08-0826-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

REPLY BRIEF FOR THE PLAINTIFFS-APPELLANTS

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INTRODUCTION

All of the government's arguments in this litigation have at their core a single proposition: that the government's authority over the admissibility of aliens is not subject to constitutional limitation or judicial review. The federal courts, including this one, have rejected this proposition repeatedly.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE GOVERNMENT'S EXCLUSION OF PROFESSOR RAMADAN IS SUBJECT TO JUDICIAL REVIEW.

As plaintiffs have noted, the federal courts have been uniform in concluding that they have jurisdiction to hear U.S. citizens' First Amendment challenges to the exclusion of foreign scholars. Brief for the Plaintiffs-Appellants (hereinafter "Pl. Br.") 16-17 (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972), as well as cases from the First, Second, and D.C. Circuits).[1] More generally, the courts have repeatedly recognized that the judiciary has not only the authority but the responsibility to ensure that the power of the political branches over immigration is exercised consistently with the Constitution. Pl. Br. 16-17; *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977) ("Our cases reflect acceptance of a limited judicial

[1] Since plaintiffs filed their principal appeal brief, another Court of Appeals has reached the same conclusion. *Bustamante v. Mukasey*, -- F.3d --, 2008 WL 2669735 (9th Cir. July 9, 2008).

responsibility under the Constitution even with respect to the power . . . to regulate the admission and exclusion of aliens."); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893). There is simply no support for the contention that government action of the kind challenged here is "immune from judicial intervention." Brief for Defendants-Appellees (hereinafter "Gov't Br.") 2.[2]

The government rightly notes that courts *generally* refrain from reviewing the decisions of consular officers, but, as the district court noted, there is no merit to the argument that the doctrine of consular nonreviewability bars the kind of First Amendment claim presented here. SPA-57 (noting that government's argument "directly contradicts *Mandel*"). Indeed, every court to have considered this argument since *Mandel* has rejected it. *See, e.g.*, *Adams v. Baker*, 909 F.2d 643, 647 n.3 (1st Cir. 1990); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988); *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986) (stating that "defendants have not

[2] The government seeks to distinguish recent cases in which the Supreme Court has reaffirmed that the power of the political branches over immigration is limited by the Constitution. Gov't Br. 26 n* (discussing *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), and *Zadvydas v. Davis*, 533 U.S. 678 (2001)). These cases are inapposite here, the government contends, because "they involved aliens already in the United States." *Id*. This statement suggests a fundamental misunderstanding about the nature of the instant suit. This case is not a challenge brought by an alien asserting a right to admission. It is a challenge brought by U.S. citizens who assert their own First Amendment rights.

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*, 484 U.S. 1 (1987); SPA-57-58 (citing other cases). This Court addressed the issue in *Burrafato v. Department of State*, 523 F.2d 554 (2d Cir. 1975), a case involving a U.S. citizen's challenge to the exclusion of her spouse. In dismissing the challenge on jurisdictional grounds, the Court expressly distinguished the kind of claim at issue here. *Id*. at 556 ("[T]he courts of this Circuit have interpreted *Mandel* to require justification for an alien's exclusion . . . . [I]n each of these cases . . . the claim was grounded on an alleged violation of First Amendment rights of American citizens *over which the federal courts clearly had jurisdiction.*" (emphasis added)).

Seeking to distinguish *Mandel*, the government observes that *Mandel* involved the denial of a waiver of inadmissibility whereas this case involves the denial of a visa. Gov't Br. 15-18. But it is the government's exclusion of an invited foreign speaker (and the resulting effect on First Amendment rights) that triggers the judicial review required by *Mandel* – 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, the denial of a visa based on a finding of inadmissibility. SPA-21; SPA-50;

SPA-57. The only reason the Supreme Court did not address the visa denial in *Mandel* is that the plaintiffs in that case did not *challenge* the visa denial. *Mandel*, 408 U.S. at 767.

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. *See Adams*, 909 F.2d at 647; *Allende*, 845 F.2d at 1114; *Abourezk*, 785 F.2d at 1048-49; *Bustamante*, 2008 WL 2669735 at *2. The government's argument that these courts "failed to consider consular nonreviewability" or reached their conclusions "without independent analysis," Gov't Br. 16, is simply wrong. In *Bustamante*, for example, the court carefully considered the government's argument that *Mandel* was limited to waiver denials and expressly rejected it. *Bustamante*, 2008 WL 2669735, at *2 n.1 ("We are unable to distinguish *Mandel* on the grounds that the exclusionary decision challenged in that case was not a consular visa denial, but rather the Attorney General's refusal to waive Mandel's inadmissibility. The holding is plainly stated in terms of the power delegated by Congress to 'the Executive.' The Supreme Court said nothing to suggest that the reasoning or outcome would vary according to which executive officer is exercising the Congressionally-delegated power to exclude."). *See also Abourezk*, 785 F.2d at 1051 n.6 (expressly rejecting

application of consular nonreviewability doctrine); *Adams*, 909 F.2d at 647 n.3 (same).[3]

