, *supra* note 49, at 1828.

<sup>56</sup> See, e.g., *Abbott*, 138 S. Ct. at 2353–54 (Sotomayor, J., dissenting).

<sup>57</sup> See W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1204 (2022).

cleansing measures.<sup>58</sup> This doctrine closes off judicial scrutiny of discrimination in the (many) scenarios where old, avowedly discriminatory laws are reauthorized with little change except their justification.<sup>59</sup> By constraining the relevant timeframe for the historical inquiry and applying the reauthorization doctrine, federal courts have defanged the historical prong.

### C. Unusual Procedures

The third prong of *Arlington Heights*, departures from usual procedures and standards, has similarly been undermined. In *Abbott*, the Court considered a challenge to Texas redistricting plans.<sup>60</sup> As Justice Sotomayor recognized in dissent, the legislature's procedure was far from ordinary; the legislature passed the plans in a special session on a shortened time frame while failing to disclose information to counsel.<sup>61</sup> But the majority insisted nothing was suspicious about the slew of unusual procedures; the legislature acted irregularly because they needed to act quickly, the Court explained.<sup>62</sup> The Court went out of its way to emphasize that the redistricting plans survived despite the legislature's unusual procedure.<sup>63</sup> This trend has continued, with the Supreme Court devaluing unusual procedural elements during the first Trump Administration when it considered challenges to immigration policies.<sup>64</sup> Another prong of *Arlington Heights* eroded.

### D. Protecting What Is Left: Statements

Prongs one through three of *Arlington Heights* have been chipped away. In *Cooper v. Harris*,<sup>65</sup> the Court claimed that “in no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail.”<sup>66</sup> But that reassurance feels hollow given that *Cooper* relied extensively on decisionmaker statement evidence.<sup>67</sup>

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<sup>58</sup> *E.g.*, *Abbott*, 138 S. Ct. at 2313 (declining to consider intent of earlier legislature for reauthorized redistricting plans). *But see* *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2274 (2020) (Alito, J., concurring) (concluding that discriminatory taint remained following readoption of prohibition on government aid to sectarian schools); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020) (considering racist history in assessing Sixth Amendment claim against reenacted laws allowing for nonunanimous convictions). In 2023, over the dissent of Justice Jackson, who was joined by Justice Sotomayor, the Court left in place a decision by the Fifth Circuit holding that the reenactment of felon disenfranchisement laws cured discriminatory purpose. *See* *Harness v. Watson*, 143 S. Ct. 2426, 2426–27 (2023) (Jackson, J., dissenting from the denial of certiorari). *See* generally Murray, *supra* note 57, for a discussion of reauthorization.

<sup>59</sup> *See* Murray, *supra* note 57, at 1204–07.

<sup>60</sup> *Abbott*, 138 S. Ct. at 2313.

<sup>61</sup> *Id.* at 2350–51 (Sotomayor, J., dissenting).

<sup>62</sup> *See id.* at 2328–29 (majority opinion).

<sup>63</sup> *See id.*

<sup>64</sup> *See* Dale Carpenter, *The Dead End of Animus Doctrine*, 74 ALA. L. REV. 585, 588 (2023).

<sup>65</sup> 581 U.S. 285 (2017).

<sup>66</sup> *Id.* at 319.

<sup>67</sup> *See id.* at 310–13.

While the first three prongs of *Arlington Heights*<sup>68</sup> may technically be available<sup>69</sup> — and some lower courts continue to employ them<sup>70</sup> — their utility has eroded.<sup>71</sup> Prong four — explicit discriminatory statements by decisionmakers — remains.<sup>72</sup> But the Supreme Court’s treatment of presidential speech could close even this narrow opening for proving animus in the case of discrimination by the Executive.<sup>73</sup>

## II. THE SUPREME COURT’S DISTASTE FOR PRESIDENTIAL STATEMENTS

The Roberts Court has repeatedly signaled skepticism of presidential speech evidence when assessing governmental purpose in challenges to executive actions. Although the Court has not explicitly barred consideration of such speech, *Trump v. Hawaii*,<sup>74</sup> *DHS v. Regents of the University of California*,<sup>75</sup> and *Murthy v. Missouri*<sup>76</sup> illustrate a trend in a hostile direction. If the Supreme Court continues down this path, plaintiffs challenging discriminatory actions by the Executive will not be able to rely on a classic piece of animus evidence — discriminatory statements by the decisionmaker. This Note is concerned with the interaction between presidential speech and discrimination law, so the fact that both *Hawaii* and *Regents* concerned discrimination makes them especially illustrative for discussing this collision. But *Hawaii*, *Regents*, and *Murthy* are all relevant because in all three cases, the Roberts Court failed to consider presidential statements as probative purpose evidence.

<sup>68</sup> There are a few non-*Arlington Heights* animus cases. See generally Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (2014), for an explanation. But the evidentiary pathways are like *Arlington Heights*. See *id.* at 245–46 (listing animus factors). *Arlington Heights* is also the dominant framework. See Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 786 (2018) (“The *Arlington Heights* factors have guided courts’ intent inquiries for forty years.”).

<sup>69</sup> Recent Case, *Lewis v. Governor of Alabama*, 896 F.3d 1282 (11th Cir. 2018), 132 HARV. L. REV. 771, 776 (2018) (“*Arlington Heights* technically remains good law,” but “the Supreme Court has refused to . . . find actual intentional discrimination from circumstantial evidence.”).

<sup>70</sup> *E.g.*, *N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections*, 155 F.4th 298, 310–12 (4th Cir. 2025) (considering history and disparate impact in finding racially discriminatory purpose).

<sup>71</sup> See Recent Case, *supra* note 69, at 776 (noting that Court has rejected arguments “without a ‘smoking gun,’” including those relying on history and statistics (quoting *Veasey v. Abbott*, 830 F.3d 216, 231 n.13 (5th Cir. 2016))).

<sup>72</sup> *Fields*, *supra* note 4, at 293 (“[C]ourts consistently reject evidence that could satisfy any one of the *Arlington Heights* factors, requiring instead explicit evidence of a perpetrator’s subjective intent to discriminate.”). Scholars often criticize direct discriminatory statements as an evidentiary pathway because most actors will not admit malice. See, e.g., *Siegel*, *supra* note 24, at 1135–37. But in the case of discriminatory presidential speech, the President is admitting malice. See *The Supreme Court, 2017 Term — Leading Case: Trump v. Hawaii*, 132 HARV. L. REV. 327, 334 (2018) (“Unlike President Trump, parties accused of discriminatory motive usually hide it, a problem that courts have struggled to overcome.”).

<sup>73</sup> See Carpenter, *supra* note 64, at 587–88.

<sup>74</sup> 138 S. Ct. 2392 (2018).

<sup>75</sup> 140 S. Ct. 1891 (2020).

<sup>76</sup> 144 S. Ct. 1972 (2024).

