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11/21/2019	55 Response Brief for Appellees	2	BRIEF by Grannaz Amirjamshidi, Arab American Association of New York, IAAB Jane Doe #1, Zakzok Jane Doe #1, IRAP Jane Doe #2, Zakzok Jane Doe #2, IAAB Jane Doe #3, IRAP John Doe #4, IAAB Jane Doe #5, IRAP John Doe #5, IAAB John Doe #6, HIAS, Inc., International Refugee Assistance Project, Iranian Alliances Across Borders, Iranian Students' Foundation, Afsaneh Khazaeli, Mohamad Mashta, Muhammed Meteab, Middle East Studies Association of North America, Inc., Fahed Muqbil, Shapour Shirani, Yemeni−American Merchants Association and Eblal Zakzok in electronic and paper format. Type of Brief: RESPONSE. Method of Filing Paper Copies: N/A. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 11/21/2019. [1000631370] [19−1990] Mark Mosier
12/17/2019	82 BRIEF (all formal, non−sealed briefs/electronic & paper form)	65	BRIEF by William P. Barr, Mr. Kenneth T. Cuccinelli, II, Department of State, Joseph Maguire, Mark A. Morgan, Office of the Director of National Intelligence, Michael R. Pompeo, Donald J. Trump, United States Department of Homeland Security and Chad Wolf in electronic and paper format. Type of Brief: REPLY. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 12/17/2019. [1000646543] [19−1990] Joshua Waldman

No. 19-1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients; YEMENI-AMERICAN MERCHANTS ASSOCIATION, on behalf of itself and its members; IRAP JOHN DOE #4; IRAP JOHN DOE #5; IRAP JANE DOE #2; MUHAMMED METEAB; MOHAMAD MASHTA; GRANNAZ AMIRJAMSHIDI; SHAPOUR SHIRANI; AFSANEH KHAZAELI; IRANIAN ALLIANCES ACROSS BORDERS; IAAB JANE DOE #1; IAAB JANE DOE #3; IAAB JANE DOE #5; IAAB JOHN DOE #6; IRANIAN STUDENTS' FOUNDATION, Iranian Alliances Across Borders Affiliate at the University of Maryland College Park; EBLAL ZAKZOK; FAHED MUQBIL; ZAKZOK JANE DOE #1; ZAKZOK JANE DOE #2

Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; KEVIN K. McALEENAN, in his official capacity as Acting Secretary of Homeland Security; MICHAEL R. POMPEO, in his official capacity as Secretary of State; JOSEPH MAGUIRE, in his official capacity as Acting Director of National Intelligence; MARK A. MORGAN, in his official capacity as Senior Official Performing the Functions and Duties of the Commissioner of U.S. Customs and Border Protection; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; WILLIAM P. BARR, in his official capacity as Attorney General of the United States,

Defendants – Appellants.

United States District Court
for the District of Maryland, Southern Division
(8:17-cv-00361-TDC; 8:17-cv-02921-TDC; 1:17-cv-02969-TDC)

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees certify as follows: The International Refugee Assistance Project, HIAS, Inc., the Middle East Studies Association of North America, Inc., the Arab American Association of New York, the Yemeni-American Merchants Association, IRAP John Doe #4, IRAP John Doe # 5, IRAP Jane Doe #2, Muhammed Meteab, Mohamad Mashta, Grannaz Amirjamshidi, Shapour Shirani, Afsaneh Khazaeli, the Iranian Alliances Across Borders, IAAB Jane Doe #1, IAAB Jane Doe #3, IAAB Jane Doe #5, IAAB John Doe #6, the Iranian Student's Foundation, Eblal Zakzok, Fahed Muqbil, Zakzok Jane Doe #1, and Zakzok Jane Doe #2 have no parent corporations. They have no stock, and hence, no publicly held company owns 10% or more of their stock.

s/ Mark W. Mosier
Mark W. Mosier

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INTRODUCTION

The government attempts to divorce the question presented in this appeal from the procedural posture in which it arises. In the government's view, this Court must hold that the Proclamation[1] satisfies rational-basis review, because the Supreme Court has already so held. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). But the Supreme Court did not determine the ultimate merits of the *Hawaii* plaintiffs' constitutional claim—it instead ruled only that there was not a sufficient likelihood of success on the merits to warrant preliminary injunctive relief. Nor are the merits of Plaintiffs' constitutional claims before this Court now. This interlocutory appeal of the partial denial of the government's motion to dismiss presents only the question whether Plaintiffs have stated a plausible claim that the Proclamation is unconstitutional. The district court correctly held that they have.

The government urges this Court to hold that *Hawaii* forecloses further proceedings in these cases. But the government misunderstands the effect of a preliminary-injunction ruling. Preliminary-injunction proceedings result in preliminary rulings. That is especially true when—as in *Hawaii*—a court decides which party is likely to prevail on the merits by weighing the limited evidence in a record

[1] *See* Proclamation No. 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public Safety Threats," 82 Fed. Reg. 45,161 (Sept. 27, 2017).

created solely of publicly available evidence and without discovery. The government contends that the Supreme Court did not limit its holding to the preliminary-injunction issue before it, but the Court's own statement of its holding demonstrates otherwise: "We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim." *Hawaii*, 138 S. Ct. at 2423.

At this stage of the litigation, Plaintiffs need not prove that they are likely to prevail on the merits of their claims. They need only allege facts demonstrating that they have a plausible basis for relief—in other words, that they have plausibly alleged that the Proclamation is unconstitutional. The district court correctly held that Plaintiffs made this showing and that they are entitled to discovery to prove their claims. That decision should be affirmed.

STATEMENT OF THE CASE

A. The President Issues a Proclamation Fulfilling His Campaign Promise to Ban Muslims from Entering the United States.

Throughout his campaign, President Donald J. Trump said that he wanted a "total and complete shutdown on Muslims entering the United States." JA154 ¶ 28. Despite later rebranding this "Muslim ban" as a "travel ban," President Trump made clear that the switch from a religious-based ban to a country-based ban was merely "politically correct" cover: "People were so upset when I used the word 'Muslim.' 'Oh, you can't use the word 'Muslim.' Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." JA208 ¶ 20(i). President Trump's

associates and advisors were equally clear about the link between the travel ban and the earlier-promised Muslim ban. Rudy Giuliani, the President's personal lawyer, confirmed that the travel ban was the product of the President's campaign promise to ban Muslims from entering the country. JA210 ¶ 27.

In the first days of his presidency, President Trump fulfilled this campaign promise by signing Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO-1"). EO-1 restricted travel to the United States for 90 days for nationals of seven Muslim-majority countries. The President signed EO-1 on only his eighth day in office and with "no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security." *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 545 (D. Md. 2017). The ban was swiftly challenged and enjoined. JA146 ¶ 4.

On March 6, 2017, President Trump rescinded and replaced EO-1 with Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO-2"). EO-2 had the same purpose and effect as the first: Both were designed to, and did, prevent Muslims from entering the United States. Because the major provisions of the two orders were nearly identical, EO-2 suffered from the same fundamental defects as EO-1, so it too

was blocked by the courts. JA146-47 ¶ 4; *see also, e.g.*, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 590-91 (4th Cir. 2017) (en banc) ("*IRAP I*").

On September 24, 2017, the President issued the Proclamation, imposing an indefinite ban on most travel to the United States by more than 150 million people, the vast majority of whom are Muslim. JA164 ¶ 60, JA168 ¶ 65. The Proclamation suspended categorically and indefinitely the entry into the United States of nationals of five of the six countries included in EO-2 (Iran, Libya, Syria, Yemen, and Somalia), as well as yet another Muslim-majority country (Chad). The Proclamation also imposed restrictions on nationals of North Korea, even though virtually no North Korean nationals travel to the United States, and on the non-immigrant entry of a small group of Venezuelan government officials and their immediate family members. JA167 ¶ 64.

The Proclamation purports to be based on a worldwide review of information-sharing practices, policies, and capabilities of foreign countries. JA168 ¶ 66. The Proclamation states that the Secretary of Homeland Security "developed a baseline for the kinds of information required from foreign governments" regarding individuals seeking entry into the United States, evaluated each country against this baseline, and then submitted a report to the President with the results of the worldwide review. Despite purporting to cover every foreign country's information-sharing practices, the report was a mere 17-pages long—or less than one-tenth of a

page for each of the "nearly 200" countries purportedly evaluated in the worldwide review. JA170 ¶ 69.

The Proclamation includes a waiver provision, under which applicants otherwise barred by the Proclamation might be allowed to enter the United States. JA174 ¶ 81. But in practice there is no procedure to apply for these waivers. JA175 ¶ 82. Applicants and their attorneys have been informed that "[t]here is no role or requirement for legal services to facilitate the waiver process." *Id.* Waivers are rarely granted, and one Plaintiff's relative was denied a waiver before she could even apply for it. JA175-76 ¶ 84. In a sworn declaration filed in federal district court, former consular officials testified that they were instructed "to determine at all possible cost" that applicants were "not eligible to even apply for the waiver." JA176 ¶ 85. In their view, this waiver process is a "fraud" and has "no rational basis." *Id.*

B. Plaintiffs Seek to Enjoin the Proclamation.

Plaintiffs filed these three cases and sought preliminary relief because the Proclamation irreparably harms them. The individual Plaintiffs are U.S. citizens and lawful permanent residents whose relatives—including spouses, parents, and children—are unable to enter the United States because of the Proclamation. Plaintiffs include individuals who are ill or have gravely ill relatives, and are seeking urgent family reunification that the Proclamation prevents. JA113 ¶ 359 (husband with terminal cancer); JA151 ¶ 15 (elderly plaintiff seeking to be reunified with her son).

And several Plaintiffs fear that, because of the Proclamation, their loved ones will have no choice but to return to countries where they face grave danger. *See*, *e.g.*, JA150 ¶ 12; JA222 ¶ 69; JA226 ¶ 95. Plaintiffs also feel singled out and condemned by the message that the Proclamation sends of disapproval and hostility toward Muslims. JA111-12 ¶ 349; JA106-07 ¶ 329; JA113 ¶ 358; JA224 ¶ 79; JA225 ¶ 87.

The Proclamation also harms the organizational Plaintiffs. For example, *IRAP* Plaintiff Middle East Studies Association ("MESA") cannot fulfill its mission of bringing together scholars of Middle Eastern studies and will therefore suffer substantial financial losses, because the Proclamation prevents many members and scholars from attending its annual meeting in the United States. JA101-02 ¶¶ 296-300. And *IRAP* Plaintiffs Arab-American Association of New York and International Refugee Assistance Project ("IRAP") have been forced to divert their limited resources to aid clients and others in response to the Proclamation. JA93-94 ¶¶ 250-57; JA102-03 ¶¶ 301-09.

Shortly after the President announced the Proclamation, Plaintiffs moved for a preliminary injunction to prevent it from taking effect. On October 17, 2017, the district court granted Plaintiffs' motions and enjoined the government from implementing most of the Proclamation's ban. *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 633 (D. Md. 2017). This Court, sitting *en banc*, affirmed. *See Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 274 (4th Cir. 2018) (en

banc) ("*IRAP II*"). This Court held that the "highly unusual facts" of this case "compelled" a finding that the Proclamation is "not only a likely Establishment Clause violation, but also strikes at the basic notion that the government may not act based on religious animosity." *Id.* at 269 (quotation marks and citation omitted).

While a petition for certiorari was pending in this case, the Supreme Court granted certiorari to review a Ninth Circuit decision affirming a similar preliminary injunction. *See Hawaii v. Trump*, 878 F.3d 662, 702 (9th Cir. 2017), *cert. granted* 138 S. Ct. 923 (2018).

In *Hawaii*, the Supreme Court held that the plaintiffs had not demonstrated a likelihood of success on the merits of their Establishment Clause claim. 138 S. Ct. at 2423. The Court applied rational-basis review to reach this result, which required it to weigh the "extrinsic evidence." *Id.* at 2420. Weighing the evidence before it, the Supreme Court found "persuasive evidence" that the Proclamation could "reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420-21. Justice Kennedy joined the majority opinion, but he also wrote separately to stress that "[w]hether judicial proceedings may properly continue in this case, in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs, and in light of today's decision, is a matter to be addressed in the first instance on remand." *Id.* at 2424 (Kennedy, J., concurring).

