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.	**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Case No. 06-588 (PAC)

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants have barred Professor Tariq Ramadan from the United States since July 2004, when they revoked a visa that would have allowed him to teach at the University of Notre Dame. In August 2004, defendants explained the revocation to the press by referencing 8 U.S.C. § 1182(a)(3)(B)(i)(VII) (hereinafter, the "ideological exclusion" provision), a provision that renders inadmissible those who have endorsed or espoused terrorism. Plaintiffs American Academy of Religion (AAR), American Association of University Professors (AAUP), and PEN American Center (PEN) filed this motion because the exclusion of Professor Ramadan infringes their First Amendment rights and because they do not believe that Professor Ramadan has endorsed or espoused terrorism.

Defendants do not defend their exclusion of Professor Ramadan on the merits. Instead, they argue, on diverse grounds, that their actions are simply not subject to judicial review. The July 2004 revocation, they contend, is unreviewable because it was "prudential." A subsequent visa refusal is unreviewable because it was "administrative." A pending visa application is unreviewable because defendants' adjudication of it is "incomplete." This jurisdictional shell game would be unacceptable in any context, but it is particularly so here, where the First Amendment rights of United States citizens are at stake. The Supreme Court has made clear that, in the face of a First Amendment challenge to the exclusion of an invited scholar, the government must provide a facially legitimate and bona fide explanation for its actions. Here, defendants have not provided any explanation at all. For this reason, and for the reasons set forth below, plaintiffs respectfully urge the Court to grant the injunctive relief plaintiffs have requested.

ARGUMENT

I. DEFENDANTS CANNOT IMMUNIZE THEIR ACTIONS FROM JUDICIAL REVIEW BY RETREATING NOW, AFTER THE COMMENCEMENT OF LITIGATION, FROM A POSITION THEY HAVE MAINTAINED FOR ALMOST TWO YEARS.

a. Plaintiffs have standing to seek injunctive relief barring defendants from relying on the ideological exclusion provision to exclude Professor Ramadan.

Defendants argue that plaintiffs do not have standing to seek an injunction with respect to the ideological exclusion provision because defendants have never formally determined Professor Ramadan to be inadmissible under that provision, Govt Br. 16, and because they "do[] not presently anticipate" that he will be excluded on this basis in the future, Govt Br. 1. They also contest plaintiffs' standing on the theory that plaintiffs' injury is not likely to be redressed by the requested relief. Govt Br. 16. None of these arguments has merit.

Plaintiffs satisfy the "injury in fact" requirement because the injury they complain of is "concrete and particularized as well as actual or imminent, not conjectural or hypothetical." *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2004) (internal quotation marks omitted); *id.* at 636 (injury established where there is a "direct risk of harm which rises above mere conjecture"); *Leibovitz v. N.Y.C. Transit Auth.,* 252 F.3d 179, 184 (2d Cir. 2001) (injury established where plaintiff alleges "some actual or threatened harm to him or herself").

The likelihood that defendants will continue to rely on the ideological exclusion provision to exclude Professor Ramadan is real and substantial, not conjectural or hypothetical. Defendants have already excluded Professor Ramadan for almost two years. Over that period, defendants' actions have prevented Professor Ramadan from attending events sponsored by plaintiffs, and, more generally, their actions have deprived plaintiffs and their members of the opportunity to meet with Professor Ramadan, to hear his views, and to engage him in discussion and debate. Ramadan Decl.

¶¶ 27-28, 31; DeConcini Decl. ¶¶ 18-27; Buck Decl. ¶¶ 16-19. Defendants' actions, if not enjoined, will prevent Professor Ramadan from attending events sponsored by plaintiffs in the future. Roberts Decl. ¶ 27; DeConcini Decl. ¶ 28; Buck Decl. ¶ 20. Further, the only remotely specific explanation that defendants have *ever* offered for their decision to revoke Professor Ramadan's visa prudentially in July 2004 is the one they offered to the press on or about August 25, 2004, namely, that Professor Ramadan had "endorse[d] or espouse[d] terrorist activity." Ramadan Decl. ¶ 14, Exh. G (*Muslim Scheduled to Teach at Notre Dame Has Visa Revoked*, Los Angeles Times, Aug. 25, 2004 (quoting DHS spokesperson)). This explanation was reprinted repeatedly in newspapers not only in the United States but also abroad.[1]

