UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

- v.-

MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; CONDOLEEZZA RICE, in her official capacity as Secretary of State,

Defendants.

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ECF CASE

06 Civ. 588 (PAC)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendants respectfully submit this reply memorandum of law in opposition to plaintiffs' motion for summary judgment, and in further support of their cross-motion for summary judgment.

ARGUMENT

I. THE CONSULAR OFFICER'S DENIAL OF A VISA TO TARIQ RAMADAN SHOULD NOT BE OVERTURNED

A. Plaintiffs' Challenge Is Barred by the Doctrine of Consular Nonreviewablility

The doctrine of consular nonreviewability precludes plaintiffs' challenge to the denial of Ramadan's visa application. The Court should reject plaintiffs' contention that the "law of the case" requires the Court to find the doctrine of consular nonreviewability inapplicable. See Plaintiffs' Reply Memorandum ("Pl. Repl."), at 2-4. The "law of the case" doctrine generally does not apply to rulings made in connection with a preliminary injunction motion. See Goodheart Clothing Co. v. Laura Goodman Enters., 962 F.2d 268, 274 (2d Cir. 1992) (given nature of preliminary injunctions, it would be anomalous to "regard [a court's] initial ruling as foreclosing the subsequent, more thorough consideration of the merits that the preliminary injunction expressly envisions"); see also Meyers v. Jay St. Connecting R.R., 288 F.2d 356, 360 (2d Cir. 1961). Moreover, the law of the case doctrine is "discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment." Aramony v. United Way of Am., 254 F.3d 403, 410 (2d Cir. 2001).

As to the merits of plaintiffs' argument that the consular officer's decision here is reviewable, Kleindienst[1] both recognized and relied on the doctrine of consular nonreviewability in sharply limiting judicial review of the Executive's discretionary denial of a waiver, and the few cases that have extended Kleindienst to the decisions of consular officials have done so without discussing (or indeed acknowledging) this critical aspect of the Supreme Court's decision. See Defendants'

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[1] Defendants here employ the same defined terms and abbreviations used in their opening brief.

Memorandum ("Deft. Br."), at 8-13 (citing cases). Further, it is neither illogical nor "strange," see Pl. Repl. at 5, that judicial review of a consular visa decision would be more highly circumscribed than that of a discretionary denial of a waiver of inadmissibility: consular visa determinations represent the exercise of the plenary authority Congress has delegated to the Executive, and are precisely the type of actions that have historically been insulated from review under the doctrine of consular nonreviewability. To the extent Kleindienst authorizes any judicial inquiry, it is limited to a non-consular denial of a waiver of inadmissibility, which is not at issue here.

Plaintiffs are also incorrect in asserting that consular nonreviewability does not apply because decisions about Ramadan's exclusion "are being made by officials in Washington." Pl. Repl. at 6-7. To the contrary, the decision to deny Ramadan's visa was made by Aaron Martz, a consular officer in Bern, Switzerland, who considered all relevant information (including Ramadan's admissions during his visa interviews), not just the Security Advisory Opinion. See Declaration of Aaron Martz, dated July 13, 2007 ("Martz Decl."), ¶¶ 2-3; Kinder Decl. ¶¶ 11-12. The doctrine of consular nonreviewability accordingly applies, and precludes review of the visa denial.

B. The Government Has Provided a Facially Legitimate and Bona Fide Reason for Denying Ramadan's Visa

1. The Government's Proffered Reason Satisfies the Minimal Inquiry Permitted Under the "Facially Legitimate and Bona Fide" Standard

Although plaintiffs ask this Court to engage in its own fact-finding to review the consular officer's decision, see, e.g., Pl. Repl. at 11-13, such an inquiry is foreclosed by Kleindienst, which expressly forbids courts to "look behind" the stated basis for the Government's decision. See Kleindienst v. Mandel, 408 U.S. 753 , 770 (1972). Here, because the Government has proffered a reason for its decision that conforms with a statutory basis for exclusion, it has provided a "facially

legitimate and bona fide" reason, and thus satisfied the minimal showing Kleindienst contemplates. As Judge Leval has held, where the Attorney General refuses to waive an alien's excludability,

> The Court has no power to inquire into the wisdom or basis of the Government's reasons. The Supreme Court in [Kleindienst] held that even in the face of a challenge based on the First Amendment, the court must accept a facially lawful reason. . . [The Government's] authority is all the more immune from court examination when questions of national security are involved.

