NOTE

POLITICAL AND JUDICIAL INCORRECTNESS: THE CASE FOR MODIFYING THE *ARLINGTON HEIGHTS* TEST TO DISINCENTIVIZE DISCRIMINATORY APPEALS

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Throughout history, discriminatory appeals to the public have been exploited by demagogues and dictators in order to concentrate power predicated on prejudice. As recent events have revealed, creating scapegoats, cultivating resentment, and capitalizing on fear and hate all remain unfortunately familiar marks on the political roadmap. Discriminatory appeals, particularly those rooted in Islamophobia, remain a significant problem in American discourse. However, suppressing or judicially regulating this speech is both constitutionally forbidden and inherently antidemocratic. While the First Amendment shields harmful appeals to discrimination, fear, and hate by political figures, this does not mean that courts should stand idly by when these discriminatory appeals manifest in illicitly motivated policies. Indeed, the First Amendment protects political speech as strongly as it does because of the importance and weight this speech carries. Accordingly, when individuals possessing sole decision-making power implement policies that appear to follow from discriminatory statements, such as President Trump's "Muslim ban," courts should presume that such discriminatory motives serve as the bases for these policies. In these special instances, courts should apply strict scrutiny to "smoke out" illicit motives, rather than the Arlington Heights *test used to assess the motivating factors behind policies implemented by multimember bodies whose views are harder to disaggregate and discern. Such an approach will, in addition to preventing*

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illicitly motivated policies from working discriminatory effects, disincentivize political figures from seeking power through discriminatory appeals by giving their speech the weight the First Amendment affords it, but no more.

INTRODUCTION: *TRUMP*, *KOREMATSU*, AND JUDICIAL FAILURE TO DISCERN DISCRIMINATORY PURPOSE

In 2014, Supreme Court Justice Antonin Scalia told University of Hawaii law students that the events of *Korematsu v. United States* would repeat themselves.[1] While emphasizing that the case had clearly been wrongly decided, Justice Scalia nevertheless told the students that they were "kidding [themselves] if [they] think the same thing will not happen again."[2] Four years later, the Supreme Court's decision in *Trump v. Hawaii* was met with comparisons to *Korematsu*, despite the ironic fact that the Court, in this decision, purported to finally formally overrule it.[3] The policies at issue in these cases share the common evils of being motivated by prejudice and animus. Additionally, both share the same outcome: a victory by the government in the nation's highest court. The animus at issue in *Korematsu*, however, was better disguised. Ostensibly necessitated by threats of sabotage and espionage determined to be legitimate in the military's judgment, the government forced

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1 Debra Cassens Weiss, *Scalia:* Korematsu *Was Wrong, but 'You Are Kidding Yourself' If You Think It Won't Happen Again*, A.B.A. J. (Feb. 4, 2014), https://www.abajournal.com/news/article/scalia_korematsu_was_wrong_but_you_are_kidding_yourself_if_you_think_it_won [https://perma.cc/R9EY-R9TN].

2 *Id.*

3 Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting); Jamal Greene, *Is* Korematsu *Good Law?*, 128 YALE L.J. F. 629, 629 (2019) (characterizing the purported overruling as "dicta and therefore not technically binding on lower courts").

Japanese people into internment camps solely due to their race and national origin.[4]

As the *Korematsu* Court explained, "military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion."[5] The Court could not say that after

> the war-making branches of the Government" determined through their military judgment that some contingent of Japanese people were planning to assist Japan, they "did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.[6]

Of course, this military judgment was not the accurate exercise of expertise that the Court characterized it as. General John DeWitt, who asserted the military necessity of exclusion, relied on affirmative misrepresentations rather than hard evidence of the subversive activity he stressed the necessity of preventing.[7] Unbeknownst to the Court, Justice Department attorneys planned to disavow reliance on this false information when arguing their case but were overruled by high echelon officials.[8]

While the information relied on in *Korematsu* was false, and the prejudice underlying the policy apparent,[9] the animus underlying the policy was not explicitly stated. In the events preceding *Trump v. Hawaii*, by contrast, a discriminatory purpose was expressly acknowledged and assiduously defended.[10]

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4 *Korematsu* itself specifically upheld an exclusion order. Korematsu v. United States, 323 U.S. 214, 223 (1944). *Hirabayashi v. United States* upheld a curfew order. 320 U.S. 81, 104-05 (1943). Both orders were passed pursuant to Executive Order 9066. *Korematsu*, 323 U.S. at 217. Internment, while part of the same general scheme, was acknowledged but not directly passed upon by the Court in Korematsu. *Id.* at 220–21.

5 *Korematsu*, 323 U.S. at 218.

6 *Id.* (quoting *Hirabayashi*, 320 U.S. at 99).

7 DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945 750–71 (1999).

8 *Id.*

9 *Korematsu*, 323 U.S. at 239 (Murphy, J., dissenting) (noting that the reasons for exclusion appeared to be "largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices"); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 496 (1945) (asserting that "[t]he dominant factor in the development of this policy was not a military estimate of a military problem, but familiar West Coast attitudes of race prejudice").

10 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018) (describing President Trump's public statements regarding the travel ban).

On the campaign trail, then-candidate Donald Trump published a "Statement on Preventing Muslim Immigration," calling for the "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[11] He also stated, as a candidate, that the United States was "having problems with Muslims coming into the country," and reiterated this sentiment through statements such as "Islam hates us."[12] Shortly after his victory, when asked about "ban[ning] Muslim immigration," President-elect Trump stated that his plans on the matter were already known.[13] The first iteration of the ban at issue in the case went into effect only a week after President Trump's inauguration.[14]

Rudy Giuliani, at the time a campaign adviser for President Trump, explained in a television interview that the President referred to the policy as a Muslim ban when it was first announced.[15] Giuliani explained that the President "called [him] up," and directed him to "[p]ut a commission together," and "show [him] the right way to do it legally."[16] "And what we did," Giuliani continued, "was we focused on, instead of religion, danger . . . [t]he areas of the world that create danger for us, which is a factual basis, not a religious basis. Perfectly legal, perfectly sensible."[17] Although the first iteration of the ban differed from the final, the President complained that the order had been diluted, and expressed preference for the "tougher" version that had been supplanted.[18] The President later retweeted links to anti-Muslim propaganda videos.[19]

When it heard a challenge to the policy, the Supreme Court explained that the issue it faced involved "the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility."[20] Doing so, the Court continued, involved considering not only a particular president's statements, but the

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11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 Rebecca Savransky, *Giuliani: Trump Asked Me How to Do a Muslim Ban 'Legally'*, THE HILL (Jan. 29, 2017), https://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally [https://perma.cc/7PXP-DNU2].

