No. 19-350
(8:17-cv-00361-TDC)
(8:17-cv-02921-TDC)
(1:17-cv-02969-TDC)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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; 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 this official capacity as Acting Director of U.S. Citizenship and Immigration Services; WILLIAM P. BARR, in his official capacity as Attorney General of the United States,

Defendants-Petitioners,

v.

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; JOHN DOE #4; IRANIAN ALLIANCES ACROSS BORDERS; JANE DOE #1; JANE DOE #3; JANE DOE #4; JANE DOE #5; JANE DOE #6; IRANIAN STUDENTS' FOUNDATION, Iranian Alliances Across Borders Affiliate at the University of Maryland College Park; EBLAL ZAKZOK; SUMAYA HAMADMAD; FAHED MUQBIL; JOHN DOE #2,

Plaintiffs-Respondents.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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INTRODUCTION

Beginning in January 2017, the President ordered a series of immigration bans targeting people from majority-Muslim nations. Those bans have upended the lives of tens of thousands of individuals, including the individual Plaintiffs as well as the members and clients of Plaintiff organizations. The bans constitute an effort by the President to follow through on his unequivocal campaign promise to ban Muslim immigration to the United States. *See Int'l Refugee Assistance Project*, 883 F.3d 233, 322 (4th Cir.) (*en banc*), *vacated*, 138 S. Ct. 2710 (2018) ("*IRAP II*") (Wynn, J., concurring) ("[T]he President never has disputed that his Proclamation . . . implements his campaign promise to ban Muslims from entering the United States.") "[T]o the objective observer," those bans "exhibit a primarily religious anti-Muslim objective," *IRAP II*, 883 F.3d at 269. Plaintiffs have now been in limbo for nearly two years because of the current ban, Proclamation 9645,[1] and separated indefinitely from husbands and wives, sons and daughters, grandchildren and grandparents.

The Proclamation is in effect today because the Supreme Court first stayed, then vacated, preliminary injunctions issued in this case and in *Hawaii v. Trump*. The government argues that the Supreme Court's preliminary injunction decision

[1] Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists and Other Public-Safety Threats, 82 Fed. Reg. 45161 (Sept. 27, 2017).

requires dismissal of the entire case. The district court carefully considered that argument and denied the government's motion to dismiss. The government now seeks an extraordinary departure from standard civil procedure—which strongly disfavors piecemeal, interlocutory appeal—and asks this Court to hear its appeal from the denial of its motion to dismiss while the case is still pending in the court below.

Although the district court granted the government's application to appeal, this Court is broadly empowered to deny the Defendants' request for an appeal, and it should do so. Interlocutory appeal is rarely warranted. Exercising this Court's power to reject the government's request is especially proper here given that the district court granted appeal based upon a misreading of a recent case from this Court.

Despite the high-profile nature of this case, Defendants' petition for appeal is simply a request to prematurely reargue an outcome with which they are displeased, and to use the premature appeal to further put off all discovery in the case, including discovery that does not involve any potentially privileged material. A party's mere disagreement with a district court's ruling, even when strenuous and repeatedly made, is not an extraordinary circumstance. Plaintiffs request, and the law commands, that this Court deny that request.

BACKGROUND AND PROCEDURAL HISTORY

A. The District Court's Preliminary Injunction Order

The individual Plaintiffs in these cases are U.S. citizens and lawful permanent residents whose relatives—including spouses, parents, and children—are unable to obtain visas while the Proclamation is in effect. (*See generally IRAP*, No. 17-361 D. Ct. Doc. 219; *IAAB*, No. 17-2921, D. Ct. Doc. 46; *Zakzok*, No 17-2969, D. Ct. Doc. 36, at 21-35.) The Proclamation has prevented the individual Plaintiffs from reuniting with their family members and loved ones and has caused them to feel "personally attacked, targeted, and disparaged." (*IAAB*, No. 17-2921, D. Ct. Doc. 26-8.) The organizational Plaintiffs are social services organizations and associations of young people, with similarly situated members of clients, that host events and provide services that the Proclamation has disrupted. (See *IRAP*, No. 17-361, D. Ct. Doc. 219; *IAAB*, No. 17-2921, D. Ct. Doc. 46; *Zakzok*, No. 17-2969, D. Ct. Doc. 36.)