Until the commencement of this litigation, defendants never made any attempt to qualify or retract that explanation, even though they had many opportunities to do so. For example, on August 27, 2004, just days after the statement was made, plaintiff AAUP wrote to defendants quoting the explanation that they had offered to the press, expressing concern with that explanation, and asking defendants to reconsider their position. Buck Decl. ¶ 17, Exh. F (Letter from AAUP to Secretaries Powell and Ridge, Aug. 27, 2004). Several days later, on August 31, 2004, the Chicago Tribune published an editorial quoting the explanation that defendants had offered to the press, noting defendants' failure to offer evidence that Professor Ramadan had endorsed or espoused terrorism, and calling on the defendants to reconsider their position. Ramadan Decl. ¶ 15, Exh. M (Editorial, *A Muslim Scholar's Exclusion*, Chicago Tribune, Aug. 31, 2004). In the 20 months that followed, plaintiffs wrote more letters to the same effect. DeConcini Decl. ¶ 21, Exh. E (Letter from AAR

[1] *See, e.g.,* Celia McGee, *Biographer to Lead PEN Center in the U.S.*, N.Y. Times, Mar. 21, 2006; Julia Preston, *Lawsuit Filed in Support of Muslim Scholar Banned From U.S.*, N.Y Times, Jan. 26, 2006; Tim Dowling, *Real Lives: They Shall Not Pass*, The Guardian, Mar. 23, 2005; Carlyle Murphy, *For Muslims, a Beleaguered Feeling*, Wash. Post., Oct. 15, 2004; Around the World, Houston Chronicle, Oct. 10, 2004; Tom Coyne, *US Revokes Work Visa for Muslim Professor*, Assoc. Press, Aug. 26, 2004; Nation in Brief, Wash. Post, Aug. 25, 2004; Terrorism Digest, Seattle Times, Aug. 25, 2004.

and Middle East Studies Association to Secretaries Powell and Ridge, Aug. 30. 2004); Buck Decl. ¶ 19, Exh. G (Letter from AAUP to Secretaries Rice and Chertoff, Mar. 29, 2005). Despite these repeated requests, however, defendants neither qualified nor retracted the statement that their spokesperson had made to the press. Instead, defendants let the statement stand entirely unqualified until plaintiffs commenced this litigation. Only now, confronted with the possibility of having to justify Professor Ramadan's exclusion, do defendants retreat into obscurantism from the position they have maintained for almost two years.

Plaintiffs' fear that defendants will invoke the ideological exclusion provision against Professor Ramadan in the future (and that they are misapplying it to him even now without saying so) is plainly reasonable. Notably, defendants do not wholly retreat from their previous position even now. In fact, defendants make no attempt to explain why they stated to the press in August 2004 that Professor Ramadan had endorsed or espoused terrorism, and they offer no justification for their failure to qualify or retract that statement until the need to oppose the present motion arose. Indeed, even though defendants characterize their prior statement to the press as the "central premise of plaintiffs' motion," Govt Br. 1, the sole declaration they proffer does not mention it even once. Nor do defendants offer any alternative explanation for their actions. Beyond stating without elaboration that they revoked Professor Ramadan's visa "prudentially" – which is merely to restate the issue rather than to explain it – defendants offer no explanation whatsoever.[2]

Moreover, defendants equivocate about whether they will rely on the provision to exclude Professor Ramadan in the future. *See, e.g.,* Govt Br. 1 ("the Government does not *presently*

[2] Defendants themselves acknowledge that they regard Professor Ramadan as potentially inadmissible on security grounds. Dilworth Decl. ¶ 15. The Dilworth Declaration, taken together with defendants' explanation to the press in August 2004, makes clear that the July 2004 revocation was based on a determination that Professor Ramadan was – or might be – inadmissible under the ideological exclusion provision. *Cf.* 9 F.A.M. 41.122 PN 12.3 (stating that Department of State may revoke visa "[w]hen . . . derogatory information relates to a suspected 212(a)(3) security ineligibility").