16 *Id.*

17 *Id.*

18 *Trump*, 138 S. Ct. at 2417.

19 *Id.*

20 *Id.* at 2418.

authority of the President.[21] While the proclamation was indeed facially neutral with regard to religion, as Giuliani had already explained in his interview, statements President Trump had made clearly demonstrated both a desire to discriminate on the basis of religion, as well as a plan to craft a pretextual justification for this discrimination. But the Courtframed the plaintiffs' focus on these facts as a request to "probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office."[22] The Court also noted the unusual nature of the case, given its concern with a national security directive, an area where the President receives greater judicial deference.[23] Given this deference, the Court assumed it could look beyond the proclamation's face to the extent that doing so was consistent with rational basis review, considering the "extrinsic evidence" but upholding the policy as long as it could reasonably be understood to result from a justification independent of unconstitutional purposes.[24] Citing to essentially the same "security rather than religion" justification Giuliani had characterized as a pretextual justification, the Court upheld the policy.[25]

Despite the *Trump v. Hawaii* majority's claims to the contrary, Justice Scalia had been right. His prediction that the government would wrongfully adopt a policy similar to the one at issue in *Korematsu*[26] came true only three years after he made it. It remains clearly good law that government action with the "ostensible and predominant purpose" of disfavoring any given religion violates the Establishment Clause.[27] To make such a determination, courts ask whether a reasonable observer would view the policy as enacted for the purpose of disfavoring a religion.[28] Importantly, such analysis is not restricted to the text of the policy at issue; courts also consider the operation of the policy and evidence regarding "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in

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21 *Id.*

22 *Id.*

23 *Id.* at 2419.

24 *Id.* at 2420.

25 *Id.* at 2423 ("[T]he Government has set forth a sufficient national security justification to survive rational basis review.").

26 Cassens Weiss, *supra* note 1.

27 McCreary Cnty. v. A.C.L.U. of Ky., 545 U.S. 844, 860 (2005).

28 Town of Greece v. Galloway, 572 U.S. 565, 589 (2014) (plurality opinion in part).

question, and the legislative or administrative history, including contemporaneous statements" by the decision maker.[29]

So, with the history including the President campaigning on a Muslim ban, repeatedly doubling down on this language, and a close adviser openly admitting to a conversation with the President about constructing a pretextual justification,[30] how could the proclamation still be legally justified? The answer is that the test for determining improper purposes underlying facially neutral laws needs seriousimprovement. Strengthening the standards for making these determinations, if those standards are faithfully applied, will reduce discriminatory appeals by unitary decision makers and ensure that the benefits such speech receives under the First Amendment will also be given the weight these protections demand.

The *Arlington Heights* test provides a method for courts to determine whether an allegedly improper motive led to the adoption of an otherwise constitutionally valid law.[31] This test provides factors which indicate whether an allegedly improper purpose served as the "but-for" cause of a law's adoption.[32] This Note argues that the *Arlington Heights* test should be modified as applied to decisions by single individuals by allowing one of the *Arlington Heights* factors to trigger strict scrutiny, the application of which will determine whether government action has been taken for an impermissible purpose.

This Note contends that such a modification of the *Arlington Heights* test will, within constitutionally permissible bounds, disincentivize appeals to discrimination and animus in campaign speech in a manner consistent with the First Amendment. Part I outlines the First Amendment's relationship with discriminatory speech and illustrates how the law establishes a self-regulating speech market that suffers failures when discriminatory appeals gain popularity and become ripe for exploitation. Part II provides an explanation of current law regulating assessments of whether official actions were undertaken for discriminatory and illicit purposes. Part III advocates for a new test that assesses whether actions taken by single decision makers, such as presidents or governors issuing executive orders, are the result of discriminatory purposes.

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29 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993).

30 Savransky, *supra* note 16.

31 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–67 (1977).

32 *Id.* at 270 n.21.

I
MARKET FAILURES IN THE MARKETPLACE OF IDEAS

It is a core First Amendment principle that speech cannot be censored or punished simply because it is offensive.[33] Moreover, such speech that not only offends, but also may induce people to anger and unrest, is heavily protected and has a strong purpose under the First Amendment.[34] This rule does not change in the event that speech is demonstrably false.[35] In such situations, the solution is to counteract falsehood with more speech, not by limiting the speech at issue.[36] Even "hate speech" is protected under the First Amendment for the same reason, and cannot be singled out for proscription even when only unprotected speech is singled out on the basis of content.[37] Government speech indicating the presence of such improper purposes has also been immunized from regulation, primarily on democratic grounds. The electoral process, rather than any direct regulation, imposes limits on government expression by punishing such expression at the ballot box.[38] This argument encapsulates the marketplace of ideas theory,[39] but fails to provide any contingency in the event of market failures. However, discriminatory campaign speech is not only limited to the expression of ideas. Instead, it indicates political actors' perspectives, their reactions to those perspectives, and their plans to craft policies based on the interests underlying such reactions. Treating this speech as such when assessing the presence of improper purposes would not only prevent such ill-motivated action from escaping judicial scrutiny but also serve to limit this speech without impermissibly punishing or restricting it.

The rationale behind the constitutional prohibition on suppression of such speech is that a free and unregulated "market-

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33 Texas v. Johnson, 491 U.S. 397, 414 (1989).

34 Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978).

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

36 *Id.* at 726.

37 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 384–85 (1992) (explaining that a city council cannot "enact an ordinance prohibiting only those [constitutionally unprotected] legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government . . . activity can be banned because of the action it entails, but not because of the ideas it expresses").