Four justices dissented. They would have held, based on the publicly available evidence, that "plaintiffs are likely to succeed on the merits of their Establishment Clause claim." *Hawaii*, 128 S. Ct. at 2433 (Sotomayor, J. dissenting); *see also id.* (Breyer, J. dissenting) ("I would leave the injunction in effect"). In his dissent, Justice Breyer explained that "there is evidence that supports . . . that the Government is not applying the Proclamation as written." *Id.* at 2431. And Justice Sotomayor explained in her dissenting opinion that the majority opinion "ignor[es] the facts, misconstru[es] our legal precedent, and turn[s] a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals." *Hawaii*, 138 S. Ct. at 2433 (Sotomayor, J., dissenting). She further explained that "[t]he full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith." *Id.* at 2434-35.

C. Following the Preliminary-Injunction Proceedings, the District Court Denies the Government's Motion to Dismiss.

Following the *Hawaii* ruling, the Supreme Court vacated this Court's judgment and remanded these cases. *Int'l Refugee Assistance Project v. Trump*, 138 S. Ct. 2710 (2018). This Court subsequently remanded the cases to the district court for further proceedings. *Int'l Refugee Assistance Project v. Trump*, 905 F.3d 287 (4th Cir. 2018).

Back in the district court, the government moved to dismiss Plaintiffs' claims. The district court granted the motion on Plaintiffs' Administrative Procedure Act ("APA") claims, but denied the motion on their constitutional claims. JA277. The court held that "Plaintiffs have put forward factual allegations sufficient to show that the Proclamation is not rationally related to the legitimate national security and information-sharing justifications identified in the Proclamation and therefore that it was motivated only by an illegitimate hostility to Muslims." JA269.

As the district court held, "the Complaints provide detailed allegations of statements by the President exhibiting religious animus toward Muslims and articulating a desire to ban Muslims from entering the United States." *Id.* Moreover, "the Complaints also provide specific allegations aimed at refuting 'the presumption of rationality' that applies to the Proclamation's stated national security purposes." JA267 (quoting *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008)). For example, Plaintiffs' "allegations of uneven application of [the baseline test's] purportedly neutral criteria undermine the national security rationale for the Proclamation's ban against majority-Muslim countries." JA267. And Plaintiffs' "allegations of a systematic refusal to grant waivers to individuals who meet the stated criteria . . . further support the inference that the Proclamation is not rationally related to the stated national security interests, but is instead a pretext for discrimination." JA268.

The district court specifically considered and rejected the government's argument that *Hawaii* forecloses further litigation of Plaintiffs' claims. JA269. The court emphasized that different standards apply on a motion for a preliminary injunction and a motion to dismiss. JA269-70. For a preliminary injunction, a court reviews a limited evidentiary record and makes an initial assessment about the merits of a claim. JA269. But on a motion to dismiss, "the court must view the facts in the light most favorable for the plaintiff and find for the plaintiff 'if relief could be granted under any set of facts that could be proved consistent with the allegations.'" JA270 (quoting *Giarratano*, 521 F.3d at 303). As a result, the Supreme Court's assessment of whether the *Hawaii* plaintiffs had made a sufficient showing for a preliminary injunction did not answer "whether under the highly deferential Rule 12(b)(6) standard, Plaintiffs have stated a plausible claim for relief" in this case, so as "to progress beyond the pleadings and obtain discovery." JA270

On August 20, 2019, the district court certified its order for interlocutory appeal. JA289-90. This Court granted the government's petition for permission to appeal under Section 1292(b).

SUMMARY OF THE ARGUMENT

I. The district court correctly denied the government's motion to dismiss on Plaintiffs' constitutional claims. The district court applied the well-established standard for deciding motions to dismiss and concluded that Plaintiffs had alleged a

plausible basis for relief. As the district court explained, in ruling on the *Hawaii* plaintiffs' preliminary-injunction request, the Supreme Court did not suggest that the plaintiffs there had failed to state a claim under Rule 12(b)(6).

A. Plaintiffs have stated a plausible claim for relief because they plausibly allege that the Proclamation was adopted based on anti-Muslim animus, rather than any purported national-security justification. The district court correctly considered Plaintiffs' extensive allegations of anti-Muslim animus and intent, because the Proclamation's purported legitimate justifications must be considered in light of the evidence of improper motivations. The district court also correctly considered the many ways in which the Proclamation does not further the purported national-security justification. Plaintiffs have plausibly alleged that the Proclamation fails rational-basis review based on the design and implementation of both the "baseline test" and the waiver process, and because existing immigration law already achieves the objectives that the Proclamation supposedly furthers.

B. The Supreme Court's decision in *Hawaii* does not foreclose Plaintiffs' claims. According to the government, the Supreme Court did not limit its ruling to the preliminary-injunction order before it, but instead decided the ultimate merits of the plaintiffs' claims. But the Supreme Court made clear that it was deciding only the preliminary-injunction issue. And the Supreme Court also made clear that its decision depended on the evidentiary record that the *Hawaii* plaintiffs presented

without the benefit of discovery. The law is clear that a preliminary-injunction ruling based on an undeveloped evidentiary record does not preclude a plaintiff from taking discovery and presenting her claims on a fully developed evidentiary record.

Nor is the government correct that the district court relied solely and improperly on arguments that the Supreme Court rejected. The district court properly considered all of Plaintiffs' allegations, even those related to aspects of the Proclamation that the Supreme Court considered. The Supreme Court's analysis is not dispositive here because it considered the Proclamation under the demanding standard applicable to a preliminary-injunction motion, not the more liberal pleading standard applicable to a motion to dismiss. Put another way, that the *Hawaii* plaintiffs did not present evidence to warrant a preliminary injunction does not mean that Plaintiffs fail even to state a claim. Moreover, as the district court acknowledged, Plaintiffs allege facts that the Supreme Court did not consider. The Court cannot—as the government urges—weigh the new allegations against the supposed evidence that the government now attempts to introduce.

C. The district court did not misapply the standard for rational-basis review. In arguing otherwise, the government conflates the test for deciding whether Plaintiffs have stated a claim under Rule 12(b)(6) with the showing Plaintiffs must ultimately make to prevail on the merits of their claims. This Court has previously held that a plaintiff does not lose the benefit of the liberal pleading standard that

applies on a motion to dismiss simply because her claims challenge a law subject to rational-basis review. Nor did the district court err in recognizing that Plaintiffs are entitled to discovery to support their claims. As *Hawaii* illustrates, rational-basis review is conducted on an evidentiary record. Plaintiffs may develop such a record before their claims are adjudicated on the merits.

D. The government's additional arguments also lack merit. *First*, the Proclamation cannot be justified as furthering an information-sharing objective that is independent of the purported national-security rationale. The government has waived any argument that the Proclamation is supported by two independent objectives by not making this argument in the district court. *Second*, the government's continued reliance on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), is misplaced. Plaintiffs have overcome any bar imposed by *Mandel* because they have alleged with particularity that the President adopted the Proclamation in bad faith. Moreover, the government cites no authority supporting the view that a court may uphold a law under *Mandel* even if it fails rational-basis review. If the Proclamation fails rational-basis review, it must be held unconstitutional.

II. A. The government incorrectly contends that Plaintiffs do not assert their own constitutional rights. The district court correctly rejected this argument as simply repackaging the government's failed standing arguments. The argument also fails because the allegations in the complaints leave no room for doubt about whether

Plaintiffs are alleging violations of their own rights. The Supreme Court has repeatedly accepted a plaintiff's framing of her own claims and addressed whether a foreign person's visa denial violated the constitutional rights of a U.S. citizen.

B. The government contends that Plaintiffs' due-process claims fail because they have not alleged a protected liberty interest. Although Plaintiffs alleged liberty interests arising under both the Constitution and federal immigration law, the government timely challenged only whether they have a liberty interest arising from the Constitution. Because the district court correctly held that the government waived any argument regarding Plaintiffs' statutorily created liberty interests, this Court need not address the argument. If the Court addresses the argument, it should hold that federal immigration law—specifically, the statutory provisions creating a visa-application process for U.S. citizens to sponsor entry of their relatives—creates for Plaintiffs a protected liberty interest that ensures the visa-application process complies with due process. The Court should also hold that Plaintiffs' interest in reunification of their families is so central to their pursuit of happiness that the Constitution protects this liberty interest.

ARGUMENT

I. Plaintiffs Plausibly Allege That the Proclamation Is Unconstitutional.

The district court correctly denied the government's motion to dismiss Plaintiffs' constitutional claims. To survive a motion to dismiss, Plaintiffs had to allege

facts showing they have a plausible basis for relief. Plaintiffs' allegations that the Proclamation is unconstitutional satisfy this minimal plausibility threshold. *Hawaii* does not dictate a different result. That the *Hawaii* plaintiffs did not obtain a preliminary injunction does not mean that they failed to state a claim under Rule 12(b)(6)—much less that Plaintiffs *here* have failed to do so.

A. Plaintiffs Plausibly Allege That the Proclamation Fails Rational-Basis Review.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Because Plaintiffs' claims for relief are based on the theory that the Proclamation is unconstitutional under rational-basis review, they must plausibly allege that the Proclamation does not rationally further a legitimate state interest. *See Giarratano*, 521 F.3d at 303 (*Twombly*'s plausibility standard applies even when law is subject to rational-basis review). The district court correctly held that Plaintiffs have plausibly alleged that the Proclamation fails rational-basis review because anti-Muslim animus is the only plausible explanation for it.

1. In ruling on the government's motion to dismiss, the district court correctly considered Plaintiffs' extensive allegations that the Proclamation, like the prior executive orders, was issued with the purpose of disfavoring Muslims and their religion, Islam. JA265-66. Dating back to his time as a candidate, President Trump

has repeatedly expressed prejudice and an intent to discriminate against Muslims, including by calling for a "total and complete shutdown of Muslims entering the United States." JA154 ¶ 28; *see also* JA205-08 ¶¶ 18-22 (collecting anti-Muslim statements). This Muslim ban became a central talking point of the Trump campaign, promoted by President Trump and his surrogates at campaign events across the country. JA155 ¶ 30. True to this unconstitutional promise, President Trump issued EO-1 shortly after taking office. JA209 ¶ 23. When that order was swiftly enjoined, he issued EO-2, which the President himself described as a "watered-down version" of the initial ban. JA212 ¶ 33. When EO-2 was enjoined, the President issued the Proclamation. *Id.* Plaintiffs allege that all three versions of the travel ban embody the same discriminatory policy toward Muslims. JA86 ¶ 198; JA214 ¶ 39.

The government contends that the President's anti-Muslim statements are irrelevant, Gov't Br. 36, but *Hawaii* holds otherwise. Although the Supreme Court refused to decide the Proclamation's constitutionality based *solely* on the President's statements, the Court made clear that these statements could not be ignored. "Rather, the Supreme Court specifically stated that this evidence 'may be considered,' so long as the 'authority of the Presidency itself' is given its due." JA266 (quoting *Hawaii*, 138 S. Ct. at 2418, 2420). Indeed, the Supreme Court framed the rational- basis inquiry to require addressing the relationship between the purported legitimate state interest and the unconstitutional purpose. *Hawaii*, 138 S. Ct. at 2420 (Proclamation

will be upheld "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds").[2] The district court thus correctly held that it could consider allegations of anti-Muslim animus in deciding whether Plaintiffs had plausibly alleged that the Proclamation is unconstitutional.

2. The district court correctly considered Plaintiffs' allegations regarding how the Proclamation's "baseline test" was designed and implemented. JA267. Even when a law appears to rely on neutral criteria, it may fail rational-basis review if those criteria are applied unevenly and irrationally. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985) (denial of a housing permit failed rational-basis review in part because the purportedly neutral criteria were applied differently to homes for mentally challenged than to other types of group homes). Plaintiffs have plausibly alleged that the Proclamation is similarly flawed.

Plaintiffs plausibly allege that the Proclamation fails rational-basis review because of its reliance on the baseline test, which was created by copying the eligibility

[2] The Supreme Court's prior decisions applying rational-basis review also considered evidence of the challenged laws' alleged improper purpose. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) (noting that challenged state law "raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," and holding that the law "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else"); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (considering evidence that challenged law was enacted to prevent "hippies" and "hippie communes" from obtaining food stamps).

criteria from the Visa Waiver Program. JA170 ¶ 71. In the Visa Waiver Program, those criteria are used to determine whether a country's citizens are eligible for certain visas—visas allowing entry by business travelers and tourists visiting the United States for less than 90 days—without an in-person interview or detailed written submission. JA170-71 ¶ 72. But the criteria serve no rational purpose when used for the Proclamation's baseline test, which is intended to determine which noncitizens should be barred indefinitely from entering the United States, even with an in-person interview and detailed submission. JA171 ¶ 73. Indeed, Plaintiffs plausibly allege that the Proclamation's reliance on the Visa Waiver Program's criteria simply reflects its anti-Muslim animus: By relying on these criteria, the government ensured that most of the countries subject to EO-2 would also fail the baseline test. JA171 ¶ 71.