anticipate that he will be excluded on that basis") (emphasis added); *id.* at 16 ("defendants do not *now* contemplate denying his pending application on that basis") (emphasis added). These statements, plainly meant to defeat this Court's jurisdiction while preserving for defendants the ability to invoke the ideological exclusion provision against Professor Ramadan in the future (or to continue to exclude him on that basis without ever having to say that they are doing so), do not deprive the Court of the authority to issue the requested relief. Indeed defendants' unenforceable assurances would be insufficient to defeat the Court's jurisdiction even if the assurances were unequivocal. It is well-settled that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave [t]he defendant . . . free to return to his old ways." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (internal quotation marks omitted) (alternations in original). As the Second Circuit has written more recently:

> Although a defendant's abandonment of a challenged practice is one factor that a court should consider in determining whether to adjudicate the controversy before it, it is a matter relating to the exercise rather than the existence of judicial power. When a defendant does attempt to obtain dismissal on mootness grounds in such a case, the test is a stringent one. There must be a showing that it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur . . . [or, put another way, that] the likelihood of further violations is sufficiently remote to make . . . judicial relief unnecessary. It is incumbent upon the defendant who has ceased to engage in the challenged practice and who is seeking dismissal to meet the heavy burden of satisfying this test.

Ahrens v. Bowen, 852 F.2d 49, 52 (2d Cir. 1988) (citations and internal quotation marks omitted) (alterations in original); *see also City of New York v. Baker*, 878 F.2d 507, 511-12 (D.C. Cir. 1989).

Defendants' additional contention that "the alleged injury is not likely to be redressed by the requested relief," Govt Br. 16, is no more persuasive. Defendants have never held Professor Ramadan inadmissible under any provision other than the ideological exclusion provision – and, indeed, defendants contend they have never found him inadmissible even under that provision.

Moreover, before July 2004, when defendants revoked Professor Ramadan's H-1B visa, Professor Ramadan was admitted under the visa waiver program on multiple occasions. There is no reason to believe, then, that an injunction preventing defendants from excluding Professor Ramadan under the ideological exclusion provision will lead to his being found inadmissible for some other reason. (Indeed, given the history, a finding of inadmissibility on some other basis would raise serious questions about pretext.) Granting the injunctive relief sought by plaintiffs will likely result in Professor Ramadan's being admitted to the United States – which is, of course, precisely why plaintiffs brought this suit in the first place.

In any event, the injunctive relief plaintiffs request would be warranted even if there *were* a real danger that Professor Ramadan might be found inadmissible under another provision. As the Supreme Court has held, "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). Notably, if the government's argument were correct, a court would *never* be able to redress injury caused by unlawful exclusion, because there would always remain a theoretical possibility that the alien might be found inadmissible on another basis. Yet other courts have issued injunctive relief in circumstances analogous to those presented here. *See, e.g., City of New York*, 878 F.2d at 512; *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525, 532 (D. Mass 1986), *vacated as moot*, 852 F.2d 563 (1st Cir. 1986).[3] *See also Allende v. Shultz*, 1987 WL 9764, *6 (D. Mass. Mar. 31, 1987), *aff'd*, 845 F.2d 1111 (1st Cir. 1988) (granting declaratory relief).

[3] The government correctly notes that the Table simply states that the decision was "vacated." Govt. Br. 14 n.5. An unpublished order, however, makes clear that the decision was vacated as "moot." *Harvard Law School Forum v. Shultz,* No. 86-1271 (1st Cir June 18, 1986).

b. Plaintiffs' claims with respect to the ideological exclusion provision are ripe.

Defendants argue that plaintiffs' claims with respect to the ideological exclusion provision are not ripe. Defendants are mistaken. The ripeness inquiry requires the court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). Here, both elements of the ripeness inquiry plainly favor the issuance of injunctive relief.

Defendants' exclusion of Professor Ramadan is fit for judicial review because "its effects [have been] felt in a concrete way by the challenging parties." *Id*. at 148-49. Professor Ramadan has now been barred from the United States for almost two years, and that exclusion has had concrete, practical effects on plaintiffs' First Amendment rights. It cannot seriously be proposed that this dispute is merely abstract. To the contrary, the dispute involves government action that has already had a significant adverse effect on plaintiffs' rights and that threatens to further infringe plaintiffs' rights in the imminent future. *Cf. United States Gypsum Co. v. Muszynski*, 161 F. Supp. 2d 289, 291 (S.D.N.Y. 2001) ("where an agency's decision is given practical effect, it will be sufficient to trigger judicial review").

