THE EQUAL PROTECTION CASE AGAINST DISPARATE U.S. HUMANITARIAN PAROLE POLICIES FOR AFGHANS COMPARED TO UKRAINIANS

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The disparities between the U.S. government's use of humanitarian parole in response to the humanitarian crises in Afghanistan and Ukraine are indicative of discrimination and violate the Equal Protection Clause. As such, U.S.-based relatives of Afghans should prevail in seeking accountability for the thousands of Afghans who continue to wait for protection.

First, this Note explains what immigration parole is, provides an overview of standing, equal protection, and animus, and describes how the government has used parole for Afghans and Ukrainians. Second, it compares parole for Afghans and Ukrainians and discusses recent immigration equal protection challenges. Third, it demonstrates that the differences between the uses of parole are disparities indicative of discriminatory animus, outlines what an equal protection animus claim against the government by U.S.-based relatives of Afghans could consist of, and urges the courts to adopt a new framework that would enable a finding of discriminatory animus in this and future immigration cases as a means of holding the government accountable.

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INTRODUCTION

Ifat is a six-year-old girl who now lives with her family on a U.S.-run army base in Doha, Qatar.[1] Ifat and her family were forced to flee their home in Afghanistan when the Taliban overthrew the government in August 2021.[2]

1. *See* Tanvi Misra, *They Thought Their Sick Little Girl Would Be Safe in America. Then It Denied Her Family Entry*, POLITICO MAG. (Sept. 17, 2023), https://www.politico.com/news/magazine/2023/09/17/afghanistan-visa-family-00113267 [https://perma.cc/2FNM-TBYC].
2. *See id.*

They continue to live in limbo without a permanent residence.[3] This is true despite Ifat's rare genetic disorder which causes her skin to blister so severely, creating lesions resembling third degree burns.[4] Ifat's father, Najeebullah, worked for the U.S. Embassy in Kabul until it shuttered.[5] Najeebullah filed humanitarian parole[6] applications for his family, but U.S. Citizenship and Immigration Services (USCIS) rejected his request because of a "lack of evidence."[7]

Margo is an eight-year-old girl who turned seven the day Russia invaded Ukraine.[8] During a raid by Russian forces, Max, her fifteen-year-old cousin, "pushed her to the corner of the porch, covering her with his body to protect her."[9] Max told Margo "to close her ears and open her mouth so she would not get a concussion from the explosions."[10] Now, Margo lives in Florida with her mother, her cousin Max, and her aunt.[11] They arrived in September 2022 through Uniting for Ukraine (U4U), a parole program meant to enable Ukrainians to come to the United States with the support of a U.S.-based sponsor.[12] Elizabeth, Margot's sponsor, along with her husband and two friends, are among the more than 210,000 people who signed up to be sponsors as part of U4U.[13]

The differences between Ifat's and Margo's experiences stem from the U.S. government's response to the humanitarian crises in Afghanistan and Ukraine.[14] Regarding Afghanistan, the United States evacuated some Afghans and encouraged those left behind to apply for humanitarian parole or seek protection through the refugee resettlement process.[15] As for Ukraine, the United States granted parole to Ukrainians who arrived at the United States-Mexico southern border right after the invasion, and then launched the U4U Program.[16]

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3. *See id.*
4. *See id.*
5. *See id.*
6. Humanitarian parole is a type of immigration parole that the U.S. government uses to allow people into the country on humanitarian grounds who otherwise would not have a basis for entry. Parole in the immigration context is not the same as parole used in the criminal law context. *See infra* Part I.A.
7. Misra, *supra* note 1. Ifat's father also applied for a Special Immigrant Visa (SIV) based on his past employment with the embassy and was preliminarily denied due to a lack of sufficient documentation proving his employment. *Id.* Lastly, he attempted—and failed—to obtain protection through the U.S. refugee resettlement process. *Id.*
8. *See* Maureen Groppe, *Ukrainians Are Finding Refuge at Fast Pace Thanks to Everyday Americans. But Is It Enough?*, USA TODAY (Feb. 24, 2023, 5:00 AM), https://www.usatoday.com/story/news/politics/2023/02/24/ukrainian-refugees-us-sponsored-americans/11280199002/ [https://perma.cc/9FKA-JDMH].
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*; *Uniting for Ukraine*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/ukraine [https://perma.cc/D3MJ-A59T] (Oct. 10, 2024).
13. *See* Groppe, *supra* note 8.
14. *See infra* Part II.A.
15. *See infra* Part I.B.1.
16. *See infra* Part I.B.2.

The U.S. Department of Homeland Security (DHS) has the discretion to grant immigration parole to noncitizens to allow them to remain in the United States under certain circumstances.[17] In response to the war between Russia and Ukraine, the U.S. government instituted the U4U program, which has allowed over 200,000 Ukrainians to come to the country.[18] This program is an important benchmark for how capable the United States is of using its immigration parole authority. Yet, there are discrepancies between the government's response to the crisis in Ukraine and its response to the crisis in Afghanistan.[19] Currently, there are still thousands of Afghans languishing while their humanitarian parole applications continue to move through the USCIS adjudication process.[20] In contrast, the U4U program continues to function, and Ukrainians are still permitted to apply and obtain relief.[21]

This Note examines the differences between the U.S. government's responses to the crises in Afghanistan and Ukraine. It proposes that the Equal Protection Clause, by way of the animus doctrine, may allow for U.S.-based relatives to seek accountability for their Afghan family members and loved ones who were left behind.[22] To do so, this Note proceeds in three parts. Part I provides background on immigration parole, key concepts related to the equal protection doctrine, and an overview of the use of parole for Afghans and Ukrainians.[23] Part II then compares the use of parole for Afghanistan and Ukraine and analyzes three immigration-related equal protection challenges as a means of further understanding how the courts approach such claims.[24] Part III demonstrates the differences between the government's responses, and it explains how the animus doctrine may offer hope for seeking accountability for Afghans.[25] Additionally, Part III outlines what a complaint could consist of for plaintiffs who are U.S.-based relatives or loved ones of Afghans left behind, arguing that the disparities between the government's responses are indicative of discriminatory animus toward Afghans.[26] Part III further proposes a test that the U.S. Supreme Court should apply when considering such a claim.[27] This Note concludes by arguing that an equal protection claim would shed light on the underlying discrimination of the U.S. government's response to the humanitarian

17. *See* 8 U.S.C. § 1182(d)(4) (2014); *see also* AM. IMMIGR. COUNCIL, THE USE OF PAROLE UNDER IMMIGRATION LAW 2 (2024), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_use_of_parole_under_immigration_law_2024.pdf [https://perma.cc/MLJ6-3MWD] ("DHS may only grant parole if the agency determines that there are urgent humanitarian or significant public benefit reasons for a person to be in the United States, and that that person merits a favorable exercise of discretion.").

18. *See Uniting for Ukraine*, *supra* note 12; *see also infra* note 76 and accompanying text.

19. *See infra* Part II.A.

20. *See infra* Part II.A.

21. *See infra* Part II.A.

22. *See infra* Parts II, III.

23. *See infra* Part I.

24. *See infra* Part II.

25. *See infra* Part III.A.

26. *See infra* Part III.B.

27. *See infra* Part III.C.

impacts of war and would play an important role in creating change in this area of U.S. immigration policy.[28]

I. IMMIGRATION PAROLE, EQUAL PROTECTION, AND OVERVIEW OF PAROLE FOR AFGHANS AND UKRAINIANS

This part provides an overview of key concepts in immigration and constitutional law, as well as the relevant uses of parole in Afghanistan and Ukraine. Part I.A defines immigration parole and explains the various types of parole. Part I.B discusses the extent to which the U.S. government used parole in response to the humanitarian crises in Afghanistan and Ukraine. Part I.C describes constitutional standing, the equal protection doctrine, and the animus doctrine.

A. Immigration Parole 101

Immigration parole permits DHS "to grant certain types of noncitizens temporary lawful presence in the United States for emergencies, international reciprocity with neighboring countries, humanitarian reasons, or public benefit."[29] An individual with a grant of lawful presence through parole is permitted to remain in the United States for usually one to two years, with possible renewal of parole under some circumstances.[30] However, such individuals are only permitted to stay and apply for work authorization at the discretion of DHS.[31] Having parole neither puts individuals on a path to permanent resident status or citizenship, nor does it allow individuals to petition for lawful status for family members.[32] Nonetheless, parole serves as an important form of relief, particularly for individuals fleeing humanitarian crises.[33]

DHS can issue parole in different forms depending on the specific circumstances.[34] Over the decades, this has led to the development of

28. *See infra* Part III.D.

29. *See* Sara N. Kominers, *Caught in the Gap Between Status and No-Status: Lawful Presence Then and Now*, 17 RUTGERS RACE & L. REV. 57, 65 (2016); 8 U.S.C. § 1182(d)(4).

30. *See* 8 U.S.C. § 1182(d)(4)–(5).

31. *See id.* § 1182(d)(5)(A); *see also* Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1, 10–11 (2016) (providing further information about employment authorization for individuals with parole).

32. *See* 8 U.S.C. § 1182(a)(9)(B)(i); *see also* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1134–39 (2015) (discussing the implications of parole as providing only a temporary lawful status).

33. *See* Heeren, *supra* note 32, at 1136.

34. *See* ANDORRA BRUNO, CONG. RSCH. SERV., R46570, IMMIGRATION PAROLE 4 (2020) (providing an overview of the different types of parole). Other types of parole include advanced parole, significant public benefit parole, parole-in-place, port-of-entry parole, and family reunification parole. *See generally* ELIZABETH CARLSON & JOANNA MEXICANO FURMANSKA, CATH. LEGAL IMMIGR. NETWORK INC., ALL ABOUT PAROLE (2023), https://www.cliniclegal.org/resources/parole/all-about-parole-practice-advisory [https://perma.cc/5EQF-ADZ9].

different categories of parole, including humanitarian parole and special parole programs.[35]

Humanitarian parole grants persons outside the United States permission to enter the country for urgent humanitarian reasons on a temporary basis.[36] USCIS permits anyone to request parole for themselves or on behalf of another individual, such as an individual who is outside of the United States.[37] Nothing requires the applicant to be a resident of the United States or a relative of the beneficiary.[38] USCIS then reviews requests on a case-by-case basis and requires that individuals undergo security screening.[39]

Various presidential administrations have established country-specific special parole programs designed to address specific populations' circumstances, including those facing unreasonable barriers to relief from natural disasters, social and political upheaval, or significant limitations of the immigration system.[40] For example, the administration of President Joseph R. Biden, Jr., implemented a parole process for Cubans, Haitians, Nicaraguans, and Venezuelans (CHNV) that enables individuals from these countries with financial sponsors in the United States to travel to, enter the country, and stay for an initial period of two years.[41] Since CHNV, the Biden administration has announced similar programs for Colombia, Ecuador, El Salvador, Guatemala, and Honduras.[42]

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35. *See* IMMIGRANT LEGAL RES. CTR. ATT'YS, PAROLE IN IMMIGRATION LAW 1–6 (2d ed. 2022) (providing an overview of parole and the different types of parole that emanate from the same statutory authority); AM. IMMIGR. COUNCIL, *supra* note 17, at 2, 6–7 (describing humanitarian parole and then providing examples of special parole programs).

36. *See* BRUNO, *supra* note 34, at 5–6.

37. *See Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states [https://perma.cc/EK7B-4NRN] (Oct. 11, 2024); CARLSON & FURMANSKA, *supra* note 34, at 9.

38. *See Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, *supra* note 37; CARLSON & FURMANSKA, *supra* note 34, at 9; *Uniting for Ukraine*, *supra* note 12.

39. *See* Kaylette Clark, Comment, *Detention of At-Risk Individuals During COVID-19: Humanitarian Parole and the Eighth Amendment*, 29 AM. U. J. GENDER SOC. POL'Y & L. 403, 407 (2021) (discussing the requirements for parole of inadmissible noncitizens).

40. *See* AM. IMMIGR. COUNCIL, *supra* note 17, at 3–4.

41. *See Process for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/CHNV [https://perma.cc/P2EH-DUFX] (Oct. 11, 2024). In response to the program in January 2023, twenty state attorneys general, led by Texas, filed a lawsuit in the U.S. District Court for the Southern District of Texas challenging the processes. *See generally* Complaint, State of Texas v. U.S. Dep't of Homeland Sec., No. 23-CV-00007, 2024 WL 1021068 (S.D. Tex. Mar. 8, 2024). On March 8, 2024, the court found that Texas did not establish that it had suffered harm due to the CHNV parole programs and therefore did not have standing to bring its claims. *See* Texas v. United States Dep't of Homeland Sec., No. 23-CV-00007, 2024 WL 1021068, at *17 (S.D. Tex. Mar. 8, 2024). For a summary of the timeline of this case, see *Texas v. DHS (CHNV Parole)*, JUST. ACTION CTR., https://justiceactioncenter.org/case/texas-v-dhs/ [https://perma.cc/DG8H-GUKH] (last visited Nov. 14, 2024).

42. *See DHS Announces Family Reunification Parole Processes for Colombia, El Salvador, Guatemala, and Honduras*, U.S. DEP'T OF HOMELAND SEC. (July 7, 2023), https://www.dhs.gov/news/2023/07/07/dhs-announces-family-reunification-parole-processes-colombia-el-salvador-guatemala [https://perma.cc/Q4CX-22J7]; *DHS Announces Family*

In sum, parole is a tool in immigration law available to presidential administrations to react to migration flows that the country would otherwise be unable to address. Accordingly, administrations choose to use parole to different extents.[43]

B. Parole for Individuals from Afghanistan and Ukraine in the Aftermath of Humanitarian Crises

The Biden administration has used parole for Afghans affected by the humanitarian crisis in the aftermath of the Taliban's takeover of Afghanistan's government, and for Ukrainians affected by Russia's invasion of Ukraine.[44] This section will describe how parole has been deployed in response to both crises.

1. Afghanistan: Parole for Evacuees and Those Left Behind

This section briefly provides context on the role of the United States in Afghanistan, including an explanation of Operation Allies Refuge, Operation Allies Welcome, and humanitarian parole for Afghans left behind after the evacuations.

In 2001, the United States invaded Afghanistan as part of the war on terror.[45] For almost two decades, U.S. military presence[46] and military endeavors led to the deaths of over 100,000 civilians.[47] Back home in the United States, policies and hostilities directed at Arab and Muslim immigrants, both noncitizens and citizens, proliferated in the name of national security.[48]

Reunification Parole Process for Ecuador, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 18, 2023), https://www.uscis.gov/newsroom/news-releases/dhs-announces-family-reunification-parole-process-for-ecuador [https://perma.cc/PJJ3-LXYC].

43. *See, e.g.*, YAEL SCHACHER, REFUGEES INT'L, SUPPLEMENTARY PROTECTION PATHWAYS TO THE UNITED STATES: LESSONS FROM THE PAST FOR TODAY'S HUMANITARIAN PAROLE POLICIES 4 (2022).

