No. 19-2375

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARAB AMERICAN CIVIL RIGHTS LEAGUE, on behalf of itself, its members, and its clients; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, on behalf of itself and its members; AMERICAN ARAB CHAMBER OF COMMERCE, on behalf of itself and its members; ARAB AMERICAN AND CHALDEAN COUNCIL, on behalf of itself and its members; ARAB AMERICAN STUDIES ASSOCIATION, on behalf of itself and its members; HEND ALSHAWISH; SALIM ALSHAWISH; FAHMI JAHAF; and KALTUM SALEH, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees

v.

DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CUSTOMS AND BORDER PROTECTION; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. DEPARTMENT OF STATE; U.S. DEPARTMENT OF JUSTICE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; KEVIN MCALEENAN, Acting Secretary of Homeland Security; MARK A. MORGAN, Senior Official Performing the Functions and Duties of the Commissioner of U.S. Customs and Border Protection; KENNETH T. CUCCINELLI, Acting Director of U.S. Citizenship and Immigration Services; MICHAEL R. POMPEO, Secretary of State; WILLIAM P. BARR, U.S. Attorney General; JOSEPH MAGUIRE, Acting Director of National Intelligence; UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the
United States District Court for the Eastern District of Michigan
Case No. 2:17-cv-10310-VAR-SDD

APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-2375 Case Name: ACRL, et al. v. Donald Trump, et al.

Name of counsel: Miriam J. Aukerman

Pursuant to 6th Cir. R. 26.1, Arab American and Chaldean Council
Name of Party
makes the following disclosure:

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2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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s/ Miriam J. Aukerman

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-2375 Case Name: ACRL, et al. v. Donald Trump, et al.

Name of counsel: Miriam J. Aukerman

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makes the following disclosure:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-2375 Case Name: ACRL, et al. v. Donald Trump, et al.

Name of counsel: Miriam J. Aukerman

Pursuant to 6th Cir. R. 26.1, American Civil Liberties Union of Michigan
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-2375 Case Name: ACRL, et al. v. Donald Trump, et al.

Name of counsel: Nabih H. Ayad

Pursuant to 6th Cir. R. 26.1, Arab American Civil Rights League, American Arab Chamber of Commerce, Hend Alshawish, Salim Alshawish, Fahmi Jahaf, and Kaltum Saleh
Name of Party

makes the following disclosure:

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UNITED STATES COURT OF APPEALS
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Case Number: 19-2375 Case Name: ACRL, et al. v. Donald Trump, et al.

Name of counsel: Miriam J. Aukerman

Pursuant to 6th Cir. R. 26.1, Kaltum Saleh
Name of Party
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STATEMENT REGARDING ORAL ARGUMENT

By taking the extraordinary step of granting certification under 28 U.S.C. §1292(b), the Court has already recognized the significance of this case. Plaintiffs-Appellees believe the Court would be aided by oral argument.

INTRODUCTION

The presidential Proclamation at issue in this appeal is complex.[1] But the civil procedure is not. Plaintiffs claim that President Trump's executive order was a down payment on his campaign promise of "a total and complete shutdown of Muslims entering the United States." The complaint—which necessarily relies only on publicly available evidence—alleges that the Proclamation is grounded in unconstitutional animus. Third Amended Complaint ("Compl."), R.124, PageID.2395-96. Before Plaintiffs obtained any discovery, Defendants moved to dismiss, arguing that the intervening case of *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), foreclosed the suit. The district court denied the motion.

Under the Federal Rules of Civil Procedure, the question on appeal is whether Plaintiffs' complaint pleads a constitutional violation with sufficient particularity to satisfy *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 556-57 (2007). The answer is plainly "yes." Plaintiffs' 124-page complaint goes far beyond reciting the bare elements of each of the three causes of action. Indeed, it is full of detailed allegations that support Plaintiffs'

[1] *See* Proclamation No. 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public Safety Threats," 82 Fed. Reg. 45,161 (Sept. 27, 2017) ("EO-3", or "Proclamation").

bottom-line allegation that the Proclamation was motivated by anti-Muslim animus. Plaintiffs are therefore entitled to litigate their claims.

The government contends that *Hawaii* covertly ruled on the ultimate merits of any conveivable challenge to the Proclamation—regardless of what facts another plaintiff might assemble—rather than simply deciding the preliminary-injunction issue on which certiorari was actually granted. This argument cannot be right. Defendants ignore the different substantive standard, different evidentiary standard, different procedural posture, and different record that controlled the extraordinary request for immediate interim relief in *Hawaii*. Defendants also ignore how the Supreme Court described its own holding before remanding for further proceedings like those here: "We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim." *Hawaii*, 138 S. Ct. at 2423.

At this stage, Plaintiffs need only allege facts demonstrating a plausible basis for finding the Proclamation unconstitutional. The district court correctly held that Plaintiffs made this showing. That decision should be affirmed.

STATEMENT OF ISSUES

I. Did the district court properly deny Defendants' motion to dismiss Plaintiffs' claim under the Establishment Clause?

II. Did the district court properly deny Defendants' motion to dismiss Plaintiffs' claim under the equal protection guarantee of the Fifth Amendment?

III. Did the district court properly deny Defendants' motion to dismiss Plaintiffs' claim under the First Amendment rights to freedom of speech and asssociation?

STATEMENT OF THE CASE

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

Throughout his campaign, President Donald Trump said he wanted a "total and complete shutdown on Muslims entering the United States." Compl., R.124, PageID.2391. President Trump later rebranded this "Muslim ban" as a "travel ban," making clear that the switch from a religious-based ban to a country-based ban was merely "politically correct" cover: "People were so upset when I used the word 'Muslim.' 'Oh, you can't use the word 'Muslim.' Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." *Id.*, PageID.2411.

On his eighth day in office, President Trump fulfilled this campaign promise through Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO-1"). EO-1 restricted travel to the U.S. for nationals of seven Muslim-majority countries. The President signed EO-1 without consulting the Department of Homeland Security, the Department of Defense, or the Department of State. Compl., R.124, PageID.2419. The ban was swiftly challenged and enjoined. *Id.*, PageID.2430.

On March 6, 2017, President Trump replaced EO-1 with Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO-2"). EO-2 had the same purpose and effect as EO-1: Both were designed to, and did, prevent Muslims from entering the U.S.

EO-2 suffered from the same fundamental defects as EO-1 and was quickly blocked by the courts. Compl., R.124, PageID.2441-44.

On September 24, 2017, the President issued a third version of the ban, Proclamation No. 9645 ("Proclamation" or "EO-3"), imposing an indefinite ban on most travel to the U.S. by more than 150 million people, the vast majority of whom are Muslim. Compl., R.124, PageID.2445-46. EO-3 suspended entry indefinitely for nationals of five of the six countries included in EO-2 (Iran, Libya, Syria, Yemen, and Somalia, together "Designated Countries"), as well as another Muslim-majority country (Chad) that was later removed from the list. *Id*., PageID.2447-48. EO-3 also imposed restrictions on North Korean nationals, even though virtually no North Koreans travel to the U.S., and on non-immigrant entry of a small group of Venezuelan government officials and their immediate families. *Id.*, PageID.2454-55.

EO-3 purports to be based on a worldwide review of information-sharing practices, policies, and capabilities of foreign countries, stating that the Secretary of Homeland Security "developed a baseline for the kinds of information required from foreign governments" (the "baseline test") and evaluated each country against this baseline. *Id.*, PageID.2453-54. Despite purporting to cover every foreign country's information-sharing practices, the report on this worldwide review was a mere 17 pages long. *Id.*, PageID.2474.

EO-3 includes a waiver provision, but in practice there is no procedure to apply for these waivers. *Id.*, PageID.2448, 2458. Waivers are rarely granted; some applicants have received pro forma denials of both visas and waivers from consular offices around the world. *Id.*, PageID.2458-59. Further, "waivers under EO-3 are purely discretionary and are issued, if at all, only on a case-by-case basis." *Id.*, PageID.2448.

B. Plaintiffs Seek to Enjoin the Proclamation.

Plaintiffs filed suit, alleging that EO-3 gravely harmed them and violated their constitutional rights. The individual Plaintiffs are U.S. citizens and lawful permanent residents who seek to reunite with family members but cannot because EO-3 prohibits their family members from entering the U.S. *Id.*, PageID.2496-501. They include parents separated from their minor children, a husband separated from his wife, and a daughter seeking to care for her elderly mother. *Id*. Many members and clients of the organizational Plaintiffs are likewise separated from their families because of EO-3. *Id*., PageID.2476-77, 2479, 2485-89, 2494.

The individual Plaintiffs and many members and clients of the organizational Plaintiffs are Muslim; as Muslims unable to reunite with their Muslim family members abroad, they feel singled out and condemned by the message that EO-3 sends of disapproval and hostility towards Islam as a disfavored religion. *Id.*, PageID.2475-77, 2483-85, 2494-501.

EO-3 also harms Plaintiffs' ability to hear from, speak with, debate with, and associate with individuals from the Designated Countries. For example, EO-3 impedes Plaintiff Arab American Studies Association's (AASA) goal of advancing learning and exchanging ideas with scholars from the Designated Countries through scholarly collaboration, international conferences, and recruitment of faculty and students. *Id.*, PageID.2489-94. EO-3's failure to provide narrow, objective, or definite standards for the issuance of case-by-case waivers only exacerbates the problem. *Id.*, PageID.2492. Similar effects on the other organizational plaintiffs have left them all unable to fully carry out their programs or to completely fulfill their missions. *Id.*, PageID.2477-81, 2483-88, 2490-94. And EO-3 has forced all of the organizational plaintiffs to divert their limited resources from their ordinary activities to addressing crises faced by their members and other disruptions to their organizations. *Ibid*.