A consideration of the hardship to the parties only underlines the appropriateness of injunctive relief. First, as discussed above, defendants' unlawful exclusion of Professor Ramadan has already prevented Professor Ramadan from attending events sponsored by plaintiffs and others. The continuing exclusion, if not enjoined, will prevent Professor Ramadan from attending events scheduled to take place in April, June, and November. As plaintiffs discussed in their opening brief, Pl. Br. 9-11, the courts have repeatedly recognized that the denial of First Amendment rights, even for a short period of time, constitutes "irreparable injury." Second, to accept defendants'

arguments would *indefinitely* deny plaintiffs any means of vindicating their First Amendment rights. Defendants have already excluded Professor Ramadan from the country for almost two years based on decisions they characterize as "prudential" (and therefore unreviewable), "administrative" (and therefore unreviewable), and "incomplete" (and therefore unreviewable). Dilworth Decl. ¶¶ 3-6, 8, 15. And defendants say that Professor Ramadan may be in this administrative limbo for many years to come. Dilworth Decl. ¶ 15 ("The Government cannot predict the additional time required to complete processing of Mr. Ramadan's pending visa application."). Indeed, in this context, defendants' suggestion that the "hardship" inquiry weighs against the issuance of injunctive relief is simply incomprehensible. Defendants' actions have already inflicted injuries of a constitutional dimension and they threaten to do so into the indefinite future. On the other hand, the only hardship that injunctive relief would impose on defendants is the hardship of abiding by the law.[4]

II. DEFENDANTS' "EXPLANATION" OF PROFESSOR RAMADAN'S EXCLUSION DOES NOT SATISFY THE REQUIREMENTS OF *MANDEL*.

Consistent with their effort to shield their actions from judicial review, defendants contend that *Kleindienst v. Mandel,* 408 U.S. 753 (1972), does not require them to furnish the Court with a facially legitimate and bona fide reason – or, indeed, *any* reason – for the actions plaintiffs challenge here. Govt Br. 26 (stating that Mandel "never affirmatively imposed a burden of justification on the Government, as plaintiffs maintain"). This contention is completely insupportable. To plaintiffs' knowledge, *every* lower court that has considered the question in like circumstances has held that *Mandel* requires the government to provide a justification for its

[4] All of the arguments above apply equally to plaintiffs' request for an injunction prohibiting defendants from excluding Professor Ramadan on the basis of his speech. Plaintiffs have standing to seek this relief because defendants have said that they excluded Professor Ramadan because of his speech and because, as plaintiffs have noted, all of the speech that Professor Ramadan has engaged in is speech that United States citizens and residents have a constitutional right to hear. Plaintiffs' claim is ripe because the issues are fit for review and because plaintiffs would suffer significant hardship in the absence of injunctive relief.

actions. *See, e.g., Allende v. Shultz*, 605 F. Supp. 1220, 1224 (D. Mass. 1985) ("[t]he lower federal courts have interpreted *Mandel* to require the Government to provide a justification for an alien's exclusion when that exclusion is challenged by United States citizens asserting constitutional claims"); *Abourezk v. Reagan*, 592 F. Supp. 880, 881 (D.D.C. 1984) (stating that the judiciary must "inquire whether the government has provided a facially legitimate explanation for its refusal to permit an alien to enter"), *vacated on other grounds,* 785 F.2d 1043 (D.C. Cir. 1986) (internal quotation marks omitted); *id.* at 883 (noting that court must "decide whether the Department of State has given a facially legitimate and bona fide reason for denying visas") (internal quotation marks omitted). Nor is the issue open in this Circuit. *See Burrafato v. United States*, 523 F.2d 554, 556 (2d Cir. 1975) ("the courts of this Circuit have interpreted Mandel to require justification for an alien's exclusion"). The relevant portion of defendants' brief, Govt Br. 24-27, simply ignores these cases. None of the cases cited by the government involved First Amendment claims brought by citizens.[5]

