No. 19-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES #1 AND 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients; YEMENI-AMERICAN MERCHANTS ASSOCIATION; MOHAMAD MASHTA; GRANNAZ AMIRJAMSHIDI; FAKHRI ZIAOLHAGH; SHAPOUR SHIRANI; AFSANEH KHAZAELI; JOHN DOE #5; and JOHN DOE #4

Plaintiffs – Respondents,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; KEVIN K. McALEENAN, in his official capacity as Acting Secretary of Homeland Security; MICHAEL R. POMPEO, in his official capacity as Secretary of State; JOSEPH MAGUIRE, in his official capacity as Acting Director of National Intelligence,

Defendants – Petitioners.

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

[Caption continued on inside cover]

DEFENDANTS' PETITION FOR PERMISSION TO APPEAL
PURSUANT TO 28 U.S.C. § 1292(b) AND
MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS

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IRANIAN ALLIANCES ACROSS BORDERS; JANE DOE #1; JANE DOE #3; JANE DOE #4; JANE DOE #5; JANE DOE #6; IRANIAN STUDENTS' FOUNDATION;
Plaintiffs – Respondents,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; KEVIN K. McALEENAN, in his official capacity as Acting Secretary of Homeland Security; MARK A. MORGAN, in his official capacity as Senior Official Performing the Functions and Duties of the Commissioner of U.S. Customs and Border Protection; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; MICHAEL R. POMPEO, in his official capacity as Secretary of State; WILLIAM P. BARR, in his official capacity as Attorney General of the United States,
Defendants – Petitioners.

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

EBLAL ZAKZOK; SUMAYA HAMADMAD; FAHED MUQBIL; JOHN DOE #1; JOHN DOE #2; JOHN DOE #3,
Plaintiffs – Respondents,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF STATE; KEVIN K. McALEENAN, in his official capacity as Acting Secretary of Homeland Security; MICHAEL R. POMPEO, in his official capacity as Secretary of State,
Defendants – Petitioners.

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

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PRELIMINARY STATEMENT AND QUESTION PRESENTED

Defendants respectfully petition this Court, pursuant to 28 U.S.C. §§ 1292(b), 1651, and Federal Rules of Appellate Procedure 5, 27, for permission to appeal an order certified for interlocutory appeal by the United States District Court for the District of Maryland, and for a stay of district court proceedings.[1]

Presidential Proclamation No. 9645 ("Proclamation"), *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), imposed tailored entry restrictions on nationals of countries that do not share adequate information for the United States to assess the risk of their nationals' entry, or that otherwise present unacceptable national-security risks. The Proclamation followed a process in which multiple cabinet agencies assessed every country in the world against "baseline" information-sharing and security-risk criteria, conducted diplomatic engagement to encourage countries to improve their practices, and then recommended that the President impose certain entry suspensions on those few countries that continued to be deficient.

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court held that the Proclamation is subject at most to rational basis review even for constitutional

[1] The district court's opinion and order, issued on May 2, 2019, are attached as Exhibits A and B. The district court's opinion and order certifying its order for immediate appeal, issued on August 20, 2019, are attached as Exhibits C and D.

challenges. *Id.* at 2419-20. And the Court reversed a preliminary injunction against the Proclamation, reasoning that the plaintiffs had failed to show even a mere likelihood of success in their challenge, because "there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns," and "[u]nder these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review." *Id.* at 2421, 2423. The Court rejected four specific arguments raised by those plaintiffs: that "statements by the President and his advisers cast[] doubt on the official objective of the Proclamation," *id.* at 2417; that alleged "deviations from the review's baseline criteria" showed "evidence of animus toward Muslims," *id.* at 2421; that "not enough individuals are receiving waivers or exemptions" from the entry suspensions, *id.* at 2423 n.7; and that Congress' statutory scheme had already addressed the Proclamation's purported national security justification, *id.* at 2422 n.6.

In this case, plaintiffs brought constitutional challenges to the Proclamation based on the very same arguments rejected in *Hawaii*. Even though the district court acknowledged that the plaintiffs here and in *Hawaii* relied upon "many of the same facts," it denied the government's motion to dismiss the complaint, holding that *Hawaii* "is not dispositive." 5/2/19 Op. ("Op.") 38 (Ex.A).

