08-0826-cv

To Be Argued By:
DAVID S. JONES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-0826-cv

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

Plaintiffs-Appellants,

—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-Appellees.

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

BRIEF FOR DEFENDANTS-APPELLEES

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York,
Attorney for Defendants-Appellees.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2822

KRISTIN L. VASSALLO,
DAVID S. JONES,
SARAH S. NORMAND,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

PAGE

PAGE

TABLE OF AUTHORITIES

Cases:

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

Statutes:

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-0826-cv

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

Plaintiffs-Appellants,

—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-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiffs-Appellants American Academy of Religion, American Association of University Professors, PEN American Center, and Tariq Ramadan ("plaintiffs") appeal from a December 20, 2007 judgment of the United States District Court for the Southern District of New York (Hon. Paul A. Crotty, J.), awarding summary judgment to defendants-appellees Michael

Chertoff and Condoleezza Rice ("defendants" or the "Government"). (Special Appendix ("SPA-") 69).

This case arises against the backdrop of Congress's plenary authority to define what categories of aliens may, or may not, enter the United States. This authority has long been recognized as a core sovereign function central to national security and foreign relations, reserved exclusively for the political branches, and immune from judicial intervention. Indeed, the Supreme Court has repeatedly rejected challenges to statutes that render aliens inadmissible because of their prior advocacy, views, or memberships, notwithstanding objections—like plaintiffs' here—that such exclusions violate the First Amendment.

Plaintiffs challenge Tariq Ramadan's exclusion under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) for providing material support to terrorist organizations. They also seek facial invalidation of 8 U.S.C. § 1182(a)(3)(B)(i)(VII) (along with its predecessor statute, the "endorse/espouse provision"), which bars from entering the United States any alien who has endorsed or espoused terrorist activity. The Court should affirm the district court's award of summary judgment to defendants on both of these claims.

The judgment dismissing plaintiffs' challenge to the denial of Ramadan's visa should be affirmed because the doctrine of consular nonreviewability bars judicial review of that decision. The district court improperly reviewed the consular officer's decision, but found that the Government articulated a "facially legitimate and bona fide" reason for denying Ramadan's visa. As they did below, plaintiffs proffer evidence to attack the consular officer's factual findings, but courts may not

entertain such challenges. Nor is Ramadan's exclusion improper on the ground that his disqualifying conduct was not a basis for inadmissibility when it occurred, as Congress expressly made the controlling statute applicable to pre-enactment conduct.

The dismissal of plaintiffs' facial challenge to the endorse/espouse provision should also be affirmed. As the district court correctly found, plaintiffs lack standing to bring this claim. Unlike every case recognizing a plaintiff's standing to challenge an alien's exclusion, plaintiffs here have identified no alien whom they were prevented from hosting by the endorse/espouse provision. Even if plaintiffs had standing, the statute is constitutional.

Statement of Jurisdiction

Plaintiffs' complaint erroneously asserts jurisdiction under the First Amendment and the Administrative Procedure Act, 5 U.S.C. § 702. (Appendix ("A-") 427). As set forth *infra*, the doctrine of consular nonreviewability barred the district court from exercising jurisdiction to review the consular officer's determination. Furthermore, the court lacked jurisdiction over the facial challenge to the endorse/espouse provision, because plaintiffs have no standing to pursue that claim.

Because plaintiffs timely appealed from a final judgment (A-897-98), this Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the doctrine of consular nonreviewability bars judicial review of the denial of Ramadan's visa.

2. Whether the Government proffered a facially legitimate and bona fide reason for its denial of Ramadan's visa.

3. Whether plaintiffs lack standing to challenge the constitutionality of the endorse/espouse provision.

4. Whether the endorse/espouse provision is a constitutional exercise of Congress's plenary power to define which categories of aliens may enter the United States.

Statement of Facts

A. Revocation of Ramadan's H-1B Visa and His October 2004 Visa Application

On May 5, 2004, Tariq Ramadan was issued an H-1B non-immigrant visa to work as a professor at Notre Dame. (A-808). Following issuance of that visa, the Department of State received information that might have led to a determination that Ramadan was inadmissible to the United States. (*Id*). On July 28, 2004, the Department of State prudentially revoked Ramadan's H-1B visa pursuant to 8 U.S.C. § 1201(i), based on the information it had received. (*Id.*). No determination was made as to Ramadan's inadmissibility under the endorse/espouse provision, or any other provision. (*Id.*; A-808 (prudential revocations under 8 U.S.C. § 1201(i) are not findings of inadmissibility)).

On October 4, 2004, Ramadan reapplied for an H-1B visa in Switzerland, but the visa was refused pursuant to 8 U.S.C. § 1201(g), an administrative action used to close a case pending receipt of further information. (A-A-808). In December 2004, before the United States consulate completed reviewing his application, Ramadan withdrew his acceptance of Notre Dame's job offer. (*Id.*). Accordingly, the Department of Homeland Security ("DHS") revoked the visa petition Notre Dame had filed on Ramadan's behalf. (*Id.*). Because there was no longer a valid petition supporting Ramadan's visa application, the application was rendered moot. (*Id.*).

B. Ramadan's September 2005 Visa Application

On September 16, 2005, Ramadan submitted an application for a B-1/B-2 non-immigrant visa at the United States Embassy in Bern, Switzerland. (*Id.*). Consular officials interviewed Ramadan in September and December 2005. (A-808-09). During these interviews, Ramadan stated that he had made donations to the Comité de Bienfaisance et de Secours aux Palestiniens ("CBSP") and the Association de Secours Palestinien ("ASP"). (A-447, 449, 809).

C. Plaintiffs' Motion for a Preliminary Injunction

While Ramadan's September 2005 visa application was pending, plaintiffs sued in district court, asserting both a facial challenge to the endorse/espouse provision, and an "as applied" challenge to the exclusion of Ramadan allegedly pursuant to that provision. (A-11-36). In March 2006, plaintiffs moved for a preliminary injunction enjoining DHS from denying Ramadan a visa based on his speech or pursuant to the endorse/

espouse provision, and directing DHS to adjudicate Ramadan's visa application. (A-37-38).

On June 23, 2006, the district court directed the Government to adjudicate Ramadan's visa application within ninety days, and denied plaintiffs' motion in all other respects. *See Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 422-23 (S.D.N.Y. 2006).

D. Denial of Ramadan's September 2005 Visa Application

Based on Ramadan's interview statements and other available information, including a Security Advisory Opinion provided by the Department of State in accordance with applicable law and State Department procedures,* Aaron Martz, a consular officer at the United States Embassy in Bern, Switzerland, determined that Ramadan was inadmissible and, exercising his authority under 8 U.S.C. § 1201(g), denied Ramadan's application for a visa on the basis of 8 U.S.C. §§ 1182(a)(3)(B)(i)(I) and 1182(a)(3)(B)(iv)(VI). (A-809, 853-54). Ramadan was notified of this refusal in a letter dated September 19, 2006, which stated:

> You have been found inadmissible . . . for engaging in terrorist activity by providing material support to a terrorist organization. . . . The basis for

---

* Pursuant to the Foreign Affairs Manual, a consular official must submit all visa applications involving possible inadmissibility under 8 U.S.C. § 1182(a)(3)(B) for a Security Advisory Opinion. *See* 9 Foreign Affairs Manual ("F.A.M.") 40.32 N1.2, *available at* <.http://www.state.gov/m/a/dir/regs/fam>.

> this determination includes the fact that during your two interviews with consular officials you stated that you had made donations to [CBSP] and [ASP]. Donations to these organizations, which you knew, or reasonably should have known, provided funds to Hamas, a designated Foreign Terrorist Organization, made you inadmissible under [Immigration and Nationality Act] § 212(a)(3)(B)(i)(I).

(A-811).

The consular officer's determination that Ramadan was inadmissible incorporated the assessment that CBSP and ASP were undesignated terrorist organizations when Ramadan made his donations in 2001 and 2002. (A-854). In August 2003, the Treasury Department formally designated ASP and CBSP as entities that support terrorism, based on the groups' prior fundraising for Hamas.* (SPA-5).

Following the denial of Ramadan's visa application, plaintiffs filed an amended complaint challenging the

---

* Designated terrorist organizations under the Immigration and Nationality Act (the "INA") do not include designations by the Treasury Department. *See* 8 U.S.C. § 1182(a)(3)(B)(vi)(I)-(II). However, the Treasury Department's designations of ASP and CBSP as organizations that support terrorism is consistent with a finding that they are undesignated terrorist organizations under 8 U.S.C. §1182(a)(3)(B)(vi)(III).

denial and seeking a ruling that the endorse/espouse provision on its face violated the First and Fifth Amendments to the Constitution. (A-395-428). The parties thereafter cross-moved for summary judgment. (A-431-32, 791-92).

E. The District Court's Decision

In an opinion and order dated December 20, 2007, the district court granted defendants' motion for summary judgment, denied plaintiffs' cross-motion, and dismissed the amended complaint. (SPA-10-34).

Noting that the doctrine of consular nonreviewability is "firmly rooted in our jurisprudence," and that "all judicial and legislative proposals to limit the doctrine have been soundly rejected," the court nonetheless held that under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), courts have jurisdiction to hear challenges brought by American citizens claiming that the denial of a visa to an alien has violated their First Amendment rights. (SPA-11-12, 17). In such instances, the court concluded, review of a consular decision is very limited:

> Once the Executive has exercised the discretion allotted by Congress, and has provided a facially legitimate and bona fide reason for doing so, the Court's inquiry must end. The Executive's decisions cannot be overturned by courts balancing the consular decision against First Amendment values.

(SPA-20). The court determined, based on the "unique circumstances of this case," including the involvement

of non-consular officials in adjudicating the visa, that the denial of Ramadan's visa application was subject to limited review. (SPA-21-23).

The district court then held that the Government had provided a facially legitimate and bona fide reason for the visa denial. The court found that the Government's stated reason for the denial—Ramadan's admitted donations to ASP and CBSP—was "based on an appropriate statute," 8 U.S.C. § 1182(a)(3)(B), that was "properly applied." (SPA-24-29). In so holding, the court rejected plaintiffs' arguments that Congress did not intend the material support provision of the REAL ID Act* to apply retroactively, and that Ramadan's donations to ASP and CBSP—which occurred before the REAL ID Act took effect—thus did not provide a facially legitimate and bona fide reason for the visa denial. (SPA-24-25).