In any event, it would be illogical to limit *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 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. 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 Immigration and Nationality Act ("INA") committed inadmissibility determinations to standardless agency discretion, noting that "the statute lists thirty-three

[3] The government argues that the D.C. Circuit's willingness to exercise jurisdiction in *Abourezk* turned on the existence of a statute that has since been repealed. Gov't Br. 17. However, the *Abourezk* court stated that it had jurisdiction under the federal question statute because the case involved constitutional claims. 785 F.2d at 1051 n.6. In support of its interpretation of *Abourezk*, the government cites the D.C. Circuit's later decision in *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999), but that case expressly distinguished *Abourezk* on the grounds that it involved constitutional claims brought by U.S. citizens.

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").

The district court was correct to find that the doctrine of consular nonreviewability does not bar review of U.S. citizens' First Amendment challenges to the exclusion of foreign scholars. But even if the doctrine of consular nonreviewability *could* bar review of a First Amendment claims of the kind presented here, the doctrine would have no application in this case. As the district court noted, "it is uncontested that the decision at issue here was not made solely by consular officials." SPA-22. In fact, every significant decision relating to Professor Ramadan's exclusion has been made at least in part by a government official in Washington. *See* SPA-58-59; SPA-22; A-808; A-809; A-446; A-45. The doctrine of consular nonreviewability plainly does not immunize from judicial review the decisions of non-consular officials in Washington. *See, e.g.*, *Abourezk*, 785 F.2d at 1051 n.6; *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988).[4]

[4] The government's reliance on *Afshar v. Everitt*, 2005 WL 2898019 (W.D. Mo. 2005), is misplaced. Although the consular officer in that case referred to guidelines issued by the Department of Homeland Security, all decisions with respect to the nonissuance of plaintiff's visa were made by the consular officer alone. *Id.* at *2. The government's citation to the Ninth Circuit's one-page, non-precedential opinion in *Raduga U.S.A. Corp. v. Dep't of State*, 2008 WL 2605564, *1 (9th Cir. 2008) (unpublished

The government argues, finally, that extending jurisdiction to claims of the kind brought here would "potentially allow judicial review of every visa denial." Gov't Br. 20. The problem with this argument is that the Supreme Court made clear 37 years ago that the federal courts have jurisdiction to hear the kind of First Amendment claim presented here, yet the "judicially unmanageable" flood of First Amendment cases, Gov't Br. 16, simply has not materialized. As history shows, the real danger is not the danger that judicial review will lead to a flood of new lawsuits, but that the absence of review will lead to a flood of content-based exclusions. Brief of Amici Curiae American Association for the Advancement of Slavic Studies *et al.* (filed May 5, 2008), pp.15-25; *Abourezk v. Reagan*, 592 F. Supp. 880, 888 (D.D.C. 1984) ("judicial scrutiny of the specific reasons for denials of entry" is necessary to prevent "a mushrooming of . . . content-based denials").

II. THE DISTRICT COURT ERRED IN FINDING THAT THE GOVERNMENT HAS SUPPLIED A FACIALLY LEGITIMATE AND BONA FIDE REASON FOR ITS REFUSAL TO GRANT PROFESSOR RAMADAN A VISA.

a. As the district court held, *Mandel* requires the government not simply to point to an inadmissibility provision but to show that

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disposition), is insufficient to warrant the radical expansion of the consular nonreviewability doctrine the government seeks here. In any event, that decision expressly distinguishes cases involving "constitutional claim[s] raised by a U.S. citizen." *Id*.

the provision actually applies.

The government argues that if the First Amendment imposes any burden on it at all in the present context, the government carries this burden merely by identifying the statutory provision on which the visa denial is based. Gov't Br. 22. This, too, is an argument that the courts have rejected.

In circumstances such as those presented here, the courts have required the government not only to reference statutory authority for its actions but to show that the referenced statute actually applies to the person who has been excluded. Pl. Br. 17-19. The district court properly noted that "this limited level of judicial review is necessary to ensure compliance with the First Amendment." SPA-57.[5]

[5] The government relies on *NGO Committee on Disarmament v. Haig*, No. 82 Civ. 3636 (PNL), 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 courts have "no power to inquire into the wisdom or basis of the Government's reasons." Gov't Br. 24. However, just eight days after this Court affirmed the district court's decision in *NGO Committee* by non-precedential summary order, this Court issued an opinion making clear that the "facially legitimate and bona fide" standard requires at least some degree of factual review. *Bertrand v. Sava*, 684 F.2d 204, 213 (2d Cir. 1982). The government's reliance on *El-Werfalli v. Smith*, 547 F. Supp. 152 (S.D.N.Y. 1982), is also misplaced. In *El-Werfalli*, the court rejected the government's public declarations precisely because they did not provide a reasoned basis for the government's action. *Id*. at 154 (rejecting public declarations because they failed to establish a "logical connection" between the facts and the statute relied upon).