### A. Understanding the Previous Status Quo

A few years ago, “courts for the most part lack[ed] any coherent interpretive framework for evaluating either speech or intent when it c[ame] to the President.”<sup>77</sup> Several lower court decisions had considered presidential speech,<sup>78</sup> but critics attacked these decisions as pursuing a “path . . . strewn with danger.”<sup>79</sup> An attention-grabbing dissent from Judge Kozinski of the Ninth Circuit called the consideration of presidential campaign speech “folly” that encroached on the separation of powers and free speech.<sup>80</sup>

Shaw and Fields have each produced scholarship suggesting at least some consideration of presidential speech may be appropriate, including in discrimination cases.<sup>81</sup> Shaw’s first article on the subject proposes a normative model focused on the speech’s intent and context.<sup>82</sup> Presidential speech “offered in the spirit of advocacy, persuasion, or pure politics” should not be considered by courts.<sup>83</sup> Speech that shows the President “inten[ded] to enter the legal arena” should be considered.<sup>84</sup> Following Shaw’s model, informal statements, like impromptu replies to the press, should be given little weight, but certain prepared statements, like scripted televised addresses, should be taken seriously.<sup>85</sup> Shaw’s second article compares presidential speech to legislative intent inquiries and concludes that consideration of the bully pulpit can be justified on analogous analytical grounds.<sup>86</sup> Fields focuses on campaign speech from the President, arguing it is relevant evidence for identifying discriminatory purpose.<sup>87</sup>

But scholars and courts were developing these ideas largely in the dark, without clear contemporary guidance from the Supreme Court.<sup>88</sup>

<sup>77</sup> Shaw, *supra* note 4, at 1339.

<sup>78</sup> See Shaw, *supra* note 8, at 74–75 (discussing *Texas v. United States*, 86 F. Supp. 3d 591, 668 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 579 U.S. 547 (2016); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 919 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011) (per curiam); *Al Warafi v. Obama*, No. 09-2368, 2015 WL 4600420, at \*1 (D.D.C. July 30, 2015), *vacated as moot*, No. 15-5266, 2016 U.S. App. LEXIS 4227 (D.C. Cir. Mar. 4, 2016) (per curiam); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 58–59 (D.D.C. 2014)).

<sup>79</sup> *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc); see also *Texas*, 809 F.3d at 208 (King, J., dissenting) (criticizing district court for “selectively rel[ying]” on presidential statements and claiming that there is “no precedent” for such reliance).

<sup>80</sup> *Washington*, 858 F.3d at 1173 (Kozinski, J., dissenting from the denial of reconsideration en banc); see also Shaw, *supra* note 4, at 1382 (discussing this dissent).

<sup>81</sup> Shaw, *supra* note 8, at 137–40; Fields, *supra* note 4, at 324–25.

<sup>82</sup> See Shaw, *supra* note 8, at 129–40.

<sup>83</sup> *Id.* at 129.

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

<sup>85</sup> *Id.* at 129–31. Under Shaw’s model, special considerations weigh in favor of assessing speech relating to unconstitutional purpose independent of the President’s intent to enter the legal realm. *Id.* at 137.

<sup>86</sup> Shaw, *supra* note 4, at 1342–43.

<sup>87</sup> Fields, *supra* note 4, at 276.

<sup>88</sup> See Shaw, *supra* note 4, at 1375.

In only “a handful of cases” had “the Supreme Court . . . itself made some reference to presidential intent.”<sup>89</sup> Before *Hawaii*, the Supreme Court’s examination of presidential speech amounted to “scattered” references.<sup>90</sup> Recent cases more clearly illuminate the Court’s trend away from considering presidential speech.

### B. *Hawaii Rejects Statement Consideration*

*Hawaii* provided the first signal that the Court was averse to considering presidential speech. In *Hawaii*, litigants challenged a presidential proclamation restricting entry to the United States, claiming that the facially neutral measure was motivated by anti-Muslim animus.<sup>91</sup> As evidence of the motivating animus, litigants identified a litany of statements by President Trump, including his claim that the United States was “having problems with Muslims” and his reference to the policy as a “Muslim ban.”<sup>92</sup> The Court acknowledged these statements existed but did not cite to any of them in assessing governmental purpose.<sup>93</sup> Instead, Chief Justice Roberts emphasized that it was not the Court’s place to “denounce the statements”<sup>94</sup> and ruled for the government.<sup>95</sup> Justice Sotomayor responded with a blistering dissent, explaining that “[t]he President’s statements, which the majority utterly fails to address . . . , strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims.”<sup>96</sup> Although *Hawaii* can be cabined on various grounds — for example, much of the Islamophobic speech was campaign speech, and alleged national security concerns earned the government more deferential review<sup>97</sup> — the majority’s dismissive treatment of presidential speech has led many to condemn the case as a return to *Korematsu* and a free pass for discriminatory presidential action.<sup>98</sup> *Hawaii* did not explicitly bar consideration of discriminatory presidential speech, but it functionally gave it no weight,<sup>99</sup> allowing the President to “launder” discrimination through facial neutrality.<sup>100</sup>

<sup>89</sup> Shaw, *supra* note 4, at 1375; *see id.* at 1375–76 (citing *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 274–75 (1974); *Cappaert v. United States*, 426 U.S. 128, 139 (1976); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)).

<sup>90</sup> *Id.* at 1376.

<sup>91</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018).

<sup>92</sup> *Id.* at 2417; *id.* at 2435–39 (Sotomayor, J., dissenting).

<sup>93</sup> *See id.* at 2418, 2420–23 (majority opinion).

<sup>94</sup> *Id.* at 2418.

<sup>95</sup> *Id.* at 2423.

<sup>96</sup> *Id.* at 2442 (Sotomayor, J., dissenting).

<sup>97</sup> *See, e.g., Illinois v. Trump*, No. 25-cv-12174, 2025 WL 2886645, at \*22 (N.D. Ill. Oct. 10, 2025) (distinguishing *Hawaii* on those grounds, among others).

<sup>98</sup> For an example of this critique, see generally Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641 (2019).

<sup>99</sup> *See Hawaii*, 138 S. Ct. at 2420–23.

<sup>100</sup> *Id.* at 2439 (Sotomayor, J., dissenting).

### C. Regents *Devalues Speech*

Similarly, in *Regents*, the Supreme Court did not completely bar consideration of presidential speech for discrimination claims, but the plurality treated such speech dismissively.<sup>101</sup> The plaintiffs claimed that the Trump Administration’s rescission of Deferred Action for Childhood Arrivals (DACA), a policy that granted certain undocumented “immigrants who grew up in the U.S. . . . temporary protection from deportation,”<sup>102</sup> was driven by discriminatory animus against Latinos.<sup>103</sup> To show animus, the plaintiffs invoked the *Arlington Heights* factors, including “statements by President Trump.”<sup>104</sup> A plurality of the Court found Trump’s statements to be “unilluminating” because they were “remote in time and made in unrelated contexts.”<sup>105</sup> But the statements were not remote.<sup>106</sup> The Acting Secretary of Homeland Security rescinded DACA just two weeks after President Trump called immigrants “animals.”<sup>107</sup> Some of the statements cited by the plaintiffs were campaign statements, but as Justice Sotomayor’s separate opinion argued, “nothing in . . . precedent supports [the] blinkered approach’ of disregarding . . . campaign statements as remote in time from later-enacted policies.”<sup>108</sup> “Nor did any of the statements arise in unrelated contexts.”<sup>109</sup> The statements all related to Mexican immigration, a focus of DACA.<sup>110</sup> Additionally, by the plurality’s determination, other executive branch officials were the decisionmakers, so the President’s remarks were not relevant to identifying discriminatory purpose.<sup>111</sup> But the plaintiffs alleged that the President “himself directed the end of the

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<sup>101</sup> See *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915–16 (2020) (opinion of Roberts, C.J.).