44. For more information regarding the two programs, see generally Alexandra Ciullo, Note, *Humanitarian Parole: A Tale of Two Crises*, 37 GEO. IMMIGR. L.J. 493 (2023).

45. *See* Leoni Connah, *US Intervention in Afghanistan: Justifying the Unjustifiable*, 41 S. ASIA RSCH. 70, 71, 78–79 (2021); *see also* Emily Stewart, *The History of US Intervention in Afghanistan, from the Cold War to 9/11*, VOX (Aug. 21, 2021, 8:00 AM), https://www.vox.com/world/22634008/us-troops-afghanistan-cold-war-bush-bin-laden [https://perma.cc/R42M-ALGL] (discussing how the first U.S. intervention in Afghanistan predates the twenty-first century and goes back to the Cold War).

46. *See A Timeline of U.S. Troop Levels in Afghanistan Since 2001*, MILITARYTIMES (July 6, 2016), https://www.militarytimes.com/news/your-military/2016/07/06/a-timeline-of-u-s-troop-levels-in-afghanistan-since-2001/ [https://perma.cc/KC8T-RPVY] (describing the ebb and flow of the number of U.S. troops in Afghanistan since 2001).

47. *See* Connah, *supra* note 45, at 70 (citing *Afghanistan: Civilian Casualties Exceed 10,000 for Sixth Straight Year*, UN NEWS (Feb. 22, 2020), https://news.un.org/en/story/2020/02/1057921 [https://perma.cc/3CP8-ZJVU]).

48. *See, e.g.*, Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1380–86 (2007) (describing how the U.S. government targeted Arabs and Muslims after the attacks of September 11); R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*,

In August 2021, the Biden administration withdrew all military forces from Afghanistan.[49] Soon after, the Taliban recaptured the country and chaos ensued, partially due to civilians' widespread fear of persecution and repression under a Taliban regime.[50] Civilians who had worked for the U.S. government, such as interpreters, were particularly at risk.[51]

In response, the United States launched Operation Allies Refuge,[52] a program intended to provide limited evacuation flights for U.S. citizens, legal permanent residents, and some Afghans, including those who already had or were eligible for Special Immigrant Visas (SIVs).[53] Thousands of civilians rushed to the international airport in Kabul, desperate to leave the country.[54]

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89 CORNELL L. REV. 1201, 1201–17 (2004) (describing antiterrorism policies and methods enacted after September 11, 2001); Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5, 5–11 (2004) (criticizing President George W. Bush's administration's violation of the law in focusing removal efforts on noncitizens from nations that allegedly "harbored" terrorists and were populated predominantly by Arabs and Muslims).

49. *See The U.S. War in Afghanistan*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/timeline/us-war-afghanistan [https://perma.cc/C4TL-4FCQ] (last visited Nov. 14, 2024) (providing a timeline of the U.S presence in Afghanistan and its withdrawal of troops). *See generally* U.S. DEP'T OF STATE, AFTER ACTION REVIEW ON AFGHANISTAN (2022), https://www.state.gov/wp-content/uploads/2023/06/State-AAR-AFG.pdf [https://perma.cc/JU3T-852J] (detailing the U.S. government's decision to withdraw troops and the shortcomings of that decision).

50. *See* Ahmad Seir, Rahim Faiez, Tameem Akhgar & Jon Gambrell, *Taliban Sweep into Afghan Capital After Government Collapses*, ASSOCIATED PRESS (Aug. 15, 2021, 11:35 PM), https://apnews.com/article/afghanistan-taliban-kabul-bagram-e1ed33fe0c665ee67ba132c51b8e32a5 [https://perma.cc/7DZ6-7MV9].

51. *See* Nick Schifrin & Teresa Cebrian Aranda, *U.S. Allies in Afghanistan Fear for Their Lives Under Taliban Rule*, PBS (Aug. 17, 2022, 6:45 PM), https://www.pbs.org/newshour/show/u-s-allies-in-afghanistan-fear-for-their-lives-under-taliban-rule [https://perma.cc/795Y-F6TY].

52. *See Operation Allies Refuge*, U.S. MISSION TO AFGHANISTAN (July 17, 2021), https://af.usembassy.gov/operation-allies-refuge/ [https://perma.cc/83X9-QKXU].

53. *See Evacuations from Afghanistan by Country*, REUTERS (Aug. 30, 2021, 9:06 AM), https://www.reuters.com/world/evacuations-afghanistan-by-country-2021-08-26/ [https://perma.cc/C7RV-ANAL]. For more information on SIVs specifically for Afghans who worked with the U.S. government, see *The Steps of the Afghan SIV-Process*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov/steps-of-the-afghan-siv-process.html [https://perma.cc/Q4LE-TSHV] (last visited Nov. 14, 2024) and *Afghan and Iraqi Allies v. Blinken: Challenging Systemic Delays in Deciding Special Immigrant Visa Applications*, INT'L REFUGEE ASSISTANCE PROJECT, https://refugeerights.org/news-resources/afghan-and-iraqi-allies-v-pompeo-challenging-the-systematic-delay-in-processing-of-special-immigrant-via-applications [https://perma.cc/HK5Z-E8WK] (last visited Nov. 14, 2024) (describing litigation regarding delayed processing of SIVs for Afghans and Iraqis). Not discussed here, but important to recognize, is the role of nonstate actors in evacuations, including nonprofit organizations. *See generally* JUNLI LIM & ELISABETH WICKERI, LEITNER CTR. FOR INT'L L. & JUST., "THE WORLD SIMPLY GAVE UP": INTERNATIONAL LAW AND THE ROLE OF NON-STATE ENTITIES IN HUMANITARIAN EVACUATIONS IN AFGHANISTAN (2023), https://www.leitnercenter.org/wp-content/uploads/2023/09/FINAL-LeitnerCenter_Afghanistan-Evacuations_WEB.pdf [https://perma.cc/L7NT-EK4E].

54. *See* Zolan Kanno-Youngs & Annie Karni, *Series of U.S. Actions Left Afghan Allies Frantic, Stranded and Eager to Get Out*, N.Y. TIMES (Aug. 29, 2021), https://www.nytimes.com/2021/08/18/us/politics/afghanistan-refugees.html [https://perma.cc/JP35-FVWF]; *see also* Lauren Leatherby & Larry Buchanan, *At Least 250,000 Afghans Who*

However, relative to the number of individuals seeking to evacuate, few were able to get on flights.[55] In total, the U.S. government evacuated 82,015 Afghans—about 76,000 of whom were evacuated to the United States.[56] Further, of those 76,000 evacuated, about 36,000 had pending SIV applications, 36,433 had no immigration status, and the others were either U.S. citizens, legal permanent residents, or visa holders.[57] The 36,433 individuals without immigration status were admitted to the United States under Operation Allies Welcome and through humanitarian parole provided at a port of entry.[58] After receiving parole, these evacuees were transported to eight domestic military bases for additional vetting and temporary shelter until refugee resettlement agencies could settle them elsewhere.[59] The evacuees received parole for two years with the possibility to renew, and they were able to obtain work authorization and refugee benefits.[60]

As a threshold matter, the use of parole for Afghans who were left behind—specifically those who were either unable to make it onto evacuation flights by the time the United States fully withdrew from Afghanistan, or those who were evacuated but were taken to third countries like Qatar—differs from the use of parole for the Afghans who were evacuated directly to the United States.[61] Those who were evacuated to the United States automatically received humanitarian parole upon entry to the

Worked with U.S. Haven't Been Evacuated, Estimates Say, N.Y. TIMES (Aug. 25, 2021), https://www.nytimes.com/interactive/2021/08/25/world/asia/afghanistan-evacuations-estimates.html [https://perma.cc/6MDU-FYXL].

55. *See* Kanno-Youngs & Karni, *supra* note 54; Leatherby & Buchanan, *supra* note 54.

56. *See* U.S. DEP'T OF HOMELAND SEC., OPERATION ALLIES WELCOME AFGHAN EVACUEE REPORT 2 (2022).

57. *See id.*

58. *See id.* For interviews with evacuees, see generally ALEXANDRIA J. NYLEN, OMAR BAH, JONATHAN BOTT, GIOVANNA DELUCA, ADAM C. LEVINE & SUBHAN MOHEBI, CTR. FOR HUM. RTS. & HUMANITARIAN STUDS. & THE REFUGEE DREAM CTR., "THEN, WE LOST EVERYTHING," AFGHAN EVACUEE EXPERIENCES OF OPERATION ALLIES REFUGE AND OPERATION ALLIES WELCOME (2023). This type of humanitarian parole issued at a port of entry is also sometimes referred to as port-of-entry parole. *See* CARLSON & FURMANSKA, *supra* note 34, at 15–16; *see also* Lindsay M. Harris & Yalda Royan, *Afghan Allies in Limbo: Discrimination in the U.S. Immigration Response*, 61 SAN DIEGO L.R. (forthcoming Dec. 2024) (manuscript at 12) (on file with author) ("Around 76,000 Afghans were permitted to enter the U.S. in the late summer and early Fall of 2021, using a mechanism called 'port parole,' a form of humanitarian parole.").

59. *See* Ciullo, *supra* note 44, at 497; Camilo Montoya-Galvez, *U.S. Relocates All Afghan Evacuees from Military Sites, Completing First Resettlement Phase*, CBS NEWS (Feb. 19, 2022, 4:31 PM), https://www.cbsnews.com/news/us-relocates-afghan-evacuees-from-military-sites-completing-first-resettlement-phase/ [https://perma.cc/Q9R5-YT6Q].

60. *See* Ciullo, *supra* note 44, at 497; Montoya-Galvez, *supra* note 59.

61. *Compare Operation Allies Welcome*, U.S. DEP'T OF HOMELAND SEC. (Sept. 29, 2022), https://www.dhs.gov/allieswelcome [https://perma.cc/EX6F-4VDQ] (describing the process for Afghans evacuated by the United States and brought to the country), *with Information for Afghan Nationals on Requests to USCIS for Humanitarian Parole*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 1, 2024), https://www.uscis.gov/humanitarian/humanitarian-parole/information-for-afghan-nationals-on-requests-to-uscis-for-humanitarian-parole [https://perma.cc/72F8-99B3] (describing the application process for humanitarian parole for Afghans who are not in the United States).

country, whereas Afghans left behind had to apply for humanitarian parole.[62] Consequently, Afghans left behind had to submit their applications in accordance with USCIS' strict guidelines while their country was in upheaval, or while being housed on U.S. military bases in third countries.[63]

Those who remained and continue to remain in Afghanistan are stuck in danger and limbo.[64] Those who were evacuated to third countries face an arduous path to make it to the United States.[65] These third countries include Germany, Italy, and Qatar, where Afghans were, and continue to be, housed on U.S. military bases while they undergo security and health clearances and wait for their visas, refugee resettlement, or humanitarian parole as a means to travel to the United States.[66] Details on the treatment of Afghans waiting for further clearance to travel to the United States or the timing of the processing of their applications is unclear.[67]

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62. *See* Ciullo, *supra* note 44, at 497; Montoya-Galvez, *supra* note 59.

63. Woqai Mohmand, cofounder of legal advocacy group Project ANAR, noted that "[Operation Allies Welcome] doesn't help any of the Afghans that filed for parole or that remain in Afghanistan," and that people who were allowed into the United States in the wake of the evacuation are "a completely different group of people from those who applied for humanitarian parole from outside of the United States." Najib Aminy & Dhruv Mehrotra, *The US Has Approved Only 123 Afghan Humanitarian Parole Applications in the Last Year*, REVEAL (Aug. 19, 2022), https://revealnews.org/article/the-us-has-approved-only-123-afghan-humanitarian-parole-applications-in-the-last-year/ [https://perma.cc/HZ4U-PBT8].

64. *See, e.g.*, Monika Evstatieva, *Three Years After the U.S. Withdrawal, Former Afghan Forces Are Hunted by the Taliban*, NPR (Sep. 25, 2024, 4:35 PM), https://www.npr.org/2024/09/25/nx-s1-5099028/former-afghan-army-and-police-hunted-by-the-taliban [https://perma.cc/T6C9-8MRU]; Jack Deutsch, *Taliban Killings Skyrocket in Forgotten Afghanistan*, FOREIGN POL'Y (Aug. 2, 2022, 3:54 PM), https://foreignpolicy.com/2022/08/02/taliban-killings-skyrocket-afghanistan/ [https://perma.cc/B8AD-9SN8]; UNITED NATIONS HUMAN RTS. SPECIAL PROCS., UN EXPERTS: LEGAL PROFESSIONALS IN AFGHANISTAN FACE EXTREME RISKS, NEED URGENT INTERNATIONAL SUPPORT (2023), https://www.ohchr.org/sites/default/files/documents/issues/ijudiciary/statements/2023-01-17/20230201-stm-sr-ijl-sr-afghanistan-day-endangered-lawyer.pdf [https://perma.cc/KZ54-B9EW]; Barbara Marcolini, Sanjar Sohail & Alexander Stockton, Opinion, *The Taliban Promised Them Amnesty, Then They Were Executed*, N.Y. TIMES (Apr. 12, 2022), https://www.nytimes.com/interactive/2022/04/12/opinion/taliban-afghanistan-revenge.html [https://perma.cc/8UWD-CPKX]; Scott Peterson, *For Afghanistan's New Enemies of the State, a Life in Hiding*, CHRISTIAN SCI. MONITOR (Feb. 1, 2022), https://www.csmonitor.com/World/Middle-East/2022/0201/For-Afghanistan-s-new-enemies-of-the-state-a-life-in-hiding [https://perma.cc/BVU5-8VZA].

65. *See* Kristen E. Eichensehr, *United States Grapples with Aftermath of Withdrawal from Afghanistan*, 116 AM. J. INT'L L. 190, 193 (2022) (citing Kristina Cooke & Mica Rosenberg, *Evacuated Afghans, Hoping to Resettle in U.S., Face Extended Limbo in Third Countries*, REUTERS (Sept. 2, 2021), https://www.reuters.com/world/asia-pacific/evacuated-afghans-hoping-resettle-us-face-extended-limbo-third-countries-2021-09-02 [https://perma.cc/KC6B-LJR]). Adding to the challenges Afghans are encountering in seeking protection in the United States is that many of those who fled to neighboring Pakistan without documentation have become targets for deportation by the Pakistani government. *See Pakistan to Start Second Phase of Afghan Deportations*, AL JAZEERA (June 30, 2024), https://www.aljazeera.com/news/2024/6/30/pakistan-to-start-second-phase-of-afghan-deportations [https://perma.cc/46UE-TRNZ].