Plaintiffs allege numerous causes of action and sought a preliminary injunction of the Proclamation on some of those claims. (See *IRAP*, No. 17-361, D. Ct. Doc. 205; *IAAB*, No. 17-2921, D. Ct. Doc. 26; *Zakzok*, No. 17-2969, D. Ct. Doc. 2.) In an order dated October 17, 2017, the district court agreed that the Proclamation likely violates both the Establishment Clause and the Immigration and Nationality Act's anti-discrimination provision, 8 U.S.C. § 1152(a), and therefore

issued a preliminary injunction prohibiting the Government from enforcing provisions of Section 2 of the Proclamation. (See *IRAP*, No. 17-361, D. Ct. Doc. 220; *IAAB*, No. 17-2921, D. Ct. Doc. 47; *Zakzok*, No. 17-2969, D. Ct. Doc. 37.) In an *en banc* decision, this Court affirmed. *IRAP II*, 883 F.3d 233.

On December 4, 2017, the Supreme Court stayed the preliminary injunction, along with another preliminary injunction that had been issued in parallel litigation in the District of Hawaii. *Trump v. IRAP*, 138 S. Ct. 542 (2017); *Trump v. Hawaii*, 138 S. Ct. 542 (2017). The Supreme Court ultimately granted certiorari in *Trump v. Hawaii*, 138 S. Ct. 923 (2018), and vacated the preliminary injunction. The Supreme Court also granted cert petitions in these cases, vacating and remanding this Court's *en banc* decision affirming the district court's order granting the preliminary injunction. *IRAP v. Trump*, 138 S. Ct. 2710 (2018). This Court then remanded these cases to the district court. *IRAP v. Trump*, 905 F.3d 287 (4th Cir. 2018).

B. The Government's Unsuccessful Motion to Dismiss Plaintiffs' Constitutional Claims

The *IAAB* and *Zakzok* Plaintiffs subsequently amended their complaints, (*IAAB* D. Ct. Doc. No. 78; *Zakzok* D. Ct. Doc. No. 62), and the *IRAP* Plaintiffs voluntarily dismissed certain of their statutory claims, (*IRAP*, D. Ct. Doc. No. 270.) As amended, the complaints advance two categories of claims.

First, Plaintiffs allege that the Proclamation and the actions taken by the agencies implementing it violate the substantive and procedural requirements of the

Administrative Procedures Act. *See Int'l Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650, 658 (D. Md. 2019). Second, Plaintiffs allege that the Proclamation violates the United States Constitution. *Id.* Specifically, all Plaintiffs allege that the Proclamation violates the Establishment Clause. *Id.* The *IRAP* and *IAAB* Plaintiffs also allege that the Proclamation violates the Fifth Amendment guarantees to equal protection and due process; the *IAAB* Plaintiffs further allege that the Proclamation violates the First Amendment's guarantees of freedom of speech and association. *Id.*

On May 2, 2019, the district court granted the Government's motion to dismiss the APA claims, but denied the motion to dismiss as to the constitutional claims. *See generally id.* The district court denied the Government's justiciability arguments, holding that Plaintiffs have standing. *Id.* at 660-61. The district court also declined to adopt the Government's argument that *Trump v. Hawaii* forecloses Plaintiffs' constitutional claims, explaining that "the highly deferential Rule 12(b)(6) standard" differs from the standard applied by the Supreme Court at the preliminary injunction stage. *Id.* at 674-75. The district court concluded that "Plaintiffs have put forward factual allegations sufficient to show that the Proclamation is not rationally related to the legitimate national security and information sharing justifications identified in the Proclamation and therefore that it was motivated only by an illegitimate hostility to Muslims." *Id.* at 674. In July, the

District Court for the Eastern District of Michigan also denied a Government motion to dismiss similar claims relying, in part, on the *IRAP* district court's opinion. *See generally Arab Am. Civil Rights League v. Trump*, _ F. Supp. 3d _, No. 17-10310, 2019 WL 3003455 (E.D. Mich. July 10, 2019).

