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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INTRODUCTION

Plaintiffs' rational-basis constitutional challenges to Presidential Proclamation 9645 have already been rejected by the Supreme Court. In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Court held that the Proclamation is subject at most to rational-basis review even for constitutional challenges. *Id.* at 2419-20. The Court reversed a preliminary injunction against the Proclamation, holding that the plaintiffs had failed to show even a mere likelihood of success in their challenge, because "there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns," and "[u]nder these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review." *Id*. at 2421, 2423; *see also id.* at 2411, 2421 (noting Proclamation's other "key objective * * * to encourage foreign governments to improve their practices" is also a "legitimate purpose[]"). The Court rejected four specific arguments raised by those plaintiffs: that "statements by the President and his advisers cast[] doubt on the official objective of the Proclamation," *id.* at 2417; that alleged "deviations from the review's baseline criteria" showed "evidence of animus toward Muslims," *id*. at 2421; that "not enough individuals are receiving waivers or exemptions" from the entry suspensions, *id.* at 2423 n.7; and that Congress' statutory scheme had already addressed the Proclamation's national-security justification, *id.* at 2422 n.6.

Notwithstanding the Supreme Court's conclusion that the Proclamation survives rational-basis review, the district court in this case refused to dismiss plaintiffs' constitutional challenges to the Proclamation. And in doing so, the district court relied upon precisely the arguments rejected in *Hawaii*. The district court's erroneous decision cannot be squared with *Hawaii* and threatens the action of the President in the exercise of his core foreign-affairs responsibilities, taken on the basis of national-security threats identified after a worldwide assessment and consultation with multiple Cabinet officials. This Court should reverse the judgment below and instruct the district court to dismiss plaintiffs' constitutional challenges.

STATEMENT OF JURISDICTION

The district court entered its opinion and order denying the government's motion to dismiss on May 2, 2019. JA 232-279. On August 20, 2019, the district court certified that order and opinion for interlocutory appeal under 28 U.S.C. § 1292(b). JA 289-290. On August 30, 2019, the government timely petitioned this Court for permission to appeal under Section 1292(b). This Court granted permission to appeal on September 11, 2019. JA 291-292. This Court has jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUE

Whether the district court erred in failing to dismiss plaintiffs' rational-basis challenges to the Proclamation.

STATEMENT OF THE CASE

A. Presidential Proclamation No. 9645

"The exclusion of aliens is a fundamental act of sovereignty" that rests on the "legislative power" and "is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). The Constitution and Acts of Congress both confer on the President broad authority to suspend or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. *See* 8 U.S.C. §§ 1182(f), 1185(a)(1). After a worldwide review of the processes for vetting aliens seeking entry from abroad involving multiple Cabinet officers, and following diplomatic engagement to encourage countries to improve their practices, the President determined that it was necessary to impose tailored entry restrictions on certain nationals of countries whose governments do not share adequate information with the United States to assess the risk of their nationals' entry, or whose conditions otherwise present unacceptable national-security risks, in order to induce those governments to improve their cooperation and to protect this Nation until they do. *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. 24, 2017) ("Proclamation").

1. As directed by the President, *see* Executive Order 13,780 § 2(a), 82 Fed. Reg. 13,209 (Mar. 9, 2017), the Department of Homeland Security ("DHS"), in consultation with the Department of State and the Office of the Director of National Intelligence, conducted a "worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the [Immigration and Nationality Act] * * * in order to determine that the individual is not a security or public-safety threat." Proclamation § 1(c). The review examined "[i]nformation-sharing and identity-management protocols and practices of foreign governments," because those governments "manage the identity and travel documents of their nationals and residents" and "control the circumstances under which they provide information * * * about known or suspected terrorists and criminal-history information." *Id.* § 1(b).

The agencies developed a "baseline" level of information the United States requires from foreign governments to identify and protect against national-security risks in the immigration context. That baseline incorporated three components

designed to identify the risk to national security posed by individuals from particular countries:

> (1) identity-management information, *i.e.*, "information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be," which turns on criteria such as "whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports";
>
> (2) national-security and public-safety information about whether a person seeking entry poses a risk, which turns on criteria such as "whether the country makes available * * * known or suspected terrorist and criminal-history information upon request," "whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States," and "whether the country provides passport and national-identity document exemplars"; and
>
> (3) a national-security and public-safety risk assessment of the country, which turns on criteria such as "whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program * * * that meets all of [the program's] requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States."

Proclamation § 1(c).

DHS, in coordination with the Department of State, collected and evaluated data regarding all foreign governments. *Id.* § 1(d). Applying the baseline factors, DHS identified 16 countries as having "inadequate" information-sharing practices and risk factors, and another 31 countries as "at risk" of becoming "inadequate." *Id*. § 1(e). The State Department then conducted a 50-day diplomatic engagement

to encourage all foreign governments to improve their performance, yielding significant improvements from many countries. *Id*. § 1(f). Multiple countries provided travel-document exemplars to combat fraud and/or agreed to share information on known or suspected terrorists. *Id*.

After completing the review, the Acting Secretary of Homeland Security identified seven countries that, even after diplomatic engagement, continued to have inadequate identity-management protocols or information-sharing practices, or other heightened risk factors: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. *Id.* § 1(g) and (h). She recommended that the President impose entry restrictions on certain nationals from those countries. *Id*. She also recommended entry restrictions for certain nationals of Somalia, because although Somalia generally satisfies the information-sharing component of the baseline standards, it has other heightened risk factors, including "identity-management deficiencies" and a "significant terrorist presence." *Id*. § 1(i).[1]

[1] The Acting Secretary assessed that Iraq does not meet the baseline, but she recommended not restricting entry of Iraqi nationals given the close cooperative relationship between the U.S. and Iraqi governments, the strong U.S. diplomatic presence in Iraq, the significant presence of U.S. forces there, and Iraq's commitment to combatting ISIS. *Id.* § 1(g); *see also Hawaii*, 138 S. Ct. at 2405 (discussing this recommendation).

2. After evaluating the Acting Secretary's recommendations in consultation with multiple Cabinet members and other officials, the President issued the Proclamation. *Id.* § 1(h)(i). Considering numerous factors – including each country's "capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors," as well as "foreign policy, national security, and counterterrorism goals" – the President found that entry of certain foreign nationals from the eight countries identified by the Acting Secretary "would be detrimental to the interests of the United States." *Id*. Preamble, § 1(h)(i).

Based on that finding and "in accordance with the [Acting Secretary's] recommendations," the President imposed tailored restrictions on those nationals' entry. *Id.* § 1(h)(i)-(iii). He determined that the restrictions are "necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States," and "to elicit improved identity-management and information-sharing protocols and practices from foreign governments." *Id*. § 1(h)(i). He explained that these "country specific restrictions" would be the "most likely to encourage cooperation given each country's distinct circumstances," while "protect[ing] the United States until such time as improvements occur." *Id*. § 1(h)(i).

For countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), the Proclamation largely suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. *Id.* § 2(b)(ii), (d)(ii), (e)(ii). For countries that are valuable counter-terrorism partners but had deficiencies (Chad, Libya, and Yemen), the Proclamation suspends entry only of nationals seeking immigrant visas and nonimmigrant business, tourist, and business/tourist visas. *Id*. § 2(a)(ii), (c)(ii), (g)(ii). For Somalia, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas, in light of the "special concerns that distinguish it from other countries." *Id*. § 2(h)(i), (ii). For Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation suspends entry only of government officials "involved in screening and vetting procedures" and "their immediate family members" on nonimmigrant business or tourist visas. *Id*. § 2(f)(i)-(ii).