38 Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45, 89 (2021).

39 The "marketplace of ideas" refers to the idea that discussion of ideas and views should be free and open, a bedrock principle predicated on the notion that the people, rather than the government, decide what is or is not worth discussing. *See* Reed v. Town of Gilbert, 576 U.S. 155, 182 (2015).

place of ideas" will best serve to filter out poor ideas, due to their inability to gain traction in a free market of contrary opinions.[40] This rationale does not support or sympathize with such hostile and discriminatory views but instead counts on them being drowned out by better ideas and views.[41] Such an approach protects political speech, which lies at the very core of First Amendment protection.[42] Additionally, this approach allows for the market to filter out bad ideas without the specter of government censorship imposing a chilling effect that would deter others with minority viewpoints from expressing themselves.[43] In fact, protecting such minority viewpoints is also within the First Amendment's command.[44] Similar rationales for promoting positive outcomes exist in the economic market.[45] This point notwithstanding, there is a clear problem that follows the dissemination of hate speech or appeals to Islamophobia and racism. The prevalence of such speech is not a desired outcome of the First Amendment but instead represents a market failure of sorts.

Accordingly, when views generally seen as "bad," such as those appealing to discrimination, gain popularity, the market has failed to properly regulate itself or at least produce the expected and desired outcomes resorted to in justifying the market's structure.[46] In the economic context, market failures can be, and often are, addressed by regulation.[47] However, the First Amendment speech context, due to constitutional limitations, is not susceptible to the same sorts of interventions other markets are when the Invisible Hand loses its grasp.

Such a market failure is doubtlessly occurring. For example, President Trump's previously discussed statements on the campaign trail relating to Muslims serve as a stark example. However, these statements were not the beginning of such a market failure in the speech realm. The beginning of President

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40 *See* Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

41 *See id.*

42 Virginia v. Black, 538 U.S. 343, 365 (2003).

43 Citizens United v. F.E.C., 558 U.S. 310, 311–12 (2010).

44 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

45 *See, e.g.*, Daniel Henninger, *Bring Back Laissez-Faire Capitalism*, WALL ST. J. (Apr. 15, 2020), https://www.wsj.com/articles/bring-back-laissez-faire-capitalism-11586988064 [https://perma.cc/Q844-G9VN].

46 *Market Failure*, INVESTOPEDIA , https://www.investopedia.com/terms/m/marketfailure.asp [https://perma.cc/5ZGW-QEQ3] (last updated Dec. 6, 2021).

47 Joseph Stiglitz, *Regulation and Failure*, *in* NEW PERSPECTIVES ON REGULATION 17–18 (David Moss & John Cisternino eds., 2009).

Trump's campaign involved similar appeals to animus.[48] As he descended the escalator in Trump Tower, he excoriated immigrants entering the country through the southern border, insisting they were bringing in drugs and crime and referring to them as rapists.[49] He made the construction of a wall between the United States and Mexico the centerpiece of his campaign, calling for its height to be increased by ten feet when asked how he would pay for it on the debate stage.[50] As he continued making appeals to limit the entry of Muslims into the United States and began implementing such policies after his ascension to office, the impact on the public was tangible, as evidenced by an increase in hate crimes.[51]

Scapegoating minority groups and promoting hateful views towards them is not adding a novel page to the playbook of demagoguery.[52] Neither is it novel to assert that demagogues present a serious threat to a functioning democracy. In fact, preventing such an individual from securing power was a prevalent concern held by the Framers.[53] The First Amendment does not aim to protect speech solely for its own ends. Instead, political speech in particular is so heavily protected because of its integral role in preserving democracy.[54] For an informed populace to participate in a democratic society envisioned in the Constitution, that populace must be informed, a predicate which is frustrated by censorship.[55] This presents a paradox

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48 *See* Jose A. DelReal, *Donald Trump Announces Presidential Bid*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/donald-trump-to-announce-his-presidential-plans-today/ [https://perma.cc/Z4HA-X74J].

49 Michelle Ye Hee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, N.Y. TIMES (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/ [https://perma.cc/AK4N-ED95].

50 Ryan Struyk, *Donald Trump Warns Former Mexican President the 'Wall Just Got 10 Feet Taller'*, ABC NEWS (Feb. 25, 2016), https://abcnews.go.com/Politics/donald-trump-warns-mexican-president-wall-10-feet/story?id=37207947 [https://perma.cc/P9JC-HKQL].

51 *See U.S. Anti-Muslim Hate Crimes Rose 15 Percent in 2017: Advocacy Group*, REUTERS (Apr. 23, 2018), https://www.reuters.com/article/us-usa-islam-hatecrime/u-s-anti-muslim-hate-crimes-rose-15-percent-in-2017-advocacy-group-idUSKBN1HU240 [https://perma.cc/BF4D-F64B] (noting a connection between an increase in anti-Muslim hate crimes and these policies).

52 Megan Garber, *What We Talk About When We Talk About 'Demagogues'*, ATLANTIC (Dec. 10, 2015), https://www.theatlantic.com/entertainment/archive/2015/12/what-we-talk-about-when-we-talk-about-demagogues/419514/ [https://perma.cc/6SP8-Q3FG].

53 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 218 (Max Farrand ed., 1911).

54 *See* Buckley v. Valeo, 424 U.S. 1, 26–27 (1976).

55 Marsh v. Alabama, 326 U.S. 501, 508–09 (1946).

as the reason political speech, including appeals to animus, racism, and religious discrimination, is protected is because such speech lies at the core of the First Amendment and cannot be selectively regulated based on content or viewpoint.[56] When a decision maker such as the President is already in office at the time such statements are made, these statements are also enjoy status as government speech, which is not regulated by the First Amendment.[57] At the same time, such speech presents an increased risk of demagoguery rising.