C. Proceedings in the District Court.

Shortly after the President announced EO-1, Plaintiffs moved for a TRO, which the district court granted in part. Order on Pl.'s Mot. for TRO, R.8, PageID.70. Plaintiffs then filed a First Amended Complaint, R.13, and, after President Trump replaced EO-1 with EO-2, a Second Amended Complaint. R.41. The operative Third Amended Complaint addresses EO-3. R.124.

Instead of seeking a preliminary injunction, Plaintiffs vigorously pursued discovery from the outset, believing that further factual development was essential. *See* Discovery Pleadings, R.43, 61, 78, 104, 108, 110, 131, 139, 145, 146. The district court recognized that discovery would be subject to significant limitations and require resolution of "complex privilege issues." Order Denying Mot. to Extend Time, R.89, PageID.1224. But the court rejected the government's blanket assertion that the burden on the Executive categorically outweighed the need for discovery. *Id.* Rather, the court allowed limited discovery, and the parties began briefing the privilege issues. *Id.*, PageID.1225-26.

Before any discovery was produced, the district court stayed proceedings pending the Supreme Court's consideration of *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) ("*IRAP I*"). Order Granting Stay, R.114, PageID.2309. The Court recognized that the "high respect" owed to the Executive "should inform the entire proceeding, including the timing and scope of discovery," and concluded that any Supreme Court decision would likely provide guidance for discovery. *Id.*, PageID.2307-08.

D. The Supreme Court Holds in *Hawaii* that the Preliminary Record Compiled Before Discovery Was Insufficient to Justify the Extraordinary Remedy of Interim Relief.

The Supreme Court subsequently granted certiorari in *Hawaii v. Trump*. The Court held 5-4 that the plaintiffs there had failed to demonstrate a likelihood of

success on the merits sufficient to entitle them to a preliminary injunction. 138 S. Ct. at 2423. The Court weighed the "extrinsic evidence" before it under the demanding standard applicable to preliminary injunctions, and found "persuasive evidence" that EO-3 could "reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420-21. The Court repeatedly noted the limited nature of its holding, *id.* at 2423 ("Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion."), and emphasized that it was *not* reaching the ultimate merits, *id.* ("We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim."). Justice Kennedy's concurring opinion likewise stressed that whether proceedings should continue "is a matter to be addressed in the first instance on remand." *Id.* at 2424 (Kennedy, J., concurring).

Four justices dissented. Based solely on the publicly available evidence, they would have held that "plaintiffs are likely to succeed on the merits of their Establishment Clause claim." *Id.* at 2433 (Sotomayor, J., dissenting); *see also id.* at 2431 (Breyer, J., dissenting) ("[T]here is evidence that supports ... that the Government is not applying the Proclamation as written."). *Id.* at 2431.

E. Plaintiffs File an Amended Complaint.

After *Hawaii* was decided, Plaintiffs filed their Third Amended Complaint, R.124, which included two claims not at issue in *Hawaii*. Plaintiffs' complaint also included new factual allegations that were not in the *Hawaii* record, including:

- New allegations tying Trump's anti-Muslim campaign statements to the resulting excutive orders, *id.*, PageID.2410-13 (alleging, *e.g.*, the President's personal lawyer, Rudy Giuliani, described a memorandum that his "commission" prepared that "had caused the candidate's proposal to shift from a 'general ban' to 'very specific, targeted criteria' focusing on specific countries");
- New allegations further corroborating Plaintiffs' bottom-line allegation that the government's proffered justification is a pretext for anti-Muslim animus, *id.* PageID.2429-30, 2461 (alleging, *e.g.*, that President Trump's assertions about terrorism statistics in a speech to Congress were conceded to be false in response to a FOIA request);
- New allegations that undermine the government's purported national security interests, *id.* PageID.2423-24, 2429-30, 2461, 2471, *see, e.g.*, PageID.2423-24 (discussing letter from DHS Inspector General to several Senators concluding that there was no "evidence that [Customs and Border Protection] detected any traveler linked to terrorism based on the additional

procedures required by the EO"); *id.*, PageID.2461 (new allegation that "[a]t a September 2017 meeting…., Associate Attorney General Rachel Brand stated that Attorney General Sessions did not 'agree with the conclusions of [a report claiming that refugees presented national security risks],' and would not be guided by its findings."); PageID.2471 (new allegation that a January 2018 DHS and DOJ report justifying the Executive Order has been "heavily criticized by several former Government officials, including a former Assistant Attorney General for DOJ's National Security Division," because "the report's flawed methodology results in vastly overstating the risk posed by immigrants");

- New evidence of harm to Muslims resulting from the ban, *id.* PageID.2440, 2460 (alleging, *e.g.*, impacts to student visas and refugee admissions, and evidence that hate crimes against Muslims have "not only increased dramatically since President Trump announced his candidacy, but also spiked coincident with events such as his call for a Muslim ban").

F. The District Court Denies the Motion to Dismiss.

The government moved to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1)[2] and failure to state a claim under FRCP 12(b)(6). R.128. The district

[2] The government has not appealed the district court's denial of the challenges under FRCP 12(b)(1).

court denied the motion, holding that "Plaintiffs plausibly allege sufficient facts to demonstrate that the Proclamation is not rationally related to national security goals of preventing inadequately vetted individuals and inducing other nations to improve information sharing," and that Plaintiffs "also plausibly allege[] that the Proclamation is not able to be explained by anything but animus toward Muslims." Order & Opinion Denying Motion to Dismiss ("Opinion"), R.138, PageID.2750, 2752. The court emphasized that "Plaintiffs' Third Amended Complaint contains extensive, detailed, and non-conclusory allegations that support their three claims." *Id.*

In reaching these conclusions, the district court relied on allegations that had not been in the *Hawaii* record, such as the fact that "[i]n early July 2016, Giuliani indicated that his commission caused President Trump's proposal to shift from a 'general ban' to 'very specific, targeted criteria' focusing on specific countries." *Id.*, PageID.2733-34. The district court also found that "publicly available data regarding the rate at which waivers are granted provide even more evidence that the Government enforces a *de facto* Muslim ban." *Id.*, PageID.2740. That data has changed since the Supreme Court considered similar arguments. *See Hawaii*, 138 S. Ct. at 2422-23 (pointing to waiver program as evidence of likely national security purpose); *id.* at 2423 n.7 (recognizing that effectiveness of waiver process could

provide "a piece of the picture"); *id.* at 2430 (Breyer, J. dissenting) (observing that how government uses waivers would shed light on Proclamation's true purpose).

The district court rejected Defendants' argument that *Hawaii* forecloses further litigation, explaining in detail how different standards apply on a motion for a preliminary injunction and a motion to dismiss. Opinion, R.138, PageID.2748-49. The court also noted that "[t]he Supreme Court explicitly recognized the limited nature of its holding in *Hawaii*, stating that '[u]nder these circumstances'—i.e., based on the limited record presented—'the 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 [Establishment Clause] claim.'" *Id.* (quoting *Hawaii*, 138 S. Ct. at 2423) (emphasis in original).

SUMMARY OF ARGUMENT

The district court correctly denied the government's motion to dismiss, finding that Plaintiffs had alleged facts sufficient to state plausible claims under the Establishment Clause, the Fifth Amendment's equal protection guarantee, and the First Amendment's speech and association clauses. Nothing in *Hawaii* is to the contrary.

Plaintiffs' 124-page complaint goes far beyond reciting the bare elements of their Establishment Clause claim. As the district court recognized, the complaint contains highly particularized allegations that individually and collectively support Plaintiffs' bottom-line allegation: EO-3 was, in fact, motivated by anti-Muslim animus. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (animus is not a legitimate government interest). The district court also correctly considered Plaintiffs' allegations that EO-3 does not further the purported national-security justification, both because analysis of the "baseline test" and waiver process show they are fundamentally flawed, and because existing immigration law already achieves the objectives that EO-3 supposedly advances. *See Craigmiles v. Giles*, 312 F.3d 220, 227-29 (6th Cir. 2002) (considering overbreadth and underbreadth with other indicia of purpose before striking down statute under rational-basis review).

Defendants' challenges to the Establishment Clause claim misunderstand both civil procedure and constitutional law. First, the government conflates the liberal pleading standard under Rule 12(b)(6) with the stricter showing ultimately required to prevail on the merits. Rational-basis review does not deprive plaintiffs of the presumption that their allegations are true on a motion to dismiss. *Davis v. Prison Health Servs.*, 679 F.3d 433, 438-40 (6th Cir. 2012). Second, the government wrongly argues that Plaintiffs are not entitled to an opportunity for discovery. A long line of precedent holds that rational-basis review is conducted on an evidentiary

record. *E.g.*, *Craigmiles*, 312 F.3d at 227-29. Third, the government's belated effort to identify a purported information-sharing objective distinct from a purported national-security purpose is both unpersuasive and waived. Finally, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), poses no bar because Plaintiffs have alleged with particularity that the purported justification for EO-3 was not made in good faith.