66. Eichensehr, *supra* note 65, at 193.

67. Alice Speri, *The Biden Administration Is Keeping Thousands of Afghans in Limbo Abroad*, THE INTERCEPT (Sept. 13, 2023, 7:00 AM), https://theintercept.com/2023/09/13/afghan-refugee-resettlement-camps/ [https://perma.cc/6WH4-35KX] (citing Complaint for

In short, the United States was present in Afghanistan for decades, and after its withdrawal, civilians, many of whom had worked with U.S. forces, were left in danger.[68] Humanitarian parole was one of the forms of relief available to Afghans upon evacuation, and then it became an option for Afghans who were left behind.[69] Despite this being an option, parole has failed to materialize for thousands of Afghans who continue to wait for their applications to process, either in Afghanistan or in third countries.[70]

2. Ukraine: Parole Through Uniting for Ukraine (U4U)

In February of 2022, Russia invaded Ukraine, disrupting peace in Europe and leading to the largest mass humanitarian crisis in the continent since World War II.[71] As of February 2024, over three million people in Ukraine are internally displaced, and over six million Ukrainians have fled the country.[72] Since 2022, the United States has supported Ukraine with more than seventy-five billion dollars in assistance, including humanitarian, financial, and military support.[73] Dozens of other countries, including most members of the North Atlantic Treaty Organization (NATO) and the European Union (EU), have also provided aid.[74] As part of its commitment to supporting Ukraine, the Biden administration promised to accept up to 100,000 Ukrainian refugees.[75]

Declaratory and Injunctive Relief, Ctr. for Const. Rts. v. U.S. Dep't of Def., No. 23-cv-7689 (S.D.N.Y. Aug. 30, 2023)). In March 2023, groups filed public records requests seeking to establish the exact number of Afghans awaiting resettlement to the United States, as well as the terms of their confinement and the exact role played by the U.S. government in running the sites where they are being held. *Id.* The U.S. Departments of State and Homeland Security did not respond to the records requests, whereas the U.S. Department of Defense agreed to release some of the records but has failed to do so. *Id.*

68. *See* Schifrin & Aranda, *supra* note 51.

69. *See, e.g.*, Aminy & Mehrotra, *supra* note 63.

70. *See id.*; *see also* Misra, *supra* note 1.

71. *See* Matthew Chance, Nathan Hodge, Tim Lister, Laura Smith-Spark & Ivana Kottasová, *Peace in Europe 'Shattered' as Russia Invades Ukraine*, CNN (Feb. 24, 2022, 7:01 PM), https://www.cnn.com/2022/02/24/europe/ukraine-russia-invasion-thursday-intl/index.html [https://perma.cc/MST5-M4CR].

72. *See* UNHCR REG'L BUREAU FOR EUR., UKRAINE SITUATION FLASH UPDATE #73, at 1 (2024).

73. *See* Jonathan Masters & Will Merrow, *How Much U.S. Aid Is Going to Ukraine?*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts [https://perma.cc/74AW-QEFX] (May 9, 2024, 9:00 AM); PIETRO BOMPREZZI, IVAN KHARITINOV & CHRISTOPH TREBESCH, KIEL INST. FOR THE WORLD ECON., UKRAINE SUPPORT TRACKER—METHODOLOGICAL UPDATE & NEW RESULTS ON AID "ALLOCATION" 3–8 (2024) (detailing aid from the United States and European countries to Ukraine through figures that demonstrate trends of support throughout the war).

74. *See* Masters & Merrow, *supra* note 73; BOMPREZZI ET AL. *supra* note 73, at 3–8; *see also* CLAIRE MILLS, HOUSE OF COMMONS LIBR., RESEARCH BRIEFING: MILITARY ASSISTANCE TO UKRAINE SINCE THE RUSSIAN INVASION 14, 16, 66 (2024) (discussing United Kingdom, North Atlantic Treaty Organization, and European Union aid to Ukraine).

75. *See Fact Sheet: The Biden Administration Announces New Humanitarian, Development, and Democracy Assistance to Ukraine and the Surrounding Region*, THE WHITE HOUSE (Mar. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases

On April 12, 2022, President Biden announced the U4U program, with the stated goal of creating a "new streamlined process to provide Ukrainian citizens who have fled Russia's unprovoked war of aggression opportunities to come to the United States."[76] U4U is a fully online program that adjudicates parole applications by Ukrainians who seek temporary protection in the United States.[77] Instead of traveling to the southern border and requesting parole there or waiting out the years-long refugee resettlement process, U4U provides parolees with an electronic travel document that allows them to fly to the United States and enter lawfully through any port of entry.[78]

In sum, since Russia invaded Ukraine, the Biden administration has been committed to supporting Ukrainians who were forced to flee.[79] After initially offering humanitarian parole to Ukrainians who arrived at the southern U.S. border, the U.S. government established U4U, a parole program, that despite its imperfections,[80] has played an important role in allowing Ukrainians to come to the United States with the support of U.S.-based sponsors.[81]

Thus far, Parts I.A.2 and I.B.2 have provided an overview of how the U.S. government has used parole to respond to the humanitarian crises in Afghanistan and Ukraine.[82] By describing the features of parole for Afghans and Ukrainians, these parts provide important context for the forthcoming

/2022/03/24/fact-sheet-the-biden-administration-announces-new-humanitarian-development-and-democracy-assistance-to-ukraine-and-the-surrounding-region/ [https://perma.cc/7G2C-K4KN] ("[T]he U.S. is announcing plans to welcome up to 100,000 Ukrainians and others . . . through the full range of legal pathways.").

76. *Uniting for Ukraine*, *supra* note 12. Soon after the invasion, Ukrainian refugees arrived on foot at the United States-Mexico border. Title 42, a public health authority that allowed the government to effectively keep the border closed during the COVID-19 national emergency, was in place at the time, initially preventing Ukrainians from entering the country. DHS, however, made exceptions to Title 42 and granted parole for about 22,000 Ukrainians. After those Ukrainians received parole at the border, the Biden administration launched the U4U program. For coverage on the early arrivals of Ukrainians to the border, see Camilo Montoya-Galvez, *U.S. to Extend Legal Stay of Ukrainian Refugees Processed Along Mexican Border*, CBS NEWS (Mar. 13, 2023, 7:43 PM), https://www.cbsnews.com/news/ukrainian-refugees-us-extends-legal-stay-mexico-border/ [https://perma.cc/563G-5X6D]. For coverage on the end of Title 42 in May 2023, see Colleen Long, *Title 42 Has Ended. Here's What It Did, and How U.S. Immigration Policy Is Changing*, ASSOCIATED PRESS (May 12, 2023, 4:14 AM), https://apnews.com/article/immigration-biden-border-title-42-mexico-asylum-be4e0b15b27adb9bede87b9bbefb798d [https://perma.cc/QY4N-Q87D] and Muzaffar Chishti & Kathleen Bush-Joseph, *U.S. Border Asylum Policy Enters New Territory Post-Title 42*, MIGRATION POL'Y INST. (May 25, 2023), https://www.migrationpolicy.org/article/border-after-title-42 [https://perma.cc/N6X3-6RS7] (covering current asylum policy after the end of Title 42).

77. *See Uniting for Ukraine*, *supra* note 12.

78. *See id.*; *see also An Overview of the "Uniting for Ukraine" Program*, AM. IMMIGR. COUNCIL (Jan. 13, 2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/fact_sheet_uniting_for_ukraine.pdf [https://perma.cc/D5RS-MFPB].

79. *See Fact Sheet*, *supra* note 75.

80. *See, e.g.*, Kimiko de Freytas-Tamura, *These Ukrainians Arrived Under a Biden Program. They Ended Up Homeless.*, N.Y. TIMES (Apr. 2, 2023), https://www.nytimes.com/2023/04/02/nyregion/ukraine-refugees-homeless.html [https://perma.cc/MK27-3DLH].

81. *See Uniting for Ukraine*, *supra* note 12.

82. *See supra* Part I.B.

discussion that compares both uses of parole.[83] But first, what follows is an overview of the constitutional doctrines that frame the legal challenge to the U.S. government's discriminatory use of parole in this context.[84]

C. The Standing, Equal Protection, and Animus Doctrines

Federal courts have weighed the constitutionality of immigration policies since the 1800s.[85] Accordingly, to discuss how courts have approached such immigration-related questions requires an understanding of certain foundational constitutional doctrines. To that end, this section explains standing, equal protection, and animus.

1. Standing

Article III of the Constitution limits the subject matter jurisdiction of federal courts to "[c]ases" or "[c]ontroversies."[86] The Court has interpreted Article III to define justiciability requirements, including mootness, ripeness, political question, and standing.[87] The standing doctrine, as articulated by the Court in *Allen v. Wright*,[88] embraces several judicially-imposed limits on the exercise of federal jurisdiction.[89] These limits include the general prohibition on a litigant raising a third party's legal rights, barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.[90]

The Court has developed the standing doctrine to include three requirements: (1) injury-in-fact, (2) causation, and (3) redressability.[91] First, for an injury-in-fact, there must be an invasion of a plaintiff's legally protected interest or a violation of some legal right that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical."[92] Second, causation requires that the injury must be caused by or is fairly traceable to the defendant's action, meaning the injury-in-fact would not exist but for the defendant's challenged conduct.[93] Lastly, redressability

83. *See infra* Part II.

84. *See infra* Parts I.C, III.B.

85. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12 (1998).

86. U.S. CONST. art. III, § 2; *see also* Raj Shah, Comment, *An Article III Divided Against Itself Cannot Stand: A Critical Race Perspective on the U.S. Supreme Court's Standing Jurisprudence*, 61 UCLA L. REV. 198, 199 (2013).

87. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does.").

88. 468 U.S. 737 (1984).

89. *See id.* at 751.

90. *Id.* (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474–75 (1982)).

91. *See* Shah, *supra* note 86, at 201; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

92. *Lujan*, 504 U.S. at 561.

93. *See* Shah, *supra* note 86, at 199 (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

means the form of relief requested by the plaintiff must redress or relieve the alleged injury-in-fact.[94]

2. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o [s]tate shall . . . deny to any person within its jurisdiction the equal protection of the laws."[95] The Amendment only applies to "state" actions, not actions by the federal government.[96] However, the Court determined that through the Due Process Clause of the Fifth Amendment, the Constitution guarantees equal protection and prohibits unjustified discrimination by federal actors.[97] Since then, courts have assessed equal protection claims against federal actors under the Fifth Amendment in the same way equal protection claims against state actors under the Fourteenth Amendment are analyzed.[98]

A plaintiff can plead a Fifth Amendment claim of discrimination in one of three ways: by showing (1) that a law or policy is discriminatory on its face; (2) that a facially neutral law or policy has been applied in an intentionally discriminatory manner; or (3) that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus.[99] Under the third option, plaintiffs can only proceed with their equal protection claim if they have adequately pled that (1) the facially neutral law or policy in question has been enforced in an intentionally discriminatory manner or its enforcement adversely affects individuals of plaintiffs' same race, religion, or national origin and (2) the law or policy itself was motivated by discriminatory animus.[100]

In general, plaintiffs must prove a racially discriminatory intent or purpose for a policy to show a violation of equal protection.[101] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[102] one of the leading authorities on equal protection, the Court, in discussing its holding in *Washington v. Davis*,[103] stated that "official action will not be held unconstitutional solely because it results in a racially disproportionate

94. *Id.*

95. U.S. CONST. amend. XIV, § 1, cl. 4.

96. *Id.* amend. XIV, § 1; *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states.").

97. *See* United States v. Navarro, 800 F.3d 1104, 1112 n.6 (9th Cir. 2015) (citing *Bolling*, 347 U.S. at 498–99).

98. *Id.* (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)); *see also* Buckley v. Valeo 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

99. *See* Alharbi v. Miller, 368 F. Supp. 3d 527, 563 (E.D.N.Y. 2019) (citing Aguilar v. Immigr. & Customs Enf't Div. of the U.S. Dep't of Homeland Sec., 811 F. Supp. 2d 803, 819 (S.D.N.Y. 2011)).

100. *See id.*

101. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

102. 429 U.S. 252 (1977).

103. 426 U.S. 229 (1976).

impact."[104] Rather, plaintiffs must demonstrate racially discriminatory intent, as evidenced by factors including disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decision-makers.[105]

When the government treats two classes of persons differently, courts examine the government's actions through varying levels of judicial scrutiny, also referred to as standards of review.[106] There are three standards of review.[107] Under strict scrutiny, the government's action must be "narrowly tailored" to further a "compelling" state interest.[108] Intermediate scrutiny means that the government's classification must be "substantially related" to an "important" government interest.[109] Lastly, rational basis review provides for the greatest degree of deference to the government, calling for the government's action to be "rationally related to [a] legitimate government[]" interest.[110]

The plenary power doctrine, though separate from the levels of scrutiny, is relevant here, too, because of its role in immigration-related constitutional challenges.[111] The plenary power doctrine provides the government with wide discretion in immigration law.[112] Historically, the Court considered Congress's power to regulate immigration as plenary, suggesting that courts had little to no power to review the constitutionality of Congress's actions.[113] In recent decades, however, courts have extended this degree of deference to the executive branch as well.[114]

3. Animus in Equal Protection

The animus doctrine is an area of equal protection law that provides for a "robust" rational basis review, and it is applied in situations in which a law

104. *Arlington Heights*, 429 U.S. at 264–65. The Court further referenced *Washington v. Davis* in stating, "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.* at 265 (quoting *Washington*, 426 U.S. at 242).

105. *See id.* at 266–68.

106. *See* Andrea Galvez, Comment, *Bias and Immigration: A New Factors Test to Examine Extrinsic Evidence of Animus in Immigration Cases*, 71 EMORY L.J. 57, 68 (2021).

107. *See id.* at 68–69 (explaining that classifications based on race, nationality, and alienage usually receive strict scrutiny, classifications based on sex, gender, and children of unmarried parents receive intermediate scrutiny, and all other classifications including those based on age, disability, wealth, and nonmarital families are subject to rational basis review).

108. Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).

109. Craig v. Boren, 429 U.S. 190, 197 (1976).

110. Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

111. *See generally*, Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13 (2019).

112. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 574 (1990) (describing plenary power doctrine); *see also* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 378–79 (2004) (describing the scope of the doctrine).

113. *See* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 926 (1995).

114. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 461–64 (2009).

serves as a manifestation of animus toward a specific group of people.[115] Derived from the Supreme Court's 1973 decision in *United States Department of Agriculture v. Moreno*,[116] which concerned the federal denial of food stamps to nontraditional family units, the animus doctrine prohibits the federal government from acting out of dislike or animus toward a particular group.[117] As Justice William J. Brennan, Jr., expressed in that case, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[118] In this way, the animus doctrine serves as a guardrail that can keep the government from instituting policies or laws that harm a particular group.[119]

Additional seminal cases in the development of the animus doctrine include *City of Cleburne v. Cleburne Living Center*,[120] concerning a city's denial of housing to a group home for the cognitively disabled;[121] *Romer v. Evans*,[122] regarding a state constitutional amendment denying antidiscrimination protections for gay men;[123] and *United States v. Windsor*,[124] involving denial of federal recognition to same-sex marriages.[125] In these cases, the Court performed a review of the government's rationale or purpose for its action that went beyond simply taking the government's purported "legitimate" considerations at face value.[126] Instead, because the Court suspected animus as the government's motivation for its action, the Court placed the evidentiary burden on the government to prove its true

115. *See* Ray, *supra* note 111, at 50.