The district court likewise rejected plaintiffs' contention that the Government failed to demonstrate that Ramadan possessed the knowledge required under the material support provision. (SPA-26-27). Looking to the language of the statute, the district court noted that § 1182(a)(3)(B)(iv)(VI)(dd) refers to "knowledge" in two separate contexts: it defines "engaging in terrorist activity" as committing "an act that the actor knows, or reasonably should know, affords material support . . . to a terrorist organization," but provides that the statute does not apply if the "actor can demonstrate, by clear and convincing evidence, that the actor did not know, and should not reasonably have known, that the

---

* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005) ("REAL ID Act").

organization was a terrorist organization." (SPA-27). The court found the first element satisfied because Ramadan admitted knowing that he was donating to ASP, and thus understood he was providing "material support" to the recipient. (*Id.*). With respect to the second element, the court held that Ramadan had not met his "heavy burden" of showing by clear and convincing evidence that he lacked knowledge that ASP was a terrorist organization. (SPA-28).

As for plaintiffs' facial challenge to the endorse/espouse provision, the district court dismissed the claim for lack of standing. Noting that plaintiffs had not identified a single alien excluded under the statute with whom they wished to meet, the court held that plaintiffs had failed to demonstrate the concrete and particularized harm necessary to confer standing. (SPA-28-31). The court further found that plaintiffs could not establish standing based on the provision's alleged chilling effect on their First Amendment rights, or the purported threat that future alien invitees would be excluded on this basis, a risk that the court found "hypothetical." (SPA-31). Likewise, the court rejected plaintiffs' argument that the endorse/espouse provision operated as an unconstitutional licensing scheme. (SPA-31). The court did not address the merits of plaintiffs' constitutional challenge to the endorse/espouse provision.

Summary of Argument

The district court's judgment dismissing plaintiffs' amended complaint should be affirmed. The doctrine of consular nonreviewability precludes judicial review of the denial of Ramadan's visa. *See* Point I. Even for

discretionary waivers of inadmissibility, *Mandel* made clear that courts may not look behind the Government's facially legitimate and bona fide explanation for its actions. *See* Point II.A. Although the district court erred by reviewing the visa denial, it properly found that the Government provided a facially legitimate and bona fide reason for denying the visa. *See* Points II.B, II.C.1.

In challenging the factual determinations underlying the visa denial, plaintiffs ask the Court to conduct a factual inquiry for which it lacks jurisdiction. *See* Point II.C.2. Plaintiffs also fail to establish any error in the district court's conclusion that the material support statute applies to Ramadan's conduct, even though that conduct was not a ground for inadmissibility when it occurred, for Congress specified that the provision applies retroactively. *See* Point II. C.3.

Plaintiffs' facial challenge to the endorse/espouse provision was also properly dismissed. Plaintiffs have not suffered an injury sufficient to establish standing, most fundamentally because they have not identified a single alien whom the endorse/espouse provision prevented them from meeting. *See* Point III.A. Even if plaintiffs had standing, the statute validly exercises Congress's plenary power to decide which categories of aliens may not enter the United States. *See* Point III.B.

ARGUMENT

Standards of Review

This Court reviews *de novo* a district court's order granting summary judgment. *See Gorman v.*

Consolidated Edison Corp., 488 F.3d 586, 595 (2d Cir. 2007). Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

As explained *infra* at 13-21, however, the doctrine of consular nonreviewability bars courts from examining the consular officer's decision to deny Ramadan's visa. *See Mandel*, 408 U.S. at 765. Thus, plaintiffs' suggestion that the district court should have granted them summary judgment because the Government did not controvert their evidentiary submissions, *see*, *e.g.*, Plaintiffs' Brief ("Br.") at 36-38, 42-45, is misplaced for the fundamental reason that courts may not receive evidence submitted in an attempt to secure judicial review of a visa denial. *See* Point II.A.

POINT ONE

THE DOCTRINE OF CONSULAR NONREVIEWABILITY BARS REVIEW OF RAMADAN'S VISA DENIAL

A. The Doctrine of Consular Nonreviewability Has Long Exempted Consular Decisions From Judicial Review

The power to exclude aliens is "an attribute of sovereignty essential to the preservation of any nation," *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982), "necessary for maintaining normal international relations and defending the country," *Mandel*, 408 U.S. at 765 (citation omitted). The authority to make such decisions is exclusively committed to the political branches, which enjoy extraordinarily wide discretion

in its exercise. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *Mandel*, 408 U.S. at 766 ("[O]ver no conceivable subject is the legislative power of Congress more complete."). Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden," and Congress is constitutionally empowered "to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention." *Id.* (citations and quotation marks omitted).

In recognition of the political branches' sovereign authority over this inherently political area, courts have long held that "[t]he judicial branch should not intervene in the executive's carrying out the policy of Congress with respect to exclusion of aliens." *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 556 (2d Cir. 1975); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). This long-standing principle, known as the doctrine of consular nonreviewability, bars courts from exercising jurisdiction over suits challenging the decision of a consular officer to grant or deny a visa. *See Hsieh v. Kiley*, 569 F.2d 1179, 1181 (2d Cir. 1978); *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927).

B. The Doctrine of Consular Nonreviewability Bars Judicial Review of Consular Decisions Even in the First Amendment Context

The principle exempting consular decisions from review fully applies in the First Amendment context. In *Mandel*, the Supreme Court considered claims of

professors who invited Marxist scholar Ernest Mandel to speak at events in the United States, and alleged that Mandel's exclusion violated their First Amendment rights to hear from him. *See Mandel*, 408 U.S. at 757-60. A consular officer had denied Mandel's visa application on the ground that he advocated world communism and was thus inadmissible under then-section 212(a)(28) of the Immigration and Nationality Act (the "INA"). *See id.* at 756. At issue in *Mandel*, however, was not the consul's visa denial but rather the Attorney General's refusal to exercise his statutory discretion under INA § 212(d)(3) to waive Mandel's inadmissibility after he was found ineligible for a visa. *See id.* at 762.

The Court noted that while an alien has no constitutional or statutory right to enter the United States, exclusion of the alien could "implicate[]" the First Amendment rights of American citizens who wish to confer with him. *Id.* at 762, 765. Nonetheless, the Court held that if the Attorney General declines to exercise his discretionary authority to waive an alien's inadmissibility on the basis of a "facially legitimate and bona fide" reason, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the [alien]."* *Id.* at 770.

In so deciding, *Mandel* also held that the rights of United States citizens to receive ideas do not outweigh

---

* Subject to certain exceptions, the INA now explicitly precludes judicial review of such waiver decisions. *See* 8 U.S.C. §§ 1252(a)(2)(B)(ii), (a)(2)(D).

the Executive's power to exclude aliens by declining to grant a waiver of inadmissibility. *See id.* at 768-69. As the Court observed, creating a "First Amendment" exception to this authority would plunge courts into innumerable disputes that are constitutionally vested in the political branches and beyond judicial review. *See id.* Seeking to avoid the dangers of weighing the Government's interest in excluding an alien against the audience's interest in meeting with him, the Court found that the Government had proffered a facially legitimate and bona fide reason for refusing to grant a waiver, and refused to look behind that decision. *See id.* at 769-70.

In the years since *Mandel*, some courts presented with similar challenges have overlooked a critical aspect of its holding: the fact that the decision under review was *not* a consular officer's determination of an alien's admissibility, but rather the Attorney General's discretionary decision to deny a waiver of inadmissibility. *See Mandel*, 408 U.S. at 759. Because *Mandel* did not engage in or authorize review of a consular decision, any argument that *Mandel* requires the Government to proffer a facially legitimate and bona fide reason for its actions could only be raised in cases involving discretionary waiver denials, rather than challenges to consular officers' admissibility determinations, such as the visa denial at issue here. *See Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987); *Encuentro del Canto Popular v. Christopher*, 930 F. Supp. 1360, 1370-71 (N.D. Cal. 1996); *Romero v. Consulate of U.S., Barranquilla, Colombia*, 860 F. Supp. 319, 323 n.7 (E.D. Va. 1994).

Any courts implying or holding otherwise misconstrue *Mandel*, and should not be followed. Notably, both *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990), and *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988), cited by plaintiffs, *see* Br. at 16, failed to consider consular nonreviewability or to recognize that *Mandel* involved a waiver decision rather than a consular officer's determination. *See Adams*, 909 F.2d at 647; *Allende*, 845 F.2d at 1116-21. Similarly, the Ninth Circuit recently and without independent analysis followed *Adams* and other cases (including by misreading this Court's decision in *Burrafato*, *see infra* at 18), and held that there is "a limited exception to the doctrine" of consular nonreviewability "where the denial of a visa implicates the constitutional rights of American citizens." *Bustamante v. Mukasey*, _ F.3d _, 2008 WL 2669735, at *2 (9th Cir. July 9, 2008). *Bustamante* simply repeats the error of *Adams* in failing to recognize that *Mandel* was expressly limited to waiver denials. *See Mandel*, 408 U.S. at 767-69. Indeed, because it involves an American spouse's assertion of constitutional violations in the denial of her husband's visa application for suspected drug trafficking, *Bustamante* highlights the significant problems that the Supreme Court foresaw and sought to avoid in deciding *Mandel*. *See Mandel*, 408 U.S. at 768-69 ("Appellees' First Amendment argument would prove too much," because "in almost every instance of an alien excludable . . . , there are probably those who would wish to meet and speak with him," yet there is no judicially manageable means to evaluate such claims without rendering Executive authority in this area a "nullity").