Plaintiffs further allege that the government's implementation of the baseline test shows that it is not a legitimate national-security tool. The government purportedly applied the baseline test to every country in the world through a "worldwide review" that resulted in a written report that, despite purporting to cover every foreign country's information-sharing practices, was 17-pages long—or less than one-tenth of a page for each country evaluated. JA170 ¶ 69. Plaintiffs plausibly allege that this review was a sham "intended to reverse engineer a ban on the core Muslim-majority countries targeted by EO-1 and EO-2." JA217 ¶ 48.

Plaintiffs also allege that the Proclamation's treatment of the results of the baseline test further demonstrates that the Proclamation fails rational-basis review. Rather than implementing the results of the baseline test, the Proclamation, at times, ignores its own assessments of national security in favor of other grounds. For example, the worldwide review apparently identified 16 "inadequate" and 31 "at risk" countries, but the Proclamation does not explain how or why Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen were singled out from that broader list of countries for new or renewed travel and visa restrictions. JA89 ¶ 219. Nor does the Proclamation provide any reason why certain other countries that do not share important screening information with the United States (such as Belgium) did not likewise have travel and visa restrictions imposed on them. JA90 ¶ 223.

The Proclamation explicitly deviated from the baseline test at times in favor of other grounds not rationally related to its stated purposes. For example, "although Iraq failed the baseline test, the acting Secretary of Homeland Security recommended that its nationals not be banned from entry by the Proclamation," as a diplomatic reward for the Iraqi government's close relationship with the United States. JA171-72 ¶ 74. But the Proclamation does not explain why the Secretary of Homeland Security is making a diplomatic judgment, especially when it undermines the purported national-security rationale for relying on the baseline test. Plaintiffs

also allege that the addition of two non-majority Muslim countries to the Proclamation (Venezuela and North Korea) fails to demonstrate a religion-neutral basis, but is instead a thin effort to paper over the Proclamation's otherwise transparently anti-Muslim motivations: "The affected populations from Venezuela and North Korea, the only non-Muslim-majority countries targeted by [the Proclamation], are so small as to be relatively negligible, especially when compared to the affected populations from the Muslim-majority countries targeted by [the Proclamation]." JA90 ¶ 227. These allegations plausibly demonstrate that the baseline test is irrational in both design and implementation.

3. The district court correctly considered Plaintiffs' allegations regarding how the Proclamation's waiver process was designed and implemented. JA268. Courts have invalidated laws under rational-basis review when they contain exemptions inconsistent with the purported purpose of the law. *See Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008) (law failed rational-basis review where, by including an exemption, "government has undercut its own rational basis" for the law); *Peoples Rights Org., Inc. v. Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (exemption caused law to fail rational-basis review because "[t]here simply exists no rational distinction between" those covered by the law and those exempted). Plaintiffs have plausibly alleged that the waiver process suffers from this sort of irrationality.

Plaintiffs plausibly allege that the Proclamation's irrationality is evident from the design and implementation of its waiver provisions. Two of the criteria for eligibility to receive a waiver—the undue-hardship and national-interest factors—do not bear any rational relationship to the purported national-security purpose. JA216. And implementation of the waiver process can be explained only in relation to the Proclamation's anti-Muslim purpose. Given how rarely waivers are granted, Plaintiffs plausibly allege that the waiver process is "window dressing" to distract from the reality that "there really is no waiver process that enables individuals impacted by the Proclamation to enter the United States," dramatically reducing the number of individuals entering the United States from Muslim-majority countries, but affecting only a very small number of individuals entering the United States from North Korea and Venezuela. JA219-20 ¶¶ 52-55. As a sworn declaration by a former consular official describes it, the waiver process is a "fraud" with "no rational basis." JA176 ¶ 185.

4. The district court correctly considered Plaintiffs' allegations that the Proclamation's purported national-security justification is already achieved by existing law. JA269. Courts have repeatedly held that a law fails rational-basis review when existing law already achieves the objective that the challenged law allegedly furthers—particularly where, as here, there is evidence that the stated rationale is

pretextual. *See Moreno*, 413 U.S. at 536 (restriction on food stamps was not a rational law to prohibit fraud when existing statutory provision already addressed food-stamp fraud); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-25 (5th Cir. 2013) (law granting funeral directors exclusive authority to sell caskets was not a rational consumer-protection measure because existing law "already polices inappropriate sales tactics by all sellers of caskets"); *Craigmiles v. Giles*, 312 F.3d 220, 227-29 (6th Cir. 2002) (same). Plaintiffs have plausibly alleged that the Proclamation falls into this category.

Plaintiffs allege that the Proclamation fails rational-basis review because the immigration laws already achieve the identical purported national-security objectives. JA215-16 ¶ 44. Under existing law, consular officers must consider whether a person's entry into the United States poses a national-security risk, 8 U.S.C. § 1182(a)(3), and they must deny entry if they lack sufficient information to make that determination, *id.* § 1361; 22 C.F.R. § 40.6. The Proclamation does not cite any visa-vetting failures, nor does it explain how the President concluded that these existing procedures were inadequate. JA172-73 ¶ 77. Indeed, as Plaintiffs allege, the President does not appear to have even considered whether existing law sufficiently addressed the concerns that he identified. JA173-74 ¶¶ 79-80. In contrast, Plaintiffs have alleged that the ban is "unnecessary" in light of existing vetting procedures and

will "cause serious harm" to national security—an allegation supported by a sworn declaration by former national security officials. JA176 ¶ 85.

In sum, when Plaintiffs' factual allegations are accepted as true, Plaintiffs have plausibly alleged that the Proclamation cannot "reasonably be understood to result from a justification independent of unconstitutional grounds." *Hawaii*, 138 S. Ct at 2420. The district court correctly held that Plaintiffs have plausibly alleged that the Proclamation is unconstitutional.

B. The *Hawaii* Ruling Does Not Foreclose Plaintiffs' Claims.

The government's primary objection to the district court's ruling is that it disregarded the Supreme Court's decision in *Hawaii*, which the government views as precluding Plaintiffs from litigating the merits of their claims. Gov't Br. 27-35. The district court did not disregard *Hawaii*. It considered the decision and correctly concluded that the preliminary-injunction ruling does not bar adjudication of Plaintiffs' claims on the merits. JA27.

1. The Supreme Court Resolved Only the Preliminary-Injunction Request, Not the Underlying Merits of the Claims.

The government does not appear to dispute that preliminary-injunction proceedings usually do not preclude litigation on the merits. But it nevertheless contends that the preliminary-injunction ruling in *Hawaii* forecloses further litigation here. In the government's view, the Supreme Court did not merely review the preliminary-injunction ruling on which certiorari was granted, but it instead reached

"the *ultimate legal conclusion* that the Proclamation survives rational-basis scrutiny." Gov't Br. 31 (emphasis in original).

The Supreme Court expressly stated that it was doing no such thing. The Court repeatedly noted the limited nature of its holding, which it expressed by referencing the preliminary-injunction standard: "We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim." *Hawaii*, 138 S. Ct. at 2423. The Court also stated that, "[b]ecause plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion." *Id.* The Court never stated that it was making a conclusive and final determination that the plaintiffs' constitutional claim (or the constitutional claims of the Plaintiffs here) necessarily failed, much less that their allegations failed even to state a claim under Rule 12(b)(6).

The Supreme Court's limited ruling in *Hawaii* is consistent with its prior preliminary-injunction decisions, which hold that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (same). Courts of appeals have repeatedly held that preliminary-injunction rulings based on an incomplete evidentiary record do not foreclose further proceedings to resolve the merits of a claim. As the Ninth

Circuit has explained, "decisions at the preliminary injunction phase do not constitute the law of the case. This is true for the reason that a preliminary injunction decision is just that: preliminary." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) (quotation marks and citation omitted).[3]

Hawaii cannot foreclose litigation of Plaintiffs' constitutional claims because the Supreme Court based its decision on the evidence in the limited record that the plaintiffs there put before it. The Supreme Court acknowledged that it could "consider plaintiffs' extrinsic evidence" to determine whether the Proclamation was rationally based on a purported national-security rationale, or whether it could be explained only by anti-Muslim animus. 138 S. Ct. at 2420. The *Hawaii* majority ultimately concluded that the plaintiffs there did not establish a likelihood of success on the merits because the "evidence" supporting the "national security concerns" was "persuasive." *Id.* at 2421. Far from precluding further review, this ruling invites it. For example, the Court was unwilling to infer a lack of "thoroughness of the multi-

[3] *See also Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974) (preliminary-injunction ruling "does not constitute the law of the case for the purposes of further proceedings and does not limit or preclude the parties from litigating the merits"); *New Jersey Hosp. Ass'n v. Waldman*, 73 F.3d 509, 519 (3d Cir. 1995) (finding it "noteworthy that no discovery had been conducted prior to the hearing on the application for the preliminary injunction," and holding that preliminary-injunction rulings "do not foreclose any findings or conclusions to the contrary based on the record as developed at final hearing").

agency review" based on the evidence that the "final DHS report 'was a mere 17 pages,'" *id.*, but the Court did not suggest that the *Hawaii* plaintiffs could not seek discovery to establish a lack of thoroughness through direct evidence.[4]

Justice Kennedy's concurrence confirms that the Court did not resolve the underlying merits of the plaintiffs' claims. Justice Kennedy joined the majority opinion, but he also wrote separately to state that "[w]hether judicial proceedings may properly continue in this case . . . is a matter to be addressed in the first instance on remand." *Hawaii*, 138 S. Ct. at 2424 (Kennedy, J., concurring). The government accuses the district court of "misunderstand[ing] Justice Kennedy's concurrence," Gov't Br. 32, but the district court did precisely what Justice Kennedy directed. And critically, neither Justice Kennedy's opinion nor the majority opinion directed, stated, or even suggested that the plaintiffs' claims should be dismissed. The government's view that the Supreme Court foreclosed further litigation by definitively resolving the Proclamation's constitutionality is not supported by what those opinions actually say.

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[4] The dissenting opinions further highlight that the Supreme Court's decision turned on its consideration of the evidence. *See Hawaii*, 138 S. Ct. at 2433 (Breyer, J., dissenting) (reviewing "[d]eclarations, anecdotal evidence, facts and numbers taken from *amicus* briefs" to conclude that he would "on balance, find the evidence of antireligious bias" provides "a sufficient basis to set the Proclamation aside."; *see also id.* at 2442 (Sotomayor, J., dissenting) (Proclamation fails rational-basis review based on "the overwhelming record evidence" supporting the plaintiffs' claims).

2. The District Court Properly Considered All of Plaintiffs' Allegations.

The government contends that the district court erred by "relying upon and crediting the very arguments rejected by the Supreme Court." Gov't Br. 27. This argument fails because it ignores the different standards applicable to preliminary-injunction and motion-to-dismiss rulings. It also fails because Plaintiffs allege facts that were not before the *Hawaii* Court.

a. According to the government, the district court should have disregarded many of Plaintiffs' allegations—including those related to the President's anti-Muslim statements, the baseline test, the waiver process, and the existing statutory framework—because the Supreme Court considered those issues in *Hawaii*. Gov't Br. 27-30. *Hawaii* does not make these issues irrelevant because it does not suggest that the plaintiffs there failed to state a claim under Rule 12(b)(6).

The Supreme Court's ruling is not dispositive here because obtaining a preliminary injunction is more difficult than surviving a motion to dismiss. That is true for two reasons. *First*, the *Hawaii* plaintiffs had to establish a likelihood of success on the merits of their claims to obtain a preliminary injunction. 138 S. Ct. at 2423. In contrast, to survive a motion to dismiss, Plaintiffs here need show only that their claims for relief are "plausible." *Iqbal*, 556 U.S. at 678. The "plausibility standard is not akin to a 'probability requirement.'" *Id.*; *see also Twombly*, 550 U.S. at 545 (allegations need only "raise a right to relief above the speculative level"). *Second*,

because the Supreme Court was predicting which party was likely to prevail on the merits, the Court weighed the evidence in the limited record and drew inferences in the government's favor. *Hawaii*, 138 S. Ct. at 2421-23. In contrast, in deciding the government's motion to dismiss, the district court could consider only Plaintiffs' allegations and had to assume them to be true. *Iqbal*, 556 U.S. at 678.