The Government filed its answers on May 31, 2019. (*IRAP* D. CT. No. 283; *IAAB* D. CT. No. 96; *Zakzok* D. CT. No. 75.) Rather than proceeding with discovery, however, the Government now seeks an interlocutory appeal and stay of proceedings. As required, the Government first moved the district court to certify this matter for appeal pursuant to 28 U.S.C. § 1292(b). (*IRAP* D. CT. No. 289; *IAAB* D. CT. No. 100; *Zakzok* D. CT. No. 79.)

In an order issued August 20, 2019, the district court made it clear that the government cannot justify interlocutory appeal under the long-established legal standard. (Pet. Ex. C.) The district court noted at the outset of its analysis that it had "doubts that the issues identified by the Government constitute controlling questions of law as to which there is substantial ground for difference of opinion." (*Id.* at 5.) The Court thereafter proceeded through each of Defendants' asserted questions for certification, explaining why each likely fell short of the requirements for interlocutory appeal. (*See id.* (noting court was unpersuaded that Defendants' disapproval of court's *Mandel*-or-rational-basis answer met section 1292(b) requirements); *id.* at 6 (same regarding Defendants' disapproval of rational basis

analysis); *id.* at 6-7 (same regarding Defendants' disapproval of Plaintiffs' cognizable legal interests to pursue their constitutional claims).)

Despite that analysis, the district court held that this Court may have "expanded the reach of § 1292(b)" in its recent *In re Trump* decision. (*Id.* at 7.) The district court read *In re Trump* as setting forth a new rule that even where the requirements of § 1292(b) are not otherwise satisfied, a case that "has national significance and is of special consequence" is appropriate for interlocutory review, at least in this case where "other district courts, although without significant analysis, have disagreed" with the district court's application of *Trump v. Hawaii* to Plaintiffs' current complaints. (*Id.* at 7-8.) On that basis, the district court certified its decision for possible interlocutory appeal.

Having narrowly cleared the first step in the 1292(b) process, Defendants now ask this Court to permit them to appeal. As fuller consideration of *In re Trump* makes clear, however, this is not a case for which premature appeal is appropriate. Likewise, the mere fact that two courts have dismissed, without substantial analysis, similar constitutional claims does not warrant this Court hearing this case.

LEGAL STANDARD GOVERNING THE PETITION

"The finality requirement in [28 U.S.C.] § 1292 evinces a legislative judgment that restricting appellate review to final decisions prevents the debilitating effect on judicial administration cause by piecemeal appeal disposition of what is, in practical

consequence, but a single controversy." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978) (cleaned up), *superseded other grounds*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1706 (2017). To that effect, section 1292(b) requires a two-step procedure for appeals of non-final orders. First, an appeal may only be taken upon certification by the district court, which may only be granted if the district court determines: (1) "that such order involves a controlling question of law;" (2) "as to which there is a substantial ground for difference of opinion;" *and* (3) "that an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

If the district court finds each factor is met and exercises its discretion to certify the matter, "the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand*, 437 U.S. at 475. "The appellate court may deny the appeal for any reason, including docket congestion." *Id.*

ARGUMENT

I. *In re Trump* Does Not Necessitate or Support a Premature Appeal

Despite granting permission to file the instant petition, the district court rejected most of Defendants' arguments in their section 1292 motion. The district court's ultimate decision to certify its decision for potential interlocutory appeal was

based in substantial part on this Court's recent decision in *In re Trump*, 928 F.3d 360 (4th Cir. 2019), a case published after Plaintiffs' opposition was already on file.[2] However, *In re Trump* does not support the government's request for interlocutory appeal.

A. *In re Trump* Did Not "Expand the Reach" of Section 1292(b)

The district court erred in concluding that *In re Trump* "expanded the reach of § 1292(b)." Rather, this Court's discussion of the importance of the matter in *In re Trump* pertained to this Court's *mandamus* analysis, not its 1292(b) analysis. In a mandamus action, this Court considers whether a petitioner establishes: "(1) that it has a clear and indisputable right; (2) that there are no other adequate means to vindicate that right; and (3) that the writ is appropriate under the circumstances." *Id.* at 369 (cleaned up). Only the first prong, "a clear and indisputable right," overlaps with the section 1292(b) analysis. The remaining prongs are specific to whether to exercise the extraordinary power of mandamus.

