

Muslim Americans: Do US Democratic Institutions Protect Their Religious Liberty?

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INTRODUCTION

The First Amendment to the United States Constitution protects the free exercise of religion and prevents the government from favoring one religion over another. As a result of First Amendment protections, the Muslim American community enjoys autonomy and the same rights as other religious communities free from government interference. Additionally, the Constitution has created three separate co-equal branches of the federal government—the legislative, executive, and judiciary—to guard against the abuse of power by individuals or groups. This separation of powers further facilitates religious freedom because each branch keeps each other accountable for addressing unconstitutional laws, policies, and practices within a federalist system.

In addition to the Constitution, federal statutes and state laws provide protections for minority faith groups and persons against discrimination by public and private actors. These include, for instance, the Religious Land Use and Institutionalized Persons Act and the Civil Rights Act of 1964 among others discussed in greater depth here. As a result of this intersecting framework of federal, state, and local laws, Muslim Americans are permitted to own and operate halal butcher shops as well as freely purchase and consume such food products. Similarly, Muslim Americans are permitted to purchase property for mosque construction projects and operate cemeteries for the practice of Islamic burial rituals. In the event of discrimination, Muslim Americans may seek legal redress in court, and the state and federal governments may also do so on their behalf.

This Article presents a normative, legal, and analytical discussion about the Muslim experience at the intersection of religion, law, and society in contemporary America. This Article starts by providing a demographic sketch of Muslims and Islam in the US to provide the relevant socio-political context. The two subsequent sections examine the Separation of Powers doctrine and the First Amendment’s religious freedom protections, respectively, followed by a substantive discussion using illustrative case studies. These sections explore the following subjects: the notorious “Muslim Ban”; Islamic faith practices such as religious attire, ritual male circumcision, and halal food products; religious land use controversies involving mosques, cemeteries, and private Islamic schools; and the role of religion in public schools and employment. Ultimately, this essay finds that US democratic institutions often act as countervailing forces guarding against official abuses of power in furtherance of religious liberty. However, in so far as these institutions signal approval for Islamophobia—against both citizens and immigrants—they help create a precedent for the government to similarly mark other minority groups for disfavored treatment in the future.

I. MUSLIMS AND ISLAM IN AMERICA: A DEMOGRAPHIC SKETCH

Muslim Americans are a small minority religious group that enjoys

academic achievement, considerable integration, and racial and ethnic diversity. Approximately three to seven million Muslims live in America.¹ Whereas Christians comprise approximately 70 percent of the entire population, Muslim Americans constitute a mere one to two percent.² Muslim Americans often tout a public image as educated and financially successful professionals, including as doctors, engineers, businessmen, and lawyers. Indeed, approximately 31 percent are college graduates, and an additional 11 percent hold post-graduate degrees.³ Moreover, approximately 23 percent enjoy a household income in excess of \$100,000, which is on par with other non-Muslim Americans.⁴ Still, the evidence presents a complicated reality. Almost twice as many Muslim Americans—more than 40 percent—live on *less* than \$30,000.⁵ In fact, Muslim Americans are significantly more likely than any other faith group to report such a low household income.⁶ For the sake of perspective, the middle class is generally defined as families earning between \$45,000 and \$135,000 annually.⁷ According to this standard, more Muslim Americans now appear to be living outside of the middle class. Significantly, only 44 percent of Muslim adults are fully employed, and 29 percent are underemployed.⁸

At the time of writing, Muslim Americans are the most likely religious group to report having personally experienced racial or religious discrimination.⁹ For years, the minority faith group has confronted increasing levels of bias in schools, at work, and on the streets. Nevertheless, most Muslim Americans are US citizens, racially and spiritually diverse, and proud of their national and religious identity, similar to US Congresswoman Ilhan Omar, hip hop artist Busta Rhymes, heavyweight boxing champion Mohammed Ali, comedian Dave Chappelle, journalist Ayman Mohyeldin, fashion supermodel Iman Mohamed, folk artist Cat Stevens, actor Aasif Mandhvi, or academic Reza Aslan. Indeed, approximately 82 percent are

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1. See Pew Research Center, *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream* 22, (July 26, 2017), <http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/> [hereinafter *Pew Research Center, U.S. Muslims Concerned*] [<https://perma.cc/44A6-QSAQ>].

2. *Id.*

3. *Id.* at 23.

4. *Id.* at 42.

5. *Id.* at 30.

6. See Dalia Mogahed & Youssef Chouhoud, *American Muslim Poll 2017: Muslims at the Crossroads*, INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING, 9 (June 2017), <https://www.ispu.org/wp-content/uploads/2017/03/American-Muslim-Poll-2017-Report.pdf> [<https://perma.cc/6WMH-QPFS>].

7. See Richard Fry & Rakesh Kochhar, *Are You in the American Middle Class?*, PEW RESEARCH CENTER (Sept. 6, 2018), <http://www.pewresearch.org/fact-tank/2018/09/06/are-you-in-the-american-middle-class/> [<https://perma.cc/WK25-ABM4>].

8. See Mohamed Younis, *Perceptions of Muslims in the United States*, GALLUP (Dec. 11, 2015), <http://news.gallup.com/opinion/gallup/187664/perceptions-muslims-united-states-review.aspx> [<https://perma.cc/NED9-VK2E>].

9. See *id.*

American citizens with approximately half born in the US.¹⁰ Muslim Americans are diverse in their racial and ethnic composition with approximately 41 percent self-identifying as “white” (including Arab, Middle Eastern, and Persian/Iranian); 28 percent as Asian (including South Asian); 20 percent as black; and 8 percent as Hispanic.¹¹ That diversity is similarly reflected in Muslim American belief and faith-based practices. Representative divisions surround diet and dress. Approximately 48 percent and 44 percent view consumption of halal food and modest religious attire as significant, respectively.¹² A similar number attend weekly religious services and observe the five daily prayers as proscribed by orthodox teachings.¹³ Despite such diversity, however, the overwhelming majority—79 percent—agrees that religion is important.¹⁴ There is a similar consensus about the complementary roles of one’s religious and national identity: 89 percent are proud to be Muslim *and* American, with 60 percent viewing themselves as having “a lot” in common with other Americans.¹⁵

While Muslim Americans may see commonalities with their compatriots, the American public remains suspicious about Islamic laws, beliefs, and practices. About 44 percent of non-Muslim Americans believe Islamic teachings conflict with democratic values, while 65 percent of Muslim Americans see no such incompatibility.¹⁶ Those who saw tension generally attributed it to conflicting “principles” and “morals,” with one respondent claiming, “There is no democracy in Islam.”¹⁷ What is more, half of Americans view Islam as outside of mainstream society, a sentiment that is only likely to become stronger with executive actions such as the Muslim ban, discussed in further depth here. In addition, Americans have also rated Muslims more negatively in surveys than other religious groups including Jews, Mormons, Catholics, Hindus, and Buddhists.¹⁸ According to one such survey asking Americans to rate religious groups on a “feeling thermometer,” respondents harbored the most negative feelings towards Muslims.¹⁹ Additionally, 25 percent believed half or more of Muslim Americans are “anti-American,” and another 24 percent said “some” Muslims are anti-American.²⁰

The data also suggests that American perceptions of Islam have

10. Pew Research Center, *U.S. Muslims Concerned*, *supra* note 1, at 32.

11. *Id.* at 22–23.

12. *Id.* at 63.

13. *See id.*

14. Younis, *supra* note 8.

15. Pew Research Center, *U.S. Muslims Concerned*, *supra* note 1, at 52.

16. *Id.* at 90.

17. *Id.* at 126.

18. *See id.* at 123.

19. *See id.*

20. Pew Research Center, *Republicans Prefer Blunt Talk About Islamic Extremism* (Feb. 3, 2016), <http://www.pewforum.org/2016/02/03/republicans-prefer-blunt-talk-about-islamic-extremism-democrats-favor-caution/> [hereinafter Pew Research Center, *Republicans Prefer Blunt Talk*] [<https://perma.cc/X3DY-23YT>].

worsened over the past fifteen years. In March 2002, approximately six months following the September 11, 2001 terrorist attacks (9/11), 25 percent of Americans believed Islam encourages violence more than other religions while 51 percent disagreed.²¹ But, in December 2016, just one month prior to Donald J. Trump's presidential inauguration, 41 percent said Islam is more likely to promote violence among adherents.²² Critically, these sentiments have translated into popular support for discriminatory policies. According to a 2016 study by Chapman University, approximately one-third of Americans viewed a blanket prohibition on Muslim immigration favorably, and updated findings from 2018 revealed that those views persist at similar levels currently.²³ Dr. Ed Day, who led the research study, aptly observed, "A third of the population is basically saying we need institutionalized discrimination based on religion."²⁴

II. THE SEPARATION OF POWERS DOCTRINE

The Declaration of Independence, Constitution, and Bill of Rights are the country's foundational documents responsible for outlining national values, principles, and laws. The balance of powers both between the three branches of government and between the federal and state governments represents one of these foundational values. The Constitution, specifically, creates three separate co-equal branches of the federal government to guard against the abuse of power by individuals or groups. By distributing the balance of power and providing for institutional checks, the Constitution seeks to curb government abuses. This is known as the Separation of Powers doctrine.

First, the legislative branch establishes laws and regulations for the country. As a counterweight to the executive branch, it also has the authority to impeach the president in exceptional circumstances, reject or confirm presidential appointments, control the federal budget, and declare war.²⁵ It is comprised of two chambers, the Senate and House of Representatives.²⁶ While each chamber enjoys unique privileges and obligations, all members of Congress are expected to represent the residents in his or her state. Second, the executive branch—which includes the president, vice president, cabinet, and executive agencies and commissions—enforces the laws passed by Congress.²⁷ The president leads the country as chief of state and serves as the

21. Pew Research Center, *U.S. Muslims Concerned*, *supra* note 1, at 124.

22. *Id.*

23. See Chapman University, *Fear of Muslims in American Society* (Oct. 16, 2018), <https://blogs.chapman.edu/wilkinson/2018/10/16/fear-of-muslims-in-american-society/> [<https://perma.cc/P7PZ-SBRN>].

24. Jonathan Winslow, *Chapman Study Finds People Fear Terrorists, Government Corruption, Islam*, ORANGE COUNTY REGISTER (Oct. 13, 2016), <https://www.ocregister.com/2016/10/13/chapman-study-finds-people-fear-terrorists-government-corruption-islam/> [<https://perma.cc/VNR7-ESJV>].

25. See U.S. CONST. art. I, §§ 2, 8.

26. See *id.* § 1.

27. See U.S. CONST. art. II, § 1.

Commander-in-Chief of the Armed Forces.²⁸ To counteract Congressional powers, the president may veto legislation passed by Congress and sign executive orders. To check the judiciary, the president also makes Article III judicial appointments.²⁹ Third, the judiciary, comprising of the Supreme Court and other federal courts, adjudicates cases in which it interprets the application of laws according to the Constitution.³⁰ The Supreme Court, the nation's highest court, can reject laws enacted by Congress or the President if it considers them unconstitutional.³¹ Whereas American citizens have the right to vote for members of Congress and the President in free elections to ensure a representative government, the President nominates justices to the Supreme Court who are subject to confirmation by the Senate.³²

In addition, the Constitution grants the nation's fifty states a significant level of autonomy. On the state level, the representative government also operates within its own constitution outlining local laws and principles.³³ State governments mirror the federal separation of powers with three equally powerful branches.³⁴ In every state, the governor, elected by the people in confidential ballots, leads the executive branch.³⁵ Further, state legislatures are also comprised of elected representatives who enact laws introduced by the members or suggested by the governor.³⁶ Finally, states have a high (or supreme) court and lower state courts.³⁷ If a case involves a question under the Constitution or a party from a different state, a litigant may appeal the state supreme court decision to any federal court, including the Supreme Court, for consideration. In this way, the state governments share responsibilities with the national government in a federalist system.³⁸ State governments largely oversee public schools and universities, tourism, police departments, local transportation, public health operations, and libraries.³⁹

In the context of the Muslim ban, states (as well as the federal judiciary) have played a powerful role in protecting constitutional guarantees against executive excesses as discussed below. On the other hand, in disputes involving religious land use where, for example, Muslim American institutions have sought to build mosques in local neighborhoods, the federal executive and judiciary have played a significant role in curbing state and local government abuses against the minority faith community. In this way, and as revealed below, US democratic institutions help protect the interests

28. *See id.* § 2.

29. *See id.*

30. U.S. CONST. art. III, § 1.

31. *See* *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

32. U.S. CONST. art. II, § 2, cl. 2.

33. *See, e.g.*, State & Local Government, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/state-local-government/> [<https://perma.cc/TZ7B-L6QP>].

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

of Muslim American individuals and groups within a federalist system where democratic governance is shared between local and national governments.

III. THE FIRST AMENDMENT AND RELIGIOUS FREEDOM

The Bill of Rights refers to the first ten amendments to the Constitution that protect individual civil liberties from government encroachment. Specifically, the First Amendment protects the free exercise of religion and prevents the government from favoring one religion over another. It states: “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 of grievances.”⁴⁰ As such, the First Amendment consists of two clauses that ensure religious freedom: (1) the Free Exercise Clause and (2) the Establishment Clause.

A. *The Free Exercise Clause*

First, the Free Exercise Clause prevents government interference with respect to religious beliefs and faith-based practices. Specifically, the government “may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious dogma.”⁴¹ Notably, the clause protects individuals against actions by both the state and federal government. A lawsuit brought on the basis of the Free Exercise Clause must demonstrate that a government action burdened an individual’s sincerely held faith-based practice.

In one such lawsuit, however, the Supreme Court found that an individual’s right to freely exercise religion is not absolute. In *Employment Division v. Smith*, the Court controversially held government interference with religious conduct to be constitutional, reasoning that the law equally applied to everyone and remained facially neutral to religion.⁴² In that case, the State of Oregon had denied unemployment benefits to Native American workers whose employer had fired them for ingesting peyote, a hallucinogenic drug, pursuant to a sincerely held religious belief.⁴³ The state cited a local law disqualifying workers from unemployment compensation when terminated for “misconduct.”⁴⁴ Under Oregon law, consumption of peyote is a crime.⁴⁵ The discharged workers challenged the law, arguing that it criminalized their religious beliefs and violated the Free Exercise Clause.⁴⁶

40. U.S. CONST. amend. I.

41. *Emp’t Div. Smith*, 494 U.S. 872, 877 (1990).

42. *See id.* at 890.

43. *See id.* at 872.

44. *See id.*

45. *See id.* at 874.

46. *See id.*

The Supreme Court upheld the state action, drawing a distinction between laws that specifically regulate religious beliefs and laws that remain religiously neutral.⁴⁷ In response, in 1993, Congress passed the Religious Freedom Restoration Act (“RFRA”), which prohibits both federal and state governments from “substantially burden[ing]” religious conduct even with generally applicable laws unless it is “the least restrictive means of furthering . . . a compelling governmental interest.”⁴⁸ In 1997, the Supreme Court struck down part of the statute as unconstitutional in so far as it applied to states.⁴⁹ Almost two dozen states subsequently enacted local versions of the RFRA.⁵⁰

B. *The Establishment Clause*

Second, the Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.”⁵¹ The Supreme Court has held that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”⁵² When a law discriminates on its face, the Court has required the government to show a compelling interest and that the measure is “closely fitted to further that interest.”⁵³ On the other hand, when a law is facially neutral, making no specific reference to religion, courts use a three-part test set forth in *Lemon v. Kurtzman*.⁵⁴ According to *Lemon*, to avoid running afoul of the Establishment Clause, the government action (1) must have a primary secular purpose; (2) may not have the principal effect of advancing or inhibiting religion; and (3) may not foster excessive entanglement with religion.⁵⁵ If a measure does not satisfy any one of these three prongs, a court must invalidate the challenged law or policy.⁵⁶ In order to make this determination, courts consider “among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by . . . the decisionmak[er].”⁵⁷ The Establishment Clause jurisprudence proves particularly relevant in the context of the Muslim Ban, which was a presidential campaign promise to single out an entire faith community for

47. *Id.* at 878–89.

48. 42 U.S.C. § 2000bb.

49. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

50. *See* Becket, *History of RFRA*, <https://www.becketlaw.org/research-central/rfra-info-central/history/>; <https://www.becketlaw.org/research-central/rfra-info-central/history/> [https://perma.cc/TLG4-4VNV].

51. U.S. CONST. amend. I.

52. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

53. *See id.* at 246–47.

54. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

55. *See id.* at 612–13.

56. *See id.* at 612.

57. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

disfavored treatment by the federal government.

