08-0826-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN ACADEMY OF RELIGION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, PEN AMERICAN CENTER, TARIQ RAMADAN,

Plaintiffs-Appellants,

—against—

MICHAEL CHERTOFF, in His Official Capacity as Secretary of the Department of Homeland Security, CONDOLEEZA RICE, in Her Official Capacity as Secretary of State,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SLAVIC STUDIES, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN STUDIES ASSOCIATION, ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION OF AMERICAN PUBLISHERS, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, COLLEGE ART ASSOCIATION, LATIN AMERICAN STUDIES ASSOCIATION, MIDDLE EAST STUDIES ASSOCIATION, NATIONAL COALITION AGAINST CENSORSHIP IN SUPPORT OF PLAINTIFFS-APPELLANTS, SEEKING REVERSAL

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STATEMENT REGARDING CONSENT TO FILE *AMICI* BRIEF

Counsel for both Plaintiffs-Appellants and Defendants-Appellees have consented to the filing of this *amici* brief.

Dated: May 5, 2008

Charles S. Sims

CORPORATE DISCLOSURE STATEMENT

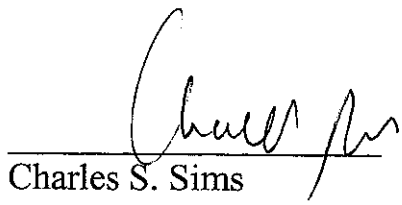
The following disclosures are made pursuant to Federal Rule of Appellate Procedure 26.1:

1. Proskauer Rose LLP (1585 Broadway, New York, NY 10036) is the sole law firm appearing for the *amici.*

2. No *amicus* has a parent corporation, and no publicly held company owns 10 percent or more of the stock of any *amicus*.

4. *Amici* are unaware of any publicly held corporation which is not a party to the proceeding before this Court having a financial interest in the outcome of the proceeding.

Dated: May 5, 2008



Charles S. Sims

STATEMENT OF INTEREST

This brief is filed on behalf of numerous scholarly and other organizations dedicated to encouraging the free-flow of information and ideas across our nation's borders. That stream of information and ideas has been and will continue to be circumscribed and threatened should the ideological exclusion provision of the USA Patriot Act be upheld. A list of *amici* and a description of each organization's special interest is attached as Addendum 1 *infra.*

INTRODUCTION AND SUMMARY OF ARGUMENT

In its desire to act quickly after the terrorist attacks of September 11, 2001, Congress significantly expanded the government's authority to bar individuals from entering the United States based on the content of their views. Under the USA Patriot Act (the "Patriot Act"), the Executive Branch is now authorized to exclude from the United States an individual on the grounds that he or she

> endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization ....

8 U.S.C. § 1182(a)(3)(B)(i)(VII) (the "ideological exclusion provision").[1] According to the State Department's Foreign Affairs Manual, the provision "is directed at

[1] As originally enacted, the ideological exclusion provision of the Patriot Act provided that aliens would be ineligible to receive visas if they had used their "position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities." Pub. L. No. 107-56, § 411, 115 Stat. 272 (Oct. 26,

irresponsible expressions of opinion by prominent aliens who are able to influence the actions of others." 9 F.A.M. § 40.32 N6.2.[2]

The suggestion that the Executive Branch can exclude visitors who risk "irresponsible expressions of opinion" should be a cause for alarm, shame and defense of First Amendment rights. But the government contends that its exercise of its authority under the ideological exclusion provision is subject to only the most limited judicial review,[3] and that neither an excluded visitor nor those who have invited that visitor to speak and seek to challenge an exclusion may obtain the power to invoke judicial review of the government's designation of foreign terrorist

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2001) (codified at 8 U.S.C. §1182(a)(3)(B)(i)(VI) (2004)). The ideological exclusion provision was expanded to its current form by the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 308, Div. B (May 11, 2005).

[2] In addition to the facial challenge to the ideological exclusion provision, *amici curiae* also support the ACLU's First Amendment challenge to the exclusion of Professor Tariq Ramadan.

[3] While the government originally maintained the position in this litigation that the doctrine of consular nonreviewability completely insulates its determination from judicial review, it later conceded that there may be "very limited judicial review of fully ripe First Amendment claims by United States nationals." *See Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 422 (S.D.N.Y. 2006). Such concession, however, offers no meaningful guidance as to the contours or extent of such "very limited" review in actual application. Further, those individuals deemed inadmissible on security grounds are not entitled to an explanation of the reasons for their exclusion. *See* 8 U.S.C. § 1182(b). Without such notification, it is unlikely that a plaintiff will ever be able to identify a specific invitee who has been denied entry because of the ideological exclusion provision.

organizations.[4] Both "terrorist activity" and "terrorist organization" are broadly defined in the statute, but if the government's say-so that a prospective visitor has "endorse[d or] espouse[d] terrorist activity" is conclusive, the breadth of the definitions are irrelevant in any event.[5]

The ideological exclusion provision is just the latest in a long line of instances in which perceived threats to national security have been used to justify sweeping legislation excluding foreign speakers from the country on ideological grounds. With the decline and fall of Communism, Congress had recognized that such ideological exclusions are antithetical to our nation's commitment to granting both people and ideas free access across America's borders. Unfortunately, the post-9/11 landscape has seen a renewed assertion of power to bar speakers from the United States based on their statements or beliefs. The ideological exclusion provision now takes its place in the lineage of immigration laws so loosely drafted and overbroad that they can be used by the government to manipulate political debate in the United States by banning speakers based on their views, all in violation of the First Amendment.

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[4] Pursuant to 8 U.S.C. § 1189(c)(1), review of the government's designation of an entity as a foreign terrorist organization may be obtained by the organization itself within 30 days of the publication of the designation in the Federal Register.