The government's argument also fails to account for the reason that a plausibility standard applies on a motion to dismiss. Plaintiffs need not show a likelihood of success at the pleading stage because they have not yet had the benefit of discovery. *Twombly*, 550 U.S. at 556. There is no reason to think that Plaintiffs' claims will necessarily fail after discovery simply because the *Hawaii* plaintiffs did not show they were likely to prevail based only on publicly available evidence and without the benefit of discovery. On the contrary, in numerous recent cases, plaintiffs challenging executive action have obtained discovery that undermined the government's position.[5] Because they have plausibly alleged that the Proclamation fails rational-basis review, Plaintiffs are similarly entitled to discovery to prove their claims.

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[5] *See, e.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019) (evidence produced in discovery demonstrated that government's purported reason for adding citizenship question to census was "contrived"); *Hamama v. Adducci*, 349 F. Supp. 3d 665, 670, 699 (E.D. Mich. Nov. 20, 2018) (despite government's assertions that Iraq would accept repatriation of its nationals, evidence obtained in discovery showed there was no repatriation agreement); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098-1104 (N.D. Cal. 2018) (enjoining termination of Temporary Protected

b. The government also incorrectly asserts that the district court relied only on arguments that *Hawaii* rejects. As the district court acknowledged, "the pending Complaints already assert additional facts not available at the time of the Supreme Court's ruling." JA271.

The government does not dispute that Plaintiffs' complaints include new allegations. Instead, it urges the Court to take judicial notice of (and interpret) many documents not referenced in either the complaints or the government's own motion to dismiss, and to hold that Plaintiffs' claims have "no merit" in light of the government's documents. Gov't Br. 34-36. That is not how a motion to dismiss is decided.[6]

The Court can disregard the government's argument because it was not raised in the district court. The government did not request that the district court take judicial notice of the information on which it now relies, much less suggest that this information could defeat Plaintiffs' claims. There is simply no precedent for this

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Status for various Latin American countries based in part on evidence of animus from emails and declarations by government officials, including evidence that the Administration pressured agency officials to selectively report on the factual reality in those countries to justify its preferred policy outcome).

[6] In deciding a motion to dismiss, a court may take judicial notice of documents incorporated into a complaint, but the government does not contend that it is relying on such documents. *See Zak v. Chelsea Therapeutics Int'l*, 780 F.3d 597, 607 (4th Cir. 2015) (declining to take judicial notice because the "documents were not explicitly referenced in, or an integral part of, the plaintiffs' complaint").

Court taking judicial notice of reams of extra-record materials, and in the first instance weighing them against the factual allegations in the complaints. Because this argument was not made in the district court, it is waived on appeal. *Laber v. Harvey*, 438 F.3d 404, 429 (4th Cir. 2006).

The argument is meritless in any event. The government relies on extra-record materials to challenge Plaintiffs' well-pleaded allegations that the waiver process is a sham and that it undermines the Proclamation's purported national-security rationale. But a court decides a motion to dismiss based on the factual allegations in the complaint. *See Iqbal*, 556 U.S. at 678. Those allegations are not weighed against evidence proffered by the defendant—they are assumed to be true. *Id.* That is true even when the defendant asks the Court to take judicial notice of its proffered evidence. *See, e.g.*, *Goldfarb v. Mayor of Baltimore*, 791 F.3d 500, 511 (4th Cir. 2015) ("judicial notice must not be used as an expedient for courts to consider matters beyond the pleadings and thereby upset the procedural rights of litigants to present evidence on disputed matters" (quotation marks and citations omitted)).[7]

Moreover, whether judicial notice is warranted depends "on the manner in which a court uses this information." *Zak*, 780 F.3d at 607. The government invites

[7] The government's reliance on extra-record evidence in attempting to refute Plaintiffs' allegations demonstrates that—contrary to the government's assertions, *see* pp. 34-35 *infra*—discovery and judicial factfinding are often necessary even under rational-basis review.

the Court to comb through "hundreds of pages of redacted versions of [State Department] internal guidance," a Frequently Asked Questions page on the State Department's website, and a State Department report asserting that "[t]housands [of visa applicants] were undergoing national security and public safety reviews as part of the waiver consideration process." Gov't Br. at 34-36. But the government does not merely want the Court to take notice of the existence of the documents. It wants the Court to review them and make factual determinations that they refute Plaintiffs' allegation that the waiver process is a "sham." Gov't Br. 35.

The Court cannot make this sort of determination on a motion to dismiss. *See, e.g.*, *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) (Rule 12(b)(6) does not permit court to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." (quotation marks and citation omitted)). This Court has "decline[d] to judicially notice" documents where the government sought notice not only "of the existence of the documents," but also "of its own interpretation of the contents of those documents," where "[t]he parties clearly and reasonably disagree[d] about the meaning to be ascribed to [the] documents." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 216 (4th Cir. 2009). The same is true here. Plaintiffs disagree that the government's self-serving documents—many of

which are redacted so heavily as to render them meaningless—refute their allegations regarding the waiver process. The meaning and relevance of those documents is an issue to be explored during discovery, not on a motion to dismiss.

C. The District Court Applied the Correct Legal Standard.

The government contends that the "district court made a series of errors in the application of the rational-basis standard," Gov't Br. 36, but those contentions lack merit.

1. In arguing that the district court misapplied the rational-basis standard, the government largely ignores cases deciding motions to dismiss. The government instead relies heavily on *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), and other cases addressing the proof that a plaintiff needs to prevail on the ultimate merits of a rational-basis challenge. Gov't Br. 37-40. According to the government, "the pertinent legal question under rational-basis review is not whether there is a plausible basis for *attacking* the law's rational basis, but whether 'there are plausible reasons' *supporting* the law's rationale." Gov't Br. 39 (quoting *Beach Commc'ns*, 508 U.S. at 313-14). This argument confuses the standard for stating a claim at the motion-to-dismiss stage with the standard for proving the claim on the merits.

This Court has held that the normal pleading rules apply even when a plaintiff alleges that a law fails rational-basis review. *See Giarratano*, 521 F.3d at 303. Acknowledging "the dilemma created when 'the rational basis standard meets the

standard applied to a dismissal under Fed R. Civ. P. 12(b)(6),'" this Court held that the deferential rational-basis standard cannot deprive a plaintiff of Rule 12(b)(6)'s liberal pleadings standards:

> The rational basis standard, of course, cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard. The latter standard is procedural, and simply allows the plaintiff to progress beyond the pleadings and obtain discovery, while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail on an equal protection claim.

Id. (quoting *Wroblewski v. City of Washburn*, 965 F.2d 452, 459-60 (7th Cir. 1992).[8]

The Supreme Court's decisions in *Twombly* and *Iqbal* confirm this point. Those decisions do not require factual allegations demonstrating that it is implausible that the defendant could prevail. A claim survives a motion to dismiss as long as it is supported by allegations that "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. This plausibility standard "does not impose a probability requirement at the pleading stage." *Twombly*, 550 U.S. at 556. On the contrary, as the Supreme Court has instructed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* (quotation marks and citations omitted).

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[8] *See also* Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. C.R. L.J. 43, 45 (2014) ("if it appears on the face of the complaint that the plaintiff could, if given the opportunity, prove that the challenged law is not rationally related to a legitimate government interest, Rule 12(b)(6) entitles her to gather and introduce the evidence to do so").

2. The government also contends that the district court misapplied the rational-basis standard by suggesting that the Proclamation's rationality should be determined based on a "more fulsome" record. Gov't Br. 22. The government contends that the Proclamation "'is not subject to courtroom fact-finding,'" but rather can be upheld "'based on rational speculation unsupported by evidence or empirical data.'" Gov't Br. 37 (quoting *Beach Commc'ns*, 508 U.S. at 315). The government vastly overreads *Beach Communications*. That decision does not prohibit courts from relying on an evidentiary record to decide if a law has a rational basis. *Hawaii* itself proves the point: The Supreme Court expressly stated that it would consider the "extrinsic evidence" in the record before concluding that there was "persuasive evidence" that the Proclamation "ha[d] a legitimate grounding in national security concerns." *Hawaii*, 138 S. Ct. at 2420-21.[9]

Contrary to the government's assertion, the law is clear that rational-basis review is conducted on an evidentiary record. *See, e.g.*, *Romer*, 517 U.S. at 635 (law fails rational-basis review when it is "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational

[9] *Beach Communications* states only that a legislature's "reasons for enacting a statute" are not subject to "courtroom fact-finding," because "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." 508 U.S. at 315.

basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. . . .” (internal citations omitted)); *Cleburne*, 473 U.S. at 448-50 (relying on findings of fact made during bench trial in invalidating a permitting requirement under rational-basis review). As the Fifth Circuit has explained, “although rational-basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.” *St. Joseph Abbey*, 712 F.3d at 223 (affirming district court’s findings of fact, made after a bench trial, that a law failed rational-basis review); *see also Merrifield*, 547 F.3d at 990-92 (holding, based on summary-judgment record, that a law failed rational-basis review).

In short, the government is incorrect to assert that “the district court misperceived its role in questioning whether the Proclamation’s stated national-security rational truly ‘motivated’ its promulgation.” Gov’t Br. 35-36. Under *Giarratano*, Plaintiffs may “progress beyond the pleadings and obtain discovery” as long as their complaints contain allegations that “state a claim to relief that is plausible on its face.” 521 F.3d at 303-04 (quotation marks and citations omitted). The district court applied this legal standard in holding that Plaintiffs had plausibly alleged that the only rational explanation for the Proclamation is anti-Muslim animus.

D. The Government's Remaining Arguments Lack Merit.

The government contends that the district court's decision should be reversed for two additional reasons: (1) the Proclamation is a rational policy for reasons other than national security, Gov't Br. 41-43; and (2) "the Proclamation should be upheld under the even more lenient *Mandel* standard," *id.* at 44-45. Neither argument has merit.

1. The government contends that, even if the purported national-security justification fails rational-basis review, "the Proclamation would be fully justified by its alter[n]ative purpose of encouraging other countries to improve their information-sharing practices." Gov't Br. 43. But this information-sharing justification is not independent of the national-security justification—it is the method by which the Proclamation is supposed to improve national security. It is not, therefore, an "alternative purpose" at all.

The government did not argue in the district court that the Proclamation furthers two distinct and independent purposes: to protect national security and to encourage other countries to share information. This Court may therefore treat this new argument as waived. *Laber*, 438 F.3d at 429. Although rational-basis review permits the government to rely on post hoc justifications, the government must actually advance those justifications during litigation. *See, e.g.*, *Beach Commc'ns*, 508

U.S. at 318 (courts should consider "*posited* reason[s]" for government action (emphasis added)). Neither the Supreme Court nor this Court has ever suggested that a district court must consider possible justifications that no party has advanced.

In any event, the Proclamation itself refutes the Government's assertion that the Proclamation served two distinct purposes, because it expressly links the information-sharing purpose to the national-security purpose. The Proclamation states that "[i]t is the policy of the United States to protect its citizens from terrorist attacks and other public-safety threats." 82 Fed. Reg. at 45,162 § 1(a). The Proclamation then states that it will achieve this objective by improving the procedures for vetting visa applicants. *Id*. ("Screening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy."). The Proclamation then explicitly connects the vetting process to information sharing. *Id.* § 1(b) ("Information-sharing and identity-management protocols and practices of foreign governments are important for the effectiveness of the screening and vetting protocols and procedures of the United States."). Thus, far from serving two distinct purposes, the Proclamation simply identifies improved information sharing by foreign governments as a way to enhance national security.

Finally, even if information sharing were treated as an independent justification, Plaintiffs still plausibly allege that the Proclamation is unconstitutional. If anything, the Proclamation even more clearly fails rational-basis review if it is not

viewed as a purported national-security measure. For example, the Proclamation's waiver provision purports to permit entry by individuals who do not pose a national-security threat. *Id.* at 45,168 § 3(c). But if the Proclamation's only objective is to improve information-sharing practices, then its waiver provisions should be designed to further that purpose—not the purportedly distinct purpose of enhancing national security. *See* Pp. 20-21 *supra*. And the Proclamation's deviations from the baseline-test results are even more irrational under the government's new purported rationale. If pressuring countries to improve their information sharing were the only objective, exempting countries with inadequate information-sharing practices on grounds unrelated to information sharing would be irrational (not to mention counterproductive). *Id.* at 17-20.

2. The Government contends that, even if the Proclamation fails rational-basis review, it may nevertheless be upheld under *Mandel*. Gov't Br. 44-45. But *Mandel* does not permit the government to adopt arbitrary and irrational laws, especially where, as here, a plaintiff's allegations provide overwhelming evidence that the law was adopted in bad faith.