Appellants do not engage with Plaintiffs' separate claims that EO-3 violates their rights to equal protection, free speech, and free association. The district court correctly held that Plaintiffs plausibly alleged separate violations of these constitutional rights.

As a matter of equal protection doctrine, purposeful discrimination on the basis of religion is subject to strict scrutiny even if perpetrated through a facially neutral mechanism. *See Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008). The existence of the requisite purpose is a question of fact. *See Shaw v. Reno*, 509 U.S. 630, 646, 653-57 (1993). A factual finding that EO-3 targeted Muslims would thus trigger strict scrutiny. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-266 (1977). This would be true even if anti-Muslim animus was not the sole motivation. *Id.* Plaintiff's well-pleaded allegations that EO-3 targets Muslims therefore means that EO-3 must here be assessed under strict scrutiny—a level of review it plainly cannot survive.

Because Defendants utterly ignore the free speech and free association claims, any appeal on those claims has been waived. *See United States v. Jerkins*, 871 F.2d 598, 602 n.3 (6th Cir. 1989). Regardless, as a matter of First Amendment doctrine, Plaintiffs have plausibly alleged that Defendants have violated their free-speech and free-association rights by relying on viewpoint and content in denying entry to persons with whom Plaintiffs wish to speak, debate, or associate, and whose ideas Plaintiffs wish to hear. Under EO-3's waiver procedure, government officials also have unbridled discretion to decide whether any particular speaker's admission would "be in the national interest," EO-3 §3(c)(i), allowing them free rein to discriminate on the basis of viewpoint and content. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (ruling unconstitutional a scheme under which permits could be denied based on an official statement that a request was "not in the public interest").

The government's principal response to all this is to claim that *Hawaii* reached out *sub silentio* beyond the preliminary-injunction question on which certiorari was granted to issue a final merits decision on "the ultimate legal conclusion that the Proclamation survives rational-basis scrutiny." Gov't Br. 33-34. But that contradicts what *Hawaii* actually said: "We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim." *Hawaii*, 138 S. Ct. at 2423 ("returning [the case] to the lower courts for such further

proceedings as may be appropriate" rather than with instructions to dismiss). More fundamentally, the government misunderstands how preliminary injunctions are litigated. The fact that the *Hawaii* plaintiffs could not amass enough public evidence to satisfy the demanding requirements for extraordinary interim relief *before* litigating the merits of their Establishment Clause claim does not speak to whether Plaintiffs here are entitled to well-managed fact development *in the ordinary course* of litigating their own claims on the merits—particularly where Plaintiffs raise different claims and have already made factual allegations that go beyond those in *Hawaii*.

For the first time on appeal, the government argues that Plaintiffs do not assert their own constitutional rights. This argument was not raised below, and is in any event nothing more than a repackaging of Defendants' failed standing arguments—right down to the cases cited. The argument also fails because the complaint leaves no room for doubt that Plaintiffs are alleging violations of their own rights. The Supreme Court has repeatedly accepted plaintiffs' assertions of their own injuries in deciding whether a foreign person's visa denial violates the constitutional rights of a U.S. citizen or lawful resident.

ARGUMENT

Standard of Review

Review of a motion to dismiss is de novo. *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 363 (6th Cir. 2015).

I. Plaintiffs' Well-Pleaded Complaint Plausibly Alleges a Violation of the Establishment Clause.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Plaintiffs' allegations readily satisfy this minimal plausibility threshold.

Defendants argue that *Hawaii* forecloses the possibility that any plaintiff on any set of allegations could ever challenge EO-3. As further discussed in Part III.A, *Hawaii* simply cannot be read as deciding the very different 12(b)(6) question presented here. The Court relied on a highly incomplete body of evidence, and explicitly stated it was not reaching the merits. *Hawaii*, 138 S. Ct. at 2423. Certainly the Court never suggested that it was making a final determination of the *Hawaii* plaintiffs' Establishment Clause claim, much less that their allegations failed to state a claim under Rule 12(b)(6). That is why the Court "return[ed] [the case] to the lower courts for such further proceedings as may be appropriate," *id.*, rather than remanding it with instructions to dismiss. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674,

691-92 (2008) ("Adjudication of the merits is most appropriate if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail…. Because the Government is entitled to judgment as a matter of law, it is appropriate for us to terminate the litigation now."); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-585 (1952).

Crucially, the *Hawaii* court expressly relied on its assessment of the limited evidence that was then publicly available without discovery. The Court explained that it could "consider plaintiffs' extrinsic evidence" to determine whether EO-3 was rationally based on the purported national-security rationale, or whether it could be explained only by anti-Muslim animus. *Hawaii*, 138 S. Ct. at 2420. The Court concluded, however, that the record compiled by the *Hawaii* plaintiffs at that point in that case was insufficient to establish a likelihood of success on the merits because the "evidence" supporting the "national security concerns" was "persuasive."[3] *Id.* at at 2421. It thus concluded that "*[u]nder these circumstances*, the Government has set forth a sufficient national security justification to survive rational basis review," *Id.* at 2423 (emphasis added). Far from precluding further review, this ruling invites it. *See Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) ("the proof required

[3] The preliminary evidence that the Court found "persuasive" all involved facts that may appear different after discovery: the baseline criteria review process, a claimed practice of ongoing review to determine whether restrictions remain warranted, and efficacy of the waiver process *Id.* at 2421-23.

for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion.").

The dissenting opinions only further emphasize the crucial point here: The Justices' dispute turned on their respective assessments of the evidence. *See Hawaii*, 138 S. Ct. at 2433 (Breyer, J., dissenting) (reviewing "[d]eclarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs" to find "evidence of antireligious bias"); *see also id.* at 2442 (Sotomayor, J., dissenting) ("the overwhelming record evidence" supports plaintiffs' claims). Justice Kennedy's concurrence likewise confirms that the Court did not resolve the ultimate merits. He joined the majority opinion, but also wrote separately to state that "[w]hether judicial proceedings may properly continue in this case ... is a matter to be addressed in the first instance on remand." *Id.* at 2424 (Kennedy, J., concurring).

A. Plaintiffs' Detailed Allegations Plausibly Allege that EO-3 Targets Muslims.

Plaintiffs have gone far beyond a bare recitation of the formal elements of their cause of action to make detailed and particularized "factual allegation[s] sufficient to plausibly suggest [Defendants'] discriminatory state of mind." *Iqbal*, 556 U.S. at 683. If credited as true, as required on a motion to dismiss, this mass of specific factual claims requires a conclusion that EO-3 does not rationally further the purported national security interest, but is instead motivated by animus against Muslims. That finding would render EO-3 unconstitutional under any level of

scrutiny. *See Moreno*, 413 U.S. at 534 (striking down statute under rational-basis review after a totality-of-the-circumstances consideration of both direct evidence that law targeted "hippies" and inferential evidence that it was poorly tailored to its purportedly neutral ends); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).

Official Statements Before and After the Presidential Election: Plaintiffs' Complaint chronicles in detail President Trump's repeated expressions of prejudice and an intent to discriminate against Muslims, including making a central talking point of his campaign the promise to ensure a "total and complete shutdown of Muslims entering the United States." Compl., R.124, PageID.2391, 2411-13; *see also id.*, PageID.2404-09 (collecting anti-Muslim statements). True to this promise, he issued EO-1 shortly after taking office. *Id.*, PageID.2414. When that order was swiftly enjoined, he issued EO-2, which he himself described as a "watered-down version" of the initial ban. *Id.*, PageID.2442. When EO-2 was enjoined, the President tried again with EO-3. *Id.*, PageID.2445-46. Plaintiffs plausibly allege that all three orders embody the same discriminatory policy. *Id.*, PageID.2456.

Defendants contend that the President's anti-Muslim statements are irrelevant, Gov't Br. 15, 21, but *Hawaii* holds otherwise. Although the Court refused to decide EO-3's constitutionality based *solely* on those statements, it made clear that such

language cannot be ignored and is relevant evidence.[4] The Court specifically stated that this evidence "may be considered," provided the "authority of the Presidency itself" is taken into account. *Hawaii*, 138 S. Ct. at 2418, 2420. *See also Village of Arlington Heights*, 429 U.S. at 267-68 (in proving discriminatory purpose, court can consider "the historical background of the decision[], particularly if it reveals a series of official actions taken for invidious purposes," including "[t]he specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," and "contemporary statements"). The district court thus correctly considered the President's anti-Muslim statements in deciding whether Plaintiffs had plausibly alleged that EO-3 targets Muslims.

Design and Implementation of the "Baseline Test": Even when a law appears to rely on neutral criteria, it fails rational-basis review if those criteria are applied unevenly and irrationally. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985) (denial of housing permit failed rational-basis review where

[4] This is perfectly consistent with the Supreme Court's conclusion in *Department of Homeland Security v. Regents of the University of California* that President Trump's statements about Latinos were "unilluminating" in that case. 140 S. Ct. 1891, 1916 (2020) (not overruling *Hawaii*). The President's statements there were "remote in time and made in unrelated contexts," *id.*, whereas here they are part of a continuous pattern of describing a specific policy throughout its evolution. Moreover, the order challenged in *Regents* was not issued by the President, as here, but by different officials for whom there was no evidence of animus. *Id.*

purportedly neutral criteria were applied differently to homes for people with disabilities than to other group homes). The district court thus correctly considered Plaintiffs' plausible allegations that EO-3 is similarly flawed due to the way the "baseline test" was designed and implemented. Opinion, R.138, PageID.2739.