Allowing powerful officeholders and candidates to capitalize on electoral advantages by appealing to animuswithout holding them to these words allows them to have their cake and eat it too. For instance, consider a candidate in a closely contested election in a state that has been hit by three terrorist attacks in the past year. The perpetrators were all Muslim. Even though the deaths from these attacks represent only a fraction of deaths resulting from violent crimes, most of which have been committed by non-Muslims, the candidate runs an aggressive campaign, assailing his opponent for naively relying on political correctness and refusing to confront "the enemy among us." Making references to ostensible indoctrination by Sharia Law, he pledges, if elected, to ensure such "poisonous ideas" are taken out of classrooms. When criticized on this point in interviews, he repeatedly reaffirms his commitment. Additionally, he promises to his supporters that he will keep "terrorists and radicals" out of the country and closes off this promise with a string of thinly veiled racial epithets. Islamophobic sentiment increases in the state during the campaign, and terrorism becomes the issue voters cite as the most important to them. The candidate is elected and immediately moves to withhold funding from any schools teaching religious tolerance classes; the order he executes this policy through cites to a need to focus only on core educational subjects. He also orders the administrative agency in charge of accepting refugees from federal intake facilities to stop doing so, citing a general need to prevent overpopulation. Leaked memoranda from advisers, however, indicate plans by high-level staff to legitimize these policies to avoid constitutional challenges.

The effect of the speech at issue in this situation is profound. It likely got the candidate elected and imperiled the safety of the state's Muslim residents. . Promises to implement blatantly discriminatory purposes facilitated the democratic

56 Reed v. Town of Gilbert, 576 U.S. 155, 168–69 (2015).

57 Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009).

exercise of electing this candidate. Nearly every advantage accruing to the candidate from the impossibility of regulating this speech was enormous. However, under the approach applied by the court in *Trump v. Hawaii*, none of the reasons for protecting this speech will limit the policies' discriminatory impact. Easily glossing these statements over with pretextual, post-hoc rationalizations, despite clear indications that these statements contain the actual interests behind the policies at issue, defeats the First Amendment interests in protecting such speech in the first place. If they are of such great constitutional weight, why should their evidentiary value here be so light? And yet, direct regulation cannot stifle such speech, nor should it be able to. So what should the solution be? The best answer is to treat such speech with the importance the First Amendment bestows upon it.

II
THE CURRENT APPROACH TO ILLICIT MOTIVES

Currently, when courts aim to identify improper purposes behind facially neutral laws, the *Arlington Heights* test is the approach most commonly used.[58] This test involves assessing the historical background of the decision, the specific events leading up to the decision, departures from normal procedures and substantive considerations , and the legislative or administrative history of the decision, especially when contemporary statements by members of the decision-making body or other records are available.[59] The historical background factor is particularly relevant if it evinces a pattern of official actions taken for discriminatory purposes.[60] Departures from normally followed procedure can indicate that improper motives are being relied on, and substantive departures can be relevant as well, especially when factors normally considered by the decision maker to be important favor a decision contrary to the one rendered.[61] While these factors are instructive in determining whether discriminatory intent was a predominant factor in a decision,[62] the *Arlington Heights* Court noted in a footnote that a finding of an illicit predominant factor would not necessarily be determinative. Instead, a court must then

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58 Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1355 (2019).

59 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977).

60 *Id.* at 267.

61 *Id.*

62 *Id.*

determine whether the same decision would have been reached in the absence of this discriminatory intent, effectively establishing a "but-for" causation test.[63] In this test, satisfying the threshold requirement of demonstrating that discriminatory purpose was a motivating factorflips the burden of proof onto the government, which must then refute the causal relationship between the improper purpose and the decision made.[64] The reasoning underlying this rule stipulates that when discriminatory purpose serves as a motivating factor in a decision, judicial deference is no longer warranted.[65] However, the government retains an opportunity to demonstrate that such an improper purpose did not "infect" the legislature.

III
APPLYING THE *ARLINGTON HEIGHTS* TEST TO SINGLE DECISION MAKERS IS IMPRUDENT AND ENABLES PRETEXTUAL JUSTIFICATIONS

The law regarding illicit motive specifically focuses on characteristics unique to multimember bodies.[66] Essentially, determining the presence of a discriminatory purpose and establishing a causal relationship between the purpose and the government action taken involves aggregating the views of multiple officials composing a collective decision-making body.[67] This observation inheres in the *Arlington Heights* decision itself as well.[68] A legislature, by design, serves as a more broadly representative body, in which each legislator represents their own constituency. Each legislator, despite the national nature of the body, is elected by their home state only. Given the broad variance of concerns, opinions, and views held among the states, a legislative body, even in the most sanguine times, is necessarily diffuse and composed of competing interests.[69] Accordingly, the notion of easily attributing the views of some members to the body as a whole is inherently suspect. This fact is not limited to prudential or contemporary concerns. Constitutional considerations also reflect the deliberative na-

63 *Id.* at 270 n.21.

64 *Id.*

65 *Id.* at 265–66.

66 Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 530–31 (2016)

67 *Id.*

68 *Arlington Heights*, 429 U.S. at 265 ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.").

69 Myers v. United States, 272 U.S. 52, 123 (1926).

ture of Congress.[70] Deliberation is essential, at least theoretically, to craft policy. Both good and bad ideas will be raised, but deliberation and discussion will include ideas other than those underscoring the final policy emerging from these deliberations. This emphasis on deliberation is not merely inferred; it can be traced to the Framer's views at the time of the nation's founding.[71]

A similar phenomenon is evident in the conduct of administrative bodies with multiple members. Again, prudential and constitutional concerns underlie this arrangement. For example, principal officers of the United States, those without direct supervision by superior officers and exercising a broad scope of authority, cannot be insulated from presidential removal through "for cause" protection, unless multiple such officers head an agency.[72] Consolidating such power within one person in the executive branch other than the President impermissibly limits presidential power.[73] However, for-cause protection can be conferred on a group of such officers, as such power is not then consolidated in a single individual.[74] In part, the reasoning for this difference finds explanation in the fact that a unilateral actor does not need to convince others of the merits of their ideas.[75] The same notion of power sharing and diverse views is at play here. The absence of colleagues requiring persuasion is the common denominator. Judicial review of agency decisions also demonstrates this principle. When members of a commission make a statement implying discriminatory treatment in an adjudication, the presence of other commissioners provides an opportunity for them to object to the consideration of such improper characteristics.[76] Such

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70 I.N.S. v. Chadha, 462 U.S. 919, 959 (1983) (noting the Framers' "unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process").