IV. THE MUSLIM BAN AND SEPARATION OF POWERS DOCTRINE

Donald J. Trump's ascension to the White House is arguably the most consequential development for religious freedom in contemporary America, particularly as it relates to Muslims. The 2016 presidential election cycle exacerbated already worsening anti-Muslim sentiment across the country. Then-Republican presidential candidate Trump specifically ran a campaign that exploited national divisions, animosities, and anxieties surrounding Islam and Muslims. He even inspired Russia to conduct a covert propaganda operation in which Russian operatives secretly purchased advertisements on Facebook that spread stereotypes and misinformation about Muslims, including the threat the group poses, in battleground states in the presidential race.⁵⁸ Significantly, such divisive messages affirmed the scaremongering Trump propagated and then projected this Islamophobic appeal back to voters. Just a few months after declaring his candidacy, during a September 2015 New Hampshire town hall meeting, one of Trump's supporters asked when the government would "get rid of [Muslims]" while referencing imaginary "training camps" sprawled across the country.⁵⁹ Rather than providing a corrective, Trump responded, "We're going to be looking at that and a lot of different things."⁶⁰ In the days and weeks that followed, Trump publicly advocated for closing mosques.⁶¹ He also spoke in favor of special identification cards, warrantless searches, and a religious registry for Muslim Americans.⁶²

On December 7, 2015, Trump unveiled his infamous Muslim ban.⁶³

58. See, e.g., Adam Entous et al., *Russian Operatives Used Facebook Ads to Exploit Divisions over Black Political Activism and Muslims*, WASH. POST (Sept. 25, 2017), www.washingtonpost.com/business/technology/russian-operatives-used-facebook-ads-to-exploit-divisions-over-black-political-activism-and-muslims/2017/09/25/4a011242-a21b-11e7-ade1-76d061d56efa_story.html?utm_term=.ea514534e779 [https://perma.cc/G3JG-HY6W]; Manu Raju, et al., *Exclusive: Russian-linked Facebook Ads Targeted Michigan and Wisconsin*, CNN (Oct. 3, 2017), <http://www.cnn.com/2017/10/03/politics/russian-facebook-ads-michigan-wisconsin/index.html> [https://perma.cc/LR3W-H4KF].

59. See, e.g., Dean Obeidallah, *Finally, Trump and the GOP Start Muslim-Bashing*, THE DAILY BEAST (Sept. 18, 2015), <https://www.thedailybeast.com/finally-trump-and-the-gop-start-muslim-bashing>.<https://www.thedailybeast.com/finally-trump-and-the-gop-start-muslim-bashing> [https://perma.cc/WPT7-WAM4].

60. *Id.*

61. See Alan Rappoport, *Donald Trump Says He Would Be Open to Closing U.S. Mosques to Fight ISIS*, N.Y. TIMES (Oct. 22, 2015), <https://www.nytimes.com/politics/first-draft/2015/10/22/donald-trump-says-he-would-be-open-to-closing-u-s-mosques-to-fight-isis/?mtrref=www.google.com&gwh=C6F90E5AECA2D4A73B705804284B9EB3&gwt=pay> [https://perma.cc/9RC9-US8A].

62. See Jose A. DelReal, *Donald Trump Won't Rule Out Warrantless Searches, ID Cards for American Muslims*, WASH. POST (Nov. 19, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/19/donald-trump-wont-rule-out-warrantless-searches-id-cards-for-american-muslims/?noredirect=on&utm_term=.6f02db1184f9 [https://perma.cc/4EEE-D7Q5].

63. See, e.g., 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->

After the tragic mass shooting by a Muslim couple in San Bernardino, California, Trump released a written campaign statement that called for “a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”⁶⁴ Later that same day, on *MSNBC*, Trump explained how immigration officials would operationalize the measure: “[T]hey would say, are you Muslim?” Trump was then asked, “And if they said yes, they would not be allowed in the country?” Trump replied, “That’s correct.”⁶⁵

Soon thereafter, Trump likened his Muslim Ban to former President Franklin D. Roosevelt’s decision to intern Japanese Americans during the Second World War due to a perceived national security risk.⁶⁶ Trump explained in relevant part, “This is a president highly respected by all, [Roosevelt] did the same thing.”⁶⁷ Indeed, two months after Japan attacked Pearl Harbor on February 19, 1942, President Roosevelt signed Executive Order 9066, forcing the relocation of more than 100,000 Japanese Americans into internment camps around the country.⁶⁸ The Supreme Court upheld the order’s constitutionality in *Korematsu v. United States*, holding that the government’s internment of citizens was lawful during wartime to avoid espionage.⁶⁹ Notably, this internment is widely regarded as one of the most appalling violations of civil liberties in American history.

After becoming the presumptive Republican presidential nominee, Trump began tempering his language but remained staunchly in favor of the discriminatory immigration policy. For instance, when asked about the Muslim ban in a July 17, 2016, interview with *60 Minutes*, he responded, “Call it whatever you want. We’ll call it territories, ok?”⁷⁰ A few days later, during a July 24, 2016, interview on *Meet the Press*, Trump further explained:

I don’t think it’s a rollback. In fact, you could say it’s an expansion. I’m looking now at territories. People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that, because I’m talking territory instead of Muslim. Our Constitution

politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.38ef6d6f37bc [https://perma.cc/PU6D-ZZ4D].

64. See *id.*

65. See, e.g., John Nichols, *The Ugliest American: How Trump’s Bigotry Isolates and Imperils America*, THE PROGRESSIVE (June 7, 2017), <https://progressive.org/dispatches/the-ugliest-american-how-trump%E2%80%99s-bigotry-isolates-and-imperi/> [https://perma.cc/EED2-6Z24].

66. See Jenna Johnson, *Donald Trump Says He is Not Bothered by Comparisons to Hitler*, WASH. POST (Dec. 8, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/08/donald-trump-says-he-is-not-bothered-by-comparisons-to-hitler/?utm_term=.db2654906069 [https://perma.cc/M8D2-7KKH].

67. See *id.*

68. See National Archives, *Japanese Relocation During World War II*, <https://www.archives.gov/education/lessons/japanese-relocation> [https://perma.cc/8K4P-SJ2N].

69. See *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

70. *60 Minutes: The Republican Ticket: Trump and Pence* (CBS television broadcast July 17, 2016), transcript available at <https://www.cbsnews.com/news/60-minutes-trump-pence-republican-ticket/> [https://perma.cc/2UYD-HFC3].

is great . . . Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently.⁷¹

Even after prevailing in the presidential election, Trump remained intent on enacting the Muslim ban. On December 21, 2016, for instance, a reporter asked Trump whether he “had cause to rethink or reevaluate [his] plans to create a Muslim register or ban Muslim immigration to the United States.”⁷² President-elect Trump responded, “You know my plans all along, and I’ve been proven to be right, 100 percent correct.”⁷³

Now in the White House, President Trump has persisted in exploiting divisions around religion. He consistently labels Muslims in dehumanizing terms, specifically as disloyal, suspicious, and dangerous national security risks. A presidential tweet aptly encapsulated his hostility and lack of understanding of Islam by spreading a widely debunked myth that “a method hostile to Islam—shooting Muslims with bullets dipped in pig’s blood—should be used to deter future terrorism.”⁷⁴

The discriminatory laws, practices, and policies enacted and promised by President Trump throughout his campaign have broader social, political, and economic ramifications. First, they reinforce misconceptions about Islam as an inherently violent religion. Second, they breed intolerance, fear, and hostility among the general population toward a marginalized minority faith community. Third, they signal government approval of discrimination against Muslims—citizens and immigrants alike—from the classroom to the neighborhood and beyond.⁷⁵ Such institutionalized discrimination creates a precedent for the government to similarly mark other minority groups for official disfavor in the future. However, President Trump does not enjoy unfettered authority even in the Oval Office. The Separation of Powers doctrine, Constitution, and rule of law continue to serve as substantial checks in our federalist system. From adjudicating constitutional challenges to the Muslim ban to introducing legislative measures to defund it, the other branches of state and federal government have been engaged in dialogue with President Trump about the limits on the executive and, arguably, the

71. *Meet the Press* (NBC television broadcast July 24, 2016), transcript available at <https://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706> [https://perma.cc/5FSD-35SJ].

72. CNN Newsroom, Interview with Donald Trump (December 21, 2016), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1612/21/cnr.05.html> [https://perma.cc/CA2E-JEYG].

73. *Id.*

74. *See, e.g.*, Laura Jarrett, *Second federal judge blocks new Trump travel ban*, CNN (Oct. 18, 2017), <https://www.cnn.com/2017/10/18/politics/second-federal-judge-blocks-trump-travel-ban/index.html> [https://perma.cc/7P3F-DH9B].

75. *See, e.g.*, Sharon Noguchi, *San Jose Muslim Teacher Wearing Headscarf Repeatedly Bullied by Students*, MERCURY NEWS (Nov. 24, 2017), <https://www.mercurynews.com/2017/11/24/san-jose-muslim-teacher-wearing-head-scarf-repeatedly-bullied-by-students/> [https://perma.cc/GFG5-348Z]; Maria Perez, *New York City Muslim Activist Called a ‘Terrorist’ and Attacked by a Group of Teen Girls at Panera Bread*, NEWSWEEK (Dec. 12, 2017), <http://www.newsweek.com/new-york-city-terrorist-hate-crime-muslim-activist-766482> [https://perma.cc/JMY7-AG8W].

place of Muslims in America. This Section examines this extraordinary dialectic at the intersection of law, politics, and religion. Specifically, it explores the role of US democratic institutions vis-a-vis the lived Muslim American experience in the era of Trump.

A. *The Ban*

Despite legal protections, biased attitudes have too often translated into discriminatory practices in a myriad of contexts. In fact, 75 percent of Muslim Americans and 69 percent of non-Muslim Americans agree that the minority faith group experiences “a lot of” discrimination.⁷⁶ Muslim Americans classify discrimination, ignorance, and misconceptions about Islam as the most significant challenge confronting their community today.⁷⁷ Significantly, half of Muslim Americans say it is difficult to be Muslim in America while citing, in relevant part, President Trump’s rhetoric and policies concerning Muslims.⁷⁸ The Muslim ban is the case in chief.

1. *The First Executive Order*

One week following his inauguration on January 27, 2017, President Trump signed an executive order entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States.”⁷⁹ The order, also known as the Muslim ban, explained that its objective was to protect Americans from immigrants who “bear hostile attitudes” toward the US and the Constitution, who “place violent ideologies over American law,” and who “engage in acts of bigotry or hatred.”⁸⁰ To that end, it immediately barred entry of immigrants and refugees from seven Muslim-majority countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—for ninety days.⁸¹ The order applied to non-citizens with lawful permanent residence as well as immigrants previously authorized to live and work in the country permanently.⁸² Those outside the US at the time of its issuance were barred from re-entry.⁸³ In addition, it prevented immigrants enrolled in universities or employed on temporary work visas from entering the US if they arrived from one of the designated countries.⁸⁴ The order also temporarily suspended the US Refugee Admissions Program in its entirety, preventing travel into the country and any decisions on refugee applications for a period of 120 days.⁸⁵

Once the admissions program resumed, the order explained that the

76. Pew Research Center, *U.S. Muslims Concerned*, *supra* note 1, at 5.

77. *See id.* at 75.

78. *See id.*

79. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

80. *Id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

government would prioritize “refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.”⁸⁶ Syrian refugees, however, were barred indefinitely.⁸⁷ President Trump clarified that the directive aimed to bar resettlement of Muslim refugees from Muslim-majority countries while giving Christians preferential treatment.⁸⁸

Notably, the order repeatedly cited the 9/11 attacks in support of its purported objective in enhancing national security; however, none of those hijackers came from the countries enumerated in the Muslim ban. According to research from the Cato Institute, not a single person from the designated countries has killed anyone in a terrorist attack on US soil.⁸⁹ Still, at the order’s signing ceremony, President Trump explained that the measure was “establishing a new vetting measure to keep Islamic radical terrorists out.”⁹⁰ The order avoided explicit references to “Muslims,” so as to appear facially neutral with respect to religion.⁹¹ However, many pointed to President Trump’s prior campaign promise to ban Muslim immigration as evidence of discriminatory intent. In fact, the day after its issuance, President Trump’s advisor, Rudolph Giuliani, confirmed this public suspicion when he explained, “When [Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”⁹² Giuliani said he assembled a group of “expert lawyers” that “focused on, instead of religion, danger—the areas of the world that create danger for us. . . . It’s based on places where there [is] substantial evidence that people are sending terrorists into our country.”⁹³

The response from Congress, including dozens from President Trump’s own Republican political party, was swift. Some condemned the religious animus inspiring the ban. For instance, Arizona Senator Jeff Flake observed,

86. *See id.*

87. *See id.*

88. In a January 27, 2017 interview with the Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the first Executive Order. *See* David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN NEWS (Jan. 27, 2017), <https://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees> [<https://perma.cc/8SE8-5YNE>].

89. *See, e.g., New Travel Ban Would Not Have Prevented Entry of any Terrorists Since 9/11*, CATO INSTITUTE (Sept. 25, 2017), <https://www.cato.org/blog/new-travel-ban-wouldve-prevented-entry-no-terrorists-911> [<https://perma.cc/MP97-44HP>].

90. *See, e.g., Dan Merica, Trump Signs Executive Order to Keep Out ‘Radical Islamic Terrorists’*, CNN (Jan. 30, 2017), <https://www.cnn.com/2017/01/27/politics/trump-plans-to-sign-executive-action-on-refugees-extreme-vetting/index.html> [<https://perma.cc/VHY2-UWVT>].

91. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

92. *See, e.g., Loulla-Mae Eleftheriou-Smith, Donald Trump asked Rudy Giuliani how to ‘legally’ create ‘Muslim ban’, claims former New York mayor*, THE INDEPENDENT (Jan. 30, 2017), <https://www.independent.co.uk/news/world/americas/donald-trump-muslim-ban-rudy-giuliani-how-legally-create-islam-us-immigration-entry-visa-new-york-a7552751.html>.30, 2017 [<https://perma.cc/Y7GE-23HA>].

93. *Id.*

“Enhancing long term national security requires that we have a clear-eyed view of radical Islamic terrorism without ascribing radical Islamic terrorist views to all Muslims.”⁹⁴ Similarly, Maine Senator Susan Collins said, “A preference should not be given to people who practice a particular religion, nor should a greater burden be imposed on people who practice a particular religion . . . [R]eligious tests serve no useful purpose in the immigration process and run contrary to our American values.”⁹⁵

Other Republicans highlighted the threat to the nation’s Constitution and the Separation of Powers doctrine, intimating that the order exceeded executive authority. For example, Michigan Representative Justin Amash stated, “President Trump’s executive order overreaches and undermines our constitutional system. It’s not lawful to ban immigrants on basis of nationality. If the president wants to change immigration law, he must work with Congress.”⁹⁶ Nevada Senator Dean Heller added, “I encourage the Administration to partner with Congress to find a solution.”⁹⁷ Additionally, New York Congresswoman Elise Stefanik criticized, “It is Congress’ role to write our immigration laws and I strongly urge the President to work with Congress moving forward as we reform our immigration system to strengthen our homeland security.”⁹⁸ However, Republican condemnations did not materialize into concrete legislative initiatives.

On the other hand, Democratic Congressmen John Conyers and Zoe Lofgren introduced legislation, the Statue of Liberty Values Act, into the House of Representatives to rescind the order and prohibit funding to enforce the ban.⁹⁹ While House Democrats overwhelmingly supported it—with 185 of 196 signing on—House Republicans, acting along partisan lines, blocked a vote.¹⁰⁰ Similarly, Democratic Congresswoman Dianne Feinstein introduced corresponding legislation in the Senate, cosponsored by thirty-eight of the chamber’s forty-eight Democrats, but Senate Republicans similarly blocked a vote.¹⁰¹ In this way, partisan politics paralyzed the legislative branch from guarding against executive abuses while further fanning the flames of racism that Trump’s politics fueled.

Unlike Congress, courts managed to issue decisions that suspended the implementation of the so-called travel ban. A wave of lawsuits filed by

94. See, e.g., Madeline Farber, *Here Are the Republicans Who Have Criticized President Trump’s Immigration Ban*, FORTUNE (Jan. 29, 2017), <http://fortune.com/2017/01/29/donald-trump-immigration-ban-republicans/> [https://perma.cc/AU62-BSJB].

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. H.R. 724, 115th Cong. (2017).

100. See, e.g., Jama Abdi, *In First And Only Vote on Trump’s Muslim Ban, Republicans Fail The Test*, THE HUFFINGTON POST (July 19, 2017), https://www.huffingtonpost.com/entry/republicans-vote-to-keep-trumps-grandma-ban_us_596e92bbe4b05561da5a5b98 [https://perma.cc/S8U9-JMWR].

101. See, e.g., House Democratic Whip Steny Hoyer, *Memo to the Media: A Look Back at 2017: Republicans Fail to Govern* (Jan. 2, 2018), <https://www.majorityleader.gov/content/memo-media-look-back-2017-republicans-fail-govern> [https://perma.cc/4FZC-3XQ3].

states, organizations, and individuals around the country immediately challenged the ban on constitutional grounds. Litigants claimed that the ban favored a religious denomination over others in violation of the Establishment Clause. Representative of one such lawsuit is *State of Washington v. Trump*.¹⁰²

Several days after President Trump signed his first executive order on January 30, 2017, the state of Washington challenged the action, alleging that the order violated the Establishment Clause by discriminating against Muslims and Islam.¹⁰³ To demonstrate racial animus, the state cited to then-presidential candidate Trump's repeated campaign promises to bar Muslim immigration and engage in "extreme, extreme vetting" as probative evidence.¹⁰⁴ The state also argued that the first executive order fulfilled the pledge to ban all Muslims.¹⁰⁵ Minnesota also joined the lawsuit.¹⁰⁶ On February 3, 2017, the federal district court in this case became the first court to issue a restraining order temporarily blocking key portions of the ban in a nationwide injunction.¹⁰⁷ In doing so, the court found that the ban violated the Establishment Clause by adversely impacting Washington's residents in the areas of employment, education, business, family relations, and the freedom to travel.¹⁰⁸ The court also found that the state itself was harmed with respect to the missions of its public universities, public funds, tax bases, and other operations.¹⁰⁹ Interestingly, in a nod to the Separation of Powers doctrine, the court noted its own role as one of three co-equal branches of the federal government and its responsibility to ensure that the actions of the executive and legislative comport with the Constitution.¹¹⁰ The government appealed the decision to the Ninth Circuit, which refused to overturn the lower court's decision, noting a likely Establishment Clause violation among other legal concerns.¹¹¹ In response, on February 16, 2017, the government stated that it planned to revise the executive order to address the court's constitutional concerns.¹¹²

102. See Complaint, *Washington v. Trump*, No. 2:17-cv-00141-JLR, 2017 WL 443297 (W.D. Wash. 2017).

103. *Id.* at 9.