[5] *See* 8 U.S.C. § 1182(a)(3)(B)(iii) and 8 U.S.C. § 1182(a)(3)(B)(vi). The pertinent portion of the statute is set forth in Addendum 2, *infra*.

As the Supreme Court has recognized, the First Amendment protects both the right to disseminate information and the right to hear speech from multifarious sources, in person, even when that speech is unpopular with either public opinion or government officials. By enacting the ideological exclusion provision, Congress has gone too far and authorized the government to circumscribe the ability of Americans to hear, in person, speech that the government dislikes. The ideological exclusion provision is both unconstitutionally vague and incapable of withstanding the scrutiny applied to regulations suppressing speech because of its message, ideas, subject matter or content. Contrary to the government's contention, plaintiffs, as organizations whose First Amendment rights have been circumscribed by the statute, having standing to the challenge the provision.

Accordingly, *amici curiae* respectfully request that the Court reverse the district court's finding that plaintiffs lack standing to challenge the ideological exclusion provision, and strike the provision as violative of the First Amendment.

I. THE IDEOLOGICAL EXCLUSION PROVISION AMOUNTS TO AN IMPERMISSIBLE INFRINGEMENT OF A FUNDAMENTAL FIRST AMENDMENT RIGHT

A. The First Amendment Guarantees The Right to Receive Information and Ideas from Speakers In Person

The Supreme Court held nearly seventy years ago that the First Amendment protects not only the right to speak, but also the right to exchange ideas face-to-face, in settings where persuasion can most readily be accomplished. In *Martin v. City of*

Struthers, 319 U.S. 141, 143 (1943), at the height of wartime, the Supreme Court struck down an ordinance forbidding speakers from knocking on doors and ringing doorbells. "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Id.* at 143. Freedom of speech was held to embrace the right to express ideas directly to others, even at their homes, and "necessarily protects the right to receive it" as well. *Id.* Such protection is necessary, the Court has held, to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957).

The First Amendment right to receive information and ideas from a multitude of sources, including from non-citizens seeking admission to the United States, for purposes of education and scholarship, was explicitly recognized in *Kleindienst v. Mandel*, where the Supreme Court rejected the government's argument that the First Amendment was inapplicable to a challenge brought to the exclusion of alien Ernest Mandel, a Belgian scholar and journalist, on ideological grounds. 408 U.S. 753, 763 (1972). Citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court affirmed that the First Amendment right to receive information and ideas may not be abridged by Congress, and that the government could not prevail without proving a

"facially legitimate and bona fide" reason not resting on grounds of speech or belief. *Id.* at 763, 770.

While Mandel's own exclusion was upheld as not violative of the First Amendment, since the reason given for his exclusion was the "facially legitimate and bona fide" reason of his "previous abuses" of granted visas, the Court unanimously rejected the government's arguments that the exclusion of persons on ideological grounds did not implicate the First Amendment rights of persons who would meet with them, or that "the First Amendment is inapplicable because [would-be listeners had] free access to Mandel's ideas through his books and speeches, and because 'technological developments,' such as tapes or telephone hook-ups, readily supplant his physical presence." *Id.* at 764-65.

B. The Ideological Exclusion Provision Cannot Withstand Scrutiny

On its face, the ideological exclusion provision is a content-based legislative provision suppressing the speech of those who have "endorsed or espoused" terrorist activity themselves or persuaded others to do the same. *See Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.").

Content-based restrictions on the rights of American citizens and residents to receive information from multifarious sources are presumptively invalid, and

therefore subject to strict scrutiny. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). To overcome the presumption of invalidity, a content-based regulation must withstand the most exacting judicial review, under which statutes regulating speech "based on its content . . . must be narrowly tailored to promote a compelling Government interest. ... If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-14 (2000).[6]

As courts have long recognized, the government has no compelling interest in regulating speech on the basis of its content alone. *See R.A.V.* 505 U.S. at 382 (1992) ("Content-based regulations are presumptively invalid."); *cf. Abourezk v. Reagan*, 592 F. Supp. 880, 887 (D.D.C. 1984) (denying the ability of the government to deny entry to an alien "solely on account of the content of speech"). Even if the government's interest under the ideological exclusion provision is framed more

[6] Speech proscribed by the ideological exclusion provision does not fall within the limited categories of speech the Supreme Court has characterized as beyond the scope of Constitutional protection. As the Court recognizes, "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (citations omitted). "The government may suppress speech for advocating the use of force or a violation of law only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). The ideological exclusion provision regulates a substantial amount of speech outside this narrow classification.

broadly as an interest in protecting national security, however, the provision still cannot withstand scrutiny. While no one would dispute that the government has a compelling interest in protecting our nation and avoiding future attacks like those of 9/11, the government nonetheless bears the burden of showing that the ideological exclusion provision is narrowly-tailored to advance that interest. As the ideological exclusion provision now stands, the government seeks to advance its interest in preventing future violence by barring an alien based on *past* speech. Absent, however, is the causal connection between such prior speech and future threats to national security that justifies an argument that the ideological exclusion provision advances the government's interests. The sweeping language of the ideological exclusion provision is both far broader than necessary and not narrowly tailored to further the government's goals.

A statute is overly inclusive for First Amendment purposes when "a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 (1991) (citation and internal quotations omitted); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794 (1978).

Here, the ideological exclusion provision impacts far more speech than that directly related to advancing the government's interest in protecting national security and avoiding attacks on our people and communities. Even if the government's

application of the ideological exclusion provision were subject to effective judicial review, the provision remains overbroad. "Endorsing or espousing terrorist activity" as defined by the statute reaches espousing or endorsing conspiracies, threats, or attempts to do anything unlawful under foreign law which involves nothing more than the sabotage of a vehicle or the use of any firearm. By going that far, the provision authorizes the Executive to exclude any person who has ever endorsed the kinds of changes that Thomas Jefferson repeatedly endorsed.[7] The Administration could have excluded U.S. citizens from hosting those who supported the failed Hungarian revolt in 1956 and the failed East German revolt of 1953, Nelson Mandela and others fighting the apartheid regime in South Africa, and those resisting genocide in Darfur or, earlier, in Bosnia or Rwanda. Indeed, the government could use the provision to exclude whoever espoused the overthrow of Saddam Hussein or the overthrow of today's Iranian regime. A statute that goes so far plainly reaches and infringes far more broadly than necessary on legitimate free speech interests of Americans.