71 THE FEDERALIST NO. 70 (Alexander Hamilton).

72 Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192, 2194 (2020).

73 *Id.* at 2204.

74 *Id.* at 2199.

75 *Id.* at 2204 ("With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy . . . ."). The emphasis on the lack of colleagues to persuade is particularly important here, as the lack of a boss or electorate exerting direct control is permitted in the case of multiple principal officers, but impermissible in the case of one.

76 Masterpiece Cakeshop, Ltd. V. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (relying on the fact that "[t]he record shows no objection to these comments from other commissioners").

reasoning is also present, of course, in the *Arlington Heights* decision itself.[77]

As the particular characteristics underlying multi-member administrative decision-making bodies and legislative bodies indicate, the *Arlington Heights* test, while far from perfect,[78] ensures that a discriminatory purpose was actually the cause of government action, a necessary question to ask in situations where a variety of competing concerns is guaranteed. However, decisions made at the discretion of a single actor do not require the same safeguards.

Such a broad range of competing interests and views need not be distinguished from each other when evaluating the decisions of a single individual, such as the President.[79] While legislatures, and the actions they take, are presumed to always result from numerous concerns, constituencies, and interests, the President acts decisively.[80] With the power of the executive branch consolidated in them personally,[81] the President is directly accountable to the people, and has sole power to make decisions based on their own views and judgments. While some of these executive determinations are made by delegees such as agency heads and bureaucratic members of the civil service, this power remains vested in the President, who controls such delegees.[82] Accordingly, the opportunity to rebut a presumption of discriminatory purpose is not justified in this situation. The interest has been made explicitly clear, and allowing assertion of other interests creates opportunities only for undesirable outcomes, such as window-dressing, post-hoc rationalizations, and pretextual justifications.

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77 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

78 An application of the *Arlington Heights* factors by the Supreme Court has never found discrimination against minorities. Zainab Ramahi, *The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future*, 108 CALIF. L. REV. 557, 577 (2020).

79 *Seila*, 140 S. Ct. at 2203.

80 *Id.* (noting that "[t]he Framers deemed an energetic executive essential . . . . [T]hey gave the Executive the '[d]ecision, activity, secrecy, and dispatch' that 'characterize the proceedings of one man'" rather than limiting the executive by forcing them to deal with a variety of opinions and views (quoting THE FEDERALIST NO. 70 (Alexander Hamilton))).

81 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–97 (2010) (noting that the President "'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch'" (quoting Clinton v. Jones, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring)).

82 Myers v. United States, 272 U.S. 52, 117 (1926) (explaining that the President's ability to ensure faithful execution of the laws requires the President be able to remove those delegated the task of exercising executive power).

Further, even an application of the *Arlington Heights* "but-for" question in such a situation is counterproductive. In the rare instances a discriminatory purpose is made as clear as possible without depriving the action of its facial neutrality, the obvious should be enough. The distinction between multi-member bodies and single actors is not novel, but how to actually establish tests for these situations is not an easy question to answer.[83] How much such tests can overlap is complicated by functional differences in the types of decisions made by these different actors. For example, many individual decisions by people like judges are actions of immediate and specific effect rather than generally applicable future effect.[84] Striking down an entire law as applied to the entire class of people regulated by it is viewed as more draconian, compared to vacating a single application of a law, such as on the ground that a prosecutor, exercising sole discretion, excluded jurors on racially discriminatory grounds.[85] However, these individualized actions, reversed for discriminatory purposes on grounds of fairness and deterrence,[86] are not the only ones that should be subject to scrutiny of motive. Courts should not shy away from inquiring into single decision makers' motives for implementing rules more similar to laws or administrative regulations, as well as those concerned with specific applications of laws.[87] One of the best reasons to do so is when the decision maker has made an improper purpose evident through their own clear and unambiguous statements.

Such statements do not require a full *Arlington Heights* analysis, both for practical reasons and because failing to apply such an inquiry in such instances ensures consistency with past jurisprudence. For instance, *Arlington Heights* refers to the option of directly examining a decision maker in order to discern their motivations, but generally cautions against doing

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83 Fallon, *supra* note 66, at 530–31 ("[T]he partly parallel problems that arise when single officials—such as prosecutors, other executive officials, or judges—act for constitutionally forbidden purposes . . . do not present the main conceptual problem . . . involving the aggregation of the mental states of multiple officials into a collective intent of a decisionmaking body."). While Fallon assesses how judicial methods of discerning the intent of individual legislators can be applied to determining the intentions of such single decision makers, his analysis expressly does "not examine how far" these same methods of assessment can be applied to individuals with sole discretion. *Id.* at 531.

84 *Id.* at 531 n.26.

85 *Id.* at 531. For example, prosecutors' use of peremptory challenges to exclude individual jurors on the basis of race is prohibited by the Equal Protection Clause. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

86 Fallon, *supra* note 66, at 531.

87 *Id.*

so.[88] Justice Scalia, dissenting in *Edwards v. Aguillard*, argued that courts should decline to inquire into decision makers' subjective intentions.[89] However, he subsequently agreed with the invalidation of a law enacted for discriminatory purposes.[90]

Some have reconciled these positions by differentiating between reliance on objective evidence and subjective inferences of intent.[91] To be clear, the intent of the decision maker may be subjective, but the distinction at play here is the manifestation of that intent. The question is not about the nature of the intent, but the nature of the evidence of such intent. Expressive conduct, such as President Trump's statements, serves as objective evidence of intent,[92] more acceptably inquired into by courts than possible subjective intentions a decision maker may hold.[93] These subjective intentions are similarly not heavily scrutinized under the *Arlington Heights* test.[94]

Accordingly, explorations of mere subjective intent of a single decision maker, under current law, are even more likely to be rejected by the Court. However, objective evidence of intent is more susceptible to review because the intrusiveness that concerned Justice Scalia, and the Court generally, is not implicated. In fact, such objective manifestations of intent *must* be

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88 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

89 482 U.S. 578, 610–19 (1987) (Scalia, J., dissenting).