This Court's discussion of the national significance of *In re Trump* primarily concerned whether "the writ [was] appropriate under the circumstances." *See In re Trump*, 928 F.3d at 369 (discussing whether overriding district court's considerable discretion is warranted); *see also id.* at 370 (proceeding to discussion of 1292(b) factors "quite apart from the novelty of the issues presented"). Section 1292(b),

[2] A petition for rehearing *en banc* is pending in *In re Trump*.

unlike mandamus actions, has no such prong. Where, as here, the district court erroneously imported the "national significance" factor in evaluating petitions for mandamus into its application of section 1292(b), and relied upon that "national significance" factor as the principal basis for certifying an interlocutory appeal, this Court should decline to accept the petition to appeal.

B. Even If *In re Trump* Is Relevant to an Ordinary Section 1292(b) Analysis, This Case Falls Far Short of *In re Trump's* "Paradigmatic" Example

Defendants begin their petition by selectively quoting this Court's description of the significance of the underlying issues of *In re Trump*, contending that this case is of equal import. (*See* Defs.' Petition, Cir. Ct. Doc. 3-1 at 16.) Anything beyond a superficial review of *In re Trump* makes clear that Defendants' comparisons are inapt.

In re Trump arose out of a lawsuit by the District of Columbia and the State of Maryland, alleging that the President is unlawfully reaping business profits from foreign nations while in office, in violation of the Emoluments Clauses. 928 F.3d at 362. The uniqueness of that case is hard to overstate, as this Court explained:

> First, the suit is brought directly under the Constitution without a statutory cause of action, seeking to enforce the Emoluments Clauses which, by their terms, give no rights and provide no remedies. Second, the suit seeks an injunction directly against a sitting President, the Nation's chief executive officer. Third, up until the series of suits recently brought against this President under the Emoluments Clauses, no court has ever entertained a claim to enforce them. Fourth, this and the similar suits now pending under the Emoluments Clauses raise

> novel and difficult constitutional questions, for which there is no precedent. Fifth, the District and Maryland have manifested substantial difficulty articulating how they are harmed by the President's alleged receipts of emoluments and the nature of the relief that could redress any harm so conceived. Sixth, to allow 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.

Id. at 368.

Unlike the Emoluments Clauses—where "no court has ever entertained" an enforcement claim—the three constitutional clauses in this case are routinely before the Federal courts in challenges to government action involving allegations of improper motivation or purpose. Nor is there a dearth of cases brought touching upon national security and/or immigration matters. Likewise, courts have heard numerous cases involving claims of unlawful discrimination by federal officials, including the President.[3]

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[3] Recent examples include *CASA de Maryland v. Trump*, 355 F. Supp. 3d 307, 325–26 (D. Md. 2018) ("Defendants do not suggest that President Trump's alleged statements are not evidence of discriminatory motive on his part, nor could they. One could hardly find more direct evidence of discriminatory intent towards Latino immigrants."); *NAACP v. DHS*, 364 F. Supp. 3d 568, 578 (D. Md. 2019) (denying motion to dismiss Equal Protection Clause challenge to ending Temporary Protected Status ("TPS") for Haitian nationals); *Saget v. Trump*, 375 F. Supp. 3d 280, 371–74 (E.D.N.Y. 2019) (same); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018), appeal filed, No. 18-16981 (9th Cir. 2018) (granting preliminary injunction in challenge to decision to end TPS for El Salvador, Haiti, Honduras, and Nicaragua); *Centro Presente v. DHS*, 332 F. Supp. 3d 393, 415 (D. Mass. 2018) (denying motion to dismiss as to Equal Protection claim in challenge to ending TPS for El Salvador, Haiti, and Honduras); *State of New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 810–11 (S.D.N.Y. 2018) (denying motion to dismiss in