Nevertheless, the district court correctly recognized that, at the very least, its refusal to dismiss this suit warranted interlocutory certification under 28 U.S.C. § 1292(b). Plaintiffs' claims "ha[ve] national significance and [are] of special consequence"; other district courts "have disagreed with" the district court's holding that *Hawaii* does not foreclose plaintiffs' rational basis challenge; and reversal "would dispose of the entire case." D. Ct. Doc. 297 at 7-8 (Ex.C).

Accordingly, the question presented is whether this Court should grant permission to proceed under Section 1292(b) with an interlocutory appeal of the certified order refusing to dismiss the complaint. The answer is plainly "yes": as this Court recently held in *In re Trump*, 928 F.3d 360, 364, 368-71 (4th Cir. 2019), *pet. for reh'g filed* (Aug. 26, 2019), the "paradigmatic case" for an immediate appeal is litigation that raises legal questions with "national significance [and] special consequence," and where immediate "resolution of the controlling issues by a court of appeals" could avoid "unnecessary intrusion into the duties and affairs of a sitting President," including "discovery against the President." That is the case here, where *Hawaii* requires dismissal of plaintiffs' rational basis challenges, and success on that issue would pretermit intrusive and burdensome litigation into the government's deliberative processes regarding national security

and foreign policy. For similar reasons, this Court should stay district court proceedings, including discovery, pending resolution of this petition.

STATEMENT OF FACTS

1. This Court, like the Ninth Circuit, affirmed a worldwide preliminary injunction prohibiting enforcement of the Proclamation. *IRAP v. Trump*, 883 F.3d 233 (4th Cir. 2018) (en banc); *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (per curiam). After granting review in the Ninth Circuit case, the Supreme Court reversed and remanded both cases, rejecting the constitutional attacks on the Proclamation.

The Supreme Court initially emphasized that the Proclamation restricts entry into this country by aliens abroad who themselves have no constitutional rights regarding entry. *Hawaii*, 138 S. Ct. at 2418. The Court then noted that it "has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen," which "limited our review to whether the Executive gave a 'facially legitimate and bona fide' reason for its action." *Id.* at 2419 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972)). The Court recognized that the "conventional application of *Mandel* * * * would put an end to our review." *Id.* at 2420. In light of the government's argument in the alternative, however, the Supreme Court merely "assume[d] that we may look

behind the face of the Proclamation to the extent of applying rational basis review," to ask whether "the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes." *Id.* Even with that assumption, the Court emphasized that the Proclamation must be upheld "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.*

The Court concluded that "the Government has set forth a sufficient national security justification to survive rational basis review" and therefore "plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim." *Id.* at 2423. "[B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification." *Id.* at 2421. "The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices," and "[t]he text says nothing about religion." *Id.* "The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies," and the Proclamation's various provisions "were justified by the distinct conditions in each country." *Id.* "Under these circumstances, the Government has set forth a

sufficient national security justification to survive rational basis review." *Id.* at 2423.

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

Second, plaintiffs sought to "discredit the findings of the [Proclamation's] review [by] pointing to deviations from the review's baseline criteria" that resulted in the inclusion or exclusion of particular countries. *Id.* at 2421. But the Court also rejected that argument, because "in each case the [Proclamation's] determinations were justified by the distinct conditions in each country." *Id.*

Third, the plaintiffs contended that "not enough individuals are receiving waivers or exemptions" under the Proclamation, *id.* at 2423 n.7. But the Court

held that, "even if such an inquiry were appropriate under rational basis review," this argument "d[id] not affect [its] analysis." *Id.*

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

Because the Proclamation could be sustained on its national-security rationale, the Court did not need to address whether it could also be upheld on the Proclamation's related "key objective[] * * * to encourage foreign governments to improve their practices, thus facilitating the Government's vetting process overall." *Id.* at 2411. But the Court made clear that "inducing other nations to improve their practices" was a "legitimate purpose[]" for the Proclamation. *Id.* at 2421.