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[7] Jefferson's personal motto was, famously, "Rebellion to tyrants is obedience to God." He also wrote that "Every generation needs a new revolution," and, in the Declaration of Independence, declared that "But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce [the people] under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security." An Iraqi exile while Saddam Hussein was still in power, dedicated to endorsing or espousing the overthrow of that regime, would have been (and remains) excludible by the Administration.

In *Ashcroft*, 535 U.S. at 255, the Supreme Court held that banning protected speech in order to advance the government's interests is fundamentally in tension with and contrary to the First Amendment rights of American citizens. It is impossible to square the holding in that case with the power claimed here:

> [t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.[8]

When a content-based restriction on speech "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another," such burden on protected speech "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *see also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). As further articulated by the Supreme Court,

> The purpose of [the least-restrictive means test] is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead,

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[8] As discussed *supra* at n.6, the government has not proven that even speech "endorsing" or "espousing" terrorist activity is in itself unlawful. Thus, the concerns implicated in *Ashcroft* are even more relevant here, where none of the speech the government seeks to suppress is outside the protection of the First Amendment.

> the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

Ashcroft v. ACLU, 542 U.S. 656, 666 (2004).

In order to justify the ideological exclusion provision as the least restrictive means of advancing its interest in fighting terrorism, the burden is on the government to prove that nothing less than a complete ban on all speech by any nonimmigrant alien who has allegedly endorsed or espoused terrorist activities or persuaded others to do the same will adequately serve its interest. The government clearly cannot carry that burden. Numerous readily available alternative mechanisms exist for furthering the government's interest in stopping the spread of terrorism – such as barring aliens who have provided material support to terrorist organizations – while simultaneously burdening less speech than the blanket ban of the ideological exclusion provision as it now stands, and without giving the Administration the means of manipulating political debate in the United States by excluding foreign speakers whom it finds too critical to admit.

C. The Ideological Exclusion Provision Violates the *Kleindienst* Standard

The ideological exclusion provision also fails the "facially legitimate and bona fide" test formulated by the Supreme Court in *Kleindienst* by allowing the government to exclude aliens from the United States solely because of the content of their speech. While the government has often asserted congressional and executive "plenary power" over immigration law as a talisman shielding such legislation from

judicial review,[9] the Supreme Court has explicitly recognized that the First Amendment rights of citizens and residents are not rendered irrelevant merely because the exclusion of aliens is subject to Congress' sovereign authority. *See Kleindienst*, 408 U.S. at 764.

As courts adjudicating claims challenging the exclusion of nonimmigrant aliens post-*Kleindienst* have indicated, excluding an invited alien speaker on the grounds of his past or expected speech is not a "facially legitimate and bona fide" reason for barring such individuals from the United States. *See Abourezk*, 592 F. Supp. at 887 (recognizing that under the First Amendment, an alien invited to the United States "to impart information and ideas" may not be excluded "solely on account of the content of speech"); *see also Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 416 n.17 (S.D.N.Y. 2006) (same). While the *Abourezk* court eventually concluded that the government had proffered a "facially legitimate" reason for excluding the aliens at issue from the United States, it stressed that "these applicants were not denied entry because of the content of the expected speeches." 592 F. Supp. at 888.

Similarly, in *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525 (D. Mass. 1986) (*vacated as moot* 852 F.2d 563 (1st Cir. 1986)), a court addressing a

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[9] While the Constitution does not expressly grant Congress the power to regulate immigration, Congress has plenary power to establish laws of naturalization. *See* U.S. Const. art. I, § 8.

challenge to the government's denial of a request to temporarily allow Zuhdi Labib Terzi, a member of the PLO, into the United States for purposes of academic debate, rejected the government's basis as illegitimate:

> [t]he Secretary concedes that his reason is based on Terzi's proposed participation in a political debate with American citizens. Although the Secretary's reason appears to be bona fide, it is not facially legitimate. The Secretary's justification is directly related to the suppression of a political debate with American citizens. ... The Secretary's proffered reason for denying Terzi's travel request *is not facially legitimate because it is related to the suppression of protected political discussion.*

Id. at 531 (citations omitted) (emphasis added).

The ideological exclusion provision grants the Executive authority to deny aliens entry to the United States solely on the content of speech and political views with only the most limited judicial review. To the extent the ideological exclusion provision allows the Executive to exclude speakers because of their speech – for example, because of their perceived support for groups hostile to the Executive's foreign policies, or who have made what the Executive deems "irresponsible expressions of opinion" (*see* pg. 2 *supra*), or engaged in "support" of organizations that the Executive has unreviewably deemed as "terrorist organizations" – it cannot survive scrutiny under *Kleindienst*. Violation of visa requirements is a bona fide and facially legitimate ground for exclusion; the fact that a speaker has been excluded because of what she "endorses" or "espouses" or "supports" is not. The ideological exclusion provision is problematic on its face, but it is made even more so by the

government's contention that its actions are subject to such limited review. As the ideological exclusion provision allows the government to exclude individuals based on the content of their speech and political opinions alone, it clearly cannot withstand scrutiny under *Kleindienst.*

D. The Ideological Exclusion Provision Is Unconstitutionally Vague

In addition to failing to pass Constitutional muster as a content-based regulation of speech, the ideological exclusion provision is also unconstitutionally vague. As the Supreme Court has long recognized in the context of facial challenges to statutes impacting First Amendment interests:

> precision of regulation must be the touchstone in an area so closely touching our most precious freedoms ... for standards of permissible statutory vagueness are strict in the area of free expression. ... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Keyishian v. Bd. of Regents, 385 U.S. 589, 603-04 (1967) (internal quotations omitted); *see also Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972) ("[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'")(citations omitted).