NGO Comm. on Disarmament v. Haig, No. 82 Civ. 3636 (PNL), 1982 U.S. Dist. LEXIS 13583, at *9 (S.D.N.Y.), aff'd, 697 F.2d 294 (2d Cir. 1982).[2] This is especially true because the consular officer necessarily had to assess Ramadan's credibility, including with respect to any statements he may have made relative to his knowledge. The doctrine of consular nonreviewability bars this Court from re-examining that assessment, or any other aspect of the consular officer's determination.

Further, although Kleindienst bars any greater inquiry into the visa denial, the Government's stated basis for denial satisfies even plaintiffs' formulation of the standard – that the Government must "supply some basis for the application of [the material support] provision to Professor Ramadan." See Pl. Repl. at 7. Despite plaintiffs' assertion that the Government has "not submitted any evidentiary basis" to support the consular officer's determination, see Pl. Repl. at 1, the Government has shown that the visa denial was based on Ramadan's admission that he gave money to CBSP and ASP, and the denial is further supported by the Treasury Department's 2003 listing of

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[2] Plaintiffs do not attempt to distinguish NGO Committee, but merely assert that the affirmance of that case was soon followed by Bertrand v. Sava, 684 F.2d 204, 213 (2d Cir. 1982), which, they claim, "ma[de] clear that the 'facially legitimate and bona fide' standard requires at least some degree of factual review." Pl. Repl. at 8 n.3 Bertrand, however, is inapposite, as are the other decisions cited by plaintiffs at page 10 of their brief, because they involve alien parole determinations and thus do not raise the same reviewability concerns as consular decisions. See Bertrand, 684 F.2d at 212-13; Nadarajah v. Gonzales, 443 F.3d 1069, 1083 (9th Cir. 2006); Marczak v. Greene, 971 F.2d 510, 516-17 (10th Cir. 1992) (all addressing parole decisions).

both groups as entities that support terrorism. See Deft. Br. at 5; Kinder Decl. ¶ 5; Martz Decl. ¶ 3. These unassailable facts belie any argument that the consul acted outside the statutory framework or failed to identify a "facially legitimate and bona fide" ground for inadmissibility.

Finally, plaintiffs misapprehend the elements of the statute under which Ramadan was found inadmissible. Section 1182(a)(3)(B)(iv)(VI)(dd) does not require an affirmative finding that Ramadan "knew or reasonably should have known" that ASP and CBSP were terrorist organizations. Rather, the statute has two distinct knowledge requirements: (1) the statute applies if the alien knew or reasonably should have known that his action affords material support to the beneficiary in question; and (2) if so, the alien is inadmissible, unless the alien demonstrates by clear and convincing evidence that he did not know, and should not reasonably have known, that the beneficiary was an undesignated terrorist organization. See 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd). The consular officer determined, as a factual matter, that Ramadan's conduct satisfied all of the statutory elements, and that Ramadan did not, and could not, demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that ASP and CBSP raised money for Hamas. See Martz Decl. ¶ 3. There is no basis to disturb these determinations.

2. Plaintiffs' Retroactivity Arguments Must Be Rejected

Plaintiffs' arguments regarding the retroactive effect of the REAL ID amendments are similarly meritless, failing to take into account the unambiguous text of the statute, or the case law, legislative history, and secondary authority cited by the Government, all of which support retroactive application. See Deft. Br. at 23-27. Nor do plaintiffs explain why Congress would include the quintessentially retroactive phrase "on, before, or after" if it intended the amendments to apply only to post-enactment events, or, more broadly, why Congress would choose such a remarkably

convoluted way to give the amendments only prospective effect, especially since it could have accomplished the same goal by omitting the provision altogether. See Deft. Br. at 28.

Instead, plaintiffs for the first time posit that § 103(d)(1) "limit[s] retroactive application of the amendments to those in removal proceedings." Pl. Repl. at 15. The section, however, includes no such limiting language. Nor would it make any sense for Congress to have applied the amendments retroactively to aliens in removal proceedings but not to aliens, like Ramadan, who apply for visas while outside the United States and are not in immigration proceedings. There would be no rational purpose to treat these classes of aliens differently, because whether an alien is in removal proceedings has no bearing on when or how the prohibited acts were committed. Furthermore, plaintiffs' interpretation would anomalously render aliens in removal proceedings subject to the more stringent REAL ID amendments, while failing to reach those outside the country – who have no right at all to enter the United States, see Kleindienst, 408 U.S. at 762.