Under *Mandel*, the government may "defeat a constitutional challenge" if the challenged action is both "facially legitimate" and "bona fide." 408 U.S. at 770. This Court has twice held—as has the Ninth Circuit—that *Mandel* must be "read through the lens of Justice Kennedy's opinion in *Kerry v. Din*, 135 S. Ct. 2128, 2041 (2015)

(Kennedy, J., concurring in the judgment)." *IRAP II*, 883 F.3d at 263; *see also IRAP I*, 857 F.3d at 590-91. Under this standard, "where a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification." *IRAP I*, 857 F.3d at 590-91 (quoting *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment)).[10]

Plaintiffs have plausibly alleged bad faith. Indeed, this Court held that "resolution of that question presents little difficulty," because "Plaintiffs here do not just plausibly allege with particularity that the Proclamation's purpose is driven by anti-Muslim bias, they offer undisputed evidence of such bias: the words of the President." *IRAP II*, 883 F.3d at 264. The government does not dispute this point. Nor could it given "President Trump's disparaging comments and tweets regarding Muslims; his repeated proposals to ban Muslims from entering the United States; [and] his subsequent explanation that he would effectuate this 'Muslim' ban by targeting 'territories' instead of Muslims directly." *Id.*

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[10] Although the Supreme Court vacated this Court's rulings in light of *Hawaii*, the aspects of those decisions not specifically ruled on by the Supreme Court continue to remain persuasive authority. *See U.S. Dep't of Health & Human Servs. v. Fed. Labor Relations Auth.*, 983 F.2d 578, 582 (4th Cir. 1992) (adopting the reasoning of a prior opinion vacated on another ground by the Supreme Court because it was "persuasive"); *Kohrens v. Evatt*, 66 F.3d 1350, 1356-57 (4th Cir. 1995) (concluding that state court opinion vacated on other grounds was persuasive).

Finally, even if the Court departed from its prior reliance on Justice Kennedy's concurrence in *Din*, *Mandel* still would not require dismissal of Plaintiffs' claims. The government has equated its interpretation of *Mandel* to rational-basis review. *See* Gov't Br. at 41, *IRAP I*, No. 17-2231, ECF No. 58 ("describ[ing] *Mandel*'s standard as 'minimal scrutiny (rational-basis review)'" (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017)); *see also Johnson v. Whitehead*, 647 F.3d 120, 127 (4th Cir. 2011) (analogizing *Mandel* standard to rational-basis review). The government offers no authority to suggest that a law that fails rational-basis review could still be upheld under *Mandel*. Because Plaintiffs have adequately alleged that the Proclamation fails under rational-basis review, their allegations are also sufficient under *Mandel*.

II. Plaintiffs Assert Their Own Rights and Have Alleged Protected Liberty Interests.

The government also argues that Plaintiffs' equal-protection and Establishment Clause claims fail because they are not based on violations of their own constitutional rights, and Plaintiffs' due-process claims fail because they lack a protected liberty interest that has been infringed. Neither argument has merit.

A. Plaintiffs' Equal-Protection and Establishment Clause Claims Are Based on Violations of Their Own Rights.

The government contends that Plaintiffs' equal-protection and Establishment Clause claims should be dismissed because Plaintiffs are not asserting their own

constitutional rights. Gov't Br. 50-55. The district court correctly rejected this argument as simply an attempt to repackage the government's failed standing arguments. JA275-76.

During the preliminary-injunction proceedings, the government argued that Plaintiffs lacked standing to bring constitutional claims because they are only indirectly injured by the Proclamation's discrimination against their relatives. JA275-76. Every court—including the Supreme Court—rejected this argument, holding that the Proclamation directly injured Plaintiffs. *Hawaii*, 138 S. Ct. at 2416; *IRAP II*, 883 F.3d at 258-61; *Int'l Refugee Assistance Project*, 265 F. Supp. 3d at 599-601.

Relying on the same line of standing cases, the government again argues that Plaintiffs' claims are not based on alleged violations of their own rights. The government now labels this a "merits issue," Gov't Br. 50, 54, but those standing cases provide no more support for this supposed merits issue than they did for the government's standing arguments. None of the cases even suggests that the government's unsuccessful standing arguments could be repurposed as merits arguments, much less that allegations sufficient to establish standing would be insufficient on the merits at the motion-to-dismiss stage. The district court thus correctly concluded that this "merits" argument fails for the same reason that the standing argument failed: Plaintiffs have alleged that the Proclamation directly injures them by violating their own constitutional rights. JA275-76.

Despite insisting that it is raising a merits question, the government does not treat the issue as a merits question. On a motion to dismiss, a court analyzes merits questions by deciding whether the allegations in the complaint state a plausible claim for relief. *See Iqbal*, 556 U.S. at 678. But the government does not even acknowledge, much less engage with, Plaintiffs' actual allegations regarding their claims.

Plaintiffs specifically allege that they are asserting their own constitutional rights. As this Court has explained, "one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders*, not full members of the political community.'" *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (quoting *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005)). Plaintiffs have not pleaded their Establishment Clause claims on the theory that the Proclamation merely sends a message that their relatives are outsiders. Rather, Plaintiffs have explicitly alleged that the Proclamation "convey[s] an official message of disapproval and hostility *toward the Individual Plaintiffs* and their families, making clear that the government deems them outsiders or second-class citizens who are not full members of the political community." JA114 ¶ 364 (emphasis added); *see also* JA180 ¶ 98 ("[T]he Proclamation communicates official disapproval of Islam, *stigmatizing Plaintiffs and their religion*.") (emphasis added).

Rather than addressing Plaintiffs' claims as pleaded, the government urges the Court to view the claims as being based solely on discrimination against Plaintiffs' relatives. Gov't Br. 50. The government cites no authority to support this radical departure from pleading practice, and this approach cannot be reconciled with cases like *Mandel* and *Din*. In those cases, a plaintiff alleged that his or her own constitutional rights were violated by the government's visa denial. The Supreme Court accepted the plaintiffs' framing of their claims and addressed whether the visa denial violated the plaintiffs' own rights. *See Mandel*, 408 U.S. at 762 (accepting plaintiffs' allegation that "they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien"); *Din*, 135 S. Ct. at 2131 (accepting plaintiff's framing of her claims as alleging a violation of "*her* constitutional rights" (emphasis in original)). The district court correctly did the same here.

The government's argument fares no better for Plaintiffs' equal protection claims. Again, the government ignores Plaintiffs' allegations that their *own* equal protection rights are violated. As the complaints make clear, "*Plaintiffs* are entitled to the protections of the Fifth Amendment," which "prohibits the federal government from denying equal protection of the law." JA180 ¶¶ 105-106 (emphasis added).

Contrary to the government's characterization, Plaintiffs are personally denied equal treatment by the challenged discriminatory conduct. Plaintiffs have

plausibly alleged that the Proclamation discriminates against U.S. citizens on the basis of national origin and religion because it treats U.S. citizens whose relatives are nationals of certain Muslim-majority countries differently from other U.S. citizens. By creating a more difficult visa-application process for U.S. citizens with Muslim relatives (who themselves are disproportionately Muslim), the government subjects plaintiffs to discriminatory treatment with respect to their concrete interest in being reunited with their close relatives. JA180 ¶ 180 (alleging that the Proclamation "has a disparate impact, targeting individuals for discriminatory treatment on the basis of religion and national origin").

B. Plaintiffs Have Alleged Sufficient Liberty Interests to Support Their Due-Process Claims.

Plaintiffs may plead due-process claims based on a liberty interest arising either from "the Constitution itself, by reason of guarantees implicit in the word 'liberty,'" or "from an expectation or interest" created by "laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citations omitted). Although Plaintiffs alleged a liberty interest under each theory, the government challenged only whether they have a liberty interest arising from the Constitution. The district court concluded that dismissal was not warranted, and that the government waived any

argument regarding whether they have a statutorily created liberty interest. This Court may affirm on either ground.[11]

1. The government has waived any arguments regarding Plaintiffs' statutorily created liberty interests. Plaintiffs' complaints clearly allege interests in their "statutory and regulatory rights," JA117-18 ¶¶ 384-89, JA181 ¶¶ 113-15, and yet the government did not challenge these interests in its motion to dismiss, JA275. The government attempted to raise the issue in its reply brief, but the district court correctly held that an argument first raised in a reply brief is waived. *Id.*

The government does not even acknowledge this ruling, much less argue that it was incorrect. Nor does the government suggest that this Court can overlook the waiver and decide the merits of the argument in the first instance. The law is clear that the Court cannot. *See, e.g.*, *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999) (issue "not timely raised" in the district court is "not preserved for appellate review unless the district court exercises its discretion to excuse the party's lack of timeliness and consider the issue"); *Stauffer v. Brooks Bros. Grp.*,

[11] In a footnote, the government contends that the district court erred in holding that *IAAB* John Doe #6 pleaded a due-process claim. Gov't Br. 48 n.9. The Court need not address the argument, because "an argument raised only in a footnote in appellant's opening brief [is] waived on appeal." *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015). In any event, the district court correctly held that this Plaintiff stated a due-process claim based on his allegation that his mother-in-law was denied a waiver "*before* she even had the opportunity to apply for [it]." JA152.

Inc., 758 F.3d 1314, 1322 (Fed. Cir. 2014) (issues are "waived on appeal" when a party "waited until his reply brief before the district court to first raise them").

Even if the issue were properly before this Court, the government's argument lacks merit. Plaintiffs have alleged a protected liberty interest in the procedures applicable to prospective immigrants and refugees. The Immigration and Nationality Act creates a special visa-application procedure for aliens sponsored by "immediate relatives" in the United States. Under this process, a U.S. citizen may file a petition on behalf of the alien, asking to have the alien classified as an "immediate relative." 8 U.S.C. § 1154(a). If the alien meets the applicable requirements, the statute imposes a nondiscretionary duty on the Attorney General to approve the citizen's petition. *Id.* § 1154(b); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1155-56 (9th Cir. 2013) (plaintiffs with immediate relatives living abroad are entitled to approval of their petitions). When the petition is approved, the alien's visa application is authorized to be granted "preference status." 8 U.S.C. § 1154(b). The alien may then apply for a visa by submitting the required documents and appearing for an interview. *Id.* §§ 1201(a)(1), 1202. Together, these statutory provisions create for

Plaintiffs a protected interest in constitutionally adequate procedures in the visa-application process for their relatives.[12]

2. The district court correctly held that Plaintiffs have adequately alleged a constitutionally derived liberty interest in the reunification of their families. JA273-74. The government challenges that holding based on the plurality opinion in *Din*. Gov't Br. 46. The *Din* plurality is unpersuasive, and the Court should not follow it.[13]

The Ninth Circuit has held that that a U.S. citizen has a liberty interest in "[f]reedom of personal choice in matters of marriage and family life" that gives rise to "a right to constitutionally adequate procedures" in the adjudication of a family member's visa application. *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).[14] Should this Court reach the question, it should likewise hold that U.S. citizens have a liberty interest in living with their family members. The right to live

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[12] Plaintiffs' interest is not terminated once the initial petition is granted. Gov't Br. 49 (citing *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999)). *Saavedra Bruno* did not address liberty interests protected by the Due Process Clause because the plaintiffs "asserted no constitutional claims." 197 F.3d at 1163. The court addressed only whether they could bring an APA claim. *Id.* at 1164.

[13] The plurality opinion in *Din* cannot be reconciled with the Supreme Court's many prior decisions that have recognized liberty interests in a variety of contexts in which the interest is "no more important" than the interests at issue here, including a prisoner's liberty interest in retaining "good time" credits. *See Din*, 135 S. Ct. at 2142-43 (Breyer, J., dissenting) (discussing prior case law).

[14] The government suggests that *Bustamante* is no longer good law because the Ninth Circuit relied on it in *Din*. Gov't Br. 48. But the Supreme Court reversed *Din* on a

together with one's family is central to an individual's orderly pursuit of happiness, such that it is implicit in the concept of "liberty." *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

CONCLUSION

The district court's order should be affirmed.

Respectfully Submitted,

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different ground, so that decision could not overrule *Bustamante*. Indeed, district courts in the Ninth Circuit continue to rely on *Bustamante*. *See, e.g.*, *Ramos v. Nielsen*, No. 18-cv-1554, 2018 WL 3109604, at *2 (N.D. Cal. June 25, 2018).

