UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN ACADEMY OF RELIGION; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; PEN AMERICAN CENTER; 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.	Case No. 06-588 (PAC)

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

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INTRODUCTION

Plaintiffs the American Academy of Religion ("AAR"), the American Association of University Professors ("AAUP"), and PEN American Center ("PEN") respectfully submit this memorandum in support of their motion for summary judgment and in opposition to defendants' cross-motion for summary judgment. The pending motions relate to the constitutionality of the government's ongoing exclusion of Professor Tariq Ramadan, an exclusion that has now been in effect for almost three years, and to the facial validity of the Patriot Act's "ideological exclusion" provision, which the government initially invoked to explain Professor Ramadan's exclusion and which invests executive officers with the authority to exclude foreign nationals from the U.S. on the basis of their speech and political views.

As will by now be plain to the Court, the government's arguments in this litigation, while varied, have at their core a single proposition: that the government's authority over the admissibility of foreign nationals to the U.S. is not subject to constitutional limitation or judicial review. This proposition, in addition to being profoundly dangerous, has already been rejected by this Court. It is without support in the case law and it is decidedly wrong where the First Amendment rights of U.S. citizens are at stake.

In the end, the government offers no reasoned basis for its continuing exclusion of Professor Ramadan. The government has determined him to be inadmissible under the REAL ID Act's material support provision, but it has not submitted any evidentiary basis to support this determination, and the evidence that plaintiffs have submitted makes clear that the provision simply does not apply. Even if the provision applied as a factual matter, it does not

apply legally because the government cannot lawfully apply it to donations that were made before the REAL ID Act became law.

The government's defense of the ideological exclusion provision is equally unsound – indeed, other than asserting that Congress' authority over the admissibility of foreign nationals is limitless, it scarcely offers a defense at all. This is unsurprising, because it is plain that the provision cannot survive scrutiny. It is a foundational principle of First Amendment jurisprudence that, however legitimate the government's ends, it cannot accomplish those ends by suppressing speech on the basis of its content or viewpoint. Yet, by allowing the government to censor disfavored speech at the border, this is exactly what the ideological exclusion provision does.

For the reasons stated in plaintiffs' opening brief, and for the further reasons stated below, plaintiffs respectfully urge the Court to enter summary judgment in their favor. There are no genuine issues of material fact.

ARGUMENT

I. DEFENDANTS' EXCLUSION OF PROFESSOR RAMADAN IS SUBJECT TO JUDICIAL REVIEW.

a. As this Court has already held, the First Amendment requires the government to supply a facially legitimate and bona fide reason for Professor Ramadan's exclusion.

In its June 2006 Opinion, this Court ruled that judicial review of an exclusion that implicates U.S. citizens' First Amendment rights is not only permissible but required, and that such an exclusion is unconstitutional unless effected for a reason that is both facially legitimate and bona fide. *AAR v. Chertoff*, 463 F. Supp. 2d 400, 416-17 (S.D.N.Y. 2006) (stating that *Mandel* and its progeny "require the Government to justify the exclusion of an alien when the First Amendment rights of citizens are implicated" and citing cases); *id.* at 411

n.13 (holding that "[t]he Court's finding that Plaintiffs have not established irreparable injury at this stage does not reduce or rid the Government of its burden to present a facially legitimate and bona fide explanation for Ramadan's exclusion"). The government now re-approaches these issues as if writing on a blank slate, Gov't Br. 10-14, but this Court's rulings were manifestly correct and now constitute the law of the case.

"The law of the case doctrine counsels against revisiting . . . prior rulings in subsequent stages of the same case absent 'cogent' and 'compelling' reasons such as an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *United States v. Thorn*, 446 F.3d 378, 383 (2d Cir. 2006) (quoting *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000)); *see also United States v. Crowley*, 318 F.3d 401, 420 (2d Cir. 2003) ("[W]hen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case"); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999); *In re PCH Assoc. v. Liona Corp., Inc.*, 949 F.2d 585, 592 (2d Cir. 1991) ("Under the law of the case doctrine, a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation."). As the Second Circuit has written, "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand*, 322 F.3d 147, 167 (2d Cir. 2003) (internal citations and quotation marks omitted).

There is nothing to warrant reopening this Court's earlier rulings; the government's interpretation of *Mandel* is just as flawed now as it was last year. The basic deficiency in the government's argument is that it takes the principle that judicial review is limited in this

context to mean that the government's actions are immune from judicial review altogether. Every lower court to have considered the question, however, has found that *Mandel* requires judicial review. Plaintiffs' Memorandum in Support of Motion for Summary Judgment (hereinafter "Pl. Br.") 14.

The government attempts to confine *Mandel*'s judicial review principle to the context of waivers of inadmissibility, Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Their Cross-Motion for Summary Judgment (hereinafter "Gov't Br.") 11-12, but, as this Court has recognized, it is the exclusion of an invited foreign speaker that triggers the judicial review required by *Mandel* and its progeny – whether that exclusion is effected by a formal visa revocation, a "prudential" revocation, the failure to act on a visa application, the denial of a waiver, or, as here, an actual visa denial based on a finding of inadmissibility. *See, e.g.*, *AAR*, 463 F. Supp. 2d at 412 (recognizing harm to plaintiffs caused "by Ramadan's exclusion more generally"). The government's argument that the availability of judicial review should be confined to the waiver context ignores more than 30 years of judicial interpretation of *Mandel*. In fact, most of the courts that have held that *Mandel* requires judicial review have reached that conclusion not in the waiver context but in the context of visa denials. *Adams v. Baker*, 909 F.2d 643, 647 (1st Cir. 1990) (reviewing visa denial and denial of waiver); *Allende v. Shultz*, 845 F.2d 1111, 1114 (1st Cir. 1988) (reviewing visa denial); *Abourezk v. Reagan*, 785 F.2d 1043, 1048-49 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987) (reviewing visa denials).[1]

[1] The government contends that the D.C. Circuit's decision in *Abourezk* was "sharply limit[ed]" by the same court's decision in *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1163 n.13 (D.C. Cir. 1999). Gov't Br. 13 n.7. As this Court has noted, however, "in *Saavedra Bruno*, the D.C. Circuit expressly distinguished between cases like *Saavedra*, in which disappointed aliens seek review of their visa applications, and cases like this one, in which

In any event, there would be no logic to limiting *Mandel* to the waiver context. While the decision to grant or deny a waiver is for the most part entrusted to the executive branch's discretion (subject, of course, to constitutional limits), the executive's authority to deem a foreign citizen inadmissible is cabined not only by constitutional limits but by statutory ones as well. It would therefore be quite strange, to say the least, if the grant or denial of a waiver received more judicial scrutiny than a finding of inadmissibility. Ordinarily, discretionary decisions receive less scrutiny, not more.[2] And it is well-settled that the courts have a special role to play in ensuring that statutory limits on the executive's authority are honored. *See, e.g.*, *Abourezk*, 785 F.2d at 1051 (rejecting argument that the INA committed inadmissibility determinations to standardless agency discretion, noting "the statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power," and finding that the "constraints Congress imposed are judicially enforceable"); *AAR*, 463 F. Supp. 2d at 414-15 ("The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts . . . to say where those statutory and constitutional boundaries lie." (quoting *Abourezk*, 785 F.2d at 1061)).

This Court has already rejected the government's argument, and it was entirely correct to do so.

American citizens challenge the Government's action on constitutional grounds." *AAR*, 463. F. Supp. 2d at 417.