The Proclamation provides for exceptions and case-by-case waivers when a foreign national demonstrates undue hardship and that his entry would not pose a threat to the national security or public safety and would be in the national interest. *Id.* § 3(c)(i)(A)-(C). It also requires the agencies to assess on an ongoing basis

whether entry restrictions should be continued, modified, terminated, or supplemented, and to report to the President every 180 days. *Id*. § 4.

Pursuant to the ongoing assessment required by the Proclamation, on April 10, 2018, the President withdrew the entry restrictions on nationals of Chad, noting that the government of Chad had made marked improvements in its identity-management and information-sharing practices. *See* Presidential Proclamation 9723, *Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, 83 Fed. Reg. 15937 (Apr. 10, 2018); *see also Hawaii*, 138 S. Ct. at 2406, 2410, 2422.

B. Prior Litigation

These three cases are brought by individual and organizational plaintiffs who challenge the Proclamation under the Due Process, Establishment, Equal Protection, and Free Speech Clauses, and who also alleged violations of their right to freedom of association. JA 116-118, 178-181, 227.[2] The individual plaintiffs

[2] The district court dismissed plaintiffs' claims under the Administrative Procedure Act, JA 247-258, and plaintiffs declined to amend their complaints to cure those deficiencies, *see* D. Ct. Dkt. 278 (May 18, 2019). IRAP plaintiffs also voluntarily dismissed their other statutory claims. *See* D. Ct. Dkt. 268 (Dec. 3, 2018). Accordingly, the only remaining claims in this litigation are plaintiffs' constitutional challenges.

include U.S. citizens and lawful permanent residents who have relatives from Iran, Syria, Yemen, and Somalia seeking immigrant or nonimmigrant visas. JA 52, 57-60, 104-114, 145, 150-152, 203-204, 221-226. Organizational plaintiffs include the International Refugee Assistance Project ("IRAP"), which provides services to refugees in the resettlement process, JA 52-54, and Iranian Alliances Across Borders ("IAAB"), which organizes youth camps, educational events, and international conferences for the Iranian diaspora, JA 149. Organizational plaintiffs allege that their clients or members have family members seeking immigrant or nonimmigrant visas from nations affected by the Proclamation. JA 91-92, 96, 99-100, 102-103, 148.

In October 2017, the district court granted a worldwide preliminary injunction barring the enforcement of Section 2 of the Proclamation for individuals who have a credible claim of a bona fide relationship with a person or entity in the United States. *IRAP v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017). (That injunction was later vacated following the Supreme Court's decision in *Hawaii*.) The district court concluded that plaintiffs were likely to succeed on their claims that the Proclamation violates the Establishment Clause, reasoning that "the Proclamation's proffered national security rationale is not the true motivation behind the restrictions, but is instead a pretext for an anti-Muslim bias." *Id.* at 617.

The court "relied largely on a record of public statements made by President Trump and his advisors" both before and after his election. *Id.* at 619-22, 624, 627-28. The court also relied upon an alleged "misalignment between the stated national security goals of the ban and the means implemented to achieve them." *Id.* at 618, *see id.* at 625-26. The court therefore concluded that the Proclamation lacked a "purpose * * * unrelated to religious animus." *Id.* at 626.

This Court affirmed. *IRAP v. Trump*, 883 F.3d 233 (4th Cir. 2018) (en banc). The majority held that the Proclamation violated the Establishment Clause because "the Proclamation's invocation of national security is a pretext for an anti-Muslim religious purpose." *Id.* at 264. The court reasoned that "the Government's proffered rationale for the Proclamation lies at odds with the statements of the President," *id.* at 264; *see also id.* at 266-67, and held that the "months-long multi-agency review" process did not "demonstrate[] that the Proclamation has a secular purpose," *id.* at 268-69. "In sum," the majority held, "the Proclamation, read in the context of President Trump's official statements, fails to demonstrate a primarily secular purpose." *Id.* at 269.

The Ninth Circuit affirmed a similar worldwide preliminary injunction prohibiting enforcement of Section 2 of the Proclamation on statutory grounds. *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (per curiam). The Supreme Court

granted certiorari in the Ninth Circuit case, *see* 138 S. Ct. 923 (2018), and held this case pending the outcome of that one.

C. The Supreme Court's Decision in *Hawaii v. Trump*

The Supreme Court reversed and remanded both cases, rejecting the constitutional (and statutory) attacks on the Proclamation.

The Court initially emphasized that the Proclamation restricts entry into this country by aliens abroad who themselves have no constitutional rights regarding entry. *Hawaii*, 138 S. Ct. at 2418-19. The Court noted that "[f]or more than a century," the admission and exclusion of foreign nationals was "largely immune from judicial control," and the Court's "numerous precedents * * * make clear" that it applies only "a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen," which requires a court to asses only "whether the Executive gave a 'facially legitimate and bona fide' reason for its action." *Id*. at 2418-19, 2420 n.5 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972)). The majority noted that the Court's "opinions have reaffirmed and applied its deferential standard of review" – known as the *Mandel* standard – "across different contexts and constitutional claims," and "[l]ower courts have similarly applied *Mandel* to broad executive action." *Id.* at 2419. The Court further observed that "*Mandel*'s narrow standard of review 'has particular

force' in admission and immigration cases that overlap with 'the area of national security,'" and "[t]he upshot of our cases" is that any "inquiry into matters of entry and national security is highly constrained." *Id.* at 2419-20 (quoting *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring)). The Court recognized that the "conventional application of *Mandel* * * * would put an end to our review." *Id*. at 2420.

In light of the government's argument in the alternative, however, the Court concluded that it was not necessary to decide whether *Mandel*'s standard of review should apply here, because plaintiffs could not prevail even "assum[ing] that we may look behind the face of the Proclamation to the extent of applying rational basis review" in order to ask whether "the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes." *Hawaii*, 138 S. Ct. at 2420. Even with that assumption, the Court emphasized that the Proclamation must be upheld "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id*.

The Court first noted that it "hardly ever strikes down a policy as illegitimate under rational basis scrutiny." *Id.* at 2420. "On the few occasions where [it has] done so, a common thread has been that the laws at issue lack any purpose other

than a bare desire to harm a politically unpopular group." *Id.* (citation and alteration omitted). The Court cited three cases exemplifying the rare instances where laws failed rational-basis review: *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). But the Court held that "[t]he Proclamation does not fit this pattern" 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." *Hawaii*, 138 S. Ct. at 2420-21. The only way to "argue otherwise," the Court noted, was to "refus[e] to apply anything resembling rational basis review." *Id.* at 2421.

Applying rational-basis review, the Court held that "because there is persuasive evidence that the entry suspension has a legitimate grounding in national-security concerns, quite apart from any religious hostility, we must accept that independent justification." *Id*. at 2421. The Court began with the observation that "[t]he Proclamation * * * is facially neutral toward religion" and "[t]he text says nothing about religion." *Id.* at 2418, 2421. In addition, "[t]he Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." *Id.* at 2421. Moreover, the Proclamation "reflects the results of a worldwide

review process undertaken by multiple Cabinet officials and their agencies." *Id.* And the Proclamation's various provisions that culminated from that review process "were justified by the distinct conditions in each country." *Id*.