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) because it uses 14-point Times New Roman, and it complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 11,321 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

s/ Mark W. Mosier
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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2019, I electronically filed the foregoing Brief for Appellees with the Clerk of Court for the U.S. Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Mark W. Mosier
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No. 19-1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients; YEMENI-AMERICAN MERCHANTS ASSOCIATION, on behalf of itself and its members; IRAP JOHN DOE #4; IRAP JOHN DOE #5; IRAP JANE DOE #2; MUHAMMED METEAB; MOHAMAD MASHTA; GRANNAZ AMIRJAMSHIDI; SHAPOUR SHIRANI; AFSANEH KHAZAELI; IRANIAN ALLIANCES ACROSS BORDERS; IAAB JANE DOE #1; IAAB JANE DOE #3; IAAB JANE DOE #5; IAAB JOHN DOE #6; IRANIAN STUDENTS' FOUNDATION, Iranian Alliances Across Borders Affiliate at the University of Maryland College Park; EBLAL ZAKZOK; FAHED MUQBIL; ZAKZOK JANE DOE #1; ZAKZOK JANE DOE #2

Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security; MICHAEL R. POMPEO, in his official capacity as Secretary of State; JOSEPH MAGUIRE, in his official capacity as Acting Director of National Intelligence; MARK A. MORGAN, in his official capacity as Senior Official Performing the Functions and Duties of the Commissioner of U.S. Customs and Border Protection; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; WILLIAM P. BARR, in his official capacity as Attorney General of the United States,

Defendants – Appellants.

United States District Court
for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)
(8:17-cv-02921-TDC)
(1:17-cv-02969-TDC)

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), held that "the Government has set forth a sufficient national security justification [for Presidential Proclamation 9645] to survive rational basis review." That binding holding forecloses plaintiffs' rational-basis challenges to the Proclamation.

Though decided in a preliminary-injunction posture, the Supreme Court's legal conclusion is fully binding here. The Court's decision did not turn on the balancing of harms or the equities involved; its comprehensive opinion did not express any tentativeness or eschew any definitive judgment; and the parties fully argued all the merits issues.

The motion-to-dismiss standard does not permit plaintiffs to open discovery on claims that the Supreme Court has already held fail as a matter of law. Whether the Proclamation rests on a rational basis is a question of law. And the pertinent legal question under rational-basis review is whether there are plausible grounds *supporting* the Proclamation, not whether plaintiffs have alleged plausible grounds for *attacking* it. If there are plausible grounds supporting the Proclamation – and *Hawaii* held that there are – then rational-basis review is at an end.

Plaintiffs merely recycle the same legal arguments that the Supreme Court already considered and rejected; they have not made any new allegations that would suffice to negate the rational basis identified and affirmed by the Supreme

Court. The Court rejected the argument that the Proclamation could be explained only by anti-Muslim bias, and held instead that the Proclamation was rationally grounded in legitimate national-security concerns and foreign-policy objectives.

Plaintiffs' arguments fare no better regarding the Government's alternative grounds for dismissal. The Proclamation's purpose of encouraging other countries to improve their information-sharing practices is plainly legitimate, as the Supreme Court recognized. The Proclamation is not irrational merely because it does not single-mindedly pursue that purpose to the exclusion of all other interests and considerations. The Government has not waived any argument about information-sharing objective; the Proclamation expressly identifies its information-sharing purpose, which was asserted at every stage of this litigation. That legitimate, rational objective is sufficient to uphold the Proclamation even if is related to the Proclamation's national-security purpose. In all events, plaintiffs fail to refute that they cannot prevail under the more deferential standard of *Kleindienst v. Mandel*, 408 U.S. 753 (1972). *Hawaii* rejected plaintiffs' argument that the Proclamation can be explained only by animus, and unequivocally stated that applying *Mandel* would put an end to its review.

Finally, plaintiffs also fail to demonstrate any cognizable violations of their own rights. The Supreme Court has squarely held that Equal Protection and

Establishment Clause claims cannot proceed unless the plaintiff is personally denied equal treatment by the challenged provision, regardless of any allegedly "stigmatic" message that may be conveyed by the provision's treatment of third parties. Plaintiffs do not dispute that the Proclamation does not even apply to them. As for plaintiffs' Due Process claims, those claims fail because plaintiffs have received all the process they may be due, a point they do not rebut. Regardless, they also provide no persuasive response to the plurality in *Kerry v. Din*, 135 S. Ct. 2128 (2015), which refutes their claimed constitutional liberty interest in the grant of a visa to a foreign national relative. Nor can they rely on a liberty interest supposedly created by statute, because their only interest is in petitioning on behalf of a foreign national, and does not extend to determining whether the foreign national is actually eligible for a visa.

ARGUMENT

I. *HAWAII* FORECLOSES PLAINTIFFS' RATIONAL-BASIS CLAIMS

The Supreme Court in *Hawaii* definitively held that the Proclamation survives rational-basis review. "Under the[] circumstances" explained in its opinion, *Hawaii* concluded, "the Government has set forth a sufficient national security justification to survive rational basis review." 138 S. Ct. at 2423. The Court identified those circumstances: "there is persuasive evidence that the entry

suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility," and the Court "must accept that independent justification." *Id.* at 2421. Plaintiffs advance three arguments for distinguishing *Hawaii*: that *Hawaii*'s preliminary-injunction posture limits its controlling effect; that plaintiffs' claims can survive under the motion-to-dismiss pleading standard, notwithstanding *Hawaii*; and that plaintiffs' claims are based on a new evidentiary record unavailable in *Hawaii*. All three arguments are mistaken.

A. *Hawaii*'s Preliminary Injunction Posture Does Not Alter the Supreme Court's Binding and Controlling Holding

Plaintiffs argue that because *Hawaii* reversed a preliminary injunction under the likelihood-of-success standard, the Supreme Court's conclusion is necessarily tentative and cannot control this case or foreclose their claims. Pls. Br. 23-25. That argument is inapplicable in light of *Hawaii*'s reasoning in rejecting the same rational-basis claims.

It is true that, generally speaking, preliminary injunction decisions do not constitute controlling decisions on the underlying merits. A preliminary injunction decision may turn more on the balancing of harms and an assessment of the equities than on an evaluation of the legal merits. Or, where a decision does address the merits, the court's resolution may rely on the *likelihood* of success (or the lack thereof), eschewing any definitive legal conclusion. Or, because

preliminary injunction cases are often resolved on a compressed schedule with expedited briefing, the court's resolution of the merits may reflect a tentativeness commensurate with the parties' limited opportunities for full and considered briefing.

But "decisions granting or denying preliminary injunctions" can "have preclusive effect * * * if the circumstances make it likely that the findings are accurate [and] reliable." *CFTC v. Board of Trade*, 701 F.2d 653, 657 (7th Cir. 1983). A court's "conclusions on a preliminary injunction motion could 'have preclusive effect if the circumstances make it likely that the findings are "sufficiently firm" to persuade the court that there is no compelling reason for permitting them to be litigated again.'" *McTernan v. City of York*, 577 F.3d 521, 530 (3d Cir. 2009). "Whether the resolution in the first proceeding is sufficiently firm to merit preclusive effect turns on a variety of factors, including 'whether the parties were fully heard, whether the court filed a reasoned opinion, and whether that decision could have been, or actually was appealed.'" *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461, 474 n.11 (3d Cir. 1997).

Hawaii has all the indicia of a binding and controlling holding. Its reversal of the preliminary injunction did not turn in any way on a balancing of the harms or equities. The parties (both in *Hawaii* and in the present case) had ample

opportunity to fully brief and argue the matter before two district courts, two appellate courts (including this Court sitting *en banc*), and the Supreme Court. Nothing in *Hawaii* reflects any tentativeness or uncertainty about its legal conclusion that the Proclamation survives rational-basis review, and the majority issued a thorough and well-reasoned opinion examining all the constitutional and statutory questions in depth. The preliminary injunction posture, in other words, does nothing to diminish *Hawaii*'s binding and controlling force.[1]

Plaintiffs emphasize (Pls. Br. 24) the Court's statement that "[w]e simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claims." 138 S. Ct. at 2423. But "simply" just underscored the preceding sentence's admonition that "[w]e express no view on the soundness of the policy." *Id.* Indeed, the sentence before that one was where the Court concluded, without qualifications or reservations, that "[u]nder the[] circumstances" described in its opinion, "the Government has set forth a sufficient national security justification to survive rational basis review." *Id.*

[1] The Government does not argue that *Hawaii* is "law of the case," *see* Pls. Br. 25 & n.3, given that this litigation is not the same case as *Hawaii*. Nor does the Government assert claim or issue preclusion against plaintiffs, who were not parties in *Hawaii*. Rather, the Government contends that *Hawaii*'s conclusion that the Proclamation survives rational-basis review is binding and controlling precedent that forecloses plaintiffs' rational-basis challenges, which are not meaningfully different from those rejected in *Hawaii*.

Plaintiffs themselves implicitly acknowledge that the legal rulings in *Hawaii* are controlling despite the preliminary-injunction posture. In addition to rejecting the rational-basis constitutional challenges, *Hawaii* rejected the plaintiffs' statutory claims that the Proclamation exceeds the President's authority under 8 U.S.C. § 1182(f); that it conflicts with the Immigration and Nationality Act generally; and that it violates 8 U.S.C. § 1152(a)(1)(A). 138 S. Ct. at 2407-15. Those statutory arguments, like the constitutional claims, were decided in a preliminary-injunction posture. Yet no one contends that *Hawaii*'s rejection of those statutory claims was not definitive and binding here, as plaintiffs recognized in voluntarily dismissing their identical statutory claims. *See* D. Ct. Dkt. 268 (Dec. 3, 2018); *see also* JA 118-120. If the Supreme Court's resolution of the statutory claims is binding here despite *Hawaii's* preliminary-injunction posture, that is equally true for plaintiffs' constitutional claims.

Plaintiffs contend that Justice Kennedy's concurrence "confirms that the Court did not resolve the underlying merits of plaintiffs' claims." Pls. Br. 26. Justice Kennedy wrote that "[w]hether judicial proceedings may properly continue in this case, *in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs, and in light of today's decision*, is a matter to be addressed in the first instance on remand." *Hawaii*, 138 S. Ct. at 2424

(Kennedy, J., concurring) (emphasis added). Justice Kennedy's statement – particularly the italicized portion, which plaintiffs notably omit with an ellipsis, Pls. Br. 26 – cannot plausibly be read as an expectation that plaintiffs' complaint would survive a motion to dismiss even though it presents exactly the same rational-basis challenges to the Proclamation, based on the same factual allegations, that the Court had just rejected.

B. Plaintiffs Cannot Evade *Hawaii* Under the Motion to Dismiss Standard

Plaintiffs contend that *Hawaii* does not control their claims because of "the different standards applicable to preliminary-injunction and motion-to-dismiss rulings." Pls. Br. 27. At the motion-to-dismiss stage, plaintiffs argue, "[t]hey need only allege facts demonstrating that they have a plausible basis for relief – in other words, that they have plausibly alleged that the Proclamation is unconstitutional." Pls. Br. 2. That argument misunderstands both the motion-to-dismiss standard and rational-basis review.

As the Government explained, on a motion to dismiss, plausibility is the pleading standard for the sufficiency of the *factual allegations*, not legal conclusions. *See* Gov't Br. 39. Plaintiffs do not even address this point. "[A] court must accept as true all of the allegations contained in a complaint," but that tenet "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009). And whether the Proclamation satisfies rational-basis review is a question of law, not a question of fact. *See, e.g., Muscarello v. Ogle County*, 610 F.3d 416, 423 (7th Cir. 2010). Accordingly, plaintiffs may not rely on a legal argument merely by labeling it "plausible."

Moreover, plaintiffs' argument gets rational-basis review backwards. The relevant legal question is not whether plaintiffs have plausibly attacked the Proclamation, but whether there are plausible reasons *supporting* the Proclamation's rational basis. *See* Gov't Br. 39-40. "Where there are 'plausible reasons'" supporting the Proclamation, the court's "inquiry is at an end." *FCC v. Beach Communications*, 508 U.S. 307, 313-14 (1993). In fact, if there are "plausible rationales" for the Proclamation, "the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]'" the Proclamation "from constitutional challenge." *Id.* at 320. As *Hawaii* put it, the relevant legal question is whether "the entry policy is *plausibly related* to the Government's stated objective to protect the country and improve vetting processes" or whether "it is *impossible* to 'discern a relationship to legitimate state interests.'" 138 S. Ct. 2420-21 (emphasis added).