[2] For example, the Administrative Procedures Act creates a presumption of review for agency action, but this presumption does not extend to decisions committed to unfettered agency discretion. *See* 5 U.S.C. § 701.

b. As this Court has already held, the doctrine of consular nonreviewability does not insulate the government's exclusion of Professor Ramadan from judicial scrutiny.

Once again ignoring this Court's earlier ruling, and once again proceeding as if writing on a blank slate, the government urges the Court to hold that its exclusion of Professor Ramadan is immune from judicial scrutiny under the doctrine of consular nonreviewability. Gov't Br. 6-14. As this Court has held, this argument is in direct conflict with *Mandel* and its progeny. *AAR*, 463 F. Supp. 2d at 416. In its earlier decision, the Court held that the doctrine "does not apply in cases brought by U.S. citizens raising constitutional, rather than statutory, claims"; that the doctrine is inapplicable "to the decisions of non-consular officials"; and that the doctrine is "certainly not [applicable] to [the Department of Homeland Security]." *Id.* at 417-18. The Court noted that the substantive decisions about Professor Ramadan's case were being made not by consular officers but by officials in Washington. *See id.* at 417 (noting consular officials "are merely awaiting a Security Advisory Opinion ('SAO') from other Government officials before they can adjudicate Ramadan's pending visa application"); *id.* at 418 (noting "DHS is clearly involved in Ramadan's case," citing evidence, and concluding that "consular officials in Bern are awaiting instructions from DHS before proceeding on Ramadan's pending visa application"). This Court concluded, therefore, that the doctrine simply did not apply.

The government offers no reason to reconsider this decision. This is still a case brought by U.S. citizens and residents to contest the exclusion of a foreign scholar whom they have invited to speak inside the U.S. and whose exclusion harms their First Amendment rights. Moreover, the government's recent submissions only confirm that all critical and substantive decisions about Professor Ramadan's exclusion are being made by officials in

Washington. *See, e.g.*, Statement of Undisputed Facts in Support of Defendants' Cross-Motion for Summary Judgment ("Gov't SUF") § A.3 (Declaration of John O. Kinder (hereinafter "Kinder Decl.") ¶ 7 (stating that Professor Ramadan's visa was revoked in 2004 by the State Department, not the consulate)); Gov't SUF § B.13 (Kinder Decl. ¶ 12 (stating that a consular officer denied Professor Ramadan's 2006 visa application only after receiving a Security Advisory Opinion from the State Department)); Gov't SUF § B.13 n.2 (Kinder Decl. ¶ 12 (acknowledging Security Advisory Opinions from officials in Washington are mandatory with respect to terrorism-related inadmissibility determinations)). The government's reliance on the doctrine of consular nonreviewability is therefore wholly misplaced.

II. DEFENDANTS HAVE NOT SUPPLIED A FACIALLY LEGITIMATE AND BONA FIDE REASON FOR THEIR REFUSAL TO GRANT PROFESSOR RAMADAN A VISA.

a. As this Court has already held, *Mandel* requires the government not simply to point to an inadmissibility provision but to show that the provision actually applies.

The government contends that, if its actions are to be subject to judicial review at all, the review should be limited to ensuring that the government has invoked an actual inadmissibility provision. *See* Gov't Br. 18 ("as the term 'facial' indicates, a court may not look behind the factual or discretionary determinations reflected in the Government's *asserted* justification" (emphasis added)); *id.* at 19 ("courts . . . should neither engage in any factual inquiry nor second-guess the deciding official's conclusions"). In this context, however, the First Amendment requires the government not merely to point to an inadmissibility provision *but to supply some basis for the application of that provision to Professor Ramadan.* Indeed, this Court has already held as much. In the previous phase of this litigation, the government

stated that it had revoked Professor Ramadan's visa "prudentially" and that it had done so for reasons relating to national security. The Court observed, however, that there was "no basis in the record (e.g. no affidavits or documents) upon which the Court could find that national security concerns [were] facially legitimate or bona fide in Ramadan's case." *AAR*, 463 F. Supp. 2d at 418. It found, therefore, that the government had not carried the burden imposed by *Mandel*. The Court explained: "[*Mandel*] require[s] the Government to *justify* the exclusion of an alien when the First Amendment rights of American citizens are implicated. . . . This limited review is necessary to ensure compliance with the First Amendment, a duty that has been expressly delegated to the federal courts." *Id.* at 417 (emphasis added). The Court cited with approval the D.C. Circuit's opinion in *Abourezk*: "[J]udicial scrutiny of the specific reasons for denials of entry" is necessary to prevent "a mushrooming of . . . content-based denials." *Id.* (quoting *Abourezk v. Reagan*, 592 F. Supp. 880, 888 (D.D.C. 1984)). It also cited with approval the following proposition: "'To find a conclusory statement that the entry of a particular individual would be contrary to United States foreign policy objectives to be a facially legitimate reason would be to surrender to the Executive total discretion,' even when First Amendment rights of American citizens are at stake." *AAR*, 463 F. Supp. 2d at 418-19 (quoting *Abourezk*, 592 F. Supp. at 888).[3]

[3] The government relies on *NGO Committee on Disarmament v. Haig*, No. 82 Civ. 3636, 1982 U.S. Dist. LEXIS 13583, at *4 (S.D.N.Y. June 10, 1982), *aff'd mem.*, 697 F.2d 294 (2d Cir. June 18, 1982), for the proposition that the Court should "decline to look behind the factual and discretionary determinations" underlying an asserted facially legitimate and bone fide reason for exclusion. Gov't Br. 22. Notably, however, just fifteen days after *NGO Committee* was decided by the district court, and just eight days after the district court's decision was affirmed by summary order (an order that was not of precedential value, *see* 2d Cir. R. 0.23 Dispositions by Summary Order), the Second Circuit issued an opinion making it clear that the "facially legitimate and bone fide" standard requires at least some degree of factual review. *Bertrand v. Sava*, 684 F.2d 204, 213 (2d Cir. June 25, 1982).

The government does not satisfy *Mandel* merely by invoking an inadmissibility provision. In *Adams*, 909 F.2d at 648-49, the First Circuit characterized the district court's application of the "facially legitimate and bona fide" standard as a "mixed question of law and fact" and it noted that the application of *Mandel* required a "determination of whether there was sufficient evidence to form a 'reasonable ground to believe' that the alien engaged in terrorist activity." The relevant question, it wrote, was whether there was "evidence . . . sufficient to justify a reasonable person in the belief that the alien falls within the proscribed category." *Id.* at 649; *see id.* at 648-49 (reviewing detailed evidence submitted by government); *Allende v. Shultz*, 605 F. Supp. 1220, 1225 (D. Mass. 1985) (rejecting government's justification for exclusion as "entirely conclusory" and observing that government had failed to "present [or] describe any set of facts which could be construed to fall specifically within the meaning of the [relied-upon] provision"); *El-Werfalli v. Smith*, 547 F. Supp. 152, 154 (S.D.N.Y. 1982) (refusing to "engage in unsupported inference and speculative supposition[]" and requiring the government not only to point to statutory authority for its exclusion of the plaintiff but to advance a "reasoned basis for [its] action"); *MacDonald v. Kleindienst*, No. 72 Civ. 1228 (S.D.N.Y. Oct. 10, 1972) (three-judge panel) (ordering government to submit reasons for refusing to waive inadmissibility), *cited in Burrafato v. U.S. Dep't of State*, 523 F.2d. 554, 556 (2d Cir. 1975).