<sup>102</sup> *DACA*, NAT’L IMMIGR. L. CTR., <https://www.nilc.org/work/daca> [<https://perma.cc/XB78-RUVH>].

<sup>103</sup> *Regents*, 140 S. Ct. at 1915 (opinion of Roberts, C.J.).

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

<sup>105</sup> *Id.* at 1916.

<sup>106</sup> *Id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>107</sup> Compare Memorandum from Elaine C. Duke, Acting Sec’y, DHS, to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs. et al., on Rescission of DACA (Sep. 5, 2017), <https://www.dhs.gov/archive/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/585P-T3S4>] (rescinding DACA on September 5, 2017), with Donald J. Trump, *Remarks at a “Make America Great Again” Rally in Phoenix, Arizona*, AM. PRESIDENCY PROJECT (Aug. 22, 2017), <https://www.presidency.ucsb.edu/documents/remarks-make-america-great-again-rally-phoenix-arizona> [<https://perma.cc/JXZ7-8ZMN>] (publishing a transcript including anti-immigrant remarks made by the President during August 2017).

<sup>108</sup> *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part) (alteration in original) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2438 n.3 (2018) (Sotomayor, J., dissenting)).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1916 (opinion of Roberts, C.J.).

DACA program.”<sup>112</sup> And the Court was ostensibly assessing the plaintiffs’ claims under a pleading standard of a mere “plausible inference” of animus.<sup>113</sup> Given that even under such a deferential posture, with extensive statements tied to the action by both content and timing, a plurality of the Court was unwilling to find the President’s speech relevant to governmental purpose, it seems the Roberts Court is retreating from considering presidential speech as evidence.

#### D. Murthy Omits Speech

*Murthy* is the latest signal of the Court’s reluctance to consider presidential speech in governmental purpose inquiries. In *Murthy*, the plaintiffs sued the Biden Administration, claiming that government officials had pressured social media platforms to remove content in violation of the First Amendment.<sup>114</sup> To illustrate this pressure campaign, the plaintiffs cited to statements by President Biden, including a remark that social media platforms were “killing people.”<sup>115</sup> The Court held that the plaintiffs lacked standing, in part because it considered injuries from the social media platforms’ decisions not “fairly traceable”<sup>116</sup> to the government defendants.<sup>117</sup> Despite the plaintiffs’ attempts to use presidential speech as evidence, the majority did not mention any presidential speech in its opinion, nor did it defend the speech’s omission.<sup>118</sup> But Justice Alito’s dissent observed that the social media platforms made “[c]oncrete changes” to their policies “in short order” following President Biden’s comment.<sup>119</sup> The Court’s neglect of presidential speech signals its aversion to examining such speech for discerning purpose.

#### E. Department of Commerce Does Not Counter the Anti-Speech Narrative

Some lower court judges have cited to *Department of Commerce v. New York*<sup>120</sup> to defend consideration of bully pulpit statements.<sup>121</sup> *Department of Commerce* said that courts can “inquir[e] into ‘the mental processes of administrative decisionmakers’” when there is a “strong

<sup>112</sup> *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018), *rev’d in relevant part sub nom.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

<sup>113</sup> *Id.* at 277.

<sup>114</sup> 144 S. Ct. 1972, 1981 (2024).

<sup>115</sup> Brief of Respondents at 8–9, *Murthy*, 144 S. Ct. 1972 (No. 23-4111).

<sup>116</sup> *Murthy*, 144 S. Ct. at 1986 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013)).

<sup>117</sup> *Id.* at 1985, 1988–89.

<sup>118</sup> *See id.* at 1981–97.

<sup>119</sup> *Id.* at 2003–04 (Alito, J., dissenting); *see also id.* at 2005 (“Facebook responded” to the President’s comment “by expressing a desire to ‘work’” with the government.).

<sup>120</sup> 139 S. Ct. 2551 (2019).

<sup>121</sup> *E.g.*, *Oregon v. Trump*, 165 F.4th 1158, 1186 (9th Cir. 2025) (Bybee, J., statement in support of en banc review).

showing of bad faith or improper behavior.”<sup>122</sup> Applying that logic, if the discriminatory motivations of the President drove agency decision-makers to make a decision, it is fair for a court to examine that presidential speech.<sup>123</sup> While this could be a potential avenue to defending presidential speech considerations,<sup>124</sup> its utility is limited because *Department of Commerce* was not squarely a presidential speech case.<sup>125</sup> In this case, the Department of Commerce claimed that it had added a citizenship question to the census at the DOJ’s request, but that explanation was contrived.<sup>126</sup> The Secretary of Commerce had actually asked the Justice Department to make the request.<sup>127</sup> The Court held that the agency action could be set aside as pretextual because the Court could not “ignore the disconnect between the decision made and the explanation given.”<sup>128</sup> But the speech at issue in *Department of Commerce* was from the Secretary of Commerce, not the President.<sup>129</sup> As four Justices signaled in *Regents*, presidential speech is distinct from agency speech.<sup>130</sup>

#### F. The Supreme Court Cases Collide with Equal Protection

The Roberts Court has not completely barred consideration of presidential speech, but it has suggested that such analysis is disfavored. And in *Hawaii* and *Regents*, the plaintiffs’ claims of animus were rejected. That is no coincidence. Examining direct statements by decisionmakers is one of the few methods left for plaintiffs to clear the high bar of discriminatory purpose. But if future cases eliminate presidential speech as a form of proof, plaintiffs will no longer have access to that critical evidence for challenging discriminatory executive action.

Excluding consideration of presidential speech would effectively bar discrimination claims by plaintiffs when such speech is the only discriminatory *statement* evidence offered. But the reach of such a restriction is broader. Claims with other statement evidence, like discriminatory statements by an agency decisionmaker,<sup>131</sup> would become precarious. *Arlington Heights* is a “cumulative” test,<sup>132</sup> so ignoring presidential

<sup>122</sup> *Dep’t of Com.*, 139 S. Ct. at 2573–74 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

<sup>123</sup> See *Nat’l TPS All. v. Noem*, 166 F.4th 739, 774–79 (9th Cir. 2026) (Mendoza, J., concurring).