In *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd without opinion by an equally divided Court*, 484 U.S. 1 (1987), also cited by plaintiffs, *see* Br. at 16, the D.C. Circuit found jurisdiction based on a statute that has since been repealed in relevant part. *See Abourezk*, 785 F.2d at 1050.* *Abourezk* discussed *Mandel* only in passing, noting only that the Supreme Court reached a "disposition on the merits" and stating that, "[p]resumably, had the Court harbored doubts concerning federal court subject matter jurisdiction. . . , it would have raised the issue on its own motion." *Id.* This bare mention of *Mandel*, in a case involving a no-longer applicable statutory grant of jurisdiction, provides no basis for extending *Mandel* to visa denials by consular officials in the absence of that statute. *See Saavedra Bruno*, 197 F.3d at 1162-64; *Abourezk*, 785 F.2d at 1050.

Indeed, the D.C. Circuit's decision in *Saavedra Bruno*, 197 F.3d at 1153, sharply limits *Abourezk*. In *Saavedra Bruno*, a panel of the D.C. Circuit, which was bound by the *Abourezk* decision, *see id.* at 1163 n.13, characterized *Abourezk*'s holding as "narrow," refused to extend that holding outside its specific factual circumstances, and reaffirmed the continuing vitality of

---

* *Abourezk* relied on 8 U.S.C. § 1329 (1982), which granted federal courts jurisdiction over "all causes, civil and criminal, arising under" the immigration statutes. *See Abourezk*, 785 F.2d at 1050. This provision has since been amended to restrict jurisdiction to immigration cases "brought by the United States." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162-64 (D.C. Cir. 1999).

the doctrine of consular nonreviewability. *Id.* at 1163-64. *Saavedra Bruno* also recognized the limits of *Abourezk*'s holding, including its reliance on the now-repealed INA provision as a basis for jurisdiction, and emphasized that *Mandel* did not arise from the decision of a consular officer applying the INA, but rather the discretionary denial of a waiver by the Attorney General. *See id.* at 1163.

This Court's decision in *Burrafato*, 523 F.2d at 556, similarly fails to support plaintiffs' expansive reading of *Mandel*. *Burrafato* held that *Mandel* did not permit judicial review of an alien's claim that a consular officer's visa denial violated his constitutional rights. *See id.* at 556-57. Although the Court noted that *Mandel*, unlike *Burrafato*, involved First Amendment claims, it did not have occasion to address the situation presented here, where United States citizens challenge an alien's visa denial on First Amendment grounds. *See id.* at 556. *Burrafato* therefore did not hold that *Mandel*—which dealt with a discretionary Attorney General action, not a consular determination—would allow review in such a case. *See id.*

Mandel's holding thus does not extend to the decision to deny a visa, even if the plaintiffs seeking review of that decision raise a First Amendment claim.

C. The District Court Improperly Exercised Jurisdiction to Review the Denial of Ramadan's Visa

In assessing plaintiffs' challenge to the denial of Ramadan's visa, the district court acknowledged that allowing courts to review a visa denial whenever a United States citizen asserted a First Amendment

claim "would be an obvious end-run" around consular nonreviewability, "interject[ing c]ourt[s] into business long allocated to the political branches of government whenever able counsel could devise an ingenious First Amendment argument." (SPA-22). Nonetheless, citing assertedly "unique circumstances" of the case, the district court undertook to review the consular officer's decision to deny Ramadan's visa. (SPA-23). In so doing, the district court misconstrued *Mandel*, and examined a determination that was beyond judicial review.

While noting that *Mandel* involved "the Attorney General's decision not to waive the visa requirement," the district court mistakenly failed to recognize that *Mandel* did not disturb the pre-existing bar on judicial review of consular decisions, and in fact the district court incorrectly described *Mandel* as addressing a "reason given by the consular official." (SPA-18 n.19). *Mandel* expressly found that the Attorney General—not the consular officer—had provided a facially legitimate and bona fide reason for refusing the waiver. *See Mandel*, 408 U.S. at 769. Thus, the district court's review of the visa denial was based on a misreading of *Mandel*.

The district court also erred in concluding that the visa denial was subject to review because of certain allegedly "unique circumstances": plaintiffs' asserted First Amendment rights, the alleged involvement of non-consular officials in denying the visa, and the "entire history" of the case, including the initial grant and prudential revocation of Ramadan's H-1B visa. (SPA-22-23). None of these circumstances provides a basis for reviewing the consular determination that Ramadan was inadmissible.

First, the fact that plaintiffs have brought a First Amendment challenge does not allow the Court to review the visa denial. Confronted with similar First Amendment claims, and recognizing the difficulties and dangers of judicial weighing of the relative importance of aliens' speech, *see Mandel*, 408 U.S. at 768-69, the Supreme Court refused to allow courts to balance citizens' First Amendment rights against the Government's reasons for excluding an alien, instead permitting only "facial[]" review of a discretionary waiver determination, *id.* at 769. Given the cautious treatment the Court gave a *non*-consular waiver determination, it follows that a visa determination—the quintessential decision protected by the doctrine of consular nonreviewability—is barred entirely from judicial review.

Further, permitting review of a visa denial every time a citizen raises a First Amendment claim would eviscerate the doctrine of consular nonreviewability, for allowing courts to intervene in a visa decision whenever someone in the United States wishes to speak with an alien would potentially allow judicial review of every visa denial. *See, e.g.*, *Bustamante*, 2008 WL 2669735, at *2-3 (reviewing American spouse's claim of due process violation in denial of alien husband's visa application). Indeed, the "dangers" of judicial interference in waiver determinations noted in *Mandel*, *see id.*, are magnified in the context of the millions of fact-specific visa decisions made by consular officers in the field. The assertion of First Amendment claims alone therefore cannot justify judicial review.

Nor is there any basis to permit review because non-consular officials may have participated in the visa

process here. The doctrine of consular nonreviewability applies broadly to Executive branch officials implementing the authority bestowed by Congress, based on its plenary authority over the area. *See Raduga U.S.A. Corp. v. U.S. Dep't of State*, _ Fed. Appx. _, 2008 WL 2605564, at *1 (9th Cir. Jun. 30, 2008) (doctrine of consular nonreviewability applied where visa denial was made at request of DHS); *Afshar v. Everitt*, No. 04-1104-CV-WFJG, 2005 WL 2898019, at *2 (W.D. Mo. Oct. 31, 2005) (same where State Department provided "advisory cables" to consul denying visa). Furthermore, even if non-consular officials provided input in the adjudication process, the decision to deny Ramadan's visa was—as a legal and factual matter—made by a consular officer. *See* 8 U.S.C. §§ 1201(a)(1), (g); (A-854).

Finally, neither the timing of Ramadan's visa decision nor the status of his previous visa applications is relevant to the visa denial at issue, and the district court cited no authority for consideration of such factors in determining its jurisdiction. The district court therefore should not have assessed the reasons for the consular officer's denial of Ramadan's visa, and this Court should affirm the judgment without engaging in such review.

POINT TWO

EVEN IF THE DOCTRINE OF CONSULAR NONREVIEWABILITY DID NOT BAR REVIEW, DEFENDANTS IDENTIFIED A FACIALLY LEGITIMATE AND BONA FIDE REASON FOR THE VISA DENIAL

Having improperly engaged in review of the visa denial, the district court found that the Government did indeed proffer a facially legitimate and bona fide reason for its actions: Ramadan's admitted donations to ASP and CBSP, which, the consular officer found, constituted material support to terrorist organizations. Thus, even if the doctrine of consular nonreviewability did not bar review, the visa denial withstands scrutiny, and should be upheld.

A. Any Judicial Inquiry Should Be Limited to Whether the Government Articulated a Statutorily Permissible Basis to Exclude Ramadan

The State Department requires that, in denying a visa, a consular officer need only identify the statutory provision on which the denial is based. *See* 9 F.A.M. 41.121(b). A visa denial letter identifying the relevant statutory provision, by itself, would thus constitute a "facially legitimate and bona fide" justification that courts may not look behind. *See Mandel*, 408 U.S. at 770.

Importantly, and contrary to this Court's *dictum* in *Burrafato*, 523 F.2d at 556, *Mandel* did not hold that the Government is *required* to advance a "facially legitimate and bona fide justification" for a challenged

exclusion, or place any evidentiary burden on the Government. Rather, the Supreme Court found that the Government had proffered a facially legitimate and bona fide justification, and no judicial review was permitted, expressly declining to decide whether the Government was required to proffer a rationale for its decision. *See Mandel*, 408 U.S. at 770. *Mandel* thus does not require the Government either to advance a reason for its decision or to explain the evidentiary basis for a consular determination challenged on First Amendment grounds.*

Here, the consular officer determined that some of the facts underlying the denial that had been volunteered by Ramadan could be disclosed in the denial letter. Accordingly, the letter identified the

---

* Requiring the Government to provide evidence underlying a consular determination would also contravene the mandate of confidentiality Congress has enacted with respect to visa records. *See Medina-Hincapie v. Dep't of State*,700 F.2d 737, 741 (D.C. Cir. 1983). Pursuant to 8 U.S.C. § 1202(f), the Secretary of State "has no authority to disclose material to the public. In that sense the confidentiality mandate is absolute." *Medina-Hincapie*, 700 F.2d at 741. Further, even when a court certifies that visa records are "needed . . . in the interest of the ends of justice," and requests release of such records, the Secretary of State retains absolute discretion to deny the court's request, an extraordinary grant of authority that demonstrates the importance of consular confidentiality and freedom from judicial interference. 8 U.S.C. § 1202(f)(1).

material support provided by Ramadan to undesignated terrorist organizations. (A-811).

That information was facially consistent with the stated statutory basis for denying the visa and cannot reasonably be construed as subjecting the Government's actions to greater scrutiny, especially because a court "has no power to inquire into the wisdom or basis of the Government's reasons." *NGO Comm. on Disarmament v. Haig*, No. 82 Civ. 3636 (PNL), 1982 U.S. Dist. LEXIS 13583, at *9 (S.D.N.Y. Jun. 10, 1982), *aff'd*, 697 F.2d 294 (2d Cir. 1982); *El-Werfalli v. Smith*, 547 F. Supp. 152, 153 (S.D.N.Y. 1982) (same); *cf. Mandel*, 408 U.S. at 777 (Marshall, J., dissenting) (objecting that standard adopted by majority "demands only 'facial' legitimacy" and shows "unprecedented deference to the Executive").* Thus, as the term "facial" indicates, a

---

* Although this Court has held in another context that a statute creating distinctions among aliens is "facially legitimate and bona fide" if it survives rational basis review, *see Azizi v. Thornburgh*, 908 F.2d 1130, 1133 (2d Cir. 1990), the *Azizi* holding cannot, consistent with *Mandel*, be applied to the visa context. Given the Supreme Court's long-standing adherence to the doctrine of consular nonreviewability, as well as its refusal to look behind the reasoning or factual basis even of the Attorney General's discretionary determination, *see Mandel*, 408 U.S. at 770, the Court may not look behind the Government's facially legitimate justification for the consular officer's denial of Ramadan's visa. In any event, even if a rational basis review were employed, the consul's decision easily

court may not look beyond the face of the denial notice provided to the visa applicant.