Indeed, even courts that have applied the "facially legitimate and bona fide" standard *outside* the First Amendment context have insisted that the government supply a factual basis for its action. Thus in *Marczak v. Greene*, 971 F.2d 510 (10th Cir. 1992), a case involving parole hearings for immigrants detained pending resolution of exclusion proceedings, the Tenth Circuit wrote:

> It is tempting to conclude from the broad language of the test that a court applying the "facially legitimate and bona fide" standard would not even look to the record to determine whether the agency's statement of reasons was in any way supported by the facts. On this interpretation, merely asserting a legally permissible justification would support a denial of parole (or other discretionary immigration decision), regardless of whether the justification factually applied to the individual in question. *This has not, however, been the practice of any of the courts that have adopted the standard in immigration matters.*

Id. at 517 (emphasis added); *see id.* at 517, 521 (requiring that the government's action "at least [be] reasonably supported by the record" and then engaging in a thorough analysis of the record); *Bertrand*, 684 F.2d at 213-14; *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083 (9th Cir. 2006) (finding that denial of parole had been based on "facially implausible evidence" and holding that government's justification for denying parole was not "facially legitimate and bona fide"). Again, these were cases that did *not* involve First Amendment claims brought by U.S. citizens. In the present context, this Court's scrutiny should be, if anything, even more searching.

b. Professor Ramadan's donations to ASP do not supply a facially legitimate and bona fide reason for exclusion because there is no evidence that Professor Ramadan knew or should have known that ASP was providing money to Hamas.

Defendants' basis for excluding Professor Ramadan is unlawful because the government has submitted *no evidence whatsoever* to support its determination that Professor Ramadan knew or should have known that ASP was providing money to Hamas. The consular officer who is said to have made the determination, Gov't Br. 15, has not submitted an affidavit at all. The former Consul at the United States Embassy in Bern, Switzerland, has submitted an affidavit that states that the consular officer's determination "was based on findings that Ramadan in fact satisfied each of the statutory requirements establishing inadmissibility under those provisions," but the Consul's affidavit does not even describe

what the government believes those requirements to be, let alone provide any factual basis for the government's conclusion that the requirements were satisfied here. Gov't SUF § B.15 (Kinder Decl. ¶¶ 12-13).

In fact there is good reason to suspect that the government found Professor Ramadan inadmissible under the material support provision without ever considering whether he possessed the requisite knowledge. While the Kinder declaration does not state what requirements the government believes must be satisfied before a foreign national can be denied a visa under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd), the government's brief states that "the consular officer found Ramadan inadmissible . . . for material support of terrorism because, as Ramadan admitted, he donated funds to ASP and CBSP, and, the consular officer determined, Ramadan could not establish by clear and convincing evidence that he neither knew nor reasonably should have known that these organizations provided funds to Hamas." Gov't Br. 15. Conspicuously missing is any acknowledgement of the material support provision's introductory language, which states that the provision applies in the first place only to those who "know[] or reasonably should know" that they are providing material support to a terrorist organization. For the statute to apply, it is not sufficient for the government to conclude that the individual in question cannot provide "clear and convincing evidence" of lack of knowledge. The government must affirmatively conclude that the individual "kn[e]w or should have know[n]." Pl. Br. 32-34. Absent from the government's papers is any indication that the government actually reached this conclusion.

The record, in any event, is replete with evidence that Professor Ramadan neither knew nor should have known that ASP was providing money to Hamas. Pl. Br. 34-38. The uncontroverted evidence shows that Professor Ramadan gave money to ASP because he

wanted to provide humanitarian aid to Palestinians, Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment ("SUF") §§ V.B, VI.A (Second Declaration of Tariq Ramadan (hereinafter "Second Ramadan Decl.") ¶ 12); that his donations were motivated, at least in part, by literature from ASP indicating that donations would support children's education, SUF § VI.B-C (Second Ramadan Decl. ¶ 10); that he would not have donated money had he believed the money would be diverted to Hamas, SUF § VI.E (Second Ramadan Decl. ¶ 11); and that he has been a consistent and vocal critic of terrorism, SUF § II (Second Ramadan Decl. ¶¶ 10-11; Declaration of Tariq Ramadan (hereinafter "Ramadan Decl.") ¶¶ 12, 15-22, 33 & Exhs. C-F, K-U; Declaration of John R. Fitzmier (hereinafter "Fitzmier Decl.") ¶ 18; Declaration of Cary Nelson (hereinafter "Nelson Decl.") ¶ 20; Second Declaration of Michael Roberts (hereinafter "Second Roberts Decl.") ¶ 26). The uncontroverted declaration of Jonathan Benthall shows that, at the time Professor Ramadan donated money to ASP, ASP was an officially recognized and registered charity in Switzerland, SUF § VII.F.i-ii (Declaration of Jonathan Benthall (hereinafter "Benthall Decl.") ¶¶ 48-51, Exhs. B-D; Second Ramadan Decl. ¶ 10); that ASP described itself in official registry documents as an organization that provided aid to poor Palestinians, SUF § VII.F.i (Benthall Decl. ¶ 50, Exhs. B & C); that ASP solicited donations through the mail, SUF §§ VII.F.i, V.B (Benthall Decl. ¶ 51; Second Ramadan Decl. ¶ 10); that there was no reliable public evidence linking ASP with Hamas or terrorist activity, SUF § VII.F.iv (Benthall Decl. ¶¶ 52, 54); that ASP was not considered a terrorist organization by the Swiss government or any European government, SUF § VII.F.ii, vi (Benthall Decl. ¶¶ 51-52); and that ASP was not considered a terrorist organization by any component of the U.S. government, SUF § VII.F.iv, vii (Benthall Decl. ¶ 52). In short, the evidence shows unequivocally that Professor Ramadan

believed that ASP was a legitimate charity not connected to Hamas and that his belief was reasonable.

Because the government has not introduced *any* evidence that Professor Ramadan knew or should have known that ASP was providing money to Hamas, the government has not satisfied the requirements of the material support provision. Moreover, plaintiffs have introduced overwhelming evidence – clear and convincing evidence – that Professor Ramadan neither possessed nor should have possessed the requisite knowledge. The government's reliance on the material support provision to justify Professor Ramadan's exclusion is therefore unlawful.[4]

c. Professor Ramadan's donations to ASP do not supply a facially legitimate and bona fide reason for exclusion because the REAL ID amendments do not apply retroactively to donations that Professor Ramadan made before the Act's effective date.

For the reasons discussed above, REAL ID's material support provisions do not apply to Professor Ramadan as a factual matter. As discussed below, these provisions do not apply to him as a legal matter, either.

i. Congress has not provided an unambiguous directive that the REAL ID amendments should be given retroactive effect.

As plaintiffs have discussed, Pl. Br. 19-21, the Supreme Court has instructed that statutes "should not be construed to have retroactive effect *unless their language requires this*

[4] Summary judgment is appropriate on the question of Professor Ramadan's knowledge because there is "no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). The government has submitted no evidence – not even a "scintilla," *id.* at 252 – to controvert plaintiffs' overwhelming evidence that Professor Ramadan neither knew nor should have known that ASP was funding Hamas, if indeed it was. The government's conclusory assertions are not sufficient to create a genuine issue of material fact. *See Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir. 2006); *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (even where material facts disputed, finding no genuine issue of material fact where one party's factual assertions were unsupported by credible evidence).

result." *I.N.S. v. St. Cyr*, 533 U.S. 289, 315 (2001) (emphasis added). The Court has repeatedly affirmed the well-settled rule that statutes are not to be given retroactive effect unless the legislature has spoken in language "so clear that it could sustain only one interpretation." Gov't Br. 24 (quoting *St. Cyr*, 533 U.S. at 317); *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-65 (2006); *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2429 (2006); *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1977). The government appears to agree that REAL ID's effective date provision must be analyzed within this legal framework. Gov't Br. 24-25.