While Defendants make the conclusory assertion that both the Emoluments Clauses case and this matter will require "intrusion into the duties and affairs of a sitting President," (Petition at 16), that comparison crumbles under even cursory inspection. In *In re Trump*, discovery would necessarily entail probing the President's *personal* financial and business dealings and the manner in which his interactions with foreign actors were or were not shaped by that influence. *See, e.g.,* 928 F.3d at 364 (describing President's purpose underlying mandamus motion as effort to "avoid 'intrusive discovery into [his] personal financial affairs and the official actions of his Administration"). Likewise, a successful challenge could conceivably compel the President, in his personal capacity, to either divest himself of his business assets or to remove himself from the Presidency. In contrast, here neither the nature of the discovery nor the form of the remedy sought are unusual for lawsuits against government actors.[4] Moreover, in stark contrast to *In re Trump*, where "there is no precedent" on the legal issues, in this case the Supreme Court has issued a detailed opinion in a parallel challenge to *the same Proclamation*, and this

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challenge to adding census citizenship question); *Regents of the Univ. of Cal. v. DHS*, 298 F. Supp. 3d 1304, 1314–15 (N.D. Cal. 2018), *aff'd* 908 F.3d 476, 519–20 (9th Cir. 2019) (denying motion to dismiss as pertained to Equal Protection challenge to ending Deferred Action for Childhood Arrivals); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 277 (E.D.N.Y. 2018) (same).

[4] *Cf., e.g., Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019) (characterizing district court granting extra-record discovery in Census questionnaire challenge as "premature, [but] ultimately justified in light of the expanded administrative record").

Court has already heard this case and its predecessor *en banc*. Thus, this case currently involves the common judicial task of applying directly controlling precedent to subsequent litigation phases. (*Cf., e.g.,* Pet. Ex. C at 5-6 (declining to hold that Defendants' *Mandel*-or-rational-basis claim is a "controlling question of law" because it "amounts to asking the Fourth Circuit to consider[] 'whether the district court properly applied settled law to the facts or evidence of a particular case" (citing *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 341 (4th Cir. 2017)).)

This Court did not describe *In re Trump* as simply one example of a case in which the abnormal route of early appeal might be appropriate. Rather, this Court described *In re Trump* as the "paradigmatic" example. 928 F.3d at 364. It is clear that this case does not resemble that paradigm in any way that matters to the analysis.

II. Defendants' Disagreement with the District Court Is Not a Basis for Interlocutory Appeal

Defendants are notably silent on just how rare interlocutory appeals are intended to be. Interlocutory appeals should generally be "avoided" because non-final judgments are "effectively and more efficiently reviewed together in one appeal." *James v. Jacobson*, 6 F.3d 233, 237 (4th Cir. 1993); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) ("Permitting piecemeal, prejudgment appeals . . . undermines judicial administration[.]" (quotation marks omitted)). This final judgment rule "is in accordance with the sensible policy of

avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise . . . ." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

As it did before the district court, the Government devotes most of its petition to restating the very arguments that the district court rejected in the order that the Government seeks to appeal. In essence, the Government argues that this Court should forego the ordinary course of litigation because the Government strenuously disagrees with the district court's decision. But "a party's disagreement with the decision of the district court, no matter how strong" is irrelevant to the § 1292(b) analysis. *Estate of Giron Alvarez v. Johns Hopkins Univ.*, No 15-cv-950, 2019 WL 1779339, at *1 (D. Md. Apr. 23, 2019); *see also Couch v. Telescope Inc.*, 611 F.3d 629, 630 (9th Cir. 2010) (dismissing appeal despite defendants' "vehement" disagreement with district court ruling).

Instead, the key question here is whether there is "a substantial ground for difference of opinion" about the controlling law. As the district court explained:

> If "controlling law is unclear," there may be substantial grounds for differences of opinion for purposes of § 1292(b). *Couch v. Telescope, Inc*¸ 611 F.3d 629, 633 (9th Cir. 2010). Therefore, courts find substantial grounds "where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *Id.* However, "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient. *In re Flor*, 79

> F.3d 281, 284 (2d Cir. 1996). Lack of unanimity among courts, *North Carolina ex rel. Howes v. W.R. Peele, Sr. Trust*, 889 F. Supp. 849, 852 (E.D.N.C. 1995), and lack of relevant authority, *Union County v. Piper Jaffray & Co., Inc.*, 525 F.3d 643, 647 (8th Cir. 2008), do not suffice.