The Court should also reject plaintiffs' argument that they need not show reliance to demonstrate an impermissibly retroactive effect. Pl. Repl. at 18-19. The Supreme Court has made clear that the "judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." INS v. St. Cyr, 533 U.S. 289, 321 (2001). Accordingly, a plaintiff's reliance (or lack of reliance) on the pre-existing state of the law is critical in determining whether application of a statute to pre-enactment conduct will have impermissibly retroactive effect. In this regard, the determinative factor in the cases cited by the Government was not whether the underlying conduct was unlawful at the time it occurred, but rather, whether the plaintiff had any right to, or reasonable expectation in, the benefit he could no longer seek as a result of the relevant statute. See, e.g., Boatswain v. Gonzales, 414 F.3d

413, 419 (2d Cir. 2005) (statute rendering enlistee ineligible for naturalization if convicted of aggravated felony was not retroactive because enlistee's former eligibility for naturalization was "far too remote to constitute a 'settled expectation'"). Here, Ramadan had neither a right to enter the United States nor a reasonable expectation that he would be able to do so. Accordingly, the amendments do not operate retrospectively with respect to Ramadan.

Finally, even if credible, see supra at 3, Ramadan's claims that he believed ASP to be a "legitimate humanitarian organization" and would not have donated money to ASP if he "thought [it] would be used for terrorism" (see Pl. Repl. at 20) do not demonstrate any reliance, let alone reasonable reliance, that he would be able to enter the United States if he provided material support to terrorist organizations. Ramadan's belief as to the propriety of his donations has no bearing on whether he had a settled and reasonable expectation that he would be able to enter the United States if he made such donations. Application of the amendments to Ramadan would thus have no impermissibly retroactive effect.

II. PLAINTIFFS' FACIAL CHALLENGE TO THE ENDORSE OR ESPOUSE PROVISION SHOULD BE DISMISSED

A. Plaintiffs Lack Standing to Bring a Facial Challenge

To have standing, plaintiffs must have suffered injury to "some legally cognizable interest," DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975), and they may proceed only if "the constitutional or statutory provision on which [their] claim rests properly can be understood as granting persons in [their] position a right to judicial relief." Warth v. Seldin, 422 U.S. 490, 500 (1975); see Deft. Br. 37-38. The mere existence of the endorse or espouse provision does not cause plaintiffs any legally cognizable injury. Rather, plaintiffs' asserted injuries – the chill that they and

alien would-be conferees assertedly feel as they organize conferences, and the possibility that a future invitee might be found inadmissible under the endorse or espouse provision – are inevitable byproducts of Congress's exercise of its plenary power. See Deft. Br. at 45-50 (citing Kleindienst, 408 U.S. at 766). Congress's plenary authority under the Constitution to determine what categories of aliens should be allowed entry lies beyond judicial competence, and instead is controlled by the executive and legislative branches, limited only by their own constitutional obligations and by the checks and balances inherent in the political process.

Kleindienst's effects aside, plaintiffs have not even established that the endorse or espouse provision has affected them. Plaintiffs have not identified a single person whom they wished to host in the United States, but who was excluded pursuant to the endorse or espouse provision. Moreover, defendants have already shown that Ramadan was never excluded pursuant to the endorse or espouse provision, and have explained in a sworn declaration that reported DHS comments to the contrary were incorrect. See Kinder Decl. ¶¶ 15. Plaintiffs thus lack the concrete, particularized interest possessed by every plaintiff held to have standing in Kleindienst and its progeny, each of whom was barred by Governmental action from meeting with a specific alien.

Past events show that plaintiffs' expressed fear that they will be prevented from hosting an alien speaker in the future is entirely speculative. The State Department has found only one alien inadmissible under the endorse or espouse provision, and that alien was granted visas pursuant to waivers of inadmissibility. See Kotval Decl. ¶ 3. Meanwhile, DHS has found, at most, ten aliens subject to exclusion under the provision. Plaintiffs have expressed no interest in meeting with any of these aliens, and none has been identified as an academic or person traveling to the United States for the purpose of expressing their views. See Morris Decl. ¶¶ 9-12. Further, despite plaintiffs'

speculation about Adam Habib, Yoannis Milios and Waskar Ari, they have not been excluded under the endorse or espouse provision, and plaintiffs present no reasonable basis for assuming they will ever be excluded on that basis. See id.