116. 413 U.S. 528 (1973).

117. *Id.* at 535, 538; *see also* William B. Araiza, *Teach Your Citizens Well: Demeaning Government Speech, Equal Protection Animus, and Government's Legitimate Power*, 2022 U. ILL. L. REV. 1861, 1870.

118. *Moreno*, 413 U.S. at 534 (emphasis added).

119. *See* WILLIAM B. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 3–4 (2017).

120. 473 U.S. 432 (1985).

121. *Id.* (finding that requiring a proposed home for the intellectually disabled to obtain a special permit not required of other comparable dwellings violated equal protection).

122. 517 U.S. 620 (1996).

123. *Id.* (holding that a Colorado amendment had made gays and lesbians "a stranger to its laws").

124. 570 U.S. 744 (2013).

125. *Id.* (finding that the principal effect of a statute was to identify a subset of state-sanctioned marriages and make them unequal).

126. *See* Ray, *supra* note 111, at 50.

motives.[127] Scholars call this type of rational review[128] "rational basis with bite,"[129] "rational basis with teeth,"[130] and "rational basis plus."[131]

II. COMPARISON OF USE OF PAROLE AND ANALYSIS OF IMMIGRATION EQUAL PROTECTION CASES

Building off the background provided in Part I, this part describes the conflicts at issue in this Note: the disparities in the U.S. government's approach to using parole in response to the humanitarian crises in Afghanistan and Ukraine, and the lack of clarity as to how federal courts apply equal protection and animus doctrine in cases challenging federal immigration policies. To that end, this part will discuss these issues in the order mentioned.

A. The Use of Parole for Afghanistan and Ukraine

This section compares Afghanistan and Ukraine parole by offering an overview of the similarities between the uses of parole for both countries and then discussing the differences between the programs, including the method of filing applications, application fees, the required location of applicants, the eligibility standard, and processing times and outcomes. Of note at the onset is that the United States initially employed humanitarian parole as the principal way of allowing Afghans to enter the country.[132] Then in September 2022, the government made an announcement revising its policy to encourage Afghans to seek relief through the refugee resettlement process instead.[133] Despite this shift, Afghans continue to be able to apply for humanitarian parole.[134] However, many of those who had previously applied continue to languish in waiting.[135]

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127. *See id.*

128. *See* Galvez, *supra* note 106, at 73–74.

129. *See, e.g.*, Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759 (2011).

130. *See, e.g.*, Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 540 (2014); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell*," 108 YALE L.J. 485, 488 n.5 (1998).

131. *See, e.g.*, Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 135 n.5 (2011). This Note will reference such review as "rational basis with bite."

132. *See* Camilo Montoya-Galvez & Nicole Sganga, *U.S. Using Humanitarian Tool to Admit At-Risk Afghans Who Don't Have Visas*, CBS NEWS (Aug. 24, 2021, 6:25 PM), https://www.cbsnews.com/news/afghanistan-refugees-evacuation-humanitarian-parole-visas/ [https://perma.cc/W5YS-VVM6] (providing early coverage of the U.S. government's use of humanitarian parole in Afghanistan).

133. *See US to Revise Resettlement Policy for Afghans: Official*, AL JAZEERA (Sept. 1, 2022), https://www.aljazeera.com/news/2022/9/1/us-to-revise-resettlement-policy-for-afghans-official [https://perma.cc/K4L9-K8C3].

134. *See Information for Afghan Nationals on Requests to USCIS for Humanitarian Parole*, *supra* note 61 (demonstrating that the information for Afghan nationals seeking parole remains current as of April 1, 2024).

135. *See* Harris & Royan, *supra* note 58, at 12.

Beginning with the similarities, Ukrainian and Afghan individuals who entered the country via humanitarian parole received parole status for two years from their date of entry into the United States and were automatically authorized to work in the United States.[136] Parolees from Ukraine and Afghanistan are both eligible for federal benefits, beyond work authorization, including Medicaid and food assistance.[137] Both groups are limited, however, in that they have no pathway to legal permanent residency or citizenship through humanitarian parole alone.[138]

In 2023, the Biden administration announced that both groups have the option to apply for "re-parole" to extend their parole status.[139] This provides another means of continuing protection for those already in the country, and comes in addition to Temporary Protected Status (TPS),[140] which is available for individuals from both countries.[141] In short, the experience of Ukrainian and Afghan parolees upon arrival to the United States in terms of benefits

136. *See Certain Afghan and Ukrainian Parolees Are Employment Authorized Incident to Parole*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 24, 2023), https://www.uscis.gov/i-9-central/form-i-9-related-news/certain-afghan-and-ukrainian-parolees-are-employment-authorized-incident-to-parole [https://perma.cc/8Z7Q-ESRZ].

137. *See Benefits for Ukrainian Humanitarian Parolees*, OFF. REFUGEE RESETTLEMENT, https://www.acf.hhs.gov/orr/fact-sheet/benefits-ukrainian-humanitarian-parolees [https://perma.cc/KL7N-55BE] (June 2024); *see also* ADMIN. FOR CHILD. & FAMS. OFF. OF REFUGEE RESETTLEMENT, ACF'S OFFICE OF REFUGEE RESETTLEMENT (ORR) BENEFITS FOR AFGHAN HUMANITARIAN PAROLEES (2023), https://www.acf.hhs.gov/sites/default/files/documents/orr/Benefits-for-Afghan-Humanitarian-Parolees-English.pdf [https://perma.cc/4E3T-SZQP].

138. *See, e.g.*, Lauren DeLaunay Miller, *Afghans Who Were Evacuated to the U.S. Navigate a Complicated Immigration System*, NPR (Aug. 27, 2023, 8:59 AM), https://www.npr.org/2023/08/27/1196219590/afghans-who-were-evacuated-to-the-u-s-navigate-a-complicated-immigration-system [https://perma.cc/A8HV-U5E5] (describing the story of Mina, a young woman from Afghanistan who entered the United States through humanitarian parole and has applied for asylum in the hopes of securing permanent status); *see also* Katherine Fung, *The Complicated Future of Ukrainian Refugees in the U.S.*, NEWSWEEK MAG. (Apr. 4, 2023, 5:30 AM), https://www.newsweek.com/2023/04/14/complicated-future-ukrainian-refugees-us-1792294.html [https://perma.cc/JB7D-SWAB] (describing the uncertainty around parole for Larysa, a Ukrainian mother of a nine-year-old son, who has also applied for asylum given the limits around humanitarian parole).

139. *See* Press Release, U.S. Dep't of Homeland Sec., DHS Announces Re-parole Process for Afghan Nationals in the United States (June 8, 2023), https://www.dhs.gov/news/2023/06/08/dhs-announces-re-parole-process-afghan-nationals-united-states [https://perma.cc/3TAL-6Q6B]; *Re-parole Process for Certain Afghans Nationals*, U.S. DEP'T OF HOMELAND SEC., https://www.uscis.gov/humanitarian/information-for-afghan-nationals/re-parole-process-for-certain-afghans [https://perma.cc/ZA9K-XTDG] (Aug. 22, 2024); *Re-parole Process for Certain Ukrainian Citizens and Their Immediate Family Members*, U.S. DEP'T HOMELAND SEC., https://www.uscis.gov/humanitarian/uniting-for-ukraine/re-parole-process-for-certain-ukrainian-citizens-and-their-immediate-family-members [https://perma.cc/UHP5-7LA5] (Aug. 6, 2024).

140. *See generally Temporary Protected Status: An Overview*, AM. IMMIGR. COUNCIL (July 12, 2024), https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview [https://perma.cc/HR3X-GW8C] (explaining TPS as "a temporary immigration status provided to nationals of certain countries experiencing problems that make it difficult or unsafe for their nationals to be deported there").

141. *See Re-parole Process for Certain Afghans Nationals*, *supra* note 139; *Re-parole Process for Certain Ukrainian Citizens and Their Immediate Family Members*, *supra* note 139.

and restrictions is similar. Where the majority of the differences lie is in the application process for parole in the first place.

1. Method of Filing Applications

The method of filing a parole application continues to be a primary difference between the use of parole for Afghans and Ukrainians. First, Afghans, applying for themselves or through a petitioner, are required to file their applications by international mail to USCIS.[142] Second, if conditionally approved, Afghans must electronically complete and submit a nonimmigrant visa application and travel to a U.S. embassy or consulate for an interview with the U.S. Department of State (DOS).[143] Since the U.S. Embassy in Kabul closed soon after the Taliban took over, Afghan applicants have had to travel to a nearby country for their interview—a particularly onerous requirement.[144]

By contrast, the U4U program was and continues to be entirely online, does not include a DOS component, and relies on USCIS alone to fully

142. *See Information for Afghan Nationals on Requests to USCIS for Humanitarian Parole*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 11, 2024), https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-noncitizens-outside-the-united-states/information-for-afghan-nationals-on-requests-to-uscis-for-parole [https://perma.cc/FUJ5-8DQE] (explaining under "How to Apply" that Afghans outside the United States must mail a physical copy of their application).

143. The conditional approval notice states the beneficiary must complete an application for a nonimmigrant visa and appear for an appointment with the DOS consular section at a U.S. embassy or consulate to verify their identity and collect biometrics. *See Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, *supra* note 37. Note that Afghans are not limited to applying for humanitarian parole for themselves—individuals in the United States are also able to request parole on Afghans' behalf. *See Information for Afghan Nationals on Requests to USCIS for Humanitarian Parole*, *supra* note 142 ("If you are outside of the United States, you may request parole into the United States for a temporary period based on urgent humanitarian or significant public benefit reasons, or someone else may request this parole for you."); *see also* Amended Class Action Complaint for Declaratory and Injunctive Relief, LaMarche v. Mayorkas, No. 23-30029 (D. Mass. May 22, 2024), 2024 WL 2502929 (providing an example where individuals who applied for humanitarian parole on behalf of Afghans are pursuing litigation against the U.S. government for its delays in processing).

144. *See Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, *supra* note 37; *U.S. Embassy in Afghanistan Status*, U.S. EMBASSY IN AFG., https://af.usembassy.gov/u-s-embassy-in-afghanistan-status/ [https://perma.cc/CYC5-GP5A] (last visited Nov. 14, 2024) (stating that the U.S. embassy is closed); *see also Information for Afghan Nationals on Requests to USCIS for Humanitarian Parole*, *supra* note 61 ("If you are currently in Afghanistan and we determine that you initially appear eligible for parole, we will send a Notice of Continued Parole Processing to your petitioner explaining that you must arrange your own travel outside of Afghanistan to a country where there is a U.S. embassy or consulate before we can fully process your parole request."). On September 25, 2024, during a webinar hosted by advocacy organizations on the third anniversary of the fall of Kabul, an immigration attorney shared that USCIS had stated in a stakeholder meeting that they were going to start issuing conditional approvals to applicants in Afghanistan without the requirement that they go to a third country. *See* Human Rights First, *3 Years After the U.S. Evacuation from Afghanistan*, VIMEO (Sep. 25, 2024), https://vimeo.com/1012892735 [https://perma.cc/JZ46-G8Q9]. This information from USCIS has not been shared in writing and has not been confirmed beyond the information shared in the webinar. *Id.*

process the parole applications.[145] Further, instead of Ukrainians directly submitting their own applications, U.S.-based sponsors apply on their behalf.[146] Upon approval by USCIS, beneficiaries submit their biographic information and then receive their travel authorization documents.[147]

2. Application Fees

One of the major roadblocks for Afghans applying for relief is the high application fee.[148] Whereas the 575 dollar filing fee for humanitarian parole has been, and still is, waived for Ukrainian applicants, each Afghan applicant, including children, initially had to pay 575 dollars per application.[149] Now, the fee for Afghans to apply has risen to 630 dollars.[150] If an Afghan applicant is unable to pay the application fee, the applicant can file a fee waiver application which requires extensive documentation of the

145. *See Uniting for Ukraine*, *supra* note 12. Under "Process Overview," DHS notes that "[t]he process begins when the supporter files Form I-134, Declaration of Financial Support, with [USCIS] to include information both on the supporter and the Ukrainian beneficiary. Ukrainians who meet the requirements receive authorization to travel directly to the United States and seek parole at a port of entry." *Id.*

146. *See id.*; *see also* Camilo Montoya-Galvez, *More Than 45,000 Americans Have Applied to Sponsor Ukrainian Refugees in the U.S.*, CBS NEWS (June 3, 2022), https://www.cbsnews.com/news/ukrainian-refugees-us-sponsorship-45000-americans-apply/ [https://perma.cc/MB2M-QWEH] (describing how many Americans submitted sponsorships for Ukrainians). Note that there continues to be no option for Ukrainians to apply for humanitarian parole on their own without a sponsor in the United States. *See Uniting for Ukraine*, *supra* note 12.

147. *See Uniting for Ukraine*, *supra* note 12.

148. Dan De Luce, *Afghans Subject to Stricter Rules Than Ukrainian Refugees, Advocates Say*, NBC NEWS (Apr. 29, 2022), https://www.nbcnews.com/politics/immigration/afghans-subject-stricter-rules-ukrainian-refugees-advocates-say-thousa-rcna26513 [https://perma.cc/5VCL-BDZK]; Kate Morrissey, *Afghans Face Insurmountable Challenges in Fleeing to U.S., a Stark Contrast to Arriving Ukrainians*, SAN DIEGO UNION TRIB. (June 19, 2022), https://www.sandiegouniontribune.com/news/immigration/story/2022-06-19/afghans-ukrainians-humanitarian-parole [https://perma.cc/M537-GKZ6].

149. *See* Aline Barros, *US Immigration Paths Available for Afghans and Ukrainians*, VOICE OF AM. (Jan. 1, 2023, 2:56 AM), https://www.voanews.com/a/us-immigration-paths-available-for-afghans-and-ukrainians/6869026.html [https://perma.cc/J2UH-76TM] (noting that Afghans must pay a 575 dollar fee whereas for Ukrainians the application is free); *see also* Ciullo, *supra* note 44, at 502. For example, one family of twenty-two applicants, facing persecution by the Taliban, had to pay 12,650 dollars in filing fees. Unable to raise the money, the family was forced to stay in Afghanistan. Ultimately, one of the family members was murdered by the Taliban for having served in the Afghan military. *See* Cathryn Miller-Wilson, *Why the U.S. Government Should Waive Fees for Afghan Refugees Seeking Humanitarian Parole*, WHYY (Aug. 27, 2021), https://whyy.org/articles/why-the-u-s-government-should-waive-fees-for-afghan-refugees-seeking-humanitarian-parole/ [https://perma.cc/KWG4-NY9K].