Although *Mandel* did not define "facially legitimate and bona fide," its discussion—especially when contrasted with Justice Marshall's dissent—demonstrates the deference accorded the Government's decision. In *Mandel*, the Attorney General declined to waive Mandel's inadmissibility because he determined that on a previous trip to the United States, Mandel had violated the conditions of his visa requiring adherence to his stated itinerary and purpose of the trip, and given this "flagrant abuse," Mandel should not be granted a waiver. *Id.* at 758-59. Although the Government had not relied on this justification during the litigation, the Court nonetheless held that it constituted a "facially legitimate and bona fide" reason for refusing a waiver, and upheld the waiver denial. *See id.* at 769. The Court refused to "look behind" the stated factual basis for the decision even though Mandel denied violating the conditions of his prior visa, and the State Department conceded that Mandel may not have known of those limitations. *See id.* at 758 n.5, 759, 778 (Marshall, J., dissenting). Nor did the Supreme Court evaluate the Attorney General's conclusion that "previous abuses by Mandel made it

---

passes muster; under this "exceedingly narrow" standard, *see Correa v. Thornburgh*, 901 F.2d 1166, 1173 (2d Cir. 1990), it was certainly rational for the consul to conclude, based on Ramadan's admissions, that he made the donations in question, and that he failed to meet his burden of establishing a lack of knowledge by clear and convincing evidence.

inappropriate to grant a waiver again." *Id.* at 769. Instead, having searched the record to find a justification for the denial (on which the Government had never relied in the litigation), the Supreme Court deemed that justification "facially legitimate and bona fide," and therefore not subject to judicial review. *See id.* Given this extraordinary solicitude for the Executive's determination, courts applying *Mandel* should neither engage in any factual inquiry nor second-guess the deciding official's facially legitimate conclusions.*

B. The District Court Engaged in Impermissible Inquiry

While stating that the facially legitimate standard allows for only "limited" review (SPA-29), the district court nevertheless examined the factual basis for the denial of Ramadan's visa. (SPA-23-24, 26-29). This review was not justified under any reading of *Mandel*.

---

* While plaintiffs cite *Nguyen v. INS*, 533 U.S. 53 (2001), and *Zadvydas v. INS*, 533 U.S. 678 (2001), to suggest that the facially legitimate and bona fide standard no longer "remains the appropriate standard," Br. at 19 n.4, those cases are inapposite because they involved aliens already in the United States. Indeed, *Zadvydas* observed that "[a]liens who have not yet gained initial admission to this country would create a very different question," 533 U.S. at 682, and noted that the Court need not "consider the political branches' authority to control entry" into the country, *id.* at 695—the plenary authority at the heart of the consular nonreviewability doctrine.

Following interviews at which Ramadan admitted making donations to ASP and CBSP,* consular officer Aaron Martz denied Ramadan's visa on the ground that he engaged in terrorist activity by providing material support to ASP and CBSP. (A-809, 853-54). Specifically, the consular officer denied the visa pursuant to 8 U.S.C. §§ 1182(a)(3)(B)(i)(I) and 1182(a)(3)(B)(iv)(VI)(dd), which render inadmissible an alien who

> engages in a terrorist activity [by] . . . commit[ting] an act that [he] knows, or reasonably should know, affords material support, including . . . funds, . . . to a[n undesignated terrorist organization] or to any member of such an organization, unless the [alien] can demonstrate by clear and convincing evidence that the [alien] did not know, and should not reasonably have known,

---

* Although Ramadan now contends that he never gave money to CBSP, *see* Br. at 12, this after-the-fact disavowal of his interview statements does not undermine the consular officer's facially legitimate and bona fide explanation. The consular officer was entitled to rely on Ramadan's interview statements, and Ramadan concedes that he "may have stated in [his] visa interview that [he] gave money to both organizations." (A-449). In any event, Ramadan concededly made donations to ASP, which alone rendered him inadmissible under the material support statute.

> that the organization was a terrorist organization.

8 U.S.C. § 1182(a)(3)(B)(i)(I), 1182(a)(3)(B)(iv)(VI)(dd).* In finding Ramadan inadmissible under these provisions, the consular officer determined that all of the statutory elements had been satisfied. (SPA-854).

To assess the visa denial, the district court did not merely judge whether the statutory basis cited by the Government was, on its face, legitimate and bona fide. Rather, the district court fashioned and applied its own three-part analysis: first, it inquired whether the Government provided a reason for the denial; second, it asked whether the Government had a "statutory basis for its decision"; and third, it evaluated "whether the cited provision [was] properly applied to Professor Ramadan." (SPA-23-24).

In making this third inquiry, the district court not only addressed whether the material support provision could be applied retroactively—a purely legal issue—but also reviewed the consular officer's factual determinations to evaluate whether Ramadan lacked knowledge with respect to ASP's status as a terrorist organization. (SPA-24-29). The district court considered evidence plaintiffs offered in the litigation, including affidavits by Ramadan and an expert on Islamic

---

* An "undesignated terrorist organization" is an organization that engages in certain enumerated terrorist activities, including providing material support to other designated or undesignated terrorist organizations. *See* 8 U.S.C. §§ 1182(a)(3)(B)(iv)(I)-(VI); 1182(a)(3)(B)(vi)(III).

charities, and concluded that Ramadan had not proven his lack of knowledge "by clear and convincing evidence." (SPA-28).

Although the district court reached the correct conclusion, its factual inquiry exceeded permissible review by "look[ing] behind" the consular officer's determination, an action that *Mandel* expressly prohibits. *See Mandel*, 408 U.S. at 770. Accordingly, this Court should not endorse or engage in the factual review performed by the district court.

C. The Government Proffered a Facially Legitimate and Bona Fide Reason for Excluding Ramadan, and No More Is Required

Although the district court lacked authority to review the consular officer's determination to deny the visa, the district court correctly concluded that the Government provided a facially legitimate and bona fide explanation for its actions.

1. Ramadan's Donations to ASP and CBSP Provided a Facially Legitimate and Bona Fide Reason for the Visa Denial

The consular officer's finding that Ramadan provided "material support" to ASP and CBSP under the statute is facially legitimate and bona fide, for the statute lists "transfer of funds" as an activity that qualifies as "material support," *see* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), and Ramadan admitted making donations to these organizations. (A-449, 809). Given this admission, the first knowledge element—Ramadan's knowledge that he was providing material

support to the recipient of his donations—was unquestionably met.

Moreover, as the district court found, the consular officer, acting with the "benefit of [] subject matter expertise [and] detailed information on the applicant" (SPA-29), was entitled to conclude that Ramadan failed to establish by clear and convincing evidence that he lacked knowledge that the recipients were terrorist organizations, especially given the Treasury Department's 2003 listing of ASP and CBSP as entities that support terrorism. This is precisely the type of factual determination—likely involving a credibility assessment—that may not be disturbed under any formulation of the facially legitimate standard.

2. Plaintiffs' Arguments Are Unavailing

On appeal, plaintiffs assert two unavailing arguments attacking the district court's decision: (1) the Government failed to come forward with evidence that Ramadan knew or reasonably should have known that ASP was providing funds to Hamas (and thus qualified as a terrorist organization); and (2) plaintiffs submitted clear and convincing evidence that Ramadan neither knew nor should have known that ASP was a terrorist organization. *See* Br. at 32-44. Both arguments rely on an erroneous view of *Mandel*.

Plaintiffs' first argument depends on a misapprehension of the statutory knowledge elements, and the incorrect premise that *Mandel* imposes an evidentiary burden on the Government. The first knowledge element of the material support statute requires that the alien knew or reasonably should have known that his actions afforded material support to the

beneficiary in question—*not* that he knew the recipient was a terrorist organization. The alien's knowledge of the recipient's terrorist status is addressed in the second prong of the statute, which makes the bar inapplicable if the alien demonstrates by clear and convincing evidence that he did not know, and should not reasonably have known, that the beneficiary was a terrorist organization. *See* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd).

Plaintiffs' construction of the statute conflates these elements, effectively nullifying the latter provision. If the Government were required to establish that an alien knew his actions would provide material support to a group he knew was a terrorist organization, as plaintiffs contend, then by definition, the alien could never establish by clear and convincing evidence that he did not know the group was a terrorist organization. Plaintiffs' interpretation violates the rule requiring courts to construe a statute in a manner that gives effect to all of its provisions. *See Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997). Because it would impose an evidentiary burden on the Government, plaintiffs' construction also conflicts with *Mandel*'s admonition that courts may not look behind the Government's facially legitimate and bona fide explanation.*

---

* Plaintiffs' reliance on the Foreign Affairs Manual, *see* Br. at 34, is also misplaced. The passage cited by plaintiffs does not relate to the material support statute, but rather provides guidance for "determining whether an alien has used [his] position of prominence to persuade others to support a terrorist

Nor do plaintiffs' evidentiary submissions and arguments concerning Ramadan's knowledge, *see* Br. at 38-45, provide any basis to disturb the district court's judgment. Plaintiffs attempt to secure judicial resolution of the very fact issues that have been decided by the consular official, which is forbidden by *Mandel* and the doctrine of consular nonreviewability. This Court simply lacks authority to entertain plaintiffs' factual challenge to the consular officer's decision-making. *See Mandel*, 408 U.S. at 770; *Bustamante*, 2008 WL 336361, at *2-3 (refusing plaintiffs' request for "remand . . . for factual development" as to basis for consular officer's conclusion).