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. 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; *see id*. at 517 (requiring that the government's action "at least [be] reasonably supported by the record"); *Bertrand*, 684 F.2d at 213-14; *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083 (9th Cir. 2006); *Amanullah v. Nelson*, 811 F.2d 1, 11, 17 (1st Cir. 1987). In cases that involve the First Amendment rights of U.S. citizens, the courts' review should be, if anything, even more searching.

The government's halfhearted argument that judicial review is precluded by the visa confidentiality statute, Gov't Br. 23 n.*, is also misguided. Plaintiffs raise a constitutional claim that cannot be trumped by

statute. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000). Notably, the visa confidentiality statute has existed since at least 1952, *see* Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952), yet neither the Supreme Court nor any lower court has found the statute to bar a First Amendment claim of the kind brought here. In any event, the visa confidentiality statute expressly allows for disclosure of visa-related information in judicial proceedings. 8 U.S.C. § 1202(f); A-371-74.

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.

As plaintiffs have explained, the material support provision's two references to knowledge impose two different burdens. Pl. Br. 32-38. The provision's first reference to knowledge requires the government to assess whether the alien committed an act the alien "knows, or reasonably should know, affords material support . . . to a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). If the government concludes that the alien possessed such knowledge, the burden shifts to the alien to come forward with "clear and convincing evidence that [he] did not know, and should not reasonably have known, that the organization was a terrorist organization." *Id.* § 1182(a)(3)(B)(iv)(VI)(dd). In the court below, the government did not

submit any evidence that Professor Ramadan knew or should have known that ASP was a terrorist organization.

The government contends that plaintiffs' construction of the statute "conflates" the two knowledge requirements and "effectively nullif[ies] the latter [knowledge] provision." Gov't Br. 30, 31. However, statutory schemes that impose an initial evidentiary burden on one party and a secondary, contingent evidentiary burden on another party are hardly uncommon. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussing burden-shifting under Title VII of the Civil Rights Act of 1964); *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008) (discussing burden-shifting under the Fair Housing Act). Indeed, the government itself recently proposed a similar burden-shifting scheme in the context of a challenge brought by an "enemy combatant" to his detention. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 527-28 (2004). In the instant context, it is entirely conceivable – in fact, it is precisely what Congress anticipated – that the government could in some cases come forth with some evidence that an alien knew or should have known that he was providing material support to a terrorist organization, and that the same alien would then respond with clear and convincing evidence that he did not possess the requisite knowledge. As

plaintiffs have noted, Pl. Br. 34-36, this is the only reading of the statute that gives effect to each of the statute's words.

The government argues that plaintiffs' reading of the material support statute would "conflict[] with *Mandel*'s admonition that courts may not look behind the Government's facially legitimate and bona fide explanation." Gov't Br. 31. There is no merit to this argument. As discussed above, the courts that have applied *Mandel*'s "facially legitimate and bona fide" review have routinely required the government to supply an evidentiary basis for its exclusion of invited foreign scholars. They have imposed this burden even where the relevant inadmissibility provision did not contain the kind of burden-shifting scheme found in the material support provision. Here, the relevant inadmissibility provision makes clear that the government must assess whether the visa applicant possesses the requisite knowledge. In this context judicial review is especially appropriate. *See Etuk v. Slattery*, 936 F.2d 1433, 1443 (2d Cir. 1991) ("While in general the Executive Branch is permitted to exercise broad discretion on immigration matters, Congress can impose limitations on the exercise of that discretion.").

In their principal brief, plaintiffs noted that the Foreign Affairs Manual ("FAM") makes *explicit* that a consular officer cannot exclude an alien for providing support to an undesignated organization in the absence of

evidence that the alien knew or should have known that the organization was engaged in terrorist activities. Pl. Br. 34-35 (citing 9 F.A.M. § 40.32 n.2.3). The government now contends that the provision of the FAM cited by plaintiffs applies not to the material support provision but to the ideological exclusion provision. This is incorrect. The first sentence of note 2.3 makes clear that the note applies not only to the ideological exclusion provision but to all of the inadmissibility provisions under the heading "engage in terrorist activities," 9 F.A.M. § 40.32 n.2.3, one of which is the material support provision, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). The government's current construction of the statute – a construction that was adopted by the district court below – is completely inconsistent with the FAM.