The Court also identified "[t]hree additional features of the entry policy" that "support the Government's claim of a legitimate national security interest." *Id.* at 2422. "First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries – Iraq, Sudan, and Chad – have been removed from the list of covered countries." *Id.* "Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals," such as permitting a variety of nonimmigrant visas, and exemptions for permanent residents and individuals who have been granted asylum. *Id.* "Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants." *Id.*

"Under these circumstances," the Court concluded, "the Government has set forth a sufficient national security justification to survive rational basis review" and therefore "plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim." *Id*. at 2423.

In reaching that conclusion, the Court rejected four arguments advanced by the plaintiffs in the *Hawaii* case. First, the plaintiffs pointed to "a series of statements by the President and his advisers" that purportedly "cast[] doubt on the official objective of the Proclamation." *Id*. at 2417. But the Court held that when considering "the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility," the Court's review must focus on "the authority of the Presidency itself," and it thus rejected the plaintiffs' argument that "the stated justifications for the policy" were undermined "by reference to extrinsic statements." *Id*. at 2418.

Second, the plaintiffs sought to "discredit the findings of the [Proclamation's] review [by] pointing to deviations from the review's baseline criteria" that resulted in the inclusion or exclusion of particular countries. *Id*. at 2421. But the Court also rejected that argument, because "in each case the [Proclamation's] determinations were justified by the distinct conditions in each country." *Id*. As the Court explained, "[a]lthough Somalia generally satisfies the information-sharing component of the baseline criteria, it 'stands apart * * * in the degree to which [it] lacks command and control of its territory." *Id*. (quoting Proclamation § 2(h)(i)). "As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close

cooperative relationship between the U.S. and Iraqi Governments and the country's key role in combatting terrorism." *Id.* (citing Proclamation § 1(g)). "[I]n any event," the Court reasoned, it is "difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims." *Id.*

Third, the plaintiffs contended that "not enough individuals are receiving waivers or exemptions" under the Proclamation. *Id*. at 2423 n.7. But the Court held that, "even if such an inquiry were appropriate under rational basis review," this argument "d[id] not affect [its] analysis." *Id*.

Finally, the plaintiffs argued that the legitimacy of the Proclamation's national-security rationale was undermined by the fact that "Congress has already erected a statutory scheme that fulfills the President's stated concern about deficient vetting." *Id*. at 2422 n.6 (quotation marks omitted). But the Court rejected that argument too, noting that the statutory scheme did not undermine the Proclamation's national-security rationale. *Id*.

Because the Proclamation could be sustained on its national-security rationale, the Court did not need to address whether it could also be upheld on the Proclamation's related "key objective[] * * * to encourage foreign governments to improve their practices, thus facilitating the government's vetting process overall."

Id. at 2411. But the Court made clear that "inducing other nations to improve their practices" was a "legitimate purpose[]" for the Proclamation. *Id*. at 2421.

After issuing its opinion, the Supreme Court vacated and remanded this Court's judgment, *see Trump v. IRAP*, 138 S. Ct. 2710 (2018), and this Court remanded to the district court for further proceedings, *IRAP v. Trump*, 905 F.3d 287 (4th Cir. 2018).

D. The District Court's Decision on Remand

On remand, the district court denied the government's motion to dismiss plaintiffs' constitutional claims, despite the Supreme Court's rejection of identical legal theories in *Hawaii*.

The district court first concluded that, under *Hawaii*, the court should apply rational-basis review to plaintiffs' constitutional claims, rather than the *Mandel* standard. JA 260. The court understood *Hawaii* to hold that courts "should" look behind the face of the Proclamation and apply rational-basis review, JA 60, and that *Hawaii* "instruct[s] courts" to consider statements of the President and his advisors in assessing the Proclamation's constitutionality, JA 266.

Although *Hawaii* held that "the Government has set forth a sufficient national security justification to survive rational basis review," and therefore the plaintiffs in that case "ha[d] not demonstrated a likelihood of success," 138 S. Ct.

at 2423, the district court nevertheless concluded that *Hawaii* "is not dispositive," even though the plaintiffs in both cases had asserted "many of the same facts" in support of their constitutional challenges. JA 269.

The district court began by noting that "[t]he Supreme Court has, on occasion, invalidated governmental classifications for failing to meet [the rational-basis] standard," and that "[u]nder *Cleburne*, *Moreno*, and *Romer*, the Proclamation would fail rational-basis review if the evidence revealed that for each of its stated purposes, either that purpose was not a legitimate state interest or, if legitimate, there was no rational relationship between the Proclamation and that purpose." JA 263-264.

The district court then reasoned that the allegations in plaintiffs' complaints could demonstrate that the Proclamation lacked a rational basis. The court first stated that "the Complaints provide detailed allegations of statements by the President" that could demonstrate that the Proclamation "was issued for [an] illegitimate purpose." JA 265-266. Next, the district court stated that supposed "deviat[ions]" from the Proclamation's "baseline criteria" were evidence "undermin[ing] the national security rationale for the Proclamation." JA 267. Third, according to the district court, plaintiffs' allegations that "the waiver process has not been applied in a manner consistent with the stated national security

purposes of the Proclamation," and that waivers "have been granted at a rate of only approximately two percent," support the argument that the Proclamation is "a pretext for discrimination." JA 268. And finally, the court pointed to plaintiffs' allegations that "the travel ban does not rationally advance national security because there already exists legal authority to exclude any potential national-security threat, including that individual applicants are required to submit a detailed application and undergo an in-person interview as part of the visa process." JA 269.

The district court also rejected the government's alternative arguments for dismissal. The government argued that plaintiffs' Due Process claim must be dismissed because plaintiffs have no cognizable liberty or property interest in the issuance of a visa to a foreign national family member. JA 272-273. The district court rejected this argument merely because, in its view, the existence of a liberty interest was not foreclosed by precedent. JA 273-274. The government also argued that plaintiffs' Equal Protection and Establishment Clause claims must be dismissed because they are based not on plaintiffs' own constitutional rights, but on injuries suffered by third parties (who lack constitutional rights of their own). The district court responded that it had previously rejected that merits argument

when framed as a question of standing, and opined that its view was "largely validated" by the Supreme Court. JA 276.

E. Certification and Permission to Appeal

The district court granted the government's motion to certify the court's order for immediate appeal under 28 U.S.C. § 1292(b). JA 289-290. This Court on September 11, 2019, granted the government's petition for permission to appeal under Section 1292(b) and its motion for a stay of district court proceedings pending the outcome of this appeal.

SUMMARY OF ARGUMENT

I. In *Hawaii*, the Supreme Court unequivocally held that the Proclamation survives rational-basis review. That decision is controlling here. The district court committed a variety of fundamental errors in concluding to the contrary.

The district court erred in relying upon, and crediting, precisely the same arguments that the Supreme Court rejected in *Hawaii*. The district court believed plaintiffs' rational-basis challenge was viable under three cases – *Moreno*, *Cleburne*, and *Romer* – even though *Hawaii* held that the Proclamation did not fit the pattern of those cases. The district court also stated that the Proclamation's national-security rationale was undermined by statements from the President, supposed deviations from the Proclamation's baseline criteria, the rate at which

waivers are granted, and the statutory scheme. But *Hawaii* considered and rejected the exact same arguments.