<sup>124</sup> See *id.* at 781–83.

<sup>125</sup> See *Dep’t of Com.*, 139 S. Ct. at 2575.

<sup>126</sup> *Id.*

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

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

<sup>129</sup> See *id.*

<sup>130</sup> See *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (opinion of Roberts, C.J.).

<sup>131</sup> See *id.* (suggesting agency decisionmaker statements can be considered, even if presidential speech cannot be).

<sup>132</sup> U.S. DOJ, Title VI Legal Manual § VI.B.2, <https://www.justice.gov/crt/fcs/T6Manual6> [<https://perma.cc/9QBF-BUYN>]; accord *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

speech could still undermine the feasibility of claims, even when discriminatory statements by other government officers are available for review. Plus, if a President knows that a secretary's speech will be reviewed, but not his own, there are clear gamesmanship incentives.<sup>133</sup> The President can openly speak to his discriminatory motivations, and if "subordinates" offer a nondiscriminatory justification,<sup>134</sup> the President can "whitewash his animus through the authority of Executive Branch officials."<sup>135</sup> The President can score political points by "[s]capegoating minority groups"<sup>136</sup> while avoiding the meaningful judicial checks that discrimination law should apply to majority power.<sup>137</sup> Allowing the President to openly admit to and implement discriminatory policies in this way inflicts harm and undermines governmental legitimacy.<sup>138</sup>

Insulating presidential speech is also logically inconsistent with the Court's embrace of unitary executive control.<sup>139</sup> It is an "obvious fact that the President is the chief executive who is ultimately responsible for his Administration."<sup>140</sup> "[T]here can be no serious doubt that" presidential speech will often "tell us something about why" an administration takes an action.<sup>141</sup> This seems especially true if the President is viewed as dominant over the Executive.<sup>142</sup> Refusing to consider presidential speech but finding that the President has complete executive control grants the President broad power while eliminating corresponding responsibility.<sup>143</sup>

And cutting off presidential speech from consideration runs counter to *Davis* and *Arlington Heights*. *Davis* adopted a relatively expansive purpose inquiry,<sup>144</sup> emphasizing that discriminatory purpose could "often be" deduced "from the totality of the relevant facts."<sup>145</sup> Similarly, *Arlington Heights* originally adopted a broad multifactor framework that encouraged consideration of an extensive pool of evidence to identify discriminatory purpose.<sup>146</sup> The *Arlington Heights* framework was

<sup>133</sup> See Carpenter, *supra* note 64, at 614–15.

<sup>134</sup> *Id.* at 615.

<sup>135</sup> *Id.* at 614.

<sup>136</sup> Steven D. Mirsen, Note, *Political and Judicial Incorrectness: The Case for Modifying the Arlington Heights Test to Disincentivize Discriminatory Appeals*, 108 CORN. L. REV. 675, 683 (2023).

<sup>137</sup> See generally Mirsen, *supra*, for a similar argument for *Arlington Heights* reform.

<sup>138</sup> See Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1527 (2018).

<sup>139</sup> See *The Supreme Court, 2019 Term — Leading Case: Department of Homeland Security v. Regents of the University of California*, 134 HARV. L. REV. 510, 518 (2020).

<sup>140</sup> Carpenter, *supra* note 64, at 614.

<sup>141</sup> Fields, *supra* note 4, at 292.

<sup>142</sup> Cf. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) ("These lesser officers must remain accountable to the President, whose authority they wield.")

<sup>143</sup> See Carpenter, *supra* note 64, at 614–15.

<sup>144</sup> Cf. Siegel, *supra* note 24, at 1133–35 (explaining that now-disfavored disparate impact evidence could be considered under *Davis*).

<sup>145</sup> *Washington v. Davis*, 426 U.S. 229, 242 (1976).

<sup>146</sup> See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

intended to be probing, with the opinion noting that testimony by government officials may be appropriate in “extraordinary instances.”<sup>147</sup> Indeed, considering decisionmaker statements is a standard inquiry with which courts are familiar.<sup>148</sup> The Supreme Court’s current approach to presidential speech runs directly counter to the kind of thorough review imagined by these foundational discriminatory purpose cases. It eliminates a core piece of evidence for discriminatory intent, even though *Arlington Heights* explicitly endorsed careful scrutiny of statements by government decisionmakers.<sup>149</sup>

### III. THE PERCOLATION IN DISTRICT COURTS

The Supreme Court’s resistance to weighing the bully pulpit could collide with discrimination doctrine. But as lower courts have encountered opportunities to develop the issue, they have increasingly considered such speech in assessing government intent, including for discrimination claims.<sup>150</sup> The Supreme Court should draw on “the experience of [its] thoughtful colleagues on the district and circuit benches,” as these lower court assessments of presidential speech “could yield insights (or reveal pitfalls)” that the Court “cannot muster guided only by [its] own lights.”<sup>151</sup>

In a flurry of recent cases,<sup>152</sup> lower courts, especially district courts, have coalesced in considering bully pulpit speech as evidence of governmental purpose.<sup>153</sup> While judicial consideration of presidential speech

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<sup>147</sup> *Id.* at 268.

<sup>148</sup> *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 251 (1989) (plurality opinion) (considering statements by decisionmakers for Title VII discrimination claim).

<sup>149</sup> *Arlington Heights*, 429 U.S. at 268.

<sup>150</sup> Cases discussed in this section are accurate as of March 2026, when this Note was finalized for publication.

<sup>151</sup> *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part and concurring in the judgment); *see also* Coenen & Davis, *supra* note 2, at 365–66 (quoting, *inter alia*, *Maslenjak*, 582 U.S. at 354 (Gorsuch, J., concurring in part and concurring in the judgment)) (discussing examples of the Justices endorsing lower court development of issues).

<sup>152</sup> There are also lower court decisions from before the second Trump Administration that considered presidential statements. *E.g.*, *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1243 (9th Cir. 2018) (quoting Interview by Bill O’Reilly with President Donald Trump in Washington, D.C. (Feb. 5, 2017), <https://www.presidency.ucsb.edu/documents/interview-with-bill-oreilly-fox-news-0> [<https://perma.cc/4YX2-RMZS>]). But this analysis focuses on recent lower court developments.