Even if the district court's construction of the material support statute is correct, the court erred in finding that plaintiffs had not submitted clear and convincing evidence that Professor Ramadan *lacked* the requisite knowledge. The evidence shows unequivocally that Professor Ramadan believed that ASP was a legitimate charity unconnected to Hamas, and the evidence further shows that his belief was objectively reasonable. Pl. Br. 38-45. Indeed, plaintiffs submitted copious evidence on these points.[6]

[6] Again, no government had designated ASP a terrorist organization at the time Professor Ramadan made his donations. A-501. As the government concedes, Gov't Br. 7, the U.S. Treasury Department did not

Rather than introduce countervailing evidence, the government relied solely on its misguided interpretation of *Mandel* and its sweeping construction of the doctrine of consular nonreviewability to argue that it should not be required to justify its actions at all. Gov't Br. 32. In these circumstances, the court erred both in denying plaintiffs' motion for summary judgment and in granting summary judgment to the government.

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, the REAL ID material support provisions do not apply to Professor Ramadan as a factual matter. Nor do they apply to him as a legal matter.

i. The REAL ID "effective date" provision addresses those in removal proceedings but is silent with respect to those seeking admission to the United States.

The government argues that the district court was correct to find that REAL ID's effective date provision – section 103(d) – applies not just to those in removal proceedings but also to those seeking admission. Gov't Br. 38. As plaintiffs have explained, however, this reading of section 103(d) renders half of the provision entirely redundant. Pl. Br. 26. The

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blacklist ASP until 2003, a year after Professor Ramadan's last donation. The State Department has not blacklisted ASP even today.

government's acknowledgement that "there may be some overlap between subsections (1) and (2)" misses the point. Gov't Br. 38. If section 103(d)(2) is given the meaning that the district court ascribed to it, there is *no need for section 103(d)(1) at all*. The only way to give effect to both parts of section 103(d) is to read section 103(d)(1) as limiting the application of section 103(d)(2) to those in removal proceedings. Professor Ramadan, of course, is not in removal proceedings.

In addition to rendering section 103(d)(1) superfluous, the district court's construction of section 103(d) ignores a critical difference between REAL ID's "effective date" provision and the Patriot Act's "retroactive application of amendments" provision. In the Patriot Act provision, Congress specified that amendments made by the Patriot Act to the material support provisions would apply to (A) actions taken by an alien before, on, or after such date; and (B) all aliens, without regard to the date of entry or attempted entry into the United States – (i) in removal proceedings on or after such date . . .; or (ii) *seeking admission to the United States on or after such date*." Patriot Act, § 411(c)(1) (emphasis added). The REAL ID Act includes a provision that corresponds to section 411(c)(1)(B)(i) of the Patriot Act but it does not include any provision that corresponds to section 411(c)(1)(B)(ii). That is, the REAL ID Act's effective date provision speaks

only to aliens in removal proceedings; it is silent as to aliens "seeking admission."

Because section 103(d) is silent as to aliens seeking admission to the United States, the provision does not speak to Professor Ramadan's situation at all. In this context, the presumption against retroactive application plainly applies. Gov't Br. 40 (conceding that congressional silence means that "the statute would apply only to conduct occurring after the effective date").

ii. Even if the REAL ID "effective date" provision conveys retroactive intent as to those seeking admission to the United States, it does not convey retroactive intent as to conduct that was not a ground for inadmissibility at the time it occurred.

The Supreme 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." *I.N.S. v. St. Cyr*, 533 U.S. 289, 317 (2001); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 39 (2006); *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1977). As plaintiffs have explained, Pl. Br. 21-27, the district court erred in finding that section 103(d) – REAL ID's effective date provision – supplies an unambiguous directive that the REAL ID amendments should be given retroactive effect.

The government argues that the district court was correct to find that the statute includes such an unambiguous directive because "provisions applying a statute to events 'before, on, or after' an effective date clearly indicate that the statute has retroactive effect.'' Gov't Br. 34. But the government, like the district court, ignores the context in which the phrase "before, on, or after" is used. 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." Any defensible construction of the provision must give effect not just to the phrase "before, on, or after," but to all of the statute's words.

If REAL ID's effective date provision signals retroactive intent, it signals retroactive intent only with respect to conduct that was grounds for inadmissibility at the time it occurred. The government concedes that

Professor Ramadan's conduct was not grounds for inadmissibility at the time it occurred. Gov't Br. 33 n*.[7]

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

Because the REAL ID Act's effective date provision is ambiguous at best, it is necessary to ask whether retroactive application would attach "new legal consequences to events completed before . . . enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994). 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 v. Hadix*, 527 U.S. 343, 358 (1998) (internal quotation marks omitted). 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.

[7] The government cites only one case in which a court found REAL ID's effective date provision to signal retroactive intent. Gov't Br. 35 (citing *Alafyouny v. Gonzales*, 187 Fed. Appx. 389, 391 (5th Cir. 2006)). *Alafyouny* decided the issue without analysis, and in any event the case involved an foreign national in removal proceedings, not a foreign national seeking admission.