104. *Id.* at 7.

105. See *id.* at 7–8.

106. See Karen Zamora, *Minnesota Suing Trump Administration Over Refugee Order*, STAR TRIBUNE (Feb. 2, 2017) <http://www.startribune.com/minnesota-suing-trump-administration-over-refugee-order/412498373/> [<https://perma.cc/M27C-6XMT>].

107. Temporary Restraining Order, *Washington v. Trump*, No. 17-0141JLR, 2017 WL 462040 (W.D. Wash. 2017).

108. See *id.* at 4–5.

109. See *id.* at 5.

110. See *id.* at 6–7.

111. See *Washington v. Trump*, 847 F. 3d 1151, 1169 (9th Cir. 2017).

112. Supplemental Brief on *En Banc* Consideration at 4, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 16, 2017).

2. *The Second Executive Order*

On March 6, 2017, one month after the Washington court blocked the first Muslim ban, President Trump rescinded the ban and issued a revised order.¹¹³ It was entitled identically as its predecessor, but it was somewhat distinct in substance.¹¹⁴ The revised order removed Iraq from the list of designated countries.¹¹⁵ It eliminated preferences for religious minorities, clarifying that the original order was not motivated by religious animus but designed to protect religious minorities.¹¹⁶ The revised order also omitted any specific references to Syrian refugees.¹¹⁷ Significantly, this version was limited to foreign nationals outside the US without visas, dual nationality, diplomatic status, or legal permanent residency.¹¹⁸ In essence, the revised order temporarily suspended refugee programs and visa approvals for immigrants from six Muslim-majority countries, although government officials could allow specific individuals entry upon review on a case-by-case basis.¹¹⁹

Exceptions were made for those with a bona fide relationship to US citizens or institutions. For instance, immigrants who were working or studying in the US but outside of the country at the time of the order could receive a waiver.¹²⁰ Foreign nationals who sought entry to visit close family members, such as a child, parent, or spouse, also qualified for a waiver.¹²¹ Further, young children and infants in need of medical care deserved special consideration.¹²² Those employed or sponsored by, or visiting to meet with employees of, the government could also gain entry.¹²³

Still, many observers drew little distinction between the original and revised orders' discriminatory intent.¹²⁴ They pointed to statements by members of the Trump administration as evidence. Shortly before the revised order was signed, for instance, Senior Advisor to the President Stephen Miller explained:

Fundamentally, you're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues that were brought up by the court and those will be addressed. But in terms of protecting the country, those basic policies are still going to be

113. Proclamation No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

114. *See id.*

115. *See id.* at 13211-12.

116. *See id.* at 13210.

117. *See id.* at 13211.

118. *See id.* at 13213-14.

119. *See id.* at 13214.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g.,* Moustafa Bayoumi, *Don't be fooled. This travel ban is as bad as the last one – it must be fought*, THE GUARDIAN (Mar. 7, 2017), <https://www.theguardian.com/commentisfree/2017/mar/07/dont-be-fooled-travel-ban-bad-must-be-fought> [https://perma.cc/R47Q-EH92].

in effect.¹²⁵

Almost immediately, the revised ban engendered another wave of lawsuits. In *Hawaii v. Trump*, the State of Hawaii argued that the second order was tainted by religious discrimination in the same fashion as its predecessor, undermining constitutional and other legal guarantees.¹²⁶ The state argued that, as a result of the order, its residents were unable to receive visits from family members and friends traveling from the enumerated countries.¹²⁷ Further, the state's interests in recruiting faculty and students to attend public universities were adversely impacted, as well as in other areas such as its tourist-driven economy.¹²⁸

The state also argued that the order's implementation ran counter to the Establishment Clauses of both the federal and state constitutions, forcing it to tolerate an unconstitutional policy that disfavored one religion over another.¹²⁹ As evidence of a discriminatory purpose, the state emphasized the historical context that included President Trump's rhetoric about Muslims on his campaign trail.¹³⁰ While the order cited national security as its secular justification, the state pointed to additional evidence that belied such concerns as pre-textual.¹³¹ Specifically, it cited a February 2017 Department of Homeland Security ("DHS") report characterizing citizenship as an "unlikely indicator" of terrorism threats.¹³² The DHS report confirmed that very few persons from the enumerated countries had perpetrated, or attempted to carry out, terrorist activities since 2011.¹³³ Thus, the evidence suggested that the executive's action did not have a secular national security purpose as required by the *Lemon* test.¹³⁴ Rather, the state argued that the second order was fueled by anti-Muslim animus, thereby injuring its institutions, economy, and interest in preserving the separation between church and state.¹³⁵ In response, the federal government argued that the revised ban did not facially discriminate against any particular religion.¹³⁶ It emphasized that Congress and the Obama Administration had found that the enumerated countries "posed special risks of terrorism."¹³⁷ It further argued

125. See, e.g., *Miller: New order will be responsive to the judicial ruling; Rep. Ron DeSantis: Congress has gotten off to a slow start*, FOX NEWS (Feb. 21, 2017), <http://www.foxnews.com/transcript/2017/02/21/miller-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis.html> [https://perma.cc/XF4X-VQR9].

126. See Complaint for Declaratory and Injunctive Relief; Summons at 1, *Hawaii v. Trump*, No. 17-00050-DKW-KJM, 2017 WL 466295 (D. Haw. 2017).

127. See *id.* at 18.

128. See *id.* at 18–19.

129. See *id.* at 20.

130. See *id.* at 6–10.

131. See Order Granting Motion for Temporary Restraining Order at 30–40, *Hawaii v. Trump*, No. 17-00050 DKW-KSC (D. Haw. 2017).

132. See *id.* at 13.

133. See *id.*

134. See *id.* at 29.

135. See *id.*

136. See *id.* at 30.

137. *Id.*

that the Muslim ban could not have been religiously motivated because (a) the ban applied to everyone in those countries regardless of their religion, and (b) the affected countries only represent 9 percent of the world's fifty Muslim-majority nations.¹³⁸ Stressing the revised order's facially neutral language, it cautioned the court against a "judicial psychoanalysis of a drafter's heart of hearts."¹³⁹

Ultimately, the federal district court sided with the state and granted injunctive relief. It held that the "specific historical context, contemporaneous public statements and specific sequence of events leading to its issuance would conclude that the Executive Order was issued with a purpose to disfavor a particular religion," thus resulting in a likely Establishment Clause violation.¹⁴⁰ The court reasoned that the second ban's seemingly neutral language did not prove an absence of discriminatory animus.¹⁴¹ Instead, the government had targeted Islam by banning six countries in which 99 percent of the population is Muslim.¹⁴² The court rejected the government's argument that religious animus only exists when a policy targets all members of that group.¹⁴³ The court further highlighted the dearth of evidence supporting the purported national security objective.¹⁴⁴ Applying the *Lemon* test, the court found the ban's stated "secular purpose"—protecting national security—was "secondary" to the religious objective of temporarily suspending the entry of Muslims.¹⁴⁵

On appeal, the Ninth Circuit largely agreed with the lower court's decision but relied on a distinct legal analysis. Rather than assessing an Establishment Clause violation, the court found that President Trump exceeded the authority intended by Congress in the Immigration and Nationality Act ("INA").¹⁴⁶ By way of background, the Constitution gives Congress the primary authority to establish immigration policy.¹⁴⁷ Congress, in turn, delegates considerable power to the executive through the INA, but the president must exercise that authority within the INA's statutory parameters.¹⁴⁸ As in the original version, President Trump executed the second order pursuant to his power under the INA, allowing him to exclude non-citizens outside the country with no ties to the 8 U.S.C. § 212(f) provides in relevant part:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the

138. *See id.*

139. *See id.* at 34.

140. *See id.* at 28.

141. *See id.*

142. *See id.* at 31.

143. *See id.*

144. *See id.* at 39.

145. *See id.* at 36.

146. *See Hawaii v. Trump*, 878 F.3d 662, 687 (9th Cir. 2017).

147. *See id.* at 685.

148. *See id.*

United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.¹⁴⁹

The Ninth Circuit found that President Trump exceeded his authority by establishing visa procedures in violation of INA provisions prohibiting nationality-based discrimination.¹⁵⁰ It declined to address the Establishment Clause claim and upheld injunctive relief.¹⁵¹

The government then appealed to the Supreme Court, which delivered a mixed response.¹⁵² The Supreme Court blocked the ban's application *only* with respect to foreign nationals or refugees who had "bona fide relationships" with persons or entities in the US.¹⁵³ Subsequent litigation clarified that the ban did not apply to immigrants with certain familial relationships, including parents, parents-in-law, spouses, fiancés, children, adult sons and daughters, sons- and daughters-in-law, siblings (half and whole), step relationships, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins.¹⁵⁴ Notably, the Court criticized the lower courts for blocking the ban against foreign nationals who had *no* connection to the country.¹⁵⁵ The Court reasoned that while the exclusion of the former group would burden American parties by inflicting "concrete hardships," banning the latter group would not.¹⁵⁶

3. *The Third Executive Order*

On September 24, 2017, President Trump signed the third iteration of the original Muslim ban.¹⁵⁷ Entitled, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," the proclamation was more narrowly tailored than its predecessors.¹⁵⁸ It explained that seven countries did not meet a "baseline for the kinds of information required from foreign governments" to facilitate official vetting of immigrants and refugees.¹⁵⁹ According to the criteria, which assessed identity, security and public-safety threats, and national security risks, sixteen countries were initially categorized as "inadequate" while thirty-one additional countries were found

149. *See id.* at 692.

150. *See id.* at 696.

151. *See id.* at 702.

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

153. *See id.* at 2404.

154. *See Stepsister, Yes; Grandma, No: U.S. Sets Guidelines for Revised Travel Ban*, N.Y. TIMES (June 28, 2017), <https://www.nytimes.com/2017/06/28/us/politics/homeland-security-prepares-to-issue-travel-restrictions.html> [<https://perma.cc/GM29-D94A>].

155. *Trump v. Hawaii*, 138 S.Ct. at 2416.

156. *See id.*

157. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

158. *See id.*

159. *See id.* at 45162.

to be “at risk” of becoming “inadequate.”¹⁶⁰ Although a subsequent “engagement” period allowing countries additional time to meet the criteria yielded significant improvements, the Trump Administration ultimately deemed seven countries as “inadequate” and banned immigration from those countries.¹⁶¹ Unlike in prior versions, the banned countries—Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen—did not exclusively consist of Muslim-majority nations.¹⁶² However, the ban only applied to high-level officials for Venezuela, and only a few immigrants travel to the US from North Korea.¹⁶³ The list also included Somalia even though the country met the baseline criteria, while omitting Iraq, which did not.¹⁶⁴ As with the prior versions, foreign nationals from the Muslim-majority countries were barred from traveling to the US but, this time, indefinitely.¹⁶⁵

Similarly, this executive order inspired a wave of lawsuits claiming violations of constitutional and statutory guarantees. Representative of these lawsuits is *Hawaii v. Trump*.¹⁶⁶ On October 15, 2017, the State of Hawaii challenged the third iteration of the original Muslim ban on similar grounds as the first two orders.¹⁶⁷ While the third ban included eight countries, the state only challenged the restrictions against the nationals of the six Muslim-majority countries.¹⁶⁸ The government, on the other hand, argued for judicial deference in favor of presidential supremacy in matters of national security and foreign policy.¹⁶⁹ It explained that “the Executive must be permitted to act quickly and flexibly” in these areas.¹⁷⁰ As such, the government cautioned the court against “second-guess[ing]” the “Executive Branch’s national-security judgments.”¹⁷¹

Despite the government’s assertions, the court, guided by the Ninth Circuit’s approach to the second Muslim ban, held that the proclamation likely violated the INA’s statutory provisions because (a) it did not make sufficient findings justifying the exclusion, and (b) it discriminated on the basis of nationality in its issuance of visas.¹⁷² First, the court highlighted that in order to exercise authority under the INA, the president must provide evidence demonstrating that entry of a certain group of immigrants was

160. *See id.* at 45163.

161. *See id.*

162. *See id.* at 45163.

163. *See id.* at 45166.

164. *See id.*

165. *See id.*

166. *See* Third Amended Complaint for Declaratory and Injunctive Relief, *Hawaii v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 6547116 (D. Haw. Oct. 15, 2017).

167. *See id.*

168. *Id.* at 23.

169. Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Temporary Restraining Order at 20, *Hawaii v. Trump*, No. 17-0050-DKW-KSC, 2017 WL 6547036 (D. Haw. Oct. 14, 2017).

170. *Id.* at 28.

171. *Id.* at 22.

172. *Hawai’i v. Trump*, 265 F.Supp.3d 1140, 1145 (2017).

“detrimental” to national interests.¹⁷³ Since the president did not present sufficient findings justifying the exclusion of millions of men, women, and children as detrimental to national interests, the court stated that he exceeded his authority as intended by Congress under the INA.¹⁷⁴ Second, the court found that the ban’s discriminatory treatment of immigrants on account of nationality violated the INA provision that requires “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”¹⁷⁵ Due to the violation, the court opted out of deciding the claims under the Establishment Clause.¹⁷⁶ The court granted the nationwide injunction for these reasons, temporarily blocking the ban yet again.¹⁷⁷

While the appeal was pending at the Ninth Circuit, on December 4, 2017, the Supreme Court issued a surprising, if not foreboding, decision in *Trump v. Hawaii*, allowing the third version of the Muslim ban to take full effect nationwide.¹⁷⁸ Subsequently, on December 22, 2017, the Ninth Circuit issued its decision.¹⁷⁹ The appellate court agreed with the lower court’s ruling but only upheld the injunction as it applied to foreign nationals who had a “bona fide relationship” with a person or entity in the US.¹⁸⁰ In other words, those without “bona fide relationships”—like so many immigrants and refugees who have arrived at America’s shores since her founding—were effectively banned.¹⁸¹

In granting injunctive relief, the Ninth Circuit clarified that the executive branch must demonstrate a threat to public interest, welfare, safety, or security in order to use its authority to exclude foreign nationals under the INA.¹⁸² The court explained that Congress has already enacted legislation, regulations, and programs to prevent terrorists and those who pose a public safety risk from entering the country.¹⁸³ While alluding to the Separation of Powers doctrine, the court found that the executive branch “has overridden Congress’s legislative responses to the same concerns the Proclamation aims to address.”¹⁸⁴ The court further highlighted the INA’s legislative history to find that the president is barred from exercising the broad authority to suspend immigration outside of exigent circumstances, making it impossible for Congress to act in a timely manner.¹⁸⁵ Finally, the court cited the

173. *Id.* at 33.

174. *Id.*

175. *Id.* at 34.

176. *See id.*

177. *See id.*

178. 138 S. Ct. 542 (2017).

179. *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017).

180. *See id.* at 702.

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.* at 687.

185. *See id.* at 688.

executive branch's historical lack of using such proclamations to find that President Trump's action "is unprecedented in its scope, purpose, and breadth."¹⁸⁶ Ultimately, the Supreme Court will determine the fate of the executive proclamation.¹⁸⁷

This Section has attempted to demonstrate how US democratic institutions protect and undermine religious liberty in a federalist system. From adjudicating constitutional challenges to the Muslim ban to introducing legislative measures to defund it, the judicial and legislative branches have attempted to check the executive branch's abuses of power. Given the nature of their countervailing actions, as well as the conflicting results from the Supreme Court, the emerging message on civil liberties is muddled, at best. But perhaps it is somewhat representative of a politically polarized America, particularly with respect to Islam, Muslims and the nation's future. The forthcoming Sections, however, provide more cause for optimism.

V. ISLAMIC FAITH PRACTICES: RITUAL MALE CIRCUMCISION, HALAL FOOD PRODUCTS, AND RELIGIOUS ATTIRE

As illustrated above, US democratic institutions can act as countervailing forces guarding against official abuse of power against an already marginalized minority faith community. These same institutions play a similar role in protecting Islamic faith practices consonant with the First Amendment's Free Exercise Clause. Indeed, the instant legal analysis of Islamic faith practices, with a particular focus on ritual male circumcision, halal food products, and religious attire, further illuminates the role of US democratic institutions in shaping the lived experiences of Muslim Americans in both the private and public spheres.

A. *Ritual Male Circumcision*

Many Muslims around the world believe that Islamic law mandates ritual male circumcision, for largely hygienic reasons.¹⁸⁸ In the US, it is most routinely performed on infants and generally viewed as an anciently practiced religious ritual by Muslims and Jews.¹⁸⁹ No federal, state, or local laws restrict the practice. However, in both state and federal courts, physicians and hospitals who perform the ritual have been subject to liability

186. *See id.* at 690.