Finally, there is nothing "absurd," Pl. Repl. at 25, about suggesting that review is appropriate, if at all, only in an "as applied" challenge. Kleindienst permits, at most, only an extraordinarily constrained judicial consideration of a specific exclusion of a specific alien, and the limited test it articulates cannot readily be applied to a statute. Even if plaintiffs had constitutional standing, they lack prudential standing, as their complaint is based in law that cannot "properly [] be understood as granting persons in the plaintiff's position a right to judicial relief." Warth, 422 U.S. at 500.

B. The Endorse or Espouse Provision Is Constitutional

At bottom, the parties dispute which constitutional framework governs. Plaintiffs invoke domestic First Amendment law, arguing that their right to receive information is a fundamental right not subject to content- or viewpoint-based restriction, and that domestic vagueness and licensing case law applies, even to a statute whose sole purpose is to exclude a category of aliens whom the legislative and executive branches have concluded should not be admitted to the United States.

The fundamental problem with plaintiffs' position is that it is contrary to more than a century of unbroken and judicially approved implementation of Congress's plenary power to exclude aliens. Domestic First Amendment analysis simply does not apply to Congress's exercise of that power. Rather, every court to consider the question has upheld Congress's authority to exclude aliens on any basis – including an alien's speech, advocacy, beliefs or membership. Indeed, Kleindienst – which postdates the seminal First Amendment cases on which plaintiffs rely – expressly reaffirmed Congress's plenary authority to define what aliens are inadmissible, and afforded only the narrowest

review under a statute that is analytically undistinguishable from the endorse or espouse provision. The cases rejecting a Government exclusion of an alien under Kleindienst reaffirm Congress's plenary power to define the admissibility of aliens, and merely consider whether a specific exclusion was "facially legitimate and bona fide." See Deft. Br. at 51-56 (citing cases).

While Congress's plenary power is subject to constitutional limits, see Pl. Repl. at 26-27, Deft. Br. at 45, that does not mean that Congress's authority to define categories of aliens as inadmissible is subject to domestic First Amendment doctrines. Kleindienst forecloses plaintiffs' position by expressly reaffirming Congress's "plenary power . . . to exclude those who possess those characteristics which Congress has forbidden," and "to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention." Kleindienst, 408 U.S. at 766; see also Deft. Br. at 44. Further, Kleindienst explicitly rejected "the proposition that governmental power to withhold a [visa] waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien." Id. at 768. Put simply, no case has restricted the bases for exclusion that Congress may permissibly enact.

The cases plaintiffs identify as recognizing or imposing constitutional limitations on Congress's plenary power are inapposite, and, indeed, their disparate and irrelevant substance underscores the lack of support for plaintiffs' position. INS v. Chadha, 462 U.S. 919 (1983), for example, had nothing to do with a basis of inadmissibility, and instead invalidated the one-house legislative veto. See Chadha, 462 U.S. at 957-59. Meanwhile, the two nineteenth-century cases cited by plaintiffs for their recitations that Congress must act "consistent with the constitution," Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893), in fact establish that courts will not interfere with Congress's power to "exclude foreigners . . . whenever, in its judgment, the public interests

require such exclusion," Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889), and even to expel a resident alien without judicial review. See Fong Yue Ting, 149 U.S. at 724 (resident aliens "remain subject to the power of congress to expel them . . . whenever, in its judgment, their removal is necessary or expedient for the public interest"). Another cited cite is inapposite because it concerns aliens already within the United States, and noted that "[a]liens who have not yet gained initial admission . . . would present a very different question," Zadvydas v. Davis, 533 U.S. 678, 682 (2001), while another held merely that the power to inspect and/or exclude aliens at border points did not authorize a warrantless search without probable cause more than twenty miles from any border. See Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); see also id. at 272 ("[I]t is undoubtedly within the power of the Federal Government to exclude aliens from the country.").

CONCLUSION

For the reasons stated above and in defendants' moving brief, plaintiffs' motion for summary judgment should be denied, and defendants' cross-motion for summary judgment should be granted.

Dated: New York, New York
July 13, 2007

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I, Kristin L. Vassallo, an Assistant United States Attorney for the Southern District of New York, hereby certify that on July 13, 2007, I caused a copy of Defendants' Reply Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Their Cross-Motion for Summary Judgment, and the Declaration of Aaron Martz, to be served, by mail and email, upon the following individuals:

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