2. On remand, despite the Supreme Court's decision in *Hawaii*, the district court denied the government's motion to dismiss plaintiffs' constitutional claims.

The district court first concluded that under *Hawaii*, the court should apply rational basis review to plaintiffs' constitutional claims, rather than the *Mandel* standard. Op. 29. Next, although the Supreme Court in *Hawaii* held that "the

Government has set forth a sufficient national security justification to survive rational basis review," and therefore the plaintiffs in that case "ha[d] not demonstrated a likelihood of success," 138 S. Ct. at 2423, the district court concluded that *Hawaii* "is not dispositive," even though the plaintiffs in both cases had asserted "many of the same facts" in support of their constitutional challenges. Op. 38.

The district court reasoned that the allegations in plaintiffs' complaints could demonstrate that the Proclamation lacked a rational basis. The court first stated that "the Complaints provide detailed allegations of statements by the President" that could demonstrate that the Proclamation "was issued for [an] illegitimate purpose." Op. 34-35. Next, the district court stated that supposed "deviations" from the Proclamation's "baseline criteria" were evidence "undermin[ing] the national security rationale for the Proclamation." Op. 36. Third, according to the district court, plaintiffs' allegations that "the waiver process has not been applied in a manner consistent with the stated national security purposes of the Proclamation," and that waivers "have been granted at a rate of only approximately two percent," support the argument that the Proclamation is "a pretext for discrimination." Op. 37. And finally, the court pointed to plaintiffs' allegations that "the travel ban does not rationally advance national security because there

already exists legal authority to exclude any potential national security threat, including that individual applicants are required to submit a detailed application and undergo an in-person interview as part of the visa process." Op. 38.

The district court then rejected the government's alternative arguments for dismissal. The government argued that plaintiffs' Due Process claim must be dismissed because plaintiffs have no cognizable liberty or property interest in the granting of a visa to a foreign national family member. Op. 41-42. The district court refused to dismiss on that ground merely because, in its view, plaintiffs' contrary argument was not "foreclosed" by precedent. Op. 42-43. The court also rejected the government's argument that plaintiffs' Equal Protection and Establishment Clause claims fail on the merits because they are based not on plaintiffs' own constitutional rights, but on injuries suffered by third parties (who lack constitutional rights of their own). The district court noted it had previously rejected that argument when framed as a question of standing, and that was "largely validated" by the Supreme Court. Op. 45.

3. On August 20, 2019, the district court granted the government's motion to certify its order denying the government's motion to dismiss for immediate appeal under 28 U.S.C. § 1292(b). *See* Ex.B. However, the district court denied

the government's motion for a stay of discovery pending any interlocutory appeal. *See* Ex.D.

REASONS WHY THE PETITION AND STAY SHOULD BE GRANTED

This Court should grant permission to take an interlocutory appeal. As this Court recently noted, where litigation "has national significance and is of special consequence," and especially where "allow[ing] such a suit to go forward in the district court without a resolution of the controlling issues by a court of appeals could result in an unnecessary intrusion into the duties and affairs of a sitting President," that presents a "paradigmatic case" for an immediate appeal under Section 1292(b). *In re Trump*, 928 F.3d at 368-71. As the Supreme Court has explained, courts "should not hesitate" to permit interlocutory appeals under Section 1292(b) for issues of "special consequence." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009). Those principles apply here.

The Proclamation is an action by the President himself, exercising a "fundamental sovereign attribute" "within the core of executive responsibility," in which judicial inquiry risks "intruding on the President's constitutional responsibilities in the area of foreign affairs." *Hawaii*, 138 S. Ct. at 2418-19. Whether plaintiffs' rational basis challenges to the Proclamation state a claim for relief presents a pure legal question, and turns on precisely the same arguments

rejected by the Supreme Court in *Hawaii*. Allowing those challenges to proceed invites contentious and wide-ranging discovery that would intrude into the duties and affairs of a sitting President, and needlessly force a confrontation with complex privilege questions on matters touching upon, and central to, the President's core foreign affairs functions. This Court should grant the petition for permission to appeal. For similar reasons, this Court should also stay district court proceedings, including discovery, pending resolution of this appeal.