As noted, *Hawaii* already held that the Proclamation is supported by a rational national-security objective. *See supra* at 3-4. Nothing in plaintiffs'

allegations can undo the Supreme Court's legal conclusion. That is particularly so where, as here, plaintiffs largely repeat the same arguments rejected in *Hawaii*. *See infra* at 12-17. For example, plaintiffs argue that "anti-Muslim animus is the only plausible explanation for" the Proclamation. Pls. Br. 15. But *Hawaii* rejected the plaintiffs' argument that "the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims." 138 S. Ct. at 2417. It held instead that "[i]t cannot be said that it is impossible to discern a relationship to legitimate state interests or that the policy is inexplicable by anything but animus," *id.* at 2420-21, emphasizing that it is "difficult to see how * * * the Proclamation can be cited as evidence of animus toward Muslims" given that it exempts Iraq, a nation that is "one of the largest predominantly Muslim countries," *id.* at 2421. Again, nothing in plaintiffs' complaint undoes that conclusion, particularly where plaintiffs do not even address many of the reasons why the Supreme Court concluded that the Proclamation does not reflect anti-Muslim bias. *See infra* at 19-20.

Plaintiffs' reliance on *Giarratano v. Johnson*, 521 F.3d 298 (4th Cir. 2008), is misplaced. Pls. Br. 32-33. As the Government explained, Gov't Br. 39, *Giarratano* holds that a conclusory assertion "is insufficient to overcome the

presumption of rationality," 521 F.3d at 304, but it does not follow that any non-conclusory allegation is sufficient to survive a motion to dismiss under rational-basis review. Moreover, *Giarrantano* expressly adopted the Seventh Circuit's decision in *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir. 1992). In "elaborat[ing] on the pleading requirements of *Wroblewski*," the Seventh Circuit explained that

> [w]hile district courts continue to presume the truth of all allegations in the complaint when evaluating a Rule 12(b)(6) motion to dismiss, allegations of animus do not overcome the presumption of rationality * * * . This standard reflects the fairly intuitive idea that a given action can have a rational basis and be a perfectly logical action for a government entity to take even if there are facts casting it as one taken out of animosity. It is only when courts can hypothesize no rational basis for the action that allegations of animus come into play.

Flying J Inc. v. City of New Haven, 549 F.3d 538, 546-47 (7th Cir. 2008).

Again, if "there are 'plausible reasons'" supporting the Proclamation, then the court's "inquiry is at an end," and "the very fact" that there are "arguable" reasons supporting the action will "immunize" it "from constitutional challenge." *Beach Communications*, 508 U.S. at 313-14, 320. Thus, if the Proclamation is supported by a rational basis – and *Hawaii* already held that it is – then the rational-basis inquiry is at an end. Plaintiffs' reliance on the pleading standard on a motion to dismiss does not change that result.

C. Plaintiffs' Supposedly New Evidence Does Not Evade *Hawaii*

Plaintiffs contend that *Hawaii* does not control their claims because they now "allege facts that were not before the *Hawaii* Court." Pls. Br. 27. But plaintiffs rely on precisely the same arguments and allegations *Hawaii* rejected. And to the extent any allegations could be considered "new," they do not bolster plaintiffs' claims. Plaintiffs bear the burden of alleging facts that so thoroughly negate the Proclamation's national-security justification as to render it irrational. None of plaintiffs' allegations, whether old or new, comes anywhere close to doing so; rather, their allegations amount to mere policy disagreements or evidentiary disputes that cannot, as a matter of law, prevail under rational-basis review. Nor do plaintiffs' allegations even respond to many of the reasons why the Supreme Court concluded that the Proclamation was grounded in legitimate national-security concerns, apart from any supposed anti-Muslim animosity.

1. As the Government explained, the district court erroneously denied the Government's motion to dismiss based on the very arguments *Hawaii* rejected. Gov't Br. 27-30. Despite plaintiffs' claim that their rational-basis challenges are based on "new allegations," Pls. Br. 12, 29, their Answering Brief simply repeats the same arguments that were rejected in *Hawaii*.

For example, plaintiffs persist in invoking *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996), in support of their argument that the Proclamation fails rational-basis review. *See* Pls. Br. 17 & n.2, 22, 34-35. But *Hawaii* held as a legal matter that "[t]he Proclamation does not fit th[e] pattern" of these three cases because "[i]t cannot be said that it is impossible to discern a relationship to legitimate state interests or that the policy is inexplicable by anything but animus." 138 S. Ct. at 2420-21.

Likewise, plaintiffs continue to raise various statements by the President purporting to show "anti-Muslim" bias. Pls. Br. 16; *see id.* at 2-3. But the Supreme Court rejected as a legal matter the argument that "the stated justifications for the policy" were undermined "by reference to extrinsic statements." *Hawaii*, 138 S. Ct. at 2418. *Hawaii* acknowledged that it could "consider" that extrinsic evidence, but admonished that it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420. And, of course, that is precisely what the Supreme Court concluded. *Id.* at 2421 ("the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility [and] we must accept that independent justification").

Plaintiffs argue that the Proclamation was predicated on a 17-page report that is not a "legitimate national-security" analysis. Pls. Br. 18. But *Hawaii* noted that, while the "dissent * * * doubts the thoroughness of the multi-agency review because * * * the final DHS report was a mere 17 pages," that argument fails: "a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it," and the Proclamation itself "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions" in "more detail[] than any prior order a President has issued under [8 U.S.C.] § 1182(f)." 138 S. Ct. at 2409, 2421. Plaintiffs also renew their assertion that the Proclamation "explicitly deviated from the baseline test," which in their view undermines its national-security rationale, Pls. Br. at 19, but *Hawaii* rejected the argument that "deviations from the review's baseline criteria" discredit the Proclamation's national-security rationale, because "in each case the [Proclamation's] determinations were justified by the distinct conditions in each country," 138 S. Ct. at 2421. More importantly, these two arguments are, in essence, attempts to second-guess the Executive's national-security judgment by arguing that it is insufficiently supported by the evidence. But those arguments fail under rational-basis review, because the Proclamation can be upheld even if it is "based on rational speculation unsupported by evidence," or

"erroneous," so long as its national-security purpose "arguabl[y] is sufficient." *Beach Communications*, 508 U.S. at 315, 320. And as the Court emphasized in *Hawaii*, "we cannot substitute our own assessment for the Executive's predictive judgments" on matters of national security and foreign affairs, and "when the President adopts a preventive measure * * * in the context of international affairs and national security, he is not required to conclusively link all the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions." 138 S. Ct. at 2409, 2421.

Plaintiffs also renew their objection that under the Proclamation "[w]aivers are rarely granted." Pls. Br. 5. But *Hawaii* considered the argument that "not enough individuals are receiving waivers or exemptions" under the Proclamation, and held that this objection "focuse[d] on only one aspect" of why the Proclamation survives rational-basis review, and thus "even if such an inquiry were appropriate under rational basis review," this factual argument "d[id] not affect [its] analysis" as a matter of law. 138 S. Ct. at 2423 n.7. (All the more so now, given the State Department's public reports, which Plaintiffs have no basis to dispute, that several thousand waivers have been granted. Gov't Br. 34-35.) Likewise, plaintiffs argue that the very existence of waivers undermines the Proclamation's national-security purpose. Pls. Br. 20-21. But *Hawaii* explicitly

cited the "creat[ion of] a waiver program" as an "additional feature[]" that "support[s] the Government's claim of a legitimate national security interest." 138 S. Ct. at 2422. Plaintiffs also object to an alleged lack of guidance or procedures in applying for a waiver, Pls. Br. 5, 30-31, and rely on the declaration of former consular officials asserting that the waiver provision is supposedly a fraud, *see* Pls. Br. 5 (citing JA 176 ¶ 85). But again, these were precisely the arguments advanced in *Hawaii*, *see* 138 S. Ct. at 2431-33 (Breyer, J., dissenting), but rejected by the majority on legal rather than factual grounds, *id.* at 2423 n.7 (opinion of the Court).[2]

Similarly, plaintiffs' assertion (Pls. Br. 17-18) that the Proclamation's reliance on a baseline test fails rational-basis review in light of the Visa Waiver Program is nothing new. The Supreme Court concluded that the Proclamation and the Visa Waiver Program do not conflict, because the Program's existence "did not implicitly foreclose the Executive from imposing tighter restrictions on nationals of certain high-risk countries" nor did it "address what requirements should govern the entry of nationals from the vast majority of countries that fall short" of the

[2] Plaintiffs continue to press their argument that "in practice there is no procedure to apply for [Proclamation] waivers." Pls. Br. 5. But visa applicants are automatically considered for a waiver without the need to complete any separate application. Gov't Br. 34-35.

Program's qualifications. 138 S. Ct. at 2411-12. More importantly, *Hawaii* held that the existence of the Visa Waiver Program *supports* the Proclamation's rational basis, because it was rational to limit the Proclamation's scope "to countries that were previously designated by Congress or prior administrations as posing national security risks" as in the Visa Waiver Program. *Id.* at 2421; *see also id*. at 2422 n.6.

Finally, plaintiffs argue that "the Proclamation's purported national-security justification is already achieved by existing law." Pls. Br. 21. But *Hawaii* considered the argument that "Congress has already erected a statutory scheme that fulfills the President's stated concern about deficient vetting," and held that this argument did not undermine the Proclamation's national-security rationale. 138 S. Ct. at 2422 n.6. That existing law allows consular officers to deny visa applications in individual cases does not require that the systematic problems addressed in the Proclamation must also be addressed in case-by-case decisions rather than through categorical rules or across-the-board policies. *Id.* at 2411.

2. Plaintiffs fare no better defending the district court's holding that there are now certain "additional facts not available at the time of the Supreme Court's ruling." JA 271. The district court merely cited the supposedly low rate of granted waivers and the purported absence of guidance or procedures pertaining to waivers. JA 268, 271. Those were the very arguments rejected in *Hawaii*. *See*

supra at 15-16. Plaintiffs' rational-basis claims are not bolstered by alleging that the same facts that failed to demonstrate irrationality in *Hawaii* continue into the present.[3]

Plaintiffs allege that the Proclamation does not explain why Belgium was excluded from the listed countries, Pls. Br. 19, and that the inclusion of Venezuela and North Korea cannot avoid the Proclamation's supposed anti-Muslim motivation, Pls. Br. 20. These allegations could charitably be considered "new" only in the narrow sense that *Hawaii* does not discuss Belgium's status under the Proclamation and the plaintiffs in *Hawaii* refrained from challenging the Proclamation as applied to Venezuela or North Korea. 138 S. Ct. at 2406. But

[3] Plaintiffs object (Pls. Br. 29-32) to taking judicial notice of the State Department's published guidance about the waiver process; its official reports about the number of waivers granted; and congressional testimony about periodic recommendations to the President. *See* Gov't Br. 34-36. Because plaintiffs' rational-basis challenges are foreclosed by *Hawaii* regardless of these materials, this Court need not reach the question. Furthermore, contrary to plaintiffs' suggestion, Pls. Br. 29 n.6, the State Department website guidance and reports on waiver statistics are referenced in or integral to their complaints, *see* JA 175 & n.63, 219 n.27. And the Court can "merely * * * take notice of the existence of the documents," Pls. Br. 31, because the district court denied the motion to dismiss on its view that no such guidance or periodic reports even exist, JA 271. Nor does taking judicial notice of the number of waivers issued under the Proclamation require "interpretation * * * about the meaning" of that number. Pls. Br. 31 (quoting *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 216 (4th Cir. 2009)). Finally, the issue is not waived; taking judicial notice supports the Government's longstanding defense that the Proclamation survives rational-basis scrutiny regardless of the plaintiffs' objections to the waiver process.

those allegations do nothing to bolster plaintiffs' rational-basis challenges. They do not remotely "negative every conceivable basis which might support" the Proclamation, *Beach Communications*, 508 U.S. at 314, nor do they undermine the "plausible rationales" for the Proclamation that "immuniz[e]" the Proclamation "from constitutional challenge," *id.* at 320, and which the Supreme Court identified in *Hawaii*. The only way to "argue otherwise," as the Court noted in *Hawaii*, is to "refus[e] to apply anything resembling rational basis review." 138 S. Ct. at 2421.