3. The Material Support Provision Applies to Ramadan's Conduct Even Though His Donations Occurred Prior to Enactment of the Provision

Plaintiffs incorrectly argue that Ramadan's donations to ASP and CBSP could not provide a facially legitimate and bona fide reason for denying him a visa because the donations "were not grounds for inadmissibility at the time they were made." Br. at 20;

---

organization." 9 F.A.M. § 40.32 N.2.3. To the extent the passage relates at all to the knowledge necessary under the material support provision, it pre-dates enactment of the REAL ID Act, and thus does not incorporate the significant changes to the knowledge elements effected by that legislation. *See id.* (promulgated on May 3, 2005).

see SPA-24-26. Jurisdictional issues aside, the district court properly rejected plaintiffs' retroactivity claim.

a. The Material Support Provision Expressly Applies to Conduct Occurring Before Its Enactment

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court established a two-part test to determine the temporal reach of civil legislation. First, courts ascertain whether Congress has clearly prescribed whether the statute should be applied retrospectively. *See id.* at 280. If the statute contains such an express command, courts look no further, and apply the statute as Congress directed. *See id.* If the statute is ambiguous, however, courts proceed to the second step and determine whether the statute's application would have an impermissible retroactive effect—that is, "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If so, courts will decline to apply the statute retroactively. *See id.*

Ramadan was found inadmissible under a provision that took effect in May 2005 with the passage of the REAL ID Act, which amended the material support statute. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005).* The applicability

---

* Before enactment of the REAL ID Act, the INA barred admission of aliens who afforded material support to undesignated terrorist organizations that committed, incited, prepared, planned, or gathered information on potential targets for terrorist activity.

of these amendments is governed by section 103(d) of the REAL ID Act, which provides:

> (d) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of [the REAL ID Act], and these amendments, and section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)), as amended by this section, shall apply to– (1) removal proceedings instituted before, on, or after the date of the enactment of this division; and (2) acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after such date.

REAL ID Act § 103(d), 119 Stat. 302.

As the district court properly held (SPA-25-26), the *Landgraf* inquiry in this case begins and ends with the unambiguous language of § 103(d). Courts have repeatedly held that provisions applying a statute to events "before, on, or after" an effective date clearly indicate that the statute has retroactive effect. *See INS v. St. Cyr*, 533 U.S. 289, 318-19 (2001); *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 164

---

8 U.S.C. §§ 1182(a)(3)(B)(iv)(I)-(III), (iv)(VI)(aa)-(dd), (vi)(I)-(III) (2002). It did not apply to aliens who provided material support to undesignated terrorist organizations that in turn provided material support to other terrorist organizations.

(2d Cir. 2006); *Drax v. Reno*, 338 F.3d 98, 109 (2d Cir. 2003); *Rojas-Reyes v. INS*, 235 F.3d 115, 121 n.1 (2d Cir. 2000). Thus, because Congress has directed that the REAL ID Act amendments apply to acts constituting a ground for inadmissibility occurring "before, on, or after" the REAL ID Act's effective date, the Court should inquire no further, and hold that the statute applies retroactively. *See Alafyouny v. Gonzales*, 187 Fed. Appx. 389, 391 (5th Cir. 2006)* (finding that REAL ID Act amendments to material support statute applied retroactively); *see also*, *e.g.*, Practising Law Institute, Asylum and Withholding of Removal—A Brief Overview of the Substantive Law, March 2006, at 319 (noting "extreme facial retroactivity" of amendments to § 1182(a)(3)(B)).

Given the plain language of § 103(d), this Court need not examine the statute's legislative history to determine the statute's retroactive effect. *See United States v. Peterson*, 394 F.3d 98, 107 (2d Cir. 2005). Nonetheless, the legislative history supports the district court's conclusion, because each member of Congress to address the issue understood the amendments to apply retroactively. *See* 151 Cong. Rec. S4614-01, S4629, 2005 WL 1083283 (May 9, 2005) (remarks of Sen. Kennedy); 151 Cong. Rec. H536-03, H561, 2005 WL 320845 (Feb. 10, 2005) (remarks of Rep. Stark); 150 Cong. Rec. H8874-02, 2004 WL

---

* The Fifth Circuit does not prohibit citation to unpublished decisions issued prior to January 1, 2007. *See* 5th Cir. R. 47.5.4.

2269105 (Oct. 8, 2004) (remarks of Rep. Jackson-Lee during consideration of predecessor bill).*

Plaintiffs incorrectly assert that the use of the phrase "effective date" as a title for § 103(d), rather than the Patriot Act's use of the section title "retroactive application," militates against a finding of retroactivity. Br. at 25. Although "[a] statement that a statute will become effective on a certain date" does not indicate retrospective intent, *Landgraf*, 511 U.S. at 257, § 103(d) does not merely announce an effective date; it also specifies that the amendments apply to all removal proceedings initiated, and all acts or conditions constituting grounds for inadmissibility occurring, "before, on, or after" the effective date—language that clearly denotes retroactivity. Further, "while the title of a statute is a "tool[] available for the resolution of a doubt about the meaning of a statute, . . . [it] cannot limit the plain meaning of the text." *Drax*, 338 F.3d at 109 (citations omitted). Thus, the mere use of "effective date" as a title does not alter Congress's command that the statute apply retroactively.

Plaintiffs additionally argue that differences between the language of the REAL ID Act and the concededly retroactive Patriot Act must mean that the REAL ID Act amendments are not retroactive. But the fact that § 411(c)(1) of the Patriot Act uses different words to establish retroactivity casts no doubt on the clarity of § 103(d) of the REAL ID Act. Congress need

---

* While plaintiffs cite legislator comments on the Patriot Act's retroactivity, they eschew reliance on similar comments concerning § 103(d). *Compare* Br. at 25 n.6 and 31.

not use identical "magic words" to make its intent clear; so long as the statute's language shows that Congress intended retroactive effect, the statute applies retroactively.

Plaintiffs' interpretation of § 103(d)(2), moreover, contravenes the plain language of the statute. Plaintiffs contend that, by including the phrase "constituting a ground for inadmissibility, excludability, deportation, or removal," Congress intended to limit the retroactive application of the REAL ID Act amendments to conduct that constituted a ground for inadmissibility, excludability, deportation, or removal at the time it occurred. *See* Br. at 25-27. But Congress did not say that the amendments apply only to "acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal at the time they occurred or existed." Instead, Congress applied the amendments to "acts and conditions" constituting such grounds "occurring or existing before, on, or after" the effective date. As the district court properly concluded (SPA-25-26), the natural meaning of this language is that the amendments apply to the conduct at issue in the statute—"acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal"—regardless of when that conduct occurred.*

Contrary to plaintiffs' claim, *see* Br. at 26, this construction does not render § 103(d)(1) "entirely

---

* This reading does not "excise" or "ignore[]" the phrase "constituting a ground for inadmissibility, excludability, deportation, or removal," as plaintiffs contend. Br. at 26. The phrase specifies the "acts and conditions" to which Congress was referring.

redundant." Although there may be some overlap between subsections (1) and (2), they are plainly directed at different things: § 103(d)(1) applies the REAL ID Act amendments to removal *proceedings*, whereas § 103(d)(2) applies them to *acts and conditions* constituting a ground for inadmissibility, excludability, or deportation, as well as removal. As this case demonstrates, an alien need not be in removal proceedings to have engaged in an act constituting a ground for inadmissibility. Plaintiffs' strained attempt to limit the application of § 103(d)(2) to the removal proceedings addressed in § 103(d)(1), *see* Br. at 26-27, is wholly unpersuasive.

Indeed, plaintiffs' interpretation would render § 103(d) internally contradictory. Section 103(d)(1) applies the REAL ID Act amendments to removal proceedings instituted "before, on, or after" the statute's effective date. Because removal proceedings have been conducted since April 1997,* this provision necessarily applies the amendments to proceedings initiated at least as far back as that date. Plaintiffs' interpretation, however, would apply the amendments only to acts and conditions constituting a ground for inadmissibility occurring after May 11, 2005. Plaintiffs thus

---

* Prior to 1996, aliens who faced return to their countries of origin were placed in either deportation or exclusion proceedings. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 349 (2005). In September 1996, Congress enacted legislation providing that all such actions commenced in or after April 1997 would be called "removal proceedings." *See Zhang v. INS*, 274 F.3d 103, 106 (2d Cir. 2001).

inconsistently read the amendments as applying the REAL ID Act to removal proceedings going back to at least April 1997, while simultaneously restricting application to post-May 2005 acts and conditions.*

Plaintiffs' construction, furthermore, would deprive § 103(d)(2) of any application to pre-enactment conduct, contrary to its express terms. By definition, an act or condition constituting a ground for inadmissibility as a result of the REAL ID Act amendments could not have constituted a ground for inadmissibility *before* the statute was amended. Under plaintiffs' reading, therefore, the provision could never apply retroactively. This is illustrated by reference to Ramadan's own conduct: the REAL ID Act made inadmissible, for the

---

* Plaintiffs also claim that § 103(d)(2)'s use of the "outdated" terms "excludability" and "deportation" suggests prospective application, Br. at 26 n.7, but Congress most likely included these terms for the opposite reason: to reach all relevant pre-enactment conduct. Although the terms have been largely, although not entirely, replaced in the INA, *see Evangelista v. Ashcroft*, 359 F.3d 145, 147 n.1 (2d Cir. 2004); *but see* 8 U.S.C. § 1227(a) (defining classes of "deportable aliens"), they continue to be used in exclusion and deportation proceedings that were commenced prior to April 1997, *see* Illegal Immigration Reform and Immigrant Responsibility Act, § 309(c)(1)(A)-(B), 110 Stat. 3009-625 (1996). Congress's use of the terms "excludability" and "deportation" thus underscores its intent to apply the REAL ID Act amendments to all relevant conduct, whenever it occurred.

first time, any person who provided material support to organizations that in turn provided material support to designated or undesignated terrorist organizations. Because this was a new ground for inadmissibility, it could not have constituted a ground for inadmissibility at any time before the REAL ID Act was enacted. Plaintiff's interpretation thus would read the word "before" out of § 103(d)(2), and accordingly is impermissible.