90 Eight years after his dissent in *Edwards*, Justice Scalia joined a majority opinion holding that, because the "predominant, overriding factor" behind it had been race , a Georgia redistricting plan could not take effect unless it could satisfy strict scrutiny. Miller v. Johnson, 515 U.S. 900, 920 (1995).

91 Fallon, *supra* note 66, at 533.

92 *See id.* at 536–37 (describing subjective indications of intent as attempts to discern the thought process or attitude of a decision maker, and objective indication of intent as evidence existing independently of the subjective thought process that is "ascertainable through inquiries that do not focus on individual psychology").

93 The Court's hesitation in *Arlington Heights* to directly examine decision makers regarding their intentions serves as an example of this judicial reluctance. Arlington Heights, 429 U.S. at 268. Even when inquiring into more subjective intentions, courts do so with reference to objective criteria. McCreary Cnty. v. A.C.L.U. of Ky., 545 U.S. 844, 862 (2005) (explaining that inquiring into legislative purpose is sensible when "an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts").

94 All of the *Arlington Heights* factors are objective. The historical background of a decision, which includes possible past findings of invidious purpose, the specific sequence of events preceding the challenged action, departures from the ordinary procedural sequence, legislative and administrative history, and contemporary statements by a decision maker are all objectively discernible. *See Arlington Heights*, 429 U.S. at 267–78.

scrutinized when decisions by a single individual are at issue, rather than those of a multi-member body. Two primary justifications support this contention.

The first sounds in the fact that such objective evidence of intent is necessarily more likely to be the "but-for" cause of action when only one decision maker takes it. While the *Arlington Heights* test is not extraordinarily searching, and is in fact fairly lenient,[95] this stems from the difficulty of establishing some decision makers' intentions as the interest agreed to by a large group composed of diffuse and competing interests.[96] Such difficulty is not present when a sole decision maker expressly makes their intentions clear.

The second reason springs from separation of powers principles. Actions taken unilaterally by the President, resembling legislative or administrative action, have the potential to—and often do—impose consequences of future effect on a wide range of individuals. Therefore, the interest in checking for improper purposes is important when action is generally applicable and has a future effect. Trump's travel ban and Executive Order 9066 serve as the primary examples. Both are characterized by the Court deferring to the military and national security judgment of the President.[97] While these interests are of course deserving of deference, actions ostensibly taken in furtherance of these interests, as the impact of both *Trump* and *Korematsu* demonstrate, can be extremely harmful because of their general applicability. To ensure that this broad grant of discretion is not abused in generally applicable modes of future effect, courts should ensure that these interests are truly being invoked, rather than being used pretextually to enable discriminatory purposes to masquerade as national security policy concerns. Such review is appropriate when a decision maker generates objective evidence of the real reason for their action. Otherwise, courts essentially abdicate their duty of review. There is a clear difference between declining to intervene in judgments relating to national security, and taking a unilateral actor's word, in the face of contrary evidence, that such security is actually the true interest at issue.

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95 Ramahi, *supra* note 78, at 576–77 (characterizing the *Arlington Heights* test as a "high bar" to demonstrating discriminatory purpose).

96 Myers v. United States, 272 U.S. 52, 123 (1926).

97 Ramahi, *supra* note 78, at 560 (observing the common reliance on national security concerns present in both *Korematsu* and *Trump v. Hawaii*).

IV
MODIFYING THE *ARLINGTON HEIGHTS* TEST WOULD REDUCE APPEALS TO ANIMUS

When the President makes statements, such as President Trump did, openly expressing a discriminatory purpose and tying it to a particular policy, with evidence documenting deliberate efforts to establish pretextual justifications, establishing causation will not be particularly difficult. Accordingly, such an improper purpose should be presumed, and an inquisitive form of strict scrutiny should obtain, enabling such a single decision maker to refute this presumption without openly receiving an opportunity to offer pretextual justifications.[98] Application of strict scrutiny in such a situation ensures that there is at most a small possibility that suspect classifications are not made for improper purposes.[99] By holding those, such as the President and presidential candidates, to their words, their speech is treated as seriously as the First Amendment demands, and such discriminatory appeals will be disincentivized without the use of impermissible restrictions of speech.

Determining whether a single decision maker's interest is improper should be subject to a relaxed version of the *Arlington Heights* test. When a decision maker provides objective evidence of the purpose underlying a policy, there is little if any reason not to believe their words. Accordingly, when a decision maker, such as President Trump, expressly designates an interest underlying a generally applicable policy of future effect, courts should act accordingly and treat this interest as the presumptive purpose of the policy. Affording great weight to evidence of an improper purpose and presuming it to be the but-for cause of the action is practically preferable to straining to identify and rely on a pretextual justification. Issuing the travel ban, for example, in light of the repeated statements President Trump made,[100] should be sufficient to trigger strict scrutiny.

Single decision makers' policies of general applicability and future effect should be treated as serving improper purposes through inquiries less exacting than those applied to the policies implemented by multi-member bodies. Evidence of im-

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98 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

99 *Id.*

100 Savransky, *supra* note 15.

proper purpose discerned through as few as one of the *Arlington Heights* factors should be sufficient to trigger strict scrutiny, the application of which should replace the *Arlington Heights* test's question of but-for causation.