187. At the time of publication, the Supreme Court upheld the third executive order. While relevant to the instant analysis, discussion of that decision is reserved for a distinct inquiry. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

188. *See, e.g.,* Abdul Rashid Gatrad & Aziz Sheikh, *Muslim birth customs*, ARCHIVES OF DISEASE IN CHILDHOOD - FETAL AND NEONATAL EDITION, 84(1): F6-8 (2001) (describing Muslim birth customs including male circumcision).

189. *See, e.g.,* Emily Bobrow, *The industrialized world is turning against circumcision. It's time for the US to consider the same*, QUARTZ (Jan. 17, 2017), <https://qz.com/885018/why-is-circumcision-so-popular-in-the-us/> [<https://perma.cc/GHE6-Y495>].

for medical malpractice.¹⁹⁰ Such lawsuits typically arise when the procedure violates public safety and health standards or has unexpected results.¹⁹¹

B. Halal Food Products

“Halal” is an Arabic word and concept meaning “permissible.”¹⁹² “Halal food” generally refers to food allowed under Islamic dietary guidelines, reflecting strict religious requirements surrounding animal treatment and slaughter.¹⁹³ It also encompasses the manufacture, production, treatment, preparation, and the use of tools, vessels, utensils, dishes, and containers for such food.¹⁹⁴

The US has seen tremendous growth in the halal food industry, including an increase in thousands of halal-compliant businesses across the country. The increasing relevance of the Muslim American consumer has given rise to a number of high-profile incidents of fraud because it is cheaper to advertise and sell non-halal food as halal while gaining the benefit of an increased Muslim consumer base. For instance, in 2011, a McDonald’s restaurant located in Michigan was accused of selling non-halal chicken nuggets as halal.¹⁹⁵ The case ultimately settled for \$700,000, and the restaurant discontinued its sale of halal food.¹⁹⁶ That same year, a supermarket in California settled a case after being similarly accused of selling non-halal meat products as halal.¹⁹⁷ More recently, in 2017, a farm in California was sued for falsely advertising that it followed Islamic practices in its meat preparation.¹⁹⁸

In response, multiple states now regulate the production, sale, and distribution of halal food products to prevent deceptive practices that victimize members of the minority faith community. For instance,

190. See, e.g., Joan McQueeney Mitric, *Merits of Circumcision A Subject of Dispute*, WASH. POST (Oct. 23, 1985), https://www.washingtonpost.com/archive/lifestyle/wellness/1985/10/23/merits-of-circumcision-a-subject-of-dispute/72a7ff4e-3a9d-4f60-a3f1-7f5e66412648/?utm_term=.3ab5688698ad [<https://perma.cc/H8DZ-R5EU>].

191. See *id.*

192. See, e.g., Nick Eardley, *What is Halal Meat?*, BBC NEWS (May 12, 2014), <https://www.bbc.com/news/uk-27324224> [<https://perma.cc/9AAJ-5JCF>].

193. *Definition of Halal*, THE HALAL FOOD AUTHORITY, <https://www.halalfoodauthority.com/definition-of-halal> [<https://perma.cc/T3TN-PP3V>].

194. See *id.*

195. Jeff Karoub, *McDonald’s settles suit over non-halal chicken*, USA TODAY (Apr. 17, 2013), <https://www.usatoday.com/story/money/business/2013/04/17/mcdonalds-halal-chicken/2090613/> [<https://perma.cc/7R2G-83XJ>].

196. See *id.*

197. Gustavo Arellano, *Super King Market Fined Over Half-a-Million Dollars for Selling Fake Halal Meat*, OC WEEKLY (Nov. 22, 2011), <https://www.ocweekly.com/super-king-market-fined-over-half-a-million-dollars-for-selling-fake-halal-meat-6624410/> [<https://perma.cc/H35K-7D6Y>].

198. Marcy Jenkins, *Lawsuit: Farm Claiming To Sell Meats As Halal Not Following Religious Rules*, CBS SACRAMENTO (July 31, 2017), <https://sacramento.cbslocal.com/2017/07/31/dixon-halal-lawsuit-superior-farms/> [<https://perma.cc/8T37-L7CQ>].

California,¹⁹⁹ Illinois,²⁰⁰ Maryland,²⁰¹ Minnesota,²⁰² New Jersey,²⁰³ Michigan,²⁰⁴ and Texas²⁰⁵ declared it unlawful to sell non-halal food as halal. Fraudulent business practices that violate these statutes generally carry substantial fines. For example, fraudulent sales carry a \$10,000 fine for first-time offenders in New Jersey.²⁰⁶ That amount doubles to \$20,000 for subsequent breaches of the law.²⁰⁷ Furthermore, in some jurisdictions such as California, those guilty of fraudulent misrepresentations risk imprisonment.²⁰⁸

Interestingly, many different types of state laws regulate the halal food industry. For instance, New Jersey requires businesses to “post information setting forth the procedures they follow in their purchase, handling, and preparation of the Halal food.”²⁰⁹ Further, Illinois prohibits the cross-contamination of non-halal and halal food while California,²¹⁰ Maryland,²¹¹ and Texas²¹² require halal restaurants to indicate whether they also sell non-halal food due to the risk of cross-contamination. Additionally, Illinois²¹³ and New York²¹⁴ require halal food manufacturers, producers, and packagers to register with the state. Both also mandate that businesses selling halal food display their halal certificate in a conspicuous location.²¹⁵ Similarly, Virginia requires halal food product labels to identify the certifying organization.²¹⁶ Several organizations in the US now fulfill this certification function including, for instance, the Islamic Society of the Washington Area, Islamic Food and Nutrition Council of America, Islamic Services of America, the Islamic Society of North America’s Halal Certification Agency, and Halal Food Council International. But regulation of this growing industry remains varied by state.

C. Religious Attire

In the US, no federal, state, or local laws prohibit Islamic dress such as the *hijab* or *kufi*. Rather, the First Amendment together with federal, state, and local nondiscrimination laws generally protect such manifestations of

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199. See Cal. Penal Code § 383c (Deering 2003).
 200. See 410 Ill. Comp. Stat. 637/15 (2016).
 201. See MD. Code Com. Law § 14-3603 (2010).
 202. See Minn. Stat. § 31.658 (2018).
 203. See N.J. Admin. Code § 13:45A-22.2 (2019).
 204. See Mich. Comp. Laws § 750.297f (2018).
 205. See Tex. Bus. & Com. Code § 17.881 (2003).
 206. See N.J. Admin. Code § 13:45A-22.2 (2019).
 207. See *id.*
 208. See Gatrad & Sheikh, *supra* note 188.
 209. See Eardley, *supra* note 192.
 210. See Gatrad & Sheikh, *supra* note 188.
 211. See Mitric, *supra* note 190.
 212. See *Definition of Halal*, *supra* note 193.
 213. See Bobrow, *supra* note 189.
 214. See N.Y. Agric. & Mkts. Law § 201-e (Consol. 2019).
 215. See *id.*
 216. See Va. Code Ann. § 3.2-5124 (2010).

religion in a variety of contexts. Still, some regulations ban face veils in photographs taken for government-issued documents, such as driver's licenses, to ensure proper identification.²¹⁷ Courts today continue to grapple with issues involving Islamic dress. This Section focuses on the courts' responses to Muslim American women who observe such religious attire.

*D. Alasaad v. United States Department of Homeland Security*²¹⁸

In July 2017, US Customs and Border Protection ("CBP") officers stopped Ghassan and Nadia Alasaad, US citizens crossing the border from Canada to Vermont.²¹⁹ The officers' justification for the detention was that they "simply felt like doing a secondary inspection."²²⁰ A male officer manually searched Ghassan's phone and then asked Nadia for the password to her locked phone.²²¹ She explained that she observed the headscarf pursuant to her Islamic faith, and since her phone had photos of her without a headscarf, she requested that a female officer conduct the electronic search.²²² The officer responded, "It would take two hours for a female officer to arrive, and then more time to search the phone."²²³ He added that the "phone would be confiscated" otherwise.²²⁴ Nadia reluctantly provided her password.²²⁵ After six hours of detention, the couple was forced to depart without their phones.²²⁶

The Alasaads are two of several Muslim Americans impacted by the government's electronic searches at the border. In March 2017, a CBP officer stopped Zainab Merchant, a US citizen and a graduate student at Harvard University, at the airport as she was traveling home to Florida from Canada.²²⁷ When asked for her smartphone, she explained that she observed a headscarf pursuant to her Islamic faith.²²⁸ Since her phone included photos of herself without the headscarf, she refused to unlock it for the male officer.²²⁹ He advised that she "could choose to unlock the phone, or have it seized indefinitely."²³⁰ In tears, Zainab provided passwords for her phone and laptop.²³¹

In September 2017, Ghassan, Nadia, and Zainab, together with seven

217. See, e.g., *U.S. Muslim ordered to lift veil*, BBC NEWS (June 6, 2003), <http://news.bbc.co.uk/2/hi/americas/2970514.stm> [<https://perma.cc/2MRB-SAUM>].

218. *Alasaad v. Nielsen*, No. 17-CV-11730-DJC, 2018 WL 2170323 (D. Mass. May 9, 2018).

219. *Id.* at *5.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at *7.

228. *Alasaad*, 2018 WL 2170323, at *7.

229. *Id.*

230. *Id.*

231. *Id.*

other individuals who experienced similar searches at the border, sued the government under the First and Fourth Amendments of the Constitution.²³² As noted, the First Amendment protects Nadia and Zainab's right to adhere to Islamic modes of dress. Such views informed their respective requests for a female, rather than male, officer to search their digital devices. The Transportation Security Administration (TSA) generally honors requests for religious accommodation by all Muslim women who require secondary security screenings by female officers in private at our nation's airports.²³³ Yet the CBP officers presumably declined Nadia and Zainab's requests because of the digitalized context even though the same First Amendment reasoning should have applied.

Significantly, the women's First Amendment concerns also intersect with those of the Fourth Amendment. Fourth Amendment jurisprudence requires authorities to secure a judicial warrant prior to conducting searches.²³⁴ However, border searches are exempt from the warrant requirement due to a sovereign country's authority to control what and who enters the country.²³⁵ As such, CBP officers routinely conduct warrantless searches of persons and effects at the border or international ports.²³⁶ Nevertheless, the plaintiffs asked the court to balance their privacy interests against the law enforcement's interests in order to seek injunctive relief for the government's actions at the border.²³⁷

The federal court relied on the Supreme Court's 2014 opinion in *Riley v. California* that held that authorities must secure a warrant prior to searching a cell phone of someone under arrest, balancing "the sovereign's interests" with the individual's privacy interests during an electronic search.²³⁸ Recognizing that "digital is different" because of the vast amount of personal information electronic devices contain, the court distinguished cell phones and laptops from luggage, briefcases, and traditional

232. The Fourth Amendment establishes that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Fourth Amendment ensures that "the usual inferences which reasonable men draw from evidence . . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). "The amendment grew out of American colonial opposition to British search and seizure practices, most notably the use of writs of assistance, which gave customs officials broad latitude to search houses, shops, cellars, warehouses, and other places for smuggled goods." *United States v. Wurie*, 728 F.3d 1, 3 (2013), *aff'd sub. nom.*, *Riley v. California*, 134 S. Ct. 2473 (2014).

233. *May I keep head coverings and other religious, cultural or ceremonial items on during screening?*, TSA, <https://www.tsa.gov/travel/frequently-asked-questions/may-i-keep-head-coverings-and-other-religious-cultural-or> [<https://perma.cc/M7CS-T8G8>].

234. *Supra* note 205, at *13.

235. *Id.*

236. *Id.* at *14.

237. *Id.*

238. *Id.* at *13.

containers.²³⁹ Nadia and Zainab's objections to the digital search due to their headscarf-less photos demonstrated the high level of intrusiveness.²⁴⁰ Thus, the court found a plausible legal claim, rejected the government's arguments, and allowed the plaintiffs' case to proceed on the merits.²⁴¹ This case highlights a fascinating intersection of First and Fourth Amendment protections. Additionally, it illustrates the role of the federal judiciary in checking a federal executive agency that arguably encroached on constitutionally protected rights.

E. Soliman v. City of New York

Similar to *Alasaad*, *Soliman* explores the parameters of First Amendment protections while illuminating the role of US democratic institutions in upholding those legal rights.²⁴² In January 2015, Mervat Soliman and her son, Mohammed Soliman, got into a physical altercation with their neighbors in New York City.²⁴³ The police officers arrested Mervat and Mohammed but due to Mervat's physical condition the police first sent Mervat to a hospital.²⁴⁴ When Mervat regained consciousness in the ambulance, she realized that her headscarf had been removed.²⁴⁵ At the hospital, Mervat underwent several hours of diagnostic testing and treatment for head, neck, and shoulder injuries.²⁴⁶ At some point, she began using a pillowcase as a headscarf.²⁴⁷ When discharged, Mervat was taken to the NYPD's 104th Precinct for processing where she requested a female photographer since she was being forced to remove the pillowcase covering her hair.²⁴⁸ The NYPD denied her request.²⁴⁹

Several months later, in March 2015, the NYPD issued Interim Order 29, establishing a new procedure whereby an officer of the same gender may take a private photograph when someone must remove his or her religious head covering.²⁵⁰ The policy identified two types of photographs, including: (1) a Department photograph, which must be taken with "an unobstructed view of the arrestee's head, ears and face"; and (2) a Prisoner Movement Slip photograph, which "may be taken while the arrestee wears their religious head covering."²⁵¹ In September 2015, Mervat sued the NYPD for religious discrimination, claiming that the NYPD violated her First Amendment Free

239. *See id.*

240. *Id.* at *14.

241. *Id.* at *24.

242. *Soliman v. City of N.Y.*, No. 15-CV-5310 (PKC) (RER), 2017 WL 1229730 (E.D.N.Y. Mar. 31, 2017).

243. *Id.* at *2.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at *3.

249. *Id.*

250. *Id.*

251. *Id.*

Exercise rights when (1) her hijab was removed while unconscious; and (2) officers required her to remove her hijab during processing and refused to accommodate her request for a female photographer.²⁵²

1. *First Amendment Retaliation Theory*

Mervat asserted a First Amendment retaliation claim—essentially arguing that the NYPD retaliated against her for practicing her constitutionally protected right to observe a headscarf as a Muslim American woman by removing her headscarf while she was unconscious in the ambulance. To prevail on her claim, she needed to satisfy three prongs: “(1) [s]he had an interest protected by the First Amendment; (2) [NYPD’s] actions were motivated or substantially caused by [her] exercise of that right; and (3) [NYPD’s] actions effectively chilled the exercise of her First Amendment rights.”²⁵³ The court rejected this claim, finding that the facts did not show that an NYPD officer had removed Mervat’s hijab.²⁵⁴ But even if so, the evidence did not meet the second prong requiring religious animus or bias.²⁵⁵ Rather, the court found it more plausible that a medical technician had innocently removed the headscarf to examine Mervat’s head for injuries.²⁵⁶ As such, the court dismissed this claim for failing to satisfy all three prongs and proceeded to address Mervat’s second theory of liability.²⁵⁷

2. *First Amendment Free Exercise Theory*

Next, Mervat asserted a Free Exercise claim, claiming that the NYPD’s policies, practices, and procedures of requiring arrestees to remove head coverings for photographs taken after arrest violated the First Amendment’s prohibition against government interference with the free exercise of religion.²⁵⁸ Relying on *Monell v. Department of Social Services*, Mervat sought money damages for the emotional and psychological harm she experienced from being forced to remove her headscarf.²⁵⁹ To prevail on a *Monell* claim, she had to demonstrate: “(1) an official policy or custom that (2) caused the plaintiff to be subjected to (3) a denial of a constitutional right.”²⁶⁰ To satisfy the initial prong, Mervat pointed to the NYPD’s policy requiring arrestees to remove head coverings without accommodation for their religious beliefs.²⁶¹ Because the NYPD’s Interim Order 29 corroborated that claim, the court found that Mervat satisfied this prong.²⁶²

252. *Id.* at *4.

253. *Soliman*, 2017 WL 1229730 at *5.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at *6.

259. *Id.*; see *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

260. *Soliman*, 2017 WL 1229730 at *6.

261. *Id.*

262. *Id.*

With respect to the remaining two prongs, the court found that a generally applicable rule or policy that incidentally burdens a religious practice does not violate the Free Exercise Clause, so long as the burden was not intended.²⁶³ The court justified the policy on account of the NYPD's interest in obtaining an accurate photographic record of arrestees from which a later identification could be made.²⁶⁴ As an alternative to satisfy the remaining two prongs, Mervat asserted that the NYPD's policy violated her constitutional rights because it did not provide a reasonable accommodation to her religious beliefs.²⁶⁵ The court found this argument largely persuasive on the basis that Interim Order 29 evidenced that the NYPD could accommodate Mervat's beliefs.²⁶⁶ Since the NYPD had no rational basis for refusing to accommodate Mervat's religious beliefs and preventing her from being photographed without a head covering by a female officer, the court permitted the case to proceed on the merits.²⁶⁷ Ultimately, in February 2018, the NYPD settled the case with Mervat and two other Muslim women who had been similarly forced to remove their hijabs to be photographed by male officers while in police custody.²⁶⁸ Arguably, the judiciary played an important role in facilitating this settlement in so far as it recognized that Mervat had a legally cognizable claim against the local police department.