Does section 103(d) – REAL ID's effective date provision – supply an unambiguous directive that the REAL ID amendments should be given retroactive effect? As plaintiffs have explained, Pl. Br. 21-27, a comparison of REAL ID's effective date provision with the corresponding Patriot Act provision highlights the REAL ID provision's ambiguity. To reach the conclusion that REAL ID's "effective date" provision manifests retroactive intent, the government is forced to excise an entire phrase, but this phrase – "constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing" – cannot simply be ignored. It is axiomatic that courts must endeavor to give meaning and effect to every word of a statute. Pl. Br. 25. If the government's construction of the provision requires that the court ignore numerous words, the provision certainly cannot be called an "unambiguous directive." *Landgraf v. USI Film Products*, 511 U.S. 244, 263 (1994).

While altogether ignoring one phrase in the statute, the government also takes another phrase – "before, on, or after" – entirely out of context. The government proposes that this latter phrase is a sort of talisman that automatically establishes retroactive intent. Gov't Br. 24. But the context in which those words are used matters. In the REAL ID provision,

Congress has *not* said that the REAL ID amendments apply to "acts and conditions occurring or existing before, on, or after such date"; it has said that the amendments apply to "acts and conditions *constituting a ground for inadmissibility, excludability, deportation, or removal* occurring or existing before, on, or after such date." The words "occurring or existing before, on, or after such date" qualify not just the words "acts and conditions" but the entire phrase "acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal." In fact the government's reading of the effective date provision renders half of the provision entirely redundant. If it is true (as the government says it is) that section 103(d)(2) is meant to convey that the REAL ID amendments should be applied retroactively to acts and conduct occurring or existing before the Act's effective date, then what purpose is served by section 103(d)(1)?

To suggest that REAL ID's effective date provision is clear is to deny reality. But even if section 103(d)(2) could fairly be read as a directive that the REAL ID amendments should be given retroactive effect, there would remain the question of which people are subject to this retroactivity rule. The government seems to assume that *all* foreign nationals – whether inside the U.S. or not, whether in removal proceedings or not – are subject to the retroactivity rule, but, again, this construction of the statute makes section 103(d)(1) superfluous. It would be far more plausible to read section 103(d)(1) as limiting retroactive application of the amendments to those in removal proceedings and 103(d)(2) as explaining, *as to those in removal proceedings*, to what acts and conditions the amendments apply. Section 103(d)(1) and (2) are not parallel provisions; rather, section 103(d)(2) *qualifies* section 103(d)(1). For those who, like Professor Ramadan, are not in removal proceedings, the REAL ID amendments do not apply retroactively.

Section 103(d) cannot fairly be characterized as an unambiguous directive that REAL ID's amendments be applied retroactively to conduct that took place before the Act's effective date. If the statute cannot be characterized as an unambiguous directive that the amendments be applied retroactively, the statute should not be applied retroactively. Even the government concedes as much. *See, e.g.*, Gov't Br. 28 (recognizing "statutory presumption in favor of prospective application").

ii. Retroactive application of the REAL ID amendments would attach new legal consequences to events completed before REAL ID's enactment.

Because REAL ID's effective date provision is ambiguous at best, this Court must determine whether retroactive application would attach "new legal consequences to events completed before . . . enactment." *Landgraf*, 511 U.S. at 270. The analysis requires a "commonsense, functional judgment," *St. Cyr*, 533 U.S. at 321, and the inquiry "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations," *Martin*, 527 U.S. 358 (internal quotation marks omitted). To suggest, as the government does, that retroactive application of REAL ID's amendments would not have a retroactive effect simply defies common sense. Application of the REAL ID amendments to conduct that pre-dates the Act's effective date would plainly have a retroactive effect because it would render foreign nationals inadmissible for donations that were not grounds for inadmissibility at the time they were made.

The government argues that applying the REAL ID amendments retroactively to Professor Ramadan would not have a retroactive effect because "Ramadan, as a non-resident alien outside the United States, had no First Amendment rights or settled expectations." Gov't Br. 30. But, whether or not Professor Ramadan and others similarly situated can be said to have had "settled expectations" with respect to their admissibility to the U.S., it is

plain that retroactive application of the REAL ID amendments would attach new legal consequences to events completed before the Act's effective date. This is sufficient in itself to establish retroactive effect. *See Hughes Aircraft Co. v. United States*, 520 U.S. 939, 947-51 (1997); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 309-13 (1994); *Landgraf*, 511 U.S. at 281-94; *Greene v. United States*, 376 U.S. 149, 160 (1964); *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (no. 13, 156) (C.C.N.H. 1814) (Story, J.); *Rojas-Reyes v. I.N.S.*, 235 F.3d 115, 121 n.1 (2d Cir. 2000).

There is no merit to the government's novel contention, Gov't Br. 30, that statutes that act upon non-residents cannot have an impermissible retroactive effect within the meaning of *Landgraf* and related cases. In *Hamdan*, 126 S. Ct. at 2762-69 , the Supreme Court found that retroactive application of the Detainee Treatment Act of 2005 would have an impermissible retroactive effect on prisoners at Guantánamo Bay who had filed habeas petitions before the Act's effective date. In *Chew Heong v. United States*, 112 U.S. 536, 558 (1884), the Supreme Court found that retroactive application of the Chinese Restriction Act of 1882 would have an impermissible retroactive effect on a Chinese national who sought to reenter the U.S. after an absence of several years. In both *Hamdan* and *Chew Heong*, the Supreme Court found that statutes would have an impermissible retroactive effect on non-resident aliens outside the United States.[5]

In any event, the government's suggestion that retroactive application of the REAL ID amendments would affect only "non-resident aliens outside the United States" is incorrect. First, retroactive application of the REAL ID amendments would have a retroactive effect not

[5] To be clear, plaintiffs do not suggest that Congress lacks *authority* to legislate retroactively with respect to non-resident aliens outside the United States. The question here, however, is not whether Congress possesses such authority but whether a statute that does not clearly manifest retroactive intent should be construed nonetheless to apply retroactively.

only on Professor Ramadan but on the organizational plaintiffs as well. These plaintiffs, of course, have constitutional rights that are implicated by Professor Ramadan's exclusion, as this Court has recognized. Second, retroactive application of the REAL ID amendments would have a retroactive effect on *resident* aliens, because, as plaintiffs have discussed, Pl. Br. 30, REAL ID's inadmissibility and removability amendments have virtually identical "effective date" provisions. Any reading of the "effective date" provision that permits retroactive application affects not only aliens outside of the country but foreign nationals inside the country – including long-time permanent legal residents. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation.").