When such an improper purpose is apparent, and the complications of discerning such a purpose's pervasiveness among a multi-member decision-making body are absent,[101] the fact that such an improper purpose is the primary rather than a "motivating factor"[102] in the decision should be presumed. Of course, decisions by single actors like the President are due different levels of deference depending on the interests underlying a given decision. The national security context, for instance, is generally left largely to presidential discretion.[103] *Trump v. Hawaii* proceeded wrongly, however, because the interest determination proceeded in an illogical sequence. Because of the national security interest invoked, the Court applied rational basis review, and therefore concerned itself with whether the executive action at issue could reasonably be connected to a security interest, without further inquiring into President Trump's other contemporary statements.[104] This puts the cart before the horse, in that the Court determined the level of scrutiny to apply, and how closely to question the truthfulness of the President's asserted interest, by referring to the very interest it was asked to scrutinize. Withholding such national security deference until after determining that such security was the actual purpose behind the policy would avoid pretextual invocations of interests given more judicial deference. Therefore, strict scrutiny should apply after a less demanding *Arlington Heights* inquiry indicates the presence of an improper purpose. Such scrutiny will allow for the proper "smoking out" of an improper purpose to ensure it is not given more judicial deference than it deserves.[105]

President Trump's contemporaneous statements on the campaign trail, after his election, and in office would be sufficient to trigger strict scrutiny under this test. Additionally, any

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101 Fallon, *supra* note 66, at 531 (noting that decision making by individuals does not implicate the issue of aggregating multiple mental states into a conception of collective intent).

102 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71, 270 n.21 (1977).

103 Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).

104 *Id.* (explaining that although it would consider President Trump's statements, the Court would uphold the policy "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds," because national security questions were at issue).

105 Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)

doubt of whether there was any connection between such statements and the travel restrictions the President instituted is resolved by Rudy Giuliani's open admission of being directed to contrive a pretextual interest.[106] In President Trump's case, independent evidentiary bases indicate the existence of an improper purpose. In this way, President Trump is an unusual figure; his impulsive nature makes actions like the travel ban unconventionally easy cases under this modified test. However, the fact that another decision maker will likely not share President Trump's tendencies does not limit the effectiveness of the test.

President Trump aside, there are more explicit appeals by single decision makers to discriminatory purposes than one might expect. For instance, after the 2015 Paris terror attacks, a mayor in Virginia cited *Korematsu* as justification for not accepting Syrian refugees into the city.[107] More often than most would like, discriminatory views are made known. Particularly when they play a role in campaign promises to implement policy, a modified *Arlington Heights* test should treat these statements as evidence of an improper purpose presumptively serving as the basis for action taken. Doing so imposes accountability in a manner that can also be analogized to market principles. Such accountability essentially increases the costs of discriminatory speech, making it less attractive to resort to. Compelling reasons exist to impose such costs on government speech in this manner. Such speech raises entrenchment concerns which endanger the democratic process, either by reinforcing entrenched majoritarian views at the expense of minorities holding other ideas, or by intimidating countermajoritarians who seek to challenge them.[108] In 2017, for example, seventy-five percent of Muslims polled reported that there is "a lot of discrimination against Muslims in the [United States]."[109] Sixty-eight percent expressed that President Trump in particular made them feel worried.[110]

Such speech also creates risks of favoritism, exhibiting close connections between the government and certain private

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106 *Id.*

107 Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J. F. 688, 699 (2019).

108 Schragger, *supra* note 38, at 50.

109 *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream*, PEW RSCH. CENTER (July 26, 2017), https://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/ [https://perma.cc/G2BW-PMFH].

110 *Id.*

groups, posing concerns for the neutrality the First Amendment demands in instances involving government positions towards different racial and religious groups. In fact, the same justices who decided *Trump v. Hawaii* have expressly affirmed this concern. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court applied the *Arlington Heights* factors to an administrative adjudication of Jack Phillips' refusal to provide a wedding cake to a homosexual couple on religious grounds.[111] This action was alleged to violate Colorado's public accommodation law.[112] Two of the adjudicators on the panel, however, expressed views that the Court treated as evincing hostility towards religion.[113] The *Arlington Heights* analysis applied by the Court demonstrated that the commission's adjudication gave "every appearance" of negative normative views of religion during the proceedings.[114]

The Court primarily focused on comments made by two of the seven commissioners, as well as the fact that these comments were not disavowed either by the commission or by the state during the proceedings leading to the order to cease and desist from refusing service to same-sex couples.[115]One commissioner, the Court noted, had said that while one can hold whatever religious views they like, if they do business in Colorado, they must be willing to compromise if state law conflicts with their personal belief system. Acknowledging that these comments were either indicative of a belief that one cannot use religious views to avoid antidiscrimination law or demonstrative of dismissiveness toward religion, the Court found the latter more likely, due to statements a second commissioner had made. This commissioner stated that religion and freedom of religion had repeatedly been used as a justification for discrimination, which he asserted was "despicable."[116] In dissent, Justice Ginsburg contended that is was not clear what prejudice had infiltrated the commission, given the fact that the decision involved several layers of independent decision making.[117] Particularly important here is the Court's observation that the First Amendment prohibits even "'subtle departures from neutrality' on matters of religion," and its demand that "upon even slight suspicion that proposals from state in-

111 138 S. Ct. 1719, 1724 (2018).
112 *Id.* at 1725.
113 *Id.* at 1729–30.
114 *Id.* at 1731.
115 *Id.* at 1732.
116 *Id.* at 1728–29.
117 *Id.* at 1751 (Ginsburg, J., dissenting).

tervention stem from animosity to religion or distrust of its practices," officials must regulate their conduct to avoid unequal treatment.[118] In other words, the Court identified the animus it found absent in *Trump v. Hawaii*, and explained in clear terms the dangers such animus poses.[119]

If avoiding such impermissible favoritism is imperative in the context of government speech alone, the interest in actually preventing the sameillicitly motives from manifesting in policy is of course more important. Imposing a higher cost on discriminatory speech when it has a connection to government action forces an actor to either refrain from making discriminatory appeals or refrain from putting discriminatory policies into practice despite campaign promises to implement them. In either event, harm is mitigated, and the risk of the courts actually having to decide challenges to these policies will decrease. Such a decrease will follow from the fact that an imposition of higher costs on such speech will likely lessen its use, making it more difficult for race-baiters and hate-stokers to gain power in the first place. One is of course free to still do so, but cannot count on these words being easily separated from action taken in accordance with this speech.