The terms "endorse," "espouse," and "persuade" are not defined within the Immigration and Naturalization Act. It is impossible to determine the level of discourse in which a foreign scholar or other alien can safely engage before being

excluded for endorsing or espousing terrorism. As the Supreme Court recognized in evaluating the "vague contours" of the Communications Decency Act in *Reno*, a statute's burden on protected speech "cannot be justified if it could be avoided by a more carefully drafted statute." *Reno*, 521 U.S. at 874. In its current form, the ideological exclusion provision burdens an immense quantity of protected speech, including speech that may be most valuable – not speech that agrees with the government's views, but speech that may be in fundamental disagreement with our nation's foreign policies. A provision producing such delay, confusion, and consequent inhibition on even inviting such speakers is clearly not the type of "carefully drafted statute" that passes vagueness muster in an area so closely touching on First Amendment freedom.

II. HISTORY REFLECTS THE GOVERNMENT'S TENDENCY TO EXCLUDE SPEAKERS ON IDEOLOGICAL GROUNDS ANTITHETICAL TO THE FIRST AMENDMENT

Holmes' dictum that a page of history is worth a volume of logic is particularly apt in assessing whether the ideological exclusion provision violates the First Amendment, because that history makes plain that if the Executive can use an individual's beliefs or associations to justify barring or attempting to bar his or her entry into the United States it will do so, not to protect the nation but because exclusion is a cheap currency that can be used to curry favor with domestic constituencies.

Under Cold War legislation meant to protect Americans from, *inter alia*, the subversive influence of those associated with the Communist party or others alleged to advocate communist, anarchist, or totalitarian doctrines, the government justified seeking the exclusion of political figures including Pierre Trudeau, the former Prime Minister of Canada who was blacklisted from entering the United States in 1952 after attending an economic conference in Moscow; Nino Pasti, the former NATO Deputy Supreme Commander and Italian senator who was denied a visa in 1983, ostensibly because of his membership in the World Peace Council, but quite evidently because he had been active in leading European opposition to the Reagan administration's policies regarding nuclear weapons; and Hortensia Allende, the widow of the slain Chilean President, denied a visa in 1983 because of her expected criticism of U.S. Latin American policy.[10]

Prominent literary icons have fared no better. The government has sought to use ideological exclusions to bar the entry of Columbia novelist and Nobel Laureate Gabriel Garcia Marquez; Chilean poet and Nobel Laureate Pablo Neruda and numerous other acclaimed writers including British novelist Doris Lessing, Swedish

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[10] *See* Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930, 930 (1987). A history of these and other exclusions are available at http://www.aclu.org/SafeandFree/details/mccarran.html.

author Jan Myrdal and Italian playwright and Nobel Laureate Dario Fo.[11] Such provisions have also been relied upon in denying visas to aliens including Cuban scholar Carlos Alzugaray Treto and philosophers Florentino Cruz Miranda and Arnaldo Silva Leon.[12]

At times, generally after exclusions on the grounds of speech have become embarrassing, the government has retreated, and made plain that the power to exclude on grounds of speech is in fact not necessary to protect the nation. Thus, with the United State's signing of the Helsinki Human Rights Accords ("the Accords") in 1975,[13] Congress was forced to acknowledge that continued enforcement of the ideological exclusion provisions of the INA would make compliance with the Accords nearly impossible, as the United States had committed itself to furthering a "reduction in barriers to the free movement of people and

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[11] *See id.*; *see also* Larry McMurtry, Testimony before the Subcommittee on Courts, Intellectual Property, and Administrative Justice of the House Judiciary Committee (May 3, 1989), *available at* http://www.pen.org/viewmedia.php/prmMID/41/prmID/341.

[12] *See* John A. Scanlan, *Symposium on Academic Freedom: Aliens in the Marketplace of Ideas: The Government, the Academy and the McCarran-Walter Act*, 66 Tex. L. Rev. 1481, 1496 n. 67 (1988); Academic Freedom and National Security in a Time of Crisis, Report of the AAUP Special Committee on Academic Freedom and National Security in a Time of Crisis (October 2003), *available at* http://www.aaup.org/AAUP/comm/rep/crisistime.htm.

[13] *See* Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, Dep't of State Pub. No. 8826 (Gen. For. Pol. Ser. 298), *reprinted in* 14 I.L.M. 1292, 1313-14 (1975).

ideas."[14] Congress passed the "McGovern Amendment" in 1977, which amended portions of the INA in an effort to make it easier for "any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States" to obtain a nonimmigrant visa.[15]

Similarly, after the Reagan administration's overreaching exclusions, the law was again amended in 1987, accompanied by the recognition that in order

> to make it clear that the United States is not fearful of foreign ideas or criticism or the individuals who espouse such ideas or advance such criticism, a thorough reform of the grounds for exclusion and deportation is necessary and long overdue.[16]

The resulting passage of the Moynihan-Frank Amendment proscribed denial of a visa to any alien "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States," subject to certain

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[14] *See* S. Rep. No. 95-194, 1st Sess. 13 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1625, 1635; H.R. Rep. No. 95-537, 1st Sess. 31-32 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 1658, 1661-62.

[15] Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, sec. 112, § 21, 91 Stat. 844, 848 (1977) (codified as amended at 22 U.S.C. § 2691(1988)). The McGovern Amendment amended the waiver provision for exclusions based upon membership in, or affiliation with a "subversive" organization by requiring that the Secretary of State should recommend to the Attorney General that a waiver be granted unless the Secretary of State had determined that admission of the subject alien would result in danger to the security interests of the United States.