The district court's effort to distinguish *Hawaii* is without merit. Although the Court reviewed a preliminary injunction under the likelihood-of-success standard, *Hawaii*'s holding turned on a binding legal conclusion that the Proclamation survives rational-basis scrutiny, not a tentative merits analysis or balancing of harms that would be relevant to a discretionary assessment of equitable relief. Also unavailing is the district court's reliance on the possibility of new evidence – specifically, concerning the approval of waivers. But this purported new evidence is legally irrelevant, because *Hawaii* already rejected the argument that the rate at which waivers are granted affects the Proclamation's rational basis. And it is also factually immaterial, in light of the thousands of waivers approved under the Proclamation since the restrictions were first imposed. Accordingly, the district court offered no persuasive rationale for disregarding the Supreme Court's holding in *Hawaii*, which is binding here and forecloses plaintiffs' constitutional claims.

The district court also fundamentally misunderstood the legal standard for applying rational-basis review at the motion to dismiss stage. The court's call for a "more fulsome" record on these issues is simply incompatible with the rational-

basis standard, which is not subject to courtroom fact-finding. Likewise, the court's examination of what "motivated" the Proclamation cannot be squared with rational-basis review, in which actual motivations are entirely irrelevant. The court's questioning of the Proclamation's national-security efficacy is also improper, because the Proclamation survives review so long as its rationales are arguable, even if they were erroneous.

The district court also erred in its view that, on a motion to dismiss, plaintiffs' rational-basis challenges may succeed based on nothing more "plausible" attacks on the Proclamation. Although the court must accept all plausibly pled factual allegations as true on a motion to dismiss, the district court was wrong to apply that principle to *legal* conclusions, including the question whether the Proclamation is supported by a rational basis. Moreover, rational-basis review asks whether there are plausible reasons supporting the law, not whether there are plausible bases for attacking it.

Finally, even if the district court were somehow able to evade the Supreme Court's application of rational-basis review, the Proclamation must still be upheld. The district court focused exclusively on arguments it believed undermined the Proclamation's national-security rationale; but those arguments do not question the Proclamation's other, independent rationale – to encourage foreign governments to

improve their practices, thus facilitating the government's vetting process overall – and the Proclamation can be sustained on that basis alone. Furthermore, while *Hawaii* did not reach this question, the Supreme Court strongly suggested that the Proclamation should more properly be analyzed under *Mandel* rather than rational-basis review, and there is no doubt that the Proclamation survives that more deferential standard.

II. Wholly apart from the threshold flaw that *Hawaii* forecloses this suit, plaintiffs' claims also must be dismissed for additional, alternative reasons. First, plaintiffs' Due Process claim fails on the merits because plaintiffs have no cognizable liberty interest in the issuance of a visa to a foreign national relative. And at a minimum, they have received all the process they are due. Second, plaintiffs' Equal Protection and Establishment Clause claims fail on the merits because those claims are not predicated on any violation of plaintiffs' own constitutional rights. The Proclamation does not apply to plaintiffs at all; it applies only to aliens abroad. Accordingly, plaintiffs' challenges must be predicated only on derivative claims based on the rights of foreign nationals who themselves have no constitutional rights. But it is a long-established rule that a party must assert his *own rights* based on being *himself* subject to the challenged government policy. Plaintiffs cannot satisfy that requirement, and so their claims fail on the merits.

Contrary to the district court's suggestion, the Supreme Court in *Hawaii* expressly declined to address this alternative basis for rejecting these claims.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's order on a motion to dismiss. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008).

ARGUMENT

I. THE PROCLAMATION SURVIVES RATIONAL-BASIS SCRUTINY

Rational-basis review "is a paradigm of judicial restraint" under which a government policy "must be upheld * * * if there is any reasonably conceivable state of facts that could provide a rational basis" supporting it. *FCC v. Beach Communications*, 508 U.S. 307, 313-14 (1993). "Where there are 'plausible reasons'" for that policy, the court's "inquiry is at an end." *Id.* The government policy "comes * * * bearing a strong presumption of validity * * * and those attacking [its] rationality * * * have the burden to negative every conceivable basis which might support it." *Id.* at 314-15 (citations and quotation marks omitted). Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated" the adoption of the government policy, and therefore the policy "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or

empirical data." *Id.* at 315. In fact, "[t]he assumptions underlying [the policy's] rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the [government's] choice from constitutional challenge." *Id.* at 320. "These restraints on judicial review have added force where the [government] must necessarily engage in a process of line-drawing." *Id.*at 315 (citation and quotation marks omitted).

Applying that deferential standard, the Supreme Court in *Hawaii* held that the Proclamation survives rational-basis review and rejected the very challenges raised by plaintiffs here. As the Court observed, "[t]he Proclamation * * * is facially neutral toward religion" and "[t]he text says nothing about religion." *Hawaii*, 138 S. Ct. at 2418, 2421. It is also "expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." *Id.* at 2421. Those purposes "reflect[] the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies," with provisions tailored according to "the distinct conditions in each country." *Id.* Further supporting "the Government's claim of a legitimate national security interest" is the removal of three majority-Muslim countries from the list of covered countries, as well as the inclusion of "significant exceptions for various categories of foreign nationals" for the remaining covered

countries, and the inclusion of "a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants." *Id.* at 2422.

Accordingly, the Court found that "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. "Under these circumstances," the Court held, "the Government has set forth a sufficient national security justification to survive rational basis review" and therefore "plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim." *Id*. at 2423.

Plaintiffs' constitutional challenges to the Proclamation are foreclosed by the Supreme Court's unequivocal conclusion that the Proclamation's national-security justification is sufficient to survive rational-basis review. The district court should therefore have granted the government's motion to dismiss.

A. The District Court's Reasoning Cannot Be Reconciled With *Hawaii*.

The district court's conclusion that *Hawaii* was "not dispositive," JA 269, does not withstand scrutiny. Its principal error was relying upon and crediting the very arguments rejected by the Supreme Court.

To begin with, the district court reasoned that "[t]he Supreme Court has, on occasion, invalidated government classifications for failing to meet [the rational-

basis] standard," and pointed to three such cases, asserting that "[u]nder *Cleburne, Moreno,* and *Romer*, the Proclamation would fail rational-basis review if the evidence revealed that for each of its stated purposes, either that purpose was not a legitimate state interest or, if legitimate, there was no rational relationship between the Proclamation and that purpose." JA 263-264. But *Hawaii* noted precisely the same three precedents and held that "[t]he Proclamation does not fit th[e] pattern" of those cases. *Hawaii*, 138 S. Ct. at 2420 (citing *Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); and *Romer v. Evans*, 517 U.S. 620 (1996)). The district court's suggestion that plaintiffs' constitutional challenge to the Proclamation is legally viable under *Moreno*, *Cleburne*, and *Romer* is flatly at odds with *Hawaii*.

Next, the district court believed that "the Complaints provide detailed allegations of statements by the President" that could demonstrate that the Proclamation "was issued for [an] illegitimate purpose." JA 265-266. But the statements relied upon by the district court were the same ones considered in *Hawaii*. *See* 138 S. Ct. at 2417. And *Hawaii* rejected the argument that "the stated justifications for the policy" were undermined "by reference to extrinsic statements," and the view that "a series of statements by the President * * * cast[]

doubt on the official objective of the Proclamation," and its "legitimate grounding in national security concerns." *Hawaii,* 138 S. Ct. at 2417-18, 2421.