<sup>153</sup> *E.g.*, *Am. Ass’n of Univ. Professors v. Trump*, No. 25-cv-07864, 2025 WL 3187762, at \*5–6, \*14 (N.D. Cal. Nov. 14, 2025) (pointing to statements by President Trump in finding that Administration “inten[ded] to chill speech” in First Amendment case, *id.* at 14); *R.I. State Council of Churches v. Rollins*, 808 F. Supp. 3d 370, 385 (D.R.I. 2025) (referencing Trump’s social media posts in determining government’s true “purposes” in pretext case).

for purpose inquiries has implications for several doctrinal areas,<sup>154</sup> its effects will be particularly significant in discrimination cases.<sup>155</sup>

### A. Identifying Discrimination with Speech

Judges in at least four district court cases have found bully pulpit speech probative of discriminatory purpose: *Miot v. Trump*,<sup>156</sup> *National TPS Alliance v. Noem*<sup>157</sup> (*Nepal TPS*), *National TPS Alliance v. Noem*<sup>158</sup> (*Venezuela TPS*), and *CASA, Inc. v. Noem*.<sup>159</sup> In these cases, the plaintiffs alleged that the Trump Administration’s termination of Temporary Protected Status (TPS) — “a government protection” allowing certain individuals to stay in the United States due to dangerous conditions in their home countries<sup>160</sup> — was motivated by “racial- and national-origin-based animus.”<sup>161</sup>

The plaintiffs in *Miot* moved to stay the Administration’s termination of TPS for Haiti.<sup>162</sup> The court granted the stay.<sup>163</sup> Judge Reyes of the U.S. District Court for the District of Columbia found the plaintiffs were likely to succeed on the merits of their equal protection claim, with a section of her *Arlington Heights* analysis entitled “President Trump has expressed racially motivated animus.”<sup>164</sup> Judge Reyes explained that President Trump had expressed animus toward Haitians by calling Haiti a “shithole country” and saying “Haitians ‘probably have AIDS.’”<sup>165</sup> During his 2024 campaign, President Trump falsely “accused Haitians

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<sup>154</sup> See Shaw, *supra* note 8, at 77 (“[P]residential speech . . . appear[s] in judicial opinions[] across a range of cases and subject matter areas.”).

<sup>155</sup> Cf. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (opinion of Roberts, C.J.) (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)) (identifying governmental purpose as central to discrimination inquiry).

<sup>156</sup> No. 25-cv-02471, 2026 WL 266413 (D.D.C. Feb. 2, 2026), *cert. before judgment granted*, No. 25-1084, 2026 WL 731087 (U.S. Mar. 16, 2026).

<sup>157</sup> No. 25-cv-05687, 2025 WL 4058572 (N.D. Cal. Dec. 31, 2025), *stayed pending appeal*, No. 26-199 (9th Cir. Feb. 9, 2026).

<sup>158</sup> 798 F. Supp. 3d 1108 (N.D. Cal. 2025), *aff’d*, 166 F.4th 739 (9th Cir. 2026).

<sup>159</sup> No. 25-cv-01484, 2025 WL 3514378 (D. Md. Dec. 8, 2025).

<sup>160</sup> NAT’L IMMIGR. F., TEMPORARY PROTECTED STATUS (TPS): FACT SHEET 1 (2026), <https://forumtogether.org/wp-content/uploads/2026/02/Temporary-Protected-Status-Fact-Sheet-February-2026.pdf> [<https://perma.cc/973E-YRSK>].

<sup>161</sup> *Nepal TPS*, 2025 WL 4058572, at \*9.

<sup>162</sup> *Miot v. Trump*, No. 25-cv-02471, 2026 WL 266413, at \*1 (D.D.C. Feb. 2, 2026), *cert. before judgment granted*, No. 25-1084, 2026 WL 731087 (U.S. Mar. 16, 2026).

<sup>163</sup> *Id.* at \*39. The Trump Administration asked the Supreme Court to stay the order, in part alleging the district court improperly relied on President Trump’s statements in finding discriminatory purpose. Application to Stay the Order Issued by the United States District Court for the District of Columbia at 27–31, *Trump v. Miot*, No. 25A999 (U.S. Mar. 11, 2026). The Court treated the application as a “petition for a writ of certiorari before judgment,” which it granted. *Miot*, No. 25-1084, 2026 WL 731087, at \*1 (U.S. Mar. 16, 2026).

<sup>164</sup> *Miot*, 2026 WL 266413, at \*31.

<sup>165</sup> *Id.* at \*32.

of . . . ‘eating the pets of the people [who] live’ in Springfield, Ohio.”<sup>166</sup> Presidential speech supported a finding of discriminatory purpose.<sup>167</sup>

The government argued that consideration of presidential speech for an animus inquiry was improper by pointing to *Regents*, but Judge Reyes rejected this contention: “[T]he Supreme Court did not place any categorical bar on considering a President’s statement in the Equal Protection context.”<sup>168</sup> Judge Reyes distinguished *Regents*, arguing that the presidential speech here was tied to the challenged action because (1) it was made close in time and (2) the President had motivated the decisionmaker, Secretary of Homeland Security Kristi Noem.<sup>169</sup> Secretary Noem made “three TPS decisions about Haiti,” two of which were issued within a month of President Trump making discriminatory statements.<sup>170</sup> President Trump had publicly taken credit for terminating TPS for Haiti, and Secretary Noem had expressed her deference to the White House.<sup>171</sup>

Similarly, the plaintiffs in *Nepal TPS* challenged TPS terminations for Nepal, Honduras, and Nicaragua as discriminatory.<sup>172</sup> The government argued the plaintiffs had failed to state a claim and moved for dismissal or summary judgment,<sup>173</sup> but the U.S. District Court for the Northern District of California held that the terminations were unlawful.<sup>174</sup> The court considered statements made by the President, including his claims that many immigrants had “murdered far more than one person” and that murder is “in their genes.”<sup>175</sup> The President also said “migrants were ‘poisoning the blood of our country’” and “ask[ed] why people ‘could not come from nice countries . . . like Denmark, Switzerland, and Norway.’”<sup>176</sup> The court found these statements akin to the “ugly abyss of racism” of *Korematsu*.<sup>177</sup> The government argued that Trump’s statements “should not [be] consider[ed]” in assessing “discriminatory motive” because the Secretary of Homeland Security was the TPS decisionmaker.<sup>178</sup> The court rejected that argument, finding the statements to be “circumstantial evidence.”<sup>179</sup> “[A]nimus can reasonably be shown from the statements made by Secretary Noem and/or

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<sup>166</sup> *Id.* at \*6 (alteration in original); *see also id.* at \*31–32 (including analysis of discriminatory presidential speech).

<sup>167</sup> *Id.* at \*33.

<sup>168</sup> *Id.* at \*32.

<sup>169</sup> *Id.* at \*32–33.

<sup>170</sup> *Id.* at \*32.

<sup>171</sup> *Id.* at \*33.

<sup>172</sup> *Nat’l TPS All. v. Noem*, No. 25-cv-05687, 2025 WL 4058572, at \*1, \*16 (N.D. Cal. Dec. 31, 2025), *stayed pending appeal*, No. 26-199 (9th Cir. Feb. 9, 2026).

<sup>173</sup> *Id.* at \*2, \*13.

<sup>174</sup> *Id.* at \*29.

<sup>175</sup> *Id.* at \*17.

<sup>176</sup> *Id.* (omission in original).

<sup>177</sup> *Id.* at \*18 (quoting *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting)).