(Pet. Ex. C at 3-4.)

Primarily, Defendants claim that disagreement exists because they believe that the Supreme Court's ruling on the preliminary injunction conclusively resolved the issues that the district court denied in the motion to dismiss. Their assertion that *Trump v. Hawaii* is the end of the matter is perplexing given that the majority expressly acknowledged that the case would continue onward. *See Trump v. Hawaii*, 138 S. Ct. at 2423 ("The case now returns to the lower courts for such further proceedings as may be appropriate.") Likewise, both Justice Kennedy, who was in the majority, and Justice Breyer, who dissented, expressly noted that the case could continue on. *See id.* at 2424 (Kennedy, J., concurring) (noting potential for "further proceedings" in the case, including discovery); *id.* at 2433 (Breyer, J., dissenting) ("Regardless, the Court's decision today leaves the District Court free to explore these issues on remand.").

And, critically, none of the arguments that the Government once again advances were adopted by the Supreme Court in *Trump v. Hawaii*. Rather, the Supreme Court did not restrict its review to the face of the Proclamation, did not abandon rational basis review, and did not deny plaintiffs' claims on the ground that they were not themselves denied visas. This Court, sitting *en banc*, has likewise

previously rejected the same arguments. *See IRAP v. Trump*, 883 F.3d 233, 263-65 (4th Cir. 2018) (*en banc*) (standard of review); *id.* at 2258-62 (standing); *see also Arab Am. Civil Rights League*, 2019 WL 3003455, at *10, *18 (rejecting Defendants' arguments that *Hawaii* meant that the Proclamation survived rational basis review as a matter of law and distinguishing between the Supreme Court's review of the Proclamation in *Hawaii* as "materially different" from the district court's review of claims at the motion to dismiss stage).

The district court did note that two courts had, without significant analysis, concluded or assumed that *Trump v. Hawaii* establishes that the Proclamation survives rational basis review. (Pet. Ex. C at 8 (citing *Alharbi v. Miller*, 368 F. Supp. 3d 527, 562 (E.D.N.Y. 2019) and *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1022-23 (N.D. Cal. 2019)).) These cursory dismissals of the claim by two district judges do not warrant interlocutory review here, because there is no analysis that undercuts or even differs from what the court below and the *Arab American Civil Rights League* court set forth. This Court could only speculate whether those judges would have reached the same determination if faced with this matter's same arguments, plaintiffs, and complaints.

The precariousness of that speculation is underscored by the fact that one of the two purportedly disagreeing opinions did not actually hold that the Supreme Court's decision foreclosed equal protection claims. Specifically, in *Emami*, rather

than describing *Trump v. Hawaii* as an insurmountable barrier, the court noted "without firmly deciding the question" that rational basis "would likely" apply and that the holding of *Trump v. Hawaii* would be "another sizeable road block to the equal protection claim as [then] *currently alleged*." *Emami*, 365 F. Supp. 3d at 1023 (emphasis added). Nor did the *Emami* Court state that the potential application of the rational basis standard meant that no viable claim could continue. Instead, the *Emami* Court gave the plaintiffs the opportunity to amend their equal protection claim, making it clear that the court did not believe that the Supreme Court had foreclosed such claims entirely. *See id*. The cases simply do not demonstrate a "substantial ground for disagreement" on the issues addressed by the district court in its opinion denying the motion to dismiss.

CONCLUSION

Plaintiffs respectfully request that this Court exercise its broad discretion and decline to hear Defendants' premature appeal.

Dated: September 9, 2019

Respectfully submitted,

__/s/ *Esther Sung*_____

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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 4,210 words.

/s/ *Esther Sung*

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2019, I electronically filed the foregoing Opposition to Defendants' Motion for 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. 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/ECF system.

/s/ *Esther Sung*