Defendants have not carried their constitutional burden here. Rather than offer an explanation for their actions, defendants simply restate the things to be explained – that Professor Ramadan's visa was revoked prudentially in July 2004, that a subsequent visa was "refused" in October 2004, and that defendants have not yet adjudicated the petition that Professor Ramadan submitted in September 2005. What defendants have proffered here does not constitute an explanation at all, let alone one that is facially legitimate and bona fide within the meaning of *Mandel* and its progeny. *Cf. Abourezk,* 592 F. Supp. at 886 (rejecting State Department's

[5] Defendants' reliance on *Reno v. American-Arab Anti-Discrimination Comm.,* 525 U.S. 471 (1999), is misplaced. Plaintiffs in that case were aliens who were present in the United States unlawfully, and the Supreme Court's holding was expressly predicated on that fact. Plaintiffs in this case, by contrast, are United States citizens and lawful residents. Defendants characterize *Reno* has having taken *Mandel* "a step further," Govt Br. 27, but the two cases address completely unrelated issues and, unsurprisingly, the *Reno* decision does not mention *Mandel* even once.

unclassified affidavit as "entirely conclusory"); *Allende,* 605 F. Supp. at 1225-26 (rejecting one of government's purported justifications for exclusion as "entirely conclusory" and finding that the government failed to establish a facially legitimate and bona fide reason for exclusion); *Allende,* 1987 WL 9764, *5-6.[6]

Unable or unwilling to furnish the court with any substantive explanation for the exclusion of Professor Ramadan, defendants fall back once again upon the plenary power doctrine. Govt Br. 26-27. Defendants' reliance on this doctrine, however, is misplaced. First, the Supreme Court has repeatedly recognized that Congress's plenary power over the admission and exclusion of aliens is subject to constitutional limitations. Pl. Br. 19 (citing cases). Second, and more to the point here, the instant motion is a challenge not to legislation enacted by Congress but rather to the executive's *implementation* of that legislation. For that reason, the fact that Congress has plenary power over the admission and exclusion of aliens strengthens rather than weakens plaintiffs' claims. Defendants have been able to exclude Professor Ramadan only by utterly disregarding the limitations specified by Congress – by misapplying the ideological exclusion provision to an invited alien who has never endorsed and espoused terrorism, and by failing to adjudicate a visa application that has been pending for six months. As the D.C. Circuit has written:

> 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, in cases properly before them, to say where those statutory and constitutional boundaries lie.

Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986)*, aff'd by an equally divided court*, *Reagan v. Abourezk,* 484 U.S. 1 (1987); *see also Harvard Law School Forum*, 633 F.Supp. at 529.

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[6] Defendants' opposition to Plaintiffs' Motion For Certification Pursuant to 8 U.S.C. § 1202(F) is consistent with their theory that they do not have to justify their exclusion of Professor Ramadan at all. Their opposition to that Motion is indefensible for all of the same reasons discussed here.

III. DEFENDANTS CANNOT IMMUNIZE THEIR ACTIONS FROM JUDICIAL REVIEW BY TAKING REFUGE IN THE DOCTRINE OF CONSULAR NONREVIEWABILITY.

Defendants argue that the doctrine of consular nonreviewability precludes the Court from affording the relief that plaintiffs seek. Govt. Br. 19-22, 33. Defendants are incorrect.

First, plaintiffs know of no court that has found the consular nonreviewability doctrine to bar First Amendment and accompanying statutory claims by United States citizens. To the contrary, the courts have been uniform in recognizing jurisdiction over claims such as those presented here. *See, e.g., Abourezk v. Reagan,* 785 F.2d at 1051 n.6 (asserting jurisdiction because "[t]his case involves claims by United States citizens rather than by aliens"); *id*. ("[t]he defendants have not produced a single case, and the court is aware of none, in which this kind of claim was found to be outside the province of the federal courts"), *aff'd by an equally divided court*, *Reagan v. Abourezk,* 484 U.S. 1 (1987); *Allende v. Shultz,* 605 F. Supp. at 1223; *Harvard Law School Forum,* 633 F. Supp. at 529; *Adams v. Baker,* 909 F.2d 643 (1st Cir. 1990); *Allende v. Shultz,* 845 F.2d 1111. *Cf. Burrafato,* 523 F.2d at 556 (noting, in the context of an exclusion challenge not involving First Amendment rights, that "courts clearly ha[ve] jurisdiction" to hear challenges "grounded on an alleged violation of First Amendment rights of American citizens"). Indeed, as the D.C. Circuit noted in *Abourezk*, the inapplicability of the consular nonreviewability doctrine was a necessary predicate to the Supreme Court's decision in *Mandel* itself. *See* 785 F.2d at 1050.