*F. Ali v. Advance America Cash Advance Centers*²⁶⁹

While the prior two cases involved claims against public actors, *Ali v. Advance America Cash Advance Centers* involved legal infractions by a private entity and illuminates the role of the judiciary in this context. Raghdaa Ali, a Muslim American woman, observed a headscarf pursuant to her religious beliefs.²⁷⁰ In June 2014, she visited a local Advance America Cash Advance Center ("AACAC") to secure a money order.²⁷¹ At the entrance, a sign read, "REMOVE HATS AND SUNGLASSES."²⁷² As Ali entered the store, an employee advised that Ali remove her headscarf, which he considered a hat.²⁷³ When she refused to do so, she was barred entry.²⁷⁴ As a result, she sued the business claiming religious discrimination pursuant to the Elliott-Larsen Civil Rights Act ("ELCRA"), a Michigan statute that

263. *Id.* at *7.

264. *Id.*

265. *See id.*

266. *Id.* at *8.

267. *Id.*

268. *See* Ewan Palmer, *Three Muslim Women Receive \$60,000 Each After Being Forced to Remove Hijab for Police Mugshots*, NEWSWEEK (Feb. 28, 2018), <https://www.newsweek.com/three-muslim-women-receive-60000-each-after-being-forced-remove-hijab-police-823622>. [<https://perma.cc/TAW8-2PGA>].

269. *See* *Ali v. Advance Am. Cash Advance Ctrs., Inc.*, 110 F. Supp. 3d 754 (E.D. Mich. 2015).

270. *Id.* at 756.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

prohibits discrimination in public spaces and public services based on protected characteristics such as religion.²⁷⁵ Under the ELCRA, Ali needed to show “disparate treatment or intentional discrimination.”²⁷⁶ Disparate treatment refers to unequal treatment on account of a characteristic protected under law such as race or religion.²⁷⁷ AACAC needed to provide “a legitimate reason for its actions.”²⁷⁸ Lastly, Ali had to demonstrate “that the reasons proffered are pretextual either by showing they lack credibility or by showing that a discriminatory motive was a more likely reason for the action.”²⁷⁹

AACAC argued that its “no hats” policy was designed to ensure the safety and security of its branch office by deterring criminal activity.²⁸⁰ It further explained that Ali attempted to enter a branch office lacking bullet-resistant glass to protect its employees.²⁸¹ The policy against headscarves only applied at those offices.²⁸² As such, AACAC argued that Ali could have performed business while observing her headscarf at another office with bullet-resistant glass.²⁸³ In response, Ali argued that these reasons were, in fact, pretextual.²⁸⁴ The court found that Ali successfully made a *prima facie* case of religious discrimination under ELCRA and that her case could proceed to trial on the merits.²⁸⁵

In sum, in each of the aforementioned cases involving religious attire, courts consistently recognized the rights of Muslim American women to observe the headscarf pursuant to a sincerely held faith belief. State legislatures have also acted to protect First Amendment interests by enacting laws and policies specifically regulating business practices surrounding the production, advertisement, and sale of halal food products. Essentially, US democratic institutions have protected Muslim American faith practices even where it meant checking potential abuses of power by other government agencies, such as the NYPD or the CBP.

VI. RELIGIOUS LAND USE: MOSQUES, CEMETERIES, AND PRIVATE ISLAMIC SCHOOLS

In the Islamic faith, mosques represent important institutions and for Muslim Americans, they embody religious freedom. Notably, the First Amendment allows mosques to serve as a place of worship for Muslim Americans. At a mosque, congregants fulfill the prayer requirement five times a day, led by an imam or religious leader. Mosques also often function

275. *Id.* at 757.

276. *Id.* at 758.

277. *See id.*

278. *Id.*

279. *Ali*, 110 F. Supp. 3d at 758.

280. *Id.* at 759.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

as sites for religious education where parents teach children about the Islamic faith.

However, in contemporary America, mosques are often stereotyped as bastions of religious extremism that propagate militant messages to worshippers.²⁸⁶ Such sentiments persist despite research findings that undermine the violent extremist narrative. Studies examining the relationship between mosque attendance and the resultant impact on adherents have revealed increased levels of adherence to democratic ideals, self-identification as both “Muslim” and “American,” and civic engagement.²⁸⁷ However, from presidential candidates calling for the blanket surveillance of mosques to government informants infiltrating them, opposition to the construction of mosques has become increasingly commonplace. According to public opinion polling from the Public Religion Research Institute, nearly half of Americans feel uncomfortable with having a mosque in their neighborhood.²⁸⁸ According to the Department of Justice, opposition to mosque construction projects make up approximately 40 percent of its cases involving violations of religious land use law.²⁸⁹

Rising anti-Muslim sentiment has had pernicious effects on Muslim organizations, notwithstanding laws designed to protect religious land use. In the US, intersecting federal, state, regional, and local statutes influence how property owners can purchase, sell, and use property.²⁹⁰ This Section focuses primarily on land use and zoning laws. Zoning refers to decisions about the use and development of real estate, and zoning laws constitute the most common form of land use regulation.²⁹¹ State legislatures commonly delegate substantial authority to counties, municipalities, towns, and villages to regulate local land use.²⁹² These local governments create zoning boards with comprehensive maps and regulations to address land use.²⁹³ Boards hold public hearings on all of its decisions, and related laws encourage local government to engage citizens in every stage of the process. Although boards enjoy wide discretion, their determinations cannot be “arbitrary, whimsical,

286. See, e.g., Lauren Green, *Controversy Surrounds Construction of Mosques Across U.S.*, FOX NEWS (last updated June 25, 2015) [<https://perma.cc/L9US-JKRN>].

287. Gabriel A. Acevedo & Ali R. Chaudhary, *Religion, Cultural Clash, and Muslim American Attitudes About Politically Motivated Violence*, 54 J. FOR SCL. STUDY OF RELIGION 242, 248 (2015).

288. See Amelia Thomson-DeVeaux, *Number of U.S. Mosques Doubled in the Past Decade*, PUB. RELIGION RESEARCH INST. (Mar. 1, 2012), <https://www.prii.org/spotlight/number-of-u-s-mosques-doubled-in-the-past-decade/> [<https://perma.cc/E7DY-HEGU>].

289. This information was shared by Eric Treene on behalf of the Department of Justice at the High-Level Forum on Combatting Anti-Muslim Discrimination and Hatred: Positive Narratives to Promote Pluralism and Inclusion. The forum was held at the United Nations Headquarters in January 2017.

290. See Christopher Cataldo, *Discriminating Against the Dead: How to Protect Muslim Cemeteries from Exclusionary Land Use Mechanisms*, 58 B.C.L. REV. 1391 (2017).

291. See Pace University School of Law, Land Use Law Center, *Beginner’s Guide to Land Use Law 4-6* (unpublished manuscript), <https://law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf> [<https://perma.cc/C468-LJSK>].

292. See *id.*

293. See *id.*

or capricious.”²⁹⁴ Religious organizations may challenge and overturn restrictions on religious land use set by boards. As such, local officials and communities play an influential role in dictating the parameters of religious land use.

Upon finding that local zoning boards identified interests such as traffic or aesthetics as a pretext to restrict religious land use, Congress passed the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) in 2000. The federal statute consists of two sections. First, the “substantial burdens provision” prohibits land use regulations that substantially burden the exercise of religion unless the government can survive a strict scrutiny analysis.²⁹⁵ RLUIPA defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief” and explains that “the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”²⁹⁶

Second, RLUIPA prohibits discrimination and impermissible exclusion on the basis of religion by prohibiting three distinct types of regulations: (1) land use regulations that treat a “religious assembly or institution on less than equal terms with a nonreligious assembly or institution” (the equal terms provision); (2) land use regulations that “discriminate[] against any assembly or institution on the basis of religion or religious denomination” (the nondiscrimination provision); and (3) land use regulations that “totally exclude[] religious assemblies from a jurisdiction” or “unreasonably limit[] religious assemblies, institutions, or structures within a jurisdiction” (the exclusions and limits provision).²⁹⁷ In the event that a municipality or township violates these statutory provisions, property owners as well as the federal government have a judicial remedy: a federal cause of action for injunctive or declaratory relief. In the cases below, plaintiffs sought judicial remedies pursuant to the RLUIPA when local officials discriminated against Muslim American institutions by opposing mosque construction projects and other religious land uses. The cases not only demonstrate the challenges confronting Muslim Americans who seek to realize constitutionally protected rights, but the role of US democratic institutions during this struggle.

A. *United States v. County of Culpeper, Virginia*²⁹⁸

The *United States v. County of Culpeper* exemplifies a common legal

294. *See id.*

295. *See* *Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007); *see also* 42 U.S.C. § 2000cc(a)(1)-(2) (2012).

296. *See* 42 U.S.C. § 2000cc(a)(1)-(2) (2012).

297. *See id.* § 2000cc(b)(1)-(3).

298. *See* *United States v. Cnty. of Culpeper*, 245 F. Supp. 3d 758 (W.D. Va. 2017).

dispute involving mosque construction projections today.²⁹⁹ In 2016, the Islamic Center of Culpeper (“ICC”), a nonprofit Muslim organization in Virginia, wanted to build a mosque to help members fulfill their religious beliefs.³⁰⁰ On January 19, 2016, the ICC contracted a one-acre tract in Culpeper County upon discovering that the land could be used for residential and religious use.³⁰¹ However, it did not include traditional septic methods. As such, the ICC needed to apply for a special “pump-and-haul” permit from the County.³⁰² State law and authorities regulated the issuance of these permits, and if the pump-and-haul operation lasted longer than a year, the operation required the supervision of the local government.³⁰³ The County’s board enjoyed wide discretion and granted all such twenty-six permit applications over the twenty-four year period preceding the ICC application.³⁰⁴

In February 2016, the ICC applied for the special permit while indicating that the land would be used for “praying and meetings.”³⁰⁵ The County scheduled a related hearing for the next month. Officials described the matter as “routine” and publicly stated that the ICC’s application satisfied state law and local protocols. Routine administrative processes commenced until a local civic leader learned of the mosque construction project and began contacting local county officials, delaying the application process.³⁰⁶ For instance, the ICC was required to resubmit its application, which diverged from traditional board practice. Soon, members of the public began expressing their opposition to the mosque construction project while expressing anti-Muslim sentiment, referencing terrorism and 9/11. Some county officials believed that the application received heightened scrutiny due to the ICC’s religious affiliation. One official even observed, “It just keeps coming back to the same question— why is this request subject to more scrutiny and tighter interpretation of the policy than all the past requests?”³⁰⁷ While officials determined that the ICC qualified for a permit, the board voted to deny it during a public hearing on April 2016.³⁰⁸ Upon doing so, they alleged that the pump-and-haul services should be used for

299. *See id.*

300. Muslim Americans, similar to other religious communities, may form commercial organizations (such as corporations, sole proprietorships, general partnership, limited liability partnership, and limited liability companies) or nonprofit organizations (which are typically organized as corporations) to obtain legal personality. Commercial entities and nonprofit corporations are formed under the law of the state in which they are formed. Most religious and faith groups are organized as nonprofit corporations to obtain favorable tax-exempt status.

301. *Culpeper*, 245 F. Supp. 3d at 762.

302. *Id.*

303. *Id.*

304. *Id.* at 763.

305. *Id.*

306. *See id.*

307. *Id.*

308. *Id.* at 764.

“emergencies” rather than “a commercial or church use.”³⁰⁹ The Board’s decision drew public applause from attendees who opposed the ICC’s mosque project.³¹⁰

The US Department of Justice (DOJ), the federal executive agency tasked with investigating RLUIPA violations, thereafter instituted a federal lawsuit pursuant to RLUIPA.³¹¹ The DOJ explained that the ICC’s members observed orthodox religious practices such as five daily prayers, but the members had to travel forty-five minutes to the nearest mosque. The mosque, due to its small space, could not accommodate religious holidays, study circles, or other gatherings. Moreover, the space lacked a washing facility for members to perform ablution (e.g. ritual cleansing preceding prayer).³¹² Thus, the DOJ argued that the County’s denial of the special permit “imposed a substantial burden on the ICC’s religious exercise.”³¹³ The County countered by requesting the Court to dismiss the suit as baseless. Instead, the Court found that the permit denial appeared to be based on religious hostility while substantially burdening the ICC’s ability to exercise its religion.³¹⁴ The fact that the County had granted all such twenty-six permit applications over the twenty-four-year period preceding the ICC application proved particularly probative. As such, the court allowed the suit to proceed.³¹⁵

Ultimately the case settled. Pursuant to the settlement, the County granted the special permit, agreed not to cause any further delays to construction of the mosque, and also paid \$10,000 to ICC for out-of-pocket expenses related to the ordeal. On its own volition, the County also took additional remedial steps such as posting non-discrimination RLUIPA notices in its Planning and Zoning Department, creating a RLUIPA complaint form and process, placing a page-long insert into all land use application packets explaining the County’s RLUIPA’s obligations, and training County employees about religious discrimination. Arguably, the DOJ lawsuit facilitated such a favorable remedy by bolstering ICC’s claims of discriminatory treatment under RLUIPA. As a federal executive agency, the DOJ prevented a local town from discriminating against a marginalized faith group.

*B. The Islamic Society of Basking Ridge v. Township of Bernards,
New Jersey*³¹⁶

In another RLUIPA case, the Islamic Society of Basking Ridge

309. *Id.*

310. *See id.*

311. *See id.* at 761.

312. *See id.* at 762.

313. Complaint at 10, *United States v. Cnty. of Culpeper*, 245 F. Supp. 3d 758 (W.D. Va. 2016) (No. 3:16cv00083).

314. *See Culpeper*, 245 F. Supp. 3d at 761.

315. *See id.* at 763.

316. *See Islamic Soc’y of Basking Ridge v. Twp. of Bernards*, 226 F. Supp. 3d 320 (D.N.J. 2016).

confronted religious animus to its mosque construction project but in New Jersey, from both local government officials and community members. The Islamic Society of Basking Ridge (ISBR), a nonprofit Muslim American institution, did not have a mosque in its town. Without a mosque, ISBR members could not hold daily prayers, run a Sunday school, hold special events, attract an imam, or engage in other important religious activities. To host Friday afternoon prayer, they had to rent a local community center.³¹⁷ Thus, in November 2011, the ISBR purchased property in Bernards Township to build a mosque. Under the local land use regulations, building houses of worship in the Township constituted a “permitted (land) use” rather than a protected use. At least ten houses of worship in addition to commercial buildings already existed within the residential zone.³¹⁸ Regardless, ISBR had to apply for zoning approval for the construction of its mosque. In advance of applying, ISBR held two open houses to discuss its plan with the larger community. It also consulted with county officials and incorporated feedback into its plan and application. In April 2012, ISBR submitted its zoning application. In proposing the construction of a mosque on its property, the application described a “prayer hall, *wudu* room, a multipurpose room, an entry gallery, a kitchen and an administrative office.”³¹⁹ It also included fifty parking spaces for the building’s estimated occupancy of 150 people.³²⁰

Over three and a half years, the Board held thirty-nine hearings on the ISBR application, diverging from traditional practice.³²¹ Also, similarly to *Culpepper*, community members attended the hearings to voice their opposition. On one occasion, an attendee urged others to “continue to attend [Board] meetings and create awareness among . . . neighbors” and warned “about the Muslim practice of ‘taqiyya,’ [which is] deceit, condoned and encouraged in the Quran.”³²² A local community group, the Bernards Township Citizens for Responsible Development (BTCRD), hired an attorney to represent its interests and objections to the ISBR project at the hearings.³²³ The Board refused to place time limits on the speakers, resulting in delays and additional expenses for ISBR.³²⁴ Community members expressed their opposition in public flyers, social media, and websites. Further, they vandalized ISBR’s property by stomping and placing “ISIS” stickers on the mailbox.³²⁵

In addition, the Board subjected ISBR to suspect practices, processes, and demands. The subject of off-street parking received unprecedented

317. *See id.* at 325–27.

318. *Id.* at 326.

319. *Id.* at 327.

320. *See id.*

321. *Id.* at 329.

322. *Id.* at 328.

323. *Id.* at 328–29.

324. *See id.*

325. *Id.* at 327.

attention. According to the local town parking ordinance, “churches, auditoriums [and] theaters” needed one parking space for every three seats.³²⁶ Previously, the Board applied the three-to-one parking ratio to all houses of worship, including two local synagogues. It also accommodated requests for fewer parking spaces than required by regulation with downward variances.³²⁷ But it refused to accommodate ISBR. ISBR’s original application complied with the three-to-one ratio, providing fifty parking spaces for its 150 congregants.³²⁸

However, in December 2012, BTCRD objectors argued that the parking ordinance’s three-to-one ratio did not apply “because a mosque is not a church.”³²⁹ BTCRD hired a traffic engineer who claimed that the mosque required 107 parking spaces—more than twice the size of what would be acceptable for a church or synagogue.³³⁰ The Board found that argument persuasive, reasoning that traffic patterns for Christian churches varied from Muslim mosques.³³¹ In January 2013, the Board issued a memorandum stating that the three-to-one ratio applied only to Christian churches and required ISBR to construct parking spaces far exceeding the three-to-one ratio.³³² The Board’s decision eventually forced ISBR to alter its site plan, and the Board then used those alterations as grounds to deny ISBR’s application (even though similar changes by a church were approved).³³³ Even in its denial, the Board strayed from prior practice. Previously, the Board provided applicants an opportunity to resubmit revised plans, but the Board denied that opportunity to ISBR outright. The Board had not denied a site plan application for a house of worship since 1994.³³⁴

In March 2016, ISBR sued the Board under RLUIPA as well as federal and state constitutions. ISBR argued that the board violated the RLUIPA’s nondiscrimination provision by applying the rules about off-street parking differently on account of religion. It argued that the parking ordinance’s term “churches” applies to places of worship for any religion, including churches, synagogues, and mosques. While the ordinance remained facially neutral and generally applicable, the Board’s application of the ordinance discriminated against mosques by interpreting the term “churches” to intentionally exclude Muslim mosques as distinct from Christian churches. As such, according to ISBR, the Board showed express anti-Muslim hostility.³³⁵ The Board responded by stating that they treated mosques differently due to the “different traffic patterns, amounts of vehicles[,] and peak demand times”

326. *See Islamic Soc’y of Basking Ridge*, 226 F. Supp. 3d at 329.