<sup>178</sup> *Id.*

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

*President Trump alone.*<sup>180</sup> The plaintiffs had a potential equal protection claim because the President was not permitted to launder his intent.<sup>181</sup> “The President is not above the law.”<sup>182</sup>

*Venezuela TPS* challenged the terminations of Venezuela’s and Haiti’s TPS status.<sup>183</sup> The district court set aside the terminations on statutory grounds<sup>184</sup> and noted that “animus can reasonably be inferred from” President Trump’s statements.<sup>185</sup> The Ninth Circuit affirmed.<sup>186</sup> In concurrence, Judge Mendoza relied extensively on presidential speech, including the President’s claims that immigrants were “animals” and “gang members,” to argue that the terminations were impermissibly motivated by animus and arbitrary and capricious.<sup>187</sup> Judge Mendoza said that looking to this speech was proper because the President “influenced and directed the policy” and the statements were closely related to the challenged action in both time and content.<sup>188</sup> Judge Mendoza emphasized that *Hawaii* and *Regents* did not bar consideration of presidential speech and explained that *Department of Commerce* actually required looking at this speech to reject “post hoc or contrived justifications.”<sup>189</sup> “When decision-makers so brazenly broadcast their racially charged reasons for reaching a decision, we should take them at their word.”<sup>190</sup>

The U.S. District Court for the District of Maryland in *CASA, Inc.* also considered challenges to TPS terminations, this time for Afghanistan and Cameroon.<sup>191</sup> The court denied the government’s motion to dismiss the plaintiffs’ equal protection claims.<sup>192</sup> The court considered statements by President Trump signaling animus toward nonwhite immigrants to be “examples of ‘contemporary statements’ by decisionmakers that can be ‘highly relevant’ to the question of discriminatory intent.”<sup>193</sup> The district court quoted President Trump’s statements “that ‘very bad people’ had come to the United States from ‘Congo and Africa,’ ‘from Asia,’ ‘from the Middle East,’ and ‘from South

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<sup>180</sup> *Id.* at \*28 (emphasis added).

<sup>181</sup> *See id.* The court did not reach the merits on equal protection, preferring to assess “the statutory claim[s] before considering the constitutional question.” *Id.* at \*30 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 692 (1979)).

<sup>182</sup> *Id.* at \*29 (quoting *Trump v. United States*, 144 S. Ct. 2312, 2347 (2024)).

<sup>183</sup> *Nat’l TPS All. v. Noem*, 798 F. Supp. 3d 1108, 1122–23, 1127 (N.D. Cal. 2025), *aff’d*, 166 F.4th 739 (9th Cir. 2026).

<sup>184</sup> *Id.* at 1164.

<sup>185</sup> *Id.* at 1157.

<sup>186</sup> *Nat’l TPS All. v. Noem*, 166 F.4th at 749.

<sup>187</sup> *Id.* at 776–78 (Mendoza, J., concurring).

<sup>188</sup> *Id.* at 780.

<sup>189</sup> *Id.* at 781.

<sup>190</sup> *Id.* at 778.

<sup>191</sup> *CASA, Inc. v. Noem*, No. 25-cv-01484, 2025 WL 3514378, at \*1 (D. Md. Dec. 8, 2025).

<sup>192</sup> *Id.* at \*2, \*7.

<sup>193</sup> *Id.* at \*5 (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)).

America.”<sup>194</sup> “President Trump’s statements [were] relevant to” assessing animus, the court explained, because they were tied directly to racial preferences in immigration policy, and Secretary Noem had clearly looked to the President when issuing the TPS terminations.<sup>195</sup>

### B. Identifying Impermissible First Amendment Purposes

In the TPS cases, the courts considered presidential speech for discrimination claims and consistently distinguished their cases from the Supreme Court’s hesitant decisions on presidential speech. Similarly, in several First Amendment cases, district courts have analyzed presidential speech as relevant to whether the Trump Administration has acted with an impermissible purpose to retaliate and limit free speech rights.<sup>196</sup> In *American Ass’n of University Professors v. Trump*<sup>197</sup> (*AAUP*), the court relied on presidential speech to find that the government was engaged in unlawful coercion.<sup>198</sup> *Perkins Coie LLP v. U.S. DOJ*<sup>199</sup> and *Chicago Headline Club v. Noem*<sup>200</sup> both cited presidential statements to support findings of retaliation.<sup>201</sup>

*President & Fellows of Harvard College v. U.S. DHS*<sup>202</sup> contained a full-throated defense of weighing presidential statements.<sup>203</sup> In finding retaliatory purpose, the court considered the President’s social media posts.<sup>204</sup> The court explained that ignoring the presented evidence, including the President’s statements, “would require the Court to ‘blind [itself] to reality.’”<sup>205</sup>

In each case, the relevant district court granted the relief requested by the plaintiffs after extensive presidential speech consideration,<sup>206</sup> signaling the growing district court trend of weighing presidential speech for purpose inquiries. The courts cited statements by the President

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at \*6.

<sup>196</sup> *E.g.*, *Am. Ass’n of Univ. Professors v. Trump*, No. 25-cv-07864, 2025 WL 3187762, at \*11–13 (N.D. Cal. Nov. 14, 2025); *Perkins Coie LLP v. U.S. DOJ*, 783 F. Supp. 3d 105, 162–64 (D.D.C. 2025).

<sup>197</sup> No. 25-cv-07864, 2025 WL 3187762 (N.D. Cal. Nov. 14, 2025).

<sup>198</sup> *Id.* at \*12–14, \*24.

<sup>199</sup> 783 F. Supp. 3d 105 (D.D.C. 2025).

<sup>200</sup> No. 25-cv-12173, 2025 WL 3240782 (N.D. Ill. Nov. 20, 2025), *vacated and appeal dismissed*, No. 25-3023, 2026 WL 622677 (7th Cir. Mar. 5, 2026).

<sup>201</sup> *Perkins Coie*, 783 F. Supp. 3d at 162–64; *Chi. Headline Club*, 2025 WL 3240782, at \*17, \*79.

<sup>202</sup> 788 F. Supp. 3d 182 (D. Mass. 2025).

<sup>203</sup> *See id.* at 204–05.

<sup>204</sup> *See id.* at 204.

<sup>205</sup> *Id.* at 205 (alteration in original) (quoting *Cox v. Murphy*, No. 12-cv-11817, 2016 WL 4009978, at \*10 (D. Mass. Feb. 12, 2016)).