The government argues that applying the REAL ID amendments retroactively to Professor Ramadan would not have a retroactive effect because "[a]s a non-resident alien outside this country, Ramadan has never had any right to enter the United States." Gov't Br. 42. But 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, and this is sufficient in itself to establish retroactive effect. Pl. Br. 28-29; *Zuluaga-Martinez v. I.N.S.*, 523 F.3d 365, 376-77 (2d Cir. 2008); *Rojas-Reyes v. I.N.S.*, 235 F.3d 115, 121 n.1 (2d Cir. 2000). The fact that Professor Ramadan is a non-resident alien outside the country is immaterial. In both *Hamdan*, 548 U.S. at 571-84, and *Chew Heong v. United States*, 112 U.S. 536, 558 (1884), the Supreme Court found that statutes would have an impermissible retroactive effect on non-resident aliens outside the United States.

In any event, the government's suggestion that retroactive application of the REAL ID amendments would affect only "non-resident alien[s] outside the country" is incorrect. Retroactive application of the REAL ID amendments would have a retroactive effect not only on Professor Ramadan but on the organizational plaintiffs as well, and these plaintiffs have First Amendment rights that are implicated by Professor Ramadan's exclusion. It

would also have a retroactive effect on *resident* aliens because, as plaintiffs have discussed, Pl. Br. 29-32, REAL ID's inadmissibility and removal amendments have virtually identical "effective date" provisions. Any reading of the "effective date" provision that permits retroactive application affects not only aliens outside the country but foreign nationals inside the country – including long-time permanent legal residents. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005). The government argues that plaintiffs do not have standing to raise constitutional concerns about the statute's possible application to others not before the court, Gov't Br. 44, but the Supreme Court rejected exactly this argument in *Clark*, 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").

The government's argument that Professor Ramadan cannot be said to have "relied" on prior law, Gov't Br. 43, is also misguided. Reliance is not a prerequisite for a finding of retroactive effect. *Hughes Aircraft Co. v. United States ex rel Schumer*, 520 U.S. 939, 947-51 (1997); *Landgraf*, 511 U.S. at 281-94; *Zuluaga-Martinez*, 523 F.3d at 376 n.4 ("[W]e have never stated that petitioners must show reliance in every case."). All of this Court's cases that have required a showing of reliance have 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.*, *Zuluaga-Martinez*, 523 F.3d at 376-77; *Wilson v. Gonzales*, 471 F.3d 111 (2d Cir. 2006); *Boatswain v. Gonzales*, 414 F.3d 413 (2d Cir. 2005); *Arenas-Yepes v. Gonzales*, 421 F.3d 111 (2d Cir. 2005).[8] Here, however, 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. *Cf. Hughes Aircraft*, 520 U.S. at 950; *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304, 313 (1994); *Landgraf*, 511 U.S. at 282; *Zuluaga-Martinez*, 523 F.3d at 376 (noting that in the case before it "the retroactive application of the stop-time rule did not alter the legal consequences of the [petitioner's] actions"). The government does not cite any case that found, in similar circumstances, that retroactive application of a statute would not have retroactive effect.

III. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFFS LACK STANDING TO CHALLENGE THE FACIAL VALIDITY OF THE IDEOLOGICAL EXCLUSION PROVISION.

[8] Other Circuits have rejected the reliance requirement even in this narrow context. *See, e.g.*, *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004).

The government states that plaintiffs have not established standing because they have "identified no alien with whom they wished to meet, but who was excluded under the endorse/espouse provision." Gov't Br. 46. The government forgets the history of this case. Plaintiffs filed this case because a government spokesperson announced at a press conference that the government had revoked Professor Ramadan's visa on the basis of the ideological exclusion provision. A-445. After the press conference, plaintiffs repeatedly asked the government to reconsider or at least explain its position, but the government declined to do so. SPA-43-45; A-195-96; A-236. Only *after* plaintiffs initiated this litigation did the government abandon its reliance on the ideological exclusion provision and cite a new ground – an equally flawed one – for excluding Profession Ramadan from the country. SPA-5-6. Given this background, there is no basis for the government's contention that plaintiffs have no "personal stake" in the outcome of the case. Plaintiffs have suffered concrete injury because of the ideological exclusion provision, Pl. Br. 46-47, and their past experience with the provision makes them fear the way that the provision will be used in the future, Pl. Br. 49-51.

Notwithstanding the government's arguments, plaintiffs are not asserting a "generalized grievance." Gov't Br. 46. Plaintiffs are

distinguished from the public at large because of their past experience with the ideological exclusion provision. They are also distinguished from the public at large because of their organizational mandates and their current and planned activities. As the record shows, 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 United States have written controversially about these issues; and many of the scholars whom they invite to speak in the United States come from the Muslim world. Pl. Br. 50-51. All of these factors distinguish plaintiffs from the public at large. *See also Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1456 (2007); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998) ("where a harm is concrete, though widely shared, the Court has found 'injury in fact'").