The baseline test was created by copying eligibility criteria from the Visa Waiver Program. Compl., R.124, PageID.2450-51. Visa Waiver Program criteria are used to determine whether a country's citizens are eligible for certain visas—visas allowing entry by business travelers and tourists visiting for less than 90 days—*without* an in-person interview or detailed written submission. *Id.*, PageID.2451. Those criteria serve no rational purpose when used to determine which noncitizens should be barred indefinitely from entering, even *with* an in-person interview and detailed submission. *Id.*, PageID.2451-52. Indeed, Plaintiffs plausibly allege that the criteria used to determine participation in the Visa Waiver Program are not rationally related to EO-3's purported objective, and EO-3's reliance on these criteria simply reflects its anti-Muslim animus. *Id.*, PageID.2452.

Plaintiffs further allege that implementation of the baseline test shows it is not a legitimate national-security tool. The government supposedly applied the test in a "worldwide review" resulting in a report that—despite purporting to cover every

country's information-sharing practices—was only 17 pages long.[5] *Id.*, PageID.2435, 2474. Plaintiffs plausibly allege that this review was a sham engineered after EO-1 and EO-2 were enjoined to continue targeting nationals from Muslim-majority countries. Indeed,"DHS reports leaked in early 2017 indicated that targeting these countries is not rationally calculated to preventing terrorism…." *Id.*, PageID.2450.

Plaintiffs also allege that EO-3's treatment of the results of the baseline test further demonstrates that EO-3 fails rational-basis review. Rather than implementing the test's results, EO-3 ignores its own assessments of national security. For example, the worldwide review apparently identified 16 "inadequate" and 31 "at risk" countries, but EO-3 does not explain how or why the Designated Countries were singled out for restrictions from that broader list of countries. *Id.*, PageID.2453. Nor does EO-3 provide any reason why certain other countries that do not share important screening information (such as Belgium) did not likewise have restrictions imposed. *Id.*

EO-3 also explicitly deviates from the baseline test in favor of other grounds not rationally related to its purported purposes. For example, in May 2016, the

[5] While the Supreme Court did not think the mere fact of the report's brevity established a lack of "thoroughness of the multi-agency review" standing alone, the Court did not suggest that the *Hawaii* plaintiffs could not seek discovery to establish a lack of thoroughness through direct evidence. *Hawaii*, 138 S. Ct. at 2421.

General Accounting Office reported that "more than a third of the 38 countries that participate in the Visa Waiver Program did not share the identity of terrorists or criminal histories, despite having agreed to do so as a condition of participating in the program." *Id.* Yet EO-3 does not explain why only eight of these countries were targeted, most of which are majority Muslim. *Id.* Plaintiffs also allege that the addition of two non-majority-Muslim countries to EO-3 (Venezuela and North Korea) fails to demonstrate a religion-neutral basis, but is instead a transparent effort to paper over EO-3's anti-Muslim motivations: "Only a handful of Venezuelan government officials and their immediate families are targeted" and "[a]ccording to State Department statistics, the ban on entry by North Korean nationals will affect fewer than 100 people." *Id.*, PageID.2455. In comparison, "[i]f in effect in 2016, EO-3 would have barred 12,998 Yemenis, 7,727 Iranians, 2,633 Syrians, 1,797 Somalians, and 383 Libyans…." *Id.*, PageID.2455. These allegations plausibly demonstrate that the baseline test is irrational in both design and implementation.

Design and Implementation of the Waiver Process: The district court correctly considered allegations regarding the design and implementation of EO-3's waiver process. Opinion, R.138, PageID.2740. Courts have invalidated laws under rational-basis review when they contain exemptions inconsistent with the law's purported purpose. *See Peoples Rights Org., Inc. v. Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (exemption caused law to fail rational-basis review because "[t]here simply

exists no rational distinction between" those covered by the law and those exempted); *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008) (law failed rational-basis review where, by including an exemption, "government has undercut its own rational basis" for the law). Plaintiffs have plausibly alleged that the waiver process suffers from this sort of irrationality.

Plaintiffs plausibly allege that EO-3's irrationality is evident from the design and implementation of its waiver provisions. Implementation of the waiver process can be explained only in relation to EO-3's anti-Muslim purpose. Given how rarely waivers are granted, Plaintiffs plausibly allege that the waiver process is "window dressing" designed to avoid "substantively alter[ing] the Muslim ban that Candidate Trump promised." Compl., R.124, PageID.2461.

Redundancy With Existing Law: If other facts tend to support the conclusion that the government's stated rationale is pretextual, a law fails rational-basis review when existing legal requirements already achieve the alleged objective of the challenged law. *See Moreno*, 413 U.S. at 536 (restriction on food stamps was not a rational law to prohibit fraud when existing statute already addressed food-stamp fraud). In *Craigmiles*, for example, the Sixth Circuit held that a law granting funeral directors exclusive authority to sell caskets could not survive rational-basis review as a consumer-protection measure, in part because existing law already policed inappropriate sales tactics. 312 F.3d at 227-29.

Plaintiffs have plausibly alleged that EO-3 fails rational-basis review because existing immigration laws already achieve the identical purported national-security objectives. Compl., R.124, PageID.2451-52. Consular officers must already consider whether a person's entry poses a national-security risk, 8 U.S.C. §1182(a)(3), and must deny entry if they lack sufficient information to make that determination, *id.* §1361; 22 C.F.R. §40.6. Plaintiffs have alleged that "this robust vetting system works," noting that "[n]o person from a Designated Country has killed anyone in the United States in a terrorist attack in over 40 years." Compl., R.124, PageID.2465. EO-3 does not cite any visa-vetting failures, nor does it explain how the President concluded that these existing procedures were inadequate. Plaintiffs also allege that the ban will cause serious harm to national security, as many former national security officials attest. *Id.*, PageID.2466-71.

In sum, when Plaintiffs' factual allegations are accepted as true, Plaintiffs have plausibly alleged that EO-3 cannot "reasonably be understood to result from a justification independent of unconstitutional grounds," *Hawaii*, 138 S. Ct. at 2420, and that it targets Muslims in violation of the Establishment Clause.

B. The Government's Rational-Basis Arguments Misapprehend the Structure and Application of Both Civil Procedure and Constitutional Doctrine.

The government contends that the "district court committed a variety of fundamental errors" in applying the rational-basis standard. Gov't Br. 21. That

contention lacks merit. First, the government misunderstands the operation of Rule 12(b)(6). Second, the government fails to recognize that rational-basis cases regularly turn on evidence that emerges during discovery. Third, the alternative grounds belatedly offered by the government on appeal are waived and, in any event, already subsumed within the national security justification argued below.

1. The 12(b)(6) Standard Requires the Court to Credit Plaintiffs' Well-Pleaded Factual Allegations as True.

The government largely ignores cases deciding motions to dismiss, instead relying heavily on *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), and other cases addressing the sufficiency of evidence for the ultimate merits of a rational-basis challenge. Gov't Br. 39-45. This argument confuses the standard for stating a claim at the motion-to-dismiss stage with the standard for proving the claim on the merits.

As this Court explained in *In re City of Detroit, Mich.*, "[t]o survive a motion to dismiss in the rational basis context, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." 841 F.3d 684, 701 (6th Cir. 2016). If the plaintiff's "allegations, accepted as true, support an inference that the [defendants] purposefully engaged in discrimination," then the plaintiff "deserves a shot at additional factual development, which is what discovery is designed to give." *Davis v. Prison Health Serv's*, 679 F.3d 433, 438-40 (6th Cir. 2012). Motions to dismiss should thus be denied if a complaint "alleg[es]

facts that negat[e] the ... most likely non-discriminatory reasons" for a government policy, *In re City of Detroit*, 841 F.3d at 701-02, or "demonstrat[es] that the challenged government action was motivated by animus or ill-will," *Davis*, 679 F.3d at 438-40. Complaints should be dismissed, by contrast, if they "include[] no facts rebutting the likely non-discriminatory reasons" for differential treatment. *In re City of Detroit*, 841 F.3d at 702-03.

The framework elaborated by this Court maps onto *Iqbal*'s distinction between (sufficient) complaints that make "well-pleaded factual allegations" and (insufficient) complaints that comprise "threadbare recitals of a cause of action's elements" from a "plaintiff armed with nothing more than conclusions." 556 U.S. at 678-79. The latter should be dismissed. The former should be permitted an opportunity for discovery.

Numerous courts of appeals have likewise held that although a law may appear rational before development of a full evidentiary record, this initial appearance of rationality can be refuted once that full evidentiary record has been developed. *See, e.g.*, *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1183-84 (10th Cir. 2009) (reversing dismissal under Rule 12(b)(6) because "without drawing factual inferences against the plaintiffs, the district court could not conclude at this early stage in the case that the [government action] was rational as a matter of law); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590-92 (9th Cir. 2008) (rejecting the

government's argument that a plausible basis for a law "necessarily defeats" the plaintiff's claim at the motion-to-dismiss stage, because the plaintiff must be allowed "to rebut the facts underlying defendants' asserted rationale"); *Keenon v. Conlisk*, 507 F.2d 1259, 1261 (7th Cir. 1974) (holding that "it was improper to dismiss the complaint without considering any evidence" that a government policy lacked a rational basis).