<sup>206</sup> *See Perkins Coie*, 783 F. Supp. 3d at 162–64, 167, 180–82; *Harvard Coll.*, 788 F. Supp. 3d at 204–05, 211; *Am. Ass’n of Univ. Professors v. Trump*, No. 25-cv-07864, 2025 WL 3187762, at \*5–6, \*39 (N.D. Cal. Nov. 14, 2025); *Chi. Headline Club*, 2025 WL 3240782, at \*17, \*79, \*93.

made in interviews, on social media, and during press conferences.<sup>207</sup> They analyzed statements made both before and during his presidency.<sup>208</sup>

### C. *Revealing Pretext with Speech*

District courts have also deemed presidential speech weighty when conducting inquiries into pretextual governmental purposes. In *AFSCME v. U.S. Office of Management & Budget*,<sup>209</sup> the district court found that reduction in force (RIF) guidance was likely arbitrary and capricious, in part based on bully pulpit statements that indicated the RIFs were political retaliation.<sup>210</sup> The government claimed the RIFs were for proper “efficiency” purposes,<sup>211</sup> but the court found the RIFs to be retaliatory since the President had stated, “We’re closing up Democrat programs.”<sup>212</sup> In *City & County of San Francisco v. Trump*,<sup>213</sup> the Trump Administration claimed that an executive order pertaining to funding in sanctuary jurisdictions was aimed merely at identifying funds for termination in sanctuary jurisdictions, rather than the actual freezing of those funds.<sup>214</sup> But the court found the Administration’s explanation pretextual, since President Trump had posted online that he was “[w]orking on papers to withhold all Federal Funding” from sanctuary jurisdictions.<sup>215</sup>

Similarly, *Rhode Island State Council of Churches v. Rollins*<sup>216</sup> considered a motion for enforcement of a temporary restraining order (TRO) after the plaintiffs alleged that the Administration had failed to comply with a TRO that mandated payment of Supplemental Nutrition Assistance Program (SNAP) benefits.<sup>217</sup> The district court found the Administration’s explanation — that it was conserving funding for Child Nutrition Programs — pretextual.<sup>218</sup> The court relied on Trump’s statements, including a Truth Social post where he explained that “SNAP BENEFITS . . . will be given only when the Radical Left Democrats open up government.”<sup>219</sup> The court held the President to his words, explaining that it was “not naïve to the administration’s true motivations.”<sup>220</sup>

<sup>207</sup> *E.g., Perkins Coie*, 783 F. Supp. 3d at 158; *Harvard Coll.*, 788 F. Supp. 3d at 206; *AAUP*, 2025 WL 3187762, at \*5; *Chi. Headline Club*, 2025 WL 3240782, at \*79.

<sup>208</sup> *E.g., Perkins Coie*, 783 F. Supp. 3d at 158; *Harvard Coll.*, 788 F. Supp. 3d at 204; *AAUP*, 2025 WL 3187762, at \*5; *Chi. Headline Club*, 2025 WL 3240782, at \*79.

<sup>209</sup> 807 F. Supp. 3d 1004 (N.D. Cal. 2025).

<sup>210</sup> *See id.* at 1035–36.

<sup>211</sup> *Id.* at 1035.

<sup>212</sup> *Id.* at 1036.

<sup>213</sup> 782 F. Supp. 3d 830 (N.D. Cal. 2025), *argued*, No. 25-3889 (9th Cir. Dec. 5, 2025).

<sup>214</sup> *Id.* at 835.

<sup>215</sup> *Id.* at 836 (alteration in original).

<sup>216</sup> 808 F. Supp. 3d 370 (D.R.I. 2025).

<sup>217</sup> *Id.* at 374–78.

<sup>218</sup> *Id.* at 385.

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

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

*D. The Impact of the District Court Approach*

Carrying the approach of the district courts forward paints a vastly different picture for the future of equal protection and presidential speech than the tenor of the Supreme Court's recent cases. The district courts are not allowing the Executive to speak to discriminatory purposes out of one side of its mouth while naming legitimate justifications with the other.<sup>221</sup> Instead of further limiting the reach of equal protection and giving the President a get-out-of-jail-free card for discrimination, the district courts are maintaining a path to relief.

But while these district court cases are notable, their meaning should not be overstated. Many of these decisions involve preliminary rulings or have been appealed.<sup>222</sup> Plus, there are substantive limits on the reach of these district court cases. First, in many of these decisions, presidential speech was not the only relevant evidence. There was often other *Arlington Heights*-esque evidence, like discriminatory statements by other Administration officials.<sup>223</sup> So while district courts appear to have coalesced around giving presidential speech real weight, it is unclear if presidential speech alone would be enough to find discriminatory purpose, and if not, how much other evidence is necessary.

Second, these cases have generally not distinguished different forms of bully pulpit speech, which limits their explanatory force. Speeches might be considered more probative than social media posts,<sup>224</sup> and campaign speech might be weighed differently than speech while in office.<sup>225</sup> In *Illinois v. Trump*,<sup>226</sup> a case challenging President Trump's deployment of the National Guard in Chicago, the district court endorsed the idea that presidential speech can have varying degrees of probative value.<sup>227</sup> The court found speech more probative when it was "made during [the] Presidency, close in time to [the] official action, and [was] likely [to] be looked to by the members of [the] administration who [we]re tasked with implementing [the] order."<sup>228</sup> But other recent cases have not been as particular.<sup>229</sup> *AAUP* considered campaign speech,

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<sup>221</sup> Cf. Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1123 (2020) (arguing that the President's personal and institutional identities cannot be separated).

<sup>222</sup> See, e.g., *Miot v. Trump*, No. 25-cv-02471, 2026 WL 266413, at \*39 (D.D.C. Feb. 2, 2026) (granting stay of TPS termination), *cert. before judgment granted*, No. 25-1084, 2026 WL 731087 (U.S. Mar. 16, 2026); *Am. Ass'n of Univ. Professors v. Trump*, No. 25-cv-07864, 2025 WL 3187762, at \*39 (N.D. Cal. Nov. 14, 2025).

<sup>223</sup> See, e.g., *Miot*, 2026 WL 266413, at \*34 (noting Secretary Noem's "expressed animus").

<sup>224</sup> See Shaw, *supra* note 8, at 77-78.

<sup>225</sup> See Fields, *supra* note 4, at 274-76.

<sup>226</sup> No. 25-cv-12174, 2025 WL 2886645 (N.D. Ill. Oct. 10, 2025).

<sup>227</sup> *Id.* at \*22.

<sup>228</sup> *Id.*

<sup>229</sup> E.g., *Am. Ass'n of Univ. Professors v. Trump*, No. 25-cv-07864, 2025 WL 3187762, at \*5 (N.D. Cal. Nov. 14, 2025).

despite it occurring before the President's actual period of authority,<sup>230</sup> and several cases have analyzed social media posts.<sup>231</sup>

Work by Shaw and Fields has wrestled more directly with these questions of form.<sup>232</sup> But this Note does not take a position on how much weight different forms of presidential speech should get. It does argue that, at least in the discrimination context, courts should consider presidential speech as potentially probative evidence of governmental purpose.<sup>233</sup> To do otherwise could practically gut discrimination claims.