Similarly, the district court reasoned that supposed deviations from the Proclamation's "baseline criteria * * * undermine the national security rationale for the Proclamation." JA 267. But the Supreme Court rejected the attempt "to discredit the findings of the [Proclamation's] review [by] pointing to deviations from the review's baseline criteria," because "in each case the [Proclamation's] determinations were justified by the distinct conditions in each country," as the Proclamation itself explained. *Hawaii*, 138 S. Ct. at 2421. In fact, *Hawaii* specifically noted the "range of restrictions" on various countries "based on the 'distinct circumstances'" of those countries, including Somalia and Venezuela, 138 S. C.t at 2405-06, 2421, which were the very countries relied upon by the district court, JA 267. (*Hawaii* also discussed the distinct circumstances justifying the particular restrictions in Iraq. 138 S. Ct. at 2405, 2421.)

The district court also relied on plaintiffs' allegations that "the waiver process has not been applied in a manner consistent with the stated national security purposes of the Proclamation," and that waivers "have been granted at a rate of only approximately two percent," to conclude that the Proclamation may be "a pretext for discrimination." JA 268. But in *Hawaii*, after noting the dissent's

suggestion that "not enough individuals are receiving waivers or exemptions," the majority questioned whether "such an inquiry [would be] appropriate under rational basis review," noted that the suggestion focused "on only one aspect" of the majority's reasoning, and concluded that in any event the argument "d[id] not affect [its] analysis." *Hawaii*, 138 S Ct. at 2423 n.7. For the same reasons, arguments about the number of waivers granted under the Proclamation should not affect this Court's analysis of the Proclamation's constitutional validity.

In addition, the district court credited plaintiffs' allegation that "the travel ban does not rationally advance national security because there already exists legal authority to exclude any potential national-security threat, including that individual applicants are required to submit a detailed application and undergo an in-person interview as part of the visa process." JA 269. Once again, the Supreme Court considered that same argument but rejected it, concluding that the statutory scheme did not undermine the Proclamation's national-security rationale. *Hawaii*, 138 S. Ct. at 2422 n.6 (noting that the Court rejected the argument "that 'Congress has already erected a statutory scheme that fulfills' the President's stated concern about deficient vetting" as part of its statutory analysis) (citing *id.* at 2443-44 (Sotomayor, J., dissenting)); *id.* at 2410-15 (statutory analysis rejecting that argument).

B. The District Court's Reasons for Distinguishing *Hawaii* are Meritless.

The district court also relied upon a series of rationales for distinguishing *Hawaii*. Those arguments do not withstand scrutiny either.

1. The district court first reasoned that *Hawaii* addressed only "a motion for a preliminary injunction," under a likelihood-of-success standard, JA 269-270. But that ignores the Supreme Court's reasoning and holding. Although the Court was presented with a preliminary injunction and thus necessarily analyzed the Proclamation's constitutionality under the likelihood-of-success standard, the Court's holding was in no way tentative; it was based on the *ultimate legal conclusion* that the Proclamation survives rational-basis scrutiny. *Hawaii*, 138 S. Ct. at 2421 ("because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification"). That legal conclusion was binding on the district court. Likewise, the Court's vacatur of the preliminary injunction turned entirely on that legal conclusion about the merits, rather than on any balancing of the relative harms to the parties, the competing equities, or the public interest. *Hawaii*, 138 S. Ct. at 2423 ("[T]he Government has set forth a sufficient national security justification to survive rational basis review. * * * We simply hold today that plaintiffs have not demonstrated a likelihood of success on

the merits of their constitutional claim."). Accordingly, *Hawaii*'s preliminary injunction posture does not make the Court's legal conclusions any less dispositive of the rational-basis challenges presented here.

2. The district court also opined that "two Justices, including one in the majority," contemplated "the possibility that constitutional claims would proceed." JA 271-272. But that assertion misunderstands Justice Kennedy's concurrence, which cautioned the district court on remand to consider carefully "[w]hether judicial proceedings may properly continue in this case" given the "substantial deference" owed to the President and "in light of today's decision." *Hawaii*, 138 S. Ct. at 2424 (Kennedy, J., concurring). Justice Kennedy's opinion cannot be read as an expectation that a rational-basis challenge to the Proclamation presenting the same arguments the Court had just rejected should nonetheless survive a motion to dismiss. Nor can the majority's remand "for such further proceedings *as may be appropriate*," *Hawaii*, 138 S. Ct. at 2423 (emphasis added), be understood to suggest that plaintiffs' lockstep rational-basis challenges should survive a motion to dismiss. And, of course, Justice Breyer's *dissenting* views, *see* JA 272, do not control whether *Hawaii* requires dismissal in this case.

3. The district court also asserted that "the pending Complaints * * * assert additional facts not available at the time of the Supreme Court's ruling." JA 271.

In particular, the district court stated that since *Hawaii* was issued, "no formal waiver guidance has been issued, and no application process or other procedure has been established for individuals to seek a waiver." JA 271. The district court noted that, according to one complaint, "waivers have been granted at a rate of only approximately two percent," suggesting that such an allegation would demonstrate that "the waiver process is a 'fraud.'" JA 268. In addition, the court stated that "it is unclear" whether the government has devised a process for assessing if the Proclamation's restrictions should continue or be terminated, or whether it has issued the periodic reports required by the Proclamation. JA 271 (citing Proclamation § 4). The district court therefore concluded that *Hawaii* "was based on a preliminary record" and does not "preclude a different determination at a later stage of the case on a more fulsome record." JA 271.

The district court's points are irrelevant as a matter of law. The majority in *Hawaii* noted that one dissenting opinion questioned whether "enough individuals are receiving waivers" under the Proclamation. *Hawaii*, 138 S. Ct. at 2423 n.7 (citing *id.* at 2431-33 (Breyer, J., dissenting)). But the majority rejected the relevance of that argument, noting that the waiver program was "only one aspect of [its] consideration," doubting whether "such an inquiry [was] appropriate under

rational basis review," and holding that in any event the argument about the number of waivers issued "does not affect our analysis." *Id.*

In any event, the district court's factual questions are immaterial, as demonstrated in matters of public record of which this Court can take judicial notice and properly consider on a motion to dismiss. *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508-09 (4th Cir. 2015); *Zak v. Chelsea Therapeutics Int'l.*, 780 F.3d 597, 607 (4th Cir. 2015); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004). The Department of State has provided answers on its public website to a number of common questions regarding the mechanics of the waiver process, explaining, for example, that "[a]n individual who seeks to travel to the United States should apply for a visa and disclose during the visa interview any information that might demonstrate he or she is eligible for a waiver." *See* U.S. Department of State – Bureau of Consular Affairs, June 26 Supreme Court Decision on Presidential Proclamation 9645.[3] The Department of State has also released hundreds of pages of redacted versions of its internal guidance in response to Freedom of Information Act requests. *See* U.S. Department of State, Freedom of Information Act: Virtual Reading Room Documents Search Results.[4] The

[3] Available at https://go.usa.gov/xVSmb (last visited on Oct. 21, 2019).
[4] Available at https://go.usa.gov/xVSmX (last visited on Oct. 21, 2019).