150. *See G-1055, Fee Schedule*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 24, 2024), https://www.uscis.gov/g-1055?form=i-131 [https://perma.cc/NRV4-YSMF] (stating that the paper filing fee "to request parole based on urgent humanitarian reasons or significant public benefit for an individual outside the United States" is 630 dollars). The increased cost for filing an I-131, Application for Travel Documents, went into effect on April 1, 2024. *See Frequently Asked Questions on the USCIS Fee Rule*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 1, 2024), https://www.uscis.gov/forms/filing-fees/frequently-asked-questions-on-the-uscis-fee-rule [https://perma.cc/P262-X5XS].

individual's inability to pay—documentation that is difficult to provide during a humanitarian crisis.[151] Despite the fees and difficulty of paying, thousands of Afghans have applied for humanitarian parole.[152] From March 1, 2021, to March 22, 2022, USCIS received 33,209 humanitarian parole applications and collected over 19 million dollars in fees.[153]

3. Location of Applicants

In contrast to Ukrainian applicants under U4U, the physical location of Afghans impacts their ability to apply for humanitarian parole. For Ukrainians, since the applications are filed by sponsors who are based in the United States, the physical location of the purported beneficiary does not play a role in the application.[154] Even if an individual fled Ukraine to a neighboring country, their U.S.-based sponsor could still file their application.[155] By comparison, Afghans unable to travel to a nearby country with a U.S. embassy or consulate were and are effectively barred from obtaining humanitarian parole, even if they receive conditional approval *and* even if someone in the United States submitted the application on their behalf.[156]

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151. *See* Gabrielle Hays, *How Humanitarian Parole Works, and Why So Many Afghan Families Are Waiting to Be Reunited*, PBS NEWSHOUR (May 5, 2022, 11:25 AM), https://www.pbs.org/newshour/nation/how-humanitarian-parole-works-and-why-so-many-afghan-families-are-waiting-to-be-reunited [https://perma.cc/V6UD-V94F].

152. *See* Aminy & Mehrota, *supra* note 63 (reporting that since July 2021, USCIS had received about 66,000 humanitarian parole applications). Note that there is no final number available for how many Afghans have applied for humanitarian parole in total. *See* Human Rights First, *supra* note 144. The attorneys on this webinar stated that they did not have access to a number of how many total people have applied or how many applications are pending. *Id.* They did state, however, that "many are still pending . . . [and] tens of thousands and the majority have been pending for over three years." *Id.*

153. *Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans*, AM. IMMIGR. COUNCIL (Mar. 16, 2023), https://www.americanimmigrationcouncil.org/foia/uscis-failures-afghans-parole [https://perma.cc/NR8Y-8X4W] (describing information explaining the cause of extensive processing delays of humanitarian parole applications for Afghans).

154. *See Uniting for Ukraine*, *supra* note 12 ("Beneficiaries are eligible for the process if they: Resided in Ukraine immediately prior to the Russian invasion (until February 11, 2022) and were displaced as a result of the invasion . . . .").

155. *See id.*

156. *See, e.g.*, D. Parvaz, *Since the Taliban Takeover, Afghans Hoping to Leave Afghanistan Have Few Ways Out*, NPR (Oct. 3, 2022, 4:59 PM), https://www.npr.org/2022/10/03/1121053865/afghanistan-refugees-visas [https://perma.cc/7FTV-W43R]; *see also* Human Rights First, *supra* note 144 (discussing the possibility of a shift in policy where Afghan humanitarian parole applicants would no longer be required to go to a U.S. embassy or consulate abroad).

4. Eligibility Standards

One of the areas that has garnered the most controversy is the varying eligibility standard for parole for Ukrainians and Afghans.[157] Afghans have to prove they were the victims of targeted, individualized persecution by the Taliban to qualify for protection.[158] The individualized standard was put in place after the initial evacuations.[159] Prior to the change, "USCIS recognized that . . . Afghans were applying for 'urgent humanitarian reasons' that warranted a grant of humanitarian parole . . . ."[160] This shift significantly heightened the eligibility threshold for Afghans left behind after the evacuations by requiring that applicants demonstrate individualized harm, as opposed to general "urgent humanitarian reasons."[161]

Relatedly, in 2022, after pausing the processing of applications from early September to November, USCIS again changed the standards for Afghans.[162] First, "USCIS announced it would no longer adjudicate applications for individuals applying from within Afghanistan."[163] Second, "USCIS 'instructed its adjudicators that applications filed on behalf of individuals who *had already left Afghanistan* could be approved only in extreme cases in which beneficiaries faced either imminent harm in the country in which they were present or an imminent risk of being returned to Afghanistan.'"[164] In practice, these changes meant that Afghans were encouraged to leave their country, and instead of requesting additional information from applicants, USCIS opted to issue widespread denials.[165]

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157. *See* De Luce, *supra* note 148 ("Advocates helping Afghan applicants say U.S. authorities are asking for extensive evidence that an applicant faces a specific and imminent danger.").

158. *See Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 23, 2022), https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests [https://perma.cc/SS8X-AQC9]. USCIS' guidance provides that parole is not intended to protect individuals from "generalized risk of harm," and further outlines stringent evidentiary standards for humanitarian parole eligibility based on harm in the individual's country of origin. *Id.* Immigration advocates and members of Congress alike have expressed concern in response to this standard. *See, e.g.*, *Joint Letter to Biden Administration Expressing Concern Regarding Humanitarian Parole Denials for Afghans*, HUM. RTS. WATCH (Dec. 16, 2021, 12:51 PM), https://www.hrw.org/news/2021/12/16/joint-letter-biden-administration-expressing-concern-regarding-humanitarian-parole [https://perma.cc/9ADU-27GG].

159. *See Roe v. Mayorkas*, ACLU MASS., https://www.aclum.org/en/cases/roe-v-mayorkas [https://perma.cc/T7CE-HXT4] (last visited Nov. 14, 2024) (describing claims in a suit alleging that USCIS deliberately heightened the standard for individualized harm to deny most Afghan parole applications); *see also* Complaint for Declaratory, Injunctive, and Mandamus Relief, Roe v. Mayorkas, No. 1:22-cv-10808 (D. Mass. May 25, 2022).

160. *See* ACLU MASS., *supra* note 159.

161. *See id.*

162. *See* Harris & Royan, *supra* note 58, at 29.

163. *See id.* (citing Complaint for Declaratory, Injunctive, and Mandamus Relief, *supra* note 159, at 11).

164. *See id.*

165. *See id.*

By contrast, to qualify for U4U, Ukrainians only need to prove that they resided in Ukraine leading up to Russia's invasion.[166] As described by an immigration attorney, the applications for the family members of former Afghan interpreters were denied because they "did not prove they were targeted for harm, something not one Ukrainian lacking any United States ties and living with protected status anywhere in Europe needed to prove to come to the [United States] through U4U."[167]

5. Application Processing Times and Outcomes

Lastly, some of the starkest differences between the use of parole for Afghans and Ukrainians are found in the application processing times and outcomes of those applications. By the end of June 2022, more than 17,000 Ukrainians had been paroled into the United States through U4U, and 24,000 more had been approved but had not yet arrived.[168] In comparison, only 297 Afghans had been granted humanitarian parole by that same time.[169]

At the outset of U4U, the government processed the applications in a matter of days or weeks, meaning that Ukrainians received the authorization to travel relatively quickly to reach safety.[170] At the time of the writing of this Note, the most recent statistics indicate that since Russia's invasion of Ukraine, over 271,000 Ukrainians have come to the United States, including more than 117,000 through the U4U program.[171] The available data on Afghanistan humanitarian parole, however, depicts a much harsh reality.

For example, from January 1, 2020, to April 6, 2022, USCIS received 44,785 applications where the applicant's country of citizenship was Afghanistan.[172] USCIS approved only 114 of those applications—less than 0.3 percent.[173] This grim reality is corroborated by statistics shared with U.S. Senator Edward J. Markey's office in November 2023 in response to his

166. *See Uniting for Ukraine*, *supra* note 12.

167. *See* SCHACHER, *supra* note 43, at 12–13.

168. *See* Muzaffar Chishti & Jessica Bolter, *Welcoming Afghans and Ukrainians to the United States: A Case in Similarities and Contrasts*, MIGRATION POL'Y INST. (July 13, 2022), https://www.migrationpolicy.org/article/afghan-ukrainian-us-arrivals-parole [https://perma.cc/PJ37-RJDW]; Camilo Montoya-Galvez, *U.S. Is Rejecting over 90% of Afghans Seeking to Enter the Country on Humanitarian Grounds*, CBS NEWS (June 20, 2022), https://www.cbsnews.com/news/afghan-refugees-rejected-us-entry-humanitarian-grounds/ [https://perma.cc/PC27-VZ85] (noting that as of early June 2022, only 297 of the 5,000 Afghan applications adjudicated had been approved, with 4,246 requests rejected).

169. *See* Montoya-Galvez, *supra* note 168.

170. *See* Rebecca Beitsch, *Nearly 6,000 Ukrainians Have Received Temporary Residency in US Through New Program*, THE HILL (May 9, 2022, 4:56 PM), https://thehill.com/news/3482233-about-6000-ukrainians-have-received-temporary-residency-%20in-us/ [https://perma.cc/7PCA-JJ52] (reporting that in a month from launching U4U, DHS had approved applications of some 6,000 Ukrainians).

171. Julia Ainsley, *U.S. Has Admitted 271,000 Ukrainian Refugees Since Russian Invasion, Far Above Biden's Goal of 100,000*, CBS NEWS (Feb. 24, 2023, 11:15 AM), https://www.nbcnews.com/politics/immigration/us-admits-271000-ukrainian-refugees-russia-invasion-biden-rcna72177 [https://perma.cc/DQR4-QG9K].

172. *See Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans*, *supra* note 153.

173. *See id.*

inquiry concerning the slow pace of processing Afghan humanitarian parole applications:

> According to the information DHS provided to my office in November, [USCIS] has received approximately 52,870 parole requests filed on behalf of Afghan nationals since August 1, 2021. Yet, USCIS has adjudicated approximately only 16,470 of them—conditionally approving only 1,860 cases and finding only another 1,446 individuals initially eligible for parole (those currently located in Afghanistan or another location with no U.S. embassy or consulate presence)—a positive result for a mere 20 percent of the approximately 30 percent of adjudicated applications.[174]

In sum, though the U.S. government used its parole authority to offer relief to Afghans and Ukrainians amid humanitarian crises in their respective countries, the way in which the government used parole differed in some areas more than others. For example, the benefits of parole and the realities of parole holders from Afghanistan and Ukraine continue to be similar upon arrival to the United States.[175] However, the differences are pronounced when considering the way in which individuals have applied for parole, and the procedures they must follow to obtain authorization to travel to the United States.[176] Ukrainians, as part of the U4U program, were, and continue to be, able to obtain humanitarian parole through a U.S.-based sponsor without paying an application fee, submitting paperwork via mail, or going to a consulate or embassy.[177] Afghan applicants face a much taller order: they must pay a fee, mail their applications, and, after conditional approval, go to a consulate or embassy for additional screening.[178] As a result, the adjudication process for Afghans has lagged, and though the U.S. government is still accepting applications, many of those who applied in the aftermath of the evacuations continue to wait.[179]

B. Immigration-Related Equal Protection Doctrine

This section provides an overview of cases that indicate how federal courts approach standing and equal protection, including rational basis review and

174. Letter from Edward J. Markey, U.S. Sen., to Alejandro Mayorkas, Sec'y, U.S. Homeland Sec., and Ur Jaddou, Dir., U.S. Citizenship and Immigr. Servs. (Jan. 4, 2024) (on file with author); *see also* Harris & Royan, *supra* note 58, at 31 ("According to [a] USCIS stakeholder meeting on Afghan humanitarian parole on March 20, 2024, as of March 11, 2024, there were 53,800 humanitarian parole applications received for Afghans. Of those, 19,500 had been processed with 13,800 denied. This is a denial rate of 71%. USCIS gave 'conditional approval' to 3,900 applicants who were living outside Afghanistan and 'continued processing' for 1,100 applicants from inside Afghanistan. So, even among the 30% not 'denied'—only 5% have actually been finally approved. This means that there are still 34,300 cases pending, most of which were filed in the months following the evacuation in August 2021, more than three years ago.").

175. *See supra* notes 136–39 and accompanying text.

176. *See supra* Parts II.A.1–5.

177. *See* De Luce, *supra* note 148.

178. *See, e.g.*, Chishti & Bolter, *supra* note 168.

179. *See Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans*, *supra* note 153; *see also* Harris & Royan, *supra* note 58, at 31.

animus claims, in relation to immigration claims. First, this section discusses *Trump v. Hawaii*,[180] the case centered on President Donald J. Trump's administration's Executive Order 13769, colloquially termed the "Travel Ban." Next, this section considers *S.A. v. Trump*,[181] concerning the Trump administration's termination of the Central American Minors (CAM) program. Lastly, this section discusses *Department of Homeland Security v. Regents of the University of California*,[182] a case concerning the Trump administration's termination of Deferred Action for Childhood Arrivals (DACA).