Second, the doctrine of consular nonreviewability insulates decisions made by consular officials abroad, not those made by government officials in Washington. *See, e,g., Abourezk,* 785 F.2d at 1051 n.6 (recognizing jurisdiction because cased involved "claims concerning the decisions of State Department officials rather than consular officials abroad"); *Mulligan v. Schultz,* 848 F.2d 655, 657 (5th Cir. 1988) (rejecting applicability of the doctrine of consular nonreviewability where

plaintiffs were "not challenging the discretion of consuls" but rather "the authority of the Secretary of State . . . ."). Every significant decision relating to Professor Ramadan's exclusion has been made by a government official in Washington.[7] The doctrine of consular nonreviewability therefore simply has no application here.

IV. DEFENDANTS CANNOT IMMUNIZE THEIR ACTIONS FROM JUDICIAL REVIEW BY INDEFINITELY DELAYING ADJUDICATION OF PROFESSOR RAMADAN'S PENDING VISA APPLICATION.

Professor Ramadan's September 2005 visa application has now been under consideration by defendants for more than six months. That delay is extraordinary and is plainly unreasonable.

The APA provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706 (1); *see also* 5 U.S.C. § 555(b) (requiring agencies to conclude matters presented to them "within a reasonable time"); *Mastrapasqua v. Shaughnessy,* 180 F.2d 999, 1002 (2d Cir. 1950) ("in appropriate circumstances, [courts] can . . . compel an official to exercise his discretion where he has obviously failed or refused to do so"). Under the APA and the mandamus power, courts have afforded relief to those aggrieved by unreasonable delay in the adjudication of visa applications. *See, e.g., Kim v. Ashcroft,* 340 F. Supp. 2d 384, 393 (S.D.N.Y. 2004) (noting that "although there is no statutory or regulatory deadline by which the [agency] *must* adjudicate [an immigration] application, at some point defendants' failure to take any action runs

[7] *See, e.g.,* Dilworth Decl. ¶¶ 2-8; State Department Daily Press Briefing, Aug. 25, 2004, available at http://www.state.gov/r/pa/prs/dpb/2004/35740.htm (including repeated assertion by State Department spokesperson that Professor Ramadan's visa was "revoked pursuant to an action by the Department of Homeland Security to invalidate the petition"); Ramadan Decl. 14, Exh. G (*Muslim Scheduled to Teach at Notre Dame Has Visa Revoked*, Los Angeles Times, Aug. 25, 2004) (stating that Professor Ramadan's visa was revoked "at the request of the Department of Homeland Security"); Ramadan Decl. ¶ 30 (stating that DHS official traveled to Switzerland from Washington to interview Professor Ramadan in December 2005); Dilworth Decl. ¶ 8 (noting that consular officer sought security directive from officials in Washington after the University of Notre Dame submitted a second visa petition in October 2004); Dilworth Decl. ¶ 2, Exh. A (indicating that prudential revocations based on receipt of "derogatory information" are effected by officials in Washington).

afoul of [the APA]"); *id.* (stating that agency "does not possess unfettered discretion to relegate aliens to a state of limbo, leaving them to languish there indefinitely") (internal quotation marks omitted); *Agbemaple v. INS,* 1998 WL 292441, *2 (N.D. Ill. May, 18, 1998); *Yu v. Brown,* 36 F. Supp. 2d 922, 929-30, 935 (D. N.M. 1999). Where delay is unreasonable, injunctive relief is warranted. *See, e.g., Patel v. Reno*, 134 F.3d 929, 931-33 (9th Cir. 1998) (finding that delay was unreasonable and remanding with instruction to district court "to order the consulate to either grant or deny the visa applications" within 30 days); *Raduga USA Corp. v. Dep't of State,* 2005 U.S. Dist. LEXIS 22941, *22 (S.D. Cal. May 20, 2005) (finding that delay was unreasonable and ordering consul to adjudicate petition, despite government assurance that adjudication was imminent); *Nadler v. INS,* 737 F. Supp. 658, 659-60 (D.D.C. 1989) (noting earlier finding of unreasonable delay and order requiring government to adjudicate petition). Notably, in each of these cases the court granted relief even though no time frame for agency action had been specified by Congress or the agency itself.[8]