Department of State has also publicly explained that there is no separate application process to apply for a waiver because "[i]f an applicant is otherwise eligible for a visa but for [the Proclamation], a consular officer will * * * *automatically* consider the applicant for a waiver." Department of State Report: Implementation of Presidential Proclamation 9645, December 8, 2017 to June 30, 2019 at 5 ("State Department June 2019 Report"); *see also id.* at 2.[5]

Nor is the waiver process a "sham." Between December 8, 2017 and September 14, 2019, consular officers found eligible for waivers and issued a total of 7,701 immigrant and nonimmigrant visas. *See* Department of State Report, Appendix: Implementation of Presidential Proclamation (PP) 9645, December 8, 2017 to September 14, 2019 at 30-34 (Tables III(a) and (b)).[6] Thousands more were undergoing national security and public safety reviews as part of the waiver consideration process. *See* State Department June 2019 Report at 3. The Department of State has also noted that as of July 2019, it had implemented a new automated enhanced screening and vetting process it expected to increase the speed and efficiency of the vetting process. *See id.* at 3-4.

[5] Available at https://go.usa.gov/xVSmN (last visited on Oct. 21, 2019).
[6] Available at https://go.usa.gov/xVSmE (last visited on Oct. 21, 2019).

The President has also acknowledged that on April 10, 2018, the Secretary of Homeland Security transmitted to him "the first of the required reports" under the Proclamation, including "the results of the review and engagement process developed with the Secretary of State," pursuant to the Proclamation. *See* Presidential Proclamation 9723, 83 Fed. Reg. at 15,937-38. And in recent congressional testimony, the Department of Homeland Security noted that the Secretary made a recommendation to the President, pursuant to the Proclamation, every 180 days, although such recommendations are not make public. *See* House Judiciary Committee, Oversight of the Trump Administration's Muslim Ban, Testimony of Elizabeth Neumann, Assistant Secretary for Threat Prevention and Security Policy, Office of Strategy, Policy, and Plans (Sept. 24, 2019).[7] And nothing in Section 4 of the Proclamation requires those recommendations to be made public. Thus, although the question is legally irrelevant to plaintiffs' claim, there is no merit to the suggestion that the Secretary has failed to comply with the Proclamation's reporting requirement.

C. The District Court Misapplied Rational-Basis Review.

The district court made a series of errors in the application of the rational-basis standard. For example, the district court misperceived its role in questioning

[7] Available at https://go.usa.gov/xp3Wy at 1:47:38 – 1:48:51, 2:09:03 – 2:09:33, and 2:13:22 – 2:13:55 (last visited Oct. 21, 2019).

whether the Proclamation's stated national-security rationale truly "motivated" its promulgation, and in examining the "subjective intent of the President" in issuing the Proclamation. JA 266, 269. Under rational-basis review, "it is entirely irrelevant * * * whether the conceived reason" for the policy "actually motivated" its promulgation. *Beach Communications,* 508 U.S. at 315. Likewise, the district court's call for "a more fulsome record" on these issues, JA 271, is contrary to rational-basis review, in which a government policy "is not subject to courtroom fact-finding," *Beach Communications*, 508 U.S. at 315.

Nor was it proper for the district court to determine whether the Proclamation sufficiently "advance[d] its national security goal," JA 269, by asking whether the Proclamation's supposed "uneven application * * * undermine[s] the national security rationale," JA 267, questioning whether the waiver provision is sufficiently tailored to national-security risks, JA 268, or opining that "a person's country of citizenship is unlikely to be a reliable indicator of potential terrorist activity," JA 268-269. Under rational-basis review, the government policy "may be based on rational speculation unsupported by evidence or empirical data," *Beach Communications*, 508 U.S. at 315, and "[t]he assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the

[government's] choice from constitutional challenge," *id.* at 320. "These restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing." *Id.* at 315 (citation and quotation marks omitted). Like the dissent in *Hawaii*, the district court here concluded that plaintiffs' complaint survives dismissal only by "refusing to apply anything resembling rational basis review." *Hawaii*, 138 S. Ct. 2421. The district court erred by overstepping its proper role on rational-basis review.

Although the district court acknowledged that under rational-basis review the plaintiff has "the burden to negate every conceivable basis which might support" the Proclamation, the court held that plaintiffs "need not" meet that burden "at the motion to dismiss stage." JA 264. The district court asserted that it is instead sufficient for plaintiffs to allege facts that would "support a conclusion" or "support [an] inference" that "undermine[s]" the Proclamation's national-security rationale, JA 266-268, by "plausibl[y]" attacking that rationale, JA 270. The district court's approach, however, fundamentally misunderstood the application of rational-basis review on a motion to dismiss.

The district court thought that "plausible" attacks on the Proclamation would suffice under *Giarratano v. Johnson*, 521 F.3d 298 (4th Cir. 2008), and *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir. 1992). *See* JA 264-265.

While those cases hold that a "*conclusory* assertion is insufficient to overcome the presumption of rationality," *Giarratano*, 521 F.3d at 304; *see Wroblewski*, 965 F.2d at 460, it does not follow that any *non-conclusory* attack would overcome the presumption of rationality, especially where the Supreme Court has already rejected that attack.

As an initial matter, the "plausibility" standard that applies to *factual* allegations has no bearing on the *legal* question whether the Proclamation is supported by a rational basis. While "a court must accept as true all of the allegations contained in a complaint," that tenet "is inapplicable to legal conclusions," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and whether a government policy survives rational-basis review is a question of law, not a question of fact, *see Muscarello v. Ogle County*, 610 F.3d 416, 423 (7th Cir. 2010); *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 249 (5th Cir. 2000); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 471 (1st Cir. 1990); *see also Iqbal*, 556 U.S. at 674-75 ("Evaluating the sufficiency of a complaint is not a 'fact-based' question of law.").

Moreover, 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, because "if there is

any reasonably conceivable state of facts" showing "plausible reasons" supporting the policy, then the court's "inquiry is at an end." *Beach Communications*, 508 U.S. at 313-14; *see Hawaii*, 138 S. Ct. at 2420-21 (under rational-basis review, Court asks whether "the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes" and whether "it is impossible to discern a relationship to legitimate state interests"). Indeed, so long as those rational bases are "arguable," that "is sufficient, on rational-basis review, to 'immuniz[e]' the [governmental] choice from constitutional challenge." *Beach Communications*, 508 U.S. at 320.

Plaintiffs thus cannot avoid dismissal merely by positing a non-conclusory allegation questioning the Proclamation's national-security rationale. Such an allegation does not meet their burden under rational-basis review, especially where the Supreme Court has already rejected the premises of their challenge. As the Seventh Circuit explained, in elaborating on the case law relied upon by the district court here, "allegations of animus do not overcome the presumption of rationality and the court evaluates those allegations once a plaintiff has pled facts that show the irrationality of the government action in question. 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." *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 547 (7th Cir. 2008).

D. The District Court Failed To Consider Additional Grounds For Upholding The Proclamation's Validity.

Even assuming *arguendo* that plaintiffs somehow sufficiently alleged, notwithstanding *Hawaii*, that the Proclamation's national-security justification was irrational, that still would not be sufficient for their complaint to survive a motion to dismiss. Plaintiffs must further refute the Proclamation's foreign-policy justification and demonstrate why rational basis applies rather than the even more lenient standard of *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Yet the district court did not meaningfully consider either issue, and either one forecloses plaintiffs' claims.