[16] House Conf. Rep. No. 100-475, 100th Cong., 1st Sess. (Dec. 14, 1987) *reprinted in* 133 Cong. Rec. H2424 (1987).

limited exceptions.[17] Such amendment was necessary, the government recognized, to address the fact that "[f]or many years, the United States has embarrassed itself by excluding prominent foreigners from visiting the United States solely because of their political beliefs."[18] Notably, in support of its call for further reform of the immigration law, the government itself highlighted the exclusion of individuals including Gabriel Garcia Marquez, Pablo Neruda and Doris Lessing.[19]

The third sweeping change to ideological exclusion provisions in immigration law came with the passage of the Immigration Act of 1990,[20] which amended the INA to eliminate many of the remaining provisions used to exclude aliens on ideological grounds, and further permanently incorporated the language of the Moynihan-Frank Amendment that precluded the exclusion of aliens on the basis of beliefs, statements, or associations "unless the Secretary of State personally

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[17] Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1400 (1987), amended by Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, H.R. Conf. Rep. No. 343, 101st Cong., 1st Sess. § 128(b) (1989). The Act originally contained a termination provision which would have caused it to apply only to nonimmigrant visas applied for in 1988, as well as applications for admissions based on such visas through March 1, 1989. The Act was later extended by Congress for an additional two years. *See* Act of Oct. 1, 1988, Pub. L. No. 100-461, 102 Stat. 2268.

[18] S. Rep. No. 100-75, 100th Cong., 1st Sess. (June 18, 1987) *reprinted in* 133 Cong. Rec. S2326 (1987).

[19] *Id.*

[20] Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

determines that the alien's admission would compromise a compelling United States foreign policy interest."[21]

Although nothing about the 9/11 attacks was attributed to the admission of persons who would have been excluded under the Moynihan-Frank Amendment, in the wake of 9/11 the Administration sought, and Congress granted, new authority to deny even short-term visas to prominent persons on the grounds of speech and belief. As history repeats itself, the government is once again targeting those individuals whose speech or beliefs are deemed unpopular by the Administration. Shortly after 9/11, the government excluded prominent members of the African National Congress (although in 2003 the Administration informed Nelson Mandela and two associates that their exclusion would be eliminated for a ten-year period).[22] Professor Carlos Alzugaray Treto, a Cuban scholar and the first Cuban ambassador to the European Union, was denied a visa to speak at the Latin American Studies Association's International Congress in 2003. After submitting his visa application, he interviewed with the U.S. Interests Section in Havana, where he was asked the titles of his

[21] If such a determination is made, the Act necessitates that he or she must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identities of the aliens and basis for the exclusion.

[22] *See* http://www.aclu.org/SafeandFree/details/mccarran.html.

lectures and whether he had been a signatory on a letter condemning the U.S. war in Afghanistan.[23]

In a case that garnered significant media attention, the government initially relied upon the ideological exclusion provision of the Patriot Act to bar Tariq Ramadan, a Swiss national and world-renowned scholar, from entering the United States to accept a tenured position with the University of Notre Dame. Ramadan, who had been a frequent guest and lecturer in the United States, was informed his visa had been revoked a mere nine days before he and his family were preparing to move to the United States, with the government – in a press conference – citing the ideological exclusion provision as the grounds for the revocation.[24]

Other foreign scholars seeking to enter the United States for academic purposes have been excluded under similar circumstances. In 2005, Dr. Waskar Ari of Bolivia, a scholar of the Aymara indigenous community, was hired to teach at the

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[23] *See* Academic Freedom, *supra* note 12.

[24] In the face of a challenge to Professor Ramadan's exclusion by the ACLU, the government renounced its reliance on the ideological exclusion provision and instead relied on a separate provision of the Patriot Act to exclude Ramadan on allegations he provided material support to foreign terrorists through his donations to organizations that provide humanitarian aid to Palestinians. The government's reliance on the material support provision is likely pretextual, however, in that Professor Ramadan is being barred from the United States not because he is a threat to national security, but because his ideas are disfavored by the United States government.

University of Nebraska-Lincoln.[25] Previously, Ari had held a student visa, earned a Ph.D. from Georgetown University and had been employed as a visiting assistant professor with Western Michigan University. While the University of Nebraska-Lincoln properly submitted a visa application on Ari's behalf, it was informed that the application had been referred to the Department of Homeland Security, and that extensive "security checks" would have to be conducted before Ari could be allowed to enter the United States. In March 2007, the University of Nebraska filed a lawsuit against the Department of Homeland Security, seeking to compel the Department to act on the H1-B employment visa petition filed by the University nearly two years earlier.[26] In July 2007 Ari's visa was finally granted, with no official response from the Department of Homeland Security as to why it took over two years for him to be allowed to assume his teaching position with the University of Nebraska.

In January 2005, Dora Maria Tellez, a historian and professor who had made multiple visits to the United States had her visa denied before she was to begin teaching at Harvard University, presumably stemming from Tellez's role in the Nicaraguan revolution in the late 1970s.[27] Although Tellez had gone on to become a

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[25] Information on this and other exclusions has been compiled by the ACLU at http://www.aclu.org/safefree/general/26132prs20060712.html.

[26] A press release describing the lawsuit is available at http://www.history.unl.edu/news/ari/Press_Release_03_05_07.pdf.

[27] *See* http://www.npr.org/templates/story/story.php?storyId=4554643&sc=emaf.