327. *Id.* at 330.

328. *See id.*

329. *Id.* at 331.

330. *See id.* at 332.

331. *See id.*

332. *Id.*

333. *See id.*

334. *See id.* at 330–33.

335. *See id.*

surrounding the mosque.³³⁶ In essence, they conceded differential treatment.

On November 22, 2016, prior to the court's ruling, the DOJ also filed a lawsuit against the town, which lent further credence to ISBR's discrimination claims. Specifically, the DOJ argued that the Board's denial of ISBR's application constituted religious discrimination by applying distinct application standards and procedures, which imposed a substantial burden on ISBR members who could not fulfill their faith convictions without a mosque.³³⁷

The following month, the court ruled in favor of the mosque.³³⁸ The court ultimately found that the Board's interpretation of the parking ordinance's text violated the RLUIPA's prohibition on express discrimination on the basis of religion.³³⁹ The board discriminatorily applied a different legal standard on account of ISBR's Islamic faith. Specifically, local officials conceded that they applied a 3:1 parking ratio to Christian churches but not to Muslim mosques despite the contrary definition in the ordinance.³⁴⁰ The court made clear that the First Amendment prohibited towns and cities from applying laws differently among various faith groups.³⁴¹ The court directed a favorable judgment for the mosque *without a trial*. As a result of federal executive and judicial actions, Bernards Township agreed to pay the mosque \$3.25 million to settle the case.

C. *United States v. Bensalem Township, Pennsylvania*³⁴²

As in the cases above, in *United States v. Bensalem Township, Pennsylvania*, the DOJ again sued on behalf of the minority Muslim faith community in response to official abuses by local government officials. The Bensalem Masjid, a nonprofit Muslim American institution, did not have a mosque and consequently held Friday afternoon prayer in a fire hall leased by another organization.³⁴³ Since the fire hall was not a mosque, members could not properly adhere to their faith practices.³⁴⁴ In 2008, members of the Bensalem Masjid began searching for property to build a mosque.³⁴⁵ In 2012, after a lengthy search, they located three adjoining properties in Bensalem Township on which they could build their mosque and entered into a lease with an option-to-purchase contract.³⁴⁶

The Bensalem Township regulated land use by zoning its districts in the

336. *Islamic Soc'y of Basking Ridge*, 226 F. Supp. 3d at 347.

337. See Complaint, *United States v. Twp. Of Bernards*, No. 3:16-cv-08700-MAS-LHG (D.N.J. Nov. 22, 2016).

338. See *id.*

339. See *The Islamic Soc'y of Basking Ridge*, 226 F. Supp. 3d at 320.

340. See *id.* at 339.

341. See *id.*

342. See *United States v. Bensalem Twp.*, 220 F. Supp. 3d 615 (E.D. Pa. 2016).

343. *Id.* at 618.

344. See *id.*

345. *Id.*

346. See *id.* at 617-18.

following way: (1) the Institutional (“IN”) zoning district, (2) the R–A residential zoning district, (3) the R–11 residential zoning district, and (4) the Business Professional (“BP”) zoning district.³⁴⁷ Under the Bensalem Code, religious institutions were permitted only within the IN district.³⁴⁸ To build on any other district, a religious institution had to gain the approval of the Bensalem Township Zoning Hearing Board.³⁴⁹ To successfully apply for a variance, the Bensalem Masjid needed to demonstrate that: (1) the unique physical characteristics of the property created an unnecessary hardship; (2) the property could not be developed according to the zoning ordinance; (3) it did not create the hardship; (4) a variance would not alter the essential character of the district, nor impair appropriate use of adjacent properties, nor be detrimental to the public welfare; and (5) the variance requested was the minimum variance required to provide relief.³⁵⁰ Notwithstanding these requirements, in practice, the Board applied a far less stringent standard in approving applications.³⁵¹ After consulting with the mayor and the Bensalem Township Council, the Bensalem Masjid submitted its application in 2013.³⁵² Following extensive questioning at six public hearings, the Board denied the application on November 6, 2014.³⁵³

On July 21, 2016, the DOJ on behalf of the Bensalem Masjid, sued the Bensalem Township.³⁵⁴ The DOJ argued that Bensalem Masjid had properly applied for a variance pursuant to land use regulations.³⁵⁵ It further argued that by denying the application, the Township violated the substantial burden, equal terms, nondiscrimination, and unreasonable limitations provisions of RLUIPA.³⁵⁶ First, the federal executive agency contended that the Board’s denial substantially burdened the Bensalem Masjid’s religious exercise.³⁵⁷ Second, the DOJ argued that, in violation of RLUIPA’s equal terms provision, the Board treated the Bensalem Masjid less favorably than nonreligious assemblies.³⁵⁸ Because the land at issue had been zoned for daycare centers, municipal buildings, and universities, the permitted uses would have had much greater impacts on the land than the proposed mosque. Yet, the secular land use required no variance while the religious use did.³⁵⁹ The DOJ pointed to this discrepancy as giving rise to an equal terms claim.³⁶⁰

Third, the DOJ argued that the Board discriminated against the

347. *See id.* at 617.

348. *Id.*

349. *Id.*

350. *Id.* at 617.

351. *See Bensalem Twp.*, 220 F. Supp. 3d at 617.

352. *Id.* at 618.

353. *Id.*

354. Complaint, *United States v. Bensalem Twp.*, No. 16-3938 (E.D. Pa. Jul. 21, 2016).

355. *See id.*

356. *See id.*

357. *See Bensalem Twp.*, 220 F. Supp. 3d at 621–22.

358. *See id.*

359. *Id.* at 621.

360. *Id.*

Bensalem Masjid on the basis of religion.³⁶¹ RLUIPA's nondiscrimination provision seeks to prevent governmental bodies from treating groups differently on the basis of their religious denomination.³⁶² The provision covers the discriminatory application of zoning regulations such as imposing more rigorous approval processes for a religious group, which is what the government contended that the Board did here.³⁶³ For example, the Board required the Bensalem Masjid to attend six hearings but required groups to attend applications in only one hearing. Lastly, the federal government argued that although the Township allowed religious land use in the IN district, no properties within that designation were available at the time of the Bensalem Masjid's purchase.³⁶⁴ The federal government contended that the Township's imposed limitations on religious land use were unreasonable, giving rise to an unreasonable limitations claim pursuant to RLUIPA.³⁶⁵

In response, the Township denied wrongdoing and asked the Court to dismiss the case as baseless.³⁶⁶ However, the Court found that the government had sufficiently stated viable claims pursuant to the substantial burden, equal terms, nondiscrimination, and unreasonable limitations provisions of RLUIPA and allowed the case to proceed.

On September 1, 2017, the Township entered into a settlement agreement that allowed the Bensalem Masjid to build a mosque.³⁶⁷ The agreement also outlined revisions for the zoning regulations, so that the mosque would comply with RLUIPA's requirements.³⁶⁸ Arguably, the federal judiciary facilitated settlement by recognizing cognizable legal claims set forth by the DOJ.

*D. Islamic Society of Greater Worcester v. Town of Dudley,
Massachusetts*

Unlike the prior cases, the *Islamic Society of Greater Worcester v. Dudley* involves a local dispute surrounding a religious cemetery rather than a house of worship. In 2016, the Islamic Society of Greater Worcester ("ISGW"), a nonprofit Muslim American institution, decided to purchase property for a burial ground where its members could bury their dead pursuant to their religious beliefs.³⁶⁹ Members struggled to adhere to this

361. *Id.* at 622.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. See THE UNITED STATES DEPARTMENT OF JUSTICE, *Justice Department and Bensalem Township Settle Lawsuit Over Alleged Religious Land Use and Institutionalized Persons Act Violations*, <https://www.justice.gov/opa/pr/justice-department-and-bensalem-township-settle-lawsuit-over-alleged-religious-land-use-and> [https://perma.cc/65TR-9F33].

368. See *id.*

369. Brian MacQuarrie, *Town of Dudley extends decision on Muslim cemetery*, THE BOSTON GLOBE (July 26, 2016), <https://www.bostonglobe.com/metro/2016/07/26/town-dudley-extends-decision-muslim-cemetery/ntxQLb77SSOhrLcVXmLR4H/story.html> [https://perma.cc/994Z-WGFP].

tradition with the closest Muslim cemetery located over sixty miles away in a neighboring state.³⁷⁰ To mitigate this concern, the ISGW, which served approximately 350 families, purchased farmland in Dudley, Massachusetts to convert it into a closer cemetery.³⁷¹ The location site accommodated 16,000 graves, but the ISGW estimated that only ten to fifteen burials would happen annually.³⁷² The process of converting the farmland into a cemetery required a special permit from the township's zoning board because the farmland had been previously zoned for residential use.³⁷³ The ISGW believed that the zoning board had to approve their application because Massachusetts state law exempted religious institutions from municipal zoning ordinances.³⁷⁴ After the ISGW submitted its application in February 2016, the zoning board scheduled an initial public hearing.³⁷⁵

Town residents objected to the cemetery project at the hearing.³⁷⁶ Some were concerned about the ISGW's Islamic identity. One resident stated, "You want a Muslim cemetery? Fine. Put it in your backyard. Not mine."³⁷⁷ The other attendees applauded that comment. Additional anti-Muslim comments included that the ISGW's burial practices would disturb residents due to the playing of "crazy music."³⁷⁸ Other residents voiced anxieties about water contamination since Muslims bury their dead directly in the ground rather than in caskets.³⁷⁹ Other residents claimed that the cemetery would congest traffic in the neighborhood.³⁸⁰ Meanwhile, the ISGW's members tried to explain that they were fellow compatriots simply trying to find an accessible location to adhere to their religious burial practices.³⁸¹ To assuage the residents' anxieties, the ISGW promised to use vaults for burials and modify the ISGW's site plan.³⁸² At the next hearing in March 2016, residents continued to object to the proposal. One explained, "They don't live in Dudley, they're not bringing anything into Dudley. They're not going to pay

370. *See id.*

371. Brian MacQuarrie, *Islamic group accuses Dudley of blocking Muslim cemetery*, THE BOSTON GLOBE (July 5, 2016), <https://www.bostonglobe.com/metro/2016/07/05/islamic-group-files-suit-accusing-dudley-illegally-blocking-muslim-cemetery-plans/9TpLhOUWs8S3z2QoGmHPbM/story.html>. [https://perma.cc/NKC5-NNWZ].

372. *Id.*

373. *Id.*

374. *See id.*

375. *See id.*

376. *See id.*

377. *Plans for Muslim Cemeteries Face Backlash Across the U.S.*, CBS NEWS (April 25, 2016), <https://www.cbsnews.com/news/plans-for-muslim-cemeteries-face-backlash-across-the-us/> [https://perma.cc/K8RU-QWJA].

378. *Dudley, Mass., warned over vote on proposed Muslim cemetery*, CBS NEWS (Dec. 6, 2016), <https://www.cbsnews.com/news/dudley-massachusetts-vote-on-proposed-muslim-cemetery-ag-warning/> [https://perma.cc/4G64-QYE8].

379. *Id.*

380. *Id.*

381. *See Plans for Muslim Cemeteries Face Backlash Across the US*, CBS NEWS (Apr. 25, 2016) available at <https://www.cbsnews.com/news/plans-for-muslim-cemeteries-face-backlash-across-the-us/> [https://perma.cc/4FCN-SDUC].

382. *Id.*

taxes in Dudley. They basically just want to buy a piece of land and utilize it for whatever they want to do.”³⁸³ A local official similarly claimed that the proposal did not benefit the community, “provid[ing] no tax revenues, jobs[,] or recreational opportunities” to the town.³⁸⁴ When the ISGW’s members reminded the board that the zoning regulations exempt ISGW as a religious institution, a local official argued that the exemption may not apply because the cemetery might qualify as commercial use.³⁸⁵ He also claimed that state law required permission from the local government for all burial ground constructions.³⁸⁶

Ultimately in June 2016, the board denied the ISGW’s application.³⁸⁷ The board claimed that the person who sold the property to the ISGW had not properly notified the town.³⁸⁸ Since the property had special tax status, the town had a right of first refusal to buy it.³⁸⁹ In response, the ISGW filed a lawsuit claiming anti-Muslim bias.³⁹⁰ A few months later in December 2017, the case settled with the town indicating that it would allow the cemetery’s construction.³⁹¹ Specifically, the town agreed not to exercise the right of first refusal over the property and recognized the cemetery as a religious land use exempt from zoning regulations.³⁹² Similar to other cases, this matter exemplifies the agency of the minority faith community in realizing religious liberty and the significance of the rule of law in doing so.

E. *United States v. Pittsfield Charter Township, Michigan*

While many RLUIPA lawsuits involve mosques, and perhaps Muslim cemeteries to a lesser extent, private Islamic schools also enjoy legal protection. A recent case involving the Michigan Islamic Academy (MIA) demonstrates this protection. MIA, a private Islamic school located in Ann Arbor, Michigan, provided both a secular and religious education to Muslim American students from pre-kindergarten throughout high school.³⁹³ By

383. David Boeri, *Battle Continues Over Proposed Muslim Cemetery In Town Of Dudley*, NPR (March 4, 2016), <http://www.wbur.org/all-things-considered/2016/03/04/dudley-rejects-muslim-cemetery> [https://perma.cc/SDB3-EV8K].

384. *Id.*

385. *Id.*

386. *Id.*

387. Brian MacQuarrie, *Dudley Township, Islamic Group at Impasse Over Cemetery*, THE BOSTON GLOBE (October 27, 2016), <https://www.bostonglobe.com/metro/2016/10/27/town-dudley-islamic-group-impasse-over-cemetery/E4R45UIEsSmzP15stxvd9I/story.html> [https://perma.cc/C52A-KL8D].

388. *Id.*

389. *Id.*

390. *Id.*

391. Jennifer Levitz, *Dispute Over a Proposed Muslim Cemetery in Mass. Ends in Settlement*, THE WALL STREET JOURNAL (December 23, 2016), <https://www.wsj.com/articles/dispute-over-a-proposed-muslim-cemetery-in-a-massachusetts-town-ends-in-settlement-1482529899> [https://perma.cc/P5SD-CNB6].

392. *Id.*

393. See Press Release, Department of Justice, Justice Department and Pittsfield Charter Township Resolve Lawsuit Over Denial of Zoning Approval for Islamic School (Sept. 29, 2016) (on file with author).

2008, the school had outgrown its first facility and did not have space for guidance counseling offices, locker rooms, administrative offices, computer or science labs, auditoriums, libraries, kitchens, cafeterias, or gymnasias³⁹⁴ As such, in September 2010, MIA sought to build a new school and purchased a twenty-seven-acre plot of land in Pittsfield.³⁹⁵ Because the land had been zoned as a residential area in which schools could not be built, MIA needed to submit a rezoning application requesting the town's permission to build a school on the land.³⁹⁶ However, after local residents organized to oppose MIA's application, the township denied the application without a sound factual basis.³⁹⁷ In October 2015, the DOJ initiated a lawsuit on MIA's behalf claiming that the township's denial of MIA's application imposed a "substantial burden" on MIA's exercise of religion in violation of RLUIPA.³⁹⁸ Ultimately, the case settled in October 2016.³⁹⁹ The township agreed to allow MIA to construct its new school building, publicize its non-discrimination policies, and conduct RLUIPA trainings for its employees.⁴⁰⁰

In all but one of the cases above, the federal government sued local towns and municipalities that discriminated against Muslim Americans in violation of RLUIPA. Such lawsuits are significant given the current socio-political context confronting Muslim Americans. First, on a symbolic level, they arguably signal official approval for mosques at a time when too many Americans openly oppose such construction projects in their neighborhoods. Second, more practically speaking, they lend credence to religious discrimination claims made under RLUIPA because the DOJ is the federal executive agency statutorily authorized to investigate violations and enforce the federal law. The DOJ's actions also reveal the positive role that US democratic institutions can play in realizing religious liberty for this marginalized minority faith community. In each case, the federal government checked unlawful discrimination by local government officials – ironically, a minority group with whom the US government is so often viewed in oppositional terms, largely due to counter-terrorism policies and practices in the post-9/11 context. Perhaps for these reasons, the DOJ's lawsuits are so striking.