1. The district court repeatedly stated, at most, that plaintiffs had presented allegations "for why the Proclamation is not rationally related to its stated *national security interests*." JA 265 (emphasis added). *See* JA 267 ("provide specific allegations aimed at refuting * * * the Proclamation's stated national security purposes"); JA 267 (Proclamation's supposed "uneven application * * * undermine[s] the national security rationale"); JA 268 ("the waiver process has not been applied in a manner consistent with the stated national security purposes of the Proclamation"); JA 268 ("support[s] the inference that the Proclamation is not

rationally related to the stated national security interests"); JA 269 ("Proclamation's nationality-based suspensions do not further the national security purpose"); JA 269 ("the travel ban does not rationally advance national security because there already exists legal authority to exclude any potential national security threat"); JA 272 ("Plaintiffs face the tall order of [refuting] the Government's contention that the Proclamation is rationally related to the stated legitimate national security purposes"). But that conclusion ignores the Proclamation's other "key objective[] * * * to encourage foreign governments to improve their practices, thus facilitating the Government's vetting process overall," which the Supreme Court made clear was a "legitimate purpose[]" of the Proclamation. *Hawaii*, 138 S. Ct. at 2411, 2421.

Specifically, the Proclamation focused in part on "whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information." *Id.* at 2404. After conducting a worldwide review, the government "identified 16 countries as having deficient information-sharing practices and presenting national security concerns" and another 31 countries that were "at risk." *Id.* at 2405. The State Department then "undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their

practices," and as a result "numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists"; only eight countries "remained deficient in terms of their risk profile and willingness to provide requested information." *Id.* And after the Proclamation was issued, the government continued its efforts to encourage foreign governments to improve their practices, which eventually led to Chad's removal from the list of counties whose nationals are subject to restrictions. *Id.* at 2406. The remaining countries were identified in the Proclamation, which imposed entry restrictions designed to address the specific shortcomings that pose a national-security risk.

That legitimate and rational objective is alone a sufficient basis for upholding the Proclamation. Under rational-basis review, plaintiffs "have the burden to negative *every conceivable basis* which might support" the Proclamation. *Beach Communications*, 508 U.S. at 314 (emphasis added). Even if the district court and plaintiffs were correct in their refutation of the Proclamation's national-security rationale (which they are not), the Proclamation would be fully justified by its alterative purpose of encouraging other countries to improve their information-sharing practices.[8]

[8] The district court, in a single sentence, asserted that plaintiffs' factual allegations show the Proclamation "is not rationally related to the * * * information-sharing

2. In addition, regardless of how rational-basis review applies, the Proclamation should be upheld under the even more lenient *Mandel* standard. In *Hawaii*, the Court noted that it "has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen"; under that limited review, courts ask only "whether the Executive gave a 'facially legitimate and bona fide' reason for its action." 138 S. Ct. at 2419 (quoting *Mandel*, 408 U.S. at 769). The Supreme Court observed that the "conventional application of *Mandel* * * * would put an end to our review." *Id.* at 2420. In light of the government's argument in the alternative, however, the Supreme Court merely "assume[d] that [it] may look behind the face of the Proclamation to the extent of applying rational basis review," *id.* at 2420, and did not resolve whether the more deferential *Mandel* standard should apply instead of rational-basis review.

The district court incorrectly understood *Hawaii* to require rational-basis review. JA 260. The Supreme Court did not resolve that question and in fact strongly suggested that *Mandel* should control. It emphasized that "[f]or more than a century," the admission and exclusion of foreign nationals was "largely immune

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justification[] identified in the Proclamation," JA 269, but nowhere in its opinion does it discuss any allegations relating to the information-sharing purpose.

from judicial control." *Hawaii*, 138 S. Ct. at 2418. And in response to the dissent's suggestion that "*Mandel* has no bearing on this case," the majority reiterated that *Mandel*'s "circumscribed judicial inquiry" has been "reaffirmed and applied * * * across different contexts and constitutional claims" and that the more deferential standard "'has particular force' in admission and immigration cases that overlap with 'the area of national security.'" *Hawaii*, 138 S. Ct. at 2418-19 (quoting *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in judgment)). The Court likewise noted that its "numerous precedents * * * make clear" that the "circumscribed inquiry" of *Mandel* "applies to any constitutional claim concerning the entry of foreign nationals." *Id.* at 2420 n.5. Because the application of *Mandel* "would put an end to [this Court's] review," *Hawaii*, 138 S. Ct. at 2420, and *Hawaii* strongly suggested that it is the appropriate standard to apply, this Court can uphold the Proclamation on this basis, regardless of the district court's errors pertaining to rational-basis review.

II. ALTERNATIVELY, PLAINTIFFS' CLAIMS MUST BE DISMISSED BECAUSE THEY LACK A LIBERTY INTEREST AND DO NOT ASSERT THEIR OWN CONSTITUTIONAL RIGHTS

Plaintiffs' claims also must be dismissed under two alternative arguments presented below but erroneously rejected by the district court. First, plaintiffs' Due Process claim must be dismissed because plaintiffs lack a liberty or property

interest in the issuance of a visa to a foreign national relative, and, at a minimum, they have received all the process they are due. Second, plaintiffs' Equal Protection and Establishment Clause claims must be dismissed because they are premised not on alleged violations of plaintiffs' own constitutional rights, but on the asserted rights of plaintiffs' foreign national family members.

A. Plaintiffs' Due Process Claim Fails Because They Lack a Protected Liberty Interest That Has Been Infringed.

To state a claim under the Due Process Clause, plaintiffs must allege the deprivation of a protected liberty or property interest. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam). Plaintiffs lack any protected interest in the issuance of a visa to a foreign national relative. In *Din*, the plurality explained that "before conferring constitutional status upon a previously unrecognized 'liberty,' we have required 'a careful description of the asserted fundamental liberty interest,' as well as a demonstration that the interest is 'objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.'" 135 S. Ct. at 2134 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). The plurality then noted that the "long practice of regulating spousal immigration precludes [a plaintiff's] claim that the denial of [her husband's] visa application has deprived her of a fundamental liberty interest," *id.* at 2135, which "repudiates

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," *id.* at 2136 (quotation marks omitted). "Only by diluting the meaning of a fundamental liberty interest and jettisoning our established jurisprudence could we conclude that the denial of [a husband's] visa application implicates any of [a U.S. citizen wife's] fundamental liberty interests." *Id.* at 2136. *See also Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (rejecting the premise that "the families of putative immigrants * * * have an interest in their admission"); *cf. Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) ("[W]e think the wife has no constitutional right which is violated by the deportation of her husband."). Because the Proclamation does not deprive plaintiffs of any liberty or property interest, their due process claim fails at the outset.

The district court rejected the government's argument solely on the ground that plaintiffs' contrary assertion of a protected liberty interest was "not foreclosed by the Supreme Court." JA 274. But that observation places the burden on the wrong party: even at the motion-to-dismiss stage, plaintiffs must affirmatively demonstrate that their factual allegations, if true, state a legally valid claim upon which relief can be granted, and thus they must demonstrate that they have a protected liberty interest as a matter of law, not just that it is an open question in

this Circuit whether they do. The district court also noted (JA 273) that "[t]he Ninth Circuit has specifically endorsed the existence of such a liberty interest in the context of a U.S. citizen's challenge to the denial of her husband's visa application," citing *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). But *Bustamante* was the very precedent relied upon by the Ninth Circuit in *Din v. Kerry*, 718 F.3d 856, 860-64 (9th Cir. 2013), which was reversed by the Supreme Court in *Kerry v. Din*.