A. Plaintiffs' Rational Basis Challenges Are Foreclosed By *Hawaii* And At A Minimum There Are Substantial Grounds For Difference Of Opinion.

The Supreme Court held that the Proclamation "set[s] forth a sufficient national security justification to survive rational basis review." *Hawaii*, 138 S. Ct. at 2423. While that conclusion was issued on review of a preliminary injunction, it is a legal determination that binds the district court here. Moreover, in reaching that conclusion, the Court rejected precisely the same arguments advanced by plaintiffs in this case. Plaintiffs' rational basis attack is foreclosed by *Hawaii*; at a minimum, reasonable jurists could disagree on the outcome of that pure question of law. Indeed, reasonable jurists could also disagree on the district court's threshold conclusion that rational basis even applies, particularly since the Supreme Court

pointedly declined to definitively hold that it does. *Id.* at 2418-19, 2420 n.5; *see also IRAP*, 883 F.3d at 364 (Niemeyer, J, dissenting).

The district court denied the government's motion to dismiss based on its view that plaintiffs had plausibly alleged "that the Proclamation is not rationally related to the legitimate national security and information-sharing justifications identified in the Proclamation and therefore that it was motivated only by an illegitimate hostility to Muslims." Op. 38. Whether the Proclamation survives rational basis review on a motion to dismiss is a pure question of law appropriate for Section 1292(b) review. *See, e.g., Muscarello v. Ogle County*, 610 F.3d 416, 423 (7th Cir. 2010) (reviewing a "classification * * * subject to the deferential rational basis test" "raises a pure question of law"); *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 249 (5th Cir. 2000) ("Whether this 'rational relation' in fact exists is a question of law."); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 471 (1st Cir. 1990) ("whether there could be *no* rational basis [is] a question of law"); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 674-75 (2009) ("Evaluating the sufficiency of a complaint is not a 'fact-based' question of law.").[2]

[2] The district court was thus wrong in suggesting that rational basis analysis is essentially a factual inquiry. D. Ct. Doc. 297 at 6 (Ex.C). And given that the Supreme Court merely assumed that rational basis applies, the district court's assertion that "the Supreme Court has already considered and ruled on [that] issue," *id.*, is also incorrect.

There is no doubt that, at a minimum, reasonable jurists could disagree with the district court's conclusion. The Supreme Court itself held that "the Government has set forth a sufficient national security justification to survive rational basis review," *Hawaii*, 138 S. Ct. at 2423, and found "persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility," *id.* at 2421. In addition, in this Court's now-vacated decision in *IRAP v. Trump*, four Judges would have held that the Proclamation survives constitutional scrutiny, *see* 883 F.3d at 373 (Niemeyer, J, dissenting); *id.* at 378 (Traxler, J., dissenting), and post-*Hawaii*, other district courts have reached the opposite conclusion from the district court below, *see Alharbi v. Miller*, 368 F. Supp. 3d 527, 562-63 (E.D.N.Y. 2019) (rejecting Equal Protection challenge in light of *Hawaii*'s conclusion that Proclamation survives rational basis review), *appeal filed* No. 19-1570 (2d Cir. May 28, 2019); *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1022-23 (N.D. Cal. 2019) (same). The views of these judges underscore that there are substantial grounds for difference of opinion.

In reaching the opposite conclusion here, the district court relied on three prior Supreme Court decisions that "invalidated governmental classifications for failing to meet this [rational basis] standard." Op. 32. But *Hawaii* expressly held that "[t]he Proclamation does not fit th[e] pattern" of these cases because "[i]t

cannot be said that it is impossible to discern a relationship to legitimate state interests or that the policy is inexplicable by anything but animus." 138 S. Ct. at 2420-21 (quotation marks omitted).

While *Hawaii*'s conclusion that the Proclamation survives rational basis review was made in the context of a preliminary injunction under the likelihood-of-success standard, the Court's legal conclusions regarding the insufficiency of the plaintiffs' allegations is binding, and the Court's vacatur of the preliminary injunction did not turn on the relative harms to the parties, the balance of equities, or the public interest. *Hawaii*, 138 S. Ct. at 2423. The district court's conclusion that "a more fulsome record" could change the legal analysis, Op. 40, cannot be squared with rational basis review, which "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Even if plaintiffs could show that the Proclamation's stated national security rationale was incorrect, that would still not suffice under rational basis review. *Id.* at 320 ("The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [government's] choice from constitutional challenge."). Plaintiffs' evidence of the Proclamation's supposed subjective motivation does not alter the analysis either;

"it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the [government]." *Id.* at 315.