Given the abundant case law characterizing "before, on, or after" as clearly establishing retroactivity, *see*, *e.g.*, *Drax*, 338 F.3d at 109; *Rojas-Reyes*, 235 F.3d at 121 n.1, Congress can only have chosen this language to indicate that the REAL ID Act amendments apply to conduct occurring "before, on, or after" enactment. This is all the more true given the statutory presumption in favor of prospective application. *See Landgraf*, 511 U.S. at 265. Had Congress wished the amendments to apply only to acts taken on or after the effective date, it could easily have said so. Alternatively, it could have said nothing, and the statute would apply only to conduct occurring after the effective date. That Congress chose language repeatedly recognized as a hallmark of retroactivity defeats plaintiffs' argument that it intended the amendments to apply only prospectively.

b. The REAL ID Act Amendments Do Not Have Impermissible Retroactive Effect Because Ramadan Had No Right or Settled Expectation That He Would Be Able to Enter the United States

Because the REAL ID Act unambiguously establishes that the statute applies retroactively, there is no need to reach the second step of the *Landgraf* inquiry. *See Restrepo v. McElroy*, 369 F.3d 627, 631 (2d Cir. 2005). Even if there were ambiguity concerning the amendments' retroactive effect, the second *Landgraf* step also supports retroactivity because denying Ramadan admission based on pre-enactment donations would not have an impermissibly retroactive effect.

Under the second prong of the *Landgraf* test, a court considering an ambiguous statute must determine "whether, in view of the 'familiar considerations of fair notice, reasonable reliance, and settled expectations,' the application of the statute to the case at hand would have a 'retroactive effect[.]' " *Id.* (citations omitted). In undertaking this determination, a court must bear in mind that "[a] statute is not made retrospective merely because it draws upon antecedent facts for its operation," or "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269-70 & n.24 (citations omitted). Instead, the court must "ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70. "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a

relevant past event." *Id.* at 270. Absent an unambiguous congressional directive, a statute may not be applied retroactively if it "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, . . . impose[s] new duties with respect to transactions already completed," *id.* at 280, or upsets a party's settled expectations after he has acted in reliance on prior law, *see St. Cyr*, 533 U.S. at 321-22.

"The aim of the presumption [against retroactivity] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct." *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004). Since *Landgraf*, courts have consistently emphasized the importance of a party's reasonable reliance on the prior state of the law in determining whether a statute has impermissibly retroactive effect. *See*, *e.g.*, *St. Cyr*, 533 U.S. at 321-24; *Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006); *Khan v. Ashcroft*, 352 F.3d 521, 523-24 (2d Cir. 2003).

Given the foregoing, even if Congress had not expressly directed that the REAL ID Act amendments would apply to pre-enactment conduct, they are not impermissibly retroactive as applied to Ramadan. As a non-resident alien outside this country, Ramadan has never had any right to enter the United States. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Mandel*, 408 U.S. at 762. Accordingly, enactment of the amendments could not affect any right Ramadan actually possessed when he donated money to ASP and CBSP, or at any time he was not within the United States. Because impairment of a "vested right" is a "telltale characteristic" of retroactive effect, *Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917, 921

(2d Cir. 1992), the absence of such impairment here precludes a finding that the REAL ID Act is impermissibly retroactive. *See Karageorgious v. Ashcroft*, 374 F.3d 152, 156 (2d Cir. 2004); *Knauff*, 338 U.S. at 544.

Nor are the amendments impermissibly retrospective under any other criteria. The REAL ID Act provisions do not increase Ramadan's liability for, or attach new duties to, past conduct, because they impose no sanction or obligation. *Cf. Boutilier v. INS*, 387 U.S. 118, 123 (1967). Furthermore, Ramadan does not claim that he relied on pre-REAL ID Act law when he made the donations. *See Arenas-Yepes v. Gonzales*, 421 F.3d 111, 117 (2d Cir. 2005); *Boatswain v. Gonzales*, 414 F.3d 413, 418-19 (2d Cir. 2005).

Even if Ramadan did rely on prior law, his reliance would have been unreasonable and thus would not establish an impermissibly retroactive effect. *See Wilson*, 471 F.3d at 122. Given that offshore aliens like Ramadan have no right to enter the United States, and the broad discretion of the political branches to decide who may enter the United States, it would have been unreasonable for Ramadan to expect that his actions would not disqualify him from admission to the United States. Therefore, even if § 103(d) were ambiguous, the REAL ID Act amendments are permissibly retroactive.

c. Retroactive Application of the REAL ID Act Amendments Comports With Due Process

Finally, the Court should reject plaintiffs' suggestion that the REAL ID Act should be deemed prospective under the doctrine of constitutional avoidance. There is no merit to plaintiffs' suggestion that a finding that the REAL ID Act amendments are retroactive "raise[s] serious constitutional problems" implicating due process for aliens inside the United States. *See* Br. at 29-30.

The issue of whether retrospective application of the REAL ID Act amendments would afford due process to aliens in the United States is not presented in this case, and plaintiffs lack standing to raise it. Plaintiffs' suit challenges the application of the REAL ID Act solely as to Ramadan, who is an unadmitted alien outside the United States. Because he has no constitutional right to enter the United States, *see Mandel*, 408 U.S. at 762, due process requirements simply do not apply.

Even if plaintiffs could properly raise a due process claim as to aliens within the United States, retroactive application of the REAL ID Act amendments easily satisfies constitutional requirements. In civil cases, retroactive application of a statute need only be "justified by a rational legislative purpose." *Pension Ben. Guar. Corp. v. R.A. Gray and Co.*, 467 U.S. 717, 730 (1984). Under this deferential standard of review, courts may "not pass judgment upon the wisdom, fairness, or logic of legislative decisions"; rather, their inquiry "turns on whether there are 'plausible' reasons for Congress's choices." *Weinstein v. Albright*, 261 F.3d 127, 140 (2d Cir. 2001) (citation omitted). When the

statute at issue involves immigration or naturalization, moreover, courts owe Congress special deference. *See Rojas-Reyes*, 235 F.3d at 121-22.

Here, retroactive application of the REAL ID Act amendments is manifestly supported by a rational basis, namely, to protect society from those who engage in terrorist activities, as defined by the INA. Given the critical and indisputable national security concerns presented by terrorism, it was unquestionably rational for Congress to enact legislation making aliens inadmissible or deportable for engaging in terrorist activities, including the provision of material support for terrorism, that occurred either before or after the legislation was enacted. *Cf. Kuhali v. Reno*, 266 F.3d 93, 111 (2d Cir. 2001). Retroactive application of the REAL ID Act to deportable aliens therefore would not violate due process.

POINT THREE

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' FACIAL CHALLENGE TO THE ENDORSE/ESPOUSE PROVISION

A. Plaintiffs Lack Standing to Challenge the Endorse/Espouse Provision

Because plaintiffs suffered no legally cognizable injury resulting from the endorse/espouse provision, the Court should affirm the dismissal of their challenge for lack of standing. *See Lance v. Coffman*, _ U.S. _, 127 S. Ct. 1194, 1196 (2007) (plaintiff "raising only a generally available grievance about government—. . . and seeking relief that no more directly and tangibly

benefits him than it does the public at large—does not state an Article III case or controversy").

To establish standing, plaintiffs must demonstrate that they suffered an injury in fact traceable to the conduct at issue and likely to be redressed by a favorable decision. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) ("personal stake" required). The complained-of injury must be concrete and particularized, and actual or imminent, not merely conjectural or hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Further, the injury must be "legally cognizable." *United States v. Hays*, 515 U.S. 737, 752 (1995) (Stevens, J., concurring); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir.) (standing based on injury to "legally cognizable interest"), *modified on other grounds*, 520 F.2d 409 (2d Cir. 1975).

In addition, prudential standing limitations bar "adjudication of generalized grievances more appropriately addressed in the representative branches." *Allen v. Wright*, 468 U.S. 737, 751 (1984). This prudential inquiry asks "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

1. Plaintiffs Allege No Cognizable Injury

Plaintiffs lack constitutional standing both for lack of a legally cognizable injury traceable to the endorse/espouse provision, and because they assert no injury that is likely to be redressed by that provision's

invalidation.* Rather, their purported injuries are "conjectural and speculative," and thus insufficient.

As plaintiffs do not dispute, *see* Br. at 45-46, they have identified no alien with whom they wished to meet, but who was excluded under the endorse/espouse provision. In every case recognizing standing to challenge an alien's exclusion, the plaintiff was a domestic host asserting that its First Amendment rights were violated when it was barred from hosting a specific alien. *See Mandel*, 408 U.S. at 756-57; *Abourezk*, 785 F.2d at 1050-51; *Allende v. Shultz*, 605 F. Supp. 1220, 1222-23 (D. Mass. 1985); *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525, 527 (D. Mass.) ("*HLS Forum*"), *vacated*, 852 F.2d 563 (1st Cir. 1986).

Plaintiffs' failure to show that the provision they challenge has prevented them from meeting with anyone precludes a finding that they have standing in light of *Mandel*, which sharply curtailed the availability of *any* review, and expressly reaffirmed Congress's "plenary power" to define aliens' admissibility to the United States. *See* 408 U.S. at 766. Because *Mandel* permits, at most, judicial consideration of whether the Government has articulated a facially legitimate and bona fide reason for a specific alien's exclusion, the mere existence of an inadmissibility provision cannot cause a legally cognizable injury to domestic plaintiffs;

---

* Notwithstanding the 2004 press report emphasized by plaintiffs, *see, e.g.,* Br. at 5, the Government has never found Ramadan inadmissible under the endorse/espouse provision or denied him a visa on that basis. (A-809).

rather, such an injury can only arise from a specific alien's exclusion, giving rise to an "as applied" challenge. Legislation excluding a category of aliens could only effect a "legally cognizable" injury if the Supreme Court had reached the opposite conclusion in *Mandel*, and authorized the broad review that the lower court had conducted and that Justice Douglas in dissent advocated. *See Mandel*, 408 U.S. at 770 (Douglas, J., dissenting) (advocating that no "ideological test" for admission is "permissible"). *Mandel* thus refutes the existence of any "legally cognizable" injury sufficient to confer standing for plaintiffs' facial challenge here.