VII. RELIGION IN US PUBLIC SCHOOLS

Historically, the nation's leaders have viewed public schooling as a tool to create good American citizens. From the viewpoints of these leaders, public schools help ensure national unity by assimilating new immigrants into a young and growing republic. Significantly, religious pluralism has

394. *See id.*

395. *See id.*

396. *See id.*

397. *See id.*

398. *See id.*

399. *See id.*

400. *See id.*

long informed state education policies.⁴⁰¹ Although the federal government has provided funding for public schools, it has traditionally played a minimal role in developing public primary and secondary education.⁴⁰² Instead, state and local governments have been responsible for designing their curriculum and school policies.⁴⁰³ Although schools operate and remain funded under the authority of local school districts, the schools remain bound by the US Constitution, particularly by the First Amendment's Free Exercise and Establishment Clauses.⁴⁰⁴ Indeed, the Supreme Court has found that a state's interest in the public education of its citizenry must be balanced against the First Amendment.⁴⁰⁵ Pursuant to the Free Exercise Clause of the First Amendment, public schools and teachers, as government institutions and employees respectively, cannot prohibit Muslim students from observing the headscarf or other religious attire. Additionally, the Court has held that the Establishment Clause creates a clear separation between church and state in public schools, meaning that the state cannot provide financial aid to private faith schools nor interfere in religious matters.

As classrooms across the country become more religiously diverse, the American legal doctrine of secularism in education is becoming more significant. The Supreme Court's modern Establishment Clause jurisprudence began in 1947 with *Everson v. Board of Education* in which the Court it asserted that the Constitution "erected a wall of separation" between church and state that is "high and impregnable."⁴⁰⁶ In *Everson*, a New Jersey school district policy had been reimbursing parents who were transporting their children to private schools, including parochial ones.⁴⁰⁷ The Court wrote, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."⁴⁰⁸ This established an important principle regarding the separation of church and state: that the government cannot directly provide aid to anything related to religion. Nevertheless, the Court in *Everson* upheld the program as constitutional because the district had been reimbursing the parents and not the schools. Relying on a principle of non-discrimination, the Court explained that the state cannot be prohibited from "extending its general state

401. See, e.g., Suzanne Rosenblith, Religion in Schools in the United States, Oxford Research Encyclopedia in Education (2017), <http://oxfordre.com/education/view/10.1093/acrefore/9780190264093.001.0001/acrefore-9780190264093-e-46> [<https://perma.cc/56YS-FEJA>].

402. See Engy Abdelkader, Muslims and Islam in U.S. Public Schools: Cases, Controversies and Curricula, EDUCATION, CITIZENSHIP, NATIONAL IDENTITY AND CORE VALUES IN WESTERN SOCIETIES, BRILL PUBLISHERS (forthcoming) (on file with author).

403. See *id.*

404. *Id.*

405. *Id.*

406. *Everson v. Board of Education*, 330 U.S. 1 (1947).

407. See *id.*

408. *Id.*

law benefits to all its citizens without regard to their religious belief.”⁴⁰⁹ The two principles of non-discrimination and the prohibition of direct aid to religion that emerged from *Everson*. In the 1960s, the Court reinforced the principle of separation between church and state in *Engel v. Vitale*⁴¹⁰ and *Abington v. Schempp*.⁴¹¹

In the cases above, the Court held that mandatory school prayer and devotional Bible reading during school violated the Establishment Clause.⁴¹² As such, school administrators, teachers, and staff could not influence the form, content, or participation in any prayer or other religious activity.⁴¹³ This prohibition encompasses government-sponsored prayer in public schools, even those prayers considered voluntary and non-denominational.⁴¹⁴ Significantly, the First Amendment does not prohibit all religious activity in public schools. For example, no constitutional restrictions exist on public school students praying voluntarily before, during, or after the school day, so long as the government does not sponsor the prayers.⁴¹⁵ Thus, Muslim students can observe their five daily ritual prayers on school premises. Further, students may be released upon their parents’ request to attend religious instruction or activity held outside the school.⁴¹⁶ This allowance may be especially significant for Muslim students who are permitted to leave on Fridays for the ritual congregational prayer. Similarly, these students may constitutionally obtain excused absences in observance of religious holidays such as Eid-ul-Fitr and Eid-ul-Adha.⁴¹⁷

Since the cases above have been decided, the Court has revisited the prohibition on state aid to religion by creating a mechanism to address such church-state controversies in schools. In 1971, the Court in *Lemon v. Kurtzman* struck down a Pennsylvania law that allowed the state to reimburse private schools, including Islamic ones, for teachers’ salaries and educational materials.⁴¹⁸ In doing so, the Court established a three-prong test for the alleged violations of the Establishment Clause for cases involving prayer, meditation, or a moment of silence in public schools.⁴¹⁹ According to the *Lemon* test, an applicable statute, policy, or regulation can only survive a court’s scrutiny if it has (1) a secular legislative purpose; (2) a principal or

409. *Id.*

410. *See Engel v. Vitale*, 370 U.S. 421 (1962).

411. *See Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.* at 262.

417. Official government observance of Muslim holidays is determined at the local level. For example, some school districts close on the two Muslim Eid holidays. In 2015, New York City became the first large metropolis in America to recognize the two Eids as official holidays and closed its public schools in observance of Eid al-Fitr and Eid al-Adha. Municipalities in Michigan, New Jersey, and Massachusetts also made similar moves.

418. *See Lemon v. Kurtzman*, 403 US 602 (1971).

419. *See id.*

primary effect that neither advances nor inhibits religion; and (3) no excessive government entanglement with religion.⁴²⁰ When applying the *Lemon* test's last prong, a court must examine the nature of the state aid provided, the purpose of the institutions benefited, and the resulting relationship between the government and the religious authority.⁴²¹

The *Lemon* test represents the current standard for applying the Establishment Clause in education cases. In more recent cases, however, the Supreme Court has not used the *Lemon* criteria. Instead, the Court has found scholastic practices unconstitutional when the degree of government involvement with religious activity created the impression of a state-sponsored and state-directed religious exercise in a public school.⁴²² The Court has found that when schools sponsor particular religious messages, they communicate to members of the school community that non-adherents are disfavored political outsiders while adherents are favored insiders.⁴²³ This message has negative implications for minority Muslim American students who may feel isolated, stigmatized, or ostracized in a majority-Christian community.

Despite this strong policy against government-sponsored prayers and messages in school, the Equal Access Act has served as a tempering force. The Supreme Court has found that a school building is not a traditional public forum.⁴²⁴ In its First Amendment jurisprudence, the Court has sorted government property into three groups: (1) traditional public forums, (2) designated public forums, and (3) non-public forums.⁴²⁵ The type of forum dictates the level of scrutiny used to determine the constitutionality of a speech restriction.⁴²⁶ Thus, this critical "forum analysis" often proves dispositive of a case's outcome. The first category, the traditional public forum, refers to areas that have conventionally been employed by the public for assembly and exchange of ideas, such as public streets, sidewalks, and parks.⁴²⁷ In a traditional public forum, a court must subject a speech limitation to strict scrutiny.⁴²⁸ The designated public forum, the second category, refers to property such as municipal meeting rooms, public university meeting facilities, and school board meeting rooms.⁴²⁹ Here, the same legal standard of strict scrutiny governs.⁴³⁰ Essentially, this means that a court will only uphold time, place, and manner restrictions if the

420. *Id.*

421. *Id.* at 608.

422. *Id.*

423. *Id.* at 622.

424. *Id.*

425. *Id.*

426. *Id.*

427. See Engy Abdelkader, *Savagery in the Subways: The First Amendment, Anti-Muslim Ads and the Efficacy of Counterspeech*, 21 ASIAN AM. L.J. 43 (2014).

428. *See id.*

429. *Id.*

430. *Id.*

restrictions meet strict scrutiny.⁴³¹ Finally, the third category, non-public forums, refers to government property that do not enjoy the same degree of First Amendment protections as found in a traditional public forum.⁴³² Examples of non-public forums include airport terminals, military bases, restricted access military stores, and jailhouse grounds.⁴³³ When dealing with a non-public forum, the standard differs and speech limitations need only be reasonable and viewpoint-neutral.⁴³⁴

Because schools do not constitute traditional public forums, the state may impose reasonable regulations involving the time, place, and manner of speech on school premises so long as the restrictions remain content-neutral. While the Court has held that students do not shed their constitutional rights to freedom of speech and expression at the schoolhouse door, it has explained that school administrators can manage their affairs without judicial oversight of minute details. As such, schools may censor some speech to prevent a substantial threat of disruption—even if the government would not ordinarily be able to restrict such speech outside of the school context. According to the Equal Access Act, once a public secondary school permits a non-curriculum student group to meet on school grounds during non-instructional time, the school has created a limited open forum. As such, it cannot deny similar opportunities to other student groups on account of the entity's religious speech content. Thus, Muslim student associations must be treated equally as other student groups.

Notwithstanding these constitutional protections, Muslim students may continue to face political, social, and cultural challenges in public schools. Some struggle to befriend classmates from different religious backgrounds. On the playground, they may experience social hostilities such as being ignored or mocked by peers. Some students have reported being verbally abused or physically assaulted by schoolmates, teachers, and administrators.⁴³⁵ In addition to this overt discrimination, Muslim students also suffer from implicit forms of bias and stereotypes.

Notably, when discriminatory harassment happens on account of a student's religion, race, national origin, gender, or disability, the school must respond to address the conduct. Administrators must respond particularly when the harassment becomes so severe, pervasive, or persistent that the harassment fosters an environment that interferes with or limits a student's ability to perform well.⁴³⁶ If the harassment continues, parents and students can file a formal grievance with the Civil Rights Division of the DOJ.⁴³⁷ The

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. See, e.g., Jamal Ahmad, *Arab American parents' perceptions of their children's experience in the USA: a qualitative study*, *Early Child Development and Care* (2017).

436. 42 U.S.C. § 2000(d) (2012).

437. See U.S. Department of Justice, *How to File A Complaint* (June 14, 2018), <https://www.justice.gov/crt/how-file-complaint#three> [<https://perma.cc/K2RD-G4JF>].

DOJ has jurisdiction over these claims pursuant⁴³⁸ to Title IV of the Civil Rights Act of 1964 (Title IV), a federal law prohibiting recipients of federal financial assistance such as public schools from discriminating on the basis of religion.⁴³⁹

Overall, this Section illustrates how legislative and judicial actions that did not involve Muslim Americans, have positively secured the group's religious liberty in public education. This reality serves as an important reminder that the religious liberty of one group or individual will likely have a far greater impact than anticipated. As such, faith groups should act on principle irrespective of the prospective litigant's religious identity, beliefs, or practices. While understandable that strategic interests often prompt communities into advocacy and organizing, religious groups should recognize the manner in which those interests often intersect in the legal arena of religious liberty.

VIII. FAITH PRACTICES IN THE WORKPLACE

Both federal and state statutes protect private and public employees against religious employment discrimination. Many states pattern their non-discrimination laws off of the federal provisions in Title VII. Specifically, Title VII bars religious discrimination in compensation and other terms, conditions, or privileges of employment⁴⁴⁰ Pursuant to Title VII, employers must accommodate faith-based practices—such as religious attire or ritual prayer—unless they can show that reasonably accommodating a religious observance would create an undue hardship to business.⁴⁴¹

In deciding such religious discrimination claims, courts generally adhere to a particular legal framework. First, the complainant must prove by the preponderance of the evidence a prima facie case of discrimination.⁴⁴² Complainants must demonstrate a sincerely held religious belief that conflicts with an employer's policy, notification to the employer of said conflict, and termination for non-compliance.⁴⁴³ The burden then shifts to the employer to demonstrate that an undue hardship—more than de minimis costs to the business—would result if the employer accommodated the employee's beliefs.⁴⁴⁴ To prove undue hardship, the employer needs to demonstrate how much cost or disruption the employee's proposed accommodation would involve.⁴⁴⁵ If the employer meets its burden, the burden shifts back to the complainant who must demonstrate pretext in the

438. 42 U.S.C. § 2000(d) (2012).

439. *Id.*

440. *Id.*

441. *See id.*

442. *See generally*, AMERICAN BAR ASS'N, RELIGIOUS DISCRIMINATION LAW (2014).

443. *Id.*

444. *Id.*

445. *Id.*

employer's position that merely veiled the employer's unlawful practices.⁴⁴⁶

Prior to filing a Title VII lawsuit, however, an employee must file a discrimination complaint within 180 days of the alleged discriminatory acts with the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces Title VII.⁴⁴⁷ The agency investigates all charges and can sue on behalf of aggrieved individuals. Individuals also may sue, but only after the EEOC has issued a "notice of right to sue," generally upon concluding its investigation.⁴⁴⁸ Significantly, the employee must bring a lawsuit within ninety days after receiving a right-to-sue letter.⁴⁴⁹ Without first exhausting the federal administrative process, the court lacks jurisdiction over the lawsuit.⁴⁵⁰ Similarly, under many state anti-discrimination statutes, an employee must exhaust local administrative remedies prior to seeking judicial review.

The following cases involving an employer's uniform policies and required work schedule. They represent some of the challenges confronting Muslim American employees today, and the role of government institutions in protecting members of the minority faith community.

A. *Muhammad v. New York City Transit Authority*⁴⁵¹

In November 2001, the New York City Transit Authority (NYCTA)—the country's largest mass transit agency—hired Gladys Muhammad as a bus driver.⁴⁵² Pursuant to her Islamic religion, Muhammad wore a headscarf to work every day.⁴⁵³ In July 2002, her manager advised her that she had to either remove her headscarf or wear a company-issued hat on top of the headscarf.⁴⁵⁴ When she objected on religious grounds, Muhammad was transferred to another bus depot where she continued operating a bus without incident until November 2003.⁴⁵⁵ In September 2002, the NYCTA published guidelines set to expire on May 1, 2003, which provided that: "Depot logo caps are optional. Depot caps may only be worn with the bill of the cap facing forward."⁴⁵⁶ The guidelines made no mention of religious headgear. In April 2003, an update to the guidelines provided: "Uniform hats/Depot logo caps.

446. *Id.*

447. U.S. Equal Employment Opportunity Commission, *Filing a Lawsuit* (2019), <https://www.eeoc.gov/employees/lawsuit.cfm> [<https://perma.cc/RN33-HDG8>]; *see also* U.S. Equal Employment Opportunity Commission, *Time Limits for Filing a Charge* (2019), <https://www.eeoc.gov/employees/timeliness.cfm> [<https://perma.cc/NJH7-2XJZ>]. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Muhammad v. New York City Transit Auth.*, 52 F. Supp. 3d 468 (2014).

452. *See id.* at 473–74.

453. *Id.*

454. *Id.*

455. *Id.* at 474.

456. *Id.*

If an operator elects to wear any form of headwear, NYCTA-issued uniform hats, such as the depot logo caps, shall be worn (with the bill of the cap facing forward).⁴⁵⁷ In November 2003, Muhammad received a citation for violating the uniform policies because she refused to remove her hijab or wear the company hat.⁴⁵⁸ When she attempted to explain, her supervisor demanded that she prove the sincerity of her religious beliefs.⁴⁵⁹ In response, she provided a letter from the religious leader of her mosque explaining the requirement to wear “a modest head covering.”⁴⁶⁰ For the following two weeks, Muhammad only received janitorial assignments.⁴⁶¹ She filed a grievance with her union but continued to receive only cleaning tasks.⁴⁶² In October 2003, she had filed a complaint with the EEOC alleging religious discrimination.⁴⁶³ Soon thereafter, in December 2003, Muhammad was involuntarily transferred to “shifting” duty, which entailed moving empty buses back and forth within and between bus depots.⁴⁶⁴ Her contact with Transit Authority customers ceased, and she continued to work as a “shifter” until her termination in 2005.⁴⁶⁵

Prior to her termination, Muhammad sued the NYCTA in June 2004, alleging violations of the First Amendment and Title VII under three separate theories of discrimination: (1) failure to accommodate, (2) disparate impact, and (3) intentional discrimination.⁴⁶⁶ Title VII reads, in relevant part:

- (a) It shall be an unlawful employment practice for an employer—
- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
 - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.⁴⁶⁷

Here, “religion” is defined to include “all aspects of religious observance and practice, as well as belief”⁴⁶⁸ Read in conjunction with the Free Exercise Clause, Title VII prohibits the NYCTA from treating Muhammad differently on the basis of her religious beliefs or practices. Further, Title VII requires

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Muhammad*, 52 F. Supp. 3d at 468.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.* at 475.

466. *See id.*

467. 42 U.S.C. § 2000(e) (2012).