#### IV. LEARNING FROM LOWER COURT WISDOM

Although the Supreme Court has not explicitly barred consideration of presidential speech, it has repeatedly signaled its disfavor.<sup>234</sup> But lower courts, particularly district courts, have shown an appetite for “rel[ying] on President Trump’s campaign and post-election statements as probative of intent where . . . they are closely connected in time and substance to the challenged action.”<sup>235</sup> The Court can now benefit from lower court ruminations that have coalesced around finding presidential speech considerations both wise and workable.<sup>236</sup>

Shifts in sentiment from Senior Judge Bybee exemplify the degree of acceptance that presidential speech has achieved in the lower courts. Senior Judge Bybee was appointed to the Ninth Circuit by President George W. Bush.<sup>237</sup> During the first Trump Administration, then-Judge Bybee believed that judges should “not get to peek behind the curtain” at presidential speech.<sup>238</sup> But in a recent statement supporting a rehearing en banc in *Oregon v. Trump*,<sup>239</sup> he asserted “that the court can and

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<sup>230</sup> Contrast *id.* (considering statements made by President Trump before his reelection), with *Washington v. Trump*, 858 F.3d 1168, 1172–73 (9th Cir. 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc) (arguing campaign speech should not be considered).

<sup>231</sup> Compare *R.I. State Council of Churches v. Rollins*, 808 F. Supp. 3d 370, 385 (D.R.I. 2025) (discussing a post by President Trump about withholding SNAP benefits), with Shaw, *supra* note 8, at 129–31 (arguing that speech that “manifested an intent to enter the legal arena,” *id.* at 129, should be considered).

<sup>232</sup> See Fields, *supra* note 4, at 276; Shaw, *supra* note 8, at 129–31.

<sup>233</sup> See Fields, *supra* note 4, at 324–25.

<sup>234</sup> See *supra* Part II, pp. 1658–65.

<sup>235</sup> *Miot v. Trump*, No. 25-cv-02471, 2026 WL 266413, at \*32 (D.D.C. Feb. 2, 2026) (citing *Perkins Coie LLP v. U.S. DOJ*, 783 F. Supp. 3d 105, 162–64 (D.D.C. 2025); *Am. Ass’n of Univ. Professors v. Rubio*, 802 F. Supp. 3d 120, 187 (D. Mass. 2025)), *cert. before judgment granted*, No. 25-1084, 2026 WL 731087 (U.S. Mar. 16, 2026).

<sup>236</sup> See *supra* Part III, pp. 1665–72.

<sup>237</sup> *Bybee, Jay S.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/bybee-jay-s> [<https://perma.cc/BB7F-PVAW>].

<sup>238</sup> *Washington v. Trump*, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting from the denial of reconsideration en banc).

<sup>239</sup> 165 F.4th 1158 (9th Cir. 2025) (mem.) (granting rehearing en banc).

should consider [presidential speech],” at least “for the case at hand.”<sup>240</sup> *Oregon* concerned whether President Trump had lawfully deployed the National Guard to Portland.<sup>241</sup> In court, the government claimed the deployment was aimed at supporting federal law enforcement,<sup>242</sup> as permitted by statute.<sup>243</sup> But, as Senior Judge Bybee cataloged, President Trump had repeatedly stated that his purpose was to police crime in Portland.<sup>244</sup> Those statements, Senior Judge Bybee contended, should factor into the court’s analysis.<sup>245</sup> As lower court judges have had the opportunity to examine presidential speech, even a past skeptic like Senior Judge Bybee has been persuaded that the bully pulpit can sometimes be examined.

District courts have also laid out pathways for the Supreme Court to distinguish its past speech-hesitant decisions in future disputes. Some district courts have relied on factual differences.<sup>246</sup> For example, courts have distinguished *Regents* on the ground that presidential speech was not considered there because the connection with the governmental action was too attenuated.<sup>247</sup> Therefore, speech can be examined if it is more closely tied to the challenged action. District courts have also seized on language from *Regents* and *Department of Commerce* as license to analyze presidential statements in cases alleging bad faith and pretext.<sup>248</sup> But the potential reach of these cases is unclear: On the one hand, they say speech should be examined if it reveals that the government’s offered explanation for an action is pretextual, but their application to presidential speech might be limited since the Supreme Court has indicated that such speech is distinct from other executive speech.<sup>249</sup>

## CONCLUSION

As this Note has identified, discrimination doctrine and presidential speech are on track to collide. If the Supreme Court continues on its current path, given the limited evidentiary methods available to plaintiffs claiming discriminatory purpose, Presidents will be given a free

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<sup>240</sup> *Id.* at 1186 (Bybee, J., statement in support of en banc review). The panel decision also considered presidential speech but felt the district court misinterpreted the President. *Oregon v. Trump*, 157 F.4th 1013, 1028–29 (9th Cir.) (per curiam), *reh’g en banc granted*, 165 F.4th 1158 (9th Cir. 2025) (mem.).

<sup>241</sup> *Oregon*, 157 F.4th at 1018.

<sup>242</sup> *Id.* at 1029–30.

<sup>243</sup> *See id.* at 1026–27; 10 U.S.C. § 12406.

<sup>244</sup> *See Oregon*, 165 F.4th 1158, 1186–87 (Bybee, J., statement in support of en banc review).

<sup>245</sup> *Id.* at 1186.

<sup>246</sup> *E.g.*, *Miot v. Trump*, No. 25-cv-02471, 2026 WL 266413, at \*32 (D.D.C. Feb. 2, 2026), *cert. before judgment granted*, No. 25-1084, 2026 WL 731087 (U.S. Mar. 16, 2026).

<sup>247</sup> *E.g.*, *id.*

<sup>248</sup> *E.g.*, *R.I. State Council of Churches v. Rollins*, 808 F. Supp. 3d 370, 385 (D.R.I. 2025).

<sup>249</sup> However, *Regents* and *Department of Commerce* set a high pretext bar. *See* Hannah M. Flesch, Note, *Honesty in Reason: How Department of Commerce v. New York Began to Tackle the Problem of Regulatory Dishonesty*, 110 GEO. L.J. 659, 677 (2022).

pass to discriminate, and victims of executive discrimination will be left without recourse. But with the district court method, equal protection claims against the Executive remain feasible.

As Justice Scalia warned, discrimination by the Executive will continue to rear its head.<sup>250</sup> Speaking on *Korematsu*, Justice Scalia said: “[Y]ou are kidding yourself if you think the same thing will not happen again.”<sup>251</sup> Equal protection means little if the President is free to openly admit to discriminatory policy. Moving forward, therefore, the doctrine will hopefully more closely track the trends in district courts, rather than the tone set in recent Supreme Court cases. Presidential speech should not be removed from animus review.

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<sup>250</sup> Debra Cassens Weiss, *Scalia: Korematsu Was Wrong, But “You Are Kidding Yourself” if You Think It Won’t Happen Again*, ABA J. (Feb. 4, 2014, at 13:05 CT), [https://www.abajournal.com/news/article/scalia\\_korematsu\\_was\\_wrong\\_but\\_you\\_are\\_kidding\\_yourself\\_if\\_you\\_think\\_it\\_won](https://www.abajournal.com/news/article/scalia_korematsu_was_wrong_but_you_are_kidding_yourself_if_you_think_it_won) [<https://perma.cc/9DSG-DAAH>].

<sup>251</sup> *Id.* (quoting Justice Antonin Scalia, Speech at the University of Hawaii School of Law (Feb. 3, 2014)).