Given *Mandel*, plaintiffs' assertion of a "concrete injury" based on "uncertainty" as to whether invitees will be admitted, Br. at 46, is both too causally speculative to support standing, and not clearly redressable. The uncertainty of would-be hosts as to whether their alien invitees will obtain visas follows from the INA's many inadmissibility provisions, and is not independently caused by the endorse/espouse provision. Nor would plaintiffs' uncertainty be redressed by a ruling in their favor, because the uncertainty would remain under other INA provisions.

The prudential standing doctrine also bars review here. As *Mandel* recognizes, claims like plaintiffs' risk plunging the courts into the impossible and standardless task of balancing U.S. citizens' interests in hosting aliens against the Government's interest in controlling who enters this country. Accordingly, the Supreme Court has delineated the narrowest possible exception—only as to specific waiver denials—to the rule that courts will not entertain such challenges. Because plaintiffs' facial challenge impermissibly seeks

"adjudication of generalized grievances more appropriately addressed in the representative branches," *Allen*, 468 U.S. at 751, plaintiffs lack standing.

2. Plaintiffs' "Chill" Arguments Do Not Establish Standing

Plaintiffs may not obtain standing by asserting that they are "chilled" from inviting aliens who might be denied visas under the endorse/espouse provision, or that aliens might be chilled from accepting invitations. *See* Br. at 47-48. Mere assertion of a chill does not establish standing:

> Because a chilled plaintiff's injury arises not from actual harm that has already occurred, but from the plaintiff's fear of future prosecution, the Court must ascertain that that fear is sufficiently concrete and immediate to constitute a present injury to plaintiff's First Amendment rights, rather than a speculative or illusory allegation of future harm.

Nitke v. Ashcroft, 253 F. Supp. 2d 587, 596 (S.D.N.Y. 2003)(three-judge panel). Moreover, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* (citing *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)).

Plaintiffs have not shown any "threat of specific future harm." While they complain that the endorse/espouse provision discourages them from inviting alien

speakers, that purported "chill" categorically differs from the "chill" in the cases plaintiffs cite. *See* Br. at 47. Those cases protected domestic speakers' First Amendment rights from possible direct sanctions that would have resulted from their own protected speech. *See, e.g.*, *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) (standing where "plaintiff is chilled from" speech "in order to avoid enforcement consequences"); *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 824 (2d Cir. 1967) ("mere threat of the imposition of unconstitutional sanctions" warrants judicial intervention); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (plaintiff faced possible civil penalties). While then-Judge Ginsburg stated that a risk of future exclusion of aliens (corroborated by specific examples, unlike here) would, "[i]n the First Amendment area," constitute an actionable "chill," *Abourezk*, 785 F.2d at 1052 n.8, that observation did not form a basis for relief ordered by the court, and instead was *dicta* immediately following the court's principal holding that the case was not mooted by the Government's grant of visas to the aliens at issue, *see id.* at 1052. This isolated statement, unsupported by other authority recognizing a "chill" doctrine relating to the exclusion of aliens, is too cursory and ambiguous to support the novel, sweeping ruling plaintiffs seek—that American would-be audiences have standing to sue to invalidate alien inadmissibility statutes, merely because unspecified future invitees may be denied visas.

3. Plaintiffs' Professed Fear That a Future Exclusion Will Violate Their Rights Is Too Remote and Speculative to Confer Standing

Plaintiffs' assertion of a "credible threat" that the provision will bar their future invitees, Br. at 49, is too remote and speculative to support their standing to bring a facial challenge. Unlike in the cases they cite, *see id.*, plaintiffs' rights will be affected only indirectly —if at all—if an alien invitee is excluded, not by direct sanction. *Compare*, *e.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (standing from "realistic danger of . . . direct injury" from "statute's operation or enforcement"); *Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974) (standing of leafletter at risk of prosecution).

While plaintiffs allegedly often invite foreign speakers to discuss the "war on terror," *see* Br. at 50, the law will not necessarily be triggered by such speakers. The endorse/espouse provision has been applied sparingly; the record reveals that the Government waived inadmissibility for the only person denied a visa under the provision (A-814), and that DHS deemed inadmissible under the provision only ten people–none known to be speakers or scholars (A-817-18). Plaintiffs' asserted possible future injury thus is speculative and remote.

Accordingly, plaintiffs lack standing to bring their facial challenge.*

---

* Notwithstanding their suggestion, *see* Br. at 46 n.15, plaintiffs also lack standing to challenge the

B. The Endorse/Espouse Provision Is Constitutional

Plaintiffs' facial constitutional challenge to the endorse/espouse provision also lacks merit. As noted above, Congress has plenary power to "exclude those who possess those characteristics which Congress has forbidden," and "to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention." *Mandel*, 408 U.S. at 766. Plaintiffs' arguments cannot be squared with *Mandel*, which permitted, at most, strictly limited judicial review of discretionary Executive applications of laws passed by Congress, and which reaffirmed Congress's exclusive authority to define the admissibility of aliens to the United States.

1. Congress May Constitutionally Exclude Persons Based on Their Associations, Memberships, Beliefs, and Speech

The Court should reject plaintiffs' argument that Congress may not constitutionally define a category of aliens as inadmissible based on their speech.

First, the endorse/espouse provision in no way restricts speech. Rather, it defines a class of aliens as inadmissible. Nothing in the statute bars anyone, anywhere, from endorsing or espousing terrorism. Nor

---

statute as an unconstitutional licensing scheme, because the statute is not a licensing scheme, *see infra* Point III.B.3, and therefore causes plaintiffs no cognizable injury.

does the statute bar anyone from hearing or receiving information.

Second, courts have consistently upheld statutes rendering aliens inadmissible on bases that would violate the First Amendment if applied to United States citizens. The Supreme Court upheld the Alien Registration Act of 1940, 54 Stat. 670, 673, despite a First Amendment challenge to that statute's bar on entry of aliens who had advocated the violent overthrow of the United States government or belonged to organizations that so advocated. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 585-92 (1952). The Court declined to intrude on the political branches' authority over aliens, noting, "Reform in this field must be entrusted to the branches of Government in control of our international relations and treaty-making powers." *Id.* at 591; *see also id.* at 596 (Frankfurter, J., concurring) (the "right of people to enjoy the hospitality of a State of which they are not citizens" is "wholly outside the concern and the competence of the Judiciary").* The Supreme Court has also rejected

---

* Likewise, the Supreme Court has repeatedly upheld provisions excluding Communist Party members from the United States. *See Niukkanen v. McAlexander*, 362 U.S. 390 (1960); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957) (reversing deportation order as not satisfying statutory terms excluding communists); *Galvan v. Press*, 347 U.S. 522, 530-31 (1954); *Harisiades*, 342 U.S. at 585-92; *Carlson v. Landon*, 342 U.S. 524, 535-536 (1952). These decisions have never been limited or overruled. Although the majority decisions did not address First Amendment claims, the

constitutional challenges to the disfavored treatment of aliens under other statutes. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 80 (1976) ("Congress regularly makes rules that would be unacceptable if applied to citizens.").

Mandel itself precludes plaintiffs' facial challenge. In reversing the lower court's invalidation of the relevant statute as an assertedly unconstitutional viewpoint-based exclusion, *see* 325 F. Supp. 620 (E.D.N.Y. 1971) (three-judge panel), the Supreme Court reaffirmed "[t]he power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country," to be "enforced exclusively through executive officers, without judicial intervention." *Mandel*, 408 U.S. at 766. Particularly given the decision it reversed, *Mandel* is incompatible with plaintiffs' contention that Congress may not exclude a category of aliens based on their stated views.

2. Plaintiffs' Arguments Are Unavailing

Plaintiffs' arguments do not alter the well-established principle that courts may not usurp Congress's authority to define categories of inadmissible aliens. Of course, within the United States, the First Amendment confers a fundamental right to "receive ideas," Br. at 15, 51-52, and the Government ordinarily may not "restrict expression because of its message." *Id.* at 52. None of this law,

---

Galvan dissents did to no avail. *See Galvan*, 347 U.S. at 532-34.

however, addresses the separate, similarly well-established principles that aliens abroad enjoy no constitutional right of entry, that whatever First Amendment rights are to be vindicated in challenges to aliens' exclusion can belong only to American would-be audiences, *see Mandel*, 408 U.S. at 762, and that Congress enjoys plenary authority to determine what categories of aliens are inadmissible, including by reference to their views, *see supra* at 52-53.

The few cases cited by plaintiffs that involve the admissibility of aliens, *see* Br. at 52-53, are distinguishable, and in some instances are not even good law. While one district court has held that the Government may not deny entry "solely on account of the content of" the alien's anticipated speech in the United States, Br. at 53 (quoting *Abourezk v. Reagan*, 592 F. Supp. 880, 887 (D.D.C. 1984), *vacated*, 785 F.2d 1043 (D.C. Cir. 1986)), plaintiffs fail to acknowledge that that decision was vacated on appeal, and the D.C. Circuit decided the appeal on statutory grounds, expressly declining to reach the constitutional claims presented, *see* 785 F.2d at 1060 n. 24.

Moreover, the *Abourezk* district court did not question Congress's power to exclude aliens based on their views, but rather acknowledged Congress's "plenary power over the admission of aliens," and addressed a narrower issue of statutory interpretation. *See* 592 F. Supp. at 883. *Abourezk* presented a challenge to the Executive Branch's application of a since-repealed statute rendering inadmissible aliens whose activities "would be prejudicial to the public interest[.]" 8 U.S.C. § 1182(a)(27) (1982) ("subsection (27)"); *see* 592 F. Supp. at 883-84. The district court

held that subsection (27) could be read to authorize the Government to exclude aliens whose harm to "the public interest" was merely in being present in the United States. *Id.* at 884, 886.