468. *See id.*

the NYCTA to make reasonable allowances to accommodate her religious convictions. In response, the NYCTA argued that Muhammad had not made out a prima facie case of religious discrimination pursuant to Title VII.⁴⁶⁹ The court examined each of the religious discrimination theories asserted.⁴⁷⁰

1. Failure to Accommodate Theory

To make out a prima facie case of religious discrimination on a failure to accommodate theory, the federal court explained that Muhammad had to demonstrate that: “(1) she ha[d] a *bona fide* religious belief that conflict[ed] with an employment requirement, (2) she informed the employer of this belief, (3) she was disciplined for failure to comply with the conflicting employment requirement.”⁴⁷¹

Regarding the first prong, the NYCTA argued that Muhammad lacked a sincerely held religious belief. First, Muhammad wore a winter hat over her headscarf in cold weather “without apparent theological constraint.”⁴⁷² As such, it argued that a “bona fide religious belief” had not prevented her from complying with the NYCTA’s uniform policy.⁴⁷³ Second, the NYCTA disputed Muhammad’s interpretation of Qur’anic scripture mandating the headscarf.⁴⁷⁴ It explained, “In recent years, [our attorney] ha[s] conducted a good deal of research into the question of the use, or non-use, of the headscarf . . . by Muslim women when in public” and noted that in the streets of “Cairo, Casablanca, and Istanbul—all cities with overwhelming Muslim populations—a passerby could confirm” that some Muslim women do not wear headscarves.⁴⁷⁵ In support of this alleged norm, the NYCTA pointed to other Muslim women who wore hats over their headscarves and submitted related photos of those women.⁴⁷⁶ Muhammad countered that she had observed the hijab for more than twenty years and believed “that wearing a khimar is required by [her] religion and that as a sacred garment [she] must not desecrate [her] khimar [with either a hat or corporate logo].”⁴⁷⁷ She also cited the letter from her mosque, which she had previously provided to her supervisor, stating that she was “an active member in good standing at Muhammad Mosque No. 7” and that wearing “a modest head covering” is dictated by Chapter 24, Verse 31 of the Quran, which provides: “Let them wear their head coverings over their bosoms.”⁴⁷⁸

To determine whether or not Muhammad’s religious belief was sincere, the court focused on whether Muhammad was “fraudulently hiding secular

469. *Id.*

470. *Muhammad*, 52 F. Supp. 3d at 476.

471. *Id.* at 480.

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.*

476. *See id.* at 481.

477. *Id.*

478. *Id.* (quoting *Philbrook v. Ansonia*, 757 F.2d 476, 481–82 (2d Cir. 1985)).

interests behind a veil of religious doctrine,” and not on “the fact finder’s own idea of what a religion should resemble.”⁴⁷⁹ The court found that Muhammad successfully demonstrated that she held a sincere religious belief that prevented her from removing or covering her headscarf.⁴⁸⁰ It rejected the NYCTA’s contention that all Muslim women must adhere to the same interpretation of religion.⁴⁸¹ Nor was the court convinced that Muhammad’s hat worn in cold weather adequately showed that she was using her religious beliefs as a façade to hide her true “secular interests.”⁴⁸²

With the second prong regarding notice not at issue, the court next turned to the third prong. The third prong involved whether Muhammad was disciplined for not conforming with her employer’s uniform policy. The NYCTA claimed, “By conscious choice, management chose *not* to discipline her for violating that policy.”⁴⁸³ In response, Muhammad countered that her involuntary transfer to the bus depot where she was assigned janitorial tasks constituted discipline.⁴⁸⁴ The court found her argument persuasive. It reasoned that she made out a prima facie case on a theory of a failure to accommodate by showing that her sincerely held religious beliefs, of which her employer was advised, conflicted with the NYCTA’s uniform policy and that she was consequently disciplined for her non-compliance thereof.⁴⁸⁵

Once Muhammad demonstrated a prima facie case, the burden shifted to NYCTA to prove that it would have suffered an “undue hardship” if it had offered her a “reasonable accommodation.”⁴⁸⁶ The NYCTA asserted that it had provided such a reasonable accommodation by transferring Muhammad to the bus depot.⁴⁸⁷ The court found this argument unpersuasive, however, reasoning that an accommodation is not reasonable “if it cause[s] [an employee] to suffer an inexplicable diminution in his employee status or benefits In other words, an accommodation might be unreasonable if it imposes a significant work-related burden on the employee without justification”⁴⁸⁸ Here, Muhammad demonstrated that she experienced a substantial diminution of status and benefits when she was transferred to the bus depot.⁴⁸⁹ The court found that her case could proceed to trial on the merits of this theory.⁴⁹⁰

479. *Id.*

480. *Muhammad*, 52 F. Supp. 3d at 481.

481. *Id.*

482. *Id.* at 482.

483. *Id.*

484. *Id.*

485. *See id.* at 483.

486. *Id.*

487. *Id.*

488. *Id.* at 483–84 (quoting *Baker v. The Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006)).

489. *Id.*

490. *Muhammad*, 52 F. Supp. 3d at 483–84.

2. *Disparate Impact Theory*

Discrimination by disparate impact occurs when facially neutral policies or practices have a disproportionately negative effect on protected groups.⁴⁹¹ To establish a prima facie claim of disparate impact, Muhammad had to demonstrate that the NYCTA enacted “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”⁴⁹² Here, the NYCTA transferred at least four Muslim women and a Sikh man for violating the headgear section of its uniform policy.⁴⁹³

In contrast, no employees who violated the policy for secular reasons had been transferred, although sixty-four such violations occurred between 2003 and 2005.⁴⁹⁴ In other words, whereas 100 percent of employees with religious objections were transferred, 0 percent of employees with secular objections were transferred.⁴⁹⁵ The court found that this evidence “on its face[,] conspicuously demonstrates [the headwear policy’s] grossly discriminatory impact” on Muslim women.⁴⁹⁶ As such, the court held that Muhammad made a prima facie showing of disparate impact and that the case should proceed to trial under this theory as well.⁴⁹⁷

3. *Intentional Discrimination Theory*

According to Muhammad’s third theory of discrimination, the NYCTA’s uniform policy violated her right to free exercise of her religion under the First Amendment.⁴⁹⁸ The NYCTA contended that this claim was without merit because its uniform policy was a facially neutral and generally applicable rule subject to rational basis review.⁴⁹⁹ To pass the more lenient rational basis standard, the policy must only be rationally connected to a legitimate government interest.⁵⁰⁰

Relying on the Supreme Court’s decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the court rejected the NYCTA’s claim, finding that the policy was not a facially neutral rule of general applicability.⁵⁰¹ In that case, the Court confirmed that the Free Exercise Clause’s protections arise when a law discriminates against all or some religious beliefs or prohibits conduct that is religiously inspired.⁵⁰² If the law’s purpose is to “infringe upon or restrict practices because of their

491. *Id.* at 485.

492. *Id.* (quoting *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009)).

493. *Id.*

494. *Id.* at 486.

495. *See id.* at 485–86.

496. *Id.* at 486–88.

497. *Id.*

498. *Id.*

499. *Id.*

500. *Muhammad*, 52 F. Supp. 3d at 486–88.

501. *See id.* at 488–89.

502. *Id.*

religious motivation, the law is not neutral and is invalid *unless it is justified by a compelling interest and is narrowly tailored to advance that interest . . .*⁵⁰³ Thus, the Court applied a strict scrutiny analysis as opposed to the more lenient rational basis analysis.⁵⁰⁴

Here, to determine whether the uniform policy was facially neutral, the court pointed to the following explicit language from the NYCTA's uniform policy: "If the employee states that he/she is not permitted to wear anything over the non-[NYCTA] issued headwear for religious reasons, inform the employee that he/she must immediately visit the Depot AGM [] to discuss the matter."⁵⁰⁵ Given the clearly non-neutral language, the court found that rational basis review did not apply.⁵⁰⁶ In addition to the text, the court noted that those with religious objections to the NYCTA's headwear requirements had been transferred to the bus depot.⁵⁰⁷ Thus, the court applied a strict scrutiny analysis. In applying strict scrutiny, the NYCTA's compelling interest in presenting a uniform workplace had to be narrowly tailored to achieve that goal.⁵⁰⁸ The court found that the NYCTA did not demonstrate how the transfer of female Muslim bus drivers to the bus depot was narrowly tailored to achieve that goal, particularly because it adopted an otherwise lenient enforcement of its uniform policies when violated on secular grounds.⁵⁰⁹ The NYCTA also proffered no explanation how a subtle change to its policy allowing religious headscarves that matched standard-issued uniforms would have hindered its ability to present a uniform workforce.⁵¹⁰ As such, the court permitted the case to move forward on this theory.⁵¹¹

B. *Mohamed v. 1st Class Staffing, Ohio*⁵¹²

This case involved fourteen refugees from Somalia and Senegal who were practicing Sunni Muslims.⁵¹³ They were all former or current employees at Jacobson, a logistics company that offered transportation, distribution, and warehousing and packaging services.⁵¹⁴ As line associates, the complainants worked on the production lines, removing cans of pet food from cartons and repackaging them for retail sale. The complainants worked Monday through Thursday from 4:00 p.m. to 2:30 a.m. with one hundred to 150 other employees.⁵¹⁵ They received two fifteen-minute breaks and a

503. *Id.* (quoting *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

504. *Id.*

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.*

509. *See id.* at 490.

510. *Muhammad*, 52 F. Supp. 3d at 490.

511. *Id.*

512. *Mohamed v. 1st Class Staffing*, 286 F. Supp. 3d 884 (S.D. Ohio 2017).

513. *Id.* at 888.

514. *Id.*

515. *Id.*

thirty-minute lunch break.⁵¹⁶

Muslim workers have historically used their breaks to perform prayers.⁵¹⁷ When complainants began working, as many as twenty to thirty employees used three to five minutes of their breaks to perform a prayer without objections from their supervisors. During work, complainants performed two of the five daily ritual prayers: *maghrib*, or sunset prayer, and *isha*, or evening prayer.⁵¹⁸ While the sunset prayer is performed after the sun has completely set, the evening prayer is performed after twilight.⁵¹⁹ The prayer area, required to be a clean space free from distraction, was located near the break room and was twenty feet by thirty feet in size.⁵²⁰ In January 2014, a supervisor observed a Muslim employee praying in the forklift aisle near the prayer space.⁵²¹ Citing safety concerns, management then prohibited prayer in that area and suggested that the Muslim workers pray in the break room, the reception, the fenced-in-patio area, or the parking lot outside.⁵²² They explained to Muslim workers that the change was due to “a safety issue” involving the forklifts, increased production, and lack of space.⁵²³

Despite the announced change, however, the employees continued to pray in their usual spot, culminating in a commotion when other employees attempted to stop them.⁵²⁴ When the supervisors attempted to address the situation by highlighting alternative prayer spaces, the employees identified the following concerns: (1) not being able to concentrate because of the large number of employees using the break room; (2) not having a clean space to pray because of people eating food nearby; (3) not having enough space to pray, particularly for men and women to pray separately; and (4) the temperature being too cold to pray outside.⁵²⁵ Ultimately, a supervisor instructed the employees that they should return to the production line or leave and even threatened termination of their employment if they left work to pray.⁵²⁶ Many chose to leave while claiming that if they could not pray on the site, they would “no longer work for this company.”⁵²⁷ None of the complainants returned to work that evening.⁵²⁸ The supervisors saw this as the employees abandoning their jobs, and 1st Class Staffing treated them as having been terminated.⁵²⁹ In fact, when several complainants attempted to return to work the following day, they were advised, “If you are from last

516. *Id.*

517. *Id.*

518. *Id.* at 889.

519. *Id.*

520. *See id.*

521. *Id.*

522. *Mohamed*, 286 F. Supp. 3d at 889.

523. *See id.* at 890.

524. *Id.*

525. *See id.* at 894.

526. *Id.* at 893.

527. *Id.* at 894.

528. *Id.*

529. *Id.*

night's shift, you can't come back."⁵³⁰

The complainants filed a lawsuit under Title VII, alleging religious discrimination and retaliation against Jacobson and 1st Class Staffing.⁵³¹ Their claim was premised on the theory that Jacobson had failed to provide a reasonable accommodation when it prohibited Muslim employees from using an area of the production floor for daily ritual prayers.⁵³² To succeed on the merits under a failure to accommodate theory, as previously stated, the complainants had to demonstrate a prima facie case of religious discrimination by showing that they: (1) held a sincere religious belief that conflicted with an employment requirement, (2) had informed the employer about the conflict, and (3) were discharged or disciplined for failing to comply with the conflicting employment requirement.⁵³³ Here, the parties agreed that complainants satisfied the first two prongs.⁵³⁴

Regarding the third prong, the complainants argued that the employer eliminated their prayer space without warning and that the alternate spaces were inappropriate and unacceptable. Since the employees learned about this only shortly prior to prayer, they were left with the following choices: (1) pray in an alternate site offered by Jacobson, but do so knowing that the prayer performed would not satisfy their religious standards; or (2) leave the workplace to go pray elsewhere, but do so under the threat of losing their jobs.⁵³⁵ When they chose to pray elsewhere, they were terminated.⁵³⁶ The complainants argued that this sequence of events satisfied the third prong.⁵³⁷ Jacobson and 1st Class Staffing countered that the complainants had voluntarily walked away from their jobs and were not discharged or disciplined.⁵³⁸ As such, they could not satisfy the third prong.⁵³⁹

Ultimately, the court found that the complainants were in fact terminated on the basis of their absence to perform their prayers.⁵⁴⁰ It described how the employer confirmed to the complainants who later called or came in that they had been terminated.⁵⁴¹ Thus, the court held that a prima facie case for discrimination had been established.⁵⁴² The burden then shifted to the employer to show that it was unable to reasonably accommodate the employees without undue hardship.⁵⁴³ Here, the employer asserted that it had reasonably accommodated the complainants' religious beliefs by providing

530. *Id.*

531. *Id.*

532. *Mohamed*, 286 F. Supp. 3d at 894.

533. *See id.* at 901.

534. *Id.*

535. *See id.* at 888.

536. *Id.* at 894.

537. *Id.* at 902.

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.*

542. *See Mohamed*, 286 F. Supp. 3d at 903-06.

543. *Id.*

alternate sites.⁵⁴⁴ It further asserted that “bilateral cooperation” was necessary in such circumstances.⁵⁴⁵ Rather than making some effort to cooperate with the attempt at accommodation, the complainants had simply abandoned their work.⁵⁴⁶ The complainants countered that the employer had not given them proper notice about the elimination of the old prayer spot, failed to consult them about suitable alternate prayer sites, presented the alternatives in a take-it-or-leave-it fashion, and refused to budge when they raised their objections at the break.⁵⁴⁷ Ultimately, the court ruled that the case should proceed to trial for resolution.⁵⁴⁸

CONCLUSION

One may extract myriad insights from the case studies and related analysis provided above. First, the initial discussion surrounding the notorious Muslim ban highlights the significance of civic engagement. According to research evidence from the Institute for Social Policy and Understanding, Muslim Americans constitute the least likely faith-based group to vote in elections due to apathy. Only by casting a ballot or running for office can members of marginalized minority communities influence that process more effectively. Anecdotal evidence⁵⁴⁹ suggests that Muslim Americans are increasingly responding to this realization by enhancing voter registration efforts and launching political campaigns locally and nationally.⁵⁵⁰

Second, the Separation of Powers doctrine needs to be situated in a larger political context. One’s political affiliation or persuasion may serve as a lens through which to understand a spectrum of issues—such as religious liberty, national security, and immigration. Arguably, the constitutional structure envisioned by the Framers of the Constitution becomes undermined when a particular party dominates all three government branches. Consider, for instance, the Ninth Circuit’s judicial role repeatedly checking executive abuses of power in *Washington v. Trump*⁵⁵¹ and *Hawaii v. Trump*.⁵⁵² The Ninth Circuit has long enjoyed a reputation for its liberal persuasion. But, in March 2017, the court’s Republican-appointed judges broke ranks with the three-judge-panel that decided those cases and issued an unsolicited filing

544. *Id.*

545. *Id.* at 909.

546. *Id.*

547. *See id.*

548. *Id.*

549. *See, e.g.,* Philip Marcelo & Jeff Karoub, *Muslim candidates run in record numbers but face backlash*, THE ASSOCIATED PRESS (July 16, 2018), https://apnews.com/62d762b7e25b49bc916d02f8d538a247/Muslim-candidates-running-in-record-numbers-face-backlash?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam&stream=top [https://perma.cc/4KAP-XR6C].

550. *See id.*

551. *Washington v. Trump*, 847 F.3d at 1151.

552. *Hawaii v. Trump*, 878 F.3d at 662.

supporting President Trump's ban: "Whatever we, as individuals, may feel about the President or the Executive Order, the President's decision was well within the powers of the presidency."⁵⁵³ In the era of Trump and the Republican party's political dominance, the Muslim ban reveals a Separation of Powers doctrine fundamentally at risk together with the civil liberties of the individuals it was designed to protect.⁵⁵⁴

Lastly, in the American federalist system, the co-equal but separate branches of government play a complicated role in the lived experiences of Muslim Americans. For instance, the Muslim ban evidences the executive's religious animus toward Islam and Muslims. However, responses from the legislative and judicial branches are mixed. On the one hand, Republican congressmen have rhetorically condemned the Muslim ban but blocked a vote on their Democratic colleagues' legislative initiatives to defund and repeal it. Similarly, the Ninth Circuit has repeatedly blocked key portions of the ban from taking effect while the Supreme Court ultimately allowed for its implementation during the course of litigation. Further, in controversies surrounding religious land use, local government officials have frustrated mosque construction projects. However, the DOJ has pursued lawsuits and negotiated settlements on behalf of those aggrieved Muslim institutions in federal courts.

Do US democratic institutions protect religious liberty vis-à-vis the minority Muslim community in contemporary America? Perhaps the most accurate answer is: it's complicated.

553. Laura Jarett, *Five Republican-nominated Judges Signal Support for Travel Ban*, CNN (Mar. 15, 2017), <https://www.cnn.com/2017/03/15/politics/republican-judges-ninth-circuit-support-travel-ban/index.html> [<https://perma.cc/6QXY-E4XS>].

554. At the time of publication, the Democratic Party had regained control of the House of Representatives.