As set out in Part I.A, Plaintiffs have gone far beyond a bare recitation of the formal elements of their causes of action. Indeed, they have made extensive and detailed factual allegations in support of two independent conclusions, either of which would cause EO-3 to fail even rational-basis review: First, EO-3 is grounded in anti-Muslim animus; second, EO-3 is not rationally related to a legitimate government interest. A "well-pleaded complaint" like this one "may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556; *Palin v. New York Times Co.*, 940 F.3d 804 (2d Cir. 2019) (plaintiff's evidentiary burden at trial may be high; "[a]t the pleading stage, however, [Plaintiff's] only obstacle is the plausibility standard of *Twombly* and *Iqbal*").

2. Plaintiffs Are Entitled to Compile a Factual Record by which to Assess the Purpose and Rationality of the Proclamation.

Claiming that rational-basis review "'is not subject to courtroom fact-finding,'" the government also denies that EO-3's rationality should be determined

based on a factual record. Gov't Br. 22, 25 (quoting *Beach Communications*, 508 U.S. at 315).

The government vastly overreads *Beach Communications*. *Hawaii* itself proves the point: The Supreme Court expressly stated that it would consider "extrinsic evidence" in the record before concluding that there was "persuasive evidence" that EO-3 "ha[d] a legitimate grounding in national security concerns." *Hawaii*, 138 S. Ct. at 2420-21. That approach was in keeping with the Court's longstanding position that rational-basis review may be conducted on an evidentiary record. *See, e.g.*, *Cleburne*, 473 U.S. at 448-50 (relying on factual findings made at trial in invalidating permitting requirement under rational-basis review); *Romer*, 517 U.S. at 635 (law fails rational-basis review when it is "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry….").

Lower courts have likewise recognized that *Beach Communications* does not prohibit discovery in aid of rational-basis analysis: "although rational-basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of

irrationality." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013). *See also Craigmiles*, 312 F.3d at 225-26 (reviewing trial evidence in concluding that statute failed rational-basis review); *Merrifield v. Lockyer*, 547 F.3d 978, 990-92 (9th Cir. 2008) (based on summary judgment record, law failed rational-basis review). Indeed, Defendants' own reliance on extra-record evidence in attempting to refute Plaintiffs' allegations demonstrates that discovery and judicial factfinding are often necessary even under rational-basis review. Gov't Br. 31 n.2.

In short, the government is incorrect to assert that a review of "the Proclamation on its face" is "the end of the matter under rational-basis review." *Id.* at 22.

3. The Government's Allegedly "Alternative" Justification Merely Restates a Rationale that Has Already Been Addressed By the District Court.

Recognizing that Plaintiffs have plausibly alleged that the purported national-security justification fails rational-basis review, the government now offers a fallback argument not raised below: "[T]he Proclamation would be fully justified by its alternative purpose of encouraging other countries to improve their information-sharing practices." *Id.* at 45. This information-sharing rationale is not independent of the national-security justification; it is instead simply a means in service of the latter end. It is not, therefore, an "alternative purpose" at all.

Defendants did not argue below that EO-3 furthers two distinct and independent purposes: to protect national security and to encourage other information sharing. This Court should therefore treat this new argument as waived. *See Bailey v. Floyd County Bd. of Educ. By and Through Towler*, 106 F.3d 135, 143 (6th Cir. 1997) ("It is well-settled that this court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice."). Although rational-basis review permits the government to rely on post hoc justifications, the government must actually *advance* those justifications during litigation. *See, e.g.*, *Beach Communications*, 508 U.S. at 318 (holding that courts should consider "*posited* reason[s]" for government action (emphasis added)).

Regardless, the very text of EO-3 refutes the assertion that the Proclamation serves two distinct purposes, because it treats the information-sharing purpose as a subset of the national-security purpose. EO-3 states that its purpose is "to protect [U.S.] citizens from terrorist attacks and other public-safety threats," and that it will achieve this objective by improving vetting procedures for visa applicants. E0-3 §1(a). *Id*. EO-3 then explicitly connects the vetting process to information sharing. *Id.* §1(b) ("Information-sharing and identity-management protocols and practices of foreign governments are important for the effectiveness of the screening and vetting protocols and procedures."). Far from serving two distinct purposes, EO-3 thus

simply identifies improved information sharing as a way to enhance national security.

Finally, the same allegations showing that EO-3 is not rationally related to national security purposes also show that it is not rationally related to any purportedly independent information-sharing purpose. If anything, the information-sharing theory makes it even clearer that EO-3 fails rational-basis review. As Plaintiffs allege, EO-3's explanation for banning immigrant visas for nationals of the majority-Muslim nations highlights that "the true concern is not information sharing but rather preventing individuals from the majority-Muslim nations from becoming part of the American community." Compl., R.124, PageID.2453-54 (quoting Proclamation §1(h)(ii), which states that individuals admitted on immigrant visas can become lawful permanent residents, who have "more enduring rights" than non-immigrant visitors and are "more difficult to remove"). EO-3's deviations from the baseline-test results are even more irrational under a purported information-sharing rationale. If the objective were really to pressure countries to improve their information sharing, then it would be irrational to exempt countries with inadequate information-sharing practices on grounds unrelated to information sharing. *See supra*, pp. 22-25.

C. Because Plaintiffs Have Alleged that the Proclamation Was Not Based on a "Bona Fide" Reason, They Satisfy the Pleading Standard Enunciated in *Kleindienst v. Mandel*.

Although the Supreme Court in *Hawaii* applied rational-basis review, 138 S. Ct. at 2404, Defendants contend that this Court should instead analyze Plaintiffs' claims under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which the government contends effectively forecloses judicial review. Gov't Br. 45-47. Why this Court should adopt a different analytical framework than the Supreme Court is a mystery.[6] Regardless, under *Mandel* the government's asserted reason for the law must be "bona fide." 408 U.S. at 770. *See also* Hawaii, 138 S. Ct. at 2420 (assuming "we may look behind the face of the Proclamation"). Plaintiffs' well-pleaded complaint alleges it was not.

Defendants rely on the brief statement in *Mandel*'s concluding paragraph that when "the Executive" exercises a congressionally-delegated "power to make policies and rules for exclusion of aliens," that decision cannot be challenged if it was made "on the basis of a facially legitimate and bona fide reason." 408 U.S. at 769-70. This test imposes two distinct requirements: the Executive's explanation must be not only (i) "facially legitimate" but also (ii) "bona fide" in the literal sense

[6] *Mandel* review is sometimes equated with rational basis review. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017) (describing *Mandel* standard as "minimal scrutiny (rational-basis review)"); *Johnson v. Whitehead*, 647 F.3d 120, 127 (4th Cir. 2011), *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990).

of being offered in good faith. Any other reading would render the *Mandel* Court's enunciation of the latter requirement redundant.

In *Kerry v. Din*, this sensible reading was confirmed by Justices Kennedy and Alito in a decisive concurrence that now controls the application of *Mandel*. 576 U.S. 86, 101 (2015) (Kennedy, J., concurring, joined by Alito, J.); *see also Marks v. United States*, 430 U.S. 188, 192-94 (1977) (explaining how to determine the holding of decisions without a majority opinion). The *Din* concurrence began by observing that "an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.'" *Id.* at 104 (quoting *Mandel*, 408 U.S. at 770). It then proceeded to analyze "facially legitimate" and "bona fide" as separate and distinct requirements. 576 U.S. at 105-06 (first concluding that "the Government's decision … is facially legitimate," and then separately concluding that "[t]he Government's citation of [a relevant statute] *also* indicates that it relied upon a bona fide factual basis") (emphasis added). In words with obvious import here, the *Din* concurrence concluded by explaining that an affirmative showing of bad faith would be sufficient:

> *Absent an affirmative showing of bad faith* on the part of the consular officer who denied [plaintiff] a visa—which Din has not plausibly alleged with sufficient particularity—*Mandel* instructs us not to "look behind" the Government's [decision] for additional factual details beyond what its express reliance on [statutory factors] encompassed.

576 U.S. at 105 (emphasis added).

This Court has joined at least three other circuits in recognizing that the Kennedy-Alito concurrence controls the application of *Mandel*[7]:

> [*Mandel*] review is limited; it ends where the Government presents a facially legitimate and bona fide reason for the denial…. Absent sufficient allegations of bad faith, therefore, a visa denial is not reviewable in federal court…. *To proceed on a bad faith theory, the plaintiffs must adequately allege bad faith on the part of an executive branch decisionmaker*….

Amiri v. Secretary, Department of Homeland Security, __ F. App'x __, 2020 WL 3618888, at *3, 4, 5 (6th Cir. 2020) (unpublished) (emphasis added). *Mandel* thus prohibits plaintiffs from challenging good-faith factual errors.[8] But *Mandel* permits plaintiffs to proceed to the merits of if they "adequately allege bad faith on the part of an executive branch decisionmaker…." *Amiri*, 2020 WL 361888, at *5.

Here, it is clear that Plaintiffs have adequately alleged bad faith. They go far beyond merely alleging that EO-3 was grounded in anti-Muslim bias and that it

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[7] *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (plaintiff had "burden of proving that the reason was not bona fide by making an 'affirmative showing of bad faith….'"); *Am. Acad. Of Religion v. Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009) (applying *Mandel* by analyzing whether plaintiff alleged bad faith). *Cf. Yafai v. Pompeo*, 912 F.3d 1018, 1022 (7th Cir. 2019) (interpreting *Din* concurrence to mean "that evidence of behind-the-scenes bad faith can overcome *Mandel*'s rule that courts must stick to the face of the visa denial in evaluating it.").

