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.

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