The government's argument, like the district court's reasoning, suffers from a deeper flaw, because the standing inquiry ultimately does not turn on whether plaintiffs can identify a specific alien who is currently being excluded under the provision. To satisfy the "injury" requirement, plaintiffs need only establish (as they have) that they are suffering concrete harm because of the provision. 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. Pl. Br. 49 (citing cases). Here, of course, the provision *has* been used. Not only did the government cite the provision to explain the revocation of Professor Ramadan's visa in 2004, but the government has invoked the provision to exclude other foreign nationals as well. A-813-14; A-817-18.

The government states that the "[m]ere assertion of a chill does not establish standing," Gov't Br. 49, but plaintiffs have done far more than merely "assert" a chill; they have submitted uncontroverted evidence that the ideological exclusion provision has discouraged or prevented them from engaging in activities protected by the First Amendment, Pl. Br. 48. This evidence is clearly sufficient to support standing. *See, e.g.*, *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 823-24 (2d Cir. 1967); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 521-22 (9th Cir. 1989); *Nat'l Student Ass'n v. Hershey*, 412 F.2d 1103, 1119-22 (D.C. Cir. 1969). Indeed, the injuries plaintiffs have asserted here are *precisely* the injuries that then-Judge Ginsberg identified as sufficient in *Abourezk*. Pl.

Br. 48. The government criticizes *Abourezk* but makes no effort to distinguish it. Gov't Br. 50.[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's power to exclude non-citizens is not subject to constitutional limit at all – even where, as here, that power directly implicates the constitutional rights of U.S. citizens and residents. Gov't Br. 52. This argument, one that is truly radical in its implications, is not supported by the case law.

Congress's 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's authority over

[9] The government argues that plaintiffs' injuries stem not from the ideological exclusion provision but from the inadmissibility provisions of the INA more generally. Gov't Br. 48. The ideological exclusion provision is unique among the inadmissibility provisions, however, in that it is specifically focused on the content of speech. 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); *Massachusetts*, 127 S. Ct. at 1458.

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*, 149 U.S. at 712, and it has been reaffirmed and given meaning in more recent years, *Zadvydas*, 533 U.S. at 695 (Congress's plenary power is "subject to important constitutional limitations"); *I.N.S. v. Chadha*, 462 U.S. 919, 941-42 (1983). It is true that some of the Supreme Court's Cold War cases included passages that cast Congress's 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's authority in this area is subject to constitutional limit and that these limits are susceptible to judicial enforcement, *see, e.g.*, *Nguyen*, 533 U.S. at 61.

The central problem with the government's argument is that it fails to recognize that the ideological exclusion provision, while nominally directed at aliens abroad, directly regulates the First Amendment rights of U.S. citizens. As the Supreme Court has recognized, "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 563-64 (1969); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). The government suggests that the First Amendment is not implicated by the exclusion of ideas from abroad, Gov't Br. 54 (stating that right to hear applies only "within the United States"), but this argument was

rejected in *Mandel*, 408 U.S. at 764-65, and has been rejected in other cases as well, *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

The government's argument that "courts have consistently upheld statutes rendering aliens inadmissible on bases that would violate the First Amendment if applied to United States citizens," Gov't Br. 53, 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 the same standards that it would have applied (at the time) to restrictions on the First Amendment rights of U.S. citizens. *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952) (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); *Rowoldt v. Perfetto*, 355 U.S. 115, 121 (1957) (reversing order of deportation based on membership in the Communist Party because the government failed to provide evidence of meaningful association and intent – requirements apparently drawn from the domestic First Amendment law at the time). 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 is that it is within Congress's authority to deny Americans the right to invite foreign scholars who have opposed (or supported) the war in Iraq, criticized (or endorsed) the "war on terror," or proposed that the United States give more (or less) in foreign aid. 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. Every court to have considered this contention has rejected it. *See, e.g.*, *Abourezk*, 592 F. Supp. at 887 ("[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."); *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"); *Harvard Law Sch. Forum v. Shultz*, 633 F. Supp. 525, 531 (D. Mass. 1986), *vacated as moot*, 852 F.2d 563 (1st Cir. 1986); *Allende v. Shultz*, 605 F. Supp. 1220, 1225 (D. Mass. 1985).[10]

[10] The government concedes that the district court in *Abourezk v. Reagan* held that the Government may not deny entry solely on the basis of speech, Gov't Br. 55-56, but it states that the district court's decision was

The government is wrong to propose that the First Amendment limits (at most) the executive's implementation of the immigration laws, and not the laws themselves. Gov't Br. 52. 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. *Miller v. Albright*, 523 U.S. 420, 433-45 (1998); *Chadha*, 462 U.S. at 955-59; *Fiallo*, 430 U.S. at 792-93, 793 n.5 (1977); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133-36 (2d Cir. 1990); *Lesbian/Gay Freedom Day Comm., Inc. 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 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 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

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vacated on appeal. This is correct, but the district court reaffirmed its First Amendment holding after remand. *Abourezk v. Reagan*, 1988 WL 59640 *2 n.8 (D.D.C. 1988).