Having found subsection (27) facially constitutional, the district court held that the Government had not articulated a "facially legitimate, bona fide basis for refusing entry" to aliens whose only contemplated "activities" in the United States were "protected speech and association" during their stay, *id.* at 886-87, as it could "reasonably be concluded" that the State Department "did not agree with or feared . . . whatever communication [the aliens] might make while in this country." *Id.* Accordingly, the court held, such aliens "may not be excluded under subsection (27) solely on account of the content of" their "proposed message." *Id.* Immediately thereafter, the district court stated, in the sentence quoted by plaintiffs, that the Government "may not, consistent with the First Amendment, deny entry solely on account of the content of speech." *Id.*

In context, the sentence relied on by plaintiffs addressed the narrow question of whether the Government could apply then-subsection (27), which was constitutional on its face, to exclude aliens whose "activities" consisted merely of speech to U.S. audiences. The district court's since-vacated decision held that the First Amendment did not permit the Executive Branch's application of the statute. The district court did not hold that Congress lacked power to exclude aliens based on their prior speech, nor that subsection (27) violated the First Amendment, nor even that the Executive could not, pursuant to an applicable statute, exclude aliens based on their prior speech, as

opposed to their expected statements to American audiences. Thus, the *Abourezk* district court decision—even if not vacated—does not restrict Congress's authority to exclude aliens based on their prior statements.

Plaintiffs also rely on *HLS Forum*, 633 F. Supp. at 531, *see* Br. at 53, which, like *Abourezk*, was vacated on appeal. *See HLS Forum v. Shultz*, 852 F.2d 563 (table), 1986 U.S. App. LEXIS 37325 (1st Cir. Jun. 18, 1986). Initially, the First Circuit stayed the district court's order because "the government had shown a likelihood of prevailing on the merits[.]" *Id.* at *1. The matter then became moot, and the First Circuit ruled that neither the district court's nor the Circuit's rulings had "precedential weight concerning the merits." *Id.* at *3.

Even if good law, *HLS Forum* would not support plaintiffs' facial challenge. *HLS Forum* addressed the Government's refusal to waive a travel restriction on the PLO's UN observer within the United States. *See HLS Forum*, 633 F. Supp. at 527. The district court characterized the issue as whether "federal courts have some role in enforcing constitutional restraints on the executive's implementation of the statutory scheme enacted by Congress"—not whether Congress's plenary power was limited. *Id.* at 529. The district court further observed that courts "have a limited role in determining whether the denial of a waiver of excludability was constitutional," *id.* at 530—a far cry from ruling that the First Amendment limits Congress's plenary authority.*

---

* Indeed, the PLO's UN observer concededly was excludable by virtue of his PLO membership. *See HLS*

The third case relied on by plaintiffs, *Allende*, 605 F. Supp. at 1225, *see* Br. at 53, also fails to support plaintiffs' facial challenge, because it hinged on whether the Executive's justification for excluding the alien comported with the applicable statute. As in *Abourezk*, the Government found the alien ineligible under then-subsection (27). *See id.* at 1222. The district court held that because another, more specific provision applied more directly, the Government's stated rationale did not fall within the terms of subsection (27), and thus was not "facially legitimate." *See id.* at 1224-25. Nothing in *Allende* questioned Congress's constitutional authority to enact viewpoint-based categories of inadmissible aliens. In fact, *Allende* held that the alien fell more properly under a bar of aliens "associated with communist or totalitarian organizations," and commented only on statutory limitations on application of that provision, *id.* at 1225, thus seemingly recognizing that the Constitution permits Congress to exclude aliens based on their views or associations.

Nor are plaintiffs aided by *Rafeedie v. INS*, 795 F. Supp. 13 (D.D.C. 1992), *see* Br. at 55-56, which concerned a lawful resident alien who enjoyed First Amendment rights, *see* 795 F. Supp. at 22. *Rafeedie* entertained facial overbreadth and vagueness challenges to the statute under which a lawful resident alien's exclusion proceeding was brought, 8 U.S.C. § 1182(a)(28)(F), which "plainly reache[d] a substantial amount of expression protected by the First Amendment." *Id.* The court held the statute overbroad

---

Forum, 633 F. Supp. at 526.

and vague, and thus violative of Rafeedie's First Amendment-protected rights. *See id.* at 22-23.

While *Rafeedie* might aid plaintiffs if it applied to non-resident aliens, it does not. Rather, *Rafeedie* holds that the affected alien enjoyed the same First Amendment rights as United States citizens. *See id.* at 22. This holding has no bearing on a statute defining which non-resident aliens are inadmissible. As even plaintiffs characterize their suit, Ramadan as a nonresident alien is a "symbolic plaintiff," and the "suit asserts the rights of the organizational plaintiffs." *See* Br. at 2 & n.1; *(see also* A-398-99); *Mandel*, 408 U.S. at 762 (constitutional challenge asserted rights of "American appellees," and "none on the part of the invited alien").

3. The Endorse/Espouse Provision Is Not a Licensing Scheme

The Court should reject plaintiffs' attempt to superimpose on the border control context domestic First Amendment limitations on licensing schemes. *See* Br. at 46 n.15. The endorse/espouse provision does not restrain or require any license for speech. Plaintiffs rely entirely on case law in the domestic context, which limited discretionary licensing requirements on First Amendment-protected speech. *See id.* (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Alexander v. United States*, 509 U.S. 544 (1993)). Such limits on prior restraint of domestic discourse have no bearing on Congress's authority to exclude nonresident aliens.

4. Plaintiffs' "Void for Vagueness" Argument Lacks Merit

Nor is the endorse/espouse provision "void for vagueness." *See* Br. at 57. The Supreme Court has rejected essentially the same argument. *See Boutilier*, 387 U.S. at 123 (INA provision imposed "neither regulation of nor sanction for conduct" and thus "no necessity exists for guidance so that one may avoid the applicability of the law"; "constitutional requirement of fair warning has no applicability" to INA's inadmissibility standards). Rather, the Court found, Congress retains "plenary power to make rules for the admission of aliens." *Id.*; *see also Beslic v. INS*, 265 F.3d 568, 571 (7th Cir. 2001) (citing *Boutilier*; "it is doubtful that an alien has a right to bring" a vagueness "challenge to an admissibility statute").

Plaintiffs' cited vagueness cases involve statutes that curtail future exercise of actual First Amendment rights, as speakers "steer far wider of the unlawful zone . . . than if the . . . forbidden area were clearly marked." Br. at 57 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)). Even the few vagueness challenges cited by plaintiffs in the immigration context involve sanctions on aliens already within the United States, for their conduct once here. *See*, *e.g.*, *Rafeedie*, 795 F. Supp. at 22-23. By contrast, the endorse/espouse provision defines a category of inadmissible aliens based entirely on their prior speech, thereby rendering inapplicable the void for vagueness doctrine.

CONCLUSION

The judgment should be affirmed.

Dated: New York, New York
July 11, 2008

Respectfully submitted,

MICHAEL J. GARCIA,
United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees.

KRISTIN L. VASSALLO,
DAVID S. JONES,
SARAH S. NORMAND,
Assistant United States Attorneys,
Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 13,909 words in this brief.

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York

By: KRISTIN L. VASSALLO,
Assistant United States Attorney

ADDENDUM

STATUTES

8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States: . . .

(3) Security and related grounds . . .

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

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

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

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

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

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

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

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

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

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

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

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

(iv) **Engage in terrorist activity defined**

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

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

(II) to prepare or plan a terrorist activity;

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

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

(aa) a terrorist activity;

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

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

(V) to solicit any individual—

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

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

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he

did not know, and should not reasonably have known, that the organization was a terrorist organization; or

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

(aa) for the commission of a terrorist activity;

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

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

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

(vi) Terrorist organization defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

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

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

8 U.S.C. § 1201. Issuance of visas

(a) Immigrants; nonimmigrants

(1) Under the conditions hereinafter prescribed and subject to the limitations prescribed in this chapter or regulations issued thereunder, a consular officer may issue (A) to an immigrant who has made proper application therefor, an immigrant visa which shall consist of the application provided for in section 1202 of this title, visaed by such consular officer, and shall specify the foreign state, if any, to which the immigrant is charged, the immigrant's particular status under such foreign state, the preference, immediate relative, or special immigrant classification to which the alien is charged, the date on which the validity of the visa shall expire, and such additional information as may be required; and (B) to a nonimmigrant who has made proper application therefor, a nonimmigrant visa, which shall specify the classification under section 1101(a)(15) of this title of the nonimmigrant, the

period during which the nonimmigrant visa shall be valid, and such additional information as may be required. . . .

(g) Nonissuance of visas or other documents

No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law: Provided, That a visa or other documentation may be issued to an alien who is within the purview of section 1182(a)(4) of this title, if such alien is otherwise entitled to receive a visa or other documentation, upon receipt of notice by the consular officer from the Attorney General of the giving of a bond or undertaking providing indemnity as in the case of aliens admitted under section 1183 of this title: Provided further, That a visa may be issued to an alien defined in section 1101(a)(15)(B) or (F) of this title, if such alien is otherwise entitled to receive a visa, upon receipt of a notice by the consular officer from the Attorney General of the giving of a bond with sufficient surety in such sum and containing such conditions as the consular officer shall prescribe, to insure that at the expiration of the time for which such alien has been admitted by the Attorney

General, as provided in section 1184(a) of this title, or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States. . .

(i) Revocation of visas or documents

After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documentation from the date of issuance: Provided, That carriers or transportation companies, and masters, commanding officers, agents, owners, charterers, or consignees, shall not be penalized under section 1323(b) of this title for action taken in reliance on such visas or other documentation, unless they received due notice of such revocation prior to the alien's embarkation. There shall be no means of judicial review (including review pursuant to section 2241 of Title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 1227(a)(1)(B) of this title. . . .

8 U.S.C. § 1202. Application for visas

(f) Confidential nature of records

The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States, except that—

(1) in the discretion of the Secretary of State certified copies of such records may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court. . . .

REAL ID Act of 2005 § 103(d), Pub. L. No. 109-13, Div. B, 119 Stat. 231.

(d) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of [the REAL ID Act], and these amendments, and section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)), as amended by this section, shall apply to– (1) removal proceedings instituted before, on, or after the date of the enactment of this division; and (2) acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after such date.