Nor was the district court writing on a clean slate. The Supreme Court already found "persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility," *Hawaii*, 138 S. Ct. at 2421, and the existence of those "plausible reasons" means the court's "inquiry is at an end," *Beach Communications*, 508 U.S. at 313-14. That is particularly so where, as here, the very arguments relied upon by the district court to attempt to refute the Proclamation's legitimate interests (Op. 34-38) were considered and rejected by the Supreme Court in *Hawaii*. Plaintiffs' repetition of the same rejected arguments does not and cannot establish a plausible claim that the Proclamation lacks a rational basis.

For example, the district court believed that "the Complaints provide detailed allegations of statements by the President" that could demonstrate that the Proclamation "was issued for [an] illegitimate purpose." Op. 34-35. But the statements relied upon by the district court were the same ones considered by the Supreme Court. *Hawaii*, 138 S. Ct. at 2417. And the Court rejected the argument that "the stated justifications for the policy" should be undermined "by reference to extrinsic statements," or that "a series of statements by the President * * * cast[]

doubt on the official objective of the Proclamation," and its "legitimate grounding in national security concerns." *Id.* at 2417-18, 2421. Plaintiffs' effort to establish subjective motives is irrelevant under rational basis review. *Beach Communications*, 508 U.S. at 315.

Similarly, the district court reasoned that supposed deviations from the Proclamation's "baseline criteria * * * undermine the national security rationale for the Proclamation." Op. 36. But the Supreme Court rejected the attempt "to discredit the findings of the [Proclamation's] review [by] pointing to deviations from the review's baseline criteria" because "in each case the [Proclamation's] determinations were justified by the distinct conditions in each country," as the Proclamation explained. *Hawaii*, 138 S. Ct. at 2421 (discussing reasons, set forth in the Proclamation, for including Somalia and excluding Iraq); *see id.* at 2405-06 (discussing the "range of restrictions" on various countries "based on the 'distinct circumstances'" of those countries).

The district court also relied on plaintiffs' allegations that "the waiver process has not been applied in a manner consistent with the stated national security purposes of the Proclamation," and that waivers "have been granted at a rate of only approximately two percent," to conclude that the Proclamation may be "a pretext for discrimination." Op. 37. But the Supreme Court held that the

plaintiffs' argument that "not enough individuals are receiving waivers or exemptions" was not a proper basis for challenging the constitutionality of the Proclamation. *Hawaii*, 138 S Ct. at 2423 n.7 (concluding that plaintiffs' argument "d[id] not affect [its] analysis").

Likewise, the district court credited plaintiffs' allegation that "the travel ban does not rationally advance national security because there already exists legal authority to exclude any potential national security threat, including that individual applicants are required to submit a detailed application and undergo an in-person interview as part of the visa process." Op. 38. Once again, the Supreme Court considered that same argument, *Hawaii*, 138 S. Ct. at 2443-44 (Sotomayor, J., dissenting) ("Congress has already addressed" the Proclamation's concerns through a "rigorous[]" application process and "an in-person interview"), but rejected it because the statutory scheme did not undermine the Proclamation's national security rationale, *id.* at 2422 n.6.

The district court also failed to address an independent reason why the Proclamation survives rational basis review: the Proclamation serves the government's legitimate foreign-policy objective of "encourag[ing] foreign governments to improve their practices." *Hawaii*, 138 S. Ct. at 2411. Regardless of whether the national-security rationale suffices, the Proclamation's diplomatic

objective of encouraging foreign governments to share information with the United States would independently require upholding the Proclamation under rational basis review.[3]