The government's argument that the Court should not find an impermissible retroactive effect because plaintiffs have not made a showing of reliance, Gov't Br. 31, misunderstands the relevant law. In general, the courts have not understood reliance to be a prerequisite for a finding of retroactive effect. *Hughes Aircraft*, 520 U.S. at 947-51; *Landgraf*, 511 U.S. at 281-94; *Rivers*, 511 U.S. at 309-13. All of the cases cited by the government involved statutes that placed new disabilities on conduct that was either criminal or grounds for deportation, or both, *at the time it occurred. See, e.g.*, *Wilson v. Gonzales*, 471 F.3d 111 (2d Cir. 2006) (retroactive application to aliens whose conduct was criminal at the time it occurred); *Boatswain v. Gonzales*, 414 F.3d 413 (2d Cir. 2005) (same); *Khan v. Ashcroft*, 352 F.3d 521 (2d Cir. 2003) (same); *Domond v. I.N.S.*, 244 F.3d 81 (2d Cir. 2001) (same); *Arenas-Yepes v. Gonzales*, 421 F.3d 111 (2d Cir. 2005) (retroactive application to aliens whose conduct rendered him deportable at the time it occurred); *Karageorgious v.*

Ashcroft, 374 F.3d 152, 156 (2d Cir. 2004) (same). Because these cases involved statutes that placed new disabilities on conduct that was already unlawful, it was not immediately obvious that retroactive application would attach new legal consequences to past conduct. It was against this background that the courts inquired whether the individuals who would be affected by retroactive application had actually relied on pre-existing law.

Here, by contrast, the government seeks to apply new law retroactively to conduct that was entirely permissible at the time it occurred. Retroactive application of the REAL ID amendments would not increase the penalties on conduct that was already unlawful but rather would attach entirely new legal liability to conduct that did not previously give rise to liability at all. *Hughes Aircraft*, 520 U.S. at 950 (finding retroactive effect where retroactive application of law would "essentially create[] a new cause of action, not just an increased likelihood that an existing cause of action will be pursued"); *Rivers*, 511 U.S. at 304, 313 (1994) (finding retroactive effect where retroactive application of law would establish "a new standard of conduct" and thus "create[] liabilities that had no legal existence before the Act was passed"); *see also Landgraf*, 511 U.S. at 282 (finding retroactive effect even though conduct that would be subject to increased penalty if law were applied retroactively "was already subject to monetary liability"). The government does not cite any case that denied retroactive effect in similar circumstances.[6]

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[6] For reasons plaintiffs have already discussed, Pl. Br. 29-32, retroactive application of the REAL ID amendments would also raise serious due process concerns. The government argues that plaintiffs do not have standing to raise these concerns, Gov't Br. 34, but the Supreme Court rejected exactly the same argument in *Clark*. *See* 543 U.S. at 382 ("when a litigant invokes the canon of [constitutional] avoidance, he is not attempting to vindicate the constitutional rights of others . . . he seeks to vindicate his own *statutory* rights"). To accept the government's argument would be to render the "effective date" provision "a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.*

Even if an individualized showing of reliance were required, that showing has plainly been made here. SUF § VI.A (Second Ramadan Decl. ¶ 10); *id.* (Second Ramadan Decl. ¶ 14 (stating that Professor Ramadan "gave money to ASP because [he] believed that it was a legitimate humanitarian organization engaged in legitimate humanitarian projects.")); *id.* (Second Ramadan Decl. ¶ 10 (stating that Professor Ramadan believed that ASP was a lawful, registered charity operating openly in Switzerland)); *id.* (Second Ramadan Decl. ¶ 10 (noting that U.S. did not blacklist ASP until 2003)); *id.* (Second Ramadan Decl. ¶ 10 ("[i]f ASP was engaged in activity that was illegal under Swiss or U.S. law, I did not know it, and I don't know how I can be expected to have known it.")); *id.* (Second Ramadan Decl. ¶ 10 ("ASP did not advertise a relationship with Hamas, and I did not have any reason to believe that it had one")); *id.* (Second Ramadan Decl. ¶ 14 ("I did not know of any connection between ASP and Hamas and I did not know of any connection between ASP and terrorism")); *id.* (Second Ramadan Decl. ¶ 11 ("I would not have given money to ASP if I had thought my money would be used for terrorism or any other illegal purpose.")). Indeed, the record establishes not only that Professor Ramadan relied on pre-existing law but that his reliance was reasonable. Pl. Br. 36-38.[7]

[7] While the government's argument regarding remedy is somewhat opaque, Gov't Br. 36, plaintiffs believe that the parties are essentially in agreement as to the proper remedy here. Plaintiffs are not asking that the Court order defendants to grant Professor Ramadan a visa. Rather, consistent with the D.C. Circuit's decision in *City of New York v. Baker*, 878 F.2d 507 (D.C. Cir. 1989), plaintiffs ask that the Court enjoin the government from denying Professor Ramadan a visa on the basis of on any donation he made to ASP or CBSP before REAL ID's enactment in May 2005. Particularly because the government has said that it does not regard Professor Ramadan to be inadmissible on any other basis, SUF § III.I (Jaffer Decl. ¶ 5), the Court should not tolerate any effort by the government to further extend Professor Ramadan's unlawful exclusion. Rather, it should require the government to re-process Professor Ramadan's September 2005 visa application immediately. (As the Court has previously noted, visa applications from Swiss nationals are ordinarily processed within 2 days. *AAR*, 463 F. Supp. 2d at 408.) Because the ideological exclusion provision is unconstitutional on

III. PLAINTIFFS HAVE STANDING TO CHALLENGE THE FACIAL VALIDITY OF THE IDEOLOGICAL EXCLUSION PROVISION.

Plaintiffs have standing to challenge the constitutionality of the ideological exclusion provision for four independent reasons: because plaintiffs have suffered concrete injury as a result of the provision; because the provision has had – and continues to have – a chilling effect on plaintiffs' and others' willingness to engage in First Amendment activity; because there exists a credible threat that the provision will be used to bar plaintiffs' invitees in the future; and because the provision operates as an unconstitutional licensing scheme that is subject to facial challenge irrespective of individual applications. Pl. Br. 39-44, 50-53. The government's argument that plaintiffs have not established standing is wholly without merit.

The government's principal contention is that plaintiffs cannot establish standing without identifying a specific individual whom they wish to meet inside the U.S. but who has been excluded under the ideological exclusion provision. To satisfy the "injury" requirement, however, plaintiffs need only establish that they are suffering concrete harm because of the provision. Plaintiffs have plainly shown this here. Pl. Br. 39-40. In fact, where litigants have established a concrete injury, a chilling effect, or a credible threat that a challenged statute will be applied to them in the future, courts have routinely entertained pre-enforcement challenges to statutes that have never been used at all. *See, e.g.*, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988) (finding that booksellers had standing to bring pre-enforcement challenge to Internet child decency statute); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (finding that doctors had standing to bring pre-enforcement challenge to abortion restrictions); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) (finding that

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its face, the Court should also declare that provision invalid and enjoin defendants from relying on it to exclude Professor Ramadan or anyone else.

operators of Internet websites had standing to bring pre-enforcement challenge to Internet child decency statute); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8 (1st Cir. 1996) (finding that political action committee had standing to bring pre-enforcement challenge to a campaign finance law where law targeted kinds of conduct plaintiffs engaged in and state intended to enforce the law).[8]

Here, of course, the challenged provision *has* been used. To begin with, the government invoked the provision to explain the revocation of Professor Ramadan's visa in 2004. While the government has since denied that it found Professor Ramadan inadmissible under the provision, a statement made by a government spokesperson indicated that Professor Ramadan's visa was revoked because the government believed that he might be inadmissible under the provision, SUF § III.A (Second Ramadan Decl. ¶ 6), and the government still has not explained this statement. This Court asked the State Department to provide Professor Ramadan's visa file, *AAR v. Chertoff*, Case No. 06-588 (PAC), Certifying Need for Visa File (Apr. 13, 2006), but to plaintiffs' knowledge, the State Department has failed even to respond to this request.