[8] *See Hussein v. Beecroft*, 782 F. App'x 437, 442 (6th Cir. 2019) (plaintiffs' offer of "evidence" to "attack[] the consular officer's conclusion that [plaintiffs] were not married" is an argument that "fall[s] outside of the narrow scope of review [permitted by *Mandel*]").

specifically harms the Muslim plaintiffs through its targeting of Muslim noncitizens; indeed, they allege highly particularized facts demonstrating such bias: the words of the President and his close advisors. *E.g.*, Compl., R.124, PageID.2410, 2445.

II. Plaintiffs Have Plausibly Pleaded Separate Claims for a Violation of Equal Protection and the First Amendment, Which the Government Ignores on Appeal.

Defendants do not address Plaintiffs' separate and independent claim that EO-3 violates their right to equal protection (other than by reprising a standing argument, *see* Part IV), and do not address Plaintiffs' free-speech and free-association claim at all. The district court correctly held that all of these claims plausibly allege a violation of Plaintiffs' constitutional rights. The government's failure to dispute that conclusion is sufficient reason to deny its appeal.

A. Plaintiffs' Well-Pleaded Complaint Plausibly Alleges a Violation of Equal Protection.

It is well established that purposeful religious discrimination is subject to heightened scrutiny under equal protection doctrine. *Hassan v. City of New York*, 804 F.3d 277, 300-01 (3d Cir. 2015), as amended (Feb. 2, 2016) ("Today we join [the Second, Eighth, Ninth, and Tenth Circuits], and hold that intentional discrimination based on religious affiliation must survive heightened equal-protection review"). *See also, e.g.*, *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008) ("Strict scrutiny applies where the classification affecting eligibility for benefits is based on religion or burdens the exercise of religion."); *Harbin-Bey v.*

Rutter, 420 F.3d 571, 576 (6th Cir. 2005). And it is a question of fact whether any particular policy was motivated by a discriminatory purpose that triggers strict scrutiny. *See Shaw v. Reno*, 509 U.S. 630, 646, 653-57 (1993) (proof of discriminatory purpose triggers strict scrutiny under Equal Protection Clause); *Koger v. Mohr*, __ F.3d __, 2020 WL 3722966, at *10 (6th Cir. 2020) (presuming that plaintiff's allegation of "invidious purpose" was true in reversing grant of summary judgment). *Cf. Church of the Lukumi*, 508 U.S. at 540-42, 546-47 (proof of discriminatory purpose triggers strict scrutiny under Free Exercise Clause).

That means the standard of review applicable to Plaintiffs' equal protection claim will depend on what emerges during fact development, both during discovery and at trial. The default standard of review for facially neutral government action is indeed rational-basis review. But a *factual* finding that EO-3 targeted Muslims would trigger strict scrutiny: "When there is a proof that a discriminatory purpose has been a motivating factor in the decision," then "[rational-basis] deference is no longer justified." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). This would be true even if anti-Muslim animus was not the sole motivation. *See Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 287 (1977) (shifting burden if unconstitutional purpose was "a 'substantial factor' or … a 'motivating factor'" for facially neutral action).

Fiallo v. Bell, 430 U.S. 787 (1977), presents no barrier to Plaintiffs' equal protection claim. That case applied *Mandel* to uphold a "congressional policy choice" giving immigration preferences to children of unwed mothers. *Id.* at 795. No one suggested that the congressional policy was motivated by the purpose of discriminating against a protected class *as such*. Rather, plaintiffs challenged the classification as an "overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children,"—that is, as a poorly tailored means to an otherwise legitimate end. *Id.* at 799 n.9. *See also id.* at 799 (quoting *Mandel*'s "facially legitimate and bona fide reason" requirement). The *Fiallo* court upheld the statute because it decided that the government's stated rationale for the immigration preference met the "standard that was applied in *Kleindienst v. Mandel*." *Id.* at 799.

The structure of Plaintiffs' case is completely different. They claim that a facially neutral Proclamation is, in fact, motivated by the purpose of discriminating against a protected class *as such*. They have, in other words, made "an affirmative showing of bad faith," *Din*, 135 S. Ct., at 2141, such that neither *Mandel* nor *Fiallo* applies. This exact distinction was decisive in *Kwai Fun Wong v. United States*, 373 F.3d 952 (9th Cir. 2004), where a noncitizen seeking immigration relief alleged that "defendants refused [her] adjustment of status … solely on the basis of her race, ethnicity, or religion, and for no immigration-related reason or other governmental purpose." *Id.*, at 975 n.29. Notwithstanding its recognition that *Fiallo* required

"'acceptance of a limited judicial responsibility,'" the Court held that "[plaintiff] could prevail" if this were true, because it could "imagine no proper governmental interest furthered by the purely invidious discrimination alleged…." *Id.* at 974-75 & n.29. In short, where the covert purpose of discriminating against a protected class *as such* motivates some facially neutral action, *Fiallo* simply doesn't apply.

Because, at this stage, Plaintiffs' well-pleaded factual allegations must be treated as true, EO-3 must be assessed under strict scrutiny. For the reasons discussed in Part I.A, Plaintiffs state a plausible claim for relief even under a rational-basis standard. It is *a fortiori* true that they likewise state a plausible claim under heightened scrutiny.

B. Plaintiffs' Well-Pleaded Complaint Plausibly Alleges a Violation of Their Free-Speech and Free-Association Rights.

This Court has long held that purposeful interference with the First Amendment right to receive information and ideas is subject to heightened scrutiny. *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 583 (6th Cir. 1976). *See also Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality); *Neinast v. Bd. Of Trustees of Columbus Metropolitan Library*, 346 F.3d 585, 591 (6th Cir. 2003).

Plaintiffs allege that EO-3 does exactly this by denying entry into the United States to individuals with whom Plaintiffs wish to speak, debate, or associate, or whose ideas they wish to hear, using the predominant religion in their country as a proxy for the individuals' religious views and beliefs. *See, e.g.*, Compl., R.124,

PageID.2479-81, 2490-92. Plaintiffs therefore claim that EO-3 as a whole violates the First Amendment's protection of speech and association, by operating as a content-, viewpoint-, and speaker-based restriction on speech regarding subjects related to Islam or grounded in an Islamic perspective.

Plaintiffs also claim that the waiver provision separately violates the First Amendment on its face. Under the waiver provisions, government officials must evaluate the proposed purpose of non-citizens' travel to the U.S. to decide whether their entry "would be in the national interest"—an assessment that cannot be made without considering the identity of the speaker and the content of the speech. EO-3 §3(c)(i). *See* Compl., R. 124, PageID.2492-93, 2511-13. Content- and viewpoint-based restrictions on speech are presumptively unconstitutional and "subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 166, 171 (2015). *See also Allende v. Shultz*, 845 F.2d 1111, 1120 (1st Cir. 1988) (denial of visa for speaker as "prejudicial to the public interest" was unconstitutional because grounded in the anticipated content of the applicant's speech).

Plaintiffs also claim that the waiver scheme is unconstitutional as a licensing scheme that lacks narrow, objective, and definite criteria. *Id.*, PageID.2458-61, 2492-93, 2511-12. This gives government officials unbridled discretion in violation

of the First Amendment regardless of whether viewpoint or content discrimination can be proven in any particular case. *See, e.g.*, *City of Lakewood*, 486 U.S. at 757 (permitting scheme violated the First Amendment because the mayor could deny any permit he determined was "not in the public interest"); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (standardless licensing schemes are unconstitutional).

Defendants have not addressed these free-speech and free-association claims at all. Any appeal on those claims is waived. *See Jerkins*, 871 F.2d at 602 n.3 (impermissible for defendant, on appeal, to raise issue for the first time in reply); *Superior Commc'ns v. City of Riverview, Michigan*, 881 F.3d 432, 444 n.4 (6th Cir. 2018); *Lyons v. Michigan Dep't of Corr.*, 2020 WL 2111454, at *3 (6th Cir. May 4, 2020) (unpublished). Below, Defendants argued only that *Mandel*—which concerned Americans' rights to obtain a visa for a foreign speaker who had not complied with prior visa restrictions—forecloses Plaintiffs' free-speech/association claims. That argument—if the Court considers it—fails.

Unlike EO-3, the visa-permitting scheme in *Mandel* was not content- or viewpoint-based. *Mandel* thus does not speak to the question presented here, which is governed by the strict-scrutiny standard of *Reed*, *Forsyth County*, and *City of Lakewood*. In any event, *Mandel* specifically declined to endorse the government's view that the Executive has "sole and unfettered discretion" to decide waivers for

"any reason or no reason." 408 U.S. at 769. The Court found only that the waiver denial had been justified by a reason that was *both* legitimate *and also* bona fide: the fact that the noncitizen had abused previously-granted waivers. *Id.* at 769-70. Plaintiffs, by contrast, have plausibly alleged that the justifications for EO-3 are *not* "bona fide." *See supra*, Part I.C.

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

The government's principal argument is that *Hawaii* categorically forecloses all further litigation. Gov't Br. 27-43. In Defendants' view, the Court reached beyond the preliminary-injunction ruling on which certiorari was granted to issue a decision on "the *ultimate legal conclusion* that the Proclamation survives rational-basis scrutiny." Gov't Br. 33-34 (original emphasis). That's not how the litigation of preliminary injunctions works. Nor is it what *Hawaii* actually said.