1. *Trump v. Hawaii*

In *Hawaii*, the Court addressed the constitutionality of the Trump administration's third iteration of the Travel Ban, widely known as the "Muslim ban."[183] The first two versions of the ban barred the entry of foreign nationals exclusively from majority-Muslim countries.[184] The third iteration of the ban—the version brought before the Court—barred foreign nationals from Chad, Iran, Libya, Somalia, Syria, and Yemen, as well as from North Korea and Venezuela, and provided for a waiver process in certain circumstances.[185]

The plaintiffs in *Hawaii* argued that Trump's executive order violated the Establishment Clause and provisions of the Immigration and Nationality Act[186] (INA).[187] As for the Establishment Clause claim, the plaintiffs alleged that the "primary purpose of the Proclamation was religious animus," and

180. 585 U.S. 667 (2018).
181. 363 F. Supp. 3d 1048 (N.D. Cal. 2018).
182. 591 U.S. 1 (2020).
183. *Hawaii*, 585 U.S. at 673–76.
184. The first ban suspended the entry of foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen for a period of 90 days, suspended the U.S. refugee admissions program for a period of 120 days, slashed refugee numbers by one half from 110,000 to 55,000, and indefinitely suspended Syrian refugee admissions. *See* Shoba Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1483–84 (2018). The second ban suspended the entry of foreign nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen for a period of ninety days, froze the refugee admissions program for a period of 120 days, and slashed the refugee numbers by one half. *Id.* at 1485–87. The second ban differed from the first ban in that the U.S. government dropped the indefinite ban on Syrians and the ban on Iraqi entrants. *Id.* Further, the effective date of the order was delayed for ten days, and the exemptions were outlined with more clarity. *Id.*
185. *See* Proclamation No. 9645, 82 Fed. Reg. 45161, 45164 (Sept. 24, 2017); *see also* Wadhia, *supra* note 184, at 1487–88 (summarizing the third iteration of the ban).
186. Ch. 477, 66 Stat. 163 (codified as amended in scattered titles and sections of the U.S. Code).
187. *See Hawaii*, 585 U.S. at 681. The challenged provisions of the INA concerned the President's statutory authority to issue such proclamations barring the entry of foreign nationals. *See id.* at 683–84. The Establishment Clause prohibits the government from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof." *See* U.S. CONST. amend. I. As such, to demonstrate a violation of the Establishment Clause, plaintiffs would need to show that a reasonable observer would regard the proclamation's purpose as showing disapproval of Islam. *See* Shalini Bhargava Ray, *The Emerging Lessons of* Trump v. Hawaii, 29 WM. & MARY BILL RTS. J. 775, 779 (2021).

that "the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims."[188] In making this argument, the plaintiffs relied on various public comments made by former President Trump on his campaign trail as President-elect and during his time in office.[189] For example, while speaking publicly during his campaign in December 2015, President Trump called for "a total and complete shutdown of Muslims entering the United States."[190] Despite comments like these, the Court concluded that plaintiffs' Establishment Clause claim was unlikely to succeed.[191]

In addition to the Establishment Clause claim, the Court's holdings in *Hawaii* discussed standing,[192] rational basis review,[193] animus,[194] and *Korematsu v. United States*.[195] In terms of standing, *Hawaii* solidified that the interest of family members serves as a basis for injury-in-fact.[196] The Court thus determined that the individual U.S.-based plaintiffs with foreign relatives affected by the entry suspension had standing to challenge the exclusion of their relatives under the Establishment Clause, given the alleged real-world effect of the Muslim ban in keeping them separated from relatives who sought to enter the country.[197] As such, the Court established that, "a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact."[198] Further, the Court noted it had previously recognized that an American individual who has a bona fide relationship with a particular person seeking to enter the country can claim concrete hardship if that person is excluded from the country.[199] This is significant because it allows U.S.-based relatives of foreign nationals abroad who are kept out of the United States, by way of an immigration policy, to bring certain claims in federal courts.[200]

188. *Hawaii*, 585 U.S. at 699.

189. *See* Galvez, *supra* note 106, at 90 (citing Brief for Respondents at 5–10, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 16-1540)).

190. *Id.*

191. *See* Ray, *supra* note 187, at 778.

192. *See Hawaii*, 585 U.S. at 697–99.

193. *See id.* at 703–04.

194. *See id.* at 705–07.

195. 323 U.S. 214 (1944); *see Hawaii*, 585 U.S. at 710.

196. *See Hawaii*, 585 U.S. at 698.

197. *See id.* at 698–99. Note, however, that the Court did not decide whether the claimed dignitary interest asserted by the State of Hawaii and the Muslim Association of Hawaii, the other two plaintiffs in the case, established an adequate ground for standing; rather, the Court only focused on the standing of the three individual plaintiffs. *See id.*

198. *Id.* at 698.

199. *See id.* at 698–99 (citing Trump v. Int'l Refugee Assistance Project, 582 U.S. 571, 583 (2017)).

200. It is important to note that this holding only applies in limited contexts. It does not mean that U.S.-based relatives have a protected liberty interest in being reunited with their spouse in the procedural due process context, for example, as the Court explained in *Kerry v. Din*. 576 U.S. 86, 91 (2015). Discussion on the due process rights of U.S.-based relatives of foreign nationals is outside the scope of this Note.

In reaching the merits of the plaintiffs' Establishment Clause claim, the Court considered the standard of review it would apply.[201] To begin, the Court discussed the framework articulated in *Kleindienst v. Mandel*,[202] which limits review to considering whether the executive branch provided a "facially legitimate and bona fide" reason for its action.[203] Were the *Mandel* framework applied to the Muslim ban, according to Chief Justice Roberts, it would have been fatal to the plaintiffs' claims because of the government's national security justification.[204] Consequently, rather than apply the *Mandel* framework and end its inquiry, the Court discussed conducting a more expansive inquiry, one that allowed the Court to look beyond the four corners of the Muslim ban executive order and consider the plaintiffs' extrinsic evidence as part of applying rational basis review.[205]

In describing its application of rational basis review, the Court did not limit itself to considering "whether the entry policy [was] plausibly related to the Government's stated objective."[206] Instead, it invoked *Moreno*, *Cleburne*, and *Romer*,[207] animus cases outside of immigration law, which call for rational basis with bite.[208] Under the doctrine, rational basis with bite requires some connection between the means and the ends of government action, such that "under- or over-inclusiveness can lead to invalidation."[209] Presumably, then, such review should have called for a more rigorous inquiry when assessing whether the statements offered by the plaintiffs were extrinsic evidence of the stated discriminatory grounds of the proclamation.[210] Yet, nothing in the Court's majority opinion approached the robust means-end scrutiny described in the animus cases.[211] Rather, Chief Justice Roberts interpreted the animus cases as holding that laws otherwise subject to rational basis review will be struck down when only animus can explain them, noting that the common thread among the animus cases was that the "laws at issue lack any purpose other than a 'bare . . . desire

201. *See id.* at 701–05 (noting that although the claim in this case concerned the Establishment Clause, the Court employed the same type of analysis it uses for Equal Protection Clause claims).

202. 408 U.S. 753 (1972); *see also* Cox, *supra* note 112, at 416 (noting that *Mandel* was the first case in which the Supreme Court permitted citizens to raise a constitutional challenge to an immigration action).

203. *Mandel*, 408 U.S. at 770.

204. *See* John Ip, *The Travel Ban, Judicial Deference, and the Legacy of* Korematsu, 63 HOW. L.J. 153, 164 (2019).

205. *See id.* at 200.

206. *Hawaii*, 585 U.S. at 704–05.

207. This Note refers to these three cases as the "animus cases."

208. *See* Ip, *supra* note 204, at 201.

209. *Id. See generally* Pettinga, *supra* note 129; Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769 (2005).

210. *See* Peter Marguiles, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159, 177, 180 (2019).

211. *See id.* at 180.

to harm a politically unpopular group.'"[212] As such, because he found "persuasive evidence" that the proclamation had a "legitimate grounding in national security concerns," the Chief Justice concluded that the animus cases required the Court to accept the government's independent justification.[213]

In short, despite beginning its analysis with a discussion of a heightened standard of review under *Mandel*, and discussing the animus cases' application of rational basis review with bite, the Court simply concluded that the plaintiffs' Establishment Clause claims would likely fail because the President and his administration's proffered national security concerns would be presumed to be legitimate.[214] Thus, in invoking heightened standards of review but employing what Professor Harold Hongju Koh calls "an unjustifiably deferential standard of review"[215] in practice, the Court left the standard of review for equal protection cases in immigration in flux.[216]

Beyond ultimately applying basic rational basis review to the inquiry in *Hawaii* and ruling against plaintiffs,[217] another component of Chief Justice Roberts's opinion that merits exploration is how it addressed *Korematsu*.[218] *Korematsu*, which permitted the forced imprisonment of Japanese Americans during World War II,[219] is one of the most rejected and disfavored decisions in the Court's history. In his opinion, Chief Justice Roberts rejected *Korematsu*'s applicability to the facts in *Hawaii* and purported to overrule the case shortly thereafter.[220] The Court's treatment of *Korematsu* in *Hawaii* is significant because whether it overruled *Korematsu* may impact future immigration-related cases.[221]

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212. Cristina M. Rodríguez, Trump v. Hawaii *and the Future of Presidential Power over Immigration*, 2 AM. CONST. SOC'Y SUP. CT. REV. 161, 168 (2018) (citing Trump v. Hawaii, 585 U.S. 667, 705 (2018)).

213. *See id.* at 183.

214. *See* Ip, *supra* note 204, at 201 ("[T]here is a disconnect between the rigor of the advertised standard of review and the rigor of the standard of review as it is actually applied by the majority.").

215. Harold Hongju Koh, Trump v. Hawaii*:* Korematsu*'s Ghost and National Security Masquerades*, JUST SEC. (June 28, 2018), https://www.justsecurity.org/58615/trump-v-hawaii-korematsu-ghost-national-security-masquerades/ [https://perma.cc/5M7D-L5PQ].

216. *See* Adam Cox, Ryan Goodman & Cristina Rodríguez, *The Radical Supreme Court Travel Ban Opinion—but Why It Might Not Apply to Other Immigrants' Rights Cases*, JUST SEC. (June 27, 2018), https://www.justsecurity.org/58510/radical-supreme-court-travel-ban-opinion-but-apply-immigrants-rights-cases/ [https://perma.cc/AFN6-V3YK].

217. *Hawaii*, 585 U.S. at 704–08.

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

219. *See id.* at 217–19; *see also Hawaii*, 585 U.S. at 710.

220. *See Hawaii*, 585 U.S. at 710.

221. *See generally* Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641 (2019). For Chief Justice Roberts's discussion of *Korematsu*, see *Hawaii*, 585 U.S. at 710 (noting that "*Korematsu* has nothing to do with this case," and that, "*Korematsu* was gravely wrong the day it was decided . . . and [] to be clear [] 'has no place in law under the Constitution.'") and Koh, *supra* note 215 ("In fact, the wholly apt resemblance to *Korematsu* should have been enough to invalidate the travel ban."). For a discussion on Justice Sotomayor's dissent, see Ip, *supra* note 204, at 154–55.

According to Professor John Ip, Chief Justice Roberts, based on his *Hawaii* opinion, interpreted the problem with *Korematsu* as the fact that the Court endorsed a truly odious government policy which created an explicitly race-based system of internment that burdened a large number of citizens.[222] As a result, Chief Justice Roberts did not find *Korematsu* relevant to *Hawaii* because, in his opinion, *Hawaii* was a case concerning a facially neutral policy that merely denied the privilege of admission to noncitizens.[223]

In a dissenting opinion, Justice Sotomayor found that *Korematsu* had everything to do with *Hawaii*.[224] According to Professor Ip, Justice Sotomayor's problem with *Korematsu* was "not simply that the court endorsed the specific policy of the Japanese American internment, but rather that it bought the government's argument that a discriminatory policy was really concerned with national security, despite there being sound reasons to suspect that the national security claim was a masquerade."[225]

In short, the question remains: what exactly did Chief Justice Roberts overrule?[226] Did the Court only overrule the Chief Justice's conception of the case?[227] If it did, the Court only outlawed an explicitly race-based policy, and the implications of overruling *Korematsu* for future cases—in which policies are not explicitly race-based—remains unclear.[228] This lack of clarity is just one of the reasons why *Hawaii* is an important case in modern immigration jurisprudence.[229]

Hawaii not only permitted the government to continue a discriminatory policy, but it helped paint a picture of how the Court approaches and may approach claims related to executive immigration policies in the future.[230] One important takeaway is that the decision provided the doctrinal underpinning for U.S.-based relatives of migrants abroad to have standing to make claims related to their interest in being physically reunited with their family members or loved ones.[231] The emerging challenges from *Hawaii* include the lack of clarity in arriving at the use of rational basis review for equal protection claims related to immigration policy and the dismissal of animus claims based on a cursory review of extrinsic evidence.[232]

The following case, *S.A. v. Trump*,[233] is one example of how federal courts have approached cases regarding executive immigration action after *Hawaii*.

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222. Ip, *supra* note 204, at 154.
223. *Id.*
224. *Hawaii*, U.S. 585 at 753 (Sotomayor, J., dissenting); *see also* Katyal, *supra* note 221, at 647–48 (detailing Justice Sotomayor's dissent).
225. Ip, *supra* note 204, at 179.
226. *See id.* at 178.
227. *See id.*
228. *See id.*; *see also* Koh, *supra* note 215; Katyal, *supra* note 221.
229. *See* Rodríguez, *supra* note 212 (discussing the implications of *Hawaii*).
230. *See id.*
231. *See* Trump v. Hawaii, 585 U.S. 667, 697–99 (2018).
232. *See* Cox, Goodman & Rodríguez, *supra* note 216; *see also* Rodríguez, *supra* note 212 (discussing how Chief Justice Roberts avoided putting the government's national security rationale to any kind of test).
233. 363 F. Supp. 3d 1048 (N.D. Cal. 2018).

2. *S.A. v. Trump*

In *S.A.*, the U.S. District Court for the Northern District of California considered the termination of the CAM program.[234] The plaintiffs were sponsors of children who would have been eligible to come to the United States but for the program's termination.[235] They sued the Trump administration, arguing that DHS had violated the Administrative Procedure Act[236] (APA), the Due Process Clause, and the Equal Protection Clause.[237] First, regarding standing, the court relied on *Hawaii* to find that the applicant-parent plaintiffs residing in the United States had standing based on their interest in being reunited with their family members.[238] Thus, because the parents were plaintiffs in regard to all the claims in the suit, the court found their presence was sufficient to make the case justiciable on all counts.[239]

On the merits of their equal protection claim, plaintiffs argued that the government's termination of CAM was substantially motivated by discriminatory intent and animus toward Latinos.[240] However, the court analogized to *Hawaii* and concluded that it was not impossible to "discern a relationship to legitimate state interests" or to determine that the policy was "inexplicable by anything but animus."[241] In effect, the court found that there were facially legitimate and bona fide reasons for terminating the CAM parole program.[242] Importantly, the court stated that its review of the plaintiffs' constitutional equal protection claim was limited because the case concerned the admission of foreign nationals to the United States.[243]

If taken as true, *S.A.* effectively forecloses claims from foreign nationals abroad seeking entry, and, in doing so, underscores that the viability of equal protection claims moving forward will likely be limited to U.S.-based individuals who can fulfill the injury-in-fact requirement for standing.[244]

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234. The CAM program is a hybrid refugee and parole program that provides eligible children from El Salvador, Guatemala, and Honduras an opportunity to reunite with family in the United States. Parents and certain legal guardians who have legal status in the United States can apply for their children to access the program. *See Central American Minors (CAM) Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/CAM [https://perma.cc/GW9K-8WNY] (Mar. 7, 2024) (providing an overview of the program and application criteria); *see also* Andrew Craycroft, *The Central American Minors (CAM) Program*, IMMIGRANT LEGAL RSCH. CTR. (Dec. 2022), https://www.ilrc.org/sites/default/files/2023-02/The%20Central%20American%20Minors%20%28CAM%29%20Program.pdf [https://perma.cc/TR4V-VCLE] (providing more background information on CAM).

235. *See S.A.*, 363 F. Supp. 3d at 1055. The discussion on this case will be limited to the court's approach to the plaintiffs' equal protection claim.

236. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–706).

237. *See S.A.*, 363 F. Supp. 3d at 1055.

238. *See id.* at 1076–77.

239. *See id.*

240. *See id.* at 1093.