The provision has also been used against others. The government itself acknowledges that the provision has been used at least 11 times. Gov't SUF §§ C.18, C.19 (Declaration of Andrew C. Kotval ¶ 3; Declaration of Paul M. Morris ¶¶ 9-11). This number is likely just the tip of the iceberg. It does not capture, for example, those visas that have been revoked prudentially (as Professor Ramadan's was) because of a determination that the foreign

[8] The government's attempt to characterize the harms inflicted by the ideological exclusion provision as "indirect," Gov't Br. 41, suggests a continuing confusion on the government's part about the nature of this case. Plaintiffs are not complaining that the government's immigration decisions have an indirect effect on their rights. Plaintiffs are complaining that the government is *directly* (and unlawfully) restricting their right to hear, a right that is protected by the First Amendment.

national in question *might* be inadmissible under the ideological exclusion provision. SUF § X.A (Nelson Decl. ¶ 29 & Exhs. E, F & G (noting government's decision to prudentially revoke the visa of Adam Habib, a South African human rights and anti-war activist)). Nor does it capture the visa applications that languish without action because the government is endlessly investigating whether individuals are inadmissible under the ideological exclusion provision. *AAR*, 463 F.Supp.2d at 421 (expressing displeasure with the fact that the government had allowed Professor Ramadan's visa application "to stagnate undecided for an indefinite period of time"); *id.* at 422 (speculating that government's delay in adjudicating Professor Ramadan's visa application might be "caused by the Government's hope of possible future statements by Mr. Ramadan that might justify exclusion" (internal quotation marks omitted)); SUF § X.A (Nelson Decl. ¶ 28 & Exh. D (noting government's continuing failure to adjudicate visa application submitted by Yoannis Milios, a Greek professor of Marxist economic thought)); *id.* (Nelson Decl. ¶ 30 & Exhs. H-I (noting government's continuing failure to adjudicate visa application submitted by Waskar Ari, a Bolivian historian of Aymara Indian descent)).

As to the government's argument that plaintiffs have alleged only "generalized grievances" and that plaintiffs are seeking relief that "no more directly and tangibly benefits [them] than it [would] the public at large," the argument, besides being misguided as a matter of law, *see, e.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("where a harm is concrete, though widely shared, the Court has found 'injury in fact'"), simply fails to engage the record before the Court. Plaintiffs have alleged ongoing harm and they have explained, in great detail, the particular financial, administrative, and institutional burdens that the ideological exclusion provision imposes on them in particular. Pl. Br. 42 (citing declarations).

Plaintiffs are organizations that regularly invite foreign scholars to speak in the United States; a great deal of their programming has focused (and continues to focus) on issues relating to the "war on terror"; many of the scholars whom they invite to speak in the U.S. have written controversially about these issues; and many of the scholars whom they invite to speak in the U.S. come from the Muslim world. *Id.* All of these factors distinguish plaintiffs from "the public at large."

The government claims that plaintiffs have not offered actual evidence of chilling effect, but the chilling effect that plaintiffs have alleged is precisely the same chilling effect that then-Judge Ginsberg discussed in *Abourezk*, 785 F. 2d at 1052 n.8, and plaintiffs have offered substantial evidence to support their allegations. Pl. Br. 40 (citing, for example, affidavit evidence in support of plaintiffs' allegations that some of their invitees have declined invitations in part because they are unwilling to be subjected to ideological scrutiny). Plaintiffs have submitted evidence that the ideological exclusion provision has discouraged or prevented them from engaging in activities protected by the First Amendment, and this evidence is sufficient to support standing. *See, e.g.*, *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965) (finding standing where civil rights organization chilled by threat of prosecution from engaging in civil rights advocacy); *Presbyterian Church U.S.A. v. United States*, 870 F.2d 518, 521-22 (9th Cir. 1989) (finding church had standing to challenge FBI surveillance because such surveillance discouraged congregants from attending services); *Nat'l Student Ass'n, Inc. v. Hershey*, 412 F.2d 1103, 1119-21 (D.C. Cir. 1969) (holding that anti-war students and student organizations had standing to challenge a directive providing that students would lose draft deferment if they engaged in "illegal protest," because the directive discouraged plaintiffs from engaging in even legal protests, even where no one had lost

deferment); *Wilson v. Stocker*, 819 F.2d 943, 946-47 (10th Cir. 1987) (finding standing to challenge statute prohibiting anonymous leafleting where statute chilled plaintiffs' leafleting activities, even though state did not intend to prosecute plaintiff under the statute); *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 823-24 (2d Cir. 1967) (sufficient chilling effect injury where the threat of receiving a higher draft classification for engaging in legal protest activity dissuaded protest activity by plaintiffs and "others similarly situated").

The government's final argument – that the issues before the Court are "best addressed not through a facial challenge, but through an 'as applied' challenge, should one ever arise" – verges on the absurd. As this Court knows, the government has argued from the outset of this litigation that the executive's immigration decisions are altogether insulated from judicial review. And the government's proposal is problematic for other reasons as well. For one thing, those who are deemed inadmissible under the ideological exclusion provision are unlikely ever to find out. *See* 8 U.S.C. § 1182(b) (exempting terrorism grounds from notice requirements). For another, the ideological exclusion provision causes harm to plaintiffs that goes far beyond the effects of individual exclusions, as plaintiffs have explained. Pl. Br. 7-12, 39-44. The government's suggestion that the courts should deal with the unconstitutionality of the ideological exclusion provision through as-applied challenges – "should [they] ever arise" – is simply another effort to allow the government to act without constitutional restraint.

For the reasons above, and for all of the reasons stated in plaintiffs' opening brief, Pl. Br. 39-44, plaintiffs have standing to challenge the ideological exclusion provision's constitutionality.[9]

IV. THE IDEOLOGICAL EXCLUSION PROVISION IS FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

The government fails to offer any serious argument that the ideological exclusion provision is consistent with the First Amendment. Instead, rehashing a now-familiar theme, it argues that Congress' power to exclude non-citizens from the country is not subject to constitutional limit at all. Gov't Br. 44 (contending that there is a "century of unvarying case law recognizing the absence of limitations" on Congress' plenary power "to define categories of aliens who are, or are not eligible for admission"); *id.* (stating that Congress' decisions in this area "lie wholly beyond the authority of the courts"). This argument, one that is truly radical in its implications, is not supported by the case law.

Congress' power to exclude non-citizens from the country is broad but it is subject to constitutional limits. This principle was recognized at the time the plenary power doctrine was introduced, *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889) (noting that Congress' authority over immigration is limited "by the Constitution itself and [by] considerations of public policy and justice which control, more or less, the conduct of all civilized nations"); *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893) (stating that

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[9] The government argues that plaintiffs' injury stems not from the ideological exclusion provision but from "the full body of immigration law." Gov't Br. 42 n.17. The harm caused by the ideological exclusion provision, however, is unique and unrelated to any harm caused by the other 32 grounds of inadmissibility. In any event, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original); *see also Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1458 (2007).

Congress' immigration power must be exercised "consistent[ly] with the Constitution"), and it has been reaffirmed and given meaning in more recent years, *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (stating that Congress' plenary power is "subject to important constitutional limitations"); *I.N.S. v. Chadha*, 462 U.S. 919, 941-42 (1983) (stating that Congress must implement its plenary power through "constitutionally permissible means"); *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (stating, in the course of evaluating a border search statute, that "no Act of Congress can authorize a violation of the Constitution").