Finally, the district court also rejected the government's alternative grounds for dismissal, which present pure and controlling questions of law for which there are substantial grounds for differing opinions. The district court held that plaintiffs' Due Process claim based on a liberty or property interest in the issuance of a visa to a foreign national relative was not "foreclosed." Op. 43. As the district court itself acknowledged, that very issue divided the Supreme Court in *Kerry v. Din*. *See* 135 S. Ct. 2128, 2132-38 (2015) (plurality opinion); *id.* at 2139 (Kennedy, J., concurring); *id.* at 2142 (Breyer, J., dissenting). And in *Hawaii*, a majority resolved the issue by holding that the government provides all the process that might be due by providing "a statutory citation to explain a visa denial," 138 S. Ct. at 2419, which dooms the plaintiffs' Due Process claims because each visa

[3] As the district court recognized, Op. 30-31, the same standard applies to all of plaintiffs' constitutional claims, whether brought under the Due Process, Equal Protection, or Establishment Clauses, and thus resolution of the questions presented in the government's favor would uniformly terminate all the constitutional claims presented. Because the district court dismissed plaintiffs' statutory claims, Op. 18-27, and plaintiffs declined to amend their Complaints to cure those deficiencies, *see* D. Ct. Dkt. 278 (May 18, 2019), the dismissal of plaintiffs' constitutional claims would end this litigation.

applicant was informed that his or her visa was denied pursuant to 8 U.S.C. § 1182(f). The district court's conclusion (Op. 44) that it is nevertheless "plausible" that such a liberty or property interest exists is not the correct standard for a motion to dismiss – the "plausibility" standard applies to factual allegations, not legal conclusions.

Likewise, the district court rejected the government's alternative argument that plaintiffs' Equal Protection and Establishment Clause claims fail on the merits because they are premised not on alleged violations of plaintiffs' own constitutional rights, but on the asserted rights of plaintiffs' foreign national family members. The district court rejected this argument as a "repackag[ing]" of the government's previous "unsuccessful standing argument" as a "different argument[] that Plaintiffs fail on the merits." Op. 45. But *Hawaii* itself held that the issue should be addressed as a merits question rather than a jurisdictional one, 138 S. Ct. 2416, although the Court's holding that plaintiffs' rational basis challenge failed on the merits obviated the need for the Court to resolve that alternative merits argument. And even if plaintiffs have *standing* to assert their constitutional claims, it does not follow (as the district court held), that their claims cannot fail *on the merits*. Here, plaintiffs' Equal Protection claim is defective because it unquestionably does not turn on their own rights (the Proclamation does

not depend on plaintiffs' own nationality or religion) but on the rights of alien family members who have no constitutional rights of their own to assert. The same is true for plaintiffs' Establishment Clause claim, which also turns on an alleged violation of the rights of alien family members. And plaintiffs' own claim of harm from observing an undesirable message is insufficient to state a claim. *Allen v. Wright*, 468 U.S. 737, 755 (1984); *see American Legion v. American Humanist Assoc.*, 139 S. Ct. 2067, 2098-2103 (2019) (Gorsuch, J., concurring in the judgment); *IRAP*, 883 F.3d at 379-84 (Agee, J., dissenting).

B. An Immediate Appeal And Stay Will Materially Advance The Ultimate Termination Of This Litigation And Obviate Unnecessary And Burdensome Discovery.

An interlocutory appeal resolved in the government's favor would materially advance the ultimate termination of this litigation by bringing the entire case to an end. Each of the arguments discussed above would be independently sufficient to require dismissal of the case, and the government thus would need to prevail on only one of them to bring the litigation to an end.

By contrast, without an immediate appeal this litigation will become mired in unnecessary and burdensome discovery – exactly the circumstances that Section 1292(b) is designed to address. An interlocutory appeal is appropriate where termination of the litigation could avoid "(possibly) costly discovery." *Kennedy v.*

St. Joseph's Ministries, 657 F.3d 189, 196 (4th Cir. 2011). *See In re Trump*, 928 F.3d at 364 (without Section 1292(b) certification, the district court's "ruling left the action to proceed forward in the district court, including discovery against the President"); *In re Trump*, --- Fed. Appx. ---, 2019 WL 3285234 at *1 (D.C. Cir. 2019) (district court orders "squarely meet the criteria" under Section 1292(b) where "important and open threshold questions of pure law" can be "resolved conclusively through an expedited interlocutory appeal" thereby "'avoiding unnecessary burdens on the President * * * including the timing and scope of discovery'"); *cf. Cheney v. U.S. District Court*, 542 U.S. 367, 385 (2004) ("This Court has held, on more than one occasion, that '[t]he high respect that is owed to the office of the Chief Executive * * * is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.") (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)).