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*, *Am. Arab Anti-Discrimination Comm. v. Thomburgh*, 970 F.2d 501 (9th Cir. 1991).[11]

V. THE IDEOLOGICAL EXCLUSION PROVISION IS UNCONSTITUTIONALLY VAGUE.

The government's principal response to plaintiffs' Fifth Amendment argument is that the vagueness doctrine has no application to statutes governing admission. Gov't Br. 60. 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 simply do not address the issue presented here.

[11] As plaintiffs have explained, Pl. Br. 46 n.15, the ideological exclusion provision is not only a content-based restriction on speech, but also a content-based licensing scheme. The government contends that the licensing-scheme analysis applies only in "the domestic context," but the Supreme Court has applied the same analysis where the government's foreign affairs and national security powers are implicated. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Kent v. Dulles*, 357 U.S. 116 (1958).

Respectfully submitted,

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ADDENDUM 1

PATRIOT ACT RETROACTIVITY PROVISION

"(I) designated under section 219;

"(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General, as a terrorist organization, after finding that the organization engages in the activities described in subclause (I), (II), or (III) of clause (iv), or that the organization provides material support to further terrorist activity; or

"(III) that is a group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I), (II), or (III) of clause (iv).''; and

(2) by adding at the end the following new subparagraph:

"(F) ASSOCIATION WITH TERRORIST ORGANIZATIONS.—Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.''.

(b) CONFORMING AMENDMENTS.—

(1) Section 237(a)(4)(B) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(4)(B)) is amended by striking "section 212(a)(3)(B)(iii)" and inserting "section 212(a)(3)(B)(iv)".

(2) Section 208(b)(2)(A)(v) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(2)(A)(v)) is amended by striking "or (IV)" and inserting "(IV), or (VI)".

8 USC 1182 note.

(c) RETROACTIVE APPLICATION OF AMENDMENTS.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to—

(A) actions taken by an alien before, on, or after such date; and

(B) all aliens, without regard to the date of entry or attempted entry into the United States—

(i) in removal proceedings on or after such date (except for proceedings in which there has been a final administrative decision before such date); or

(ii) seeking admission to the United States on or after such date.

(2) SPECIAL RULE FOR ALIENS IN EXCLUSION OR DEPORTATION PROCEEDINGS.—Notwithstanding any other provision of law, sections 212(a)(3)(B) and 237(a)(4)(B) of the Immigration and Nationality Act, as amended by this Act, shall apply to all aliens in exclusion or deportation proceedings on or after the date of the enactment of this Act (except for proceedings in which there has been a final administrative decision before such date) as if such proceedings were removal proceedings.

(3) SPECIAL RULE FOR SECTION 219 ORGANIZATIONS AND ORGANIZATIONS DESIGNATED UNDER SECTION 212(a)(3)(B)(vi)(II).—

(A) IN GENERAL.—Notwithstanding paragraphs (1) and (2), no alien shall be considered inadmissible under section 212(a)(3) of the Immigration and Nationality Act (8 U.S.C.

1182(a)(3)), or deportable under section 237(a)(4)(B) of such Act (8 U.S.C. 1227(a)(4)(B)), by reason of the amendments made by subsection (a), on the ground that the alien engaged in a terrorist activity described in subclause (IV)(bb), (V)(bb), or (VI)(cc) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a group at any time when the group was not a terrorist organization designated by the Secretary of State under section 219 of such Act (8 U.S.C. 1189) or otherwise designated under section 212(a)(3)(B)(vi)(II) of such Act (as so amended).

(B) STATUTORY CONSTRUCTION.—Subparagraph (A) shall not be construed to prevent an alien from being considered inadmissible or deportable for having engaged in a terrorist activity—

(i) described in subclause (IV)(bb), (V)(bb), or (VI)(cc) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a terrorist organization at any time when such organization was designated by the Secretary of State under section 219 of such Act or otherwise designated under section 212(a)(3)(B)(vi)(II) of such Act (as so amended); or

(ii) described in subclause (IV)(cc), (V)(cc), or (VI)(dd) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a terrorist organization described in section 212(a)(3)(B)(vi)(III) of such Act (as so amended).

(4) EXCEPTION.—The Secretary of State, in consultation with the Attorney General, may determine that the amendments made by this section shall not apply with respect to actions by an alien taken outside the United States before the date of the enactment of this Act upon the recommendation of a consular officer who has concluded that there is not reasonable ground to believe that the alien knew or reasonably should have known that the actions would further a terrorist activity.

(c) DESIGNATION OF FOREIGN TERRORIST ORGANIZATIONS.—Section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a)) is amended—

(1) in paragraph (1)(B), by inserting "or terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism" after "212(a)(3)(B)";

(2) in paragraph (1)(C), by inserting "or terrorism" after "terrorist activity";

(3) by amending paragraph (2)(A) to read as follows:

"(A) NOTICE.—

Classified information.