Here, the State Department's own website indicates that most nonimmigrant visas are processed within 2 days and that even complicated cases requiring "special clearance or administrative processing" are ordinarily processed within 30 days. Ramadan Decl. ¶ 29. Defendants do not explain why consideration of Professor Ramadan's visa application has taken six times longer than the time ordinarily required for applications that require special clearance. They certainly do not explain why consideration might take an additional two years, as they indicated to Professor Ramadan at his December 2005 interview, Ramadan Decl. ¶ 30, and perhaps even longer, Dilworth Decl. ¶ 15 ("The Government cannot predict the additional time required to complete

[8] The doctrine of consular nonreviewability does not apply to claims that a consular official has failed to act on a pending visa application. *See, e.g., Patel*, 134 F.3d at 931-32; *Raduga USA Corp.,* 2005 U.S. Dist. LEXIS 22941, *12.

processing of Mr. Ramadan's pending visa application"). The extraordinary delay is particularly remarkable in light of the fact that defendants received the allegedly derogatory information about Professor Ramadan – information that defendants have refused even to summarize, let alone disclose – in the summer of 2004. Dilworth Decl. ¶ 3. Professor Ramadan's views and writings are widely publicized, and determining whether they meet the standards for exclusion set by Congress should have required only days, not months or years.

Defendants' extraordinary delay in adjudicating the pending visa application would be unreasonable in any context, but it is particularly so here.[9] First, in this case defendants' delay has a direct affect on the constitutional rights of United States citizens and residents. Indefinite delay is plainly unacceptable where First Amendment rights are at stake. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indeed, in the licensing context, which has obvious parallels here, the Supreme Court has imposed strict procedural requirements to minimize the risk that government inaction will infringe First Amendment rights. *See Freedman v. State of Md.,* 380 U.S. 51, 58 (1965) ("within a specified brief period, [government must] either issue a license or go to court to restrain [First Amendment activity]," and "the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license"); *id.* at 57-58 (noting that "[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression."); *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 227 (1990) ("Where the licensor has unlimited time

[9] In determining whether agency action is unreasonably delayed, courts consider, among other things, "the nature and extent of the interests prejudiced by delay." *Telecommunications Research and Action Center v. F.C.C.,* 750 F.2d 70, 80 (D.C. Cir. 1984). While plaintiffs question the reasons for delay in this case, "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" *Id*.

within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion.").

Thus, even if the government's claim that it has not yet decided whether or not to exclude Professor Ramadan were to be taken at face value, the delay in decisionmaking cannot be sustained under First Amendment principles. Moreover, the delay in processing Professor Ramadan's visa, seen in the context of defendants' other conduct with respect to Professor Ramadan, appears to be a deliberate effort to evade statutory limitations and subvert the jurisdiction of the Court. *Cf. In re American Fed. of Gov't Employees, AFL-CIO,* 790 F.2d 116, 117 (D.C. Cir. 1986) (noting that "an agency's failure to implement or enforce a statutory scheme [with reasonable dispatch] can subvert the will of Congress as readily as can improper implementation") (alterations in original); *Envtl. Def. Fund v. Hardin,* 428 F.2d 1093, 1099 (D.C. Cir. 1970) ("an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief"). Defendants should not be permitted to use delay as a means of evading statutory and constitutional limitations on their authority.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that the Court enter a preliminary injunction (i) enjoining defendants from denying a visa to Professor Ramadan on the basis of the ideological exclusion provision; (ii) enjoining defendants from denying a visa to Professor Ramadan on the basis of speech that United States residents have a constitutional right to hear; (iii) requiring defendants immediately to act on Professor Ramadan's pending visa application; and (iv) requiring defendants immediately to restore Professor Ramadan's eligibility to rely on the visa waiver program described in 8 U.S.C. § 1187 (a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2005 I served Reply in Support of Plaintiffs' Motion for Preliminary Injunction by causing copies to be delivered via electronic mail and overnight courier to:

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