Parliamentary leader and Minister of Health in Nicaragua in the 1980s, she is still barred from speaking about her experiences in the United States.[28]

The individuals detailed above share a common interest in their impassioned pursuit of academic discourse and in having views and experiences that Americans wanted to hear and interact with. What they do not share is equally clear: the government never publicly suggested, and there was no reason in the public record to believe, that those individuals endorsed or espoused terrorist activities or encouraged others to do the same. Indeed, the public record is actually replete with examples of such foreign scholars denouncing the spread of terrorism while encouraging a greater understanding and appreciation of other countries, cultures and religion through knowledge and intellectual discourse. Under the challenged provision, Americans have been and will continued to be deprived from gaining knowledge from such individuals through face-to-face discussion and debate in the United States.

Further, as the *amici* well know, alternative methods of enabling face-to-face dialogue amongst Americans and foreign scholars who may be banned from the United States, such as by holding events outside the United States to avoid potential visa restrictions under the ideological exclusion provision, have been plagued by

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[28] Other recent ideological exclusions include those of Basque historian and writer Inaki Egana (*see supra* n. 25) and Kamal Helbway, the founder of the Muslim Association of Britain. *See* Michael Isikoff & Mark Hosenball, *Terror Watch: Muslim Leader Barred From U.S.*, Newsweek (October 18, 2006), *available at* http://www.newsweek.com/id/45335.

multifarious hurdles. In attempting to arrange meetings involving foreign scholars in non- U.S. venues, *amici* are faced with the risk that U.S.-based foreign members of *amici* organizations holding temporary or single-entry visas may be prevented from re-entering the country after traveling to attend conferences or other events outside the United States. Scholarly events that result in the exclusion of such *amici* members – in addition to the prohibitive costs and expenditure of time and resources that such events will necessarily entail – show that such options are not ultimately nonviable alternatives to holding such exchanges within the United States.

Exclusions on ideological grounds are not restricted to the academic community. In June 2006, over 70 South Korean activists planning to visit the United States to protest at the free trade negotiations in Washington, D.C. were denied visas, presumably because of their views. The rapper "M.I.A.," a London-based artist who planned on collaborating with American producers was also denied a visa in 2006, allegedly stemming from the political content of her songs concerning the Tamil Tigers and Palestinian Liberation Organization.[29]

Although the government once embraced the sweeping provisions of Cold War legislation that allowed for exclusion on the basis of an individual's beliefs, speech, or associations, Congress subsequently realized that reform of such laws was necessary to ensure commitment to the principle that both people and ideas should be

[29] *See supra* note 25.

allowed to move freely across America's borders. It is time to conclude that the Patriot Act's ideological exclusion provision is fostering the exclusion of individuals whose ability to interact with Americans should in fact be welcomed and encouraged. In order to avoid repeating the mistakes of our nation's past, the ideological exclusion must be seen as what it is – a content-based restriction on speech that is both unconstitutional on its face and capable of immeasurable harm to vital discourse and debate in its application. A provision so antithetical to the First Amendment freedoms our government has been charged with protecting should not be allowed to stand.

III. PLAINTIFFS HAVE STANDING TO CHALLENGE THE IDEOLOGICAL EXCLUSION PROVISION

Contrary to the government's contention, plaintiffs have standing to challenge the constitutionality of the ideological exclusion provision. Plaintiffs are experiencing an ongoing injury to their First Amendment rights that is directly traceable to the provision and will be alleviated should the provision be struck. *See Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 663 (1993) (setting forth grounds for standing).

Plaintiffs include organizations that routinely invite foreign scholars to visit the United States to speak and engage in discourse with their members and a wider audience. These organizations often choose to highlight newsworthy subjects with significant social and political implications, such as the attacks of September 11 and

subsequent "war on terror," and consequently the scholars they invite to the United States have often written controversially or made divisive verbal statements about these subjects. As such, these speakers (plaintiffs' invitees) are the likely targets of exclusions based on allegedly endorsing or espousing terrorism under the ideological exclusion provision based simply on the nature of the subjects on which they comment. When such speakers are targeted for exclusion, it is the First Amendment rights of plaintiffs that suffer.

In the court below, plaintiffs proffered significant evidence of instances in which the government has invoked the ideological exclusion provision, including the government's initial reliance on the provision in revoking the visa of Plaintiff Tariq Ramadan. Additionally, plaintiffs provided examples of instances in which their invitees declined invitations to come to the United States in an effort to avoid being subjected to ideological scrutiny – establishing clear injury-in-fact from the government's reliance on the provision, which has harmed plaintiffs' ability to engage in protected First Amendment activity. This is an ongoing injury directly caused by the ideological exclusion provision, and sufficient to provide grounds for standing. *See Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So long as [a] statute remains available ... the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.")

While plaintiffs have established their right to challenge the ideological exclusion provision based on their own injuries, jurisprudence in the First Amendment arena also makes clear that even if plaintiffs were not personally affected, standing could still be premised on First Amendment overbreadth. As the Supreme Court has recognized, facial overbreadth challenges represent "an exception to [the courts'] normal rule regarding the standards for facial challenges." *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (recognizing that the in First Amendment arena, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"); *see also Lerman v. Bd. of Elections*, 232 F.3d 135, 144 (2d Cir. 2000).

Underpinning the doctrine of overbreadth is the concern that "the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech." *Virginia v. Hicks*, 539 U.S. at 119. Accordingly,

> [m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech ... harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.

Id. (citations omitted.)

Such concern is clearly implicated here, where both plaintiffs and organizations such as *amici* are less inclined to invite controversial scholars to the United States and such speakers are less willing to accept invitations in an effort to avoid the scrutiny and mischaracterization of their writings and beliefs. In addition, plaintiff organizations are less likely to seek engagements from potentially controversial figures in an effort to avoid the administrative and financial burdens related to bringing a lawsuit to challenge ideological exclusions when they arise.