As explained above, *Hawaii* determined that the public evidence amassed at that early stage of the ligitation—before those plaintiffs obtained any discovery or otherwise litigated their Establishment Clause claim in any way—was insufficient to satisfy the demanding standard for extraordinary interim relief. *See supra* Part I. Under the well-settled framework of *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), that holding simply does not speak to whether Plaintiffs here are entitled to well-managed fact development in the ordinary course of litigation. And *Hawaii* is

not even colorably relevant to whether Plaintiffs may proceed on their equal protection and free-speech claims—neither of which were at issue in *Hawaii*.

A. *Hawaii* Was a Routine Application of the Well-Settled *Camenisch* Framework, Which Regularly Permits Plaintiffs to Proceed to Discovery Without Evidence that Would Support a Preliminary Injunction.

The Supreme Court has held that "it is generally *in*appropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Camenisch*, 451 U.S. at 395 (emphasis added). That is true because both the legal issues and the relevant bodies of available evidence are completely different.

1. Under *Camenisch*, Courts Presume that the Denial of a Preliminary Injunction Does Not Resolve the Ultimate Merits of the Case.

In *Camenisch*, the Supreme Court had to decide whether a case had been mooted by the graduation of the student plaintiff, who had been the beneficiary of a preliminary injunction. The decision explicitly rejected the argument that preliminary-injunction rulings are "tantamount to decisions on the underlying merits" to the extent that they turn on "likelihood of success on the merits." *Id.* at 394. The Supreme Court gave two reasons why "[t]his reasoning fails." *Id.* First, an argument like the Government's ignores the different legal standards involved and "improperly equates 'likelihood of success' with 'success.'" *Id. See also Iqbal*, 556 U.S. at 678 ("plausibility standard is not akin to a 'probability requirement.'"). Second, an argument like the Government's "ignores the significant procedural

differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 390. The Court explained this second point at length:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, *a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits*. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and *the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits*….

Id. at 395 (emphasis added). The Court concluded, "the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy." *Id.* at 396.

The Sixth Circuit has explicitly embraced both the substance and the logic of the *Camenisch* framework—in substantial part because "the proof required … to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739 ("… and we therefore express no opinion as to the ultimate merits of the plaintiffs' case"). *See also Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007).

In *Samuel v. Herrick Memorial Hospital*, 201 F.3d 830 (6th Cir. 2000), for example, this Court vacated a preliminary injunction after going through each claim and concluding that the plaintiff was "not likely to prevail on the merits" of any of

them. *Id.* at 837. This Court therefore "remanded the case to the district court for further proceedings," *id.* at 830, but made clear that it expected the next step to involve discovery on two claims. "The facts alleged in the complaint," this Court wrote, "are barely adequate to survive a motion to dismiss on the federal discrimination and antitrust claims…," but "after more discovery it may be possible for plaintiff to adduce further evidence on these claims." *Id.* at 834. *See also United States v. Owens*, 54 F.3d 271, 276-77 (6th Cir. 1995) (remanding to permit additional discovery and evidentiary hearing regarding disputed facts before a preliminary injunction could be converted to permanent).

Every other circuit of which Plaintiffs are aware is in accord: Preliminary-injunction rulings based on an incomplete evidentiary record do not foreclose discovery or further proceedings to resolve the merits.[9] The government cites two cases[10]—both from outside of the Sixth Circuit—that involve the "rare" situation

[9] *See, e.g.*, *Alarm Detection Systems, Inc. v. Village of Schaumburg*, 930 F.3d 812, 823 (7th Cir. 2019) (plaintiffs "*pleaded* a plausible [constitutional] claim … because of the favorable inferences we afford to them under a Rule 12(b)(6) analysis," but "have not, however, *demonstrated* a likelihood of success on the merits, as required for a preliminary injunction") (original emphasis); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013); *Sherley v. Sebelius*, 689 F.3d 776, 782-83 (D.C. Cir. 2012); *New Jersey Hospital Ass'n v. Waldman*, 73 F.3d 509, 519 (3rd Cir. 1995).

[10] The language quoted by the government from *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 126 F.3d 461 (3rd Cir. 1997) is footnote dictum on an issue that the court expressly "d[id] not decide." *Id.* at 474 n.10. And even that case stands as an example of Plaintiffs' point here: The relevant factual finding was

where an extensive process for making evidentiary findings at the preliminary stage leaves *absolutely no reason* to think that additional discovery could conceivably turn up any further evidence that might make a difference. *McTernan v. City of York*, 577 F.3d 521, 531 (3rd Cir. 2009); *id.* at 525-28 (discussing factual findings about the dimensions and location of a ramp that had been made after full evidentiary hearing); *Commodity Futures Trading Commission v. Board of Trade*, 701 F.2d 653 (7th Cir. 1983) (discussing factual findings that had been made after preliminary-injunction hearing was consolidated with full-blown merits trial that lasted six days). *See also id.* at 654-55 (noting that Seventh Circuit had earlier "remanded for a new trial on the merits" even though it simultaneously "affirmed the district court's denial of preliminary relief"). Those decisions are plainly inapplicable here.

Whereas "[t]he plausibility standard" applicable in the 12(b)(6) posture of Plaintiffs' case "is not akin to a 'probability requirement,'" *Iqbal*, 556 U.S. at 678, a probability of success was precisely what was required in *Hawaii*. That means none of the cases cited by the Government are capable of controlling Plaintiffs' complaint—certainly not where Plaintiffs have had no discovery on evidence that

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based on a three-day hearing in which both sides presented testimony and other evidence about straightforwardly observable facts—the existence of various species on a small plot of land, and the physical characteristics of the developer's mitigation efforts. *Id.* at 467-69. There was no reason that further discovery would have been necessary.

EO-3 targeted Muslims, that the proffered national security justifications are a sham, about any alternatives considered by the Government, or about the detailed operation of a complicated regulatory scheme. *Hawaii* does not control the outcome here.

2. Discovery Is Critical to Plaintiffs' Ability to Prove Their Well-Pleaded Allegations.

The government also skates past the fundamental reason for applying a mere plausibility standard in the first place: Plaintiffs have not yet had the benefit of discovery. *See Twombly*, 550 U.S. at 556. Under the *Camenisch* framework, the *Hawaii* plaintiffs' inability to show a likelihood of success *without* the benefit of discovery is no reason to think that Plaintiffs here cannot plausibly assert a claim that will be *supported* by discovery.

The quantum of proof required depends on the stage of the proceedings and the stakes of the motion at issue. *See Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 281 (6th Cir. 2010). The *factual* standard in a preliminary injunction case like *Hawaii* is "much more stringent" than even at summary judgment "because the preliminary injunction is an 'extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it.'" *Leary*, 228 F.3d at 739.

By contrast, the pleading requirements at the motion-to-dismiss stage reflect the basic principle that discovery is critical to the truth-finding process, and that plaintiffs—who have the burden of prooof—must therefore have the "opportunity to

discover information that is essential." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986); *see also Bell v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) (requiring "full opportunity to conduct discovery"). Accordingly, a motion to dismiss cannot be used to circumvent the fact gathering necessary for proper adjudication of a plaintiff's claims. Rather, motions to dismiss are meant to weed out cases where "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558.

Discovery into the administration's decisionmaking process may well reveal that the government's proffered justifications for its actions were false. In *Dep't of Commerce v. New York*, for example, evidence produced in discovery demonstrated that the government's purported reason for adding a citizenship question to the census was "contrived." 139 S. Ct. 2551, 2574 (2019). *See also Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098-1104 (N.D. Cal. 2018) (enjoining termination of immigration program based on internal evidence of animus, including selective reporting of facts to justify its preferred policy outcome); *Hamama v. Adducci*, 349 F. Supp. 3d 665, 670, 699 (E.D. Mich. 2018), *rev'd on other grounds*, 946 F.3d 875 (6th Cir. 2020) (court initially denied aspects of requested preliminary relief based on government's assertions that Iraq would accept repatriations, but later granted that same relief after evidence obtained in discovery showed the opposite).

Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984), is particularly instructive. There the district court vacated Fred Korematsu's conviction, which four decades earlier had led to the Supreme Court's decision upholding internment of Japanese-Americans. *See Korematsu v. United States*, 323 U.S. 214 (1944). In vacating the conviction, the district court focused on the fact that a "selective record" had left the Supreme Court unaware of "critical contradictory evidence" that the policy was in fact motivated by "race prejudice," as later uncovered by a historical commission with access to the full government record. *Korematsu*, 584 F. Supp. at 1417, 1419 ("The question is ... whether the court had before it all the facts known by the government. Was the court misled by any omissions or distortions in concluding that the other branches' decisions had a reasonable basis in fact?"). Although concluding that "it cannot now be said what result would have obtained had the information been disclosed," the district court held that the concealed information would have been "critical to the court's determination." *Id.* at 1420.

The weighty issues in this case should not be decided on a "selective record" like the one that led the *Korematsu* court so badly astray. While discovery will undoubtedly raise privilege questions, those issues can be left to the sound discretion of the district court in the first instance. Surely the district court's notable caution in

addressing discovery questions to date, *see supra*, p. 8, suggests that the district court is well aware of and prepared to address any privilege questions that arise.

B. The Fourth Circuit Was Wrong to Conclude that *Hawaii* Foreclosed Any and All Other Challenges to the Proclamation by Any and All Other Plaintiffs.