"(i) TO CONGRESSIONAL LEADERS.—Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate, in writing, of the

ADDENDUM 2

FOREIGN AFFAIRS MANUAL § 40.32 N.2.3 NOTES

organizations are treated more severely than contributions to organizations that were not designated at the time the contribution was made.

Exception: The Secretary of State, after consultation with the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State, may decide in a particular case not to apply the material support provisions to material support afforded to an organization or individual that has committed terrorist activity, prior to October 26, 2001 (the date the USA PATRIOT ACT went into effect). This determination is at the sole discretion of either the Secretary or the Secretary of Homeland Security and may not be reviewed.

9 FAM 40.32 N2.3 "Terrorist Organization"

(CT:VISA-734; 05-03-2005)

For the purposes of determining whether an alien has used the alien's position of prominence within any country to persuade others to support a terrorist organization (INA 212(a)(3)(B)(i)(VI)), and defining "engage in terrorist activities" (INA 212(a)(3)(B)(iv)), "terrorist organization" means any of the following three kinds of entities:

(1) An organization designated by the Secretary of State as a "foreign terrorist organization" (FTO) under INA 219 (organizations currently designated as FTOs and information concerning the criteria for designation and the designation process can be found on the *Coordinator for Counterterrorism*'s (S/CT) website. A designation under INA 219 has implications under U.S. criminal law and under federal asset-blocking laws and regulations, as well as under the INA. Aliens who engage in certain activities in connection with these organizations can be rendered inadmissible under the INA.

(2) An organization designated by the Secretary of State based upon a finding that the organization engages in the first three categories of activities described in INA 212(a)(3)(B)(iv) (see 9 FAM 40.32 N2.2), or provides material support to further terrorist activities. (The list of organizations so designated is known as the Terrorist Exclusion List (TEL) and can be found, along with information regarding the designation process, on the *Coordinator for Counterterrorism's* (S/CT) website. Unlike an FTO designation, a TEL designation only has immigration implications; it does not trigger criminal penalties or asset blocking, but aliens who engage in certain activities in connection with the organization may be rendered inadmissible under the INA.

(3) An organization that has not been designated but is a group of two or more individuals, whether organized or not, that engages in the activities described in the first three categories of activities described in INA 212(a)(3)(B)(iv). Post should submit detailed information on the group's organization and activities to the Department in its request for an SAO if post believes an alien may be inadmissible due to the alien's relationship with such a group.

Note: Additional information on terrorist organizations is available at the *United Nations Committee 1267* website maintained by the United Nations.

Note: In cases where consular officers must determine whether an alien knows or should have known that an organization is a terrorist organization, officers must consider several factors. First, facts particular to the individual, such as his or her residence, profession, or education, may permit a conclusion that the applicants knows, or should have known, that the organization is a terrorist organization. Secondly, officers must consider whether information about an organization is so widely known in the area that most persons know that the organization is engaged in terrorist activities. Other factors may also be relevant. With regard to designated organizations (FTO or TEL), knowledge can be inferred from the fact that the names of FTOs and the TEL organizations have been published in the Federal Register, that designations are publicized widely, and that the names and aliases of designated organizations are available to applicants at post. All posts MUST place prominently on bulletin boards in waiting areas the list of FTOs and TEL organizations. Finally, officers must consider whether information about an organization is so widely known in the area that most persons know that the organization is engaged in terrorist activities. Other factors may also be relevant.

9 FAM 40.32 N3 Security Advisory Opinion Mandatory

(CT:VISA-734; 05-03-2005)

a. The Department's security advisory opinion, requested by means of a "VISAS DONKEY" request, is required for any visa application involving possible ineligibility under INA 212(a)(3)(B) to ensure consistency and uniformity of interpretation and to allow input from other interested U.S. Government agencies. (For procedural guidance, *see 9 FAM Appendix G, 500 Security Advisory Opinions.)*

b. You must submit a SAO Donkey request if any doubts exist regarding an applicant's eligibility on security grounds.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,995 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

_____

Jameel Jaffer
Counsel for Appellants
August 1, 2008

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

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DOCKET NUMBER: 08-cv-0826

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CERTIFICATE OF SERVICE

I, Anna Christensen, am a legal assistant at the American Civil Liberties Union.

On August 1, 2008, I served four copies of the enclosed Reply Brief for Plaintiffs-Appellants by placing the same in a properly addressed envelope to:

David Jones, Esq.
Kristin Vassallo, Esq.
Assistant United States Attorneys
86 Chambers Street, 3rd Floor
New York, NY 10007

I then sealed the envelope and then sent the same via federal express.

I then e-mailed PDF copies to the above individuals.

I certify under penalty of perjury that the foregoing is true and correct.

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ANNA CHRISTENSEN

Executed on August 1, 2008