3. While plaintiffs repeat the very arguments rejected in *Hawaii*, they do nothing to refute the reasons why the Supreme Court held that the Proclamation survived rational basis review. Plaintiffs assert that "the only rational explanation for the Proclamation is anti-Muslim animus," Br. 35, but ignore the Supreme Court's discussion on that very issue. *Hawaii* began with the observation that "[t]he Proclamation * * * is facially neutral toward religion" and "[t]he text says nothing about religion." 138 S. Ct. at 2418, 2421. In addition, although "five of the seven nations currently included in the Proclamation have Muslim-majority populations * * * that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population." *Id.* at 2421. The Court further noted that "three Muslim-majority countries – Iraq, Sudan, and Chad – have been removed from the list of covered countries." *Id.* at

2422. For the remaining countries, "the Proclamation includes significant exceptions for various categories of foreign nationals," such as permitting a variety of nonimmigrant visas. *Id.* And as the Court noted, "[t]hese carveouts for nonimmigrant visas are substantial," because in the three years before the Proclamation went into effect, "the majority of visas issued to nationals from the covered countries were nonimmigrant visas." *Id.* Accordingly, *Hawaii* held that "[i]t cannot be said that * * * the policy is 'inexplicable by anything but animus.'" *Id.* at 2420-21.

Plaintiffs nevertheless continue to insist that "anti-Muslim animus is the only plausible explanation" for the Proclamation, Pls. Br. 15, yet do not even respond to any of the above reasons why *Hawaii* concluded to the contrary. Having failed to refute, or even address, those reasons, plaintiffs' rational-basis challenges must fail regardless of whether they have come forward with new allegations.

II. PLAINTIFFS' OBJECTIONS TO ALTERNATIVE GROUNDS FOR DISMISSAL ARE MERTILESS

A. The Proclamation is Supported by a Rational Information-Sharing Purpose

As the Government explained (Gov't Br. 41-43), apart from the national-security justification, the Proclamation can also be upheld under its other "key objective[] * * * to encourage foreign governments to improve their practices, thus

facilitating the Government's vetting process overall," which the Court noted was a "legitimate purpose[]" of the Proclamation. *Hawaii*, 138 S. Ct. at 2411, 2421.

Plaintiffs respond that if the Proclamation's "only objective" is improving other country's information-sharing practices, it is irrational because the Proclamation also permits waivers and exempts certain countries, and those provisions, in turn, serve goals unrelated to information-sharing, such as national security or diplomatic relations. Pls. Br. 38. But the Proclamation need not single-mindedly serve the information-sharing objective in order to be rational. Like many government acts, particularly in the sensitive areas of national security and foreign affairs, the Proclamation balances its objectives against other legitimate considerations and interests. Indeed, the Proclamation explicitly acknowledges that "in determining what restrictions to impose for each country," the President "considered several factors," including "information-sharing policies" as well as "foreign policy, national security, and counterterrorism goals" and "craft[ed] those country-specific restrictions" that were appropriate "given each country's distinct circumstances." Proclamation § 1(h)(i). Accommodating those competing interests does not make the Proclamation any less rational. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 83 (2000) (rational-basis review "does not require [the Government] to match [its] distinctions and the legitimate interests they serve with

razorlike precision"); *cf. Kucana v. Holder*, 558 U.S. 233, 252 (2010) ("no law pursues its purpose at all costs"). And this "process of line-drawing" among competing or complementary objectives is precisely where there is "added force" to the judicial deference due under rational-basis review. *Beach Communications*, 508 U.S. at 315.

Plaintiffs argue that the Proclamation's information-sharing objective is "not independent of the national-security justification." Pls. Br. 36. But nothing in rational-basis review requires the Proclamation's purposes to be distinct or unconnected. And even if the two purposes are related, it does not follow that if one is irrational by itself the other must be as well. Each purpose must be evaluated both on its own terms and in combination; as demonstrated, the information-sharing purpose is plainly rational, and it also partly explains what plaintiffs mischaracterize as deficiencies in the national-security purpose.

Finally, plaintiffs' contention (Pls. Br. 36) that this rationale is a "new argument" that has been "waived" is also meritless. The information-sharing objective is explicitly invoked in the Proclamation itself, *see* Proclamation § 1(b)-(h), was noted in *Hawaii*, 138 S. Ct. at 2411, 2421, and discussed in this Court's prior *en banc* decision, *see, e.g., IRAP v. Trump*, 883 F.3d 233, 263 (4th Cir. 2018); *id.* at 316-17 (Kennan, J., concurring); *id.* at 357 (Niemeyer, J., dissenting).

The Government also raised this argument below in its motion to dismiss, reply, and district court hearing. *See* D. Ct. Dkt. 265-1 at 5-6, 13-14; D. Ct. Dkt. 271 at 12; D. Ct. Dkt. 274 at 102-03. It cannot reasonably be called a "new" argument, nor can plaintiffs plausibly suggest that they have not been on notice of this argument from the outset.

B. The Proclamation Satisfies the *Mandel* Standard

In *Hawaii*, the Court assumed that rational-basis review would apply and concluded that the Proclamation meets that standard, 138 S. Ct. at 2420, and thus the Court did not need to address whether the even more deferential standard under *Mandel* should instead apply to the Proclamation. Plaintiffs contend that even if *Mandel* applies, it "would not require dismissal of [their] claims." Pls. Br. 40. But the Court could not have been any clearer that the opposite is true: "A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review." *Hawaii*, 138 S. Ct. at 2420.

Plaintiffs argue that supposedly "undisputed evidence," in the form of "the words of the President," demonstrate that "the Proclamation's purpose is driven by anti-Muslim bias," Pls. Br. 39, and therefore that the Proclamation fails even under *Mandel*. Again, however, *Hawaii* explicitly rejected this very argument. As noted

above, *supra* at 13, the Court rejected the argument that the Proclamation's legitimate national-security objectives were undermined "by reference to extrinsic statements," *Hawaii*, 138 S. Ct. at 2418, that purportedly "cast doubt on the official objective of the Proclamation," *id.* at 2417. And the Court held that "[i]t cannot be said that * * * the policy is 'inexplicable by anything but animus.'" *Id.* at 2420-21. Because those arguments were rejected under rational-basis review, which the Court described as "extend[ing] beyond" the "conventional application of *Mandel*," *id.* at 2420, they even more clearly fail under *Mandel* itself.

C. Plaintiffs' Equal Protection and Establishment Clause Claims Are Not Premised on Plaintiffs' Own Rights

Plaintiffs do not dispute any of the key premises of the Government's argument (Gov't Br. 50-55): that their Equal Protection and Establishment Clause claims must be premised on an assertion of their own constitutional rights; that the Proclamation does not regulate them at all, but only applies to aliens abroad (who themselves have no constitutional rights concerning entry to this country); and that their own religion is entirely irrelevant to the Proclamation's operation, such that their relatives would remain subject to the Proclamation whether or not plaintiffs were Muslim.

Plaintiffs nevertheless argue that *Hawaii* rejected the Government's argument that plaintiffs are not asserting their own constitutional rights when it

was presented as a question of standing, and contend that the Government cannot re-assert the argument as a question about the merits. Pls. Br. 41. But the Court recognized that the Government's argument "concerns the merits rather than the justiciability of plaintiffs' claims." 138 S. Ct. at 2416 (alteration omitted). Accordingly, the Court had no need to reach that argument, because it ruled for the Government on the alternative merits ground that the Proclamation satisfied rational-basis review regardless. *See id.*

Plaintiffs argue that their complaint alleges that they are asserting their own constitutional rights. Pls. Br. 42-43. But whether plaintiffs are asserting their own constitutional rights, or are merely asserting the claims of third parties, is a question of law, not a question of fact that must be accepted as true at the pleading stage. *See supra* at 8-9.

Plaintiffs further contend that the Proclamation sends a stigmatic message that plaintiffs themselves are outsiders, Pls. Br. 42, and argue that the Government "ignores" this point, Pls. Br. 43. But the Supreme Court has squarely rejected that argument, as the Government explained (Gov't Br. 51-52). *See Allen v. Wright*, 468 U.S. 737, 754-56 (1984) (Equal Protection claim based on "stigmatic injury, or denigration" can be brought "only [by] those persons who are personally denied equal treatment by the challenged discriminatory conduct"); *Warth v. Seldin*, 422

U.S. 490, 499, 510 (1975) (plaintiffs who are "not themselves subject to [allegedly discriminatory] practices" cannot "rest [their] claim to relief on the legal rights or interests of third parties"). Plaintiffs' claim of a stigmatic injury fares no better in the Establishment Clause context (Gov't Br. 52-53), because "observation of conduct with which one disagrees" is not the type of "personal injury" that can support an Establishment Clause claim. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982); *see also In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (Kavanaugh, J.), *cert. denied*, 556 U.S. 1167 (2009) (rejecting "recharacteriz[ation] of "government action" against others as "a governmental message").

Finally, plaintiffs contend that the Proclamation affects their own rights "[b]y creating a more difficult visa-application process for U.S. citizens with Muslim relatives." Pls. Br. 44. But this facially neutral policy does not discriminate against the U.S. citizens themselves *because of their own* religion or national origin. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Moreover, plaintiffs themselves are not applying for visas; only their family members, who are aliens abroad, are applying for visas (Gov't Br. 49). To be sure, as plaintiffs argue (Pls. Br. 46), U.S. citizens may file a petition on behalf of an alien who, if approved, may use the petition as the basis to apply for a visa,

but nothing in the Proclamation affects that statutory petition process or makes it more difficult. At the conclusion of that petition process, "[t]he alien *may then apply for a visa*" if one is available, Pls. Br. 46 (emphasis added), and at *that point* the alien family member may be subject to the Proclamation. But then it is the *alien*'s (non-existent) constitutional rights that are affected, not the U.S. citizen plaintiff's.

D. Plaintiffs' Due Process Claim Fails on the Merits

Plaintiffs' Due Process claim suffers from an insurmountable flaw: even if they had a protected liberty interest, they have received all the process they could be due. *Hawaii* held that the government provides all the process that might be due by providing "a statutory citation to explain a visa denial." 138 S. Ct. at 2419. As the Government has explained, Gov't Br. 48, that holding dooms plaintiffs' Due Process claims because any person whose visa application is denied under the Proclamation is informed that his or her visa was denied pursuant to 8 U.S.C. § 1182(f). Plaintiffs never respond to this point.

Nor do plaintiffs have a protected liberty interest in the issuance of a visa to a foreign national relative, as the plurality explained in *Kerry v. Din*, 135 S. Ct. 2128 (2015). *See* Gov't Br. 46-47. Plaintiffs' only response is that, in their view, the *Din* plurality is unpersuasive, Pls. Br. 47, but they offer no substantive

refutation of its conclusion that the "long practice of regulating spousal immigration precludes * * * any contention [of an] asserted liberty interest [that] is deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." 135 S. Ct. at 2135-36.

Finally, plaintiffs contend that they have a statutorily created liberty interest. Pls. Br. 44-46. But plaintiffs have no statutory interest in the granting of a visa to a foreign national. As explained above, *supra* at 26-27, a U.S. citizens may have a statutory interest in petitioning for an alien family member's visa application in order to be granted a preference status, but once the petition is granted, the U.S. petitioner has already been afforded all the benefit available under the statute, and thus his or her statutory interest is at an end. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999) (when "American sponsors" have "their petition * * * granted," the sponsor's "cognizable interest terminate[s] * * * [b]ecause their interest has already been satisfied"). At that point, the alien must *still* apply for a visa, and it is only at that juncture – when the U.S. petitioner has no further statutory interests – that the Proclamation comes into play. Plaintiffs respond (Pls. Br. 47 n.12) that *Saavedra Bruno* did not involve constitutional claims, but that argument does not alter its holding that a U.S. petitioner's statutory interests extend only to their own petition and not to whether the alien is ultimately found

eligible by a consular officer for a visa. And without any statutory interests in the issuance of the visa itself, plaintiffs lack any statutorily created liberty interest upon which their Due Process challenge to the Proclamation might be predicated.[4]

CONCLUSION

For the foregoing reasons and those stated in the Government's opening brief, this Court should reverse the district court's judgment and remand with instructions to dismiss plaintiffs' complaint with prejudice for failure to state a claim on which relief can be granted.

[4] Plaintiffs wrongly assert the Government waived this argument but the Government raised it below *both* in its Motion to Dismiss, *see* D. Ct. Dkt. 265-1 at 12 & n.4, *and* in its Reply, *see* D. Ct. Dkt. 271 at 17-18.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) because it uses 14-point Times New Roman, and complies the type-volume limitations of Rule 32(a)(7)(B) because it contains no more than 6479 words excluding the parts of the brief excluded by Rule 32(f).

/s/ Joshua Waldman
Joshua Waldman

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2019, I electronically filed the foregoing Reply Brief for Appellants with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Joshua Waldman
Joshua Waldman