In *International Refugee Assistance Project v. Trump*, 961 F.3d 635 (4th Cir. 2020) ("*IRAP III*") (petition for *en banc* review pending), the Fourth Circuit ruled that *Hawaii* precluded further litigation challenging EO-3. That decision was erroneous. For substantially the reasons discussed above, it should not be followed by this Court—and in any event cannot control the distinct claims made by Plaintiffs here.

First, the Fourth Circuit did not mention, let alone adequately address, the different legal and evidentiary standards that apply to preliminary-injunction and motion-to-dismiss rulings. For the reasons discussed in Part III.A, "the findings of fact ... made by a court granting a preliminary injunction are not binding at trial on the merits." *Camenisch*, 451 U.S. at 395. No more can they bind courts on a motion to dismiss. *Iqbal*, 556 U.S. at 678. Second, the Fourth Circuit failed to appreciate the legal impact of the Kennedy-Alito concurrence in *Din*, utterly ignoring that opinion's extensive discussion of how *Mandel* imposes two distinct requirements: that the government's reason be both "legitimate" and *also* "bona fide." For the reasons discussed in Part I.C, Plaintiffs' allegations of bad faith plainly survive

review under *Mandel*. Finally, Plaintiffs here raise constitutional claims under the First Amendment's free-speech/free-association protections and the Fifth Amendment's equal protection guarantee—claims that were not addressed by the *IRAP III* court.

The *IRAP III* plaintiffs have asked for en banc review, and the full Fourth Circuit may well agree to hear the case. Regardless, the *IRAP III* panel's decision was erroneous.

IV. Plaintiffs' Constitutional Claims Are Based on Violations of Their Own Rights.

The government argued below that Plaintiffs lacked standing because they are only indirectly injured. Mot. to Dismiss, R.128, PageID.2616-18. That claim had already been rejected by the Supreme Court in *Hawaii*, 138 S. Ct. at 2416, and the district court rightly rejected it here. Opinion, R.138, PageID.2742-48. Defendants, for good reason, have not appealed that ruling.

The government now tries to repackage its failed standing arguments—right down to citing the exact same cases—by arguing that Plaintiffs' Establishment Clause and equal protection claims should be dismissed *on the merits* because Plaintiffs are allegedly not asserting their own constitutional rights. Gov't Br. 47-53. Under Defendants' theory, Plaintiffs have adequately alleged a concrete and particularized injury for purposes of standing, yet not for purposes of the merits. *Id.* at 50, 54. But Plaintiffs have already concededly demonstrated that their claims are

based on injuries *they* have suffered—not the separate injuries suffered by their relatives. Defendants' novel effort to impose a more stringent injury requirement in order to state a claim than to establish standing fails.[11]

In the first place, Defendants' argument is waived because it was not raised below. *Bailey*, 106 F.3d at 143. This Court is not a "'second shot' forum, a forum where secondary, back-up theories may be minted for the first time." *Michigan Bell Telephone Co. v. Strand*, 305 F.3d 580, 590 (6th Cir. 2002). In any event, the standing cases cited provide no more support for this newly-conjured "merits issue" than they did back when Defendants used them to challenge standing. The "merits" argument thus fails for the same reason the standing argument failed: Plaintiffs allege that EO-3 directly injures them by violating their own constitutional rights.

This is not a case where Plaintiffs simply disagree with far-removed governmental action. EO-3 directly affects the ability of the individual plaintiffs and the organizational plaintiffs' members and clients to petition for the travel of family members abroad. More fundamentally, though, it is Plaintiffs' own religion and their

[11] If such a requirement existed, surely *Hawaii* would have mentioned it. Defendants suggest that *Hawaii* "clarified that [] whether plaintiffs can assert the constitutional rights of third party foreign nationals—'concerns the merits rather than the justiciability of plaintiffs' claims.'" Gov't Br. 62 (quoting *Hawaii*, 138 S. Ct. at 2416). In fact, *Hawaii*'s discussion of the "merits" was about plaintiffs' *own* "legally protected interest in the admission of particular foreign nationals—which depends upon the scope of *plaintiffs'* Establishment Clause rights," not whether they were asserting third-party rights. 138 S. Ct. at 2416.

own community that the EO-3 condemns, and it is Plaintiffs who suffer the discriminatory treatment vis-à-vis their access to relatives from overseas. Nothing more is required to establish harm under the Establishment Clause. *See, e.g.*, *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005) (government may not send message to non-adherents of a particular religion "that they are *outsiders*, not full members of the political community"); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) (plaintiffs have cognizable interest "when they are part of the relevant community and are directly affronted"); *Awad v. Ziriax*, 670 F.3d 1111, 1122-23 (10th Cir. 2012) (Muslim plaintiff could challenge ballot initiative prohibiting consideration of Sharia law because harm alleged stems from a "directive of exclusion and disfavored treatment of a particular religious legal tradition"); *Dumont v. Lyon*, 341 F. Supp. 3d 706, 721 (E.D. Mich. 2018) (plaintiffs were not just "spiritually affronted" but had been personally turned away as prospective adoptive parents).

Rather than addressing Plaintiffs' claims as pleaded, Defendants urge the Court to view the claims as based solely on discrimination against Plaintiffs' relatives. Gov't Br. 50. That simply cannot be reconciled with what the pleadings say: "Individual Plaintiffs and many of the members and clients of the organizational Plaintiffs are Muslim," and EO-3 "convey[s] an official message of disapproval and hostility towards Muslims, making clear that the government deems them outsiders,

not full members of the political community." Compl., R.124, PageID.2475. *See id.*, PageID.2476-77, 2479, 2484-85, 2489, 2498-99, 2501. Plaintiffs further allege that EO-3 has interfered—in a discriminatory manner—with their ability to reunite with their relatives. *Id.* PageID.2434-35, 2476-77, 2479, 2485, 2488, 2494, 2500-01, 2501-02, 2502-03, 2507. The Court should refuse Defendants' invitation to make such a radical departure from pleading practice, which cannot be reconciled with cases like *Mandel*, 408 U.S. at 762 (accepting plaintiffs' allegation that "they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien"), or with *Hawaii* itself, 138 S. Ct. at 2416 (courts may consider "claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals").

The government's argument fares no better on Plaintiffs' equal protection claim, where it again relies on standing cases and ignores Plaintiffs' allegations that their *own* equal protection rights are violated. As the complaint makes clear, Defendants' violation of the equal protection guarantee of the Fifth Amendment "inflicts ongoing harm upon the Individual Plaintiffs and all those similarly situated, and on the organizational plaintiffs, their members and their clients." Compl., R.124, PageID.2506. Contrary to the government's characterization, Plaintiffs are personally denied equal treatment by the challenged discriminatory conduct. By

creating a more difficult visa-application process for Plaintiffs than for people with relatives from other countries, the government discriminates against plaintiffs on the basis of national origin and religion with respect to their concrete interest in being reunited with their close relatives from Muslim-majority countries. *Id.*, PageID.2507 (alleging EO-3 has "a disparate effect on the ability of Muslims versus non-Muslims to exercise their fundamental rights to associate with their families and raise their children.").

Plaintiffs' claims for relief are directly tied to the scope of their asserted injuries—injuries that the Supreme Court has recognized were suffered by the Plaintiffs themselves and present an adequate basis for standing. Thus, Defendants' argument that the claims are not adequately pleaded on their merits due to the nature of Plaintiffs' injuries must fail.

CONCLUSION

The political salience of this case should not obscure what is a straightforward question of civil procedure. Plaintiffs have satisfied *Iqbal*'s pleading requirements. The district court's order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I electronically filed the foregoing brief by using the appellate CM/R. system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/R. system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-face requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and the type-volume and length limitations of Federal Rule of Appellate Procedure 27(d)(2)(A). The brief contains 12,980 words.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint	October 15, 2018	128	2590-2620
Plaintiffs' Opposition to Defendants' Motion to Dismiss	November 19, 2018	131	2626-2661
Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss	December 17, 2018	132	2662-2670

Order Denying Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint	July 10, 2019	138	2732-2752
Plaintiffs' Motion to Reinstate Fully-Briefed Motion to Compel and Require Responses to Outstanding Discovery Requests	July 17, 2019	139	2753-2763
Defendants' Opposition to Plaintiffs' Motion to Reinstate Their Denied Motion to Compel and Require Responses to Discovery Requests	July 31, 2019	143	2803-2821
Defendants' Answer to Plaintiffs' Third Amended Complaint	July 31, 2019	144	2822-2893
Plaintiffs' Opposition to Defendants' Motion to Certify This Court's July 10, 2019 Order for Interlocutory Appeal and for a Stay of Discovery Pending Appeal	August 6, 2019	145	2894-2924
Plaintiffs' Reply in Further Support of Motion to Reinstate Fully-Briefed Motion to Compel and Require Responses to Outstanding Discovery Requests	August 6, 2019	146	2925-2937
Order: (1) Denying Plaintiffs' Motion to Reinstate Fully-Briefed Motion to Compel and Require Responses to Outstanding Discovery Requests; and (2) Notice to Appear for Scheduling Conference	November 1, 2019	156	2990-2993
Order: (1) Granting in Part and Denying in Part Defendants' Motion to Certify July 10, 2019 Order for Interlocutory Appeal and to Stay Discovery Pending	November 1, 2019	157	2994-3010

Appeal; (2) Certifying July 10 Order for Interlocutory Appeal; and (3) Declining to Stay Discovery Pending Appeal			