Even if plaintiffs have a protected liberty interest, they have received all the process they are due. In *Hawaii*, the majority resolved this very issue by holding 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. That holding dooms the 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). *See, e.g.*, JA 152.[9]

[9] The district court opined that one plaintiff could state a due process claim because her foreign national mother-in-law was denied a waiver before she could apply. JA 274. But that allegation fails to state a violation of *plaintiff's* own due process rights, *see infra* at 49-52, and in any event an applicant whose visa is denied on the basis of the Proclamation is *automatically* reconsidered for a waiver, *see supra* at 35.

Plaintiffs argued below that the Proclamation deprives them of a liberty or property interest created by statutory a regulatory provisions that confer on plaintiffs the unqualified right to petition for visas on behalf of their relatives. But that argument is plainly meritless, because nothing about the Proclamation affects plaintiffs' ability to file petitions on behalf of their relatives who seek family-based immigrant visas. The Proclamation only affects a subsequent step in the process – *i.e.,* after a U.S. citizen or lawful permanent resident's petition is granted, then the foreign national relative must apply for a visa with a consular officer overseas, and *that* is when the Proclamation's entry suspensions first become operative. However, once the U.S. citizen's "petition [i]s granted * * * their cognizable interest [is] terminated." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999). Moreover, even if the Proclamation *did* alter the standard by which plaintiffs' petitions were evaluated, that still would not give rise to a cognizable due process claim: "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283 (1984); *see also Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

B. Plaintiffs' Equal Protection and Establishment Clause Claims Fail on the Merits Because They Are Not Premised on Plaintiffs' Own Rights.

Even accepting that Plaintiffs have Article III standing to challenge the exclusion of their relatives, clients, and members, *see Hawaii*, 138 S. Ct. at 2416, their Equal Protection and Establishment Clause claims against the Proclamation's exclusion of those third parties fail on the merits because those claims are not based on plaintiffs' own constitutional rights. The Proclamation does not regulate the plaintiffs at all; it applies only to aliens abroad (who themselves have no constitutional rights concerning entry into this country, *see Mandel*, 408 U.S. at 762). Plaintiffs nevertheless contend that the Proclamation violates the Equal Protection and Establishment Clauses because it allegedly discriminates against their foreign-national relatives (or, in the case of organizational plaintiffs, the foreign-national relatives of their clients and members) based on the religion of those third parties – or, more precisely, the predominant religion of their nations. *See supra* at 9-10. But U.S. plaintiffs cannot assert a derivative violation of their own Equal Protection or Establishment Clause rights predicated on indirect effects of alleged discrimination against third-party aliens (much less aliens who themselves have no rights to assert). *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (plaintiffs generally must assert their own constitutional rights, not the

rights of third parties). Put another way, the Proclamation cannot plausibly be said to discriminate against plaintiffs or any other U.S. citizens or residents on the basis of religion, because they are not subject to the Proclamation and their religion is irrelevant to its operation. And plaintiffs' foreign relatives and associates have no rights to assert under the Equal Protection or Establishment Clauses.

This conclusion is particularly clear with respect to plaintiffs' Equal Protection claim. After all, the Supreme Court itself has squarely upheld the dismissal of a challenge to allegedly discriminatory policies by plaintiffs who, while suffering economic injuries from the policies, were "not themselves subject to [the allegedly discriminatory] zoning practices" and thus were barred by the rule that "a plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see id.* at 509-10 (applying rule to alleged discriminatory zoning practices). And it is indisputable that plaintiffs' own religion is entirely irrelevant to the Proclamation's operation: their relatives would remain subject to the Proclamation regardless of whether they themselves were Muslim (and, in fact, regardless of whether their relatives were Muslim either). Plaintiffs try to evade this fundamental defect in their claim by alleging that the Proclamation "conveys an official message of disapproval and hostility" towards them as Muslims, and

"inflicts other stigmatic and dignitary injuries" on them, JA 114; *see also* JA 104-106, 109-113, 204, 223-226, but the Supreme Court has squarely held that an 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," *Allen v. Wright*, 468 U.S. 737, 754-55 (1984) (emphasis added). Were it otherwise, such claims could be asserted "nationwide [by] all members of the particular * * * groups against which the Government was alleged to be discriminating," thereby "transform[ing] federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* at 755-56 (citation omitted).

That analysis applies with full force to plaintiffs' Establishment Clause claims as well. As the Supreme Court has held, because "a litigant may only assert his own constitutional rights or immunities," he cannot succeed on a claim of religious discrimination when he "do[es] not allege any infringement of [his] own religious freedoms." *McGowan v. Maryland*, 366 U.S. 420, 429 (1961); *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 15, 17 (2004) (noting "the general prohibition on a litigant's raising another person's legal rights" and holding it "improper * * * to entertain a claim" of a litigant whose claim "derives entirely from his relationship with his daughter"). Allegations of a stigmatic message

cannot evade that fundamental rule in the Establishment Clause context any more than in the Equal Protection Clause context: "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not the type of "personal injury" that can support an Establishment Clause claim "even though the disagreement is phrased in constitutional terms." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982); *see American Legion v. American Humanist Assoc.*, 139 S. Ct. 2067, 2098-2103 (2019) (Gorsuch, J., concurring in the judgment); *IRAP*, 883 F.3d at 378-84 (Agee, J., dissenting).

To be sure, a plaintiff may suffer a "spiritual" injury from the violation of his own Establishment Clause rights where he himself has been "subjected to unwelcome religious exercises" or "forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 n.22. But the Proclamation says nothing about religion and does not subject plaintiffs to any religious exercise. As then-Judge Kavanaugh recognized, a putative Establishment Clause plaintiff cannot "re-characterize[]" an abstract injury flowing from "government action" directed against others as a personal injury from "a governmental message [concerning] religion" directed at himself. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (emphasis omitted), *cert. denied*, 556 U.S. 1167 (2009).

The district court rejected the government's argument as a "repackag[ing]" of its previous "unsuccessful standing argument" as a "different argument[] that Plaintiffs fail on the merits." JA 276. But *Hawaii* clarified that this issue "concerns the merits rather than the justiciability of plaintiffs' claims," 138 S. Ct. at 2416; *see also Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014), and thus the government's presentation of this argument as an issue concerning the merits simply follows the Supreme Court's guidance and is not a basis for rejecting the argument.

The district court also reasoned that *Hawaii* had "largely validated" its previous conclusion that plaintiffs have Article III standing to assert an Establishment Clause claim even though their own religion is irrelevant under the Proclamation. JA 276-277. But the fact that plaintiffs have Article III standing does not, of course, mean that their claims can prevail on the merits – indeed, *Hawaii* made clear that it was not resolving this threshold merits flaw in the claims asserted because those claims failed under rational-basis review regardless. 138 S. Ct. at 2416-23. Putting the same point differently, the Proclamation may *injure* plaintiffs, within the meaning of Article III, by "keeping [plaintiffs] separated from certain relatives who seek to enter the country," *Hawaii*, 138 S. Ct. at 2416, but it does not follow that the purported injury stems from a violation of plaintiffs' *own*

constitutional rights. To the contrary, it plainly does not, because the Proclamation does not even apply to plaintiffs and their own religion is entirely irrelevant to the Proclamation's operation.

CONCLUSION

For the foregoing reasons, 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.

Respectfully submitted,

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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 11,780 words excluding the parts of the brief excluded by Rule 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2019, I electronically filed the foregoing 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.

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