The speech and discriminatory purpose doctrines are in desperate need of development here, particularly with regard to campaign speech.[120] On the one hand, it has been argued that review of the constitutionality of government actions should be confined solely to the "four corners" of the document itself, with no further look behind the curtain.[121] Others have asserted that such speech constitutes part of the "relevant context" in determining the presence of discriminatory intent.[122] Campaign speech should be, when relevant, a key component of the *Arlington Heights* factors. In particular, such speech implicates the historical context and specific sequence of events leading up to the decision at issue.[123] Confining such analysis only to the four corners of a document is practically "begging for a

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118 *Id.* at 1731 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534, 547 (1993)).

119 William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 158 (2019).

120 *See* Shawn E. Fields, *Is it Bad Law to Believe a Politician? Campaign Speech and Discriminatory Intent*, 52 U. RICH. L. REV. 273, 274–75 (2018).

121 *Id.* at 275; *see also* Washington v. Trump, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting).

122 Fields, *supra* note 120, at 275; *see, e.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 597–98 (4th Cir. 2017), *vacated*, 138 S. Ct. 353 (2017).

123 Fields, *supra* note 120, at 297–99 (suggesting that campaign speech, including statements of the decision maker, can serve as part of an action's histori-

pretext."[124] This is because "campaign statements often provide a clear window to the candidate's true intent."[125] This also establishes a limiting principle; only campaign speech related to particular policies, and not general statements unrelated to specific actions, will be implicated by the test.

Such an approach is not only practical but has grounding in existing law. In particular, the connection between a discriminatory campaign promise and action taken, more indicative of causation than correlation, has been given judicial weight.[126] Further, while it is true that candidates often make contradictory statements, there is no reason that such oscillation could not also be considered in an improper purpose analysis.[127] Courts have also, in less precise terms, favored the incidental imposition of greater "costs" on expression of discriminatory purposes in campaign speech.[128] This stance represents the position that concerns about speech suppression are misplaced in this context because such speech is simply being given the weight of importance the First Amendment assigns it. Failing to afford such speech its proper weight gives those who appeal to and encourage discrimination a free pass when they seek to deliver on their promises.[129]

It may also be argued that seeking to hold this speech to account is still out of accordance with free speech interests because doing so improperly subjects speech to specific treatment based on the content or viewpoint of such speech. Such an argument is misguided in two ways. The first is the obvious fact that while the standard of review this Note proposes treats speech as evidence, it plainly does not regulate speech at all. To argue that it does would be to argue that the plain view exception constitutes an unreasonable search, or that a lawful

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cal context and be included in the sequence of events leading up to a challenged action).

124 *Id.* at 298 n.113.

125 Matthew Segal, *President Trump's Campaign Promises Stick with Us—They Should Stick with Him, Too*, JUST SEC. (Mar. 25, 2017), https://www.justsecurity.org/39246/president-trumps-campaign-promises-stick-us-they-stick-him/ [https://perma.cc/4VLX-E982].

126 Fields, *supra* note 120, at 298–99; *see, e.g.*, Decorte v. Jordan, 497 F.3d 433, 441 (5th Cir. 2007) (finding action taken connected to a discriminatory campaign promise).

127 Fields, *supra* note 120, at 301.

128 Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 600 (4th Cir. 2017), *vacated*, 138 S. Ct. 353 (2017) ("To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.").

129 Fields, *supra* note 120, at 314.

arrest constitutes an unreasonable seizure.[130] Second, the practice of assigning speech evidentiary weight is already embedded in criminal law, when the stakes for a given speaker are much higher, rising to potential loss of life or spending the remainder of one's life behind bars. Evidence of statements a defendant made before committing a crime serve as motive when connected to a crime.[131]

Additionally, this standard of review may at times be necessary to protect speech itself, such as when the improper purpose is to restrict speech. In such cases, courts have conducted similar inquiries into the intent of a government actor.[132] Specifically, regulations that are facially neutral cannot be pretextually justified if the purpose of such regulations is to regulate speech because of the message conveyed by it.[133] Accordingly, if a candidate calls for increasing the liability of the press after receiving media criticism, the modified *Arlington Heights* test would disincentivize the candidate from running on a policy of restricting the media. Specifically, such statements would indicate evidence of an improper purpose to suppress free expression in the event that a policy to increase media liability were actually implemented. In this way, the modified test would also help reduce attacks on the press made for political gain.

CONCLUSION

Although the First Amendment and the democratic principles it expresses do not permit direct censorship of government speech, modifying the *Arlington Heights* test is a constitutionally acceptable and practically sensible way of reducing ap-

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130 The plain view doctrine provides an exception to otherwise unreasonable searches under the Fourth Amendment. Illinois v. Andreas, 463 U.S. 765, 771–72 (1983). Searches incident to lawful arrests are also constitutionally permitted, though not without limit. Terry v. Ohio, 392 U.S. 1, 38 (1968).

131 For example, speech is used to discern whether the requisite motive is present for conviction of a hate crime. Relying on the speech does not target that speech, but instead infers meaning from it. *See* Sherry F. Colb, *Hate Crimes and Free Speech*, VERDICT (Aug. 26, 2021) https://verdict.justia.com/2021/08/26/hate-crimes-and-free-speech [https://perma.cc/Q89D-LEUA]. In the same vein, speech should serve as similar proof of a desire to commit an unconstitutional act, or to commit a constitutional act for an unconstitutional reason.

132 Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (referring to the application of First Amendment law "as a kind of motive-hunting").

133 Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 662 (1994) (explaining that content-neutral speech regulations must serve a government interest "unrelated to the suppression of free expression" (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968))).

peals to discrimination and animus. These strategies, characteristic of demagoguery and totalitarianism, present threats to the fabric of democracy itself. By holding speakers to the words they utter, modifying the *Arlington Heights* test in this manner defends democracy and respects the First Amendment by treating political speech by government actors and candidates with the seriousness the First Amendment demands it receive. While ideally, the use of such a modified test would not be necessary because of discriminatory appeals failing to catch hold, both history and the present political state of the United States demonstrate that they sometimes do. Treating discriminatory speech as evidence of illicit motive will impose higher costs on such speech, correcting for market failures that occur when making discriminatory appeals becomes profitable. Accordingly, imposing these increased costs will, in addition to making challenges to actions taken for illicit purposes more likely to succeed, make single government decision makers less likely to make such discriminatory appeals in the first place.