It is true that some of the Supreme Court's Cold War cases included passages that cast Congress' authority over immigration in sweeping terms, *see, e.g.*, *Galvan v. Press*, 347 U.S. 522 (1954), but it is now beyond dispute that Congress' authority in this area is subject to constitutional limit and that these limits are susceptible to judicial enforcement, *see, e.g.*, *Nguyen v. I.N.S.*, 533 U.S. 53, 61 (2001) (reviewing constitutionality of statute under which children born abroad and out of wedlock to one U.S. parent could claim U.S. citizenship); *Miller v. Albright*, 523 U.S. 420, 433-45 (1998) (reviewing constitutionality of similar statute); *Chadha*, 462 U.S. at 955-59 (reviewing constitutionality of statute that invested one House of Congress with the authority to invalidate the executive's decision to grant discretionary relief to a deportable alien); *Fiallo v. Bell*, 430 U.S. 787, 792-93, 793 n.5 (1977) (reviewing constitutionality of statute that afforded "special preference immigration status" to a child or parent of a U.S. citizen or lawful permanent resident, and stating that "[o]ur cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens"); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133-36 (2d Cir. 1990) (reviewing constitutionality of statute

imposing two-year foreign residency requirement on aliens who marry U.S. citizens during pendency of deportation or exclusion proceedings).[10]

In light of these precedents, the government's contention that plaintiffs are inviting a "judicial usurpation" of Congress' immigration power, Gov't Br. at 44, is difficult to understand. Whatever Congress' power to exclude non-citizens from our shores, it is unquestionably the role of the courts to say what the limits of that power may be. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is . . . . So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules govern the case. This is the very essence of judicial duty . . . ."); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("Interpretation of the law and the Constitution is the primary mission of the judiciary[.]").

To the extent the law in this area is unsettled, the open question is not whether Congress' immigration statutes are subject to judicial review but rather what standard of scrutiny applies. *Compare Nguyen,* 533 U.S. at 61 (evaluating immigration statute under intermediate scrutiny and stating that "we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization

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[10]Congress' foreign affairs power – from which Congress' immigration power is in part derived – has also been described in equally sweeping terms, but it, too, has been recognized to be limited by the Constitution. *See, e.g.*, *Perez v. Brownell*, 356 U.S. 44, 57-58 (1958) ("Broad as the power . . . to regulate foreign affairs must necessarily be, it is not without limitation."), *overruled on other grounds*, *Afroyim v. Rusk*, 387 U.S. 253 (1967); *United States v. Curtiss Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (foreign affairs power "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution"); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Robel,* 389 U.S. 258, 264 (1967); *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (war and foreign affairs power subject to the First Amendment); Louis Henkin, Foreign Affairs and the Constitution 80 (1996) ("Congressional authority related to foreign affairs is, of course, limited by the Bill of Rights.").

power") *and Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (evaluating constitutionality of immigration statute under First Amendment standards that applied to U.S. citizens at the time), *with Fiallo*, 430 U.S. at 794-95 (evaluating immigration statute under "facially legitimate and bona fide" standard). The question of what standard applies, however, need not detain this Court for long because the ideological exclusion provision cannot survive even the most deferential review.

Even under the most deferential review, the ideological exclusion provision unconstitutionally abridges the First Amendment rights of U.S. citizens and residents. As this Court has properly recognized, U.S. citizens have a First Amendment right to "to receive information and ideas," and this "broad right to receive information includes a right by citizens of the United States to have an alien enter and to hear him explain and seek to defend his views." *AAR*, 463 F. Supp. 2d at 414 (citing cases). While there are many grounds on which the government can lawfully exclude foreign nationals – including foreign nationals who have been invited to speak inside the U.S. – it cannot, consistent with the Constitution, exclude invited foreign nationals simply because of the content of their speech, Pl. Br. 46-47; *AAR*, 463 F. Supp. 2d at 416 n.17 ("[A]lthough the government may deny entry to aliens altogether, or for any number of specific reasons, it may not, consistent with the First Amendment, deny entry solely on account of the content of speech." (quoting *Abourezk*, 592 F. Supp. at 887)), unless, of course, that speech constitutes incitement to immediate unlawful activity. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Noto v. United States*, 367 U.S. 290 (1961); *Adams*, 909 F.2d at 648 (stating that "mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence . . . cannot form the basis for exclusion"); *id.* at 648 n.4 (stating that Adams' statements that "armed struggle is a

necessary and morally correct form of resistance" would not be a legitimate basis for exclusion because *Noto* "governs the reliance upon speech-related activities as a basis for the exclusion of aliens into the United States").

The ideological exclusion provision fails to distinguish between protected speech and incitement, as the government itself concedes. Gov't Br. 50 n.22 ("the [Foreign Affairs Manual] acknowledges that the endorse or espouse provision applies to speech that falls short of incitement"). Because the provision "sweeps within its condemnation speech which our Constitution has immunized from government control," *Brandenburg*, 395 U.S. at 447-48, it is invalid under the First Amendment.[11]

The government contends that the ideological exclusion cases establish at most that the *executive's* actions are subject to constitutional scrutiny, not that Congress' enactments are similarly reviewable. Gov't Br. 51-56. Again, however, the Supreme Court has made clear that Congress' authority in the immigration area is subject to constitutional limits and that these limits are judicially enforceable. The Supreme Court's cases establish that immigration statutes that implicate constitutional rights must survive scrutiny under (at the very least) the "facially legitimate and bona fide" standard. The government does not furnish any reason why statutes that implicate the First Amendment rights of citizens should be treated differently, and the courts have not considered such statutes to be immune from judicial

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[11] To the extent that the government suggests that *Mandel* held that Congress is free to exclude non-citizens based on First Amendment protected activity, Gov't Br. 50, the government is wrong. The Court's decision was limited to whether the executive's exclusion of Mandel violated the Constitution. While the Court cited the plenary power decisions, it noted that Mandel did not press the facial constitutionality of the McCarran Walter provisions. 408 U.S. at 767; *see also Reagan v. Abourezk*, No. 86-656, Transcript of Proceedings, Oct. 5, 1987 at 12-13 (noting government's concession that *Mandel* did not resolve whether Congress could constitutionally exclude non-citizens categorically because of their political views), *cited in Manwani v. U.S. Dep't of Justice*, 736 F. Supp. 1367, 1378 n.8 (W.D.N.C. 1990).

scrutiny in the past. *See, e.g.*, *Rafeedie v. I.N.S.*, 795 F. Supp. 13, 16 (D.D.C. 1992) (invalidating, under First Amendment overbreadth doctrine, provisions of the McCarran-Walter Act that applied to aliens who advocated "overthrow of the government"); *Am. Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1083-84 (C.D.Cal. 1989) (invalidating, under First Amendment overbreadth doctrine, provisions of the McCarran-Walter Act that applied to aliens who advocated communism or totalitarianism), *overruled on other grounds in Am. Arab Anti-Discrimination Comm. v. Thomburgh*, 970 F.2d 501 (9th Cir. 1992); *Harisiades*, 342 U.S. at 592 (reviewing constitutionality of immigration statute that proscribed membership in Communist party); *see also Lesbian/Gay Freedom Comm. v. I.N.S.*, 541 F. Supp. 569, 583 (N.D. Cal. 1982); *id.* at 585, n.8 (stating that "*Fiallo v. Bell* makes clear that this congressional decision to exclude homosexuals per se is also subject to constitutional challenge, and to the same standard of review applied to executive actions").