Here, the perils of permitting discovery to proceed are particularly striking given the extraordinary breadth of the discovery that Plaintiffs have signaled that they will seek, including the foreign-policy and national-security recommendations that were provided to the President by his Cabinet. At earlier stages of the litigation, plaintiffs sought expansive discovery of "[a]ll memoranda, policies, projections, reports, data, summaries, or similar documents relating to the

development" of both the Proclamation and the Executive Orders that preceded it. *IRAP v. Trump*, D. Md. No. 17-361, D. Ct. Doc. No. 63-1 at 6 (Feb. 22, 2017). Under these circumstances, it is virtually certain that any discovery will require significant motions practice – before the district court and potentially before this Court. Plaintiffs have previously stated that they "do not deny that there may be disputes about discovery requiring the time and attention of the parties" and that "this process could be lengthy and involve complicated issues" that the district court would need to "resolve * * * while appellate proceedings * * * are pending." *Zakzok v. Trump*, D. Md. No. 17-2969, D. Ct. Doc. 53 at 14-15, 27.

The broad discovery Plaintiffs are likely to pursue would be extraordinarily burdensome, and would likely generate numerous privilege disputes, including regarding the presidential communications privilege, the government's deliberative process privilege, and the confidentiality of records pertaining to the issuance or refusal of visa applications, 8 U.S.C. § 1202(f). The prospect of discovery into the President's deliberations with his closet advisors threatens the separation of powers, *Cheney*, 542 U.S. at 381-82, and may prompt the assertion of executive privilege and a "collision course" between two "coequal branches of the Government," *id.* at 389. Such a confrontation "should be avoided whenever possible." *Id.* at 390.

Despite certifying this case for immediate appeal under Section 1292(b), the district court denied the government's motion to stay discovery pending any interlocutory appeal. Permission for an interlocutory appeal is all the more warranted here where resolution of the pure legal questions – namely, that plaintiffs' claims are foreclosed by the Supreme Court's decision in *Hawaii* – could avoid such difficult privilege and other discovery matters, or could at a minimum narrow the issues and focus of such discovery.

For those reasons, this Court should grant the petition for an interlocutory appeal, and should also stay further district court proceedings, including discovery, while this interlocutory appeal is pending. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The government is likely to succeed on the merits for the reasons discussed above, and will suffer irreparable injury from the intrusive discovery that is certain to happen without a stay. This Court stayed district court proceedings for similar reasons in *In re Trump*, No. 18-2486 (4th Cir. Dec. 20, 2018), and it should follow the same course here. *See also Blumenthal v. Trump*, 2019 WL 3948478 at *3 (D.D.C. Aug. 21, 2019) (on remand, certifying interlocutory appeal under § 1292(b) and staying proceedings, including discovery).

By contrast, plaintiffs would not suffer any meaningful prejudice as a result of staying discovery pending completion of Section 1292(b) proceedings. It is far

from clear that resolution of their cases would be achieved more quickly by permitting discovery under the district court's current erroneous legal framework (subject to potential mandamus review) while a Section 1292(b) appeal is pending, rather than expeditiously resolving that appeal and then allowing discovery to commence in the (extremely unlikely) event that there are any live claims left to litigate for which discovery would be appropriate. Even if a stay posed some potential for delay, the government would be willing to minimize it through expedited proceedings before this Court.

CONCLUSION

For the foregoing reasons, this Court should grant Defendant's petition for permission to appeal under 28 U.S.C. § 1292(b) and stay district court proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 5(c). The brief contains 5191 words.

/s/ H. Thomas Byron III
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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I electronically filed the foregoing Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) and Motion for a Stay of District Court Proceedings with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I hereby certify that I served one copy of the same by first-class U.S. mail, postage prepaid, to the following attorneys listed below.

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