As discussed above, the ideological exclusion provision as it now stands infringes far more legitimate free speech interests of American citizens and residents than is necessary to advance the government's goal of eradicating terrorism in the United States. Even if plaintiffs had not established standing to challenge the ideological exclusion provision based on infringement of their own First Amendment rights, they can still challenge the statute on the grounds that the ongoing existence of the provision results in numerous organizations – including those not before the court – refraining from constitutionally protected speech.

CONCLUSION

For the reasons set forth above, *amici* respectfully request that the decision below be revised, and that the ideological exclusion provision be struck as violative of the First Amendment.

Respectfully submitted,

New York, New York
Dated: May 5, 2008

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,986 words (including footnotes). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Times New Roman font.

Dated: May 5, 2008

Charles S. Sims

ADDENDUM 1

DESCRIPTIONS OF INDIVIDUAL AMICI CURIAE

The **American Association for the Advancement of Slavic Studies** (AAASS) is a membership organization representing American scholarship in the field of Russia, Central Eurasian, Central and East European studies. Its approximately 3000 members include social scientists, historians, linguists, literature scholars, librarians and policymakers. The Association also has close to 100 institutional members, including most major university research centers focused on Russia, Eastern Europe, and Central Asia. Representatives of the AAASS sit on such bodies as the US State Department's Advisory Committee on the Soviet/East European Research and Training Act (1983), and the International Congress for Central and East European Studies (ICCEES). It is a constituent society of the American Council of Learned Societies. Its activities include the publication of the journal *Slavic Review* and a bimonthly newsletter, as well as the organization of an annual academic convention. AAASS is committed to the highest professional standards of scholarship and encourages interaction and academic exchange between American and foreign scholars.

The **American Booksellers Foundation for Free Expression** ("ABFFE") is the bookseller's voice in the fight against censorship. ABFFE was founded in 1990 by the American Booksellers Association, which represents over 1,900 independent bookstores throughout the United States. ABFFE's mission is to promote and protect

the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech. America's booksellers play a critical role in disseminating ideas by hosting hundreds of author appearances every day. They are directly affected by any regulation that would bar a foreign author from speaking in their stores.

The **American Studies Association** is nation's oldest and largest association devoted to the inter-disciplinary study of American culture and history. Chartered in 1951, the American Studies Association now includes nearly 6,000 individual members and 2,200 institutions. They represent many fields: history, literature, religion, art, philosophy, music, science, folklore, ethnic studies, anthropology, material culture, museum studies, sociology, government, communications, education, library science, gender studies, popular culture, and others. They include persons concerned with American culture: teachers and other professionals whose interests extend beyond their specialty, faculty and students associated with American Studies programs in colleges and secondary schools, museum directors and librarians interested in all segments of American life, public officials and administrators concerned with the broadest aspects of education. International scholars constitute ten percent of the association's membership of this 6,000-member, nonprofit, professional organization of American Studies scholars and educators across the U.S. and the world.

The American Studies Association publishes a learned journal, the American Quarterly, the Encyclopedia of American Studies, biannual Guide to American Studies Resources, the quarterly ASA Newsletter, American Studies Curriculum Resources Guide, the annual Abstracts of Doctoral Dissertations in American Studies, and the annual Directory of Graduate Programs in American Studies in the United States, sponsors annual meetings and special conferences oftentimes in cooperation with international American Studies associations, supports the publications and meetings of 12 regional chapters, and prepares special scholarly, editorial, and professional studies. ASA members are encouraged to participate in committees such as Women's, Minority Scholars', Secondary Education, Program Directors', Regional Chapters', Students', International, Program, and Prize, and in special task forces created from time to time.

The **Association of American Law Schools (AALS)** is an institutional membership organization representing 168 law schools, with over 7,000 law faculty members. Founded in 1900, the mission of the AALS is "the improvement of the legal profession through legal education". One of the most important activities in which AALS engages to accomplish that mission is offering a series of professional development programs for law faculty. To assure that faculty at U.S. law schools are educated about the approach to legal issues employed in different cultures and legal systems, foreign academics and practitioners are frequently invited to attend and

speak at these programs. AALS also serves as the headquarters for the new International Association of Law Schools (IALS). Founded in 2005, IALS is an organization that currently has about 120 member schools, with over 55 of those schools coming from 35 countries outside the United States. Foreign academics serve on the Board and committees of this organization and will be called upon to travel to various places in the world, including the United States, for Board meetings and scholarly conferences.

The **Association of American Publishers** (AAP) is the national trade association of the U.S. book publishing industry with approximately three hundred members, including most of the major commercial book publishers in the United States as well as smaller and nonprofit publishers, university presses, and scholarly societies. Promoting the freedom to read and the freedom to publish at home and abroad is among the Association's highest priorities. The AAP International Freedom to Publish Committee, created in 1975 , was the first group formed by a major publishers association specifically to defend the freedom of written expression worldwide. The IFTP has been outspoken in its opposition to ideological exclusion and was instrumental in lobbying for repeal of the ideological exclusion provisions of the McCarran-Walter Act.

The **Association of American University Presses** (AAUP) is a membership organization representing 112 not-for-profit scholarly publishers in the United States

and 15 international scholarly publishers. These publishers are affiliated with research universities, scholarly societies, foundations, museums, and other research institutions. The mission of AAUP members is to serve an effective and creative system of scholarly communications worldwide, and to advance through their publications the knowledge of all peoples. Freedom of intellectual exploration and exchange is central to the fulfillment of this goal.

The **College Art Association** (CAA) is a membership organization representing 14,000 practitioners and interpreters of visual art and culture, including artists, art historians, scholars, curators, collectors, educators, art publishers and other visual arts professionals, who join together to cultivate the ongoing understanding of art as a fundamental form of human expression. Another 2,000 university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA. CAA is committed to the highest professional and ethical standards of scholarship, creativity, connoisseurship, criticism, and teaching, and its activities include – and its members have sponsored and participated in – various conferences and other programs entailing the face-to-face interchange of ideas by foreign academics and artists invited to the United States to speak.