241. *Id.* at 1094 (citing Trump v. Hawaii, 585 U.S. 667, 704–08 (2018)).

242. *See id.*

243. *See id.* at 1095–96 (citing *Hawaii*, 585 U.S. at 701–06, 705 n.5).

244. *See* Ray, *supra* note 187, at 796–97.

3. *Regents*

In *Department of Homeland Security v. Regents of the University of California*,[245] a consolidation of three cases,[246] the Supreme Court considered the Trump administration's termination of the Deferred Action for Childhood Arrivals (DACA) program.[247] The Court first considered the plaintiffs' statutory APA claim,[248] and then considered their allegation that the rescission of DACA was motivated by discriminatory animus, violating the Equal Protection Clause.[249] As evidence, plaintiffs cited the disparate impact of the rescission on Latinos from Mexico who represent 78 percent of DACA recipients, the unusual history behind the rescission, and pre and postelection statements by President Trump.[250]

In analyzing plaintiffs' equal protection claim, the Court used the framework outlined in *Arlington Heights*,[251] and it referenced three specific factors: (1) disparate impact on a particular group, (2) departures from the normal procedural sequence, and (3) contemporary statements by members of the decision-making body.[252] The Court further noted that to plead animus, a plaintiff needs to "raise a plausible inference that an 'invidious

245. 591 U.S. 1 (2020).

246. *See* Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018), *vacated in part and rev'd in part*, 591 U.S. 1 (2020); NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018), *aff'd sub nom*. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020); Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260 (E.D.N.Y. 2018), *vacated in part, aff'd in part*, *rev'd in part sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020).

247. DACA is a program created by President Barack Obama's administration in 2012 that invited noncitizens lacking lawful immigration status who met certain criteria to apply for relief. Relief entailed extending the deferral of their removal for two years and rendered them eligible to apply for work authorization and other discrete benefits tied to "lawful presence" as recognized by the Attorney General. *See* Cristina M. Rodriguez, *Reading* Regents *and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 1 n.1 (citing Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., and John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/BPY2-783U]). President Trump rescinded the DACA program in early September 2017, leading to *Regents*. For a more in-depth discussion of DACA, its significance for undocumented youth, the rescission of the program and associated litigation, see Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS. L. REV. 1905, 1920–41 (2020). It is also worth mentioning here that the question of DACA's legality continues to be live in the U.S. Court of Appeals for the Fifth Circuit. *See DACA Court Case Updates: Summary of Litigation and Potential Supreme Court Case*, FWD.US (Sep. 17, 2024), https://www.fwd.us/news/daca-court-case/ [https://perma.cc/X5AS-MS9X].

248. *See Regents*, 591 U.S. at 33–34. On the plaintiffs' statutory claim, the Court found that the Trump administration's rescission of the program had violated the APA on arbitrary and capricious grounds. *Id.*

249. *See id.*

250. *See id.*

251. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977); *see also supra* notes 101–04 and accompanying text.

252. *See Regents*, 591 U.S. at 34.

discriminatory purpose was a motivating factor' in the . . . decision."[253] This differed from the Court's description of animus claims in *Hawaii*, in which Chief Justice Roberts noted that a successful animus claim could only stand if the invidious purpose was the sole motivation for the decision.[254]

The Court in *Regents* found that the plaintiffs' arguments failed to establish a plausible equal protection claim.[255] To the Court, evidence of disparate impact on Latinos was not indicative of animus because Latinos made up a disproportionate share of the immigrant population, and any change to an immigration relief program could be expected to have a disparate impact on the community.[256] The Court did not find anything unusual about the events leading to the rescission of the program, and it did not find that any of Trump's pre- or post-campaign statements about Mexican immigrants had bearing on whether the rescission was motivated by animus.[257] Further, despite Trump's inflammatory rhetoric about immigrants from Mexico—the country of origin for the majority of DACA recipients—the Court found Trump's animus "unilluminating" because DHS and the Attorney General, rather than the President, were the "relevant actors."[258]

As the latest case concerning federal immigration policy and equal protection to reach the Court, *Regents* sheds light on how the Court may approach these types of cases in the future—particularly regarding the use of discriminatory animus in Equal Protection Clause claims.[259] To Professor William Araiza, even though the Court rejected plaintiffs' claim in *Regents* that animus had motivated the rescission of DACA, the fact the Court entertained the animus claim signals that animus claims remain conceptually viable moving forward.[260] Beyond simply legitimizing the animus doctrine in equal protection, Professor Araiza posits that the Court solidified animus' doctrinal footing by explicitly absorbing the discriminatory intent factors from *Arlington Heights* into the animus analysis.[261] As such, the extent to which the Court engaged with the *Arlington Heights* factors, including the history of the issue in that decision-making body, any procedural or substantive deviations reflected in the challenged decision, and the extent of the decision's disparate impact, albeit in a cursory manner, suggests that the

253. *Id.* (quoting *Arlington Heights*, 429 U.S. at 266).

254. *See* Dale Carpenter, *The Dead End of Animus Doctrine*, 74 ALA. L. REV. 585, 613 (2023).

255. *See Regents*, 591 U.S. at 33–34.

256. *See* Carpenter, *supra* note 254, at 613.

257. *See id.* at 614–15.

258. *Regents*, 591 U.S. at 35–36; *see also* Carpenter, *supra* note 254, at 619 ("*Regents* held that Trump had effectively laundered his animus through two subordinates who issued the actual DACA rescission.").

259. *See* William Araiza, Regents*: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983, 997 (2021).

260. *See id.* at 1003–04.

261. *See id.* at 1020–21.

factors may play a role in future animus inquiries grounded in equal protection claims.[262]

In sum, these three cases allow for drawing conclusions on how courts approach immigration-related equal protection claims. In terms of animus claims, the result of *Hawaii* and *Regents* together is that the standard of review is somewhat unclear.[263] In *Hawaii*, the Court invoked seminal animus cases but applied rational basis review,[264] whereas in *Regents*, the Court drew upon the factors in *Arlington Heights*.[265] Despite the lack of clarity concerning the Court's approach, it is encouraging that the Court has acknowledged these claims, meaning that future plaintiffs may be able to bring such claims to underscore the discriminatory animus in government decisions.[266] In terms of standing, the doctrine is clear, both from *Hawaii* and *S.A.*, in that U.S.-based relatives have a sufficient interest in being with their family that they meet the injury-in-fact requirement.[267]

This Note will now apply the doctrine outlined above to the use of parole toward Afghans and Ukrainians. The following part intends to demonstrate how potential plaintiffs may be able to raise a valid discriminatory animus claim based on the inequities of the U.S. government's response and how courts should respond to such claims.

III. SEEKING ACCOUNTABILITY FOR AFGHANS THROUGH AN EQUAL PROTECTION ANIMUS CLAIM

This Note identifies two primary issues: first, that there are distinct differences between the U.S. government's use of parole in response to the crises in Afghanistan and Ukraine, and second, that the doctrine on equal protection related to immigration and specific to discriminatory animus claims is unclear.

This part addresses these issues by first demonstrating that the differences between the government's response to the crises in Afghanistan and Ukraine through parole are disparities—disparities that are indicative of discriminatory animus. Second, given the presence of discriminatory animus, this part outlines what a complaint by plaintiffs on behalf of Afghans left behind could consist of, including addressing anticipated counterarguments by the government. Third, this part recognizes the role of parole as an important means of responding to the needs of foreign nationals, and given that importance, argues that the government should not be able to discriminate against certain groups therein. As such, this part proposes a new

262. *See id.* at 1021. *Compare* Araiza, *supra* note 117, at 1874–75, *with* Carpenter, *supra* note 254, at 623 (noting that "Araiza is more optimistic than I about the future of animus doctrine. Where he sees a 'flowering,' I see at least a bit of wilting.").

263. *See supra* Parts II.B.1., II.B.3.

264. *See* Ip, *supra* note 204 and accompanying text.

265. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 33–34 (2020) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977)).

266. *See* Araiza, *supra* note 259.

267. *See* Trump v. Hawaii, 585 U.S. 667, 697–99 (2018); S.A. v. Trump, 363 F. Supp. 3d 1048, 1076–77 (N.D. Cal. 2018).

test through which courts should approach discriminatory animus claims related to immigration and discusses how, under this test, a court could find discriminatory animus in the case of Afghans left behind and hold the government accountable for its inequitable use of parole. Lastly, this part concludes with a brief overview of the role that equal protection claims play in identifying the underlying discrimination and racism in immigration policies.

A. Differences Are Disparities Indicative of Discriminatory Animus

A close reading of the differences between the U.S. government's response to the crises in Afghanistan and Ukraine through parole demonstrates that the differences are not simply differences—rather, they are disparities. Drawing from the government's response to Ukraine, and despite U4U's imperfections,[268] one can glean that the U.S. government had the capacity to respond to the crisis in Afghanistan in a similarly streamlined manner through a parole program.[269] Instead, the government opted to deploy scattered parole, SIVs, and refugee processing programs for Afghans.[270] Many Afghans, such as Ifat's father, who served as translators or worked at the U.S. embassy, were promised protection through SIVs or parole.[271] However, such individuals were either simply unable to apply for protection in time for the withdrawal, or despite applying, failed to receive relief.[272]

USCIS has collected at least nineteen million dollars in application fees from Afghans but has not processed their applications in a timely manner.[273] Rather, it heightened the standard for applicants, effectively ensuring that fewer people would receive relief.[274] These discrepancies have prompted civil rights groups to challenge USCIS's approach. For example, in, *Roe v. Mayorkas*,[275] a suit brought in May 2022 by the American Civil Liberties Union (ACLU) of Massachusetts, the plaintiffs allege violations of the APA and call out USCIS's inconsistent standards.[276] The suit further notes the

268. *See* de Freytas-Tamura, *supra* note 80.

269. *See Uniting for Ukraine*, *supra* note 12.

270. *See supra* Part II.B.1; *see also* Harris & Royan, *supra* note 58, at 38 (discussing the U.S. government's attempts to justify the differential treatment of Afghans as compared to Ukrainians).

271. *See* Misra, *supra* note 1 and accompanying text.

272. *See supra* notes 1–13 and accompanying text.

273. *See Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans*, *supra* note 153. Recent estimates indicate that USCIS has collected nearly twenty-five billion dollars in fees from Afghans seeking humanitarian parole. *See* Motion for Leave to File Amended Complaint at 15, LaMarche v. Mayorkas, No. 23-30029 (D. Mass. May 22, 2024), 2024 WL 2502929; *see also* Letter from Edward J. Markey to Alejandro Mayorkas and Ur Jaddou, *supra* note 174 (expressing concern over the delay of processing Afghan humanitarian parole applications).

274. *See Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans*, *supra* note 153.

275. No. 22-cv-10808, 2023 WL 3466327 (D. Mass. May 12, 2023).

276. *See* ACLU MASS., *supra* note 159 (describing the allegations made by plaintiffs in the case).

damning effects such delays and denials have had, and continue to have, on applicants' lives.[277] Similarly, in *LaMarche v. Mayorkas*,[278] the American Immigration Lawyers Association (AILA) and partners filed an amended complaint in August 2024 alleging that USCIS violated the APA by arbitrarily delaying action on Afghan humanitarian parole applications.[279]

By first outlining the features of the U.S. government's response, and then discussing the similarities and differences, this Note underscores what Afghans and their allies have known since the evacuation—that the United States could have done better and should now redress the harm it has caused. These stark differences demonstrate that the government's treatment of Afghans was motivated by discriminatory animus. Considering this animus toward Afghans, evidenced by the disparities in the government's use of parole, the next section will outline what a claim on behalf of Afghans left behind who intend to hold the government accountable might consist of.

B. Outlining a Complaint on Behalf of Afghans Left Behind

This section addresses standing first, and possible specific claims second. At the outset, it bears mentioning that the plaintiffs would sue the U.S. government specifically by suing DHS and USCIS. Plaintiffs may consist of U.S.-based relatives or loved ones of Afghans who were left behind,[280] namely because of the standing doctrine outlined in *Hawaii*[281] and solidified in *S.A.*[282] This means the most certain way forward for a potential claim would lie in relying on individuals who are in the country and have been trying to get their family members or loved ones relief in the United States.[283]

Specifically, these plaintiffs could argue that the U.S. government's decision to respond to the situation in Afghanistan with ad hoc parole adjudications, changing the standards for parole, and then foreclosing parole

277. *See id.* As of September 2024, the case is still pending a ruling on a motion for preliminary injunction. *Id.*

278. Amended Class Action Complaint for Declaratory and Injunctive Relief, LaMarche v. Mayorkas, No. 23-30029 (D. Mass. May 22, 2024), 2024 WL 2502929.

279. *See* Gina Kim, *Afghan Supporters Say US Arbitrarily Delayed Parole Requests*, LAW360 (Aug. 23, 2024, 10:05 PM), https://www.law360.com/articles/1872770/afghan-supporters-say-us-arbitrarily-delayed-parole-requests [https://perma.cc/XBL2-M3KV] (covering *LaMarche v. Mayorkas*' amended complaint).

280. *See, e.g.*, ACLU MASS., *supra* note 159.

281. *See* Trump v. Hawaii, 585 U.S. 667, 697–99 (2018).

282. *See* S.A. v. Trump, 363 F. Supp. 3d 1048, 1076–77 (N.D. Cal. 2018).

283. *See Hawaii*, 585 U.S. at 697–99; ACLU MASS., *supra* note 159. One important point to consider in terms of standing is the prospect of U.S. veterans bringing claims seeking relief for individuals in Afghanistan they once worked with. *See, e.g.*, Carson Frame, *Some U.S. Veterans Are Trying to Help Their Afghan Allies Escape. It's a Slow, Frustrating Process*, TEXAS PUB. RADIO (Aug. 29, 2022, 2:03 PM), https://www.tpr.org/military-veterans-issues/2022-08-29/some-u-s-veterans-are-trying-to-help-their-afghan-allies-escape-its-a-slow-frustrating-process [https://perma.cc/GDE8-4FQ5]; Olivia Rose Empson, *'These People Had Our Backs': US Veterans Lobby to Rescue Allies Trapped in Afghanistan*, THE GUARDIAN (Oct. 2, 2022, 5:00 AM), https://www.theguardian.com/world/2022/oct/02/afghanistan-taliban-us-veterans-allies-interpreters-rescue [https://perma.cc/3SQX-7M2B].

as an avenue of relief was motivated by discriminatory animus toward Afghans, animus that has manifested itself by having a disparate impact on relatives and loved ones of Afghans in the United States.[284] Plaintiffs could also draw on the U.S.'s historical involvement in Afghanistan,[285] and the extent to which the government promised Afghans who had worked with U.S. forces that they would be protected.[286] Additionally, plaintiffs could point to the government's overall discrimination toward Arabs and Muslims after the attacks of September 11[287] to support their argument.