The government's argument that "the Supreme Court . . . has consistently upheld statutes rendering aliens inadmissible even on bases that would have violated the First Amendment if applied to United States citizens," Gov't Br. 47, is simply incorrect. In the cases cited by the government – most of which were decided more than forty years ago, before the Supreme Court's major First Amendment cases of the 1960s – the Supreme Court applied exactly the same standards that it would have applied (at the time) to restrictions on the First Amendment rights of U.S. citizens. In *Harisiades*, 342 U.S. at 580, the Court determined that a foreign national could be deported for membership in the Communist Party, but it reached this conclusion only after applying the then-prevailing First Amendment standard. *Id.* at 592 (applying "incitement" test set out by *Dennis v. United States*, 341 U.S. 494 (1951), and stating that "the Constitution enjoins upon [the Court] the duty, however

difficult, of distinguishing between" constitutionally protected and unprotected advocacy).[12] In *Rowoldt v. Perfetto*, 355 U.S. 115, 121 (1957), the Court reversed an order of deportation based on purported membership in the Communist Party because the government had failed to provide evidence of meaningful association and the requisite intent – requirements that appear to have been drawn from the domestic First Amendment law at the time. *See also Bridges v. Wixon*, 326 U.S. 135 (1945) (narrowly construing a deportation statute to avoid constitutional problems that would arise if statute were read to reach mere affiliation with Communist party); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) (reversing deportation order where evidence of meaningful association insufficient); *Niukkanen v. McAlexander*, 362 U.S. 390 (1960) (evaluating whether deportees' membership was "meaningful" as a statutory matter).[13] Even setting aside the fact that none of the cases cited by the government involved First Amendment claims brought by citizens, the cases simply do not say what the government contends they say.

The government's theory, one that is not supported by the case law, is that the First Amendment imposes *no limit whatsoever* on Congress' ability to prevent U.S. citizens from inviting foreign scholars to speak inside the U.S. Gov't Br. 50 n.22. Under the government's theory, it is within Congress' authority to deny Americans the right to invite foreign scholars

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[12] *See also* T. Alexander Alienikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 869 (Oct. 1989) (read correctly "*Harisiades* stands for the proposition that deportation grounds are judged by the same standards as other burdens on First Amendment rights."). The Court's treatment of the First Amendment claim in *Harisiades* seriously undermines – if not implicitly overrules – the holding of *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904), another case relied on by the government.

[13] Rowoldt did not present any First Amendment challenge to the statute and the Court did not consider one. *Id.* at 116 (stating that the "only claim" Rowoldt pressed and the Court "need[ed] to consider" was "that [Rowoldt] was not a 'member' of the Communist Party within the scope of" the law).

who have opposed (or supported) the war in Iraq, criticized (or endorsed) the "war on terror," proposed that the United States give more (or less) in foreign aid, or suggested that the distribution of wealth in the United States is inequitable (or fair). The government theory, in other words, is that Congress may prevent Americans from meeting with foreign scholars simply because it does not approve of what those scholars have to say. As discussed above, every court to have considered this contention has rejected it. This Court should do the same.

V. THE IDEOLOGICAL EXCLUSION PROVISION CONSTITUTES A PRIOR RESTRAINT AND AN UNCONSTITUTIONAL LICENSING SCHEME.

As plaintiffs have explained, Pl. Br. 50-53, the ideological exclusion provision constitutes an unconstitutional licensing scheme and prior restraint, because it invests executive officers with sweeping power to determine which foreign citizens U.S. citizens and residents can meet with and which speech they can hear. Whereas the enforcement of other inadmissibility grounds may have an incidental effect on the First Amendment rights of U.S. citizens and residents, the effect of the ideological exclusion provision is direct. Indeed, the provision – alone among the inadmissibility provisions of the INA – is specifically addressed to speech that U.S. citizens and residents have a First Amendment right to hear.

The government's contention that the licensing scheme analysis does not have application at the border is incorrect, as the Supreme Court's cases make clear. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Kent v. Dulles*, 357 U.S. 116 (1958). While the government notes that these cases involved U.S. citizens, the same is true here – a fact that the government seems continually to elide. The government's argument that the ideological exclusion provision is not a licensing scheme because it does not target speech "that has not yet occurred," Gov't Br. 57, is also without merit. The ideological exclusion provision allows

executive officers broad discretion to suppress future speech (and to restrict U.S. citizens' and residents' right to hear that speech) on the basis of speech that has occurred in the past.

Plaintiffs' fear that the ideological exclusion provision will be used as an instrument of censorship – and a blunt one, at that – is not speculative. As plaintiffs have noted, Pl. Br. 9, the State Department's Foreign Affairs Manual describes the provision in extremely broad terms. And records released to plaintiffs this week under the Freedom of Information Act underscore the danger of investing executive officers with the authority to apply an ideological litmus test at the border. One file suggests that a Finnish national was referred to "secondary inspection" because he had converted to Islam and taken a Muslim name. The man appears ultimately to have been excluded under the ideological exclusion provision after he "would not give a direct reason for [his conversion to Islam] other than to say he felt that the Muslim way of life is what he believed in himself"; stated that he had friends who believed that "terrorist attacks on the U.S. military in Iraq was . . . a good thing"; stated that such attacks might encourage the U.S. to withdraw from Iraq; "gave a negative opinion on the U.S. in Iraq" in a news article CBP official found on the Internet; and stated that "on his home computer he had numerous articles covering terrorist activities." Declaration of Melissa Goodman ¶ 6, Exh. C (Supplemental FOIA documents 27-44).

VI. THE IDEOLOGICAL EXCLUSION PROVISION IS UNCONSTITUTIONALLY VAGUE.

The ideological exclusion provision violates not only the First Amendment but the Fifth Amendment as well. As plaintiffs have explained, Pl. Br. 53-56, the provision is unconstitutionally vague because its terms fail to "give[] a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Chatin v. Coombe*, 186 F.3d 82, 86 (2d Cir. 1999) (quoting *United States v. Strauss*, 999 F.2d 692, 697 (2d Cir. 1993)). The

provision's vagueness is of particular concern because the provision regulates activity protected by the First Amendment. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Vill. Of Hoffman Estates, Inc. v. Flipside*, 455 U.S. 489, 499 (1982); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

In response to plaintiffs' Fifth Amendment challenge, the government's principal response is that the vagueness doctrine has no application to statutes governing admission. But, reflecting a broader problem with the government's brief, none of the cases the government cites involved challenges brought by U.S. citizens to statutes that regulated their First Amendment activity. The cases the government relies on involved challenges brought not by citizens, but by aliens who had been found inadmissible. Those cases do not address the issue presented here. As plaintiffs have explained, the ideological exclusion provision *directly* regulates their First Amendment activity. The provision informs U.S. citizens that their right to hear foreign scholars extends only to those scholars who, in the government's view, have not endorsed or espoused terrorism or persuaded others to do so. As a direct regulation on the First Amendment activity of U.S. citizens, the ideological exclusion provision must be drafted "with narrow specificity," *NAACP*, 371 U.S. at 433. There is no serious argument that words like "endorse," "espouse," and "persuade" pass that test.

CONCLUSION

For the reasons stated above, plaintiffs respectfully urge the Court to enter summary judgment in their favor.

Respectfully submitted,

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June 21, 2007

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2007 I served the following documents: (1) Plaintiffs' Reply in Support of their Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion for Summary Judgment; (2) one supporting affidavit; and (3) Plaintiffs' Statement Pursuant to Local Civil Rule 56.1(b), by causing one copy to be delivered via electronic mail and overnight courier to:

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