The **Latin American Studies Association** is a membership organization representing 6,000 scholars. LASA's mission is to foster intellectual discussion, research, and teaching on Latin America, the Caribbean, and its people throughout the Americas, promote the interests of its diverse membership, and encourage civic engagement through

network building and public debate. LASA is committed to the highest professional and ethical standards of scholarship, creativity, connoisseurship, criticism, and teaching, and its activities include – and its members have sponsored and participated in – various conferences and other programs entailing the face-to-face interchange of ideas by foreign academics invited to the United States to speak.

The **Middle East Studies Association (MESA)** is a private, non-profit, non-political learned society that brings together scholars, educators and those interested in the study of the region from all over the world. From its inception in 1966 with 50 founding members, MESA has increased its membership to more than 2,700 and now serves as an umbrella organization for seventy institutional members and more than forty affiliated organizations. MESA promotes high standards of scholarship and teaching and, as part of its goal to advance learning, facilitate communication and promote cooperation, sponsors an annual meeting that is a leading international forum for scholars and specialists. Through the Committee on Academic Freedom, MESA monitors infringements on academic freedom in the Middle East and within North America. Such infringements include governmental refusal to allow scholars to conduct scholarly research, publish their findings, deliver academic lectures, and travel to international scholarly meetings. (See http://mesa.wns.ccit.arizona.edu/about/academic.htm and http://mesa.wns.ccit.arizona.edu/about/cafmenaletters.htm# .)

The **National Coalition Against Censorship** ("NCAC" or "Coalition") is an alliance of more than 50 national non-profit organizations that include literary, artistic, religious,

educational, professional, labor, and civil liberties groups.[1] Founded in 1974, the NCAC and its members are united by the conviction that freedom of thought, inquiry, and expression must be vigorously defended. To that end, the NCAC educates both its members and the public at large about the dangers of censorship and how to oppose it. Since its establishment, the NCAC has assisted thousands of teachers, students, artists, authors, librarians, readers, museum-goers and others around the country in opposing censorship. The NCAC provides information packs on a wide range of free expression issues, as well as assistance responding to censorship.

The NCAC joins this brief because of its concern about the rising number of incidents directed at suppressing unpopular political views. Most of these situations do not result in litigation, and many remain unreported and unnoticed by the public at large. College and university campuses are especially vulnerable to the chilling effects of such attitudes towards political dissent, and academic freedom inevitably suffers as a result.

[1] Among NCAC's 52 members are the American Association of University Professors, American Civil Liberties Union, American Federation of Television & Radio Artists, American Society of Journalists & Authors, Association of American Publishers, Children's Literature Association, National Education Association, and the Screen Actors Guild. The views presented in this brief, however, are those of the NCAC alone and do not necessarily represent the individual views of any of its members.

ADDENDUM 2

LEXSTAT 8 U.S.C. 1182(A)(3)(B)

*** CURRENT THROUGH P.L. 110-6, APPROVED 2/26/2007 ***

TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12. IMMIGRATION AND NATIONALITY
IMMIGRATION
ADMISSION QUALIFICATIONS FOR ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

Go to Code Archive Directory for this Jurisdiction

8 USCS § 1182

Review expert commentary from The National Institute for Trial Advocacy following 8 USCS § 1153 (relating to applications for permanent residence).

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.

(A) In general. Any alien--

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(ii) except as provided in subparagraph (C), who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)--

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is inadmissible.

(B) Waiver authorized. For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

(C) Exception from immunization requirement for adopted children 10 years of age or younger. Clause (ii) of subparagraph (A) shall not apply to a child who--

(i) is 10 years of age or younger,

(ii) is described in section 101(b)(1)(F) [*8 USCS § 1101(b)(1)(F)*], and

(iii) is seeking an immigrant visa as an immediate relative under section 201(b) [*8 USCS § 1151(b)*],

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

(2) Criminal and related grounds.

(A) Conviction of certain crimes.

(i) In general. Except as provided in clause (ii), any alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (*21 U.S.C. 802*)),

is inadmissible.

(ii) Exception. Clause (i)(I) shall not apply to an alien who committed only one crime if--

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions. Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers. Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (*21 U.S.C. 802*)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice. Any alien who--

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution. Any alien--

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h) [*8 USCS § 1101(h)*]).

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized. For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) Foreign government officials who have committed particularly severe violations of religious freedom. Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (*22 U.S.C. 6402*), is inadmissible.

(H) Significant traffickers in persons.

(i) In general. Any alien who is listed in a report submitted pursuant to section 111(b) of the Trafficking Victims Protection Act of 2000 [*22 USCS § 7108(b)*], or who the consular officer or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 103 of such Act [*22 USCS § 7102*], is inadmissible.

(ii) Beneficiaries of trafficking. Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters. Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering. Any alien--

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18, United States Code (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds.

(A) In general. Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in--

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities.

(i) In general. Any alien who--

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of--

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in *section 2339D(c)(1) of title 18, United States Code* [*18 USCS § 2339D(c)(1)*]) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity.

(ii) Exception. Subclause (VII) of clause (i) does not apply to a spouse or child--

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) Terrorist activity defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in *section 1116(b)(4) of title 18, United States Code*) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any--

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) Engage in terrorist activity defined. As used in this Act, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization--

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for--

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual--

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) Representative defined. As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) Terrorist organization defined. As used in this section, the term "terrorist organization" means an organization--

(I) designated under section 219 [*8 USCS § 1189*];

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy.

(i) In general. An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials. An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens. An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations. If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party.

(i) In general. Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership. Clause (i) shall not a alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership. Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that--

(I) the membership or affiliation terminated at least--

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members. The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing.

(i) Participation in Nazi persecutions. Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,