The government's public response to claims of disparities between the treatment of Afghans and Ukrainians has been that the government did not have the capacity to build a program in response to the crisis given the lack of infrastructure in Afghanistan and the national security concerns inherent with having to process so many people at once.[288] Plaintiffs should address these counterarguments by alleging that the difference in standards and limited accessibility to relief is nevertheless indicative of discriminatory animus. Specifically, plaintiffs should note that national security and lack of infrastructure, in this case, do not justify the animus toward Afghans, in part because the government could have bolstered its capacity to process Afghan applications, as it did with U4U. Rather, the government chose not to expand capacity and instead changed the eligibility standards and paused the processing of applications altogether.[289] In sum, the animus demonstrated toward Afghans has harmed and continues to harm U.S. citizens and U.S.-based individuals by failing to provide equitable access to relief to their family members and loved ones abroad.

Still, the claims described above, however, would be challenging for plaintiffs to make given the judiciary's approach to immigration-related equal protection claims.[290] Viewing the government's national security and

284. *See, e.g.*, Whitney Shefte, *Two Years After U.S. Withdrawal, Afghan Refugees Wait for Asylum*, WASH. POST (Aug. 30, 2023, 2:34 PM), https://www.washingtonpost.com/dc-md-va/2023/08/30/two-years-after-us-withdrawal-afghan-refugees-wait-asylum/ [https://perma.cc/H2SV-6RUE] (covering the story of Mohibullah, who was evacuated early on to the United States, has humanitarian parole, and is waiting for his asylum application to process while he continues to be separated from his family); ACLU MASS., *supra* note 159 (describing such plaintiffs, including U.S.-based relatives of Afghans left behind).

285. *See* Stewart, *supra* note 45 and accompanying text.

286. *See, e.g.*, Ellen Knickmeyer, Robert Burns, James Laporta & Zeke Miller, *Biden Vows to Evacuate All Americans—and Afghan Helpers*, ASSOCIATED PRESS (Aug. 20, 2021, 10:02 PM), https://apnews.com/article/business-health-coronavirus-pandemic-kabul-taliban-d036db0b190acba68087f3d46ffae146 [https://perma.cc/GT5L-LU42].

287. *See* Johnson & Trujillo, *supra* note 48 and accompanying text.

288. *See* Ciullo, *supra* note 44, at 505–07; *see also* Dorothy Atkins, *USCIS Chief Talks Backlogs, DACA amid UCLA Law Protests*, LAW 360 (Aug. 29, 2022, 10:16 PM), https://www.law360.com/articles/1525509/uscis-chief-talks-backlogs-daca-amid-ucla-law-protests [https://perma.cc/Q2N7-N4B4] (covering USCIS Director Ur M. Jaddou's response to a question on the wide discrepancies between the number of Ukrainian refugees who have sought protection in the United States since the war started and the number of Afghans admitted).

289. *See Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans*, *supra* note 153.

290. *See generally infra* Part II.B.

infrastructure as mere excuses for its differential treatment of Afghans after the evacuation, plaintiffs have attempted to make similar arguments before in the immigration context. Along similar grounds, the Court has ruled in favor of the government.[291] This Note has described the recent doctrine on equal protection and animus in immigration to demonstrate how the Supreme Court, and lower federal courts, have approached these questions by failing to scrutinize the government's motives closely[292] and by generally deferring to the government widely, particularly when it comes to claims of national security.[293] Given the still severe lack of clarity surrounding the Court's animus jurisprudence, this Note proposes a new framework and an updated test that pays close attention to principles of fairness, and under which the Court would be more likely to find discriminatory animus, rule in favor of Afghans in this case, and possibly rule in favor of immigrants in future cases.

C. Test for Courts to Employ in Immigration-Related Equal Protection Discriminatory Animus Claims

Based on *Hawaii* and *Regents*, the Supreme Court's approach to equal protection animus claims related to immigration is inconsistent.[294] The Court in *Hawaii* first discussed the *Mandel* framework—the facially legitimate and bona fide heightened standard of review—and animus cases that call for rational basis with bite before ultimately—and confoundingly—applying a deferential standard akin to rational basis review.[295] In *Regents*, the Court relied on *Arlington Heights* and discussed specific factors historically used to analyze discriminatory intent, including disparate impact on a particular group, departures from the normal procedural sequence, and contemporary statements by members of the decision-making body.[296]

In response, this Note proposes a new framework for the Court to employ to resolve the inconsistency in the standard of review of animus claims related to immigration.[297] First, the framework asserts that the Court should formally adopt the factors outlined in *Arlington Heights*.[298] This builds off

291. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 697–99 (2018); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 33–34 (2020).

292. *See Regents*, 591 U.S. at 34–36.

293. *See Hawaii*, 585 U.S. at 704–05 ("[O]ur inquiry into matters of entry and national security is highly constrained.").

294. *See supra* Parts II.B.1, II.B.3.

295. *See supra* Part II.B.1.

296. *See supra* Part II.B.3.

297. This Note does not propose a framework regarding standing given the clarity with which the Court ruled in *Hawaii*, establishing that U.S.-based relatives are able to meet the injury-in-fact requirement for standing. Questions regarding the possible standing of foreign nationals seeking entry themselves to the country are outside the scope of this Note.

298. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263–65 (1977) (discussing that the factors demonstrating racially discriminatory intent include disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decision-makers). Of note, the Court in *Regents* did not explicitly discuss historical background in the context of the rescission of DACA, but the proposed framework in this part does include historical background as a factor.

Professor Araiza's contention that the Court's use of the factors in *Regents* suggests that the factors could play a role in the Court's future analysis of discriminatory animus claims.[299]

Second, beyond relying on the factors alone, the proposed framework calls for coupling the use of the *Arlington Heights* factors with the rational basis with bite analysis outlined in the animus cases. Thus, the proposed framework is a two-pronged test that the Court should apply. When approaching an animus case, the Court should first analyze the issues with the *Arlington Heights* factors, and then apply rational basis with bite review. As such, the Court should go through both steps when presented with an immigration-related animus case and consider the totality of the claims and evidence provided.

This new two-pronged test would ensure that the Court conducts a searching review of the government's purpose behind its actions while still enabling the Court to defer to the government on immigration matters generally.[300] It would offer a means for the Court to hold the government accountable when the government's actions demonstrate discriminatory animus toward a particular group of foreign nationals that impacts U.S. citizens and U.S.-based individuals.

By incorporating components from both *Hawaii* and *Regents*, this proposed framework offers clarity on the threshold that litigants must overcome to demonstrate discriminatory animus in relation to immigration claims. As such, it would pave the way for immigration advocates and allies to bring claims to hold the government accountable for its disparate actions toward certain groups of immigrants over others. For example, the claim like the ones outlined in this part on behalf of U.S.-based relatives of Afghans left behind, would play an important role in holding the government accountable for its disparate treatment of Afghans.

1. Applying the Test to Equal Protection Claims on Behalf of Afghans Left Behind

This section focuses on how the proposed two-pronged test would apply to claims by U.S.-based loved ones on behalf of Afghans left behind. It urges the Court, if presented with the opportunity, to adopt this framework and conclude that discriminatory animus undergirds the U.S. government's decision to use parole in response to the crises in Afghanistan and Ukraine.

Under step one of the test, the Court would look to the *Arlington Heights* factors[301] and analyze them in turn as addressed in the plaintiffs' complaint

299. *See* Araiza, *supra* note 259, at 1021.

300. *See, e.g.*, Motomura, *supra* note 112, at 574 (describing plenary power doctrine and its role in courts usually deferring to the government on immigration). Given the Court's recent rulings on immigration, including *Hawaii* and *Regents*, it is unlikely that the Court would abandon the plenary power doctrine it has used to analyze immigration related claims. *See supra* note 112 and accompanying text.

301. Recall that these factors consist of disproportionate impact toward a specific group, the historical background of the challenged decision, the specific antecedent events, departures

to determine if the government exhibited discriminatory animus toward Afghans in designing its parole response so differently from that toward Ukrainians. First, in terms of disparate impact on a particular group, the Court would examine the disparate impact on U.S. citizens and loved ones of individuals left behind in Afghanistan without relief. It would look to the specific circumstances of the plaintiffs and the impact on their lives as a result of being separated from their loved ones. Further, the Court would, as part of its searching review of the government's motivations, review the history of government decisions made regarding Arabs and Muslims both in the U.S. and abroad, including with respect to Afghanistan. In terms of deviation from standard decision-making procedures, the Court would take note of the plaintiffs' evidence that USCIS heightened the standard for humanitarian parole and halted processing of applications at the height of need for relief, without going through standard processes.[302] Lastly, as for contemporary statements, the plaintiffs' claims in this case would differ from those made in *Hawaii* and *Regents* because President Biden has not made any explicitly derogatory statements toward Afghans in the way that President Trump did toward Muslims and Latinos both before and after assuming the presidency. Nonetheless, the Court could choose to review statements made since the attacks of September 11 across U.S. government agencies that demonstrate the extent to which the discrimination toward Muslims and Arabs has been deeply entrenched in the government, and society at large, for decades.

As for step two of the test, the Court would apply rational basis with bite review as outlined in the animus cases. Recall that rational basis with bite calls for some connection between the means and the ends of government action, where under- or over-inclusiveness can lead to invalidation.[303] Accordingly, the Court would look to the available data of Afghans admitted to the United States so far. In doing so, it would find that relative to the small number of individuals who have prompted security concerns,[304] the degree of security vetting required for humanitarian parole applicants—namely having to go to a consulate or embassy in person for additional screening—is vastly over-inclusive and exposes Afghans to dangerous circumstances, as opposed to keeping people in the United States safe. For this component, this Note would urge the Court to look beyond Chief Justice Robert's limited animus case analysis in *Hawaii* and to the *facts* of the animus cases themselves, including *Cleburne*, to find that the proffered reason for the policies—here, national security—are not sufficient to overcome rational

from normal procedures, and contemporary statements of the decision-makers. *See Arlington Heights*, 429 U.S. at 263–65.

302. *See Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans*, *supra* note 153.

303. *See generally* Pettinga, *supra* note 129.

304. *See* Nicole Sganga, *"A Very Small Number" of Afghans Prompted Security Concerns During Evacuation*, CBS NEWS (Aug. 31, 2021, 9:20 PM), https://www.cbsnews.com/news/very-small-number-afghans-security-concerns-evacuation/ [https://perma.cc/F694-3BF4].

basis with bite when a particular group—Afghans—are disparately impacted.[305]

In applying an interpretation that goes beyond that of Chief Justice Roberts, the Court would be more likely to find that the facts related to Afghans left behind closely mirrors that in *Cleburne* because Afghan family members in the United States had to, and continue to, pay large sums for their relatives to apply for humanitarian parole, and, even then, are in no way guaranteed relief given the heightened standards. In contrast, U.S. individuals without any relation to Ukrainians could, and still can, sponsor them to come to the country, without having to pay anything, and without Ukrainians having to go through extra vetting at a consulate or embassy.

By going through the two steps the Court's analysis would be more thorough and, considering all components of the test as well as the totality of the evidence, would enable the Court to determine that the stark disparities between the accessibility of relief for Afghans compared to that of Ukrainians are clear enough to demonstrate that discriminatory animus was involved.

D. Why Bringing an Equal Protection Claim Regarding Immigration Is Important

This Note argues that an equal protection claim on behalf of Afghans left behind brought by U.S.-based individuals should be feasible because the disparities among the two uses of parole are indicative of discriminatory animus. This Note chooses to advocate for equal protection as a means of seeking accountability for Afghans left behind and their families in the U.S. because equal protection litigation can frame public dialogue, advance social movements, and promote extrajudicial political change.[306] This Note echoes the premise that unlike more technical arguments, equal protection claims speak to the indignity, dehumanization, and lack of belonging experienced by affected immigrants.[307] Thus, an equal protection suit, as a general matter, is an important strategy to pursue, because even a high-profile loss can help mobilize political reform.[308]

The similarities between the challenges Afghans seeking refuge in the United States over the last few years have faced and the facts of *Hawaii*, where individuals from mostly Muslim-majority countries were denied entry to the country on the basis of national security, have led the author of this Note to believe that, in order to finally inter *Korematsu*'s ghost, the courts

305. *Compare* Trump v. Hawaii, 585 U.S. 667, 705 (2018) (describing Chief Justice Roberts' view that the animus cases call for only invalidating cases where "laws at issue lack any purpose other than a 'bare . . . desire to harm a politically unpopular group'"), *with* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447–50 (1985) (discussing the Court's holding that requiring special permits for a home for intellectually disabled individuals but not for other comparable dwellings was indicative of discriminatory animus and thus a violation of equal protection).

306. *See* Shirin Sinnar & Jayashri Srikantiah, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 207 (2019).

307. *See id.* at 207–08.

308. *See id.*

must resist new national security masquerades[309] and ensure that the government remains committed to upholding the liberties outlined in the Constitution.[310]

CONCLUSION

This Note has described immigration parole,[311] detailed the U.S. government's use of parole in the aftermath of humanitarian crises in Afghanistan and Ukraine,[312] discussed the differences and similarities between both approaches, explained the doctrine on equal protection,[313] and analyzed some of the most recent constitutional challenges related to immigration[314] with an emphasis on animus claims. Overall, this Note sheds light on the disparities between the U.S. government's use of parole in response to the crises in Afghanistan and Ukraine in an effort to hold the U.S. government accountable for its immigration actions. In doing so, it demonstrates the importance of parole as a tool available to presidential administrations to manage migration in a way it would otherwise be unable.

This Note argues that the tool of parole should not be used in a discriminatory manner toward any group of migrants. Rather, each group should be treated equitably, particularly in light of the harrowing humanitarian crises migrants may be seeking safety from. To that end, this Note argues that the differences between the use of parole for Afghans and Ukrainians are disparities that merit seeking redress through an equal protection claim, alleging discriminatory animus. Beyond outlining what a complaint could consist of, this Note proposes a new framework—a test that would allow courts to find discriminatory animus in immigration-related equal protection claims by calling for a more searching review of the government's motivations behind its policies.

This Note advances the belief that Ifat and her family should have the same access to relief that Margo and her family did.[315] It contends that U.S.-based relatives of Afghans left behind have a basis for an equal protection claim and that the Court should find discriminatory animus in the government's disparate use of parole toward Afghans and Ukrainians. This would allow Afghans to receive the relief they have been waiting on for years. Further, such a challenge on behalf of Afghans would be an opportunity for the courts to further develop the doctrine of equal protection and immigration in a way that seeks to eradicate discrimination in the United States's immigration system.

309. *See* Koh, *supra* note 215.

310. *See id.* (quoting Justice Anthony M. Kennedy, "[a]n anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect").

311. *See supra* Part I.A.

312. *See supra* Part I.B.

313. *See supra* Part I.C.

314. *See supra* Part II.B.

315. *See supra* notes 1–11 and accompanying text.